

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim CV: 2015-03519**

**BETWEEN**

**BARRY BARRINGTON**

**Claimant**

**And**

**ATTORNEY GENERAL OF TRINIDAD AND TOBAGO**

**Defendant**

**Before the Honourable Madam Justice E. J. Donaldson-Honeywell**

**Appearances:**

Mr. Abdel Ashraph for the Claimant

Ms. Zelica Haynes-Soo Hon, Coreen Findley, Javier Forrester and Ryan Grant for the Defendant

Delivered on 20<sup>th</sup> April, 2016

**RULING:**

## **Introduction and Background Facts:**

1. The Claimant filed a claim form and statement of case on 23<sup>rd</sup> October, 2015 claiming:
  - i. Damages for wrongful arrest;
  - ii. Damages for false imprisonment;
  - iii. Damages for breach of his Constitutional Right to be informed promptly and with sufficient particularity of the reason for his arrest or detention;
  - iv. Damages for breach of his Constitutional Right to retain and instruct without delay a legal advisor of his own choice and to hold communication with him;
  - v. Damages for breach of his Constitutional Right to be brought promptly before an appropriate judicial authority; and
  - vi. Such further and other relief as may be just.
2. The Claimant's statement of case outlined his experience upon arrest. He claims that he was arrested on 21<sup>st</sup> November, 2011, at his home, by approximately fifteen masked Police Officers and was not informed of the reason for his arrest. He was then taken to the Marabella Police Station for thirty minutes and thereafter to the Woodbrook Police Station where he was imprisoned for six days. On the third day of his imprisonment at Woodbrook he was given an opportunity to retain legal counsel.
3. On the 27<sup>th</sup> November, 2011 he was transferred to the Golden Grove Prison where he was interrogated by several Police Officers. The next day he was moved to the Aripo Detention Centre where he was imprisoned for a further seven days. He claims during his imprisonment he was denied further opportunities to communicate with his legal advisor and made claims of poor prison conditions. He was then released from the Aripo Detention Centre on 6<sup>th</sup> December, 2011 without having been told the reason for his fourteen-day detention.
4. The Defendant has not filed a defence to the claim. Instead an extension of time was sought by application dated December 11, 2015. The extension was granted taking into consideration that in the same application the Defendant applied to have the Claimant's statement of case along with the two affidavits in support thereof struck out, based on CPR

26.2 (1) (b) for being an abuse of process and/or based on CPR 26.2 (1) (c) for disclosing no grounds for bringing a claim.

5. In his Affidavit Javier Forrester, Attorney-at-Law of the Chief State Solicitor's Department, Cabildo Chambers, outlined the legal authority of the officers to arrest and detain under the provisions of the Emergency Powers Regulations 2011 ("EPR 2011") which were in force at the time of the Claimant's detention. He also outlined the proper procedure under the EPR 2011 for review of his detention being the Review Tribunal established under the Act.
6. The affidavit of Mervyn Richardson, then Strategic Coordinator at the National Operations Centre who was Deputy Commissioner of Police at the time of the Claimant's arrest, outlined the reasons for the arrest of the Claimant and the procedure that was followed in accordance with the EPR 2011. The Claimant was suspected to be involved in a plot to assassinate the then Prime Minister, Mrs Kamla Persad-Bissessar and others.
7. Mr Richardson averred that he was satisfied that the Claimant's initial detention which he said was on November 22, 2011 was necessary under the EPR to prevent him from acting in a manner prejudicial to public order or public safety. He also averred that he signed an Authorisation Notice on 22<sup>nd</sup> November 2011 permitting the Claimant's detention for a further seven days. A detention order under Regulation 17 and Second Schedule 1 (1) of the EPR was then issued by the then Minister of National Security, Mr Sandy on 29<sup>th</sup> November, 2011 which Mr Richardson avers was served on the Claimant on that date at around 4:45 p.m. The Claimant was finally released from custody on 6<sup>th</sup> December without charge.
8. The application to strike out was supported by written submissions filed in accordance with the Court's directions. In essence the contentions of the Defendant regarding the Claimant's alleged abuse of process by filing a claim herein and failure to disclose grounds for the claim are the same. It is argued that there was no basis for this claim to have been filed when the EPR specifically restricts the rights of persons detained to bring legal action to seek relief arising from their detention. According to the Defendant there were limited mechanisms provided for in the EPR that the Claimant as a detained person could have accessed and he was not entitled to bring the instant claim.

