REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2015-02257

BETWEEN

IN THE MATTER OF AN APPLICATION BY

ESHE LAWRENCE
(by her kin and next of friend Patsy Lawrence)

SADE SOLOMON
(by her kin and next of friend Venus Williams)

KHIAH BLACKBURN
(by her kin and next of friend Bernadette Blackburn)

SHANESIA NEWSMAN
(by her kin and next of friend Chryster Rudder)

ARIEL NORTON
(by her kin and next of friend Anika Norton)

SASHA SEEPERSAD
(by her kin and next of friend Caren Mohammed)

CHINELLE RIBERO
(by her kin and next of friend Marva Edwards)

FOR AN ADMINISTRATIVE ORDER UNDER PART 56 OF THE CIVIL PROCEEDING 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 THE ACTIONS OF THE COMMISSIONER OF PRISON, HIS OFFICERS, SERVANTS AND/OR AGENTS OF THE STATE OF THE REPUBLIC OF TRINIDAD AND TOBAGO IN DENYING THE CLAIMANTS ACCESS TO RETAIN AND INSTRUCT THEIR ATTORNEYS AT LAW FOR THE PURPOSE OF COMMENCING PROCEEDINGS AGAINST THE DEFENDANT

AND

IN THE MATTER OF AN APPLICATION BY

ESHE LAWRENCE
(by her kin and next of friend Patsy Lawrence)

SADE SOLOMON
(by her kin and next of friend Venus Williams)

KHIAH BLACKBURN
(by her kin and next of friend Bernadette Blackburn)

SHANESIA NEWSMAN
(by her kin and next of friend Chryster Rudder)

ARIEL NORTON
by her kin and next of friend Anika Norton)

SASHA SEEPERSAD
(by her kin and next of friend Caren Mohammed)

CHINELLE RIBERO
(by her kin and next of friend Marva Edwards)

CITIZENS OF THE REPUBLIC OF TRINIDAD AND TOBAGO ALLEGING THAT CERTAIN PROVISIONS OF THE SAID CONSTITUTION HAVE BEEN CONTRAVENED AND ARE BEING CONTRAVENED IN RELATION TO THEM FOR REDRESS IN ACCORDANCE WITH SECTION 14 OF THE CONISTITUTION

BETWEEN

ESHE LAWRENCE
(by her kin and next of friend Patsy Lawrence)

SADE SOLOMON
(by her kin and next of friend Venus Williams)

KHIAH BLACKBURN
(by her kin and next of friend Bernadette Blackburn)

SHANESIA NEWSMAN
(by her kin and next of friend Chryster Rudder)

ARIEL NORTON
(by her kin and next of friend Anika Norton)

SASHA SEEPERSAD
(by her kin and next of friend Caren Mohammed)

CHINELLE RIBERO
(by her kin and next of friend Marva Edwards)

Claimants

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: 19th October 2016

Appearances:
Mr. Anand Ramlogan S.C, Mr. Darryl Heeralal, Mr. Gerald Ramdeen, Ms. Delicia Helwig, and Mr. Kent Samlal for the Claimants
Mr. Duncan Byam and Mr. Bryan Basdeo for the Defendant

JUDGMENT

1. The Claimants are all young women[1] incarcerated at the Women's Prison, Arouca. It is alleged that on Sunday 28th June 2015 the girls were beaten and injured by prison officers at the Women's Prison. Through their parents, attorneys were retained to interview and take their instructions for the purpose of commencing proceedings against the Defendant for the alleged assaults. Their attorneys acted quickly but needed to gain access to the Claimants themselves for the purposes of taking instructions with regard to the said incident. Their effort to gain access to the Claimants was virtually shut at the prison gate as they were denied access to their clients by the attending prison officers.

2. These constitutional proceedings were instituted by the Claimants seeking a declaration that their denial by the Defendant of access to their attorneys and in turn the denial of their attorneys' access to their clients for the purpose of interviewing, taking instructions and taking photographs of their clients injuries was a breach of their constitutional rights

[1] Minors under the age of 18.

guaranteed under 4 (a) (b), 5(2) (c) (ii) and 5 (2) (h) of the **Constitution of Trinidad and Tobago**[2].

3. There is no dispute the Claimants were denied access to their attorneys at law. The only excuse advanced by the Defendant is that the Commissioner of Prisons had implemented a policy whereby his written permission was required before access could have been granted and that permission of the children's parents was being sought before access could have been allowed to the attorneys. There simply is no credible evidence of any such policy or any such action before this Court. In my view, for the reasons set out in this judgment, the Claimants are entitled to the declaration that they seek and for monetary compensation to "vindicate" the breach of their constitutional rights.

The alleged "incident"

4. There is no direct response by the Defendant to the Claimants' allegations that they were beaten at the Women's Prison by prison officers. In its affidavit of Shamshudeen Mohammed, Assistant Commissioner of Prisons, filed on behalf of the Defendant, he confirmed that "an incident" did occur at the Women's Prison involving persons under the age of 18 years. There is no further information forthcoming from the Defendants on the alleged "incident".

5. The facts surrounding the Claimants' attempt to obtain, instruct and hold communication with their attorneys at law can be briefly outlined. Mr Gerald Ramdeen and Mr Anand Ramlogan were retained on 28th June 2015 by the Claimants' parents to seek the interests of the Claimants and to commence proceedings on their behalf against the State for damages for assault and battery. The attorneys made telephone contact with the Commissioner of Prisons requesting that the attorneys visit the prison to interview the Claimants and take their instructions. Mobile numbers for the attorneys were given to the Commissioner of Prisons. No phone contact was made with the attorneys thereafter by the Commissioner of Prisons or any other prison officer. On that day the legal team met with the parents.

