THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2020-00858

IN THE MATTER OF AN APPLICATION UNDER SECTION 14(1)
OF THE CONSTITUTION OF TRINIDAD AND TOBAGO

BETWEEN

KESTON FELIX

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Madame Justice Margaret Y Mohammed

Date of Delivery February 18, 2021

APPEARANCES

Mr. Lee Merry instructed by Ms. Vanita Ramroop Attorneys at law for the Claimant.

Mr. Stefan Jaikaran instructed by Ms. Amrita Ramsook Attorneys at law for the Defendant.

JUDGMENT

Introduction

1. In 2014 the Parliament of Trinidad and Tobago passed legislation which amended section 50 of the Police Service Act[1] ("the Police Service Act"). The effect of the said amendments empowered the Trinidad and Tobago Police Service ("the TTPS") to take

[1] Chapter 15:01

and retain the measurements, photographs and fingerprint information of certain persons. No specified time was stated for the retention of the measurements and photographs, but specified times were stated for the retention of the fingerprint data.

2. In the instant case, the Court is asked to determine whether the said amendments namely sections 50(2), 50A(3), 50J(1), 50K(3) and 50K(4) ("the impugned provisions") of the Police Service Act infringes the Claimant's right to private life under section 4 of the Constitution of Trinidad and Tobago[2] ("the Constitution"), and if they do, to declare that these amendments are unconstitutional, illegal, null, void, invalid and are of no effect and to make certain consequential orders.

The Claimant's position

3. On Tuesday 16 May 2017, the Claimant was arrested by members of the Trinidad and Tobago Police Service ("TTPS") and subsequently charged with two summary offences, namely using insulting language to the annoyance of persons, contrary to section 49 of the Summary Offences Act[3] and resisting arrest contrary to section 59 of the Police Service Act.

4. During the Claimant's detention at the Morvant Police Station on or about Thursday 18 May 2017, his face was photographed by a member of the TTPS. Photographs were also taken of his side profiles, as well as his front profile. In addition, his height measurement was taken and recorded and fingerprint impressions of each of his fingers were taken. The Claimant was also asked to provide certain personal information (such as his address, place of work and family ties) which was recorded.

5. The Claimant disputed both charges and at the end of the trial on 24 May 2019, he was found not guilty of both charges. The Claimant has no previous convictions and no pending criminal matters.

[2] Chapter 1:01
[3] Chapter 11:02

6. The Claimant stated that he was advised by his Attorneys at law, that the impugned provisions prohibit him from applying to the relevant authorities for the immediate destruction of the information which was harvested from him on his arrest, despite now being acquitted of all charges. The Claimant was also advised by his Attorneys at law that the impugned provisions infringe on his constitutional right to private life; they do not pursue any legitimate aim; and in any event they are clearly disproportionate and/or unreasonable as:

   a. The Commissioner of Police has no discretion to immediately destroy/remove harvested information upon a person's discharge or acquittal;
   b. The Commissioner of Police is mandated by section 50(2) of the Police Service Act to keep all records relating to the measurements and photographs of the Claimant for an indefinite period of time;
   c. The Commissioner of Police may only exercise a discretion to destroy a fingerprint impression after five years from the date on which the data was entered on the National Fingerprint Database (section 50J(1));
   d. The Commissioner of Police is only mandated to destroy the fingerprint data from the National Fingerprint Database twenty years after a person is exonerated (section 50K(3));
   e. No distinction is made between persons suspected of or charged with serious offences as opposed to minor offences;
   f. No restrictions are placed on the dissemination of the harvested data by the Commissioner of Police; and
   g. The restrictions placed on the time period for which the harvested data shall be held are wholly disproportionate and/or unreasonable.

7. The Claimant deposed that he is worried about future victimization by members of the TTPS, as he had been assaulted and falsely imprisoned by the police and since that incident, he has been traumatised. He instituted proceedings[4] against the State, which has made him even more fearful that the members of the TTPS may try to retaliate against him. More particularly, the TTPS has personal information such as his address,

[4] CV 2019-02955

that makes it easier for the police officers to locate him and the possession of his photograph makes it easier for them to identify him to other police officers.

8. The Claimant stated that he has read the newspapers and watched the news on TV, in which there are numerous and frequent reports against police officers for misbehaviour in public office and fabrication of evidence. He attached to his affidavit examples of these articles[5] which he located on the internet namely:

   (a) A TV6 Article titled "Police Officers to appear in Court for Misbehaviour in Public Office" dated 11 June 2019;

   (b) Trinidad and Tobago Guardian Article titled "$200,000 bail for cops charged with misbehaviour in office" dated 14 October 2019;

   (c) Trinidad and Tobago Guardian Article titled "Cop charged for robbing disabled vendor, another for losing gun" dated 27 September 2019; and

   (d) Newsday Article titled "$750,000 bail for policeman" dated 6 July 2016.

