REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. 2016-02471

IN THE MATTER OF AN APPLICATION BY ANTARES KHAN AND KENDELLE KHAN FOR AN ADMINISTRATIVE ORDER UNDER PART 56 OF THE CIVIL PROCEEDINGES RULES 1998

AND

IN THE MATTER OF SECTION 4 AND 5 OF THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO ACT NO. 4 OF 1976

AND

IN THE MATTER OF AN APPLICATION FOR REDRESS IN ACCORDANCE WITH SECTION 14 OF THE CONSTITUTION BY ANTARES KHAN AND KENDELLE KHAN CITIZENS OF THE REPUBLIC OF TRINIDAD AND TOBAGO ALLEGING THAT CERTAIN PROVISIONS OF THE SAID CONSTITUTION HAVE BEEN CONTRAVENED

BETWEEN

KENDELLE KHAN

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Claim No. 2018-02932

IN THE MATTER OF AN APPLICATION BY LYNDON JAMES FOR AN ADMINISTRATIVE ORDER UNDER PART 56 OF THE CIVIL PROCEEDINGES RULES 1998

AND

IN THE MATTER OF SECTION 4 AND 5 OF THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO ACT NO. 4 OF 1976

AND

IN THE MATTER OF AN APPLICATION FOR REDRESS IN ACCORDANCE WITH SECTION 14 OF THE CONSTITUTION BY LYNDON JAMES CITIZENS OF THE REPUBLIC OF TRINIDAD AND TOBAGO ALLEGING THAT CERTAIN PROVISIONS OF THE SAID CONSTITUTION HAVE BEEN CONTRAVENED

BETWEEN

LYNDON JAMES

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Claim No. 2020-02085

IN THE MATTER OF AN APPLICATION BY KENDELLE KHAN FOR AN ADMINISTRATIVE ORDER UNDER PART 56 OF THE CIVIL PROCEEDINGES RULES 1998

AND

IN THE MATTER OF SECTION 4 AND 5 OF THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO ACT NO. 4 OF 1976

AND

IN THE MATTER OF AN APPLICATION FOR REDRESS IN ACCORDANCE WITH SECTION 14 OF THE CONSTITUTION BY KENDELLE KHAN CITIZENS OF THE REPUBLIC OF TRINIDAD AND TOBAGO ALLEGING THAT CERTAIN PROVISIONS OF THE SAID CONSTITUTION HAVE BEEN CONTRAVENED

BETWEEN

KENDELLE KHAN

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before the Hon. Madam Justice C. Gobin

Date of Delivery: January 04, 2021

Appearances: -
Mr. Anand Ramlogan SC leading Mr. Ganesh Saroop, Ms. Alana Rambaran and Ms. Renuka Rambhajan instructed by Mr. Alvin Shiva Pariagsingh Attorneys-at-Law for the Claimant
Mr. Fyard Hosein SC leading Mr. Rishi Dass, Ms. Linda Gopee-Khan instructed by Ms. Savi Ramhit, Mr. Vincent Jardine, Mr. Hillary Muddeen and Ms. Nairob Smart Attorneys-at-Law for the Defendant

REASONS

NOTE

On 04th January, 2021 my reasons were emailed to Counsel with an invitation to indicate any typographical errors. By response dated 06/01/2021, Counsel for the Claimants indicated three errors which I believe should be corrected. They do not in any way affect the substance of the original reasons. This version of the reasons for my ruling incorporates at paragraph 1 and paragraph 4 the corrections on matters of record. I am grateful to Counsel for pointing out the errors.

1. In these three cases the Claimants claim that the conditions of detention at the Remand Facilities at Golden Grove, Arouca (in the cases of Kendelle Khan) and the Port-of-Spain Prison (in the case of Lyndon James) for the respective periods of their incarceration breached their fundamental rights and freedoms in that they subjected them to cruel and unusual punishment and further to inequality of treatment because the conditions under which they were kept while on remand at the Maximum Security Prison are inferior to those to which convicted criminals are subjected.

2. By notice dated 15/10/2020, the Defendant made an application for my recusal from continuing to hear the matters. The application came some four years after the first claim which had been filed jointly on behalf of brothers Antares Khan and Kendelle Khan, had reached my docket sometime in the year 2016. The recusal application came late in the day, and at a stage at which, after four years of active case management, all that remains is for a trial date to be fixed.

