

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2017-01766

BETWEEN

**FRANCISCO JAVIER POLANCO VALERIO
JOHAN RODOLFO CUSTODIO SANTANA**

CLAIMANTS

AND

**THE ATTORNEY GENERAL OF
TRINIDAD AND TOBAGO**

DEFENDANT

Before the Honourable Madame Justice Margaret Y. Mohammed

Dated the 17th April, 2018

APPEARANCES:

Mr. Matthew Gayle Attorney at law for the Claimants.

Mr. Duncan Neil Byam instructed by Ms. Ryanka Ragbir Attorneys at law for the Defendant.

JUDGMENT

1. The Claimants are nationals of the Dominican Republic. They legally entered Trinidad and Tobago through Piarco on the 8th January 2016 and were allowed by Immigration officials to remain until the 8th March 2016. At the time of the institution of the instant proceedings they were still in Trinidad and Tobago but they were subsequently deported to the Dominican Republic. The issue of the deportation proceeding was the subject of judicial review proceedings which was

filed concurrently with the instant matter. That issue was ultimately not determined in their favour by the Court of Appeal.

2. In the instant matter, the Claimants have sought constitutional redress. The reliefs they sought pursuant to section 14(1) of the Constitution of Trinidad and Tobago Chapter 1:01 (“the Constitution”) are:
 - i. A declaration that section 9(4) (c) of the Immigration Act Chapter 18:01 (“the Immigration Act”) is unconstitutional in that its application to a person not convicted of any criminal offence, including the Claimants, amounts to a breach of their rights pursuant to sections 4(a) and/or 4(b) and/or 4(c) and/or 4(d) and/or 4(g) and/or 5(2)(a) and/or 5 (2)(b) and/or 5 (2)(h) of the Constitution or otherwise;
 - ii. An order striking down section 9(4)(c) of the Immigration Act as being inconsistent with the Constitution;
 - iii. An order that damages for breach of constitutional rights be assessed; and;
 - iv. Such further relief that the Court deems just.
3. The Defendant did not file any affidavit in opposition and oral submissions on points of law was made by Counsel for the Defendant.
4. The facts which have given rise to the reliefs which the Claimants have sought are not in dispute. They were set out in an affidavit filed by Mr. Robin Montano. According to the undisputed facts, the Claimants entered Trinidad and Tobago

legally on the 8th January 2016 and they were permitted to remain in the jurisdiction until the 8th March 2016. On the 14th February 2016, both Claimants were married in Trinidad and Tobago to women they met online. They were arrested together in relation to a criminal offence on the 3rd March 2017 namely, possession of a firearm and ammunition. Despite several attempts having been made, they were unable to secure bail and they were held awaiting trial. They were tried summarily and on the 27th April 2017 all charges against them were dismissed. On the charges being dismissed, the Inspector in Charge at the Siparia Magistrates Court and Process branch submitted to the Court that he had been informed by Ms. Hood of the Immigration Division that there was Order of Detention in force in relation to the Claimants and they returned to custody. The Claimants were conveyed to the Arouca Maximum Security Prison. However, upon arrival, they were denied admission on the grounds that no Order of Detention was in force in relation to them and thereafter they were returned to the Siparia Police Station where they spent the night.

5. On the 28th April 2017, the Claimants' attorney, Mr. Matthew Gayle enquired about when the Claimants would be permitted to leave the country. He was informed by Mr. Gewan Harricoo that they would be able to collect their passports and depart within an agreeable timeframe to both the Claimants and the Immigration Division.
6. According to the Claimants, they went to the immigration division in San Fernando on the 1st May 2017 with their attorney, Mr. Gayle. The First Claimant was interrogated by Immigration Officer 1 Ramjit who, at the end of the interrogation, informed the First Claimant that he would have to speak to his superior. A short while later, Ms. Hood informed the First Claimant that he would

have to be detained because his wife needed to attend. After some discussion between Ms. Hood and Mr. Gayle, the Claimants were told that they could return the following day and would be released if their wives attended together with their identification documents and their marriage certificates.

