**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No.: CV2016-04370**

**IN THE MATTER OF THE ACTION OF THE CHILDREN'S AUTHORITY OF TRINIDAD AND TOBAGO TO PLACE THE CLAIMANT IN A HOME THAT IS NOT A COMMUNITY RESIDENCE AND SUBJECT THE CLAIMANT TO CONDITIONS AMOUNTING TO SOLITARY CONFINEMENT**

**AND**

**IN THE MATTER OF AN APPLICATION FOR REDRESS IN ACCORDANCE WITH SECTION 14 OF THE CONSTITUTION BY B (by his kin and next of friend K) A CITIZEN OF TRINIDAD AND TOBAGO ALLEGING THAT CERTAIN PROVISIONS OF THE SAID CONSTITUTION HAVE BEEN CONTRAVENED AND ARE BEING CONTRAVENED IN RELATION TO HIM**

**BETWEEN**

**B**
**(By his kin and next of friend K)**

**Claimant**

**AND**

**THE CHILDREN'S AUTHORITY OF TRINIDAD AND TOBAGO**

**First Defendant**

**AND**

**THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO**

**Second Defendant**

**Before the Honourable Mr. Justice V. Kokaram**

**Date of Delivery: Wednesday 26th July 2017**

**Appearances:**
**Mr. Anand Ramlogan S.C. instructed by Mr. Alvin Pariagsingh leading Mr. Ganesh Saroop and Ms. Jayanti Lutchmedial for the Claimant**
**Ms. Sharlene Jaggernauth instructed Ms. Nazeera Ali for the First Defendant**
**Mr. Douglas Mendes S.C. instructed by Ms. Amrita Ramsook and Ms. Josephina Baptiste for the Second Defendant**

## JUDGMENT

1. This is the second chapter in a continuing story of the conditions in which B, a teenager in trouble with the law is being detained on remand pending the hearing of his criminal charges. The writing of this chapter would not have been necessary if the State had established community residences contemplated under the Children's legislation[1] to detain "juvenile offenders" such as B.

2. B was remanded to the Youth Training Centre (YTC) since February 2014, a facility which was established under what was then known as the Youth Offenders Detention Act Chap 13:05. On 24th May 2016 the Court ruled in **BS v Her Worship Magistrate Ayers Caesar and the Attorney General of Trinidad and Tobago** CV2015-02799 ("the YTC proceedings") that YTC was not a "community residence" under the Children's legislation. Pursuant to that legislation juvenile offenders are to be remanded to a community residence.[2] His detention at YTC was also declared as unconstitutional. The Court ordered that B be placed in a community residence approved by the Children's Authority of Trinidad and Tobago ("The Children's Authority") and in default to be placed in its custody until further order. Pursuant to section 3 (1) and (2) of The Children's Community Residences, Foster Care and Nurseries Act 2000, the Children's Authority is responsible for the licensing of community residences. However, no residence nor home was then approved as a licensed community residence by the Children's Authority.

3. The order was made to protect B, to seek his best interests and to promote the fundamental rights of B as a child. Subsequent to making that order, B has been accommodated at a residence under the custody of the Children's Authority. For the purposes of this judgment it will remain undisclosed and referred to as "the residence".

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[1] On 23rd October 2000 the Community Residences Act was assented to and by proclamation dated 15th May 2015 specified sections of the Act came into effect. See LN 74 of 2015. On 6th August 2012 the Children's Act 12 of 2012 was assented to by His Excellency and by proclamation dated 15th May 2015 specified sections of this Act were brought into effect. See LN 73 of 2015. Children's Authority Act Chap. 46:10.The entire suite of legislation is referred to as the Children's Legislation.

[2] Section 54(1) of the Children's Act 12 of 2012 provides:

> "54. (1) A Court, on remanding or committing for trial a child who is not released on bail, shall order that the child be placed in the custody of a Community Residence named in the Order for the period for which he is remanded or until he is brought before the Court."

4. B now contends in this claim for judicial review and constitutional relief that the conditions under which he is presently detained at the residence, amounts to solitary confinement and a breach of his constitutional rights and freedoms guaranteed under Sections 4 (a), 4 (b), 5 (2) (b) and 5 (2) (f) of the Constitution of the Republic of Trinidad and Tobago.

5. The decision in the YTC proceedings is presently under appeal. No issue of what should or should not be considered a community residence arises here nor whether the State is in breach of its obligation to provide community residences. Notwithstanding the fact that the said decision is under appeal, it is accepted by the parties that the conditions under which B is presently detained should not violate his constitutional rights. The main complaint in this claim is that B is being held in solitary confinement. If that is so and if that is a breach of his constitutional rights of due process and right not to be exposed to cruel and unusual treatment and punishment, then the question arises as to what should be the appropriate relief: whether declaratory relief, an award of compensation or in addition and/or the grant of bail on conditions.

6. The resolution of this main issue therefore requires an examination of the obligations imposed on the Children's Authority by the Children's legislation and the constitutional guarantee not to subject B to cruel and unusual treatment and punishment. This main issue of the conditions of solitary confinement of minors requires an examination of the conditions in which B is presently detained and balancing the "best interests of the child" with other legitimate competing interests.

7. There are however, preliminary issues also advanced by the Defendants. In particular, that the State is not a proper party in these proceedings, that leave ought not to have been granted as the proceedings are an abuse of process and that the Claimant is guilty of delay.

8. Notwithstanding these preliminary issues, I have chosen for the reasons set out in this judgment, to focus on the main issue first. In my view, a Court which seeks to give effect to the "best interest principle" should always concern itself with the welfare of the child notwithstanding procedural preliminary matters.

9. On that main issue, I have concluded that the conditions under which B is presently being detained do amount to solitary confinement only in the limited literal sense that B has been

segregated from his "peers", that is other youngsters on remand. He is undeniably the only youth confined at the residence. But his detention is a novel one. He is the first of his kind to be housed at the residence having regard to the nature of the order made. If indeed there are no other alternatives and had the order in the YTC proceedings not been the subject of appeal, he may have been joined by other youths on remand until suitable community residences have been approved. At its highest, his stay at the residence is comparable to being segregated from the regular juvenile offender population. However, there is no insidious aspect of such a detention. It is a detention based upon a rational and thoughtful assessment. Conditions have been established to ameliorate his isolation. His health, educational and physical needs are being addressed. I am comforted by the expert's advice that he has suffered no harm by the conditions at the residence. His surroundings are generous and open. He has opportunities to communicate with and experience the wider world. His conditions are under assessment and review by specialists. His security arrangements are not invasive or oppressive. The conditions under which he is detained do not meet the minimum severity to be actionable nor amount to a breach of his constitutional rights nor do those conditions breach the "best interest of the child" principle.

10. It is therefore not necessary to determine the preliminary issues. In any event for the reasons expressed in this judgment, the State is a proper party to these proceedings. Additionally, the fact remains that his continued detention under the custody of the Children's Authority persists as a result of the delay of the State in providing community residences approved by the Children's Authority. B is not guilty of delay in moving this Court nor is his claim an abuse of process. The impact of the present conditions on B could not have manifested itself to his mother as unusual until B's escape from the home on 21st October 2016. His pre-action protocol letters were issued on 26th October 2016[3] and 7th November 2016[4] and the proceedings filed on 5th December 2016.

11. The claim would therefore be dismissed.

12. However, the matter does not end there. At the end of this judgment, in deference to the "best interest of the child" principle, I have volunteered a non-binding thought on the way forward

[3] Concerning access to B at the Children's Home.
[4] Concerning the Freedom of Information Application.

on the larger issues raised in this matter. It is also an attempt to prevent the parties from entering a revolving door of litigation in relation to B's detention. That non-binding guidance adopts a holistic and therapeutic view of the litigation and addresses the live issues of the continued detention of B at the residence and the recommendations of the expert Dr. Rona Heather Hollingsworth. The live issues of the imminent accommodation at the YTC as detailed in these proceedings. The live issues of B and his mother, a family coping with the dislocation caused by extended criminal proceedings. Finally, issues in relation to the attorneys in this matter and their conduct of this case.

13. I also observe that had my order in the YTC proceedings not been under appeal, the State's delay in implementing community residences as contemplated under the Children's legislation makes the issue of bail a very live one. The order of detention by the Children's Authority was as I expressed earlier[5] a temporary mechanism to protect B until the approval of community residences which in the YTC proceedings was said to be imminent. It was not contemplated that such detention would now cross into its thirteenth (13th) month. I have at the end of this judgment set out measures, based on the evidence in this case, which can be introduced to further help B during his "stay" at the residence.

**Background: the YTC Proceedings**

14. B was charged with the offences of robbery and murder at the age of 14. He appeared before the Chief Magistrate on 29th January 2014 and was remanded into custody at St. Michael's YTC. The case was adjourned from time to time and he continued to be remanded into the custody of YTC. Sections 54 and 60 of the Children's Act 12 of 2012 and the Community Residence Act 2008 was proclaimed on 15th May 2015. As a consequence, the Court was mandated to remand B to a "community residence"[6]. However, no such licenced regime had been put in place and it was argued by B's attorneys that YTC did not fit the description of a "community residence".

15. In the judgment in the YTC proceedings delivered on 24th May 2016, this Court examined the constitutionality of B's detention at YTC. B complained about his detention at the YTC

[5] See procedural judgment.
[6] Section 3 of the Children's Authority Act provides that a "community residence" means a Children's Home or Rehabilitation Centre licensed under the Children's Community Residences, Foster Care and Nurseries Act.

indicating among other things that he was subjected to bullying by the older, convicted boys and that the physical conditions of the YTC were unsuitable and not that contemplated under the Children's Act.

16. One of the main issues for determination in that case was whether the failure to place children in trouble with the law in community residences gave rise to constitutional relief because it amounted to a breach of the State's obligation to provide for the welfare, safety and best interest of the children.

17. The Court held that the YTC did not qualify as a community residence under the Children's Act[7] and granted declaratory relief, mandamus and compensation. The Court declared that[8] the Chief Magistrate had no jurisdiction, power or authority in law to order B to be remanded at the YTC and the said decision was unlawful and illegal. It also declared that the detention of B from 29th July 2015 to 14th April 2016 at the YTC and the failure of the Attorney General to provide a Community Residence upon the coming into force of the Children's legislation was in breach of B's constitutional rights and freedoms guaranteed under section 4(a), 4(b), 5(2)(b) and 5(2)(f)(i) of the Constitution of the Republic of Trinidad and Tobago.

18. The Court quashed the said decision and the remand warrant remanding the Claimant to the YTC. It also ordered that **B be immediately placed in a Community Residence approved by the Children's Authority and in default, be placed in the custody of the Children's Authority until further order**.

19. The State was ordered to pay damages in the sum of $150,000.00 which sum was to be deposited into Court for the benefit of B until he attains the age of eighteen (18) or further order.

20. Importantly in that case I made the following findings and observations[9]:

    - That in all actions concerning children undertaken by institutions or courts of law the best interests of the child is a primary consideration.

[7] Paragraph 229 of **B Seepersad v Her Worship Magistrate Ayers Caeser and the Attorney General of Trinidad and Tobago** CV2015-02799.
[8] Page 145-146 ibid.
[9] **B v Her Worship Magistrate Ayers Caeser and the Attorney General of Trinidad and Tobago** CV2015-02799 paragraph 146.

- Using the "best interest" principle is to say that it is a dominant principle but it must be balanced with equally competing interests of society.
- In the criminal justice system children are not to be subjected to prolonged periods of pre-trial detention or detention without review.
- Detention before trial is a measure of last resort and if so must be done in furthering the "best interest" principle.
- There is a duty of the family, society and the State to protect the child.
- It is evident that the child participates in criminal proceedings under different conditions from that of an adult. There is the need to equalise the conditions the child faces in the criminal justice system recognizing the disability and vulnerability so that there can be true justice for all.

21. In the YTC proceedings, the Court expressed the view that "A place of rehabilitation is a place of care and nurturing where the primary concern is the best interests of the child where that child is shown empathy, care, understanding and love."[10] Further in paragraph 224 of the judgment it was explained that:

> "In the context of the Community Residences Act, a Community Residence therefore is a home which replaces that of the child's. It is a safe and secure place for remanded youths where the children are supervised and taken care of by qualified persons. The children are given the opportunity to be educated. There are exercises available and sporting activities. The children are able to receive help for their problems such as anger management issues, drug or alcohol problems. There is specialized treatment for each child by means of a treatment plan. There is no strict regimen of punishment. There are provisions for care and the absence of violence in any form on the child. It is not a place in which the child associates with adults."

[10] **B v Her Worship Magistrate Ayers Caeser and the Attorney General of Trinidad and Tobago** CV2015-02799, paragraph 18.

22. International law has had a radical impact upon the rights of the child. As this Court noted in **B v Her Worship Magistrate Ayers Caeser and the Attorney General of Trinidad and Tobago**:

> "The penumbra of rights recognized in the UNCRC and later international instruments such as the Beijing Rules, the Havana Rules and the Riyadh Rules, have therefore indisputably led to a radical change in the creation and fulfilment of rights for the child. This no doubt has been accepted by the government in its passage of a suite of legislation to provide for a more comprehensive juvenile justice system which safeguards the inalienable rights of the child. In giving effect to international norms and perceptions of children's rights, specifically in the juvenile justice system is the promotion of the principle of restorative justice where the child is rehabilitated not by doing things to them but by doing things with them. This simply means that the value of love, compassion and respect previously nurtured in the homes are now being administered by the State filling the obvious gaps in our family life."[11]

23. It is clear from the submissions of the parties in this case that there is no contest that the rights of B have been contextualised by these international norms.

24. Further, at paragraph 234 of the judgment, the Court went on to say:

> "To deprive a child who is presumed innocent his or her placement in a Community Residence while awaiting trial is in my view tantamount to denying the child his or her childhood. This is not a mere procedural irregularity as considered in those cases. This goes to a fundamental root issue of the welfare of the child during criminal proceedings pending trial, when in any event the child is not to be deprived of her liberty for any undue length of time and if so his or her best interest must be safeguarded. In this case as Parliament intended their best interest is secured in a place of rehabilitation, a place of care."

25. Importantly, on the question of bail I made the following statements at paragraph 323 :

> "…..the deeper question is therefore whether the fundamental rights that are in play are so important as to order his release on bail for what are non-bailable offences. To do so will

[11] **B v Her Worship Magistrate Ayers Caesar and the Attorney General of Trinidad and Tobago** CV2015-02799, paragraph 14.

trump legislation which mandates the denial of bail for those accused of murder, a law which pre dates the Constitution and therefore passes constitutional muster by the savings clause. But to do otherwise would necessarily mean that BS is to remain in a place that is unsuitable for him, in defiance of the Children's legislation and in breach of his fundamental rights. The recognized wide powers of a constitutional court must necessarily empower it to fashion practical remedies which will prevent its "constituents" from falling into a human rights "black hole". If murder is a non-bailable offence and such deprivation of liberty is legitimized by the Constitution's savings law clause, equally by parity of reasoning impliedly the corollary right must be that there is a suitable place to detain such a person. If a law which is declared constitutional by its saving must stand scrutiny by implication to having balanced the interest of the individual with the object of the measure. To do otherwise would mean that what law has been saved results in the death of a fundamental right. The issue of proportionality or reasonableness must therefore be applied in coming to a conclusion that bail is being refused on the premise that there is a suitable place of custody to detain the accused. In the case of children if there are no places available to preserve and protect their fundamental rights the Court must be empowered to make constitutional excursions into the existing law to protect the weak and vulnerable. If therefore there are no Community Residences there must be a safe place to keep the children in custody or else the implied balancing exercise that justified the deprivation of the right to bail would cease to exist."

26. It was observed, in the event that the Children's Authority, as it did in the interlocutory proceedings, declare that there are no suitable community residences to house B, I had considered it was appropriate, balancing the interest of the child with the interest of society, that he be placed in the custody of the Children's Authority. That was in keeping with the wide mandate of this Authority under the Children's Authority Act. The Children's Authority is the "statutory expert" in protection of the welfare of children. Section 22 (1) of the Children's Authority Act provides for the Children's Authority to protect children by taking them into their custody. It is such broad powers under the Act which were utilised by the Court in fashioning the remedy.

27. It was further stated that if suitable arrangements are not thereafter put in place for his care and rehabilitation then the Court in exercising its constitutional jurisdiction may order the release of the child on conditions to be determined by the Court.

**Background: the appeal and the dead zone**

28. It is with a great degree of caution that this Court was invited to review the conditions of the present detention of B pursuant to the previous order without treading into what I may describe as the "dead zone". The grounds of appeal are quite extensive. In summary the following main findings are under review:

    a) that the Court has power to grant bail in non-bailable capital offences on account of a failure to make provisions for "keeping detained" persons in an appropriate place.

    b) that there is fundamental unfairness to B if he is not detained in a place of rehabilitation.

    c) that the detention of the Respondent at YTC was a breach of B's right to protection of the law under section 4(b) of the Constitution and of his right not to be subjected to cruel and unusual treatment under section 5(2) (b) of the Constitution.