3. On 30th November, 2020 I dismissed the State's application. I now give my reasons for doing so. Before I proceed however, there are statements on matters which have been included in the State's submissions which were filed on 15/10/2020, which must be addressed.

4. The State claimed that the recusal application is made in the context of "various pending claims". This needs to be clarified as it may give the impression that there are several or many of these cases. At the date of the application there were three claims before me. The first claim in time was filed jointly on behalf of both Khan brothers. Of that joint claim Antares' was withdrawn sometime in the course of the proceedings. Kendelle filed a further claim for the period of his incarceration from November 9th, 2017 to present. There was no other "pending claim" at the date of the applications. On 20/11/2020 a case

of Anthony Albert and Al v The Attorney General was filed. This claim which in part concerns prison conditions only came to my attention in mid-December 2020 after I had rejected the recusal application.

5. The State also contended that the cases require a value judgment "which will have far reaching implications for both parties and the wider public". History has taught otherwise. In 2008 in determining the matter of **Colin Edghill and Ors v the Attorney General of Trinidad and Tobago No. 3178 of 2004** this Court made such a value judgment. Senior Counsel and one junior for the State appeared in those proceedings. They appeared on that occasion on behalf of the applicant **Edghill**, who was a prisoner housed, not at the MSP, but at the Remand Yard at the Port-of-Spain Prison. I do believe though that **Edghill** was the first case of its kind in this jurisdiction which a court ruled on the constitutionality of remand prison conditions. The value judgment of the Court resulted in declarations that the conditions of detention and confinement were illegal and contravened the applicant's fundamental rights – (Oct 3, 2008). This was a formal judicial pronouncement on the issue.

6. Even then I noted (paragraph 48 **Edghill**) that previous judicial pronouncements appeared to have been ignored by the State with impunity. It was in anticipation of the State's continued neglect or disinclination to address the problem of inhumane conditions at the Port of Spain facility that I concluded that it was necessary to go further and to order compensation. I expected that a declaration would on its own, be ineffective (paragraph 42-49 **Edghill**). No data or evidence has been produced which demonstrates that the judgment in **Edghill** had "far reaching implications or adverse consequences for the State or the wider public." I am not aware of any. The anticipated bursting of the floodgates (a matter raised by the State's representatives in the course of **Edghill**), did not occur between 2008 and 2016. There was no rash of constitutional claims by prisoners following **Edghill**, to burden the Court system and to empty the State's coffers.

7. Instead, prison conditions have continued to attract judicial comment, including from the current Chief Justice, (the third such to consider it necessary to speak about them) and from several other office holders including more recently the Director of Public Prosecutions. The actual experience has shown that this type of litigation against the State is no more far reaching that any other.

8. Of greater concern to me is the statement that was made in the introduction to the submissions that "some of the matters were earlier docketed to other judges but the Claimants took steps to have matters

transferred to Madam Justice Gobin". This is a matter on which the State considered it necessary to produce evidence. In an affidavit filed in support of the recusal application, State Counsel, Mr. Jardine said this: (para 4)

> "I have been informed by Counsel and my colleagues within the Ministry that all claims have now been listed for hearing before Madam Justice Gobin for determination. Some of the matters were docketed to other judges but the Claimants, through their attorneys, took steps to have the matters transferred to Madam Justice Gobin".

9. The statement is inadmissible as to the truth of it but in any case it is ill informed and in my view mischievous. A complaint which even indirectly suggests machinations to have a matter moved from one docket to the next is not just about the conduct of Counsel. It extends to that of the judge. A judge who receives a matter which is not properly docketed and who accepts it outside of the proper process undermines the integrity of the system designed to assure transparency in the assignment of cases.

10. The docketing and reassignment or transfer of cases from one judge to another is governed by internal Docket Rules and falls under the purview of a Civil Case Management Committee which comprises judges appointed by the Chief Justice. A reassignment from the first docketed judge to this judge could only have come about with the approval of that Committee. I can only presume that these matters were properly transferred on the proper exercise of the discretion of the Committee. The original claim form filed by the Khan brothers did indicate that there were related matters, **Edghill** and **Justin Charles**. As to how that disclosure factored in the decision of the CCMC is not within my knowledge. I can say however, that it is highly unlikely that the Claimants' attorneys could have done anything to engineer the result. As for the **Lyndon James** matter filed in 2020, having found its way to my docket, this too was approved by the CCMC. The wisdom of having pending related claims transferred to a judge hearing a similar case should be obvious. Indeed attorneys are required when filing civil cases to indicate whether there are such to facilitate reassignment. But in any case the transfer would ultimately have been a matter for the Committee. The belated attempt to question even the assignment of these matters to this court is surprising and disappointing.

