

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2020-01370

**IN THE MATTER OF AN APPLICATION BY DOMINIC SURAJ AND OTHERS
FOR ADMINISTRATIVE ORDERS PURSUANT TO PART 56.7 AND UNDER
SECTION 14(1) OF THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD
AND TOBAGO FOR CONTRAVENTION OF THE CLAIMANTS' RIGHTS**

BETWEEN

**DOMINIC SURAJ
MARLON HINDS
CHRISTOPHER WILSON
BRUCE BOWEN
COLLIN RAMJOHN**

Claimants

AND

THE ATTORNEY GENENRAL OF TRINIDAD AND TOBAGO

Defendant

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2020-02223

BETWEEN

SATYANAND MAHARAJ

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Mr Anand Ramlogan SC leading Ms Renuka Rambhajan, Mr Douglas Bayley, Mr Jared Jagroo and Mr Che Dindial instructed by Mr Ganesh Saroop and Mr Vishaal Siewasaran for the Claimants

Mr Reginald Armour SC leading Mr Rishi Dass, Mr Raphael Ajodhia, instructed by Ms Svetlana Dass, Ms Savi Ramhit, Ms Diane Katwaroo and Ms Lianne Thomas for the Defendant

Date: **11 September 2020**

JUDGMENT

1. The world is in the midst of a pandemic. There are few parts of the inhabited planet left untouched. The spread of a highly contagious virus has been rapid and pervasive. Governments and citizens all over have had to act with expedition with measures to contain it. Borders have been closed; some freedoms have been curtailed and measures such as sanitising, wearing of face coverings and social distancing have quickly become part of what is called a new normal.

2. Much scientific work is being done to find out about the virus and to develop an effective vaccine for it. There have been shortages of medical equipment, services and supplies. Health care systems and personnel have been placed under strain. There have been many deaths and lasting effects on many infected persons. The advice of scientists has led to changes in the approach being taken with time. We have all become used to almost daily briefings about changes in approach to try to contain the spread of the virus. There has been economic dislocation and disruption of how we live.

3. In the midst of the response, and with persons affected in many different ways, there has been much public debate about what should be done; what is working and what is not. There has, at times, been tension between government and citizens or interest groups. Some citizens are prepared to go along with the changes and curtailment of public activity. Others are less willing. They see their lives being disrupted. They question the need for certain measures and are prepared to interrogate perceived

inconsistencies in approaches or to challenge the necessity of some measures.

4. There is also a debate about what the response should be at all. On one end, advocates of a rights-based perspective say that persons should be allowed to go about their business as best as they can. They believe people should be allowed to work and engage in leisure as they did before. Some will get the virus. They accept more may die, but that this time is not unlike any other time when we have been faced with a pandemic. They think there is overreach by the State and some see the response as a grab for power to impose greater controls on the population at large. On the other end, there is the view that strong measures have to be taken to curtail the spread so that the fewest numbers are infected and die until a viable vaccine solution can be arrived at. They are prepared to go along with the curtailment and disruption to life as they see a greater good in the preservation of life and health. The question for many is, where should the balance be struck?

5. All of this has brought into focus the role of the State and its different arms. At the forefront has been executive action. In some cases the Parliament has been involved in passing laws. The courts are left as interpreters of the law and to be the arbiter between citizen and State when persons are charged or where there has been a challenge to the curtailment of rights. We in Trinidad and Tobago, like the rest of the world community, have had to respond. The tensions and debates are also evident here in our robust public opinion. The conflict has brought these claims before the court.

6. There are two claims being considered together. They both involve the validity of the **Public Health [2019 Novel Coronavirus (2019-nCoV)] Regulations, 2020** (Regulations). By **Legal Notice No. 54**, dated 19 March 2020, the first incarnation of the Regulations came into force. There has been successive Regulations since then, each numbered accordingly. Therefore, following the first Regulations, is The **Public Health [2019 Novel Coronavirus (2019-Ncov)] (No. 2) Regulations, 2020**, with each later set of Regulations revoking the previous. These Regulations have been made under the **Public Health Ordinance Ch. 12 No. 4** which has been in existence long before Independence and which has been amended and used at different times to deal with public health matters and pandemics.

7. In claim number CV2020-01370 (the Dominic Suraj claim or the Suraj claim), the five claimants were arrested and charged on 9 April 2020 for breaching **regulation 3 (1) (b)** of the **Regulations (No.9)**. The Claimants argue that the charges were unlawfully laid, because the Regulations were unlawful and /or unconstitutional and hence null and void and of no legal effect.

8. In claim number CV2020-02223 (the Satyanand Maharaj or Maharaj claim), the claimant is a Hindu Pundit. He claims that the imposition of **Regulations 2 (2) and 2 (3)** of the **Regulations (No.23)** has affected his ability to host his religious services and functions and practice his religion in the manner he usually does and therefore they breach his fundamental rights under **sub-sections 4 (a), (b) and (h)** of **The Constitution of Trinidad and Tobago, Chap. 1:01**.

9. The court certified as issues in the Dominic Suraj claim:

- Whether the Regulations under which the claimants were charged, breach the fundamental rights provisions of the Constitution.
- Whether the matters addressed in the Regulations were required to be made or approved by Parliament and in what manner.
- Following from i and ii, and considering any relevant issues of if they are reasonably justifiable or proportionate, whether the Regulations are unconstitutional, void and of no effect.

10. In the Satyanand Maharaj claim, the court certified as issues:

- Whether Regulations 2(2) and 2(3) of the Public Health [2019 Novel Coronavirus 2019-nCov] (No.23) Regulations of 2020 are unconstitutional, illegal, null and void and of no legal effect.
- Whether Regulations 2(2) and 2(3) of the Public Health [2019 Novel Coronavirus 2019-nCov] (No.23) Regulations of 2020 have breached the claimant's constitutional rights under section 4 (a), (b) and (h) of the Constitution.
- Any consequential matters arising therefrom, except damages.

Claimants' Main Contentions

11. In the Dominic Suraj case, Mr Ramlogan contends that the Regulations have infringed the claimants' constitutional rights by the restrictions it has imposed on gatherings in a public place exceeding five people, and other restrictions as detailed by the different deponents.

12. The Regulations were made under **section 105** of the **Public Health Ordinance (Ordinance)**. **Section 132** of the Ordinance requires any regulations to be published by being gazetted. **Section 133** allows entry onto premises for certain purposes in connection with the Ordinance. The claimants have accepted that the Regulations have been gazetted and the process outlined in the Ordinance has been followed. The issue relates to whether the measures or all of the measures contained in the Regulations can properly be the subject of Regulations made under the Ordinance or whether they require Parliamentary approval because of the apparent curtailment of rights.

13. The basic contentions of the claimants are:

- The measures in the relevant Regulations are plainly inconsistent with fundamental rights enshrined in **sections 4 and 5** of the **Constitution** as they "abrogate, abridge and infringe" and are inconsistent with the claimants' constitutional rights.

- The Regulations were not made and/or approved or passed with a special majority by Parliament and are therefore outside the scope of **section 13** of the **Constitution**.
- If the content of these Regulations had to be made into law, the proper course was for Parliament to make them and have them passed by a special majority.
- Alternatively, the relevant Regulations are a disproportionate and unjustified interference with the claimants' constitutional rights.

14. Counsel for the claimants went further to discuss the cases interpreting legislation which are inconsistent with fundamental rights and freedoms. They relied on reasoning in the case of **Francis and another v The State of Trinidad and Tobago (2014) 86 WIR 418**.

15. The court in that matter distinguished between two approaches for interpreting the issues: the approach used in the cases of **Hinds and others v The Queen [1976] 1 All ER 353** and **Terrence Thornhill v The Attorney General of Trinidad and Tobago [1981] AC 61** in contrast to the later decisions of **Suratt and others v The Attorney General of Trinidad and Tobago [2007] UKPC 55** and **Public Service Appeal Board v Maraj [2010] UKPC 29**.

16. In the Satyanand Maharaj claim, the claimant's main contention is with **regulation 3(7)** of the **Regulations** and the Regulations that followed. It specifically provides that places of worship that complied with the Guidelines for Places of Worship (Guidelines) issued by the Ministry of Health were not in contravention of the Regulations.