7. On the 2nd May 2017, the Claimants attended the Immigration Division shortly after 1pm. They were each instructed to pay a bond of \$4000.00 which they did. They were then placed on a further Order of Supervision by Immigration Officer 1 Dana Dookan, which required them to return to the Immigration Division on the 3rd May 2017 at 8am, which they did. On the 3rd May 2017, they were each further interrogated as to the whereabouts of their wives by Immigration Officer Ms. Hood, who then presented them with a document entitled "Reason for Arrest and Detention." Shortly thereafter, Ms. Hood placed them on a further "Order of Supervision" demanding that they return on the 10th May 2017.
8. Both Claimants indicated that their wives were reluctant to get involved with the Immigration officials and authorities in general. The Claimants also indicated that they were willing to immediately leave the country. They felt aggrieved that, through no fault of their own, they were forced to stay beyond their assigned latest departure date and were being penalized for doing so. They were fearful that they were at risk of deportation. They claim that they are being retried by the Immigration Division for offences which a criminal court had dismissed.
9. Between the 29th April 2017 and the 3rd May 2017, Mr. Gayle tried to ascertain from Mr. Harricoo when the Claimants would have been permitted to leave and/or when a Special Inquiry would be held in relation to them. However, he declined

to respond. When Mr. Gayle asked Ms. Hood about the Special Inquiry on the 3rd May 2017, she told him that there was no likely timeframe.

10. Based on the reliefs sought by the Claimants, there are three issues which arise for determination namely:
 - (a) Is section 9 (4) of the Immigration Act unconstitutional?
 - (b) If it is not, was the Immigration Division's application of section 9(4) of the Immigration Act unconstitutional?
 - (c) If the answer to (b) is in the affirmative, are the Claimants entitled to damages?

Is section 9 (4) of the Immigration Act unconstitutional?

11. It was submitted on behalf of the Claimants that section 9 (4) of the Immigration Act is unconstitutional since the wording is inconsistent with the sections 4 and 5 of the Constitution.
12. Counsel for the Defendant argued that section 9 (4) of the Immigration Act is not inconsistent with the Constitution since section 9 (4) permits an immigration officer to arrest someone who he/she reasonably suspects have over stayed his time in the country. A Special Inquiry is then conducted whereby the person subject to a declaration can make a case against being deported. Therefore, there is due process since the arrest is just one-step and not the ultimate step whereby someone can be deported.
13. Counsel for the Defendant also submitted that a deportation is not a punishment since there are offences under the Immigration Act. Section 9 of the Immigration

Act is a restitutionary step aimed at sending people who have no right to be in the country, back to their country of origin.

14. It was further argued by Counsel for the Defendant that if section 9 of the Immigration Act is inconsistent with the Constitution by virtue of section 6 the Constitution of Trinidad and Tobago Act the provision is still deemed to be constitutional. In support of this submission, Counsel relied on the 2009 Privy Council decision in **Josine Johnson, Yuclan Balwant v The AG of Trinidad and Tobago [2009] UKPC 53**.

15. Section 9(4) of the Immigration Act states :

“Where a permitted entrant is in the opinion of the Minister a person described in section 8(1)(k), (l), (m), or (n), or a person who –

- (a) Practices, assists in the practice of or shares in the avails of prostitution or homosexuality;*
- (b) Has been convicted of an offence and sentenced to a term of imprisonment for one or more years;*
- (c) Has become an inmate of any prison or reformatory;*
- (d) Was a member of a prohibited class at the time of his admission to Trinidad and Tobago;*
- (e) Has, since his admission to Trinidad and Tobago, become a person who would, if he were applying for admission to Trinidad and Tobago, be refused admission by reason of his being a member of a prohibited class other than the prohibited classes described in 8(1)(a), (b), (c) and (p);*
- (f) Was admitted or denied to have been admitted to Trinidad and Tobago under subsection (1) and remains therein after the expiration of the certificate issued to him under subsection (2) or under section 50(2);*

