

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2015-02944

**IN THE MATTER OF AN APPLICATION BY
SASHA SEEPERSAD (by her kin and Next of Friend KAREN MOHAMMED), FOR AN
ADMINISTRATIVE ORDER UNDER PART 56 OF THE CIVIL PROCEEDINGS 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, POLICY PROCEDURE AND PRACTICE OF THE
COMMISSIONER OF PRISONS, HIS OFFICERS, SERVANTS AND/OR AGENTS BEING
OFFICERS, SERVANTS AND/OR AGENTS OF THE STATE OF THE REPUBLIC OF TRINIDAD
AND TOBAGO IN DETAINING THE CLAIMANT AT THE ADULT WOMEN'S PRISON GOLDEN
GROVE, AROUCA**

AND

**IN THE MATTER OF AN APPLICATION BY SASHA SEEPERSAD (by her kin and Next of Friend
KAREN MOHAMMED), A CITIZEN 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 HER FOR REDRESS IN
ACCORDANCE WITH SECTION 14 OF THE CONSTITUTION.**

BETWEEN

**SASHA SEEPERSAD
(By her kin and Next of Friend KAREN MOHAMMED)**

Claimant

AND

**HER WORSHIP MAGISTRATE
MARCIA AYERS-CAESAR**

1st Defendant

**STERLING STEWART
THE COMMISSIONER OF PRISONS**

2nd Defendant

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

3rd Defendant

Before the Honourable Mr. Justice Vasheist Kokaram

Date of Delivery: Monday 15th February 2016

Appearances:

Mr. Anand Ramlogan SC leads Mr. Gerald Ramdeen instructed by Mr. Varun Debideen for the Claimant

Mr. Douglas Mendez SC for the First Defendant

Mrs. Deborah Peake SC for the Second and Third Defendants

JUDGMENT

1. Before the Court is an application by the Claimant to cross examine five (5) of the second and third Defendant's deponents in judicial review proceedings. In these proceedings the Claimant challenges inter alia the decision of the First Respondent to remand her into custody at the Woman's Prison. She also seeks declarations that the Third Defendant has allegedly breached her constitutional rights. The constitutional issues raised on those declarations include whether the Claimant's detention at the Woman's Prison and whether the failure of the State to provide a Community Residence pursuant to the Children's Act and Children's Community Residences Foster Care and Nurseries Act is a breach of her right to life, liberty security of the persons and enjoyment of property and not to be deprived thereof except by due process of law, the right to protection of the law and the prohibition against cruel and unusual treatment guaranteed by sections 4(a) (b), 5(2) (b) and 5(2)(f) (i) of the Constitution.
2. Both parties acknowledge in their written submissions that cross examination in these types of proceedings are not common and is exceptional. The Claimant submits that cross examination is necessary to resolve several factual disputes in these proceedings that arise on the deponent's affidavits. If not challenged the Court is likely to accept the evidence of the State. The Claimant points out that in human rights cases due to the fact specific nature and importance of assessing alleged interferences with such rights by reference to a careful evaluation of the relevant facts, cross examination would be necessary for a just determination of those issues. In this case the Claimant contends that cross examination is necessary to resolve the following material issues: Whether the Claimant was subjected to cruel and unusual punishment. Whether she has been detained in a Community Residence. Whether the nature and character of her detention is in accordance with due process.