17. This claimant argues that this provision violates the principles of legal certainty, the rule of law and the separation of powers. These Guidelines are not part of the Regulations and are not contained in a Schedule. The Guidelines are made by public officers and are subject to change. They have not been subject to any form of parliamentary scrutiny, review, debate and approval.

18. A breach of these Guidelines has been made a criminal offence that is punishable by a fine of fifty thousand dollars and imprisonment for a term of six months. In effect, the claimant contends, public officers from the Executive arm of the State are legislating and creating criminal offences. This approach, counsel has argued, is anathema to and inconsistent with the concept of a sovereign democratic state in a constitutional democracy where the Constitution is the supreme law and is predicated on the separation of powers and the rule of law.

19. Mr Ramlogan has advanced that these Guidelines have infringed concepts of legal certainty, accessibility, clarity and the ability to ascertain the current law. One has to go to the website of the Ministry of Health to find the Guidelines; any past versions are not there. Therefore the public cannot know what was in force on a particular day in the past.

20. Furthermore, the Guidelines are in breach of **section 132** which requires all regulations made under the **Public Health Ordinance** to be gazetted. Unlike the Regulations, these Guidelines have not been gazetted and hence do not have the force of law.

Defendant's Response

21. The Attorney General has rebuffed the contentions of the claimants. His counsel submitted that the **Public Health Ordinance**, which dates back a century, contains several criminal provisions with respect to infectious diseases. The Ordinance contemplates delegated legislation to the Minister and also to local authorities dealing with public health. The defendant notes there is no challenge to the Ordinance itself.

22. The Attorney General further submits that socio-economic and political measures are of a nature which requires the court to accord a significant degree of deference to the executive and legislative arms.

23. Principles of necessity and constitutional efficacy require support for delegated law making powers.

24. In response to the special majority requirement advanced by the claimants, the defendant answers that the Ordinance is saved law. The primary legislation was saved and that passes constitutional muster. The only challenge that can be made is to the vires of the Regulations. The defendant submits that **section 105** clearly allows the Regulations to be made. There are limited grounds that saved law can be challenged on such

as regarding allegations of discrimination, but that is not the contention here.

25. Mr Armour SC has also pointed to other laws containing criminal offences to be created by delegated legislation. These include offences under the **Animal (Disease and Importation) Act Chap 67:02; Plant Protection Act, Chap 63:56; Fisheries Act, Chap 67:51; Proceeds of Crime Act Chap 11:27; Motor Vehicle Road Traffic Act Chap 48:50; Conservation of Wild Life Act Chap 67:01; Anti-Terrorism Act Chap 12:07.**

26. Regarding the Satyanand Maharaj claim, the submissions are similar. However, they add in respect of the challenge to the Guidelines that there are examples of material incorporation in laws by reference and have pointed to some examples from Canada.

Evidence

27. Twelve affidavits were filed in the Suraj claim. The five claimants are: Dominic Suraj, Financial Forensic Investigator; Marlon Hinds, Businessman; Christopher Wilson, Motor Moore Operator; Bruce Bowen, Driver; and Collin Ramjohn, Fish Vendor. Seven other affidavits were also filed in support of the claimants' action by: Ivan Govia, Managing Director of Alicia's Guest House (Guest House); Primnath Geelal, Businessman; Gunniss Seecharan, Retired Police Sergeant and currently a Business Proprietor; Arkadie Mendoza, TT Ride Share Driver; Balgobin Maharaj, Network Technician; Shiva Lakhan, Singer and Songwriter; and Gregory Joseph, Acting Sergeant. They have given evidence of how the Regulations have impacted on them or

their businesses and suggest that the Regulations have curtailed their sections 4 and 5 constitutional rights.

28. In particular, the Suraj claimants were gathered at Alicia's Guest House when the police came into the premises and charged them with breaches of the Regulations and placed them before the court.

29. In the affidavits of the five claimants, several common aspects are present:

- They were all aware of the Regulations and of the government's stay-at-home order which was issued on 29 March 2020.
- They claim that the gathering was not a party; there was no loud music; that no lewd behaviour took place. Social distancing was being observed.
- They all observed the police making their entry onto the premises at approximately 11:00pm.
- After their arrest they were taken to the Four Roads Police Station.
- They were all charged on 14 April, 2020 with breaching the Regulations namely that more than five persons were gathered that was not associated with an essential service.
- They all had virtual court hearings conducted at the Besson Street Police Station and each were placed on a \$20,000.00 bail and curfew restrictions.
- They have all suffered humiliation as news reports in the media and social media referred to the incident as "Covid-19 party goers appear in court".

30. Further to this, each claimant narrate their own particulars.

Dominic Suraj

- Prior to this incident he was involved in charitable work with the Avivamiento Church of Trinidad for which he is a member and Director. His work involved assisting members of the Venezuelan community through the provision of food items and assistance to young mothers.
- Since the institution of the stay at home order, some persons in the Venezuelan community reached out to him for assistance. He knew a group of Venezuelans who were staying at the Guest House. He was aware that they were running low on food and basic items. On 9 April 2020, he along with some friends decided to visit the Guest House to prepare a meal.
- He was accompanied by two Venezuelan colleagues and another claimant, Bruce Bowen. By 11:00pm the meal had been prepared and consumed and he along with the resident Venezuelan staying at the Guest House were near the pool area. At this time, he observed police officers dressed in tactical gear enter the pool area.
- He was kept in custody for five and a half days where he was kept in a cell which did not have proper bathroom facilities or ventilation. Prior to this incident, he was never charged and had no previous convictions.

- The Regulations have resulted in him being restricted in the use and enjoyment of his vehicle. He leases the vehicle to his employee Bruce Bowen for private transport and since the Regulations Bowen has not been able to get a significant amount of work.
- The incident has caused him distress and embarrassment as his picture was shared on social media indicating that he was a “Covid-19 partygoer”. This was contrary to why he attended the Guest House on that day which was to provide charitable work. Because of this embarrassment it has hurt his business as a Consultant. He also owns his own company and business which has also been hurt by the Regulations.

Marlon Hinds

- He owns a mini-mart and he knew the first claimant and other members of the Avivamiento Church of Trinidad. He stated that the first claimant normally bought goods from his mini-mart to assist in the provision of hampers to the Venezuelan community.
- At paragraph 8 he says he knew of a group of Venezuelans that lived at the Guest House. On 9 April 2020 he met the first claimant who told him that he was going to prepare a meal for the Venezuelans there. He told the first claimant that he would meet him there and he went with his wife and sister. They waited by the pool while the food was being cooked.

- After entry of the police officers, he was asked by an officer what he was doing at the Guest House but he did not respond. He was placed in a cell with eight other persons in very inhumane conditions.
- His business has been affected since his arrest as persons no longer patronise his business. He states that the Regulations which do not have Parliamentary authority have infringed his constitutional rights.

Christopher Wilson

- He states that he knew the first claimant frequently distributes food to the Venezuelan community. On 9 April 2020 he received a call from a friend, Sherman Nicholls, who works at the Guest House to collect some money owed to him. He arrived at the house at 10:30pm and after meeting Nicholls by the pool area he was invited for a meal by the first claimant. Subsequently, members of the task force dressed in tactical wear entered the area.
- He states that no warning was given to them to disperse and go home. He was placed in a cell with eight other persons and was in custody for four days.
- The social media posts that subsequently followed have caused him great humiliation. At work he is questioned by his superiors and co-workers regarding the incident. He is also shunned by members of the public.

Collin Ramjohn

- As a Fish Vendor he has had difficulty in selling fish since the implementation of the Regulations especially as restaurants have been closed.
- On 9 April 2020, he went to the Guest House to collect the daily rent for a vehicle that he rented to an employee of Guest House, Sherman Sladden, as well as to visit a friend. He collected the money and was outside of his friend's room smoking a cigarette. He saw the gathering of persons on the eastern side of the premises and they appeared to be cooking. He and his friend were on the western side.
- While smoking he heard a loud shout of "nobody move" and he saw men in camouflage uniform appeared with the word police on it. He was arrested and placed in a cell for four days before charges were laid.
- He says he was not at the Guest House for a party. The incident has caused him much distress and embarrassment as the places he once supplied fish are no longer buying from him.