29. The parties in this litigation recognise and accept that the Court cannot re-examine its previous order. Those issues fall in a virtual dead zone as a result of the appeal. The Court is functus on issues on such matters as whether the State has failed to provide community residences, whether the YTC is a community residence and whether B was entitled to bail in the event a community residence was not provided. The parties agree that insofar as these are live issues before the appellate Court, this Court ought not to tread on them. See **Mc Knight v Mc Knight** [1983] 44 WIR. These issues cannot be raised from its dead zone and this Court has not in this case been invited to do so.

30. However, it is accepted by the parties however, that this Court can examine the conditions under which B is detained without any comment on the validity of the Court's previous order and determine whether those conditions are a breach of the rights of the child. This is the main focus of B's complaint before the Court. He complains that his present detention amounts to

solitary confinement which is a fundamental derogation of the rights of the child. I accept the Claimant's position that this consideration is "unhinged" from the YTC proceedings.

**A house for B**

31. To date B remains detained at a three bedroom house situated in Port of Spain in the custody of the Children's Authority which he must now call his home. This was a decision made by the Children's Authority in the execution of the Court's order which placed two obligations on the Children's Authority. First, that any community residence to which B was to be detained should be approved by them. This would require them to conduct the necessary assessments. Second, if no suitable community residence was available that B would be in the custody of the Children's Authority the expert under the Act in child welfare and who has the power to accommodate at risk youth. However, housing B in the residence was not the first choice.

32. Even before the judgment in the YTC proceedings, the Children's Authority was actively engaged with stakeholders in trying to have accommodations meet the standards set by the legislation. On 18th December 2015 the Children's Authority was invited to a planning meeting with Urban Development Company of Trinidad and Tobago (UDECOTT), the National Insurance Property Development Company Limited (NIPDEC), and the Office of the Prime Minister (OPM) to determine the scope of works on the compound of the St. Michael's School for Boys to establish a temporary rehabilitation centre for male child offenders. The Authority was requested to assess the adequacy of the renovation works against the minimum infrastructure requirements for rehabilitations centres in accordance with the Children Residences, Foster Care and Nurseries Act, 2000 and the Community Residences Regulations 2014.[12]

33. Thereafter, the Children's Authority conducted three site visits at the space identified for the Rehabilitation Centre on the premises of St. Michaels. These site visits were conducted on 22nd January 2016, 5th February 2016 and 16th February 2016. The Children's Authority made recommendations to the OPM who agreed to address the recommendations at a stakeholder meeting on 16th February 2016. The Children's Authority then conducted four more site visits at St. Michael's to assess the status of the renovation works following the meeting on the 16th

[12] Paragraph 6, 7 and 8 of the Affidavit of Christalle Gemmon filed on 22nd February 2017.

February 2016. These were conducted on 23rd and 29th February 2016 and 3rd and 6th March 2016. A report was then prepared by the Children's Authority on the site visit of the 6th March 2016 and forwarded to the Permanent Secretary of the OPM. The report indicated that two dormitories were completed in accordance with the minimum requirements for rehabilitation centres but there were a few outstanding issues which were identified as follows:

i. Staffing to be provided to the facility to enable close monitoring and constant supervision of residents for which arrangements were being made for hiring of care givers, tutors, psychologists, welfare officers;

ii. Facilities to be provided for the education for the rehabilitative programme- for which construction and installations had commenced to provide for therapy, educational programmes and visits.[13]

34. The report also addressed security issues and noted that there was a:

i. Lack of adequate perimeter fence for which no work had yet been commenced to erect the fence. The Ministry had previously advised the Authority on 6th March 2016, that the construction would be completed in May 2016 and;

ii. Risk of interaction between boys housed at the St. Michael's Home and residents at the rehabilitation centre.

35. The Children's Authority subsequently emailed the report again to the Permanent Secretary of the OPM on 13th April 2016 and further indicated that the facility was assessed as being fit for the interim accommodation of no more than six children pending the completion of the security arrangements. On the 11th May 2016 the Children's Authority conducted a visit to the temporary rehabilitation centre. By email dated 12th May 2016, the Children's Authority indicated their concerns of the 11th May 2016 to the Permanent Secretary of the OPM.

36. After the judgment in the YTC proceedings, the Children's Authority was careful to ensure that the residence at which B should be detained in conforms to the obligations imposed by the Children's legislation. There being no community residences, the Children's Authority had written to the Permanent Secretary of the Office of the Prime Minister (OPM) on 1st June 2016

[13] Paragraph 10 and 11 of the Affidavit of Christalle Gemon filed on 22nd February 2017.

about the terms of the Order of 24th May 2016. The letter reiterated the Children's Authority's concerns with regard to the Rehabilitation Centre at St. Michael's School for Boys based on the Children's Authority's visit on 11th May 2016 where the Children's Authority observed[14]:

a. No work had commenced on the security perimeter fence;

b. The residents at the St. Michael's School for Boys were found to be passing 'contraband' items to the residents at the Rehabilitation Centre;

c. There were eight (8) boys at the Rehabilitation Centre which went beyond the maximum number of residents that the Authority had recommended in its conditional acceptance of the interim measures placed at the Rehabilitation Centre; and

d. There was a mixing of non-offender residents with offenders in the Rehabilitation Centre.

37. In its letter to the OPM, the Children's Authority determined that the conditions for approval were not satisfied in the St. Michael's Rehabilitation Centre and as such, they were not in a position to place B there.

38. Left then with no other suitable option, B was received into the care of the Children's Authority on 1st June 2016 and placed in the residence.

39. The residence is a two (2) storey house with three (3) bedrooms, a toilet and bath, kitchen and living room.[15] B's room has a single bed, small desk and a cupboard.[16]

40. His mother noted that previously there was a tutor who would come to do lessons with the B but now only a Counsellor from Parenting TT comes for an hour on Friday and gives B some reading to do.[17] He has private lessons from a teacher on Mondays, Wednesdays and Fridays from 7am-10am. This is conducted in the living room of the house and during breaks, B is

[14] Paragraph 15 of the Affidavit of Christalle Gemon filed on 22nd February 2017.
[15] Paragraph 13 of the Affidavit of the Claimant filed on 5th December 2016.
[16] Paragraph 25 of the Affidavit of the Claimant filed on 5th December 2016.
[17] Paragraph 14 of the Affidavit of the Claimant filed on 5th December 2016.

allowed to go outside. After class he watches television until late in the night and when he does not have class, he wakes up when he wants.[18]

41. There is no dispute that B is the only person detained at the facility. His mother indicated that his interaction with the staff is minimum.[19] There is a team of people who rotate as caregivers and they come on mornings and evenings to prepare meals for B and they make him do chores like makes his bed, wash his clothes and do dishes.[20]

42. His mother noted that B spends 14 hours alone in his room or wanders around the house since he is not allowed to go outside unless accompanied by the Case Officer from the Children's Authority.[21] He does not have the opportunity to interact with children his age.[22] The door to his bedroom door was removed and an adult male security guard sleeps in the room with him.[23] It must be noted however that there is no evidence of sexual abuse or any improper interaction between B and the male guards. The complaint simply is that B ought not to have interactions with adults such as the security guards in place of his peers. K contends that the security guard is B's only source of human interaction.[24] K contended that there is one security guard on the compound at any time.[25]

43. Due to him being the only child detained at the facility, B expressed feelings of loneliness[26] and frustration and depression because of this loneliness.[27] Matters came to a head on or around the night of 21st October 2016 when he escaped from the residence. He destroyed the burglar proofing in his room, climbed out through a window, jumped from on top the AC unit over the wall and into a business place next door where he escaped.[28] He went to his father who was asleep and then he visited his mother. His mother was distraught and contacted the police afraid of the repercussions of such an escape. B further expressed his loneliness at the facility and

[18] Paragraph 24 of the Affidavit of the Claimant filed on 5th December 2016.
[19] Paragraph 10 of the Affidavit of the Claimant filed on 5th December 2016.
[20] Paragraph 14 of the Affidavit of the Claimant filed on 5th December 2016.
[21] Paragraph 25 of the Affidavit of the Claimant filed on 5th December 2016.
[22] Paragraph 29 of the Affidavit of the Claimant filed on 5th December 2016.
[23] Paragraph 30 of the Affidavit of the Claimant filed on 5th December 2016.
[24] Paragraph 34 of the Affidavit of the Claimant filed on 5th December 2016.
[25] Paragraph 14 of the Affidavit of the Claimant filed on 5th December 2016.
[26] Paragraph 10 of the Affidavit of the Claimant filed on 5th December 2016.
[27] Paragraph 11 of the Affidavit of the Claimant filed on 5th December 2016.
[28] Paragraph 15 of the Affidavit of the Claimant filed on 5th December 2016.

thoughts of suicide.[29] He indicated to his mother that "I am lonely and suffering there; please don't send me back or else you might never see me again." He also told her if he went back to the facility with the police he will "end his life."[30] His mother has stated that B has expressed to her that he feels that he should not have left YTC.

44. The Claimant submitted that the conditions of detention at the facility has had the following effect on the Claimant[31]:

(i) B has become withdrawn because he is lonely, frustrated and depressed as the only child at the residence;

(ii) B particularly misses his sister S who he saw periodically at the YTC but now only sees for a few minutes when they go to the Magistrate's Court;

(iii) B has been suffering so greatly that on or around the night of 21st October, 2016, he escaped. He begged his mother not to make him return saying:

(a) He would end his life if he was sent back to the residence as he was "going crazy with loneliness that made his head hurt" and continuously wished he could just die; and

(b) He would even rather be sent back to the YTC than return to the residence as even if he was beaten up and ultimately died there at least he would see other children there.

(iv) Since his return to the residence, he has continued to say to his mother that he is worse off now than he was at the YTC as he is alone and depressed and preferred to be bullied and beaten, abused and threatened rather than alone.

(v) B is now treated even worse by the security guard who was on duty at the time of his escape, as do all the other staff, who show him no warmth or attention, are at times angry and irritable towards him and have even given him alcohol and got him drunk;

[29] Paragraphs 15-19 of the Affidavit of the Claimant filed on 5th December 2016
[30] Paragraph 19 of the Affidavit of the Claimant filed on 5th December 2016.
[31] Paragraph 13 of the Claimant's submissions filed on 26th April 2017.

those relatives who visit him are also harassed and face restrictions in what they can bring and how they can interact with him as well as whether they can visit at all.

(vi) B is becoming increasingly depressed and withdrawn as there is no proper rehabilitation at the residence and nothing is being done to improve his conditions of detention.

(vii) The preliminary inquiry in the B's murder case is on-going with no prospect of completion and B's mother fears that B will commit suicide due to his conditions of detention at the residence, absent the intervention of the Court.

45. The Children's Authority contended however, that B is not 'isolated' because of the depth and frequency of the interaction of B with the caregivers and security personnel at the residence. B, they say, is playful and has become more 'assertive' and 'interactive' since he first came to the facility.[32] The Children's Authority also contended that the security log verifies that two security officers are assigned for each 12 hour shift from a "detachment of no fewer than eight at any time." and also one caregiver assigned per shift.[33]

46. The Children's Authority further stated that B is free to roam the indoors of the residence at his leisure and is given a stipulated airtime on a daily basis in the company of designated security personnel and a caregiver. He is also "always engaged by an officer in age-appropriate conversation, playing video or board games, watching television, cooking and other activities to make him feel normal at all times."[34]

47. The State set out efforts of the YTC to conform to the Children's legislation which include[35]:

i. Three buildings at the Pre-Trials Section of the YTC have been remodelled to establish a place that is separated from those buildings which house the lads who are convicted. These buildings are separated by two metal gates from the other building. They have been outfitted with appropriate sleeping quarters, entertainment/recreational areas,

[32] Paragraph 12 of the Affidavit of David Maynard filed on the 22nd February 2017.
[33] Paragraphs 13 and 14 of the Affidavit of David Maynard filed on the 22nd February 2017.
[34] Paragraph 15 of the Affidavit of David Maynard filed on the 22nd February 2017.
[35] Paragraphs 13-16 of the Affidavit of Elvin Scanterbury filed on 17th February 2017.

dining areas, washing areas and learning areas and the buildings are ready for occupation.

ii. Renovation and refurbishment works are scheduled for three more buildings in the Committed Residents Section of the YTC.

iii. The physical infrastructure of the Child Rehabilitation Centre at Golden Grove has met the requirements of the First Defendant through the renovation of three dormitories at the YTC to house 36 boys, the placement and installation of barricades and buffer zones in the corridors to separate the remanded and convicted lads and the provision of bedding, adequate personal storage and age appropriate living spaces.

iv. The staffing requirements of the Child Rehabilitation Centre have been increased. YTC has part of its full time staff a qualified psychologist as well as welfare officers who are trained social workers. A Counsellor visits YTC twice per week. Specialist staff are hired to develop educational and vocational programmes and specialist staff to provide for care plan formulations.

v. There is adequate staff to ensure at least 1 supervisor for every 7 residents between 10 years and 12 years.; at least 1 supervisor every 5 residents between 13 years and 16 years; and at least 1 supervisor for every 3 residents between 17 years and 18 years.

vi. Provisions have been made for adequate fencing of the facility, surveillance through the use of cameras, appropriate measures for discipline, communication with family behaviour management policies and policies for safety and security.

vii. Documents have been created and/or reformatted namely a resident handbook, rules and regulations, operational procedures, a security management plan, a complaints plan, intake forms and menu plans. All plans and documents for the Rehabilitation at YTC have been approved by the Children's Authority since October 2016.

viii. A care plan team has been assembled and a generalized care plan has been prepared which will be tailored for each boy. The multidisciplinary team consists of welfare officers, a psychologist, a medical officer, housemasters and school personnel who are undergoing training in partnership with the OPM in children's psychological health,

restorative practices, behaviour management, self-care and stress management, roles and control and restraint awareness and the responsibilities of employees.

48. The Claimant's claim in both the judicial review and in the constitutional law proceedings seek the following reliefs:

**Against the Children's Authority**

i. A declaration that the conditions of detention for the Claimant are in breach of Regulation 15(b) of the Children's Community Residences Regulations 2014 because it amounts to solitary confinement of a minor and unusual punishment.

ii. An order of mandamus directing and/or compelling the state to forthwith provide a suitable community residence as required by Section 3 (2) of the Children's Community Residences, Foster Care and Nurseries Act.

**Against the Attorney General**

i. A declaration that the continued detention of the Claimant by the Children's Authority pursuant to the order of the High Court dated 24th May 2016 at the residence is in breach of the Claimant's constitutional rights and freedoms guaranteed under section 4(a), 4(b), 5(2)(b) and 5(2)(f)(iii) of the Constitution of the Republic of Trinidad and Tobago.

ii. An order granting bail on conditions to the Claimant pending the provision of a community residence in light of the State's continuing liability to detain him at a community residence as required by law;

iii. An order that monetary compensation including vindicatory damages be paid to the Claimant by the Defendants for breach of his constitutional rights.

49. In this claim the evidence in the following affidavits were filed and considered:

i. For the Claimant the affidavits of K filed on behalf of the Claimant on 5th December 2016 and affidavit in reply filed on 10th March 2017. Affidavit of H filed on behalf of the Claimant on 10th March 2017. H is the father of K and the grandfather of B.

ii. For the Attorney General the affidavit of Elvin Scanterbury filed on 17th February 2017 and supplemental affidavits filed on 7th June 2017 and 21st June 2017. Mr. Scanterbury is the Acting Superintendent of Prisons at the YTC.

iii. For the Children Authority the affidavit of Dr. Saran Looby filed on 22nd February 2017 and supplemental affidavit of Dr. Looby filed on 27th April 2017. Dr. Looby is a Clinical Psychologist and has been a private consultant with the Children's Authority in the field of Clinical Psychology for almost 2.5 years.

iv. Affidavit of David Maynard filed on behalf of the Children's Authority on 22nd February 2017. Mr Maynard is a Security Supervisor with Daniel Maynard and Associates, Investigations and Security Consultants and supervises security officers deployed at the residence.

v. Affidavit of Christalle Gemmon filed on behalf of the Children's Authority on 22nd February 2017. Ms. Gemmon is the Deputy Director of Care, Legal and Regulatory Services of the Children's Authority.

vi. Affidavit of Keisha Mitchell filed on behalf of the Children's Authority on 22nd February 2017 and supplemental affidavit filed on 27th April 2017. Ms. Mitchell is a Children's Services Associate with the Children's Authority.