3. The Defendant makes the following submissions. That it is rare for witnesses to be cross examined in judicial review proceedings. The judge must not yield to the temptation of making findings of fact which are really the purview of the decision maker. The remit of cross examination in judicial review is much narrower than in ordinary civil proceedings. It is not enough to identify conflicts in the evidence. Resolution of such conflicts must be linked to a specific ground of challenge and the only way that ground of challenge can be determined is by recourse to cross examination. Importantly the Defendant contends that the Claimant's allegation of cruel and unusual punishment is based simply on the fact that she has been detained in a facility with adult prisoners and no cross examination is needed to resolve this issue. Furthermore there is no complaint of assault in these proceedings and therefore any dispute of fact in relation to a disturbance or riot which took place in the Woman's Prison is immaterial and cross examination is not necessary.
4. The Defendant is correct in inviting the Court to examine each of the paragraphs on which cross examination is sought to come to a realistic determination whether in this case and at this stage the exceptionally rare step of cross examination would be fair, just or appropriate. Unfortunately the Claimant has failed to properly identify in her application for each of the paragraphs of the affidavit on which cross examination is being sought, what are the conflicts of fact and its importance for the determination of a live issue or ground of challenge in these proceedings.
5. The law on cross examination in judicial review proceedings is well settled. The usual procedure is for there to be no oral evidence. Unlike in ordinary civil actions there is no wide ranging latitude to cross examine simply to resolve conflicts of facts. The reason why cross examination is rare in judicial review proceedings is that these proceedings ordinarily deal with questions of law, with the facts either not being in dispute or only being relevant to explain the context in which the issues of law arise. Further the respondent public body may normally be relied upon to disclose relevant documents fulfilling its duty of candour making the factual matrix of the dispute easier to resolve. Additionally the public body's findings of fact which is under review is for it to determine itself and is open to review on limited grounds. So to allow for cross examination too readily will present the Court a temptation to substitute its own views of the facts for that of the decision making body. See **O'Reilly v Mackman** [1983] 2 AC 237 and **R (on the application of Al Sweady) v Secretary of State** [2009] EWHC 2387.

6. Our Court of Appeal in **Manning v Sharma** [2009] UKPC 37 and **Gopichand Ganga v Commissioner of Police** [2011] UKPC 28 have set out the limits to cross examination in judicial review proceedings. However the decision in **Al Sweady** is an important development in this aspect of procedure in judicial review. In that case Scott Baker LJ usefully explained some of the novel problems the court had encountered in the case management of judicial review proceedings where there were strongly contested facts. Those proceedings related to events in 14th May 2004 when a fierce battle took place between Iraqi insurgents and the British Army and involved the issue whether members of the British Army killed or ill treated Iraqis when they had been taken prisoner. The claimants contended that the rights of those prisoners under Articles 2, 3 and 5 of the European Convention of Human Rights and Fundamental Freedoms had been infringed. The court had identified five underlying factual disputes. Two disputes of interest were whether one of the insurgents died on the battlefield or were murdered by British soldiers after being taken to their camp. This was considered a “jurisdiction dispute” as only in the latter case would their ECHR rights be invoked. Another factual dispute was whether the detained insurgents were ill treated at the camp and in what way their Article 3 rights would have been infringed. The court had to consider the means of resolving such factual disputes through the mechanism of disclosure and cross examination.
7. Scott Baker LJ acknowledged that cross examination in judicial review proceedings is a rare occurrence. However he noted that where there are factual disputes the Court is ordinarily obliged to resolve them in favour of the defendants and if such an approach was adopted the more far reaching consequence would be that a defendant would always succeed if sued for an infringement of human rights which was disputed. A different approach was therefore needed for “hard edged” questions of fact. This represented an important exception to the rule precluding the Court substituting its own view in judicial review cases. In such a case cross examination is ordered if it is necessary to enable the court to determine factual issues for itself.
8. Scott Baker LJ also observed the increasing frequency of cross examination in judicial review proceedings where such hard edged questions of fact will arise. The overarching concern is that where there are conflicts of facts critical to such hard edged questions the courts should not be reluctant to order cross examination in suitable cases where it is necessary to resolve the matter fairly and accurately.