Bruce Bowen

- He was involved with the charitable work of the first claimant. He is also a member of the Avivamiento Church of Trinidad.

- Since the government's stay-at-home order, he would accompany the first claimant in dropping off food items to members of the Venezuelan community.
- He knew of a group of Venezuelans the first claimant assisted at the Guest House. On 9 April 2020, the first claimant asked him to assist in preparing a meal for them at the Guest House. The meal was prepared and served. Afterwards everyone was chatting.
- At 11:30pm he observed masked men jumping the gate. He along with others were all told to line up against a wall. They were searched and placed on a police bus.
- He was kept in custody for five and a half days. The cell he was placed in did not have proper bathroom facilities nor was it ventilated. He suffered severe back pains and nausea while in custody.
- He is a taxi driver and since the incident his services has suffered. A lot of his passengers are now avoiding him. The Regulations have also caused losses to his trade as it only allows 50 per cent capacity for taxis.

31. This court is not in a position to interrogate or come to any conclusion on the reasons the claimants in Suraj have advanced for being at Alicia's Guest House on the night in question. Their evidence is material to this claim only to the extent that the Regulations have impacted on them, they having been charged with an offence of gathering in numbers over 5

persons in breach of the Regulations. They were charged under the Regulations and certain of their activities have been affected by the Regulations. Their evidence at this stage is to record the impact they assert the Regulations have had on them, in particular in bringing them to face the court for a breach of the Regulations.

32. It is not for me at this stage to examine their Defence or to pronounce on it.

Other Evidence

33. There are seven other affidavits filed in support of the claimants' claim. The affidavit of Ivan Govia describes the Guest House as private property that restricts entry to the public. It is not a public area, he contends. The persons who were there on the day of the incident had permission to be there or were residents at the property. He states that there is video footage from security cameras on the day of the incident that he is prepared to provide this. On his review of the footage, a party was not taking place and proper social distancing was being observed. He also personally knew the first to fourth claimants and they were there to deliver food to some members of the Venezuelan community.

34. Gregory Joseph states that he was detained by police officers but never charged on 12 April 2020. He was told that he was arrested for loitering and resisting arrest. He states that a consequence of the Commissioner of Police's attempt to enforce the lockdown was the violation

of the rights of citizens by police officers including a violation of his rights on 12 April.

35. In the affidavit of Gunniss Seecharan, he states that his rights are also being violated as he is not able to operate his restaurant and bar as a result of the Regulations. Unlike groceries which are able to sell their goods, he is not allowed curbside collection of his items or allowed to operate the restaurant section of his business since it is viewed as linked to the bar.

36. In the affidavit of Arkadie Mendoza he states that he is a registered driver with Trinidad and Tobago Ride Share. The Regulations have affected his services as a driver. He also related an incident with police officers where he was not allowed to provide his service.

37. Shiva Lakhan relates an incident that he experienced at the home of his mother. He states he has video footage of the incident that he is prepared to provide to the Court. On 29 May 2020, he was having a small gathering to celebrate a relative's birthday. Subsequently, police arrived and asked that the guests leave because they were in violation of the Regulations which forbade gathering of over five persons. He also states that the police officers entered the property without a search warrant. He was grabbed by a police officer but was not detained.

38. In the affidavit of Primnath Geelal, he states that he was arrested while operating his business on 10 April 2020. Despite the business falling under "essential services" as provided for under the Regulations, police

officers forcibly held and escorted him to the Barataria Police Station. He was subsequently released after an apology by the Senior Officer.

39. Balgobin Maharaj narrated his thoughts regarding the constitutional validity of the Regulations and stated he intends to file his own claim in the matter.

Claimant Satyanand Maharaj

40. An affidavit was filed by this claimant on 3 August 2020. He states that his right to liberty, protection of the law and freedom of conscience and religious belief and observance as provided under **sub-sections 4(a), (b), and (h)** of the **Constitution** have been breached by the imposition of the **Regulations No. 23** and the Guidelines.

41. He states that his daily routine as a pundit has been curtailed as a result of the Regulations. These include spiritual services, weekly classes and the manner of officiating at funerals.

42. According to Regulations 3(7) of **No. 18**, religious services or any other religious gatherings if in compliance with the Guidelines issued by the Ministry of Health are not in contravention of Regulation 1(b). But places which did not adhere to the Guidelines, are in contravention and commit an offence and becomes liable to a fine of fifty thousand dollars and imprisonment for a term of six months. Therefore, Pundit Maharaj notes that if he were to breach the Guidelines, he would be subject to this penalty.

43. He contends that this is offensive to the principle of legal certainty, the rule of law and the separation of powers. The Guidelines are not part of the Regulations and are not contained in a Schedule; they were made by public officers and have not been subject to Parliamentary scrutiny, review, debate, and approval. Furthermore, as per **section 132** of the **Constitution**, all regulations are to be gazetted, but unlike the regulations, the Guidelines have not been gazetted.

Defendant's Evidence

44. The Attorney General filed two affidavits in response. These were of the Minister of Health, Mr Terrance Deyalsingh and the Chief Medical Officer, Dr Roshan Parasram.

The Minister of Health, Mr Terrance Deyalsingh

45. In his affidavit, Mr Deyalsingh states that the Minister of Health is the designated authority under **sections 105, 132, and 133** of the **Public Health Ordinance**, as amended, for the passing of Regulations to deal with dangerous infectious diseases. He stated that as a result of the World Health Organization's (WHO) declaration on 30 January 2020 that Covid-19 was a Public Health Emergency of International Concern, by **Legal Notice 34 of 2020**, the President declared that the 2019 Novel Corona Virus a "dangerous infectious disease."

46. He stated that from 19 March 2020 to 16 August 2020, he has signed and caused to be issued 24 sets of Regulations to control and/or mitigate

the spread of the disease in Trinidad and Tobago depending on the prevailing circumstances at the particular time the Regulations are brought into effect and the scientific evidence available. Each succeeding set of Regulations revokes the previous Regulations made before. The objective of the Regulations is to protect the health of the citizens of Trinidad and Tobago by combatting the spread, as far as is practicable, of the disease in accordance with the **Public Health Ordinance**.

47. At paragraph 8 he states that the Regulations are made after the receipt of advice from the Ministry of Health. The Ministry emphasises the exceptional nature and threat of the disease to public health.

48. He has also brought the Regulations to the attention of the Cabinet. However, the ultimate responsibility for the Regulations lie with the Minister of Health. He has also been guided by the various health experts including Dr Roshan Parasaram, Chief Medical Officer and Dr Avery Hinds, Technical Director – Epidemiology Division. Given the contagious spread of the disease, transmission is best controlled by restricting movements of persons and the containment of large gatherings at public places. Such restrictions became very important as there is community spread where infected persons are not aware of how they acquired the disease. Places in particular that may be a cause of this spread are bars, restaurants and places of worship.

Dr Roshan Parasaram

49. At paragraph 5 of his affidavit Dr Parasram states that he has been advising the Ministry of the appropriate response to Covid-19. To do this, he has been keeping abreast of data and guidelines published by the WHO whose primary role is to coordinate and direct international health within the United Nations system of which Trinidad and Tobago is a member.

50. From the data available, for every one person infected, 2.3 persons can get infected rendering Covid-19 an infectious disease.

51. At paragraph 7, he outlined the contagiousness of the disease by stating Covid-19 is contracted if persons breathe in droplets from a person affected with the disease who coughs or exhales droplets or if they touch objects or surfaces on which these droplets have landed and proceed to touch their eyes, nose or mouth. The disease is a serious concern for older persons with pre-existing medical conditions. There is no vaccine or anti-viral drug at this time.

52. At paragraph 8, he states that there is a potential that if too many persons are infected this can place a strain on the resources and capacity of the medical system to such an extent that persons seeking treatment for conditions other than Covid-19 may not receive that treatment.

53. At paragraph 11, he stated that nations which have been slow to curb movement are the ones that are currently experiencing a severe impact as opposed to those that are proactive.