50. Written submissions were also filed and considered.[36]

51. The Court had previously ordered that the issues raised did not require cross examination. The Court also appointed a single expert Dr. Rona Heather Hollingsworth by order dated 8th May, 2017[37], (the Hollingsworth order) who's evidence by report dated 12th June, 2017 and her oral examination proved extremely useful. The Hollingsworth order incidentally was a detailed order with instructions to expert explaining her terms of reference and dealing with the important issue

[36] Submissions of the Claimant filed on 26th April 2017. Submissions of the Children's Authority filed on 5th June 2016. Submissions of the Attorney General filed on 7th June 2016. The attorney for the Attorney General also submitted the useful authority of **AB and others v The Secretary of State for Justice and others** [2017] EWHC 1694 (Admin) by email dated 24th July 2017. However the judgment has not altered the Court's view on the final disposition of this dispute and did not require any assistance on it by the parties.

[37] **B v The Children's Authority of Trinidad and Tobago and The Attorney General** CV2016-04370 8th May 2017.

of impartiality. A site visit was conducted on 25th July 2017 of the residence and YTC where all the attorneys for the parties obtained a true feel for both premises.

**The issues**

52. Against this backdrop the following main questions arise:

    a. Whether those conditions at the residence amount to solitary confinement, and;

    b. Whether such detention in those conditions can give rise to any breach of his constitutional rights.

53. The State also advanced the preliminary issue whether it is a proper party to these proceedings. They relied on the **Attorney General of Trinidad and Tobago v Carmel Smith** [2009] UKPC 50 to demonstrate that any complaint of a breach of constitutional rights should be levelled solely against the Children's Authority.

54. The Children's Authority advanced its own preliminary issue: Whether the Claimant is guilty of delay and whether the claim amounts to an abuse of process. The Court had in fact granted leave to apply for judicial review without prejudice to the Children's Authority's right to raise these issues at the substantive hearing.

55. As the Court has in its final disposition dismissed this claim on its merits, it would be appropriate to deal with the substantive issues first and then treat with the preliminary issues. It would also be appropriate to deal with the main issue first as it raises the question of the conditions in which B is being detained subsequent to the making of the Court's order. This the Court must look at very carefully, regardless of preliminary objections in the circumstances of this case. The Court must in seeking to advance the best interest of the child, be concerned that in compliance with a Court's order, no further harm is brought to B. It is also therapeutic to the parties in disputes such as these for the Court to address this main question "head on" so that parties feel a sense of vindication on the substantive issues raised rather than left to wonder "what if ?" in the event there is merit in the preliminary submissions.

**Solitary Confinement**

56. In dealing with the main issue I have first in deference to the attorneys in this case and their helpful detailed submissions, summarise their submissions, but very briefly. Second, I examine

the definition of solitary confinement. Third, I examine the "best interest principle" rule and finally, I examine the conditions in which B is being accommodated at the residence. In examining the Claimant's case on solitary confinement I have addressed it under three broad limbs, the narrow argument of the alleged breach of Regulation 15 obligations, the wider argument of the breach of obligations consistent with international norms and the cruel and unusual punishment argument.

**Submissions**

57. Senior Counsel for the Claimant submitted that there is no precedent to guide the Court on the issue of the detention of a minor as it relates to the definition of solitary confinement. It was submitted by the Claimant that the Court must have regard to the intention and purpose of the law which prohibits the confinement of a child in circumstances where he is isolated from his peers and which is detrimental to his emotional and psychological well-being undermining the policy of the law which emphasises the rehabilitative component of his detention. It is argued that through the "eyes of a child" he is for all intents and purposes in solitary confinement at the residence, deprived of interaction with his peers.

58. Senior Counsel for the Claimant pointed out some distinguishing features of this case. There is no specific order or direction that B be placed in solitary confinement or that he should be segregated. I understand the argument to be that it was a decision made by the Children's Authority, not the Court, to confine B at the residence. The option of placing him in a Children's home for instance was not explored. He also pointed out that it would be the cruellest irony that the Court by its order would have directed B to be placed in worse conditions than those he experienced at YTC as discussed in the YTC proceedings. In this case, a main complaint levelled by Senior Counsel is the lack of interaction of B with his peers in breach of international law. He repeatedly emphasized that of particular importance in this case is that B is a child on remand. That is he is presumed innocent. He is not guilty of any crime. The conditions therefore to which he should be exposed must be consistent with that presumption. He is not a criminal, he has not broken any social pact and should not be treated as a convicted person. The conditions are in breach of Regulation 15(b) of the Children's Community Residences Regulations 2014 which prohibit the solitary confinement of youth offenders and amount to conditions that are cruel and unusual punishment.

59. As I understand the Claimant's submissions, it has a narrow and wider focus. In examining his detention through B's eyes he is in solitary confinement simpliciter and ergo the Children's Authority is in automatic breach of the fundamental rights of the child not to be so confined. On a wider perspective, in examining the totality of his condition at the residence, inclusive of the solitary confinement of B and all the adverse effects that comes with such confinement, the conditions amount to cruel and unusual punishment. In the latter respect, the Court should pay regard to B's mental anguish, suffering and fears.

60. Counsel for the Children's Authority was at pains to demonstrate that the conditions at the residence do not amount to solitary confinement. In response to that criticism that there is no interaction with his peers, she countered that there are ample opportunities to interact with his peers and anyone else subject to the Children's Authority's approval. She pointed out the distinguishing features in the cases referred to which demonstrate far more severe conditions than B such as **Brough v Australia** Communication No. 1184/2003 and **Öcalan v Turkey** [GC] NO 46221/99, 196, 12 May 2005. Relying heavily on the evidence of Keisha Mitchell, she demonstrated that the Children's Authority adopted a flexible approach in managing B and there was absolutely no denial of human contact. It is due to the present novel circumstances that inevitably B is the only child occupant of the home. Admittedly, although not an ideal situation, the best possible care is being afforded to B.

61. Senior Counsel for the State helpfully narrowed the issues even further. He agreed that the Court was functus with respect to the live issues under appeal but the Court can say whether the present conditions in which B is accommodated are unconstitutional or not. If the conditions in which he is kept are not cruel and inhumane, the order of the Court is being complied with and there is nothing wrong. If there is a violation of his constitutional rights then the Court can order declarations, damages or "remove what is offensive". It cannot grant bail as that strays into what I have referred to as the dead zone. He invited the Court to carefully examine the conditions in which B is kept which will demonstrate that it is not solitary confinement. The evidence he urged demonstrates that the Children's Authority has bent over backwards to accommodate B and to care for him.

62. Both Counsel and Senior Counsel for the Defendants delicately side stepped the issue whether B's detention as the only child in the residence amounts to solitary confinement in the limited

sense. Senior Counsel to his credit accepted that it might but it does not carry any sinister, insidious or offensive meaning as considered in the authorities. Of course there is a difference made out in the authorities between "solitary confinement" simpliciter and "actionable" solitary confinement.

**Through the eyes of the child**

63. I make it plain that B is not in a place that he would like to be. He is on remand facing the most serious charge in our criminal law. The consequences of being charged and having to await his day in Court must be agonising and distressing. In the meantime, he is separated from his mother and his siblings. He is placed in a residence that is unfamiliar to him. He has to make adjustments mentally and physically while he waits. No child wants this. Looking at this adult world through the eyes of the child must be unsettling.

64. This alone does not however, help in answering the question whether what has been put in place for B at the residence is an act of punishment, ill treatment or an act of such severity that it has offended his constitutional rights or the "best interest" principle. Put very simply, is the Children's Authority torturing, punishing or taunting B? Are they mistreating him or subjecting him to cruel and inhuman conditions or exposing him to unacceptable levels of harm for children? Or are they protecting, caring for B and seeking to advance his best interest? I take this matter seriously as indeed until B is placed in a community residence we are all faced with these short hand measures to protect B searching for the best that can be done in the circumstances caused by the premature promulgation of the Children's legislation.

**Regulation 15 – the narrow question**

65. The Claimant contends that the Children's Authority is in breach of Regulation 15 by keeping B in solitary confinement. This raises the narrow question whether the Children's Authority can be held in breach of a Regulation which governs the operation of a community residence. This can be disposed of shortly.

66. Regulation 15 of the Children's Community Residences Regulations provides:

> "15. A child placed in the care of a community residence shall not be subjected to–
>
> (a) corporal punishment;

**(b) solitary confinement;**

(c) unreasonable immobilization; or

(d) unreasonable physical restrain.

67. The Children's Authority placed in the unusual position as the caretaker of B until community residences have been approved, it is axiomatic that it could not itself be held in breach of Regulation 15 (b). This for the simple fact that the Children's Authority is the regulator of community residences and tasked with the duty to enforce Regulation 15 with respect to licenced community residences. See sections 5(1)(f) and 34(1) of the Children's Authority Act Chap 46:01. The Children's Authority is not itself a community residence or manager of community residences.

68. B was not placed in the care of the Children's Authority "as a community residence". In any event, the residence is not a community residence nor is it a community residence "in waiting" seeking approval to become licenced under the Children's legislation.

69. I agree with the Children's Authority that the allegation of a breach of Regulation 15 (b) is a simple non-starter. This Regulation is binding on the managers of community residences. It refers to solitary confinement as a form of punishment. If there is a breach of this Regulation, it is matter for the Children's Authority to enforce by revoking the licence of that community residence or it is a condition which the Children's Authority will examine as part of their process of "grand mothering" establishments as community residences. See section 11 of the Children's Community Residences, Foster Care and Nurseries Act.

70. It could hardly be expected nor was it contemplated by the order, that the Children's Authority would be regulating itself and granting unto itself licences and revoking same to operate community residences. In any event, the licensing regime which will give Regulation 15 teeth has not yet been proclaimed.

71. Although, therefore, the Children's Authority nor the State can be held in breach of Regulation 15, I understand the Claimant's argument to be that Regulation 15 in fact codifies a well-established principle that a child ought not to be held in solitary confinement as general policy which the Children's Authority above all else should observe. That feeds into the wider argument.

**The wider argument**

72. The narrow argument above nicely fits into the judicial review question of whether the decision made by the Children's Authority was in breach of the law a policy of the Act or was unreasonable or irrational. The wider argument really is that the legislation specifically recognises as a matter of policy that B should not be kept in conditions of solitary confinement as this would amount to cruel and inhuman punishment. Further, as a matter of principle and policy the Children's Authority itself should not offend such fundamental rights of the child which prohibits punishment by the solitary confinement of children in the juvenile justice system. In this argument the wider public law issues of illegality as well as unconstitutionality are in play.

73. The question of B's detention at the residence is against the backdrop of the rights inherent to the child in detention on remand pending the hearing of the serious charge of murder. The allegation that he is in solitary confinement is made against the backdrop of established principles of what constitutes cruel and inhuman punishment and the treatment of children in the juvenile justice system.

74. Lord Hope recognised in **R v Secretary of State for Home Department ex parte Thompson and Venables** [1998] AC 407 that every system of criminal justice has had to face up to the problem of how to deal with children who commit crimes. This case highlighted the question of how does the juvenile system deal with those children alleged to have committed crimes. They are on remand and are presumed innocent. But even with the guilty, **Venables** explored that concept of protecting young children against the full rigor of the criminal law.

75. The Law Lords in **Seepersad and Panchoo v AG** [2012] UKPC 4 recognises that provisions of the Children's Act in dealing with child offenders show that a different policy was to be adopted towards child or young offenders from that adopted towards adults when they were given a sentence of indefinite duration. Lord Hope noted that "Protection and welfare lie at the heart of these provisions. Regard must be had throughout to the welfare of the child or young offender."

76. Baroness Hale in both **Nadikie and others v AG of T&T** (2004) UKPC 49 and in **R v Home Secretary** (2006) AC 1 AC 159, referring to **Roper v Simmons** 543 U.S. 551 (2005) highlighted three important differences between juveniles and adults. There is a lack of

maturity. Their vulnerability and susceptibly to negative pressure and outside pressure. Thirdly, the transitory personality traits of juveniles. Importantly, for this discussion is Baroness Hale's observation that the important aim of sentencing is to promote a process of maturation, the development of a sense of responsibility and the growth of a healthy adult personality and identity. She commented that:

> "It is important to the welfare of any young person that his need to develop into fully functioning law abiding and responsible members of society is properly met. But that is also important for the community as a whole, for the community will pay the price either of indefinite detention or of further offending if it is not done."

77. In the South Africa Constitutional Court where there were recognised constitutional rights of the child the observations made by Cameron J on their minimum sentencing regime are equally important. Cameron J recognised the sharp distinction between the adult and the child for practical reasons relating to the child's greater physical and psychological vulnerability. He noted that:

> "Children's bodies are generally frailer, and their ability to make choices generally more constricted, than those of adults. They are less able to protect themselves, more needful of protection, and less resourceful in self-maintenance than adults."[38]

78. Of course those cases dealt with an entirely different matter of sentencing of juveniles. B is a far way off from such a circumstance. As discussed below, it is important for the Court and administrators alike to recognise the vulnerability of children and the need to give effect to the best interest of the child balancing those interests with other equally important interests. The principles of promoting the welfare of the child and ensuring that the juvenile justice system is responsive to B's needs as a child as distinct from that of an adult are well placed in any discussion of solitary confinement.

## A definition of Solitary Confinement

79. Solitary confinement was traced in the Special Rapporteur's Report of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment 5th August

[38] **Centre for Child Law** v **Minister of Justice and Constitutional Development and Others** [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC) at paras 26-9.

2011, to the 1820's United States of America where it was believed that isolation of prisoners would aid in their rehabilitation. As such, prisoners spent their entire day alone mostly in their cells to "reflect" on behaviour away from negative influences. In the 1830's, European and South American countries began to follow this practice from the USA. Two hundred (200) years ago this model was viewed as a socially and morally progressive way of dealing with punishment as it emphasises rehabilitation and attempted to substitute for the death penalty, limb amputations and other penalties then prevalent.[39] Faced with such dreadful alternatives a detainee would readily accept solitary confinement as punishment!

80. In some countries solitary confinement is widely used as punishment. Some States in the USA routinely use it in the penal regime. In 2003, Brazil amended their existing "Law of Penal Execution" in Brazil, Law which contemplated "a "differentiated" disciplinary regime in an individual cell for up to 360 days, without prejudice to extensions of similar length for new offences and up to one sixth of the prison term." The Province of Buenos Aires in Argentina instituted a Programme of Prevention of Violent Behaviour in its prisons in 2010. This programme consists of isolation for a minimum of nine months with the initial three months in full isolation.[40]

81. Taking its literal meaning, solitary confinement can be described as being confined or kept with the bounds or restricted to a single or lonely place. In the strict definition of the term, B is in solitary confinement if one views this from his perspective that he is the only child kept in bounds at the residence and his movement is restricted to that single property. But this is an over simplistic view of the reality of B's confinement and glosses over too easily the context of and the present ameliorating conditions of his detention.

82. There is no universally accepted definition of solitary confinement. International treaties have attempted a definition of solitary confinement. Rule 43 of the Mandela Rules[41] refers to solitary

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[39] See Special Rapporteur Report 2011 on Torture and other cruel, inhuman or degrading treatment or punishment.

[40] Paragraph 23 and 24 of the Special Rapporteur Report 2011 on Torture and other cruel, inhuman or degrading treatment or punishment.

[41] The UN Standard Minimum Rules for the Treatment of Prisoners (The Mandela Rules)

Rule 43-45 of the Mandela Rules provides:

"**Rule 43**

1. In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices, in particular, shall be prohibited:

confinement as confinement for more than a day without meaningful human contact. Solitary confinement can be for a short or prolonged period of time. It is in most cases used as a term to describe a disciplinary measure or a form of punishment as seen in Regulation 15 discussed above.

83. The Special Rapporteur Report of the Human Rights Council on Torture and other Cruel and Inhuman Punishment usefully observed at paragraph 25 and 26 that:

> "25. There is no universally agreed upon definition of solitary confinement. The Istanbul Statement on the Use and Effects of Solitary Confinement defines solitary confinement as the physical isolation of individuals who are confined to their cells for 22 to 24 hours a day. In many jurisdictions, prisoners held in solitary confinement are allowed out of their cells for one hour of solitary exercise a day. Meaningful contact with other people is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, generally monotonous, and often not empathetic.

84. The Special Rapporteur Report observed that there are euphemisms for solitary confinement such as "segregation", "isolation", "separation", "cellular", "lockdown", "Supermax", "the

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(a) Indefinite solitary confinement;

(b) Prolonged solitary confinement;

(c) Placement of a prisoner in a dark or constantly lit cell;

(d) Corporal punishment or the reduction of a prisoner's diet or drinking water;

(e) Collective punishment……..

**Rule 44**

For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.

**Rule 45**

1. Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. It shall not be imposed by virtue of a prisoner's sentence.

2. The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures. The prohibition of the use of solitary confinement and similar measures in cases involving women and children, as referred to in other United Nations standards and norms in crime prevention and criminal justice, continues to apply.

hole" or "Secure Housing Unit (SHU)" All these terms can involve different factors. The Special Rapporteur defined solitary confinement as the physical and social isolation of individuals who are confined to their cells for 22 to 24 hours a day. Of particular concern to the Special Rapporteur is prolonged solitary confinement, which is defined as any period of solitary confinement in excess of 15 days.