6. On the following day, Monday 29th June 2015, the parents personally visited the Prison. Some were allowed the opportunity to see their daughters. On Tuesday 30th June 2015 the

[2] The Constitution Chap 1:01

legal team attended on the prison to take instructions from the Claimants. Mr Ramdeen telephoned the Superintendent of the Prison to inform the authorities of the purpose of his visit. The attorneys then arrived at the Women's Prison at 8:15a.m. Their names were booked by the officer at the gate. They provided the names of the Claimants and were told to wait in the waiting room. At the end of two hours the attorneys were informed that the officers were waiting on a directive from the Commissioner of Prisons and they could not allow them access. Despite the attorneys' objection to the delay there was no positive response. They were later informed by the prison officers that they would not allow the attorneys to see the Claimants unless they had a directive from the Commissioner of Prisons.

7. There is no denial by the Defendant that the Claimants' attorneys tried unsuccessfully to gain access to the Claimants at the prison on 28th and 30th June 2015. Further, there is no denial by the State that the attorneys who made the request to visit the Claimants and who attended at the prison to do so were in fact the attorneys for the Claimants. The Claimants' attorneys received no response from the Commissioner of Prisons on 28th June 2015 and 30th June 2015. After waiting in vain the attorneys left and issued a pre action letter. There was no response to the pre action letter. The Claimants then filed their constitutional motion and an application seeking a conservatory order.

The proceedings

8. On 30th June 2015, the Claimants applied for a conservatory order directing the Defendant to undertake that no action would be taken by the Commissioner of Prisons that would deny the Claimants the right to instruct and hold communications with their attorney at law. At an emergency hearing before Rahim J on the same day, the Defendant undertook to allow the Claimants' attorneys-at-law immediate access to the Claimants to permit consultation with the Claimants.

9. I must make some mention here of the history of the proceedings before this Court in some detail as it is relevant when I deal with the issue of costs later in this judgment.

10. When this matter first came on for hearing before this Court, on the return hearing of the Claimants constitutional motion on the 14th July 2015, inexplicably, the Defendant failed to appear. The Court expressed the concern that minors were being denied access to their attorneys and additionally queried whether there was any published policy in place to

facilitate attorneys access to their clients in prison generally, especially in light of the Court of Appeal's ruling in CA No 135 of 2015 **Sterling Stewart Commissioner of Prisons and the Attorney General of Trinidad and Tobago v Marvin Scott et al.** That judgment of the Court of Appeal reaffirmed the prisoner's right on remand to retain and instruct a legal advisor and to hold communication with him. In light of the Court of Appeal's ruling, it was expected that there would be no further issue arising of attorneys gaining access to their clients in prison and vice versa. The Court was informed that unfortunately this was not the case and there were repeated incidents of difficulties encountered by prisoners to hold communication with their attorneys at law. The matter was adjourned to 19th August 2015.

11. On the 19th August 2015, the Defendant for the first time appeared and the Court engaged with the attorneys for the parties on the issue of protocols or guidelines governing prisoners' access to their attorneys. The Court was advised that attorneys still encountered difficulties in taking instructions from their clients in prison. Directions were given for the proceedings to be served on the Law Association of Trinidad and Tobago, the Criminal Bar Association and the Inspector of Prisons to deal with this issue of polices/procedures /protocols governing prisoner's rights to instruct and hold communications with their attorneys at law. The Court expressed its concern of dealing once and for all with the process or policies that are implemented in the prisons for prisoners to hold communication with their attorneys. The Defendant agreed to the course of action adopted by the Court.

12. At the next date of hearing on 18th November 2015, the Defendant again did not appear and no affidavit was filed in response to the fixed date claim. It appeared to this Court that the Defendant had no interest in defending the matter. However, rather than proceed on an ex parte hearing of the claim which would have been a sterile exercise having regard to the larger problem expressed at the previous dates of hearing by the parties, directions were again given for the filing of affidavits in response on or before 25th January 2016 by the Defendant and interested parties.

13. The matter came on for hearing again on 11th December 2015, where the Defendant appeared and surprisingly for the first time submitted that the proceedings were academic. They now opposed the Claimants' claim on the basis that no relief can be granted since the conservatory order having been made there was no need to proceed with this matter.

Inexplicably, this was not the Defendant's position on 19th August 2015 and it was clear that there was an about turn in the Defendant's participation in these proceedings. A hearing of the fixed date claim was scheduled for 13th April 2016 with directions again being given to file affidavits to deal with the issue of policies implemented for access by prisoners to their attorneys.

14. Eventually an affidavit in response was filed by the Defendant on 4th April 2016 after the Court granted it an extension of time by Order made on 18th February 2016. Permission was later granted to the Claimants to file a supplemental affidavit referring to other High Court proceedings in which this issue of the denial of access to the prisoners' attorneys at law was dealt with. It is unfortunate that both the Law Association of Trinidad and Tobago and the Criminal Bar Association took no further part in these proceedings despite being invited to do so on such an important aspect of the work of attorneys with clients who are incarcerated in the Nation's prisons.

15. On 7th July 2016, directions were given for the parties to file and serve their brief submissions on or before the 15th July 2016. The Claimants filed their submissions within the stipulated time. On the 20th July 2016, further directions were given which granted an extension of time for the Defendant to file and serve its written submissions on or before the 29th July 2016 with judgment reserved for 29th September 2016. The parties agreed that the Court could deliver its judgment based upon the parties' written submissions.