54. Dr Parasram states that the following measures are critical to curbing the disease:

- Minimizing movement and or gathering of people;
- Isolating persons who are Covid-19 positive, whether they show symptoms or not;
- Discharging patients only after they test negative twice within 24 hours; and
- Encouraging a further self-isolation for 7 days.

55. He has been assisting with a flow of information to the Cabinet and other Ministries to slow the spread of the disease. While there has been initial success in slowing the spread, as of 18 August 2020, there has been local spread of cases.

56. He advised on the Guidelines and received input from various religious organisations including the Sanatan Dharma Maha Sabha.

57. It should be noted that it is not the claimants' contentions in either matter that laws cannot be made to curtail certain behaviour or conduct. However the essential argument is that it is the Parliament that must make those laws which impact on fundamental rights and not the Minister, a member of the executive, under Regulations. Further, Guidelines do not have the force of law and therefore cannot be accompanied by criminal sanction.

Law

58. The relevant provisions of the **Constitution** which the claimants contend have been breached are sub sections **4(a), (b), (c), (g), (h), (j)**, and **5(1)**:

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

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

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

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

(g) freedom of movement;

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

(j) freedom of association and assembly; and

59. Under 5. (1) except as provided by section 54 no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of these rights.

60. **Section 13** of the **Constitution**, mandates that Acts that are inconsistent with sections 4 and 5, have to meet certain requirements to be passed:

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

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

61. **Section 105** of the **Public Health Ordinance** provides:

105. (1) The Board shall have the direction of all measures dealing with dangerous infectious diseases, and may make regulations with regard to the control of any dangerous infectious disease for all or any of the following purposes:

the restraint, segregation, and isolation of persons suffering from any dangerous infectious disease, or likely from exposure to infection to suffer from any such disease;

the removal to hospital and the curative treatment of persons suffering from any dangerous infectious disease;

the removal, disinfection, and destruction of personal effects, goods, houses, and other property exposed to infection from any dangerous infectious disease;

the speedy burial or cremation of the dead, and in such last mentioned case the provision of crematoria;

house to house visitation and inspection;

the provision of medical aid and accommodation;

the promotion of cleanliness, ventilation, and disinfection;

the prevention of the spread of dangerous infectious diseases as well on the seas and rivers and waters of the Colony, and on the high seas within three miles of the coast thereof, as on land;

the doing of any such matter or thing as may appear advisable for preventing or checking such diseases:

Provided that with respect to any hospital or asylum, or to any institution for the relief of the sick and destitute poor under the control of the Government, or to any patient therein, the powers given by this section shall not be exercisable by the Board, but such powers shall be exercised by the Governor in Council:

Provided further, that in the event of immediate action becoming, in the opinion of the Governor, necessary to deal with, any dangerous infectious disease under the provisions of this section or of any regulations made thereunder, and of its not being practicable, in the opinion of the Governor to have a meeting of the Board forthwith, the Governor may, pending the holding of such a meeting, take all such measures, do all such

things, exercise all such powers, and enjoy all such privileges and immunities as might be taken, done, exercised or enjoyed by the Board, and all such measures and things and the exercise of such powers shall be as effectual, valid, and protected in all respects as if they had been taken, done, or exercised by or under the authority of the Board.

(2) The provisions of sections 132 and 133 shall apply to all regulations made under this section.

(3) There may be attached to any breach of any regulation made under this section, a fine not exceeding four hundred and eighty dollars, or a term of imprisonment, with or without hard labour, not exceeding six months.

62. **Section 133** of the **Public Health Ordinance** provides:

133. For the purposes of this Part of this Ordinance, any person authorised to act under the provisions hereof or of any regulations made in pursuance of any authority contained in this Part of this Ordinance may at any time, with or without assistance—

enter on lands and buildings and inspect and examine the same and all things thereon or therein;

do on any land or in any building any sanitary or other work authorised or directed;

generally do, with respect to persons, places, land, buildings, animals, or things, whatever is necessary or expedient in order to carry out the foregoing provisions of this Part of this Ordinance or any direction or requirement given or arising thereunder.

63. Section 105 of the Ordinance was amended by section 5 of the **Miscellaneous Provisions [2019 – Novel Coronavirus (2019-nCoV)] Act, No. 2 of 2020** to increase the penalty for any breach of Regulations made under section 105 to a fine not exceeding \$50,000.00 or 6 months imprisonment. This has since been further amended to increase the fine which can be imposed. This is important as the penalty section has been prescribed and approved by the Parliament. While the penalty has been provided for in the Regulations, this penalty has been approved by Parliament as an amendment to section 105.

The Regulations

64. In the Suraj claim, the relevant regulations the claimants contend that were in violations of their fundamental rights and freedoms were regulations 2, 3, 4, 5, and 6 as they appeared in **Regulations No. 17** and successive Regulations:

2. (1) During the period specified in regulation 10, a person who provides public transport in a motor vehicle shall not carry in the motor vehicle more than three-quarter the number of passengers which the motor vehicle is licensed to carry.

3. (1) During the period specified in regulation 10, a person shall not, without reasonable justification—

be at any work place unless—

the work place is associated with a service specified in subregulation (2);

(ii) the presence of the person at the work place is essential for the carrying out or provision of a service specified in subregulation (2); and

(iii) it is not practicable for the person to work from home; or

be found at any public place where—

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

(ii) the gathering is not associated with a service specified in subregulation (2);

participate in any sport or team sport which involves more than five persons

...

Subject to subregulation (4), the holder of a spirit retailer's licence, wine retailer's licence, restaurant licence under the Liquor Licences Act shall ensure that the premises relative to such licence, is closed for operation during the period set out in regulation 10.

Subregulation (3) shall not apply to discount stores, markets and supermarkets.

...

(7) Subregulation (1)(b) does not apply to religious or ecclesiastical services or any other religious gatherings.

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

4. Notwithstanding regulation 3(2), the opening of the following services shall be as specified:

hardware stores, including electrical and plumbing establishments, shall only be open for sales to the public from 8:00 a.m. to 6:00 p.m. every day;

subject to regulation 5(1), street vending of food and beverages, all retail food services, delivery and take away food services shall only be open for sales to the public until 8.00 p.m. every day;

retail services shall only be open for sales to the public until 6:00 p.m.;

wholesale stores shall only be open until 6:00 p.m. every day;

pharmacies shall only be open for sales to the public until 8:00 p.m. every day;

motor vehicle sales, servicing and repair centres, motor vehicle mechanics, motor vehicle parts dealers or vendors and tyre shops shall only be open until 5.00 p.m. every day;

professionals, such as engineers, architects, valuers, assessors and land, quantity and other surveyors shall only be open until 6.00 p.m. every day;

the National Lotteries Control Board's business shall only be open until 6.00 p.m. every day;

spas, barbers, hairdressers, aestheticians, nail technicians or such similar service providers until 6.00 p.m. every day; and

dry cleaners and laundries shall only be open until 5.00 p.m. every day.

5. (1) For the purposes of controlling and preventing the spread of the 2019 Novel Coronavirus (2019-nCoV), it shall be an offence, during the period specified in regulation 10, for any person—

to conduct the business of a bar, whether or not the person is a licensed person under the Liquor Licences Act;

to operate a club, as defined in section 2 of the Registration of Clubs Act;

to operate a theatre licensed under the Cinematograph Act;

to operate a common gaming house or betting office licensed under the Gambling and Betting Act;

to provide the amenity of seated dining at a restaurant to any customer;

to provide any onsite indoor consumption of any product provided by a food or beverage establishment at any shopping centre or mall; and

to allow onsite consumption of any product provided by a street vendor selling food or drink.

(2) Subregulation (1)(f) shall not apply to restaurants, hotels, ecolodges providing outside dining to its guests provided that such amenity

complies with the social distancing guidelines set by the Ministry of Health.

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

6. (1) All air and sea ports or any place where an aircraft or ship or vessel can land shall, except in relation to air and sea cargo, remain closed to the arrival or departure of aircraft or ships or other vessels carrying passengers unless permitted by the Minister with responsibility for national security.