9. The Claimant failed to file written submissions on the law in the time directed. The Claimant's submission was filed more than a month late with no application for an extension of time. It was received two days before delivery of this Ruling thereby depriving the other side of the opportunity to reply as provided for in the directions. Accordingly the late submission was not taken into account herein. The Claimant did file a supplemental Affidavit in accordance with the Court's directions. In the Affidavit the Claimant denies that he was ever served with any document regarding either the seven day extension allegedly authorized by Mr Richardson or the Detention Order of Minister Sandy. Further the Claimant alleges that he was never informed of his rights under the EPR during his detention.

**The Issues:**

10. The main issue to be determined in the present application is whether the Claimant's claim amounts to an abuse of process, discloses no ground for bringing a Claim and should be struck out.

**Law and Analysis:**

11. Under Rule 26.2 (1) (b) of the Civil Proceedings Rules, 1998 ("CPR"), the court may strike out a statement of case "*if it appears to the court that the statement of case or the part to be struck out is an abuse of the process of the court*". The Defendant cites the local decision of *RA Holdings Limited v Ramnath Dave Rampersad*<sup>1</sup> as authority for the proposition that instituting an action where there is statutory provision for an alternative recourse may amount to an abuse of process.

*i. Lawfulness of Detention:*

12. A state of public emergency was declared by the President on the 21<sup>st</sup> August, 2011 by Legal Notice No. 162 of 2011 and Regulations were established for operations under the state of emergency by Legal Notice No. 163 of 2011 cited as the EPR 2011.

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<sup>1</sup> CV 04837 of 2012

13. Regulation 16 (1) & (2) EPR 2011 provides for the arrest without warrant of any person suspected to be about to act in a manner prejudicial to public safety and their detention for inquiries. It states that:

*“(1) Notwithstanding any rule of law to the contrary, a Police Officer may arrest without warrant any person **who he suspects** has acted or is acting or is about to act in a manner prejudicial to public safety or to public order or to have committed or is committing or is about to commit an offence against these Regulations; and such Police Officer may take such steps and use such force as may appear to him to be necessary for affecting the arrest or preventing the escape of such person.*

*(2) Subject to these Regulations a person arrested by a Police Officer under subregulation (1) may be detained in custody for the purposes of inquiries.”*

[Emphasis added]

14. Regulation 16(3) EPR 2011 outlines the requirements for the detention of a person for a prolonged period, stating that the authority of a Magistrate or a Police Officer not below the rank of Assistant Superintendent is required for detention beyond twenty-four hours but not exceeding seven days. The provision is as follows:

*“(3) No person shall be detained under the powers conferred by this regulation for a period exceeding twenty-four hours except with the authority of a Magistrate or of a Police Officer not below the rank of Assistant Superintendent, on either of whose direction such person may be detained for **such further period**, not exceeding seven days **as in the opinion of such Magistrate or Police Officer**, as the case may be, **is required for the completion of the necessary inquiries**, except that no such directions shall be given unless such Magistrate or Police Officer, as the case may be, is satisfied that such inquiries cannot be completed within a period of twenty-four hours.”* [Emphasis Added].

15. The Defendant argues that the initial arrest was lawful based on the EPR and the authority given by the Deputy Commissioner of Police was sufficient to justify the continued detention of the Claimant for seven days from 22<sup>nd</sup> November, 2011 to 28<sup>th</sup> November, 2011.