16. The Defendant failed to file their submissions. Prior to the hearing on 29th September 2016 the Court upon making its enquires, was informed that the Defendant will be making oral submissions instead. On 29th September 2016 however, the attorneys for the Defendant submitted that they did not come prepared to make any oral submissions at all and instead made an oral application for an extension of time to file their written submissions. They also submitted that if the Court prefers it can proceed to deliver its judgment without submissions from the Defendant. The Court granted the Defendant another extension of time to 7th October 2016 but imposed an express sanction on the Defendant that their evidence would be struck out if the submissions were not filed within the deadline. Their written submissions were eventually filed on 7th October 2016.

17. The main issues for determination are:

(i) Whether the Defendant breached the Claimants' constitutional rights and freedoms by denying them access to their legal advisers and to hold communication with them.

(ii) In the event that there was a breach of those rights whether monetary compensation should be awarded to the Claimants in addition to making the declaratory orders sought.

The Right to Counsel

18. The "right to Counsel" is enshrined ***Section 5(2) (c) (ii) and 5 (2) (h) of the Constitution***[3] which provides as follows:

> "5. (1) Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared.
>
> (2) Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not—…
>
> (c) Deprive a person who has been arrested or detained— ….
>
> **(ii) Of the right to retain and instruct without delay a legal adviser of his own choice and to hold communication with him;**
>
> …
>
> (h) Deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms."

19. The Claimants submitted that:

- The Claimants are entitled to the protection of the law and in particular to not be deprived of such rights to procedural provisions giving effect and protection to their rights and freedoms.
- The Claimants, as minors, are entitled to have their respective kin and next of friends instruct Counsel on their behalf.
- The Claimants are entitled to the protection afforded by the constitutional rights to be protected and properly represented through full and proper access to Counsel.

[3] 5(2) (c) (ii) and 5 (2) (h) of the Constitution Chap 1:01.

- The law expresses that any person who has been arrested or detained has an unfettered right to retain and instruct Counsel of their choice and to communicate with them.
- The Claimants were denied full and proper access to their Counsel.[4]

20. The Claimants relied upon **Marvin Scott & Others v. Commissioner of Prisons and Attorney General for Trinidad and Tobago CV 2015-02088**. In that case the Claimants, also prisoners at the Golden Grove Prison, alleged that they were assaulted by the prison officers of the prison. Their attorneys were not allowed to take photographs of their injuries. The Defendant justified this position based upon ***rule 28 and 29 of the Prison Service Ordinance (1950)***. Rule 28 provides that:

    "The Commissioner shall not allow any person to view any prison or to hold conversation with a prisoner except in accordance with the provisions of these rules or their relevant provisions."

21. Rule 29 which follows states that:

    "The Commissioner shall ensure that no person authorised to view any prison makes any sketch or takes any photograph thereof except with the permission of the Minister."

22. Boodoosingh J in that case expressed the view that he did not think the rules *"provide a blanket prohibition of the taking of photographs in every context or situation."*[5] He further went on to say at paragraph 9:

    "The photographs are to aid their oral evidence when they bring claims to support the contention that they were injured. The photographs cannot tell us how the events took place. But rather, they represent a visual representation which may aid the evidence of the claimants themselves about the nature and extent of the injuries they sustained."[6]

23. In addressing the rationality of the policy, the Learned Judge had this to say:

    "32. This claim only concerns whether a policy, which prevents an attorney in a particular context from being able as part of an interview with a client within the prison from taking a photograph of alleged injuries, is irrational or unreasonable.

[4] Paragraphs 23 and 24 of the Claimants submissions filed on the 15th July 2016.
[5] **Marvin Scott & Others v. Commissioner of Prisons and Attorney General for Trinidad and Tobago** CV 2015-02088 paragraph 5, pg 3.
[6] Ibid, paragraph 9, page 4.

33. It is in that context that I hold that a policy which prevents photographs being taking in such a blanket form is irrational.

34. I am of the view that reasonable measures can be put in place to allow the claimants to hold communication with their attorneys and to have their photographs taken to facilitate evidence being adduced in furtherance of their claims."[7]

24. On appeal, the Court of Appeal upheld the trial judge's decision. Mendonca J.A. in no uncertain terms stated:

"In the context of this case, it is beyond dispute that a prisoner on remand has a right to retain and instruct a legal advisor and to hold communication with him. It is also undisputed that he enjoys the right to the protection of the law. These rights cannot be taken away by implication and without clear words. Any policy must conform to these rights."

25. It should be noted that **Marvin Scott** dealt with a case where the purpose of the attorney's access was to take photographs of the client. In contrast, in this matter, the Claimants were denied the basic right to access and hold communications with their attorneys.

26. Reliance was also placed by the Claimants on **Sasha Seepersad v The Attorney General of Trinidad and Tobago** CV2015-02885 where the State sought to justify the refusal to allow access to the minor prisoner's counsel to her attorney of choice based on a procedure which involved putting the attorney's request to the legal team at the prison service. The proceedings in that case was exhibited in the supplemental affidavit of Darryl Heeralal filed on the 3rd May 2016. The affidavit in those proceedings were filed on 25th August 2015 and the alleged procedure referred to in that matter should have been within the information of Mr Mohammed in this case when he filed his affidavit on 4th April 2016. The policy of the prisons in providing access to the prisoner's attorney in that case notably lies in stark contrast to the alleged procedure or policy in this case.