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

65. In the Satyanand Maharaj claim, the relevant regulations the claimant contend that infringed or had the potential to infringe his constitutional rights were regulations 2(2) and (3) as they appeared in the **Regulations No. 23**:

2. (2) The limit of persons at—

religious or ecclesiastical services or any other religious gatherings including funerals, weddings and christenings, may exceed the number set out in subsection (1), provided that they comply with the Guidelines for Places of Worship issued by the Ministry of Health; and

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

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

66. The Guidelines were mentioned in **Regulations No. 18** under regulation 3(7) made on 10 June 2020, but the Guidelines were to have effect on 22 June 2020:

Guidelines for Places of Religious Worship

The Guidelines apply to all Places of Worship and Religious Services, and all services and activities therein including weddings, funerals and wakes. It is the

responsibility of Heads of Religious Organizations to communicate these Guidelines to their members or congregants; via announcements, signs, bulletins, websites and social media. The Head of the Religious Organization is required to ensure all staff members are trained, virtually, or in-person, on the following Guidelines:

4.1.1 General Attendance

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

1,000 sq ft = 27/25 persons;

2,500sqft = 69/60 persons;

4,000sqft = 111/100 persons;

7,500sqft = 208/200 persons;

10,000sqft = 278/250 persons.

Elderly persons should be given the option to attend services separately and apart from the normal services preferably early in the morning at 6 a.m.;

Where there are multiple services, there should be no less than forty-five (45) minutes between

each service to allow for sanitation and cleaning of facilities.

4.1.2 Sanitation of Facilities

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

Ensure cleaning and sanitisation immediately before and after all gatherings and services;

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

Where possible, set-up hand sanitizer dispensers at specific areas; and

Ensure proper ventilation systems for areas of congregation using, preferably natural air in the first instance, and/or limited use of air condition.

4.1.3 Personal Hygiene

Post visual alerts (e.g., signs, posters) at the entrance and in strategic locations e.g., waiting areas, elevators, common areas to provide instructions (in appropriate languages) about hand hygiene, respiratory hygiene and cough etiquette. Instructions should include wearing a cloth face covering or facemask for source control, and how and when to perform hand hygiene;

Provide an adequate supply of 60% alcohol-based hand sanitizer or hand washing facilities or stations (fixed or portable), soap and running water for use before and after the service. It would be ideal to have easy open-close taps or pedal actuated or hands-free taps;

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

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

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

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

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

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

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

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

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

4.1.4 Staff Member or Congregant

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

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

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

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

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

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

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

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

Advise staff and congregants with symptoms of COVID-19 or who have tested positive for COVID-19 not to return to the place of worship until

his/her symptoms cease as confirmed by a Medical Practitioner.

4.1.5 Physical Distancing

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

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

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

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

Provide physical guides, such as tape on floors or walkways and signs on walls, to ensure that persons remain at least 6 feet apart all around in

lines and at other times (e.g. guides for creating “one-way routes” in hallways);

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

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

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

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

Adapt worship practices to prevent physical contact between and among worshipers, e.g.

replace handshakes and hugs with a bow or a verbal greeting; and

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

4.1.6 Sharing of Worship Materials

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

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

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

When receiving "blessings", this should be done 6 feet apart and without physical contact;

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

Ensure that meals and religious and ceremonial foods are individually prepacked and distributed to persons when exiting the place of worship as per Food and Safety Guidelines as appended; and Ensure setting up a no touch method to collect contributions where stationary boxes can be used that facilitates/encourages physical distancing.

4.1.7 Use of Music

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

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

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

4.1.8 Use of Technology for Sharing of Worship Materials

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

For example:

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

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

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

Expand use of television and radio channels.

Implementation of the Guidelines

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

Monitoring and Evaluation

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

Case Law

67. Several cases and other authorities were helpfully referred to by both sides and were considered. However, I will refer here to the key decisions / sources which impacted on my analysis and conclusions.

68. In **DPP v Kebeline [2002] AC 366** at page 381, Lord Hope stated:

“In this area difficult choices may need to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or persons whose act or decision is said to be incompatible with the Convention... It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection.

69. In **Williams v The Supervisory Authority (Antigua and Barbuda) [2020] UKPC 15** it was stated:

“The judgment of the legislature that preventative measures... are required to protect the interest of the general public is entitled to substantial respect. The requirement for a judgment to be made about the extent of the problem in society and how pressing is the need to address it and the difficulty of assessing how best to fashion preventive measures which are capable of being efficacious, means that it is appropriate to afford the legislature a significant margin of appreciation when a court comes to assess the proportionality of the regime of that legitimate aim.”

70. In the important constitutional text **Fundamentals of Caribbean Constitutional Law**, by **Robinson, Bulkan and Saunders**, (Sweet & Maxwell), 2015 at para 7.014 this point is made:

“There is no strong separation between legislative and executive power in the Anglophone Caribbean. While the power to make laws is constitutionally vested in Parliament, there can be a voluntary distribution of powers. Floissac CJ in *Astaphan v Comptroller of Customs* recognised that “the delegation or transfer of legislative power by the legislature to the executive is not per se inconsistent with the principle” of separation of powers. Effective control is maintained if the legislature limits the power or establishes guidelines or policy for its exercise. Courts police the boundary between legislative and executive power through judicial review of executive action. Caribbean courts have a duty to strike down administrative or executive action that exceed jurisdiction or undermines the authority of the legislature.

The power to delegate legislative authority to the executive is justified on the bases of both necessity and constitutional efficacy. As the complexity of modern regulation increases, law making correspondingly requires highly specialised knowledge and experience. Additionally, the sheer volume of regulation to be undertaken means that if Parliament would monopolise legislative powers, it could easily become overwhelmed and unable to function effectively. Consequently, delegation of legislative authority to appropriate executive bodies which are concerned with the actual implementation of the law is both a rational and effective allocation

of functions. Those bodies encompass a wide spectrum, including ministers, civil servants, and government departments, municipalities, public bodies, and even the Cabinet as a whole.”

71. In **Director of Public Prosecutions of Jamaica v Mollison [2003] 2**

AC 411 Lord Bingham observed at para 13:

“Whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so. Such separation, based on the rule of law, was recently described by Lord Steyn as ‘a characteristic feature of democracies’: *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, 890-891, para 50.”

72. In **Matthew v State of Trinidad and Tobago [2005] 1 AC 433** the Board of the Privy Council stated in respect of the savings law clause of the Constitution:

“3. This is a very important point. It is not suggested that there is any ambiguity about the Constitution itself. It is accepted that it is simply not susceptible to a construction, however enlightened or forward-looking, which would enable one to say that section 6(1) was merely a transitional provision which somehow and at some point in time

had become spent. It stands there protecting the validity of existing laws until such time as Parliament decides to change them.”

73. On the issue of the standard of legislation, in **Merkur Island Shipping Corporation v Laughton [1983] 2 AC 570** Lord Diplock stated at page 612:

“Absence of clarity is destructive of the rule of law; it is unfair to those who wish to preserve the rule of law; it encourages those who wish to undermine it”.

74. In **Sunday Times v United Kingdom** (1979) 2 EHRR 245 the European Court of Human Rights stated at para 49:

“In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”

75. At the English Court of Appeal in **Misra and Srivastava [2005] 1 Cr. App. R. 21** then Lord Judge LJ stated at para 34:

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

76. In **R (Gillan) v Commissioner of Police of the Metropolis [2006] 2 AC 307** at para 34 the Court noted:

“The lawfulness requirement in the Convention addresses supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law.”

77. In **R (Application of *Justice for Health Ltd*) v The Secretary of State for Health [2016] EWHC 2338, para 141** Green J commented:

“The principle serves a number of important purposes. A law or policy should be sufficiently clear to enable those affected by it to regulate their conduct i.e. to avoid being misled. Such a law or policy should be sufficiently clear as to obviate the risk that a public authority can act in an arbitrary way which interferes with fundamental rights of an individual. Clear notice of a policy or a decision also required so that the

individual knows the criteria that are being applied and is able to both make meaningful representations to the decision maker before the decision is taken and subsequently to challenge an adverse decision (for instance by showing that the reasons include relevant matters). Where the principle applies it might require the publication of the policy the decision maker is exercising; it might require that the policy be spelled out in greater detail so that the limits of a discretion may be demarcated; it might require the decision-maker to be more specific as to when he/she will or will not act.”