16. The High Court decision of *Abdul Kareem Muhamad v AG*<sup>2</sup> outlined the considerations to be taken into account where a person is arrested and detained under the Emergency Powers Regulations of 1990 (“EPR 1990”). Regulation 16 (1) EPR 1990 is similarly worded to the same provision in EPR 2011. The Court, analysing that section at pages 8-9 of the Judgment, considered that suspicion must be in the mind of the arresting officer and that it is a condition precedent to a valid arrest under the Regulation and further that the onus is on the arresting officer to justify the arrest. The Court also stated that the suspicion must be reasonable, citing *Cedeno v O’Brien (1964) 7 WIR 192*. The Hon Mr Justice Carlton Best said at paragraph (7) of the Judgment

*“It is incumbent upon the respondent to place before the Court credible evidence that the condition precedent for the invoking of Reg. 16(1) had been first satisfied in that the suspicion referred therein had been aroused in the mind of the arresting officer on reasonable grounds.”*

17. The Court found that the officer in that case had failed to satisfy the court of this and as a result, the arrest was ultra vires the Constitution and null and void. *“It was a clear infringement of the fundamental rights of the applicant to liberty and the right not to be deprived thereof except by due process of law as guaranteed in Chapter 1 of the Constitution.”*

18. In the present case, it is unclear from the affidavit evidence whether the arresting officer Police Sergeant Nobbie did indeed have reasonable suspicion at the time of the arrest that the Claimant acted or was acting or was about to act in a manner prejudicial to public safety or to public order. According to the Claimant, Sergeant Nobbie did not inform him of the reason for his arrest and stated that he was following orders. There is no direct evidence on Affidavit from Sergeant Nobbie filed herein by the Defendant.

19. The Honourable Mr Justice Best provided guidance in the said case of *Abdul Kareem Muhamad* on the condition precedent that must be established regarding the next stage of a detention under the EPR. That is the stage where pursuant to Regulation 16(3) the detention is extended beyond 24 hours to up to a further 7 days based on authorization of a senior Police Officer. He says at paragraph (12) that it is incumbent upon the officer

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<sup>2</sup> HCA No. 3768 of 1990

- i. “To place before the Court factual evidence as to how he became satisfied that the necessary inquiries could not be completed within a period of twenty-four hours, so that the purported exercise of the said discretion could be subjected to review by the Court.”*

20. In the ***Abdul Kareem*** case it was found on the facts that there was no evidence to suggest that the officer applied his mind to the relevant facts and accordingly it was determined that the extension of the detention for the further seven days amounted to an arbitrary detention in violation of the Constitution.

21. Following the useful guidance as to interpretation of the EPR, provided by Justice Best, it is clear in the instant matter that there is a triable issue as to whether then Deputy Commissioner of Police Richardson applied his mind to whether the inquiries could not, and for what reasons, be completed within twenty-four hours and how many more days would be needed. It is only if later at trial this is established that, the condition precedent for debarring the Claimant from any relief from the Court arising for his detention would be met.

22. The Defendant further submits that the Detention Order made on the 29<sup>th</sup> November, 2011 by the Minister of National Security which allowed for the Claimant to be kept in custody until 6<sup>th</sup> December, 2012 was made in accordance with Paragraph 2, Second Schedule EPR 2011 and therefore lawful. Paragraph 2 states:

*“2. (1) Subject to the provision of paragraph 4, the Minister may, if satisfied with respect to any person that, with a view to preventing him acting in any manner prejudicial to public safety or public order or the defence of Trinidad and Tobago, it is necessary to provide for his preventative detention, make an order— (a) Directing that he be detained; and (b) Stating concisely the grounds for such detention, so however, that no defect of any kind on such statement shall invalidate the order.”*

23. The Defendant therefore submits that the Claimant’s entire period of detention was in fact lawful as the procedures outlined in the EPR 2011 were properly followed.