- (g) Has escaped lawful custody or detention under this Act;*
- (h) Came into Trinidad and Tobago or remains therein with a false or improperly issued passport, visa or other document pertaining to his admission or by reason of any false or misleading information, force, stealth, or fraudulent or improper means, whether exercised by himself or by any other person;*
- (i) Returns to or remains in Trinidad and Tobago contrary to the provisions of this Act after a deportation order has been made against him or otherwise;*
- (j) Came into Trinidad and Tobago as a member of a crew, and without the approval of an immigration officer or beyond the period approved by such officer, remains in Trinidad and Tobago after the departure of the vessel on which he came into Trinidad and Tobago;*
- (k) Has, since he came into Trinidad and Tobago broken any of the terms and conditions of the certificate issued to him under subsection (2)."*

16. Sections 4 and 5 the Constitution provide:

"4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;*
- (b) the right of the individual to equality before the law and the protection of the law;*
- (c) the right of the individual to respect for his private and family life;*
- (d) the right of the individual to equality of treatment from any public authority in the exercise of any functions;*
- (e) the right to join political parties and to express political views;*

- (f) *the right of a parent or guardian to provide a school of his own choice for the education of his child or ward;*
- (g) *freedom of movement;*
- (h) *freedom of conscience and religious belief and observance;*
- (i) *freedom of thought and expression;*
- (j) *freedom of association and assembly; and*
- (k) *freedom of the press.*

5. (1) *Except as is otherwise expressly provided in this Chapter in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgement or infringement of any of the rights and freedoms hereinbefore recognised and declared.*

(2) *Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not-*

- (a) *authorise or effect the arbitrary detention, imprisonment or exile of any person;*
- (b) *impose or authorise the imposition of cruel and unusual treatment or punishment;*
- (c) *deprive a person who has been arrested or detained-*
 - (i) *of the right to be informed promptly and with sufficient particularity of the reason for his arrest or detention;*
 - (ii) *of the right to retain and instruct without delay a legal adviser of his own choice and to hold communication with him;*
 - (iii) *of the right to be brought promptly before an appropriate judicial authority;*
 - (iv) *of the remedy by way of habeas corpus for the determination of the validity of his detention and for his release if the detention is not lawful;*

- (d) *authorise a Court, tribunal, commission, board or other authority to compel a person to give evidence unless he is afforded protection against self-incrimination and, where necessary to ensure such protection, the principles of fundamental justice for the determination of his rights and obligations;*
- (e) *deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;*
- (f) *deprive a person charged with a criminal offence of the right-*
 - (i) *to be presumed innocent until proved guilty according to law, but this shall not invalidate a law by reason only that the burden of proving particular facts;*
 - (ii) *to a fair and public hearing by an independent and impartial tribunal; or*
 - (iii) *to reasonable bail without just cause;*
- (g) *deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a Court, commission, board or other tribunal, if he does not understand or speak English; or*
- (h) *deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms.*

17. Section 6 of the Constitution of the Republic of Trinidad and Tobago Act states:

“(6) Nothing in sections 4 and 5 shall invalidate—

(a) an existing law;

(b) an enactment that repeals and re-enacts an existing law without alteration; or

(c) an enactment that alters an existing law but does not derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right."

18. When the Court is interpreting the provisions of an Act of Parliament it strives to ascribe a meaning to reflect Parliament's intention and to do so it must first look to the ordinary meaning of the words of the section. **Bennion on Statutory Interpretation 6th ed** described this rule of statutory interpretation as:

"Literal meaning: The term 'literal meaning' corresponds to the grammatical meaning where this is straightforward. If, however the grammatical meaning, when applied to the facts of the instant case, is ambiguous then any of the possible grammatical meanings may be described as the literal meaning. If the grammatical meaning is semantically obscure, then the grammatical meaning likely to have been intended (or any one of them in the case of ambiguity) is taken as the literal meaning. The point here is that the literal meaning is one arrived at from the working of the enactment alone, without consideration of other interpretative criteria. When account is taken of such other criteria (for the purpose of arriving at the legal meaning of the enactment) it may be found necessary to depart from the literal meaning and adopt a strained construction.