78. In **Quincy Mc Ewan (and others) v The Attorney General of Guyana** [2018] CCJ 30 Saunders J, President of the Caribbean Court of Justice, noted the requirements to be met for an instrument to amount to a valid ‘law’:

“80. A penal statute must meet certain minimum objectives if it is to pass muster as a valid law. It must provide fair notice to citizens of the prohibited conduct. It must not be vaguely worded. It must define the criminal offence with sufficient clarity that ordinary people can understand what conduct is prohibited. It should not be stated in ways that allow law enforcement officials to use subjective moral or value judgments as the basis for its enforcement. A law should not encourage arbitrary and discriminatory enforcement.”

79. Lord Hoffman on the principle of legality in **R v Secretary of State for the Home Department ex p. Simms [2000] 2 AC 115 at 131E** stated:

“The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost.

Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.”

Conclusions on Constitutionality of the Regulations

80. It cannot be doubted that the Regulations have had the effect of curtailing aspects of our rights and freedoms, some included under sections 4 and 5. Freedom of movement and association has been affected. The ability of some persons to earn an income as before has been impacted upon. We are all subject to restrictions that at the start of the year we could not think would happen.

81. The parent Ordinance provided that Regulations can be made under it. These Regulations could affect the rights and freedoms of citizens as far

as it is necessary to control the outbreak of infectious disease. The Ordinance, itself, already contains restrictions on rights and freedoms. For example, it curtails the rights of infected persons. They can be quarantined. Their property can be seized and destroyed. It permits entry onto premises to inspect and to allow for cleaning.

82. Some specifics of conduct which can be curtailed are found at **section 105**:

- the restraint, segregation, and isolation of persons..., or likely from exposure to infection to suffer from any such disease
- the removal to hospital...
- the removal, disinfection, and destruction of personal effects, goods, houses...
- the speedy burial or cremation of the dead...
- house to house visitation and inspection;
- the provision of medical aid and accommodation;
- the promotion of cleanliness, ventilation, and disinfection;
- the **prevention of the spread** of dangerous infectious diseases...

- the **doing of any such matter or thing as may appear advisable for preventing or checking such diseases**

83. **Section 133** of the Ordinance allows the authorities to:

- enter on lands and buildings and inspect and examine...
- do on any land or in any building any sanitary or other work authorised...
- **generally do, with respect to persons, places, land, buildings, animals, or things**, whatever is **necessary or expedient** in order to carry out the foregoing provisions of this Part of this Ordinance or any direction or requirement given or arising thereunder

(Emphasis supplied)

84. There are many other provisions of the Ordinance which regulate and restrict the conduct of persons during the period of the currency of a Proclamation of there being a dangerous infectious disease. As can be seen from a study of Regulations made under the Ordinance in the past, Regulations have been made in respect of other outbreaks including cholera and yellow fever. The making of Regulations to control the spread of infection is therefore not new. Regulations to control spread of infection will necessarily impact on the rights of persons.

85. But the Ordinance went further to permit Regulations to be made to further restrict freedoms. This is an added layer to prevent the spread of the infectious disease.

86. The starting point to determine whether the Regulations are constitutional is to start with the Ordinance. The **Public Health Ordinance** is saved law. It is under section 105 that the Minister has made the Regulations. That section is saved giving the power to the Minister to make Regulations.

87. Mr Ramlogan in his Reply submissions mounted a fulsome critique of the savings law clause and how it operates. He points to the trenchant criticism of the savings law clause in academic writings. He sets out reservations about it expressed in judicial decisions. Rampersad J. in **Jason Jones v The Attorney General, CV 2017 – 00720**, called for a review of it. In that judgment Rampersad J. referred to an academic writer Ms Cynthia Barrow-Giles who noted that it weakens the Constitutional rights and creates ambiguity. **Robinson's** text has indicated it has kept us in a time warp. Professor Drayton in a lecture to the Judicial Education Institute on 2 March 2016 called it toxic. There is the suggestion that savings law clauses should have a time limit. The savings law clause stifles rights.

88. This court, however, remains bound by authority of higher courts. The CCJ in **R v Jabari Sensimania Nervais (2018) CCJ 19 (AJ)** made a strong criticism of savings law clauses and the effect they have had on depriving citizens of rights. However the provision remains in this and other Caribbean jurisdictions. The solution which both the CCJ and other courts have found is to give savings law clauses a restrictive interpretation (See **R v Jabari Sensimania Nervais**). But this does not render the savings law clause inoperable. It remains for our Parliament, and other Parliaments, to repeal the clause if they are to be cast into history. It is telling that no Parliament

in Trinidad and Tobago since Independence, although occupied by many different parties and distinguished legal minds and persons, has thus far passed a constitutional amendment to repeal it.

89. What then does a restrictive interpretation of the operation of the savings law clause yield in this case? Mr Ramlogan in his reply suggested that what is saved is the Ordinance, and not the Regulations. The Regulations were made in 2020, not 1940, and therefore cannot be saved, he suggests. While it is true that the Regulations were not in existence before this year, the power to make them was saved and that power resident in section 105 cannot be rendered inoperable. Thus the Minister cannot be left unable to make Regulations because that would neutralise the enabling power.

90. The claimants' argument runs like this. The Ordinance is saved. But the Regulations are not. Thus, if the content of the Regulations breach sections 4 and 5 of the Constitution, then it is the Parliament that has to enact those measures by special majority. The saving of the Ordinance cannot extend to the Regulations. But then what would become of the power conferred by section 105? The power to make Regulations to prevent or check the spread of the infectious disease must allow the Regulations made to do that. What in that context are the kinds of measures which can prevent or check the spread of infectious disease? Surely it must include the types of measures included in the Regulations and as justified by Dr Parasram in his evidence. It seems to me that, necessarily, measures to prevent or check the spread of an infectious disease would involve and extend to some curtailment of rights such as freedom of movement or

association. Prevention of spreading must in some way restrict the potential spreaders.

91. The claimants attractively argue that they are challenging the Regulations and not the enabling Ordinance. But the Regulations would have no parent without the power of section 105. They are derived from the Ordinance. Without the Ordinance they could not have been made. The court cannot, in effect, disable the power under **section 105**.

92. Thus even though the Regulations impact on rights and freedoms they are constitutional once they fall within the remit of the enabling power (**Johnson and Balwant v The Attorney General [2009] UKPC 53**).

93. Counsel for the claimants has referred the court to case law calling for a broad and purposive approach to be taken to the Constitution; one that promotes fundamental rights and freedoms; one that allows the Constitution to breathe and develop and to respond positively to changes in society. He is pushing at an open door. I readily agree. But, as pointed out by Counsel for the Attorney General, the Constitution must be read as a whole. It must be read as one document. And that document contains a savings law clause. Judicial will, creativity and ingenuity can only carry us so far.

94. Howsoever much discomfort there may be that 58 years after Independence we are still relying on saved law, the situation is what it is. The highest court has indicated how saved law is to be treated (**Matthews and Balwant** cited above). While there have been some judicial chipping

away of the effect of saved law, it remains relatively stable in its impact. It remains for Parliament to review saved laws and to decide if we still need to be reliant on a savings law provision. Just as the judiciary must fulfil its constitutional mandate, so too must the other arms of the State. However, the effect of the savings law clause in this case is determinative.

95. The real question is whether the Regulations and the various restrictions made can properly be said to be within the ambit of what the Ordinance allows. In other words are the Regulations within the scope of what is permitted by the Ordinance.

96. The question is whether those enabling provisions allow the Minister to make Regulations which in effect curtail the freedom of movement and gathering of persons as prescribed under the present Covid-19 Regulations. The evidence from Minister Deyalsingh and Dr Parasram placed before the court is that gatherings in public places especially bars, places of worship and indoor restaurant dining are, from contact tracing, the significant places where spreading takes place. The transmission of the virus is done by lack of social distancing and is spread by droplets, surface contact and other such transmission. Their evidence is that in an effort to balance the need for movement of persons for work, essential shopping and seeking medical care, it has become necessary to restrict certain aspects of gathering.