24. In *Kelshall v. Pitt*,<sup>3</sup> Malone, J. states that:

*“It is thus manifest that whilst the Constitution envisages that in certain circumstances a period of public emergency may have to be declared and that during that period the liberties it enshrines may have to be abrogated, abridged or infringed, nevertheless it seeks to ensure that the powers it gives in such circumstances are open to challenge. From that it follows, I think, in construing an enactment affecting the liberty of the subject in a period of public emergency it is necessary to ensure that there has been strict compliance with the terms of the enactment and that the enactment conforms to the Constitution.”*

25. One issue for strict compliance is the inclusion of grounds in the order. There is however no issue herein as to whether the Detention Order did not contain a statement of the grounds for the detention. Such an omission was held to be sufficient to make a Detention Order void under the Emergency Powers Regulations (Government Notice No.56) (“EPR 1970”) in the case of *Re Weekes, Montano, Minister of Home Affairs et al: In the Matter of an Application of Habeas Corpus*<sup>4</sup>:

*“To be a ‘Detention Order’ a document must include not only (a) of the definition but also (b) thereof, i.e. a statement of the grounds for such detention, however imperfect or defective it would appear that statement may be.”*

26. The court in that case held that the applicant’s detention after a purported detention order which did not outline the grounds for the order was unlawful:

*“The Minister if satisfied...that it is necessary to provide for the preventive detention of the applicant may make an order comprising two constituent parts or elements. The first is in a prescribed simple form and in concise language; It consists of a plain direction that the person be detained. The other is in un-prescribed form but required to be concise; it must state the grounds for such detention. Understandably, no defect in this statement ought to be permitted to defeat the purpose of this enactment i.e. render the order invalid. On the other hand apart altogether from the clear and unambiguous language of the paragraphs it is*

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<sup>3</sup> (1971) 19 W.I.R. 136 at 140

<sup>4</sup> HCA No. 790 of 1970



*equally understandable that the Minister must state the grounds for such detention.”*

27. Another provision of the EPR that must be strictly complied with is Paragraph 3(3), Second Schedule EPR 2011. It provides that “*As soon as practicable after any person is arrested in pursuance of a detention order, a copy thereof certified under the hand of the Permanent Secretary to the Minister shall be served by a Police Officer*” on him and its contents explained to him in a language that he understands. He must also be informed of his right to consult a legal adviser.
28. The Claimant’s pleading on this point is that he was not properly served. Accordingly, there is a triable issue regarding whether the condition precedent of bringing to the Claimant’s attention of the Detention Order was met so as to make this a lawful EPR detention under detention orders. The Defendant must file its own pleadings in this regard.
29. Currently there is on record an affidavit in support of the striking out application filed by the Defendant that alleges that the Claimant was properly served with the Detention Order on 29<sup>th</sup> November, 2011. The affidavit includes a corroboration that the order was served in a contemporaneous note in the station diary. Therefore, it appears at this stage that once the Defendant files pleadings herein and the matter proceeds, the evidence of the Defendant, in this regard, may be stronger than other aspects of the case for the Defence. It remains, however, a triable issue so there is no basis to strike out the Claim at this stage.
30. Overall it is clear that the considerations in determining a lawful detention under Emergency Powers legislation are not as clear-cut as the Defendant has outlined. Therefore a fuller determination of the issues is required.

*ii. Alternate recourse:*

31. The Defendant further argues that even if the detention was found to be unlawful the proper remedy available to the Claimant was either through recourse to his Excellency the President or to the Review Tribunal provided for in the EPR 2011.