*The initial presumption is in favour of the literal meaning in the sense just explained, since Parliament is taken to mean what it says. The presumption is of very long standing, being embodied in early maxims of the law."*¹

19. In determining the intention of the framers of section 9 of the Immigration Act the statutory scheme laid out in the Immigration Act must be examined.

¹ Pages 780 to 781

20. Section 9 (1) of the Immigration Act clearly sets out the category of persons whom the immigration authorities may allow to enter Trinidad and Tobago, namely, diplomats, members of the military from another country who visit Trinidad and Tobago for defence and security interest, tourist, visitors, persons who are passing through to go to another country, clergy, students, flight crew and persons who are engaging in a legitimate trade, profession, trade or occupation.
21. Section 9(2) provides that when any person except a diplomat or a member of the military enters Trinidad and Tobago that the Immigration Division indicates the specified period and the terms and conditions of the entry. Subsection 3 goes on the state that if a person is already in Trinidad and Tobago and wishes to extend the period of entry or have the terms and conditions changed, then that person must submit to an examination under the provisions of the Immigration Act and the Immigration Authority may extend the period of stay or vary the conditions. The process set out in the Immigration Act where a person has been permitted entry and requests to extend his stay is under section 13 of the Immigration Act. Section 13 of the Immigration Act empowers an immigration officer to inquire into whether such extension should be granted and subsection (3) provides an aggrieved person the right of appeal within 24 hours to the Minister responsible for the Immigration Division.
22. Where a person has remained in Trinidad and Tobago and he has not obtained an extension from the Immigration Division, under section 14, the Minister who is responsible for Immigration may issue a warrant for the arrest of that person in respect of whom an examination or inquiry is to be held or a deportation order has been made.

23. However, if the person was declared by the Minister under section 9(4) as losing his permitted entrant status the person can be arrested pursuant to section 15 of the Immigration Act. In **Naidike and ors v The Attorney General of Trinidad and Tobago [2004] UKPC 49** the Privy Council (“the Board”) provided clarity on the interpretation of sections 9(4) and 15. The Board held that the intended scope of section 15 is uncertain and that any uncertainty must be resolved in favour of the liberty of the individual. The Board concluded that the power to arrest under section 15 was only bestowed *after* a person has been declared by the Minister to no longer be a permitted entrant.
24. After the declaration by the Minister under section 9(4) of the Immigration Act the Minister is empowered under subsection 5 to make a deportation order against the person who has no right of appeal and who shall be deported as soon as possible. The conjoint effect of sections 9 (4), 9(5) and 15 of the Immigration Act, effectively, is that a person who has been declared by the Minister as no longer being a permitted entrant and who the Minister makes a deportation order under subsection 5, is deprived of due process since there is no avenue to appeal such deportation order which contravenes section 4 of the Constitution. However, the Immigration Act was passed on the 1st July 1976, one month before the proclamation of the Constitution of the Republic of Trinidad Tobago Act on the 1st August 1976 and section 6 of the latter validates section 9(4) as a pre-existing law.
25. In the Privy Council’s ruling in **Josine Johnson** the appellants were a police constable and a public health inspector. They claimed that Regulation 52 of the Police Service Commission Regulations and Regulation 58 of the Statutory Authorities Service Commission Regulations were discriminatory and inconsistent with Section 4 of the Constitution of the Republic of Trinidad and

Tobago. They sought to have the regulations declared null and void under Section 2 of the Constitution. Their case was that the regulations discriminated against women and married female public servants in contravention of Section 4 (b) and/or (d) of the Constitution. They further sought a declaration that, pursuant to Section 5(1) of the Constitution, regulations 52 and 58 should be construed as severed from the respective Regulations on the ground that they are inconsistent with Section 4 of the Constitution.