97. It seems to me that the measures in the Regulations are precisely the kinds of measures which have been found to be and considered as necessary to **prevent** and **check** the **spread** of the virus as contemplated by the Regulations. These decisions have been taken based on the expertise

available to the Minister and guided by WHO advice. There is nothing which contradicts this. Thus, in my view, the Regulations can be seen to be within the scope of what section 105 provides regulations can be made for by the Minister of Health.

98. It also seems to me that Public Health Regulations to prevent the spread of infectious and dangerous disease fall within a narrow compass of exceptional laws which permit a Minister leeway to restrict certain of the rights and freedoms under the Constitution. It is often necessary in these matters to act quickly and efficiently to ensure that the spread of the disease is contained as much as possible. It is to be noted that these measures took place after there was a Proclamation by the President on 21 January 2020 that the virus was a “dangerous infectious disease”.

99. Mr Ramlogan has referred the court to the State of Emergency provisions under the Constitution. These allow for the declaration of a state of emergency where there is an outbreak of disease. However, the law allows two bites of the cherry as it were here. There is first the provision of the Ordinance which allows the President to make the declaration as was done here and as was done previously for the Ebola virus.

100. However, there is a second layer of law available where the outbreak of infectious disease has expanded to such an extent that it leads to a state of affairs so serious in the country which then triggers the operation of the emergency provisions of the Constitution and allows for a declaration of a State of Emergency. The two are distinct. In such a case, wider powers will be available in terms of imposition of curfews and the like.

101. The crux of the claimants' case in the Dominic Suraj matter is the charge for gathering. Other deponents complained about the police, acting purportedly under the Regulations, unlawfully seeking to enforce a curfew. One deponent complained about not being allowed to operate his restaurant and bar and thereby being denied his right to earn his livelihood. Another complained about the inability to provide his services as a driver. One complained about the police entering a private residence and breaking up a celebration. Another deponent said he was operating an essential service but yet was arrested by the police and subsequently released.

102. These instances do allege some confusion among police officers, overreach, and even abuse, in terms of how the Regulations are being enforced. But those matters go to the manner of the enforcement of the Regulations for which the individuals affected have their rights in law to challenge the police conduct. They have all options to defend themselves on criminal charges and to bring appropriate civil claims for relief. Breaches of the types complained of go to how the Regulations are enforced, not whether the Regulations are impermissible. Nothing prevents them from challenging the conduct of the police.

103. What at highest is required is evidence of a proper balancing act and consideration of the least disruptive way to effect the behavioural change required in considering the ambit of section 105. There have been several adjustment to the Regulations in the past 6 months. There has been relaxing of the requirements and greater "lockdown" as well. That in itself demonstrates consideration is being given as to how the Regulations impact on citizens.

104. Mr Ramlogan nonetheless says it is for Parliament to do this, not the Minister. He has put separation of powers frontally in his argument.

105. Counsel for the Attorney General has correctly made the point that there is some overlap between the executive and the Parliament in terms of prescribing laws. The Public Health Ordinance is perhaps the best example of where this occurs. Even so it is not an unlimited power. The Regulations must meet the test of being vires the powers allowed by the primary legislation. In this case, I have found that it does. The making of the Regulations here, does not therefore breach the separation of powers principle of the Constitution. I do not accept that the case here is akin to a **Khoyratty [2006] UKPC 13** type situation which concerned a judicial / legislative clash.

106. I have found that the Ordinance is saved law and the Regulations properly fall within its ambit. This, in my view, is an answer to the legal challenge. I have further noted that up to the time of the Minister's affidavit, 24 sets of Regulations had been made, each revoking the previous one. Perhaps, this is the cumbersomeness for Parliament to deal with that the **Robinson** text has identified in circumstances where the virus appears to be a moving target. Quick changes will, at times, be required.

107. In respect of the second claim, Pundit Maharaj's issue on the Regulations goes to how his right to practice his religion has been affected particularly by the gathering provisions. I can discern no fundamental threats in these measures which curtail his constitutional right to practice his religion or challenges his right to religious belief or conscience. There are

restrictions on gathering of persons, but there is nothing that strikes at the core of his freedom to practice his religion. He has to do it in the physical company of fewer persons. All religious groupings have been affected when the gathering provisions are considered. The practice of religion has at times to be adapted to societal needs. Again these are all within the ambit or scope of what the enabling provisions of the Ordinance allow, in particular section 105.

108. The above essentially disposes of the constitutional aspects of the claim. However, there are a few observations that I can make which in my view is permissible in the court's respectful and arms-length engagement with the other arms of State and I consider this an appropriate case in which to do it.

109. The first is that when the **Public Health Ordinance** first became law and various changes were made before Independence, there was no Parliament existing in Trinidad and Tobago as we now know it. Since independence, it is recognised that separation of powers is a core principle of the Constitution, particularly between the executive/legislature and the judiciary. Incursion into core judiciary functions would not be constitutionally acceptable.

110. Even as stated in the **Robinson** text and the cases quoted above, there is some overlap in the law making functions between the executive and legislature. At the same time, the main function of the legislature is to make law and the main function of the executive is to frame policy, implement the law and govern. Members of Parliament are elected to

Parliament, to discuss, scrutinise, debate and pass laws, on behalf of citizens. In my view, there ought really to be no objection in principle to some form of Parliamentary scrutiny to Regulations being made which, even if justifiable, impact on the freedoms of citizens. There is no specific relief sought about modifications to the Ordinance as the Ordinance was not challenged and therefore the court cannot make any such order. I would, however, urge the Attorney General to consider, at minimum, some form of appropriate Parliament scrutiny for Regulations made by the executive where normal every day freedoms are affected, as has occurred here. I would note that both the **Williams** and **Kebeline** cases cited above speak about the “legislature” being involved in law making.

111. Second, I have noted that while there are laws in our statute books where penalties have been included in Regulations, these are for the most part enabled by primary legislation. Further, health regulations are part of a relatively limited few laws where this occurs. It must therefore be considered to be exceptional circumstances (such as the present) where incursions into rights and freedoms with criminal penalties attached to Regulations made by the executive may be considered acceptable. The operation of the savings law clause is also central to the outcome here. This decision should therefore not be taken as encouragement to expand the areas of law where Regulations made by the executive restrict rights and freedoms of individuals without Parliamentary scrutiny or without considering whether a special majority is needed. It cannot become the norm for laws, in my view, especially with significant penalties attached, to be made without Parliamentary input.

Conclusions on Guidelines

112. There is of course nothing wrong with providing Guidelines on measures which may be taken for the safe holding of religious or other activities. We are a religious society. There would be a strong desire to ensure that these can continue once public health considerations and safety can be addressed and balanced. These Guidelines for holding of religious functions have been comprehensive and detailed and include a number of practices which promote hygiene, public safety and cleanliness. They also promote social distancing while allowing for gathering to take place, albeit in a limited way. They give an option to religious bodies to continue their observances without a complete shutdown of activities. They encourage alternative means to conduct worship using video and technology. They do not allow religious groups to do everything that they could do before, but the Guidelines are expressed as an exception to a more severe restriction of activities. Nothing that is said below should therefore be seen as the court expressing disapproval of the Guidelines.

113. The critical legal issue, however, as I see it, is can a penalty be imposed in respect of Guidelines? A penalty can be imposed for an offence. Conduct can be prohibited by a regulation. But those regulations have to be incorporated into law by the process prescribed. To the extent that the Guidelines were not incorporated as law they cannot be subject to a criminal penalty.

114. In considering these Guidelines it is difficult to say whether some of the provisions can be subject to criminal conduct. The language appears to

be voluntary in some instances referring to “should”, “ensure”, “encourage”, “endorse”, “advise”, “discourage”, “adapt”, “consider”. There are examples of suggestions being made such as “where possible set up hand sanitiser dispensers”, “provide an adequate supply of 60% alcohol based hand sanitiser”; “encourage persons where possible...”, “discourage non-essential physical gatherings”, “it would be ideal to have”. These dictates are not easily capable of being construed in a way to allow for certainty that they are offences.