85. It is indeed difficult to lay down any tariff on what will constitute prolonged solitary confinement and there is an arbitrary nature of the effort to establish a moment in time which an already harmful regime becomes prolonged and therefore unacceptably painful. He concludes that 15 days is the limit between "solitary confinement" and "prolonged solitary confinement" because at that point, according to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible.

86. A tariff on the number of the days spent in solitary confinement is however only a factor to be taken into account to determine whether there are adverse or inhuman effects of the confinement and does not amount on its face to a breach of the detainee's rights.

87. What is particularly instructive in this Report is the common physical and non-physical conditions of a prison regime which prevail in conditions of solitary confinement. Three broad categories are recognised: Physical conditions, the Prison regime and Social isolation.

88. It is useful to set out the observations verbatim:

> "**1. Physical conditions**
>
> 48. The principal physical conditions relevant to solitary confinement are cell size, presence of windows and light, and access to sanitary fixtures for personal hygiene. In practice, solitary confinement cells typically share some common features, including: location in a separate or remote part of the prison; small, or partially covered windows; sealed air quality; stark appearance and dull colours; toughened cardboard or other tamperproof furniture bolted to the floor; and small and barren exercise cages or yards (E/CN.4/2006/6/Add.3, para. 47). In some jurisdictions, prisoners in solitary confinement are held in leg irons and subjected to other physical restraints (A/HRC/13/39/Add.4, para. 76 (f)).

49. There is no universal instrument that specifies a minimum acceptable cell size, although domestic and regional jurisdictions have sometimes ruled on the matter. According to the European Court of Human Rights in *Ramírez Sanchez v. France*, a cell measuring 6.84 square metres is "large enough" for single occupancy. The Court did not elaborate on why such measures could be considered adequate; the Special Rapporteur respectfully begs to differ, especially if the single cell should also contain, at a minimum, toilet and washing facilities, bedding and a desk.

50. The presence of windows and light is also of critical importance to the adequate treatment of detainees in solitary confinement. Under rule 11 of the Standard Minimum Rules for the Treatment of Prisoners, there should be sufficient light to enable the detainee to work or read, and windows so constructed as to allow airflow whether or not artificial ventilation is provided. However, State practice reveals that this standard is often not met. For example, in Georgia, window-openings in solitary confinement cells were found to have steel sheets welded to the outside bars, which restricted light and ventilation (E/CN.4/2006/6/Add.3, para. 47). In Israel, solitary confinement cells are often lit with fluorescent bulbs as their only source of light, and they have no source of fresh air.

51. Rules 12 and 13 of the Standard Minimum Rules stipulate that detention facilities should provide sufficient sanitary fixtures to allow for the personal hygiene of the detainee. Therefore, cells used for solitary confinement should contain a lavatory and wash-basin within the cell. In its 2006 report on Greece, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment observed that isolation cells in the Komotini Prison failed to meet the necessary minimum standard for sanitary fixtures because detainees were forced to use the toilet for a wash-basin as well. Other environmental factors, such as temperature, noise level, privacy, and soft materials for cell furnishings may also be implicated in the solitary confinement setting.

**2. Prison regime**

52. The principal aspects of a prison regime relevant to an assessment of the conditions of solitary confinement include access to outdoor exercise and programming, access to meaningful human contact within the prison, and contact with the outside world. In accordance with rule 21 of the Standard Minimum Rules for the Treatment of Prisoners,

every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits. Similarly, the European Committee for the Prevention of Torture emphasizes that all prisoners without exception should be afforded the opportunity to have one hour of open-air exercise per day. However, State practice indicates that these standards are not always observed. In Jordan, for example, a detainee was allowed outside of his solitary confinement cell for only one hour per week (A/HRC/4/33/Add.3, appendix, para. 21). In *Poltrotsky v. Ukraine*, the European Court of Human Rights found that a lack of opportunity for outdoor exercise, coupled with a lack of access to natural light, constitutes a violation of article 3 of the European Convention on Human Rights.

53. Access to meaningful human contact within the prison and contact with the outside world are also essential to the psychological health of detainees held in solitary confinement, especially those held for prolonged periods of time. Within prisons this contact could be with health professionals, prison guards or other prisoners. Contact with the outside world could include visits, mail, and phone calls from legal counsel, family and friends, and access to reading material, television or radio. Article 17 of the International Covenant on Civil and Political Rights grants prisoners the right to family and correspondence. Additionally, the Standard Minimum Rules for the Treatment of Prisoners provide for various external stimuli books; 41 and 42 on religion; 71-76 on work; 77 and 78 on education and recreation; and 79-81 on social relations and after-care).

**3. Social isolation**

54. Solitary confinement reduces meaningful social contact to an absolute minimum. The level of social stimulus that results is insufficient for the individual to remain in a reasonable state of mental health.

55. Research shows that deprived of a sufficient level of social stimulation, individuals soon become incapable of maintaining an adequate state of alertness and attention to their environment. Indeed, even a few days of solitary confinement will shift an individual’s brain activity towards an abnormal pattern characteristic of stupor and delirium. Advancements in new technologies have made it possible to achieve indirect supervision and keep individuals under close surveillance with almost no human interaction. The

European Court of Human Rights has recognized that "complete sensory isolation, coupled with total social isolation, can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason."

89. In my view, in assessing the conditions under which B is being detained it would be useful to borrow these three broad headings of the physical conditions, the facilities regime and the social interaction to determine the extent to which B is in fact in solitary confinement or if so whether it amounts to the minimum level of severity to amount to cruel and unusual treatment.

**The international rules-based framework**

90. The international framework governing the rights of the child specifically prohibit the solitary confinement of children. The United Nation Convention on the Rights of the Child (UNCRC), the Riyadh Guidelines and the Beijing Rules which all provide universal protection for children specifically set out a number of safeguards for juvenile detainees.

The United Nation Convention on the Rights of the Child ("UNCRC")

91. Article 37 of the UNCRC provides:

"**Article 37**

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall 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 his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do

so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

92. At paragraph 89 in General Comment 10, the United Nations (UN) Committee on the Rights of the Child emphasized that, inter alia, the following principles and rules need to be observed in all cases of deprivation of liberty:

"– Children should be provided with a physical environment and accommodations which are in keeping with the rehabilitative aims of residential placement, and due regard must be given to their needs for privacy, sensory stimuli, opportunities to associate with their peers, and to participate in sports, physical exercise, in arts, and leisure time activities;

– Every child of compulsory school age has the right to education suited to his/her needs and abilities, and designed to prepare him/her for return to society; in addition, every child should, when appropriate, receive vocational training in occupations likely to prepare him/her for future employment;
– Every child has the right to be examined by a physician upon admission to the detention/correctional facility and shall receive adequate medical care throughout his/her stay in the facility, which should be provided, where possible, by health facilities and services of the community;
– The staff of the facility should promote and facilitate frequent contacts of the child with the wider community, including communications with his/her family, friends and other persons or representatives of reputable outside organizations, and the opportunity to visit his/her home and family;
– Restraint or force can be used only when the child poses an imminent threat of injury to him or herself or others, and only when all other means of control have been exhausted. The use of restraint or force, including physical, mechanical and medical restraints, should be under close and direct control of a medical and/or psychological

professional. It must never be used as a means of punishment. Staff of the facility should receive training on the applicable standards and members of the staff who use restraint or force in violation of the rules and standards should be punished appropriately;

- Any disciplinary measure must be consistent with upholding the inherent dignity of the juvenile and the fundamental objectives of institutional care; disciplinary measures in violation of article 37 of CRC must be strictly forbidden, including corporal punishment, placement in a dark cell, closed or solitary confinement, or any other punishment that may compromise the physical or mental health or well-being of the child concerned;
- Every child should have the right to make requests or complaints, without censorship as to the substance, to the central administration, the judicial authority or other proper independent authority, and to be informed of the response without delay; children need to know about and have easy access to these mechanisms;
- Independent and qualified inspectors should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative; they should place special emphasis on holding conversations with children in the facilities, in a confidential setting."

93. Importantly from this comment in relation to children in detention, the Committee was keen to survey the physical conditions in which children are accommodated, the education needs of the child, his health and well-being, the staff of the facility, the appropriate disciplinary regime and a complaints and independent review system.

<u>The UN Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules).</u>

94. Rule 67 of the Havana Rules provides:

> "67. **All disciplinary measures** constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or **solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned**. The reduction of diet and the restriction or denial of contact with family members should be prohibited for any purpose. Labour should always be viewed as an educational tool and a means of promoting the self-respect of the

juvenile in preparing him or her for return to the community and should not be imposed as a disciplinary sanction. No juvenile should be sanctioned more than once for the same disciplinary infraction. Collective sanctions should be prohibited."

95. Rule 12 provides:

"12. The deprivation of liberty should be effected in conditions and circumstances which ensure respect for the human rights of juveniles. Juveniles detained in facilities should be guaranteed the benefit of meaningful activities and programmes which would serve to promote and sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society."

96. Rule 28-33 provides:

"28. The detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations. The principal criterion for the separation of different categories of juveniles deprived of their liberty should be the provision of the type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and well-being.

29. In all detention facilities juveniles should be separated from adults, unless they are members of the same family. Under controlled conditions, juveniles may be brought together with carefully selected adults as part of a special programme that has been shown to be beneficial for the juveniles concerned.

30. Open detention facilities for juveniles should be established. Open detention facilities are those with no or minimal security measures. The population in such detention facilities should be as small as possible. The number of juveniles detained in closed facilities should be small enough to enable individualized treatment. Detention facilities for juveniles should be decentralized and of such size as to facilitate access and contact between the juveniles and their families. Small-scale detention facilities should be established and integrated into the social, economic and cultural environment of the community.

31. Juveniles deprived of their liberty have the right to facilities and services that meet all the requirements of health and human dignity.

32. The design of detention facilities for juveniles and the physical environment should be in keeping with the rehabilitative aim of residential treatment, with due regard to the need of the juvenile for privacy, sensory stimuli, opportunities for association with peers and participation in sports, physical exercise and leisure-time activities. The design and structure of juvenile detention facilities should be such as to minimize the risk of fire and to ensure safe evacuation from the premises. There should be an effective alarm system in case of fire, as well as formal and drilled procedures to ensure the safety of the juveniles. Detention facilities should not be located in areas where there are known health or other hazards or risks.

33. Sleeping accommodation should normally consist of small group dormitories or individual bedrooms, while bearing in mind local standards. During sleeping hours there should be regular, unobtrusive supervision of all sleeping areas, including individual rooms and group dormitories, in order to ensure the protection of each juvenile. Every juvenile should, in accordance with local or national standards, be provided with separate and sufficient bedding, which should be clean when issued, kept in good order and changed often enough to ensure cleanliness."

97. Rule 47 provides:

"47. Every juvenile should have the right to a suitable amount of time for daily free exercise, in the open air whenever weather permits, during which time appropriate recreational and physical training should normally be provided. Adequate space, installations and equipment should be provided for these activities. Every juvenile should have additional time for daily leisure activities, part of which should be devoted, if the juvenile so wishes, to arts and crafts skill development. The detention facility should ensure that each juvenile is physically able to participate in the available programmes of physical education. Remedial physical education and therapy should be offered, under medical supervision, to juveniles needing it."

98. Rules 59-60 provide:

"59. Every means should be provided to ensure that juveniles have adequate communication with the outside world, which is an integral part of the right to fair and humane treatment and is essential to the preparation of juveniles for their return to society. Juveniles should be allowed to communicate with their families, friends and other persons or representatives of reputable outside organizations, to leave detention facilities for a visit to their home and family and to receive special permission to leave the detention facility for educational, vocational or other important reasons. Should the juvenile be serving a sentence, the time spent outside a detention facility should be counted as part of the period of sentence.

60. Every juvenile should have the right to receive regular and frequent visits, in principle once a week and not less than once a month, in circumstances that respect the need of the juvenile for privacy, contact and unrestricted communication with the family and the defence counsel."

99. Rule 87 provides:

"87. In the performance of their duties, personnel of detention facilities should respect and protect the human dignity and fundamental human rights of all juveniles, in particular, as follows:

(a) No member of the detention facility or institutional personnel may inflict, instigate or tolerate any act of torture or any form of harsh, cruel, inhuman or degrading treatment, punishment, correction or discipline under any pretext or circumstance whatsoever;
(b) All personnel should rigorously oppose and combat any act of corruption, reporting it without delay to the competent authorities;
(c) All personnel should respect the present Rules. Personnel who have reason to believe that a serious violation of the present Rules has occurred or is about to occur should report the matter to their superior authorities or organs vested with reviewing or remedial power;
(d) All personnel should ensure the full protection of the physical and mental health of juveniles, including protection from physical, sexual and emotional abuse and

exploitation, and should take immediate action to secure medical attention whenever required;

(e) All personnel should respect the right of the juvenile to privacy, and, in particular, should safeguard all confidential matters concerning juveniles or their families learned as a result of their professional capacity;

(f) All personnel should seek to minimize any differences between life inside and outside the detention facility which tend to lessen due respect for the dignity of juveniles as human beings."

100. The Havana Rules prohibit solitary confinement as a form of punishment and in particular, it prohibits such punishment which may compromise the physical or mental health of the juvenile concerned. It sets out obligations to carefully take into account, the particular and individual needs of the child, considerations for the physical condition and design of the facilities, the child's health and well-being and his ability to access the wider world.

The UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)

101. Rule 13 of the Beijing Rules provides:

"**13. Detention pending trial**

13.1 Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.

13.2 Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.

13.3 Juveniles under detention pending trial shall be entitled to all rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations.

13.4 Juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.

13.5 While in custody, juveniles shall receive care, protection and all necessary individual assistance-social, educational, vocational, psychological, medical and physical-that they may require in view of their age, sex and personality."

The UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)

102. Importantly Rule 10 of the Riyadh guidelines provides for the socialisation of the child:

> "**IV. SOCIALIZATION PROCESSES**
>
> 10. Emphasis should be placed on preventive policies facilitating the successful socialization and integration of all children and young persons, in particular through the family, the community, peer groups, schools, vocational training and the world of work, as well as through voluntary organizations. Due respect should be given to the proper personal development of children and young persons, and they should be accepted as full and equal partners in socialization and integration processes."

103. This international framework therefore places emphasis for the child's protection during detention which includes the absence of solitary confinement as a form of punishment. It promotes meaningful interaction of the child with others including his peers. It emphasizes that juveniles in detention need special care and the treatment must be responsive to their individual idiosyncrasies, their educational and health needs (both physical and mental), their physical environment and the infrastructure and staffing regime which should be accommodating and sufficient to stimulate the child. Such conditions are the antitheses of solitary confinement within the limited historical meaning and indeed of conditions of solitary confinement which will have a negative and adverse impact on the child.

104. Another fundamental principle established by international norms which will guide the Court in making an assessment of the conditions in which a child is detained and in its general approach to treat with cases in which juvenile offenders are concerned, is the "best interest principle".

**The "best interest" principle**

105. Article 3 of the Conventions on the Rights of the Child states:

> "***Article 3***
>
> 1. **In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or**

**legislative bodies, the best interests of the child shall be a primary consideration**.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."

106. In dealing with this question of the legality of the conditions at the residence for B, whether he is in solitary confinement or in such confinement as to amount to cruel and unusual punishment, the Court must give due regard to the best interest of the child. The concept was born from international norms and codified in human rights jurisprudence.

107. The "best interest" principle was recently summarised and neatly explained by our Court of Appeal by Jamadar JA in **SS v Her Worship Magistrate Ayer-Caesar, Sterling Stewart the Commissioner of Prisons, The Attorney General of Trinidad and Tobago**, Civil Appeal No. S 244 of 2015. I prefer Jamadar JA's indigenous summation of this salutary principle of the rights of the child and repeat it verbatim:

> "59. In fact, in constitutional proceedings affecting minors, the best interests of the child principle must be a primary consideration. Further, the best interests' principle operates as both a substantive right and as an interpretative device. Thus, in regard to the latter, where a legal provision is open to more than one interpretation, courts of law are compelled to choose the interpretation that most effectively supports the best interests' principle. Furthermore, the best interests principle, consistent with the due process requirements of procedural fairness, must be applied at all stages of proceedings (indeed even prior to and post formal legal proceedings). Thus, the best interests' principle adds a further layer of consideration to the interpretation and application of the law where it impacts on minors.
>
> 60. To say that the best interests of a minor shall be a primary consideration means that those interests must be given primacy where there are other equally competing interests.

To determine this, a two-stage process ought to be followed: first, determine what is in the best interests of the minor (as an independent question); and second, determine whether these best interests are in conflict with other competing interests and if so, whether they are outweighed by those other competing interests. This is obviously a balancing exercise to be assessed in all the circumstances of the case.