27. The Defendant in their written submissions made no submissions on the constitutional right of access to counsel at all. Instead they submitted that as a matter of process that there was no need to bring two (2) separate sets of proceedings for judicial review and constitutional

[7] Ibid, paragraph 32,33,34, page 8.

relief. The Claimants, the Defendant submitted, could simply have obtained all the relief necessary in a claim for judicial review. Reliance was placed on **Josephine Millette v Sherman McNicholls**[8]. The Court was indeed mystified by these submissions as no judicial review proceedings were filed at all in this case. When I inquired from the attorneys at law for the Defendant why submissions were made on these alleged "two sets of proceedings" they replied that it was in direct response to the Claimants' written submissions which began by stating that "These submissions are filed on behalf of the Claimants in respect of two sets of proceedings arising out of claims for both judicial review and constitutional relief". That was an obvious typographical error and I was alarmed that the attorneys for the Defendant could continue to make submissions as though judicial review proceedings were indeed filed.

28. The Defendant further submitted that the relief sought is moot and academic or serves no useful purpose. I agree that "the court does not beat the air in vain" See **R v Southwark London Borough Council ex p Bannerman** (1990) 2 Admin LR 381, 388B-E and would not grant a remedy where the matter ceased to have any practical significance. However as I made clear from the outset it is still perplexing that occasions will arise where prisoners are denied access to their attorneys in prison in the absence of clear policies or guidelines to facilitate their access.

29. The main thrust of the Defendant's argument is that on 30th June 2015 after the Defendant gave its undertaking at the hearing for the conservatory order, the Claimants were granted access to their legal advisers and that the grant of the conservatory order assured that the Claimants obtained their essential remedy which was access to their legal advisors for the purpose of taking photographs.

30. In my view, it would seem that the prison authorities in this case ignored the fundamental legal principle that a prisoner in spite of imprisonment retains all civil rights which are not taken away expressly or by necessary implication. See **Raymond v Honey** [1983] 1 A.C. 1. See also **R v Gray** [1900] 2 Q.B. 36, 40. Lord Bridge in upholding Lord Wilberforce in **R v Gray** also pointed out that any rule-making power which fetters a prisoner's right to access

[8] C.A. No. 155 of 1995 In the Matter of an Application by Josephine Millette for leave to apply for Judicial Review and In the Matter of Decisions dated the 16th February 1993 made by the Learned Magistrate Mr. Sherman McNicholls in the Point Fortin Magistrate's Court, **Josephine Millette v Sherman McNicholls**.

to the court to institute proceedings is ultra vires and an interference with the course of justice.

31. Lord Bingham of Cornhill in **R (Daly) v Home Secretary** [2001] UKHL 26 stated at paragraph 5:

> "Any custodial order inevitably curtails the enjoyment, by the person confined, of rights enjoyed by other citizens. He cannot move freely and choose his associates as they are entitled to do. It is indeed an important objective of such an order to curtail such rights, whether to punish him or to protect other members of the public or both. But the order does not wholly deprive the person confined of all rights enjoyed by other citizens. Some rights, perhaps in an attenuated or qualified form, survive the making of the order. And it may well be that the importance of such surviving rights is enhanced by the loss or partial loss of other rights. Among the rights which, in part at least, survive are three important rights, closely related but free standing, each of them calling for appropriate legal protection: the right of access to a court; the right of access to legal advice; and the right to communicate confidentially with a legal adviser under the seal of legal professional privilege. Such rights may be curtailed only by clear and express words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment."

32. In **Pett v Greyhound Racing Association Limited**[9] Lord Denning noted:

> "If justice is to be done, he ought to have the help of someone to speak for him, and who better than a lawyer who has been trained for the task? He should, therefore, be entitled to a lawyer if he wants one…. Legal representation should not be forbidden altogether."

33. In the seminal authority of **Attorney General of Trinidad and Tobago and another v Whiteman**[10] the Privy Council explored the free standing right to retain and instruct without delay a legal adviser of his own choice and hold communication with him. Although in **Whiteman,** access to one's legal adviser was not specifically required as a corollary to an arrest and detention, it was the basic access to legal advice which was viewed as a requirement of due process and the rule of law. Lord Keith famously explained that the language of the Constitution falls to be construed not in a narrow and legalistic way but

[9] [1969] 1 Q.B. 125 at 132.
[10] **Attorney General of Trinidad and Tobago and another v Whiteman** [1992] 2 All ER.

broadly and purposefully so as to give effect to its spirit. In that case, the Law Lords were of the view that a right to communicate with a legal advisor is of little value if the person is not informed of that right. Lord Keith explained:

> "In this case the right conferred by s 5(2)(c)(ii) upon a person who has been arrested and detained, namely the right to communicate with a legal adviser, is capable in some situations of being of little value if the person is not informed of the right. Many persons might be quite ignorant that they had this constitutional right or, if they did know, might in the circumstances of their arrest be too confused to bring it to mind. Section 5(2)(h) is properly to be regarded as intended to deal with that kind of situation as well as other kinds of situation where some different constitutional rights might otherwise be at risk of not being given effect and protection. There are no grounds for giving a restricted meaning to the words 'procedural provisions'."

34. The right can only be effectuated if one is informed of his right. In this case the basic right of the Claimants to access their legal advisers was denied without explanation, without any communication by the authorities to either the Claimants or their attorneys at law as to what was operating in its mind as to the proper process to be followed if at all.