115. An offence creating statute must specifically state the conduct which leads to criminal liability in mandatory terms. Criminal statutes must be expressed as a command. A person cannot be put in peril of being prosecuted by language which suggests a recommendation.

116. Even the term “guidelines” goes against settled legal principles about how conduct should be criminalised. A guideline cannot be a mandatory requirement. It may be seen as something being strongly urged; it is there for assistance; it is there to encourage a particular kind of conduct. But it is not prohibited with the sanction of a punishment and not one of imprisonment as is the case here.

117. The risk is that even if there may not be prosecutions for violations like this, it makes someone potentially liable at the hands of a zealous police officer. It makes the situation confusing for a police officer to discern what constitutes an offence and what does not. It can lead to confusion or uncertainty among citizens about what is being urged and what is prohibited. By simply saying that if you comply with the Guidelines you will

not be subject to prosecution but if you don't you may, is not good enough. This does not distinguish which aspects of conduct are prohibited to be subject to criminal penalty and which are being urged. This creates uncertainty and lack of clarity for everyone. None of this is consistent with the proper application of the criminal law.

118. Making the breach of the Ministry of Health Guidelines a criminal offence in my view is outside of the ambit of the powers given to the Minister under the Ordinance and in particular section 105. This amounts to the Minister authorising Regulations which criminalise conduct which in several instances are uncertain and vague or expressed as non-mandatory practices. Such a provision is not a valid or legitimate exercise of the powers under the Ordinance.

119. The claim is brought as a one for constitutional relief. But even within the claim Pundit Maharaj has asked that the Guidelines be deemed illegal. I think the court has both the power and the duty to act to make an appropriate order even if the overall claim is expressed as one for constitutional relief. The court has the power to declare an aspect of the Regulations unlawful without affecting the Guidelines as such. The both sides have addressed the law on the requirements for criminal statutes. In this case it is the aspect of the Regulations which seeks to criminalise a breach of the Guidelines that is offensive, but not the underlying intent and policy of the Guidelines.

120. Further, while I accept the defendant's contention that there is precedent in other jurisdictions for incorporation of documents into a

statute, the criminalising of conduct by reference to Guidelines is in my view unsustainable in these circumstances. This is specifically in reference to there being no clear identification of which provisions of the Guidelines will lead to criminal sanction. That in itself puts someone in peril of being brought before the court to answer an uncertain offence.

121. For aspects of breach of the present Guidelines to be capable of prosecution, the specific conduct has to be framed as offences with the elements of the offences identified and these ought to be included in the Regulations and must be published in the prescribed manner. Certainty and clarity are more likely to be so satisfied.

122. Pundit Maharaj therefore partially succeeds on this aspect of his claim.

Proportionality and the Surratt / Francis Debate

123. The defendant says the question of proportionality does not come into play and there is no need for the court to test the Regulations for proportionality. The claimants on the other hand are inviting the court to enter into the debate on the **Suratt / Francis** principles and particularly whether the **Hinds** approach should be favoured. The decisions of higher courts are there. It will be up to a higher court in due course to resolve the debate. It is respectfully not for this court to do so even if I may be inclined to a view on it.

124. It may be observed that our public law jurisprudence has advanced somewhat since the cases of **Hinds** and **Thornhill**. The decisions of public authorities and functionaries are challenged every day in court. Some of the earlier strictures in interpreting constitutional law have fallen by the way and there is greater clarity in how constitutional principles should apply. As noted by both Baroness Hale and Lord Bingham in **Suratt**, not every instance where a right or freedom stated in sections 4 and 5 is impacted upon will necessarily lead to a finding of a breach of the right. The rights are not absolute and the courts can undertake the balancing act required in appropriate cases with justifiable evidence.

125. I would say, however, that on the assumption that these Regulations need to be tested, I consider that this would be an appropriate case to apply proportionality principles. First, there has been need for a response to a pandemic and to deploy measures in quick time. Necessarily many factors have had to be considered particularly economic, social and political ones and in any analysis a significant measure of deference has to be accorded to the executive and legislature by the courts in respect of the response in such cases.

126. Second, the uncontradicted evidence of Dr Parasram is that controlling gathering and enforcing social distancing are critical components to check the spread of the disease. When the Regulations are looked at as a whole, it is clear that they are targeted at precisely the control of gatherings and to try to enforce aspects of social distancing. The recent additions of face covering Regulations, which the court takes notice of, are also consistent with this approach. I do not discern, when the Regulations

are looked at as a whole, any significant incursion of rights that go beyond controlling aspects of freedom of association and movement. Necessarily, the control of movement and gatherings have impacted on economic activity by some such as taxi drivers, service and leisure providers. These aspects of life are pervasive so it is not surprising that they have impacted on all citizens, admittedly more on some, than others.

127. Third, in considering the matter of proportionality of the Regulations the court takes judicial notice that many of these measures are similar to measures being taken in other democratic States such as some parts of the United States, European countries, Commonwealth and Caribbean States.

128. Fourth, the Regulations have been amended on several occasions. There has clearly been constant monitoring of the status of the virus in this jurisdiction and adjustments have been made accordingly. These were well spelt out in the early part of the defendant's submissions. This suggests to the court that ongoing analysis has been taking place to ramp up controls for the prevention or checking of infections and the de-escalation of controls at different times. Since August, there has been a significant increase in the number of cases. Certain restrictions have been made. There has been an attempt to balance the needs for economic and business activity with the need to ensure there are safety measures in place. As the cases indicate those are matters best left to the executive and legislature to navigate. In appropriate and exceptional cases the courts are here to intervene if there is need to do so.

129. Fifth, the persons charged have a full opportunity to advance their cases before the courts and no hindrance has been placed by these Regulations on the courts for persons to access their rights. In all of the circumstances and considering the evidence put before me I would have concluded that the Regulations under consideration here have been a proportionate response to management of the pandemic.

130. The resolution of the debate has to be left to another case.

131. The **order** therefore is as follows:

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- i. The claim is dismissed.

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- ii. It is declared that the relevant **Public Health [2019 Novel Coronavirus (2019-nCoV)] Regulations, 2020** (No. 23) are unlawful to the extent **only** that they make a breach of the Guidelines for Places of Worship, made by the Ministry of Health, a criminal offence.

- iii. The other aspects of this claim are dismissed.

Costs

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132. The claimants have raised important constitutional issues in this matter. This is the first decided case which tested the Covid-19 Regulations. The Regulations have justifiably impacted on how every citizen goes about his or her daily life. The issues raised have by no means been frivolous. They were considered to be sufficiently important since they affected rights and since several persons have been charged for breaches of the law. The challenge has sought to interrogate fundamental constitutional principles. Perhaps a few may think the court's judgment has added a degree of clarity. At very least a court has made a decision at first instance which the parties may either accept or decide to pursue further. I have also made certain observations which do not give the claimants any relief but at least has raised certain matters for consideration of the Attorney General.

133. At the same time, costs have been incurred. The claimants have brought a claim and have not succeeded. Balancing the general rule that costs follow the event with the relevant challenge made of the Regulations, I would order that the claimants pay half of the defendant's costs certified fit for Senior Counsel, one junior and one instructing, to be assessed by a Registrar in default of agreement.

Satyanand Maharaj

134. This claimant has partially succeeded in his claim. He is entitled to some costs, with costs following the event. I would order that the Attorney General pay half the costs of the claimant certified fit for Senior Counsel, one junior Counsel and one instructing attorney, to be assessed by a Registrar in default of agreement.

135. The matters were heard together and there was overlap of certain issues. Therefore it would be right that the same Registrar should assess the costs in both claims and consider them together.

Thanks

136. These claims have raised important constitutional issues which required expeditious determination. I pressed attorneys on both sides to comply with short deadlines. The attorneys on both sides valiantly complied with no sacrifice of quality, scholarship and comprehensive assistance for which I am very grateful. I also wish to record my thanks for the usual helpful assistance given by my Judicial Research Counsel, Mr Shane Pantin.

Ronnie Boodoosingh (E-signed)

Ronnie Boodoosingh

Judge