61. In determining the best interests of the minor, regard must be had to the specific circumstances of the minor, including age, maturity, vulnerabilities, needs and even preferences. Also, regard must be had to the international and local rights and interests of minors that are recognized and protected; as these form as it were, the content of the rights of minors and so must inform any best interests' analysis. A four quadrant analysis is suggested. First, determine the interior-individual features of the minor (such as his/her attitudes, values, preferences, mental and psychological states etc.). Second, determine the external-individual characteristics of the minor (such as his/her behavioural patterns and character traits etc.). Third, determine the existing cultural norms, values and attitudes that are relevant to the issue at hand (including legal, sociological and historical factors etc.). Fourth, determine the existing societal infrastructure, institutions and amenities relevant to the issue at hand (including the existence of appropriate facilities and support personnel etc.). This internal-individual, external-individual, internal-societal and external-societal framework is a suggested practical means to get a 360º assessment of all relevant considerations before determining the best interests of a minor."

108. Recently in the sentimental case of **Constance Yates and Christopher Gard v Great Ormand Street Hospital For Children NHS Foundation Trust and Charles Gard (a child by his guardian)** [2017] EWCA Civ 410 the Court had to consider whether having a baby undergo experimental treatment in speculative conditions was in his best interest. On the one hand, obtaining the treatment held out hope for life. On the other hand, trying to obtain such treatment may have had a negative effect on him and increased his pain and suffering. A difficult choice. The Court observed:

"As the authorities to which I have already made reference underline again and again, the sole principle is that the best interests of the child must prevail and that must apply even to cases where parents, for the best of motives, hold on to some alternative view."

The Supreme Court, thereafter, refused permission to the parents to appeal against the order of the Court of Appeal.

109. Whether the conditions at the residence for B is cruel and inhuman must be examined through the "best interest principle."

110. Solitary confinement is not in and of itself tantamount to cruel and unusual punishment. Solitary confinement in and of itself is not actionable. There may be legitimate reasons to confine a detainee for his protection, for his health and wellbeing and to protect other inmates. These are legitimate objectives. Arguably, an inmate removed to sick bay is in solitary confinement. An inmate quarantined with an infectious disease is in solitary confinement. An uncontrollable inmate that poses a threat to others needing special management is in solitary confinement. None of this of itself without any attendant degrading inhuman treatment would amount to a breach of B's constitutional rights or breach of any policy to not punish children with conditions of solitary confinement.

111. What then is required is an analysis of all the conditions in which the child is detained? This analysis must be done through the prism of the "best interests of the child". The Court must strive in that analysis to obtain a 360° picture of the child, his surroundings and his well-being. The Court should therefore determine two matters. First, what is in the best interests of the minor? In doing so, the Court adopts a 360° assessment examining the internal-individual, external-individual, internal-societal and external-societal framework. Second, determine whether these best interests are in conflict with other competing interests and if so, whether they are outweighed by those other competing interests. This is a balancing exercise to be assessed in all the circumstances of the case.

112. Before such an assessment is conducted, it would be useful to extrapolate the principles which will guide a Court in making a determination whether a child is in solitary confinement and in cruel and unusual conditions of detention.

**Cruel and Unusual Treatment or Punishment**

113. Our Courts have examined the obligation of the State in relation to this constitutional right. What constitutes cruel and unusual punishment varies from cases to cases. Usefully, the

following judgments assist in understanding what constitutes cruel and unusual treatment or punishment.

114. In **Thomas v Baptiste** [2000] 2 AC 1 the applicants were detained in cramped and foul smelling cells, deprived of exercise or access to open air for long periods of times and were handcuffed when they were allowed to exercise in the fresh air. In the Court of Appeal, de la Bastide CJ found that the conditions did not amount to cruel and unusual treatment or punishment. Lord Millett, in delivering the judgment in the Privy Council made the following observations:

> "In their Lordships view, the question for consideration is whether the conditions in which the applicants were kept involved so much pain and suffering or such deprivation of the elementary necessities of life that they amounted to treatment which went beyond the harsh and could properly be described as cruel and unusual. Prison conditions in third world countries often fall lamentably short of the minimum which would be acceptable in more affluent countries. It would not serve the cause of human rights to set such demanding standards that breaches were commonplace. Whether or not the conditions in which the applicants were kept amounted to cruel and unusual treatment is a value judgment in which it is necessary to take account of local conditions both in and outside prison. Their Lordships do not wish to seem to minimise the appalling conditions which the applicants endured. As the Court of Appeal emphasised, they were and are completely unacceptable in a civilised society. But their Lordships would be slow to depart from the careful assessment of the Court of Appeal that they did not amount to cruel and unusual treatment."

115. In **Pretty v United Kingdom** (2002) ECHR 2346/02 the Court in commenting on Article 3 of the ECHR noted at paragraph 52:

> "As regards the types of "treatment" which fall within the scope of art 3 of the Convention, the Court's case-law refers to "ill-treatment" that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering (see Ireland v United Kingdom [1978] ECHR 5310/71 at para 167; V v United Kingdom [1999] ECHR 24888/94 at para 71). Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or

inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of art 3…"[42]

116. In **Ahmad v United Kingdom** (2013) 56 EHRR 1, the Court recognised that complete sensory isolation together with total social isolation can destroy the personality of an individual and constitutes a form of inhuman treatment. The Court further went on to note that whether isolation of an individual falls within the ambit of Art. 3 of the ECHR depends on "the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned".

117. The inquiry undoubtedly is fact sensitive. Other cases are merely working examples of applying a fixed principle.

**Solitary confinement-examples and principles**

118. Notwithstanding the Claimant's submission that there is no precedent to guide the Court, the Court was supplied with a number of cases in which the issue of solitary confinement was analysed against the backdrop of their unique facts. From these, together with the "best interest" principles, a useful guideline can be extricated to guide the Court's assessment of B's conditions mindful of course of the fact sensitive exercise.

119. In my view, from an examination of the cases that follow, solitary confinement has been treated as a species of cruel and inhuman punishment. A summary of the applicable principles which will guide a Court in making a determination as to whether conditions of solitary confinement are indeed actionable or a breach of fundamental rights are as follows:

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[42] The International Covenant on Civil and Political Rights ( "ICCPR")

Article 7 of the ICCPR provides:

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

The Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment

The UN Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment states at paragraph 77 of his report of 5th August 2011 that:

> "……..the Special Rapporteur holds the view that the imposition of solitary confinement, of any duration, on juveniles is cruel, inhuman or degrading treatment and violates article 7 of the International Covenant on Civil and Political Rights and article 16 of the Convention against Torture."

(a) That there is a level of sustained segregation of a prisoner without contact with other human beings.

(b) The longer the segregation, the greater the likelihood of detention violation of the fundamental right. A short period of confinement may be actionable depending on the other conditions associated with it.

(c) Whether the ill treatment has reached the minimum level of severity depends upon the age of the prisoner and other circumstances unique to the individual.

(d) Account must be taken of the fact that all confinement entails some element of distress, frustration and humiliation which will impact upon the prisoner's mental state and well - being.

(e) The degree to which the prisoner is deprived of mental stimulation.

(f) Whether the confinement is a means to degrade or denigrate the prisoner.

(g) The impact on the prisoner's mental health.

(h) Every case is fact sensitive.

120. On the question of principles applicable in determining whether treatment amounts to cruel and inhuman punishment, in **R (On the application of N) v Secretary of State for Home Department** [2003] EWHC 207 Admin Silber J observed that for the purposes of Article 3 of the ECHR there were a number of relevant established principles determined by the Strasbourg Court. In this case the Claimant submitted that B is confined at the facility for 22 hours or more a day without meaningful contact with persons and consequently it satisfies Rule 44 of the Mandela Rules on the definition of solitary confinement. The Claimant further contended that the main source of B's distress is his isolation which is having a negative impact on him because he is suffering from a "crushing and desperate loneliness which has prompted him to consider taking his own life."

121. The principles considered were:

"(i) the prohibition contained in it is an absolute one, permitting of "no qualification or excuse" (R. (Wilkinson) v. MRO Broadmoor Hospital [2002] 1 WLR 419 [77]).

(ii) "ill-treatment must attain a minimal level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental aspects and, in some circumstances, the sex, age and state of health of the victim" (A v. United Kingdom (1998) 27 EHRR 611 [20])

(iii) in determining whether treatment is "degrading" within the meaning of Article 3, the Court has to have regard to whether its objective is to humiliate and deface the person concerned as that is a factor to be taken into account, but the absence of any such intention "cannot conclusively rule out a violation of Article 3" (Peers v. Greece (2002) 33 EHRR 51 [74])

(iv) treatment can be described as "inhuman" if it "causes intense physical or mental suffering" (Ireland v. United Kingdom (1978) 2 EHRR 25)

(v) the facts constituting violation must be proved beyond a reasonable doubt, but it may be proved by inferences or unrebutted presumptions of fact" (Ireland v. United Kingdom (1978) 2 EHRR 25 [161])

(vi) the "uncertainty, doubt and apprehension" experienced by a close relative of a disappeared person must only reach the minimum level of severity to constitute inhuman treatment (Kurt v. Turkey (1998) 27 EHRR 373 [130 to 134])

(vii) deterioration in the mental health of a person is capable of constituting inhuman or degrading treatment if it reaches the appropriate level of severity. In Aerts v Belgium (2000) 29 EHRR 50, the European Court did not uphold a finding by the Commission of an Article 3 breach because of the acute anxiety caused by the claimant's conditions or detention expressly on the basis that "there is no proof of deterioration of [the claimant's] mental health"

(viii) the test to be applied before finding a breach of Article 3 is becoming stricter, and significantly the Strasbourg Court has observed that:-

> "having regard to the fact that the Convention is a "living instrument which must be interpreted in the light of present day conditions the Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly

high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably, requires greater firmness in assessing breaches of the fundamental values of democratic societies" (Selmuni v. France (2000) 29 EHRR 403 [101]).

(ix) the kinds of ill-treatment which fall within the scope of Article 3 are very serious as "the [Strasbourg] Court's case law refers to ill-treatment that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering" (Pretty v. United Kingdom (2002) 35 EHRR 1 [52] with my emphasis added)."[43]

122. He further noted three important conclusions about Article 3. First, Article 3 is only engaged where there is so serious a case of inhuman treatment that, it is incapable of being justified by the State as being in accordance with law and necessary in a democratic society in the interests of national security, public safety or for the well-being of the country, or for the prevention of disorder or crime, for the protection of health or morals or for the protection of rights and freedoms of others. Second, in order to ascertain if inhuman or degrading treatment reaches that threshold entails considering all the circumstances of the alleged inhuman treatment, such as the nature and context of the treatment, its duration, and its physical and mental aspects. There is no need for a Claimant to show an intention by the State to achieve that end. In considering all the circumstances, it is necessary for a balancing operation to be conducted in relation to all elements of the treatment accorded to the Claimant to determine whether the treatment complained of reaches the requisite threshold. Third, the focus of the inquiry has to be substantially but not exclusively on the nature of the treatment suffered by the Claimant shows the significance of the treatment rather than the consequences for the Claimant.

123. The locus classicus on actionable solitary confinement is **Ahmad v United Kingdom (2013)** 56 EHRR 1[44]. In this case the applicants were indicted on a number of charges of terrorism in the USA. Due to this, the USA sought extradition of the 6 applicants from the UK. If convicted, the applicants were faced with the prospect of being imprisoned in ADX Florence

[43] **R (On the application of N) v Secretary of State for Home Department** [2003] EWHC 207, paragraph 81.
[44] Paragraphs 205-212 of the judgment.

which was known as a "supermax prison" with very limited freedoms. The Court held that, among other things, that there would not be a violation of Article 3 of the applicants were extradited to ADX. However, when considering the issue if solitary confinement that Court sets out the following principles as follows:

(i) That complete sensory isolation, coupled with social isolation, can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason.

(ii) That other forms of solitary confinement which fall short of complete sensory isolation may also amount to torture, inhuman or degrading treatment or punishment.

(iii) That all forms of solitary confinement without appropriate mental and physical stimulation are likely in the long term to have damaging effects, resulting in the deterioration of mental faculties and social abilities.

(iv) The prohibition of contact with other prisoners for disciplinary or protective reasons does not by itself amount to inhuman treatment or punishment.

(v) Whilst prolonged removal from association with others is undesirable, whether such measure falls within the ambit of torture, inhuman or degrading treatment or punishment, depends on the particular conditions and stringency of the measure, its duration, the objective pursued and its effects on the person concerned.

124. A number of authorities before the European Court of Human Rights (ECHR) saw a range on conditions which either did or did not meet the threshold of the minimum level of severity. Bearing in mind of course that none of these cases are binding but simply demonstrate a range of circumstances in which the question of actionable solitary confinement may arise.

125. In **Keenan v United Kingdom** (2001) 33 EHRR 38, a relatively short period of segregation was imposed on the prisoner concerned: 7 days segregation plus an additional 28 days to his sentence imposed 9 days before his expected date of release. However, when combined with the other circumstances of the case, including what the Court found to be the lack of effective monitoring of his condition and the lack of informed psychiatric assessment and treatment, which disclosed significant defects in the medical care provided to a mentally ill person known

to be a suicide risk, this led to a finding that there had been inhuman and degrading treatment and punishment, contrary to Art 3, on the facts of that case.

126. In **Öcalan v Turkey** [GC] NO 46221/99, 196, 12 May 2005 it was held that social isolation of the applicant (who was the sole inmate at Imrah Prison) for six years did not reach the minimum level of severity required to constitute inhuman or degrading treatment within Article 3 of the ECHR. The Court noted at paragraph 194 that while the Applicant's only contact was with the prison staff, he still has books, newspapers and a radio and even though he does not have access to television programmes or a telephone he does communicate with the world by letter. Further, he also saw a doctor every day and his lawyers and family members once a week.

127. In **Rohde v Denmark** (2005) the Applicant was in isolation for eleven months and fourteen days and in determining whether his isolation was excessive, the ECHR took into account the following conditions at paragraph 97:

> "The applicant was detained in a cell which had an area of about eight square metres and in which there was a television. Also, he had access to newspapers. He was totally excluded from association with other inmates, but during the day he had regular contact with prison staff, e.g. when food was delivered; when he made use of the outdoor exercise option or the fitness room; when he borrowed books in the library or bought goods in the shop. In addition, every week he received lessons in English and French from the prison teacher and he visited the prison chaplain. Also, every week he received a visit from his counsel. Furthermore, during the segregation period in solitary confinement the applicant had contact twelve times with a welfare worker; and he was attended to thirty-two times by a physiotherapist, twenty-seven times by a doctor; and forty-three times by a nurse. Visits from the applicant's family and friends were allowed under supervision. The applicant's mother visited the applicant approximately one hour every week. In the beginning friends came along with her, up to five persons at a time, but the police eventually limited the visits to two persons at a time in order to be able to check that the conversations did not concern the charge against the applicant. Also, the applicant's father along with a cousin visited the applicant every two weeks."

The Court found that in the above circumstances, the period of solitary confinement did not contravene Article 3 of the Convention.

128. In **Shahid v Scottish Ministers** [2015] UKSC 58 the Appellant was convicted with his two accused for the racially aggravated and abduction of a 15 year old boy from a public street. The boy was repeatedly stabbed then set alight with petrol. The Appellant was extradited from Pakistan to Scotland to stand trial and on 6th October 2005 was remanded into custody pending his trial. On 7th October 2005 he was placed in solitary confinement. He remained in segregation for almost 5 years until 13th August 2010. After subjecting the facts to rigorous examination, Lord Reed concluded that the Claimant in that case had not been subjected to treatment which breached Art 3. This was despite the fact that he was kept in segregation for two periods of 11 months and 45 months, amounting to a total of 56 months, which was exceptional by the standards of prisons in the United Kingdom. There were also aspects in which his conditions might have been improved, in particular by making greater provision for the pursuit of purposeful activities. Furthermore, Lord Reed was of the view that the procedural protections available were not as effective as they should have been, particularly as a result of the prolonged delay in obtaining legal aid: see para. 37. Nevertheless he concluded in the same paragraph that comparison with such cases as *Ramirez-Sanchez*, where the applicant was held for 8 years in solitary confinement, under much more stringent conditions, indicates that segregation of the duration experienced by Mr Shahid, under the conditions in which he was held, did not entail a violation of Art 3.

129. The Court found that the treatment of the Appellant did not meet the minimum level of severity required for a violation of Art 3. Indeed being in solitary confinement is not in and of itself actionable. The Court noted the following at paragraphs 32-3

> "**[32]** In the present case, it is accepted that the conditions of the appellant's segregation were not such as in themselves to breach art 3. The space and layout of the cells were satisfactory, and there was integral sanitation, although it was not screened. Although a report lodged on behalf of the appellant concluded that the ventilation in the relevant segregation units (including the one at HMP Barlinnie) fell short of accepted standards, and that the level of natural light also fell below desirable standards, that view might be contrasted with the report by the European Committee for the Prevention of Torture

and Inhuman or Degrading Treatment or Punishment ("CPT"), following a visit to Barlinnie in 2012, that the cells in the segregation unit had adequate lighting, including access to natural light, and adequate ventilation (Report to the Government of the United Kingdom on the Visit to the United Kingdom carried out from 17 to 28 September 2012). On any view, the conditions were compatible with respect for the appellant's human dignity, and adequate to secure his health and well-being.