35. Our Court of Appeal in **Sterling Stewart Commissioner of Prisons and the Attorney General of Trinidad and Tobago v Marvin Scott et al**. C.A CIV 135 of 2015, has made it pellucid that there can be no blanket refusal by the prison authorities of the prisoner's access to his attorney and any reliance on rule 28 to do so would be misplaced. Especially in a case such as this where the Claimants are seeking to access the Courts to ventilate a claim against the State, any such obstacle would be a hindrance to their access to justice. Mendonca J.A. noted:

> "While there might be some interference with the rights enjoyed by a prisoner as he is incarcerated to consult with his attorney and to hold communication with him in incarceration, there has been no attempt to justify the policy as framed. In our view, it amounts to an impermissible infringement of the rights of the prisoners to consult with their attorney and to hold communication with them."

"…refusal of permission cannot be justified on the basis of the rules and the policy."[11]

36. In this case, the Defendant is again simply relying on the prison rules to justify the refusal of permission. Nothing advanced by the Defendant in this case however, has made it clear that there was any justifiable policy in place to facilitate the Claimants' right to retain and instruct a legal advisor and to hold communication with them. I draw such a conclusion for the following reasons.

37. First, from a proper reading of the Defendant's submissions it is clear that (a) they accept as a fundamental principle that the Claimants are entitled to access to their attorneys; (b) that a process must be in place to facilitate this access. It must also be taken as accepted that at the time the application for a conservatory order and the constitutional proceedings were issued that the Defendant had made no arrangements for counsel to access their clients. It is also clear from the Defendant's affidavit that there was no communication by the officers of the prison to the Claimants' attorney of any policy or procedure which must be followed to gain access to their clients.

38. Second in the Defendant's written submission at paragraph 1 they make the false claim that:

    "They (the Claimants' attorneys) were informed by staff at the prison that before access could be given to take these photographs the parents and/or guardians would be contacted in order to ascertain whether they consented to photographs being taken of their minor daughters."

    However there is absolutely no such evidence in this case that the Claimants' attorneys were ever informed of this by any of the prison officers.

39. Third, the Defendant's own evidence with regard to the procedure to be followed to allow the minor children to access their legal advisor is inconsistent and unreliable. The Assistant Commissioner of Prisons (Ag) Mr Shamshudeen Mohammed suggests that prior to 20th June 2015 civilians were not permitted to enter the prison for the purpose of taking photographs. This policy changed after the decision of the Court of appeal in CR No 135 of 2015 **Sterling Stewart Commissioner of Prisons and the Attorney General of Trinidad and Tobago v Marvin Scott et al**. It is to be noted however in this case the Claimants complained of their

[11] Court of Appeal Judgment in **Marvin Scott and others**, page 5, lines 15-17

basic right to access their legal advisors and it was not limited at all to the ability to take photographs of their clients.

40. Fourth, the Defendant deposed to a policy which is neither supported by any contemporaneous document or memoranda and is inconsistent with previous statements from the prison authorities in **Sasha Seepersad**. Further, there is no evidence that any of this procedural policy was ever communicated to the attorneys for the Claimants. Nor was there any publication of this alleged policy. There was no evidence as to who was responsible in the Commissioner's Office to make the necessary enquiries to verify the contents of any request. There is no evidence as to what is a reasonable period of time to facilitate requests. Importantly, at paragraph 10 of Mr Mohammed's evidence he deposes that it is the Commissioner who grants permission if satisfied that there are no adverse security risks *"to take photographs of the prisoner"*. However the request in this case was for basic access to the Claimants to interview them. See paragraph 10 of the Heeralal affidavit. Notably, in this case there is no evidence that the Commissioner of Prisons himself authorised the entry of the Claimants' attorneys at the hearing of the application for the conservatory order. The only evidence that is proffered is that *"We contacted the Counsel for the State and indicated that the Commissioner of Prisons would undertake to allow the proposed Claimants' attorney to enter the Women's Prison with a view to obtaining photographs of the proposed Claimants".*[12]

41. The affidavit fails to address the basic right of Counsel to visit his client and take instructions and the alleged policy seems hinged solely on the issue of taking photographs.

42. Fifth, after setting out the alleged policy in paragraphs 8 to 10 in the Defendant's affidavit, as an afterthought the Defendant states in paragraph 16 that before the Claimants were seen by anyone *"we wanted to first obtain the permission of their respective parents and/or guardians before access could be given to take photographs of the minor children."* Again there is no evidence that this was communicated to the Claimants or their attorneys. There is no evidence that this was part of their policy. Nor is there evidence that this policy was implemented in the best interest of the minor children. There is no evidence as to what steps were taken to meet or to speak with the respective parents. Nor is there any evidence that any

[12] Paragraph 17 of the affidavit of Shamshudeen Mohammed filed on the 4th April 2016.

such permission was indeed obtained before the Claimants' attorneys, were eventually allowed to visit them when the Defendant consented to the conservatory order being made.

43. There is absolutely no answer and no evidence advanced to explain why the Claimants were denied their basic right to hold communications with their attorney, to give them instructions in relation to the alleged assaults. The Defendant simply cannot rely upon the proposition that there was no cross examination of the evidence of the State and so the Defendant's evidence must be accepted. The Court must always be alive in these proceedings to examine the quality of the evidence adduced. This is more so the case in light of the Court's directive pointedly making it clear that it was concerned to discover what policies or procedures are in place to allow for the minors access to their attorneys. Examining the evidence of the Defendant in this case, it falls woefully short in demonstrating that there was any valid reason for the denial of the Claimants' of their basic constitutional right to instruct their attorneys and to hold communication with them.