REASONS

11. I turn to my reasons for rejecting the State's application. I did so after carefully conducting the required balancing exercise. I considered the importance of recusal where it is necessary for the maintenance of impartiality and instilling public confidence in the administration of justice on the one hand, and my duty to sit and to discharge my responsibility to carry and complete the cases docketed to me in accordance with my oath of office. At the end of the exercise I concluded that the reasons for the application, the bona fides of which were in doubt, were not good enough. I determined that I should complete the matters which were properly before me rather than to unfairly burden my colleagues.

DELAY

12. The timing of the application some four years into the management of the case at this stage when all that is left is for trial dates to be fixed, is simply unfair to the Claimants. It also raised an issue as to the sincerity of the concerns on the basis of which the objections are made.

13. **Edghill** was decided in October 2008. Some Counsel for the State in these matters appeared then, as Counsel for the Claimant in that matter. Since well before 2016 when the Khan brothers' first matter was filed and then reassigned to this Court, Counsel for the State would have been aware of the previous decision and the "robustness" of its previous findings. No objection was taken for a period of four years of case management. In these circumstances, the previous judicial decision made almost twelve years ago could not in my view justify an application for recusal at this stage. The delay is inexplicable and the timing of the recusal application in the circumstances in my view reasonably raised a question as the bona fides of it.

14. There was significant delay in relation to the second ground of complaint too. The comments which gave rise to it were made in the course of case management on 30 January 2019, more than fifteen months before the date of the recusal application. State Counsel were aware of the comments. There was no immediate or timely complaint. Even when the State subsequently made an application before me for a stay of further directions pending an appeal against the directions I made on that day, no issue of recusal was raised. Once again, the delay raised a question as to the seriousness or indeed the validity of the concerns.

15. The State's appeal was determined after more than a year and only then was the way finally cleared for a trial date to be fixed and any other outstanding final directions to be given. The Claimants' case had been put on hold pending the appeal. A transfer of these claims to the docket of another judge at this stage is necessarily going to result in disruption, further delay and prejudice and basic unfairness to the claimants. There is no guarantee that any new judge's calendar will accommodate a trial before the end of 2021, or in 2022. My intention was to fix a trial date in the new term.

16. I have also considered it would also be unfair to the panel of Civil Judges who have during the period January 2020 to November 2020 had their workloads significantly increased as a result of the elevation of four civil judges to the Court of Appeal. It now falls to thirteen judges to deal with the entire civil case load that was formerly distributed among seventeen judge of us. Quite apart from the increase in the number of new matters to fewer judges, all the matters left behind by the judges who have been elevated, have been redistributed to the remaining thirteen. In these circumstances, I refuse to readily shirk my duty to sit and complete the matters in my docket, for the reasons given by the State. There are not good enough and the imperative that I do my fair share of the work assigned to me must prevail in the circumstances.

Previous Decision of this Court in Edghill

17. The ground of the State's objection of my having decided **Edghill** with the robust and categorical views expressed in the judgement, in my view, lacks merit. What was required in **Edghill** was a value judgment such as is required here. The State's objection appears to be premised on the notion that the value judgment which informed the ruling in **Edghill** was an expression of my individual, personal and subjective views. This is wrong. Counsel who appeared in **Edghill** on both sides took great pains to underscore that for that value judgement to be legitimate, it had to be objective. This Court was at all times aware of the guidance in **Coker v Georgia 1977 433 –US 584 at 592** that "these judgements should not be, or appear to be merely the subjective norms of individual Justices; judgement should be informed by objective factors to the maximum possible extent."

18. The value judgement was informed by what I considered to be contemporary norms in Trinidad and Tobago after 48 years of independence and with regard to the "emerging consensus of values in the civilised community, "of which we surely agree our Republic is a proud part (paragraphs 23 to 31, **Edghill**). It was arrived at after an analysis of evidence on which there was little dispute. There was no

appeal by the State against the value judgment made by the Court in **Edghill**. There was no complaint that the judgement was subjective. There has so far been no impeachment of the process by which I arrived at it, nor indeed, of the result. There has been no criticism that the standards of decency that the Court considered we are entitled to expect of our institutions, were too high.