**[33]** It is also accepted that the measures imposed on the appellant did not in themselves breach art 3. Although the regime prevented contact with the general prison population, it did not involve the appellant's total isolation from other prisoners or from other human contacts. He was confined to his cell for between 20 and 22 hours per day. He was permitted to associate with other prisoners at times when he was released from his cell. He generally had access to one hour of exercise per day in the segregation unit yard. He often had access, for about an hour at a time, to a gym located in the segregation unit. He was entitled to receive visits and to use prison telephones. He had daily access to showers and newspapers. He occasionally had his hair cut. He was occasionally visited by an Imam. He occasionally attended court. After March 2008 all the cells in which he was accommodated had electric power, and a television was provided. Prior to that date, he was provided with a battery powered television in his cell. The impression conveyed by the documentation is that the staff of the various segregation units generally did their best to treat him as well as they could within the restrictions inherent in the r 94 regime. On the other hand, no work or other occupation was provided or permitted in his cell, and education courses were not generally available. He was not permitted to attend religious services, although from May 2009 he attended a class for Muslim prisoners at HMP Glenochil."

130. In **R (Bourgass and Hussain) v Secretary of State for Justice** [2016] AC 384, the Claimant was segregated by order of the prison governor under 45(1) of the Prison Rules 1999 for reasons of good order and discipline. After 72 hours, each of the Claimants segregation was reviewed by a segregation review board, a non-statutory document issued by the Secretary of State which provided for internal reviews by a committee chaired by a senior officer within the prison to whom the Secretary of State purported to delegate his power under rule 45(2), as

substituted, to authorise continued segregation for more than 72 hours. This continued for several months until the Claimants were transferred to another prison. The Claimants contended that the continued segregation violated under article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and of their common law rights to procedural fairness. Bourgass segregation consisted of him being locked in his cell for 23 hours a day, denied association with other prisoners and allowed out of his cell for exercise. He was unable to participate in activities which involved other prisoners such as work, education and communal religious services. Hussain's segregation was similar to Bourgass. He was allowed to make a telephone call once every three days but he did not have a television. The Court noted at paragraph 125 that "The critical question is whether the prisoner's continued segregation is justified having regard to all the relevant circumstances. Those will include the reasonableness of any apprehension that his continued association with other prisoners might lead to a breakdown in good order and discipline within the prison; the suitability of available alternatives; the potential consequences to the prisoner if authorisation is granted; and the potential consequences to others if it is not."

131. It was held that the Claimants segregation had been taken without lawful authority and that their segregation beyond the initial 72 hours was not authorised by the Secretary of State and was therefore unlawful.

132. In **R (on the Application of Dennehy) v Secretary of State for Justice and Another** [2016] EWHC 1219 (Admin) presented quite an interesting case where the Claimant like B is in a unique position. The Claimant was one of only two women in the jurisdiction subjected to a life order for murder, life imprisonment for two offences of attempted murder and two concurrent determinate sentences of 12 years imprisonment for offences of preventing burial. Her victims were all men. The Claimant was segregated since 19th September 2013 when she was still in remand but she contended that her segregation between 21st September 2013 and 4th September 2015 was unlawful because it was not authorized by the Secretary of State. The Court found that the Claimant's segregation did not breach Art 3 of the ECHR. From the principles discussed in that case the Court considered the conditions of the Claimant under the discrete heads of the intention of the detention, the ability to socialise, the monitoring

mechanism, the legitimate aim or purpose of the confinement and the review of the confinement. Singh J noted at paragraphs 122-125 and 127-128.

> "**[122]** First, there is no suggestion that the Claimant has been kept in segregation with the intention of debasing or humiliating her; nor any suggestion that the measure was calculated to break her resistance or will. There has been no element of premeditation in the sense used by the European Court of Human Rights.
>
> **[123]** Secondly, the segregation regime has not amounted to total solitary confinement and has been modified as conditions have permitted. For example, the Claimant has been permitted to communicate with some other people; has been able to do some work as an orderly and has had access to facilities such as a library and a gym.
>
> **[124]** Thirdly, although the Claimant suffers from a mental disorder, the impact of segregation on her health has been monitored by professionals, including psychologists, and it has been certified that she can continue to be kept in that environment at all relevant times.
>
> **[125]** Fourthly, the Claimant's segregation has at all material times had a legitimate aim and has not been imposed for arbitrary reasons. The reality is that the Claimant is in an almost unique position in the prisons of this country. She poses an exceptionally high risk to others, including other prisoners. This is not to say that the Claimant's segregation can be indefinite but that is not what the Second Defendant has sought to do. Rather the evidence before this Court makes it clear that reasonable efforts have been made to facilitate the Claimant's ability to move to another environment within the prison estate but only in a safe and structured way.
>
> ……
>
> **[127]** Fifthly, the need for the Claimant's continued segregation has been kept under review on a regular basis both by the Second Defendant and by the First Defendant. Those authorities have concluded, in their professional judgment, which is based on extensive experience of prisons, that her continued segregation is necessary. The reasons for those conclusions have been explained to the Court in evidence which is before me and which I have summarised earlier.
>
> **[128]** Finally, the Claimant has had access to an independent judicial authority, namely this Court, which has been able to assess the continuing need for her segregation. On the

evidence before this Court I am satisfied that that need has been demonstrated by the Defendants."

133. The Court also noted the following[45] that in the context of ill-treatment of prisoners, the following factors, among others, have been decisive in the Court's conclusion that there has been a violation of Art 3:

> "• the presence of premeditation;
> • that the measure may have been calculated to break the applicant's resistance or will;
> • an intention to debase or humiliate an applicant, or, if there was no such intention, the fact that the measure was implemented in a manner which nonetheless caused feelings of fear, anguish or inferiority;
> • the absence of any specific justification for the measure imposed;
> • the arbitrary punitive nature of the measure;
> • the length of time for which the measure was imposed; and
> • the fact that there has been a degree of distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. …"

134. At paragraph 108, the Court relied on paragraph 211 of **Ahmad** where the Court said:

> "Equally, although it is not for the Court to specify which security measures may be applied to prisoners, it has been particularly attentive to restrictions which apply to prisoners who are not dangerous or disorderly; to restrictions which cannot be reasonably related to the purported objective of isolation; and to restrictions which remain in place after the applicant has been assessed as no longer posing a security risk."

135. The Court advocated for a thoughtful and careful approach when it came to making the decision to detain in solitary confinement and relied on paragraph 212 of **Ahmad** where the Court noted:

> "Finally, in order to avoid any risk of arbitrariness resulting from a decision to place a prisoner in solitary confinement, the decision must be accompanied by procedural safeguards guaranteeing the prisoner's welfare and the proportionality of the measure. First,

[45] **R (on the Application of Dennehy) v Secretary of State for Justice and Another** [2016] EWHC 1219 (Admin), paragraph 100.

solitary confinement measures should be ordered only exceptionally and after every precaution has been taken, as specified in para. 53.1 of the European Prison Rules. Secondly, the decision imposing solitary confinement must be based on genuine grounds both *ab initio* as well as when its duration is extended. Thirdly, the authorities' decisions should make it possible to establish that they have carried out an assessment of the situation that takes into account the prisoner's circumstances, situation and behaviour and must provide substantive reasons in their support. The statement of reasons should be increasingly detailed and compelling as time goes by. Fourthly, a system of regular monitoring of the prisoner's physical and mental condition should also be put in place in order to ensure that the solitary confinement measures remain appropriate in the circumstances. Lastly, it is essential that a prisoner should be able to have an independent judicial authority review the merits of and reasons for a prolonged measure of solitary confinement."

136. In **V.Q and others v Onondaga County Sheriff and others** 2017 WL 696808 22 February 2017 putative class action was brought on behalf of all the 16 and 17 year old inmates incarcerated at county justice centre alleging that the Defendants' routine imposition of solitary confinement on juveniles at the justice center violated the Eight and Fourteenth Amendments and that the juveniles in solitary confinement were being denied the minimum educational instruction guaranteed by State law in violation of the Fourteenth Amendment. The District Judge accepted that the plaintiffs had demonstrated that the "juveniles face an objectively sufficiently serious risk of harm from the solitary confinement practices at the Justice Center" and that the defendants were "specifically aware of" and have consciously chosen to disregard, the serious risk of harm posed by the Justice Center's solitary confinement practices as they relate to juveniles. The District Judge further accepted that the Onondaga County defendants' "continued use of solitary confinement on juveniles puts them at serious risk of short- and long-term psychological damage, and that the related deprivation of education services by both defendants hinders important aspects of their adolescent development."

137. In **AB and others v The Secretary of State for Justice and others** [2017] EWHC 1694 (Admin) the Claimant, a 16 year old boy, who was serving a 12 month Detention and Training Order in Feltham Young Offender Association was removed from association as a result of his

challenging behaviour. The Claimant's attorneys contended that his removal from association amounted to "solitary confinement" and "prolonged solitary confinement." The Claimant suffered a difficult childhood, suffered from emotional and physical abuse, witnessed domestic violence between his parents, was held hostage by his father when he was 5 years old, has been diagnosed with post-traumatic stress disorder (PTSD), Conduct Disorder and Attention Deficit Hyperactivity Disorder (ADHD). He has had a series of convictions. At the Cookwood YOI he displayed abusive, aggressive and threatening behaviour to the staff and inmates and upon his arrival at Feltham YOI he was put on "single lock" which meant that he could not leave his room when the other detainees were out of their cells. The Court found that there was justification for AB's removal from association which was to initially to protect officers, then to protect officers from AB and AB from inmates whose anger he aroused by his shouting abuse, sexual, racist comments. His behaviour, the Court acknowledged, "created significant challenges for the YOI." The Court further went on to state that "he should have had education earlier, which would have got him out of his cell earlier and for longer periods. But there would still have been a justified, and reasonable, extensive removal from association with fellow inmates. This is very relevant to whether treatment breaches Article 3". He also received proper medical care and attention, was in contact with his solicitors from an early stage and was not kept in "total solitary confinement." As a result, the Court found that Article 3 ECHR was not breached.

138. A common thread in these authorities also resonate with the recommendations of the Rapporteurs Report.[46]

[46] The Recommendations of the 2011 Special Rapporteur Report are as follows:

"Recommendations

82. The Special Rapporteur calls upon States to respect and protect the rights of persons deprived of liberty while maintaining security and order in places of detention. He recommends that States conduct regular reviews of the system of solitary confinement. In this context, the Special Rapporteur reiterates that States should refer to the Istanbul Statement on the Use and Effects of Solitary Confinement as a useful tool in efforts to promote the respect and protection of the rights of detainees.

83. The Special Rapporteur calls upon States to ensure that all persons deprived of their liberty are treated with humanity and respect for the inherent dignity of the human person as protected by article 10, paragraph 1, of the International Covenant on Civil and Political Rights. The Special Rapporteur refers to the Standard Minimum Rules for the Treatment of Prisoners and recommends that States increase the level of psychological, meaningful social contact for detainees while in solitary confinement.

84. The Special Rapporteur urges States to prohibit the imposition of solitary confinement as punishment — either as a part of a judicially imposed sentence or a disciplinary measure. He recommends that States develop and implement alternative disciplinary sanctions to avoid the use of solitary confinement.

139. Adopting these principles, the conditions at the residence can now be assessed applying these principles paying due regard to the "best interest" principle.

**Assessment of conditions at the residence**

140. On my assessment of the evidence, B's stay at the residence is a far cry from the conditions normally associated with solitary confinement. There is no element of punishment. There is no ulterior act to debase. It was not imposed arbitrarily. The physical conditions are generous. There is social interaction. There is a regime established for his health and wellbeing.

141. First, B is in a unique set of circumstances. The intention of his detention is not a form of punishment but a means to fulfil the legitimate objectives of an order for his welfare.

142. Second, the physical conditions do not remotely resemble the picture of a prison. It is a two storey house with three bedrooms on the upper floor. One of the bedrooms is assigned to B for his sole use and occupation. In this bedroom he has a single bed, small desk and a cupboard.[47] There are also a toilet and bath on the upper floor which a reserved for B's sole use as well. On the lower floor of the house there is another washroom facility for the staff, tutors or visitors

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85. States should take necessary steps to put an end to the practice of solitary confinement in pre-trial detention. The use of solitary confinement as an extortion technique during pre-trial detention should be abolished. States should adopt effective measures at the pre-trial stage to improve the efficiency of investigation and introduce alternative control measures in order to segregate individuals, protect ongoing investigations, and avoid detainee collusion.
86. States should abolish the use of solitary confinement for juveniles and persons with mental disabilities. Regarding disciplinary measures for juveniles, the Special Rapporteur recommends that States should take other measures that do not involve the use of solitary confinement. In regard to the use of solitary confinement for persons with mental disabilities, the Special Rapporteur emphasizes that physical segregation of such persons may be necessary in some cases for their own safety, but solitary confinement should be strictly prohibited.
87. Indefinite solitary confinement should be abolished.
88. It is clear that short-term solitary confinement can amount to torture or cruel, inhuman or degrading treatment or punishment; it can, however, be a legitimate device in other circumstances, provided that adequate safeguards are in place. In the opinion of the Special Rapporteur, prolonged solitary confinement, in excess of 15 days, should be subject to an absolute prohibition.
89. The Special Rapporteur reiterates that solitary confinement should be used only in very exceptional circumstances, as a last resort, for as short a time as possible. He emphasizes that when solitary confinement is used in exceptional circumstances, minimum procedural safeguards must be followed. These safeguards reduce the chances that the use of solitary confinement will be arbitrary or excessive, as in the case of prolonged or indefinite confinement. They are all the more important in circumstances of detention where due process protections are often limited, as in administrative immigration detention. Minimum procedural safeguards should be interpreted in a manner that provides the greatest possible protection of the rights of detained individuals. In this context, the Special Rapporteur urges States to apply the following guiding principles and procedural safeguards."

[47] Paragraph 25 of the Affidavit of the Claimant filed on 5th December 2016.

of B's. A kitchen and living room area, fully outfitted, forms part of the house.[48] B has access to the entire house. Although, of course, he is under constant watch and supervision and his access to the outside of the house is limited.

143. At the site visit, there was nothing alarming about the conditions at the residence. B has the house to himself. We met B standing at the dining room table with his football jersey and short pants and I asked him to take us all on a tour. He did so generously. He pointed out the kitchen, the microwave and the stove. He had just eaten stewed chicken. He showed us his television, DVDs and PlayStation. He is a fan of football and his favourite PlayStation game is FIFA. His favourite football team is FC Barcelona. He shared with us that if there was one gift that those present could give him was a FC Barcelona jersey. Messi is his favourite player. He showed us the laundry room area which is also a rundown storage. He took us upstairs from the coral painted 1st floor to the second floor where he showed us his bedroom which was air conditioned and tiled like the rest of the house. Through the window was the sights and sounds of Port of Spain. He also showed us the bathroom.

144. There is nothing to suggest that the physical conditions render the facility unbearable or uninhabitable. There are no sanitary concerns. Even, the Claimant has also contended that the physical conditions at the residence are "fine."[49]

145. Third, there is nothing in the regime or in his socialisation which suggests that he has been cut off from the world or that he is being underdeveloped or deprived of a healthy learning environment.

**Educational Needs**

146. In his preparation for his School Leaving Examination Certificate, B was tutored on Mondays – Saturdays from 10:00a.m – 1:00p.m.[50] He also had lessons on Mathematics, English Language, Composition and Reading.[51] In addition to this, he was also engaged in art

[48] Paragraph 13 of the Affidavit if Keisha Mitchell filed on 22nd February 2017.
[49] Paragraph 13 of the Affidavit of the Claimant filed on 5th December 2016.
[50] Paragraph 5 of the Affidavit if Keisha Mitchell filed on 22nd February 2017.
[51] Paragraph 5 of the Affidavit if Keisha Mitchell filed on 22nd February 2017.

projects such as building model houses, drawing and painting, cup decorating, key holder making, bracelet making etc.[52]

**Health needs and mental health and wellbeing**

147. B is exposed to weekly counselling sessions by Parenting TT from Dr. Saran Looby. He also participates in psychological activities such as Self Talk, Self-Monitoring, Positive Self Talk, Gift of Listening, Active Listening, Communication Barriers, Self, Johari Window Exercise and Self-Management.[53] He is also allowed airing time for at least one hour per day. Further, as indicated by the Report of Dr. Hollingsworth, he does not suffer from a mental disorder nor an intellectual disability.