44. Finally, there is an added dimension of this case which must not be overlooked. The Claimants are all minors and the claim to their right to counsel must be viewed through the lens of the minor child and "at risk" youth. Trinidad and Tobago is a party to the 1989 United National Convention on the Right of the Child. Article 3 (1) of the Convention requires that in all actions concerning children whether undertaken by public or private, social welfare institution or court of law administrative authorities, the best interest of the child shall be a primary consideration.

45. In **R (on the application SR) v Nottingham Magistrates Court**, Justice Newham noted[13]:

> "All the states parties to the UNCRC undertook to respect and ensure the rights "set forth" in that convention to every child within their jurisdiction without discrimination (UNCRC Article 2.1). It follows that every public authority concerned with issues relating to the care and management of children in custody must take their interests as a primary consideration (UNCRC Article 3.1), and must afford them the following rights and entitlements, so far as they are consistent with their custodial status:
>
> i) The entitlement of such protection and care as is necessary for their well-being;

[13] [2001] EWHC Admin 802 at para. 66

ii) The right to maintain personal relations and direct contact with both their parents on a regular basis;

iii) The right to a standard of living adequate for their physical, mental, spiritual, moral and social development;

iv) The right to insist that any period of imprisonment must be in conformity with the law and used as a measure of last resort and for the shortest appropriate period of time;

v) The entitlement, when deprived of liberty, to be treated with humanity and respect for the inherent dignity of the human person and in a manner which takes into account the needs of persons of their age;

vi) The entitlement, when deprived of liberty, to be separated from adults unless it is considered in their best interests not to be so separated;

vii) The entitlement, when deprived of liberty, to maintain contact with their family through correspondence and visits, save in exceptional circumstances;

viii) When it is alleged or recognised that they have infringed the penal law, the right to be treated in a manner consistent with the promotion of their dignity and worth."

46. Although this Convention has not been incorporated into the domestic law of this jurisdiction, its spirit has been reflected in a suite of children's legislation enacted in this jurisdiction[14]. Additionally, international conventions can inform our interpretation of the constitutional text[15]. The Constitution of Trinidad and Tobago does not expressly recognise a fundamental right of the child but our fundamental freedom and rights of the protection of the law under section 4(b) of the Constitution are broad enough to recognize the concept of the child's right that its best interest is secured while in custody. See **In the matter of an application by BS (by his kin and Next of Friend Karen Mohammed)** CV2015-02799, CV 2015-3725.

47. Baroness Hale in **Naidike and Others v Attorney General of Trinidad and Tobago** [2004] UKPC 49 pointed out that in all actions concerning children *"the best interests of the child*

[14] The Children's Act 2012, The Children's Community Residences Foster Care and Nurseries Act 2000, The Children's Authority Act Chap 46:01.
[15] AC V Joseph and Boyce (2006) 69 WIR 103.

shall be a primary consideration."[16] Where minors have made complaints of being attacked by adults in an adult prison the administrative authorities must demonstrate a level of sensitivity and efficiency in dealing with these complaints. One aspect of their reaction to such allegations is to ensure that their best interest is secured by the efficient access to their attorneys at law. Such interaction would provide the bridge for counselling and advising both the minors and their parents as to the appropriate action that should be taken to protect the minor's interests. For at risk youth every negative experience while incarcerated can increase tenfold through the eyes of the child and these rights previously articulated by adults must moreover be taken even more seriously when it is being invoked to protect the rights of minors.

48. Examining the constitutional right in the international context and through the lens of the minor children, there is certainly no answer by this Defendant as to why these minors could not have seen their lawyers on the morning of 30th June 2015 and why it would take the filing of these constitutional proceedings and an application for a conservatory order for them to access same.

49. This Court expresses the hope that incidents such as the one under examination would be a relic of the past and every effort will now be taken by the Defendants to properly articulate in writing a clear policy and process to facilitate administratively the constitutional guarantee of the prisoner's rights to retain and instruct a legal advisor and to hold communication with them. There should be no unreasonable fetters or restraints. It is indeed advisable that such policies and procedures be communicated to the Law Association of Trinidad and Tobago, the Criminal Bar Association and the Judiciary and that the policies and procedures be properly communicated and disseminated through the ranks of the prison services.

Damages

50. The Court has the discretion to grant relief beyond a mere declaration under section 14 of the Constitution. Although there is no constitutional right to damages, in my view, this is a fitting case for an award of damages. Although an award of damages in this case would not be a significant sum as there is no quantifiable loss or damage suffered by the Claimants, it is

[16] Naidike and Others v Attorney General of Trinidad and Tobago [2004] UKPC 49 para 71-72

appropriate to reflect this Court's emphasis of the importance of the constitutional right and the gravity of the breach in the case of minors and to defer further breaches.