19. Against this background the motive behind the recusal application is in my view questionable. The State now seems to be aiming for a different value judgement, perhaps a subjective value judgement of a different judge. This comes down to forum shopping, and in the circumstances I am not inclined to accommodate it.

20. The State need not be unduly concerned that the earlier findings in **Edghill** mean that the outcome in these cases is sealed. The exercising of a value judgement is not a static one. It therefore remains open to the State in these new cases to argue that the values which this Court objectively identified and articulated are no longer applicable or that we as a society have evolved since 2008 in such a way that requires me or any other judge to revisit the objective assessment that was made then.

Statements made in the course of case management hearing on 30/01/2019.

21. The comments which ground the second complaint were in my view permissible and they were made in accordance with established procedural rules and guidelines. They were made in the course of case management to assist with the allocation of judicial time and resources at the trial. I sought to ascertain how much of the evidence as to the physical conditions of detention was actually being disputed by the State. I considered the inquiry necessary and legitimate; the answer would allow me to gauge the length of cross-examination I could expect or indeed allow.

22. Further, against the background of my having made an objective value judgment, in 2008 in circumstances where the conditions of detention of a prisoner at the Remand Yard Port of Spain were found to breach his fundamental right, I was entitled to remind of the less than acceptable standards which were found in that case and to enquire as to whether they were the same and to further remind of how the Court viewed them. This did not signal that my mind was closed to any argument that distinguished the instant cases from **Edghill** on the facts. The remark that I considered the use of slop pails in 2020 indefensible, was not an indication that the claimants were bound to succeed on their claim. It was made to indicate what I consider frankly, a particularly troubling aspect of the evidence

especially in the circumstances of overcrowding. It was to indicate my thinking and to allow the State to prepare to meet the concerns.

23. Support for this approach is to be found in the judgement of Warner JA in **No. 75 of 2006 Panday v Virgil at paragraph 97** in which the learned judge of appeal referred to the observations of Kirby J in **Johnson v Johnson 74 AL JR 1380** who stated that "while in earlier times silence was favoured on the part of an adjudicator during a hearing to avoid allegations of pre-judgment, that stance is now seen as carrying risks of greater injustice. Unless the adjudicator expresses his trend of thinking a party may be effectively denied justice because that party does not have the opportunity to present arguments that could have settled the adjudicator's concerns". This statement is as applicable in the course of case management as at any other stage of proceedings.

24. Further, in the peculiar circumstances of my having previously dealt with **Edghill** it would be surprising if parties expected that I would approach the matter with a blank mind. But I daresay that the same could be said of any judge. It would be almost impossible for any judge who has to decide on prison conditions not to take judicial notice of the notoriety of some of the conditions and of the repeated judicial comments including those of two former Chief Justices and the current one, on the subject, and of the continuing appeals from several quarters, including the office of the Director of Public Prosecutions, to ameliorate them. But in no case would the matter simply end there. It would remain open to the State, as it does now, to present evidence and arguments that the conditions, though unsatisfactory do not cross the threshold, or indeed that the conditions are not as extreme as generally thought, or that an objective value judgement exercised today should yield a different result.

25. The State's attorneys are well aware that I refused to accede to the Claimants' request for a visit to the MSP facility on the ground that current conditions on the ground might not be what obtained at the time of the Khans' incarceration in 2013/14. I considered that it would be more fair to the parties (moreso to the State, was my thinking), to have Mr. Daniel Khan, former Inspector of Prisons, produce reports and evidence of the conditions during his tenure, part of the period of which coincided with the period under consideration in the Khan matters. Counsel who appeared in **Edghill** would be aware that reports of the Inspector of Prisons were made available in those proceedings.

26. The Court expects that Mr. Khan's evidence would be material to the case and it would assist in resolving important factual issues. Above all, it is expected that it would be independent. The decision to issue a witness summons for Mr. (Daniel) Khan's attendance was made on the same day that I made the comments that have caused the State to fear a pre-judgement of the matters. In the context of all that transpired on the day that the comments were made, I considered that fear to be baseless. All directions and enquiries were made in the course of permissible proactive case management and pursuant to the court's powers under the CPR and in pursuance of the overriding objectives.

27. The State's application was dismissed with costs.

CAROL GOBIN

Judge