148. I am also comforted in this case by the evidence of the experts that there is no permanent harm to B as a result of his detention at the residence.

***Dr. Saran Looby's Report Dated 16th February 2017***

149. In Dr Saran Looby's report[54] she observed among other things that B "demonstrated poor judgment and limited insights. Additionally, he did not exhibit symptoms of delusions and hallucinations", "was unable to recognize appropriate behaviour and explore consequences for infractions within the scenarios discussed. However he was unable or unwilling to apply such lessons to his own life", "was reluctant to try calming skills when frustrated or angry", "had some challenges broadening his interpretations of events, changing his perspective and finding the meaning and positive aspects of unwanted circumstances" and "it is likely B's frustrations with his living conditions hindered his openness to change." She also noted that "further therapeutic work is needed to improve his thinking style, coping skills, anger management and decision making particularly since B continues to express frustration, loneliness and boredom and still engages in disruptive behaviour."

***Dr. Rona Heather Hollingsworth report dated 12th June 2017***

[52] Paragraph 5 of the Affidavit if Keisha Mitchell filed on 22nd February 2017.
[53] Paragraph 6 of the Affidavit if Keisha Mitchell filed on 22nd February 2017.
[54] Saran Looby's report dated 16th February, 2017 and annexed as "S.L.1" to the affidavit of Saran Looby filed on 22nd February 2017.

150. In Dr. Hollingsworth's report she made the following conclusions which are worth repeating:

> "Assessment of B's intellectual functioning did not suggest that either his cognitive or academic functioning had been eroded by psychological difficulties, as often occurs when experiencing a major mental disorder. On the WISC V[55] which measured B's thinking and reasoning skills, he obtained an FSIQ of 54, which suggested overall skills in the lower extreme range. It is likely however that his scores on the WISC V were affected by cultural bias, and failure to invest in the test, rather than by a decrease in cognitive functioning caused by mental illness. On the WRAT 4[56], B obtained scores that indicated that, his ability to read words, spell, and understand written sentences were at the level of a child in Standard Two or lower. His ability to perform basic math computations were at the level of a child in Standard Four. This test of academic functioning was consistent with previous testing, and test failures and thus also did not suggest an erosion in functioning because of emotional abuse.
>
> Testing suggested that B's main source of psychological distress is the acute loneliness that he feels because of limited social interaction. It also suggested that he can be overwhelmed by emotions, at times, particularly when completely unstructured. It is likely however that these feelings of emotional overwhelm are not long lasting, and occur when his coping mechanisms fail. Testing suggested that the coping mechanism that he utilizes generally allow him to manage difficult emotions. Testing also suggested that B felt supported, but longed for contact with peers. Testing did not suggest that B suffered from a major mental disorder, since it revealed no symptoms of these. Testing was therefore in agreement with Dr. Looby's diagnosis that he did not meet the criteria for Major Depression and did not support a diagnosis of Major Depressive Disorder- Recurrent Episode, Moderate, with anxious distress that was assigned to B in 2015. It could be that B met the Criteria for Major Depression in 2015, because it was early in his incarceration, and typically these are the hardest years for an inmate. B therefore may have adjusted to his incarceration. Testing could not explain why B's mother reported that he had spoken of suicide to her so

[55] Weschsler Intelligence Scale for Children- Fifth Edition.
[56] Wide Range Achievement Test Revision 4.

frequently. While testing did not suggest that B was suicidal, or experiencing thoughts of self-harm, it is possible that when he experiences brief periods of overwhelm, he also experiences suicidal ideation when his defences fail. While testing did not suggest that B suffered from a major mental illness, it did not suggest that he suffered from the DSM5 diagnosis Problem Related to Living Alone. This diagnosis is not a mental disorder, but a way of drawing attention to a problematic issue. Criteria to meet this diagnosis include chronic feelings of loneliness, isolation, and lack of structure in carrying out activities of daily living. This is a condition that while distressing can be remedied.

B exhibited some strengths. His greatest strength, appears to be his resilience, he becomes very frustrated, and has periodic decompensations but appears to bounce back relatively quickly. He also has a good support system."[57]

151. She also responded to Referral Questions which she included in her report as follows:

a. **"Referral Question-**What impact being the sole detainee at the subject facility has had on B's mental state and wellbeing.

**Response:** Being the sole detainee has caused B to suffer feelings of acute loneliness and isolation. Testing also suggested that B can be vulnerable when there is a lack of structure and can be overwhelmed by emotion at such times but testing did not suggest that B's sole detainee status has led to a significant deterioration in cognitive, academic, or personality functioning to such an extent that he had developed a mental disorder. Testing suggested rather a DSM 5 diagnosis of Problem Related to Living Alone. B's main suffering can be attributed to two sources, lack of structure and lack of peer relationships. As an adolescent, B does not have the maturity to create his own structure. Structure must therefore be provided in the environment for him. Structure must first be external, before as an adult one learns to internalize this structure and structure oneself. B also does not have the maturity to turn aloneness into a peaceful solitude. He is not completely alone but the boundaries that should exist between guard and guarded mean that he is unable to develop friendships. Since B is an adolescent, it is also important he

[57] Pages 11-12.

has relationships with persons of his own age and level of maturity. Adolescents are at the developmental stage where they move away from parents and more towards their peers so that they can begin the process of forging an identity. They also have a need to feel liked and accepted by their peers who help them to learn to be adults.

b. **Referral Question:** Whether B has suffered any severe or permanent injury to his health and well-being as a consequence of being the sole detainee?

**Response:** Testing did not suggest that B had suffered severe or permanent injury to his health and well-being because of being the sole detainee. Had B suggested severe injury to his wellbeing, he would have developed a major mental disorder and none of the measures utilized suggested that he had done so. Additionally, testing also did not suggest that prior to incarceration B had been subjected to the type of adverse childhood events (severe trauma) which would have predisposed him to develop a serious mental disorder with the experience of a stressor like incarceration. There have also been no reports of a sustained deterioration in his functioning since he has been the sole detainee.

c. **Referral Question:** Whether there are any adverse effects to his health and well-being as a consequence of being the sole detainee, and if so what immediate steps can be taken to address these effects.

**Response:** Apart from the issues identified in (a) above there do not appear to be any adverse effects to health and wellbeing……"[58]

152. Subsequent to submitting the report, Dr. Hollingsworth attended Court on the 21st of June, 2017 where she was questioned on the report by the Court and the parties. She indicated that the WISC V test was not a true representation of B's cognitive abilities because his results were in the range of someone who has a moderate intellectual disability which she stated he did not have. She expressed the view that the WISC V test is a problematic test because it has a cultural bias in that certain groups tend to score lower on it. She stated that one indicator which demonstrated that B does not have an intellectual disability was that was that when she

[58] Pages 12-13 of Dr Hollingsworth Report dated 12th June 2017.

administered the Personality Assessment Inventory Adolescent (PAIA) test he was able to accurately predict the answers. While she accepted the WISC V test is the widely used test to assess someone's cognitive functions it was clear to her that B did not have an intellectual disability.

153. She further indicated B stated that he could stay at the residence if he can have peers or do something to learn a trade. She also noted that he required more structure to his schedule since she noted that he was mostly left to "his own devices" at the residence. None the less, she was of the view that B was doing "pretty well" and she credited his mother for setting a good foundation in his life, a foundation which she acknowledged is based on love and nurturing.

154. She reiterated the recommendations which she supplied in her report which stated:

(i) B needs structure and his days should be structured. As an adolescent he has not yet developed an internalized structure that would allow him to structure himself, he therefore needs to have structure in his environment. Additionally, he needs structure because testing suggested that it is when he is most unstructured that his coping mechanisms can fail and he can experience symptoms. Everyday should therefore be structured to include time for education, leisure activities, physical activity and socialization. He should not therefore be left to his own devices with little to do for most of the day.

(ii) Testing did not suggest B was suicidal but since his mother has reported suicidal ideation, it is necessary to put measures in place to prevent any likelihood of such an act. It is important to put a suicidal prevention plan in place. This plan should include the following components;

a. Dr. Looby should develop a suicide/self-harm contract for B so that both he and staff can have a map to follow if he experiences suicidal ideation.

b. If and when B reports to Ms. Mohammed that he feels suicidal this should be reported immediately to security personnel and CATT the self-harm contract should then be utilized and B should receive an assessment from a mental health professional.

c. Security should ensure that B does not have unmonitored access to material that could cause self-harm particularly if there have been reports of suicidal ideation.

(iii) Provision should be made for B to have regular peer interaction. One way that this might be achieved is if an arrangement could be made for B to have educational instruction with a group of peers.

(iv) B needs intensive remedial education if he is to pass the PSLCE examination. In particular his reading, spelling and reading comprehension skills needs to be enhanced. He could benefit from a psychoeducational evaluation to determine whether his reading challenges are due to a reading disorder but in the interim the following measures could be used to increase academic functioning:

a. To enhance vocabulary, reading and reading comprehension, B could listen to audio books. He is interested in reading but books in areas of interest to him such as football might peak his attention. There are many free audiobook sites such as LibriVox and Digitalbook.io. He could also benefit from computer reading programmes such as starfall.com (a free programme) which teaches reading with phonics. He could also play games like Scrabble."

Dr. Hollingsworth was not aware that B passed his PSLCE but was surprised that he did.

**Security at the residence**

155. The residence is a secured environment. A security log is maintained which notes the persons entering and leaving the facility as well as any noted incidents in or around the facility.[59] Two security officers are assigned for each 12 hour shift from a detachment of no fewer than 8 at a time. In addition to the two security officers there is also one caregiver assigned per shift.[60] B is also allowed to roam the house at his leisure whilst the security supervises him. He also engages with the officers in age appropriate conversation and plays video or board games and watches television. The officers also engages him in card games and

[59] Paragraph 10 of the Affidavit of David Maynard filed on 22nd February 2017.
[60] Paragraph 13 and 14 of the Affidavit of David Maynard filed on 22nd February 2017.

football during his airing time.[61] The environment is depicted as one of comfort and not one riddled with anxiety like that of a prison setting.

**Family Interaction**

156. B's family was given the opportunity to visit him in the residence with the agreement being that his mother would visit him twice a week for three hours. His mother was also granted permission to bring his sister along with her to visit him since this would be beneficial to him.[62] While B's mother did not visit him every week, this has not cast her in a negative light nor does it degrade her care and attention towards her son because as a mother, one can understand that the circumstances must be one which is emotionally taxing for her as well. Nonetheless, his mother is urged to make the required visits to him since this can only benefit his own care and well-being both emotionally and mentally.

**Schedule**

157. His weekly schedule included[63]:

i. Weekly Counselling session by Parenting TT;
ii. Psychological activities including Self Talk, Self-Monitoring, Positive Self Talk, Gift of Listening, Active Listening, Communication Barriers, Self, Johari Window Exercise and Self-Management;
iii. Agricultural grow box;
iv. Art projects, building model houses, drawing and painting, participating in the "Who I Am" project, cup decorating, key holder making, bracelet making;
v. Personal self-development sessions regarding any issues, complaints or discussions;
vi. Physical activity in the areas of football, cricket and fitness training;
vii. Board and video games to improve hand eye coordination and stimulate the child's interest;
viii. Access to Cable television;
ix. Academic lessons on Mathematics, English Language, Composition and Reading;

[61] Paragraphs 15 and 22 of the Affidavit of David Maynard filed on 22nd February 2017.
[62] Paragraph 7 of the Affidavit if Keisha Mitchell filed on 22nd February 2017.
[63] Paragraph 6 of the Affidavit if Keisha Mitchell filed on 22nd February 2017.

x. Airing time for at least 1 hour per day.

158. Taking into account these conditions at the residence, they do not meet the minimum level of severity nor the ingredients of solitary confinement as discussed supra which are the restricted physical conditions, the prison regime environment and social isolation.

159. Further, I have subjected his conditions at the residence to the four quadrant analysis and examined any competing legitimate objects for B's present confinement.

**Internal-individual assessment**

160. In presenting this application, B did not present any medical evidence to demonstrate the impact that this detention is having on him psychologically. Such evidence came later through Dr. Saran Looby and by the Court appointed expert Dr. Rona Heather Hollingsworth. This evidence has proved very instructive in assessing the mental state of B in his new home at the residence.

161. These assessments of B are a "snap shot" in time. The underlying theme is that B is coping and that there is no detrimental adverse effects on him as a result of him being the sole detainee at the residence. While there is no actionable harm to B as recorded in these reports, there is however a duty to protect the best interest of the child and follow through with the recommendations made for his continued welfare and well-being.

**External-individual assessment**

162. Dr. Hollingsworth and Dr. Looby provide a comprehensive overview of B's behavioural patterns and character traits. It is noted of course that there are expressed feelings of loneliness, anger and frustration. While it cannot be denied that these are classic symptomologies of a child in solitary confinement, equally it cannot be denied they also feature in B's frustrated circumstances of detention pending the determination of his charges for such an inordinately long period of time which will make it three (3) years on this month since he has been on remand awaiting the conclusion of his preliminary enquiry with no evidence that his case is being fast tracked or dealt with expeditiously.

**Internal-societal assessment**

163. There is unanimity in the view of the parties that solitary confinement is at minimum a feature of last resort or at best not a measure open to be applied to children at all. This is as seen above consistent in the discussions on the international rights of the child. As examined above, the myriad of international instruments have declared that solitary confinement of children violates human rights laws prohibiting cruel and inhuman punishment. The Riyadh Guidelines, the Beijing Rules and the Havana Rules all speak to this. The philosophy espoused in those instruments demonstrate that separation practices to protect, manage or discipline youth should be used sparingly and should never rise to the level of actionable solitary confinement. It recognises that solitary confinement in the sense of total deprivation, physical and social isolation of itself is psychologically, developmentally and physically damaging and can result in long term problems and even suicide.

**External-societal framework**

164. However, the external framework in place meets the acceptable level of treating B taking into account his individual needs. Although there is no permanent structure to guarantee peer interaction, visits to him by any of his peers are not prohibited. On a regular basis B would interact with his tutor, his psychologist, the security guard and members of his family, in particular his mother.

165. B's interaction and that of his mother with an officer David Maynard has been the source of some friction. There are allegations of heavy handedness and to use the local parlance the "dropping of words" by Mr. Maynard. There should be a viable complaints mechanism in place for K and B to make any reports of mistreatment to the Children's Authority for their proper investigation and follow up.

166. However as the evidence discussed above reveals, every attempt is being made to ensure for B's educational needs, his interaction with the outside world through television and radio and visits, his interaction with peers with a flexible policy in place for such interaction and his physical conditions are not conducive of prison conditions or those usually associated with solitary confinement.

**Competing interests**

167. The Children's Authority recognise that B's incarceration is not ideal. Indeed they are simply carrying out the mandate of the Court. Although the Court never specifically ordered that B be placed at the residence, clearly from the range of the possible options to secure B's welfare, the evidence is clear that the Children's Authority chose the best option available to secure B's welfare and interests. There could be absolutely no criticism of the approach taken by the Children's Authority in the manner in which they carried out their responsibilities under the order. It is an unfortunate circumstance that B is the only child that is the beneficiary of such protection. It would have been expected by this Court that had the order not been appealed then it would have meant that all children presently on remand would have to be accommodated in places such as the residence.

168. As observed in **S v The Attorney General** C.A CIV S.244/2015, another important competing interest is the law of the land in this case the law that murder is a non-bailable offence. The fact remains therefore that B must be detained but in conditions that are humane and which give effect to the best interest principle.

**Conclusion on Solitary Confinement**

169. The conditions at the residence do not amount to cruel and inhuman punishment nor solitary confinement and is not causing harm to B. Steps are being taken by the YTC to accommodate B in the near future. Mr. Scanterbury has this time prescribed a target date upon the promulgation of Regulations. He has deposed that several administrative changes have been implemented to bring the YTC into compliance with the Act.

170. Looking at this snapshot of B at the residence and entirely without reference to this Court's earlier ruling there is no ill treatment. But it must be understood that B cannot be kept at the residence ad infinitum. It also must be recognised that B's detention at the residence must be kept under close and careful scrutiny. While there is no violation at this stage of B's rights, it is perfectly open to this Court now that this has come to the Court's attention, to put such detention under judicial scrutiny. Recognising even from the Children's Authority own submissions that the continued detention at the residence is a burden on them and indeed out of sync with the regulatory environment which requires B to be at a community residence, the State should be held to its own deadline of 30th September 2017 to provide a suitable community residence to accommodate B.