9. One also has to bear in mind that such orders for cross examination effectively is an exercise of case management with the overall duty being to give effect to the overriding objective of dealing with cases justly. In particular the principle of proportionality should weigh in the Court's exercise of its discretion when considering the question of cross examination in judicial review proceedings.
10. Where conflicts of fact therefore arise in judicial review proceedings which also raises breaches of fundamental rights such as in these proceedings the approach can be summarized as follows:
- (a) The remit of cross examination in judicial review proceedings is narrower than in ordinary civil proceedings. Considerations such as credibility of witnesses and relevance to issues without more provide no justification for cross examination in judicial review proceedings.
 - (b) The Court retains the discretion to order or permit cross examination where there is a critical factual dispute central to a material issue or which infringes the duty of full and frank disclosure.
 - (c) Cross examination will be permitted if it is linked or relevant to an existing ground of challenge of the decision maker's decision or procedural impropriety.
 - (d) The trial judge must in considering whether to permit cross examination to resolve a factual dispute, resist the temptation to resolve and find facts which are really within the purview of the decision maker which is the ultimate finder of the facts.
 - (e) However where no such eventually arises when issues of breaches of fundamental rights arise for determination the Court must be in a position to make findings of fact. Cases which deal with breaches of fundamental human rights tend to be fact specific and any judgment on the proportionality of a public authority's interference with a protected right calls for a careful and accurate evaluation of the facts. Where critical "hard edged questions of fact" (of the type described by Lord Mustill in **R v Monopolies Mergers Commission ex parte South Yorkshire Ltd** [1993] 1 WLR 23) arise in judicial review proceedings cross examination should be ordered if necessary for the Court to determine the factual dispute itself.

- (f) Such orders for cross examination should only be made if it is necessary in order to resolve the matter fairly and accurately.
- (g) Parties have a clear obligation in any judicial review case to consider at all times where there is a hard edged issue as this will be relevant in determining whether the Court should make orders for cross examination and disclosure. If the parties cannot reach agreement an application should be made for the appropriate orders. Such applications should identify the relevant conflict in the evidence that is to be subject to cross examination and the particular relevant issue or ground of challenge to which it relates.

See **Manning v Sharma, Ganga v Commissioner of Police, Al Sweady**, *Judicial Review Principles and Procedure* by Auburn and Moffett, *Judicial Remedies in Public Law* by Clive Lewis.

11. I am satisfied that there are some critical factual disputes which arise in this case which are linked or relevant to the alleged breaches of the Claimant's fundamental rights. Cross examination is the only vehicle through which these disputes can be fairly and accurately resolved and is necessary to fairly and accurately resolve these constitutional issues. Guided by the principles set out above, I would permit limited cross examination of the following deponents on the paragraphs of their evidence which I set out below. I have not permitted cross examination on the other aspects of the evidence which are the subject of the Claimant's application for the reason that they do not constitute critical factual disputes nor important for a resolution of the main constitutional issues raised.
12. Germaine De Graf: The following paragraphs of her affidavit relate to the factual dispute of the interaction of the Claimant with adult inmates and her conditions at the prison which form a critical feature of the allegation of cruel and unusual punishment which must be resolved by the Court. Paragraphs 13, 15 and 16 of the affidavit filed on 18th September 2015 and paragraphs 11, 14, 16, 18, 22, and 28 of the affidavit filed on 11th November 2015.
13. Nicole Hernandez: Similarly for this Court to fairly and accurately make a finding on the Claimant's interaction with adult inmates and critical aspects of her detention such as airing cross examination is necessary on the following paragraphs 10, 11 of the affidavit of 18th September 2015 and 12, 15, 21, 24 and 27 of the affidavit of 11th November 2015.

14. Avalon Felix: For this Court to accurately and fairly make a determination of the Claimant's interaction with adult inmates and her condition of her detention which is relevant to the allegation of cruel and unusual punishment I would permit cross examination on paragraphs 10 and 15 of her affidavit of 16th November 2015.
15. I agree with the Defendant that the deponents' account of the riot contained in the Janelle Mc Hardy's affidavit and Kathryn Grant's affidavit in these proceedings are not critical to a resolution of the fundamental rights issues raised. It is an accepted fact that there was a riot or a disturbance and that the Claimant was hurt. This is a sufficient factual basis upon which the Court can make an assessment of the Claimant's claims. The details of the respective versions of the incident are not critical factual controversies.
16. The costs of the application are reserved.

Vasheist Kokaram
Judge