51. In **Attorney General v Mukesh Maharaj** Civ. App. No. 67 of 2011, the Court of Appeal addressed the nature of awards of damages awarded by a Court exercising its discretion in granting redress under section 14(1) of the Constitution. The Honourable Chief Justice Ivor Archie explained the "raison d etre" of constitutional relief can only be to vindicate constitutional rights. The Court noted:

> "[16] One should also not lose sight of the fact that the starting point of constitutional redress is the vindication of the victim's constitutional right. It is for that reason that it has been said, in Ramanoop for example, that where there is an adequate common law remedy, one should not seek constitutional redress unless there is some unusual feature of the case that renders it an appropriate course of action."
>
> [17] If the purpose of any 'additional award' is not punitive then any other intended purpose can be achieved by its explicit recognition in the overall quantum awarded without any need to set out a separate sum. Returning to the analogy of aggravated damages for the moment, it was acknowledged in Subiah that, unlike some other jurisdictions, it is not the practice in Trinidad and Tobago to award a separate sum for aggravated damages.
>
> [18] In summary, therefore, the expression "vindicatory damages" in the sense of a separate award has a rather tenuous lineage. A careful reading of the authorities convinces me that it has never really been expressly approved by Page 7 of 28 the Privy Council (at least as a requirement), and its use may be misleading in that it may tempt trial courts to artificially and doubly compensate claimants in respect of breaches that are properly compensable by a single and undifferentiated award of 'damages'."[17]

52. I am of the view that compensation ought to be awarded to the Claimants as a result of the breaches to their constitutional rights and freedoms guaranteed by section 4 (a) 4(b) and 5 (2) of the Constitution. There is no evidence of any loss or harm to the minors as a result of the breach. The attorneys did eventually gain access to them within a relative short space of time

[17] **Attorney General v Mukesh Maharaj** Civ. App. No. 67 of 2011 paragraphs 16, 17, 18.

after issuing the pre-action letter. However, the right to hold communication with counsel is an important right especially in the context of minors. This award would mark the breach of the constitutional right and hopefully for the Defendant to deter further breaches and demonstrate the need to devising clear and proper guidelines for access to counsel and additionally making special accommodation for the rights of children in custody.

53. I have considered similar cases where there was a paucity of evidence of injury to the Claimants in **Dion Samuel v The Attorney General of Trinidad and Tobago** CV2012-03170 and **Quincy George v The Attorney General of Trinidad and Tobago** CV2011-03875. The harm suffered by the Claimants in those cases were more serious than the instant complaints by the Claimants.

54. I award damages in the sum of $10,000.00 payable for each Claimant.

Costs

55. The Defendant naturally must pay to the Claimants their costs of this claim to be assessed as costs follow the event. However, the Court has a wide discretion in the award of costs and can in the appropriate set of circumstances make an order for costs on an indemnity basis.

56. Part 56.14 (4) of the CPR underscores the Court's wide discretion in making orders as to costs conferred on the Court by section 9 (1) of the **Supreme Court of Judicature Act Chap 4:01** Section 9 (1) provides:

> "There shall be vested in the High Court all such original jurisdiction as is vested in or exercisable by the High Court of Justice in England under the provisions of the Supreme Court of Judicature (Consolidation) Act, 1925 of the United Kingdom."

Section 50 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925 provides:

> "50 (1) Subject to the provisions of this Act and to rules of Court and to the express provisions of any other Act, the costs of and incidental to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent the costs are to be paid."

57. In **Aiden Shipping Ltd v Interbulk Ltd** [1986] AC 965 the Law Lords emphasised that the Court has a wide discretion in awarding costs. In that case it was held that "the discretionary

power to award costs under section 51(1) of the Supreme Court Act 1981 (which is similar to section 50 (1) of the 1925 Act) was expressed in wide terms, leaving it to the rule-making authority, if it saw fit to do so, to control its exercise by rules of court and to the appellate courts to establish principles for its exercise."

58. The award of costs on an indemnity basis was never rule based. It originated from the Court's wide discretion in awarding costs. In **EMI Records Ltd v Ian Cameron Wallace Ltd and another** [1982] 2 All ER 980, Sir Robert Megarry V-C noted the rules of the Supreme Court contained no express mention of costs on indemnity basis but yet the Courts have been making such orders. The Learned Judge stated that:

> "As I have mentioned, the starting point is the Supreme Court of Judicature (Consolidation) Act 1925, s50(1) and this is in very wide terms. Not only are the costs in the discretion of the court, but the court is to have 'full power' to determine 'to what extent the costs are to be paid.'"[18]

59. Sir Robert Megarry traced the history of costs orders on an indemnity basis and noted:

> "The Rules of the Supreme Court contain no express mention of any such basis, and there seems to be no clear statement of what such a basis means. Yet for many years the courts have been making such orders, particularly against contemnors, and the taxing masters have been having to do their best to tax costs under such orders… There can be no doubt that orders to, pay costs on an indemnity basis, *eo nomine*, were and are common, at any rate in contempt cases in the Chancery Division."[19]

60. Our Practice Direction (2007) on costs make it clear that the Court can exercise its discretion in making orders on a standard basis or on an indemnity basis. The indemnity basis of assessment is described as follows:

> "Where the court assesses the amount of costs on the indemnity basis, for example, on an attorney-at-law and client basis, it will not allow costs which have been unreasonably incurred or are unreasonable in amount. The court will resolve in favour of the receiving party any doubt which it may have as to whether costs were reasonably incurred or were

[18] **EMI Records Ltd v Ian Cameron Wallace Ltd and another** [1982] 2 All ER 980 at 985.
[19] Ibid at 984.

reasonable in amount. The test of proportionality is not applicable to the indemnity basis."

61. Although the costs on an indemnity basis is now rule based in the United Kingdom by Part 44 of the Civil Procedure Rules, the learning is instructive on the approach to making such orders.

62. An order for costs on an indemnity basis is justified *"where the Court decides that there is something in the conduct of the action, or in the circumstances of the case in general, which takes it out of the norm"*[20] (Per Lord Woolf LLC in **Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnson (a firm) and another** [2002] EWCA Civ 879.)