**Preliminary Issue 1: The State is a proper Party**

171. The State seeks to shield behind section 19(2) of the State Liabilities and Proceedings Act Chap. 8:02 in its submission that as the real complaint is the condition in which B is detained at the residence, it is a case for the Children's Authority and not the State. I accept as a salutary principle Lord Walker's definition of servant or agent of the State in **The Attorney General v Carmel Smith** [2009] UKPC 50 at paragraph 16:

> "The proper scope and function of the State is a topic which has engaged political philosophers for many centuries. In the context of English law the concept of the State has traditionally been associated with the Crown, and the public service with Crown Service. Although Trinidad and Tobago has been a republic for over 30 years its Constitution still reflects this historical background. The traditional approach has always been that Crown Service is limited to the military or civil service of central government. Those employed in local government or statutory corporations are working in the public sector (a much wider expression) but are not in Crown service. Denning LJ summarised the position in Tamlin v Hannaford [1950] 1KB 18, a case concerned with the British Transport Commission, which took over the British railway industry when it was nationalised by the Transport Act 1947. After referring to the Minister's power to give general policy directions to the Commission, Denning LJ said (at p24):
>
> > "These are great powers but still we cannot regard the corporation as being his agent, any more than a company is the agent of the shareholders, or even of a sole shareholder. In the eye of the law, the corporation is its own master and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants, and its property is not Crown property."

172. The Children's Authority is not a servant or agent of the State and is liable as was the Statutory Authorities Service Commission in **Carmel Smith**. However this submission misses two main matters. First, the question of bail has once again been raised by B and the Attorney General as representative of the judicial arm of the State could only be the proper party to deal

with such an issue.[64] Second, on its face, the claim seeks a mandamus against the State to immediately provide community residences. Although it is now accepted that the issue of whether YTC is a community residence is a dead issue for this Court, the fact still remains that the State has again in these proceedings been called upon to account for the status of these community residences, a matter which was promised in the previous proceedings.

**Preliminary Issue II: Abuse of Process and Delay**

37. The Children Authority argued that the claim is an abuse of process as in light of the concurrent appeal the Claimant has an alternative remedy by way of immediate relief by seeking before the Court of Appeal urgent injunctive relief to treat with the alleged fresh constitutional breach. It is further argued that the real relief of bail is a rehashing of the arguments on bail with which the Court of Appeal is seized.

38. This argument has effectively been abandoned at the oral hearing as in response to my direct question as where does this Court's jurisdiction lie in relation to live matters before the Court of Appeal all parties agreed that a live issue for this Court to consider is the conditions under which B is presently detained. If there is a breach then consequential questions of the appropriate relief would arise. Such an issue is not a live matter for the Court of Appeal. In any event it is esoteric and artificial to place a burden on the Claimant who is a respondent in the appeal to take on the burden and risk of making an application for fresh evidence before the Court of Appeal to bring before it the new questions of B's present conditions of detention. The logic is circuitous and circular. B's conditions are new facts that have arisen and which give rise to separate considerations of constitutional and administrative law. There is no adequate alternative remedy nor can this litigation in the narrow confines in which the parties have argued it, be remotely construed as a second bite of the cherry.

173. The Children's Authority also raised the issue on the judicial review proceedings that leave ought to be refused on the ground of unreasonable delay. It is trite law that the applicant must

[64] In **Gurtner v Circuit and Another** [1968] 2 Q.B. 587, Lord Diplock made the following observations at 603:

> "Clearly the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff upon the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained. A matter in dispute is not, in my view, effectually and completely *"adjudicated upon*" unless the rules of natural justice are observed and all those who will be liable to satisfy the judgment are given an opportunity to be heard."

apply promptly for leave and in any event within three (3) months from the date the decision was made. In this case, it is clear that the decision was made to detain B in the residence in June 2016 and the application for leave was made some 6 months later in December 2016.

174. The authorities referred to by the Children's Authority on this question of delay is uncontroversial. Recently in **Devant Maharaj v National Energy Corporation of Trinidad and Tobago** Civil Appeal No 115 of 2011 provides the most recent elucidation of the notion of delay. Smith JA noted:

> "24. First, this interpretation of the CPR nullifies both the mandatory provisions of Section 11(1) of the JRA and Part 56.5(2) of the CPR. Section 11(1) of the JRA mandates that an application for judicial review "shall be made promptly and in any event within three months…". Part 56.5(2) mandates that the application for leave "must be made within three months…". If a court must also consider prejudice and detriment before refusing leave, then the time of the application for leave is no longer a material factor since issues of prejudice and detriment will override any "delay" or time limit for making the application for leave.
>
> 25. Second, this interpretation nullifies:- a) The pivotal discretion of a trial judge under Section 11 (1) of the JRA to refuse to extend the time for applying for leave unless there is a good reason to do so. This is so because on the reasoning of the Abzal Mohammed case, even if an applicant fails to provide a good reason for delay, a trial judge will be unable to refuse leave if there is no prejudice or detriment and hence he will of necessity have to extend the time for applying for leave. b) The discretion granted to a judge under Part 56.5(1) to "refuse leave…in any case in which he considers that there has been unreasonable delay before making the application." This is so because on the application of the reasoning in the Abzal Mohammed case, even if there is unreasonable delay a trial judge will be unable to refuse leave if there is no prejudice or detriment.
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> 26. Third, the interpretation as proffered in the Fishermen and Friends of the Sea case is consonant with both the parent Act (the JRA) and the CPR since it preserves both (a) the time filter provided in the Act and the Rules of Court and (b) the discretion of the trial judge to balance the needs of good administration and the need to avoid creating a stymie on deserving applications. Part 56.5(3) which mandates the considerations of prejudice and

detriment must be read in conjunction with Section 11(2) of the Act. This means that the 56.5(3) considerations (prejudice and detriment) only apply when considering the residual discretion to refuse leave pursuant to Section 11(2) even where there may be reason to extend the time for leave.

27. Fourth, the Fishermen and Friends of the Sea interpretation is more compatible with the statutory scheme for judicial review than the Abzal Mohammed interpretation. At the leave stage, which is usually ex parte, and where the public authority would not in all likelihood have filed an affidavit, it would be very difficult in most cases to properly know, assess or weigh competing factors of prejudice and detriment to good administration. To mandate proof of prejudice and detriment to good administration at the leave stage will, in practice, negate the requirements of timeliness in relation to applications for judicial review.

28. Fifth, the later decision in Abzal Mohammed could be considered as per incuriam as it did not cite the earlier decisions in (i) Fishermen and Friends of the Sea, where the statutory effect of the parent Act (the JRA) in the face of a rule consonant with Part 56.5(2) of the CPR was considered and approved by the Court of Appeal and the Privy Council and (ii) Public Service Commission v Dennis Graham at paragraph 64.21."

175. It is plain that the time period for the application is a "filter" to assist in good governance and to prevent administrators constantly looking over their shoulders. The grant of an extension of time must be for good reason. Such reason balances the interest of good administration and the vindication of rights. The question of promptitude and good reason are all to be decided against the backdrop of the unique facts of each case. The question of prejudice and detriment to good administration must be taken into account in the exercise of the discretion to extend time to apply for leave.

176. In my view, there is adequate material before this Court to demonstrate there is a good reason for the delay in applying to the Court. First, a major factor to consider is the emotional and physiological wellbeing of the child is of paramount concern. Regardless of time bars, any question that a child's welfare may be affected by administrative action, no time bar unless egregious ought to interfere with the Court's demand that the child's best interest be protected. Moreover, in this case it is a matter of six (6) months. Second, it is clear from the evidence that

it only became apparent to B's mother of the alleged negative impact of B's confinement at the residence was having on him when he escaped from the residence on 21st October 2016. It is true that B exhibited signs of withdrawal to his mother prior to that event. Feelings of frustration and hurt. No doubt in the context of a child in detention, B's mother would have had to withstand these cries constantly. The breaking out from a facility is however a tipping point which readably galvanises these experiences into a matter of direct concern. Third, the Claimant's attorney could hardly be faulted for even then failing to move the Court prematurely. They followed proper pre action procedures to bring B's plight to the attention of the Children's Authority in an exchange of correspondence dated 26th October 2016.

177. Fourth, I find it unsatisfactory to complain of delay by B when in fact the delay of the State is the main culprit in B's plight. The intention of my order was that this arrangement of B being in the custody of the Children's Authority was pending the establishment of community residences which the Court was advised in the previous proceedings was soon to be materialised. Twelve months have passed. The frustration of B no doubt is understandable.

178. Finally as in **Abzal Mohammed v The Police Service Commission** Civil Appeal No. 53 of 2009 the question of a good reason for the delay must be weighed in the balance of the very weighty and significant question being asked by B, is there such a thing as solitary confinement of the child in circumstances where he is segregated and do those conditions amount to a breach of his constitutional rights.

179. For these reasons the Court will ordinarily grant the Claimant an extension of time to make its application for leave to apply for judicial review.

180. However, having regard to the manner of disposition of the main question this issue is moot. The claim is dismissed. I would not want this judgment to be interpreted as a loss to B or a victory to the Defendants. I would rather that all parties feel vindicated in this dispute and I prefer that their relationship not end but evolve from this.

## The way forward-A Non-Binding Guide

181. "In a practical and entirely unsentimental sense, children embody society's hope for and its investment in its own future."[65] The story of B is but a chapter in the larger story of how we treat our vulnerable at risk children who also embody society's future. With this in mind and with the task entrusted to Courts when faced with children to pay particular regard for their best interest, I offer this non-binding opinion for the benefits of all the parties.

182. Judgments of course should address the issues that are presented to the Court for its determination. This I have already done. However, in cases where the "best interest principle" is in play, care must be taken for the judgment to have a therapeutic effect on the child and parties in the dispute which may impact on the child's future and our collective welfare. This can be achieved in this case by addressing some of the issues which clearly impact the parties in a practical way. Those are issues which did not fall for determination in the adversarial model of this litigation.

183. I am mindful that this is the second occasion that B has come to the steps of this Court seeking justice. I am mindful that the Defendants have demonstrated that they are trying to do their best to keep apace with a radical paradigm shift in the treatment of juvenile offenders. B and his mother have invested significantly in this dispute. Litigation itself has an emotional cost and this family is, from the reports already received, not a family of means. It is not lost on this Court that half of the expenses of the Court's expert was paid by the Claimant's attorneys themselves. For this reason I set out a non-binding opinion of a way forward from this litigation.

## The family: B and his mother K

184. To B and his mother. There is no party in this case nor counsel representing them who is not sympathetic to their plight. It has been said that isolating pieces of evidence, statutory rules or precedents from the context in which they arose is an impoverished way of comprehending reality. The picture painted by the Court's expert of B is that of a child coping with all that has overwhelmed him. The orders made in the YTC proceedings were made for his protection. The

[65] I adopt Cameron J's observations from **Centre for Child Law v Minister for Justice and Constitutional Development** [2009] ZACC 18.

dismissal of this claim simply means that the Court is satisfied that the present conditions are not a breach of his constitutional rights. That is the finding in law. B is a teenager and with that comes all the dynamic challenges of growing up. His is an evolving picture.

185. No one has been denied access to B. I urge his mother to continue her regular visits as difficult as those may be and to include other members of his family. I had suggested that some interaction with other students of his age may be useful. Of course there must be security and other concerns. But the rehabilitation of juvenile offenders is a task for all, not for one. I had suggested matters such as "face time" in a class making such a class part of B's virtual world. But this presents an opportunity to work with other groups such as the Juvenile Court. Parents and Teachers Associations (PTAs), the Ministry of Education and the Trinidad and Tobago Unified Teacher's Association (TTUTA), NGO's, religious groups and other groups on how they can help.

186. I also commend Dr. Hollingsworth's useful recommendations, set out in the judgment, to the Children's Authority. This can pre-empt any future anomalies in B's behaviour as he evolves over time. She indicated that B's days should be more structured. Usefully a timetable of a more structured list of activities is set out at pages 37-39 of the YTC handbook. She recommended a plan be put in place to deal with self-harm. She also made practical suggestions to help his reading, spelling and comprehension skills by listening to audio books and computer reading programmes.

187. A clear complaint procedure should be implemented by the Children's Authority so that both K and B can know clearly to whom they can raise their concerns and who can help address them.

188. B wants to be a soldier. B told me this a long time ago and recently when I met him again. Are interactions with persons from the cadet force or scouts possible? He is good with his hands. His cognitive ability is not strong but he is trying, his is coping. He has passed his school leavers certificate. It is of course worrying that B has tried to escape and that there may be tantrums thrown. Which youth is a stranger to this? The task in rehabilitation is to continue to build the child's foundation. Dr. Hollingsworth has commented that his coping mechanism is based on his strong foundation, one built by love. No matter the walls of his residence or the paper upon which the best laid rules are inscribed, I remind everyone that it is the love in the

human interaction with B as with other juvenile offenders which defines the rehabilitative exercise.

**The Children's Authority**

189. The Children's Authority has been placed in an unenviable position. But no doubt the Children's Authority has diverted their resources strictly from being a regulator to providing for B a function normally of a community residence. It is not lost on the Court that these funds are needed in other aspects of the Children's Authority's operations.

190. However, this is an opportunity for them to lead by example and ensure from their own experience that the care afforded to juvenile offenders in community residences ascribe to that minimum standard and give effect to the "best interest principle" based on their own experience. They can be better equipped to judge others based on this experience to advise on the challenges which are met with the detention of young offenders. One hopes that they use this time wisely with B to properly document the responsiveness of juvenile offenders to a rehabilitative environment.

**The State and YTC**

191. The State needs to be commended for introducing the new regime which revolutionised the treatment of juvenile offenders. Unfortunately, its implementation of the new regime is not ideal and putting the cart before the horse is a flattering description of what has unfolded. Since the last proceedings, steps have been taken to now rehabilitate existing structures and institutions. The YTC is now known as a Youth Rehabilitation Centre. New regulations have been implemented. In Mr. Scanterbury's evidence a number of steps have been taken and have to be taken to meet a target date of 12th September 2017.

192. I observe that regulations 51 and 52 of the Child Rehabilitation Centre Regulations 2017 provides for punishing a child by referring him to the "Reflection Unit". See also Schedule 3 regulations (f) and (g). The "Reflection Unit" is defined as a "place where residents can engage in quiet activities for the purpose of reflecting on their behaviour"[66]. Regulation 52(8) provides that such punishment shall not be deemed to be solitary confinement. I hope that this judgment

[66] Regulation 2 of the Child Rehabilitation Centre Regulations 2017.

would prove useful to the parties in determining how such provisions are to be implemented, if at all.

193. Mr. Scanterbury has stated that the facility should be ready by 30th September 2017. To make a rehabilitatory environment a reality needs support for their infrastructural development and intervention strategies to help their juveniles and let it be done consistent with the best interest principle. The best interest of the child which cuts through all administrative machinery to safeguard and protect B and other juvenile offenders. Administrators must never lose sight of this and I emphasise that it is the human interaction with the child offender which makes the difference in rehabilitative efforts.

194. I had started this chapter in the earlier proceedings enquiring about the other young men in YTC. We of course have not addressed our young girls in these proceedings and indeed B's sister attaining the age of maturity is no longer a juvenile and is housed in an adult prison. When we visited B he was drawing a card for his sister S, now in prison. The issue of dealing with girl offenders also need urgent collaborative attention.

195. The emphasis in these judgments have been on juvenile offenders but we should not lose sight and should also spare a thought for the victims of the crimes and what steps can be made for healing between victim and offender.

**The attorneys, and the Overriding Objective**

196. To the attorneys. For counsel on opposite sides I wish to commend them for their industry in their quick preparation, their extremely helpful submissions and their civil and accommodating disposition to one another. More importantly, there were several procedural applications which came before this Court which were dealt with in a collaborative atmosphere for which I thank them as it assisted me greatly in managing this case and helped us all to focus on the greater issues at stake in this dispute.

197. They have demonstrated in real and practical terms what it means by the concept that both the judiciary and attorneys are enjoined in the joint enterprise of dealing with cases justly, affording citizens access to justice and upholding the rule of law. This matter commenced by filing an application for leave on 5th December 2016. This first procedural hurdle of leave was dealt with consensually despite vigorous opposition. A second procedural hurdle of appointing

experts was also dealt with collaboratively. Consensus building not only has a place in substantive law by producing settlements but procedurally to create the proper environment within which calm decisions can be made which has an impact on the lives of others. In such an environment it encourages Judges and attorneys alike to truly deal with live issues and see through the briefs to deal with more human aspects of disputes.

198. It was this collaborative atmosphere created by the civility and non-adversarial approach by the attorneys that has encouraged me to produce for them this postscript.

199. Finally, nothing of course stops the parties from continuing to engage in discussions in light of these guidelines. Nothing further stops any of them to enter into voluntary undertakings and to signal same to this Court. Nothing prevents joint applications to deal with any issue. Nothing prevents the appointment of child advocates to represent the "voice of the child", to assist the administration in making the transition into the new regime. Nothing stops even the attorneys from making an enquiry of the welfare of B, victims of crime or other detainees and stop by to visit, of joining together in presenting B with a gift of a book or board game or an inspirational talk. The village needs to be reconstructed in whatever fashion to raise our children and more so our children in trouble with the law.

**Vasheist Kokaram**

**Judge**