26. The application was dismissed by Best J in the High Court who held that counsel for the applicants admitted that the said regulations formed part of the existing laws when the 1976 Constitution was enacted and that modification of the existing law by section 5 (1) of the 1976 Constitution is inconsistent with the supremacy of the Constitution. The Court of Appeal dismissed the appellant's appeal from that decision and the matter was appealed to the Privy Council for determination.
27. Before the Board, the appellants stated in their affidavits that their decision whether to marry or remarry was affected by the fact that, if they did, they would have been vulnerable to an additional ground for having their appointment terminated under regulation 52 and 58 respectively. The Board held, in that situation, there was no room for that argument since the two officers were actually unmarried. As such regulations 52 and 58 did not apply to them and the proceedings were premature.
28. The Board dismissed the appeal. The Board held that the regulations discriminated on the grounds of sex which would contravene section 4 of the Constitution since it affected female officers, when deciding whether or not to marry but not male officers. The Board noted that the regulations proceeded on the assumption that

married women, as opposed to married men would be taken up with family obligation which they may not have been able to combine with the proper discharge of their professional obligations.

29. According to the Board, the plain intention of section 18 is that any law passed while the Independence Constitution was in force, and not declared void by the time the new Republican Constitution commenced, was deemed to be valid and to be in full force and effect at that date. Therefore, regulations 52 and 58 were not declared invalid. They had effect immediately before the Constitution came into effect in 1976. As such, they are “existing laws” in terms of section 6(1) and since they were existing laws, section 4 does not apply to them. So even though they discriminate against women by reason of their sex, they are constitutional.
30. The Board concluded that it was satisfied that regulations 52 and 58 were not inconsistent with the Constitution and therefore valid. The Board recommended that their continued inclusion in the relevant regulations be reviewed.
31. In the instant case, section 9(4) of the Immigration Act contravenes section 4 of the Constitution which states that a person is not to be deprived of his liberty without due process. However, since it was existing law at the time of the proclamation of the Constitution of the Republic of Trinidad and Tobago Act it was validated as a pre-existing law.

Was the Immigration Authority's application of section 9(4) of the Immigration Act unconstitutional?

32. It was argued by Counsel for the Claimants that the Immigration Division's application of section 9(4)(c) of the Immigration Act to the Claimants was unconstitutional since at the time the Claimants were placed on the supervision order they were not convicted of any criminal offences in Trinidad and Tobago and the Immigration Authorities interpreted and applied section 9(4) (c) in a manner which offended the principle of the presumption of innocence.
33. Counsel for the Defendant submitted that there could not have been a mistake to make the declaration under Section 9 (4) because by the Claimants' own admission they were in Trinidad and Tobago beyond the time that they were permitted and one of the orders they asked for was an order mandamus that they be allowed to leave.
34. It was not in dispute that the Order of Detention which the Claimants were detained under stated that it was pursuant to section 15 of the Immigration Act. As stated previously, **Naidike** was clear that such power of arrest and detention can only be made after the Minister has declared that the person has ceased to be a permitted entrant since the effect of the detention order is to deprive the person of his liberty.
35. The reason the Immigration Authorities stated that the Claimants were arrested and detained was because they had ceased to be permitted entrants pursuant to section 9(4) (c) of the Immigration Act since they had become "*an inmate of any prison or reformatory*". However, there was no evidence that at the time of the

Claimants' arrest the Minister had issued the declaration under section 9(4) (c) which stated that the Claimants had lost their status as permitted entrants. Indeed, if the Claimants had lost their status as permitted entrants under section 9(4) (c) the Minister could have made the deportation order under section 9 (5). In this regard, the Immigration Division's application of section 9(4) (c) was unconstitutional since it applied a section to deprive the Claimants of their liberty and freedom of movement without any lawful authority.

36. Turning to Counsel for the Claimants' argument that the Immigration Authorities application of section 9 (4) (c) offended the principle of presumption of innocence since when the Claimants were placed on the supervision order they were not convicted of any criminal offences. I accept that section 9(4) (b) of the Immigration Act is not applicable since this provides that a person who was permitted entry and who has been convicted of an offence and sentenced to a term of imprisonment for one or more years may be declared by the Minister that he is no longer a permitted entrant.
37. Section 9(4) (c) states that the Minister can declare a person who was a permitted entrant to cease to be so once the person has become an inmate of any prison or reformatory. The Immigration Act does not define the term "*inmate*". **Black's Law Dictionary** 8th ed at page 803 defines and "*inmate*" as "*a person confined in a prison, hospital or other institution*". There is no definition of "*inmate*" in the **Prison Act Chapter 13:01** but a "*prisoner*" is defined to include "*every inmate of any prison detained therein under sentence or conviction for any offence or under committal or remand pending trial or investigation on a charge of any offence*".