63. Costs on indemnity basis has traditionally been awarded where *'there has been some culpability or abuse of process such as:*

    (a) Deceit or underhandedness
    (b) Abuse of the Court's procedure
    (c) Not coming to court with open hands
    (d) Tenuous claims
    (e) Unjustified defences
    (f) Voluminous and unnecessary evidence
    (g) Extraneous motives for the litigation.'[21]

64. In **Lifeline Gloves Ltd v Richardson and another** [2005] EWHC 1524 (Ch) the defendants withdrew their defence after successfully opposing the claimant's application for summary judgment with the costs being reserved. Thereafter, the Claimants were awarded costs on an indemnity basis because the defendant's conduct coupled with lack of merit in their defence amounted to unreasonable behaviour.

65. In **Siegel v Pummell** [2015] All ER (D) 143 (Feb) M. Justice Wilkie in analysing costs on indemnity basis, had this to say:

[20] Halsbury's Laws of England, Volume 12A (2015) Footnote 6 of para 1704.
[21] Cook on Costs, 2008, para 11.49.

"9. The Court of Appeal has declined to define the circumstances in which a court could or should make an order for costs on the indemnity basis. In Excelsior Commercial and Industrial Holdings v Salisbury Hamer Aspden and Johnson [2002] EWCA Civ 879 Lord Woolf, the then Lord Chief Justice, at paragraph 30, cited a judgment of Simon Brown LJ in Kiam v MGN Limited (No. 2) [2002] 2 All ER 242 who, at paragraph 12, had said:

> "I for my part, understand the court there to have been deciding no more than that conduct, albeit falling short of misconduct deserving of moral condemnation, can be so unreasonable as to justify an order for indemnity costs. With that I respectfully agree. To my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight. An indemnity costs order made under Part 44 (unlike one made under Part 36) does I think carry at least some stigma. It is of its nature penal rather than exhortatory. …"

10. Lord Woolf at paragraph 32 said, in addition, as follows:

> "… there is an infinite variety of situations that can come before the courts and which justify the making of an indemnity order.… I do not respond to Mr Davidson's submission that this court should give assistance to lower courts as to the circumstances where indemnity orders should be made and circumstances where they should not.… This court can do no more than draw attention to the width of the discretion of the trial judge and re-emphasise the point that has already been made that, before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement.""

66. Importantly, a party can be ordered to pay costs on the indemnity basis even if there had been no moral lack of probity or conduct deserving moral condemnation on the part of the party.[22] The litigation could have been conducted in such a way which was unreasonable and justified an award of costs on indemnity basis even though the party could not be regarded as being morally condemned.[23] However, the conduct would have to be unreasonable to a high degree

[22] Cook on Costs, 2008, para 11.51.
[23] Ibid.

and not merely wrong in hindsight for the order to be justified. See **Kiam v MGN Ltd (No 2)** [2002] EWCA Civ 66.

67. The power of the Court to award costs on an indemnity basis should not be regarded as penal "*because orders for costs, even when made on an indemnity basis, provide a means of achieving a fairer result for a claimant whilst falling short of actually compensating a claimant for having to come to court to bring proceedings."*[24] This was enunciated in **Petrotrade Inc v Texaco Ltd;** [2002] 1 WLR 947. Lord Woolf MR had this to say:

> "62. However, it would be wrong to regard the rule as producing penal consequences. An order for indemnity costs does not enable a claimant to receive more costs than he has incurred. Its practical effect is to avoid his costs being assessed at a lesser figure. When assessing costs on the standard basis the court will only allow costs "which are proportionate to the matters in issue" and "resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party". On the other hand, where the costs are assessed on an indemnity basis, the issue of proportionality does not have to be considered. The court only considers whether the costs were unreasonably incurred or for an unreasonable amount. The court will then resolve any doubt in favour of the receiving party. Even on an indemnity basis, however, the receiving party is restricted to recovering only the amount of costs which have been incurred: see rules 44.4 and 44.5."

68. I would order costs on an indemnity basis in this case for the following reasons: (a) the Defendant's failure to attend court at the early stages of this matter leaving the Court to manage the claim without its input; (b) when it did appear it adopted a position of assisting the Court in setting out the policies and procedures to allow for access to attorneys and then adopted an about face in resisting the application on the basis that the exercise is academic; (c) in failing to properly set out the procedure for access to attorneys generally and specially in relation to minors; (d) in making submissions before this court which fail to reply to the submissions of the Claimant on the substantive issue of the right to counsel; (e) unnecessarily seeking extensions of time to file written submissions to the extent that expressed sanctions were imposed on the Defendant leading to the delay in delivery of this judgment.

[24] Halsbury's Laws of England, Volume 12A (2015) Footnote 6 of para 1704.

69. I would expect much more collaboration from the Defendant in the future and in my view the Defendant's conduct of these proceedings rose to the level of unjustifiably defending the proceedings and failing to properly assist this Court in the determination of the issues in this case.

Conclusion

70. The Court therefore declares that the actions of the Commissioner of Prisons his servants and or agents being officers of the State of Trinidad and Tobago in denying the Claimants the right to instruct and hold communications with their attorney-at-law on the 30th June 2015 is unconstitutional, unlawful and in breach of the rights of the Claimant guaranteed under section 4 (a), (b), 5 (2) c (ii) and 5 (2) h.

71. The Defendant shall pay to the Claimants damages in the sum of $10,000.00 each and the costs of these proceedings on an indemnity basis to be assessed by this Court in default of agreement.

Vasheist Kokaram
Judge