32. Regulation 6 of the EPR 2011 provides:

*“6. No person shall be liable to any suit or action in respect of any act done under lawful direction and authority pursuant to the provisions of these Regulations but the President may in his discretion order that compensation shall be paid out of the public funds to any person upon being satisfied that such person has suffered loss or damage by reason of the exercise of any powers conferred by regulation 3, other than sub regulation (2)(j) thereof and regulation 4.”*

33. This according to the Defendant presents a bar to the Claimant’s claim in this court, and instead provides for an appeal to the President for any compensation. As considered above, there is however a condition precedent to this bar to litigation in that the initial arrest must have been one that could properly be deemed to have been made under the EPR2011. The key issue to be proven is the relevant suspicion held by the arresting officer. In this case there is no evidence as yet at all about the suspicion held by the initial arresting officer. This is a question of fact that must be determined at trial so the Defendant must be required to file a Defence and thereafter present sufficient evidence that the arrest was a lawful EPR 2011 arrest.

34. There is, however, further provision for review by the Tribunal set up under the Second Schedule to the EPR 2011. This provision applies at the stage where a detention order by the Minister is in place. Paragraph 4, Second Schedule provides:

*“4. Where a person is detained by virtue of the provisions of this Schedule, his case shall be reviewed by the Tribunal established under paragraph 5 in accordance with the following provisions, if he so requests at any time during the period of that detention not earlier than six months after he last made such a request during that period.”*

35. There is no explanation from the Claimant for not having pursued recourse under the EPR 2011. However, it may be noted that the same provision was contained in the EPR 1990 and no issue of abuse of the court’s process prevented the making of the Court’s decision in the *Muhamad v AG* case. There was no mention of the applicant having made use of the alternate recourse under the EPR nor of any objection by the State to the action being brought to the High Court.

**Conclusion:**

36. The fact, circumstances herein, are distinguishable from those in the case of *RA Holdings Limited v Ramnath Dave Rampersad* relied on by the Defendant as authority that the claim should be struck out. It is not possible to say that in this case like that one where there is a statutory remedy provided for and if the Applicant does not make use of it, the application should be struck out as an abuse of process. In this case there are triable issues of fact as to whether the conditions precedent for the provisions of the EPR restricting access to the Courts for redress to be applicable have been met. In particular the condition precedents are that certain elements must be established to prove that each stage of detention was lawful.
37. There is, on the face of the Claimant's pleadings, an issue of fact as to whether the Defendant has sufficiently proven the lawfulness of the detention of the Claimant in light of:
- i. The lack of evidence of reasonable suspicion by the arresting officer;
  - ii. The fact that on the pleadings there is an issue in dispute as to whether Deputy Commissioner Richardson authorized the seven day extension and if so whether he put his mind to the reason why more than twenty-four hours was required for the inquiries; and
  - iii. The fact that on the pleadings there is a dispute as to whether the Claimant was served with a detention order, whether it was explained to him and whether he was at the time the detention order was served afforded the opportunity to consult counsel.
38. It is only if all the conditions precedent for each stage of the detention are proven, that the Defendant may ultimately succeed when this case is tried, based on their contention regarding the existence of the alternative remedies prescribed in the EPR and the failure by the Claimant to make use of same.
39. Strict compliance with the EPR is required regarding the three periods of detention on the facts, herein, in order for the detention not to be subject to review by this Court regarding possible breaches of human rights. There are issues of fact and law to be determined at trial before the Court's jurisdiction can be ousted in the manner contended by the Defendant. Regarding the first one or two days the conditions precedent in EPR 16 (1)

must be complied with. Regarding the next seven days the conditions precedent in EPR 16 (3) are relevant. As it relates to the remainder of the period in detention the conditions precedent at 2 (1) and 3 (1) of the Second Schedule of the EPR must be proven to have been strictly fulfilled by the State.

40. Accordingly, the application to strike out the Claim is dismissed and the Defendant must file a Defence. Thereafter further directions will be considered including whether the Affidavits filed thus far by the Defendant in support of the Application to strike out can stand as the evidence of the Defendant or whether the State's evidence will be supplemented by additional sworn statements. There will be no order as to costs based on the Claimant's failure to file written submissions within the time directed.

Eleanor Joye Donaldson-Honeywell

Judge

Assisted by: Christie Borely

Judicial Research Counsel I