38. In my opinion, a literal interpretation of section 9(4) (c) includes a person who has been convicted of an offence for a period of less than 1 year; a person who is on remand awaiting trial; or a person who may be detained at an institution such as the Youth Training Centre (YTC) or the St Ann's Psychiatric Hospital. Therefore, section 9(4) (c) permits the Minister to make the declaration under this provision even where the person is awaiting trial and he is presumed to be innocent. As pre-existing law, this provision is also validated by the section 6 of the Republic of Trinidad and Tobago Act. However, all this in my opinion is academic since there was no evidence of a declaration from the Minister which stated that the Claimants had ceased to be permitted entrants when they were arrested.
39. In the absence of the declaration from the Minister declaring that the Claimants were no longer permitted entrants, the Immigration Authorities acted unconstitutionally in its application of section 9(4) (c) when they arrested the Claimants.

If the answer to ((b) is in the affirmative so are the Claimants entitled to damages?

40. The Court of Appeal in **Attorney General v Mukesh Maharaj** Civ. App. No. 67 of 2011 stated that a Court has the discretion to grant monetary compensation in instances it deems equitable to do so. If the Court finds that monetary compensation is the proper and just award, it can then award a single sum for damages. Bereaux J.A noted:

“[40] ... There is no constitutional right to damages. See Lord Hope in *Seepersad & Anor. v. The Attorney General of Trinidad and Tobago* (2004) 64 WIR 378. The court in its constitutional jurisdiction is concerned to

uphold or vindicate the constitutional right which has been contravened. See *Uric Merrick v The Attorney General & Ors.*, Civil Appeal No. 146 of 2009 (unreported) paragraph 57.

[41] "Vindication" of the right applies in both the widest and narrowest of Page 16 of 28 senses. To the extent that a compensatory award is granted in respect of the breach of the right and as "recompense for the inconvenience and distress suffered during the illegal detention" (per *Maharaj v. The Attorney General* (No. 2) (1978) 2 ALL ER 670), such an award is, in the widest sense, a vindication of the right."

41. In the instant case, while I am satisfied that the declaration with respect to the application of section 9(4) to the Claimants was unconstitutional, I am of the view that the Claimants are entitled to an award of damages since they were deprived of their liberty for one (1) day. Based on the cases **Christopher Odikagbue v Chief Immigration Officer and The Attorney General of Trinidad and Tobago** CV2016-02258 and **Kendall Grannum v The Attorney General of Trinidad and Tobago** CV2015-04378 and the limited evidence of the loss suffered by the Claimants for this breach, I award the Claimants damages in the sum of \$7,000.00 each.
42. The Claimants having partly succeeded, I order the Defendant to pay the Claimants half of the costs to be assessed by the Registrar in default of agreement.

CONCLUSION

43. Section 9(4) of the Immigration Act contravenes section 4 of the Constitution. However, since it was existing law at the time of the proclamation of the Constitution, it was validated as pre-existing law. The Immigration Authorities

also acted unconstitutionally in its application of section 9(4)(c) when they arrested the Claimants since they so acted in the absence of the declaration from the Minister declaring that the Claimants were no longer permitted entrants. The Claimants are entitled to \$7,000.00 in damages each.

ORDER

44. It is declared that section 9(4)(c) of the Immigration Act is consistent with the Constitution.
45. It is declared that the Immigration Division's application of section 9(4)(c) of the Immigration Act was unconstitutional.
46. The Defendant to pay the Claimants damages in the sum of \$7,000.00 each.
47. The Defendant to pay Claimants 50% of their costs to be assessed by the Registrar in default of agreement.

**Margaret Y Mohammed
Judge**