9. The Claimant further stated that successive Commissioners of Police have publicly acknowledged the serious issues within the TTPS, regarding the existence of "rogue officers" and he attached[6] copies of articles in which these concerns were reported including the following:

   (a) Trinidad and Tobago Guardian Article titled "150 rogue cops suspended in four years: CoP begs public to keep faith" dated 16 November 2016;

   (b) Trinidad and Tobago Guardian Article titled "CoP points fingers at rogue officers" dated 31 December 2019; and

   (c) Newsday Article titled "CoP: We will probe rogue police" dated 11 February 2020.

10. According to the Claimant, he was advised that numerous civil cases are brought against the State each year, concerning fabrication of evidence by police officers and other unbecoming conduct such as assaults and false imprisonment. Many of these

[5] Exhibit "K.F.1" to the Claimant's Affidavit filed on the 2 March 2020
[6] Exhibit "K.F.2" to the Claimant's Affidavit filed on the 2 March 2020

cases are successful and strong pronouncements have been made by different judges condemning the actions of police officers.

11. The Claimant stated that he has lost trust in the TTPS due to the actions of some of its members. He is fearful about how the TTPS may use his fingerprints, height measurement, photographs and other personal information. It is also distressing to him that even though he was acquitted of all charges the police are still able to keep this information. As a free citizen, he feels as though his privacy has been invaded and he wants the said personal information to be destroyed so it cannot be accessed by the TTPS.

12. For those reasons the Claimant has sought the following reliefs in this action:

    a. A declaration that the impugned provisions infringe on the Claimant's right to private life;
    b. A declaration that the impugned provisions are unconstitutional, illegal, null, void, invalid and are of no effect;
    c. An order that the Commissioner of Police shall immediately destroy all information harvested from the Claimant, including all photographs, fingerprint impressions and any other documentation in which his personal characteristics are recorded;
    d. An order that the Claimant's fingerprint impressions, any record of any analysis of same and any data from same shall be immediately removed from the National Fingerprint Database;
    e. An order that the Commissioner of Police shall destroy all information harvested from persons who have not been convicted of a criminal offence and who have no criminal charges pending before the courts, including all photographs, fingerprint impressions and any other documentation in which their personal characteristics are recorded;
    f. An order that the fingerprint impressions, any record of any analysis of same and any data from same of persons who have not been convicted of a criminal offence and who have no criminal charges pending before the courts shall be removed from the National Fingerprint Database; and

g. Costs.

The Defendant's position

13. The Defendant's position was that the action should be dismissed, as the impugned provisions are constitutional and any interference with an individual's right to private life under section 4 of the Constitution of Trinidad and Tobago[7] ("the Constitution") is reasonably justifiable in a society that has proper respect for the rights and freedoms of the individuals in accordance with section 13(1) of the Constitution.

14. The Defendant filed an affidavit of Sheridon Hill ("the Hill Affidavit"), in which Mr Hill did not dispute that the TTPS obtained and recorded the Claimant's personal information upon his arrest. Mr Hill also explained that the information obtained from the Claimant upon his arrest inclusive of photographs, height and weight measurements, fingerprints, personal characteristics including particulars of any scars, tattoos and name, address and occupation of his parents was recorded and is currently stored on the TTPS database pursuant to section 50 of the Police Service Act.

15. Mr Hill stated that the database is necessary in order to facilitate the timely analysis and comparison of fingerprints retrieved from crime scenes and persons in custody and also to provide evidence before the court during trial. According to Mr Hill, the fingerprint impressions can be retained for a minimum of five years and a maximum of twenty years. A person seeking to have his/her records removed from the database can apply to the Commissioner of Police requesting that same be removed and the Commissioner of Police can then order the removal of the records, in accordance with the provisions of section 50K (2) of the Police Service Act.

16. Mr Hill further explained that there are restrictions on the dissemination of the data stored on the TTPS database, as well as software and firewalls to prevent unauthorized access to data stored on the database. According to Mr Hill, no information is disseminated without an application being made in writing to the Commissioner of

[7] Chapter 1:01

Police and dissemination is done only after the Commissioner of Police grants permission to do so. He stated that the database at the Criminal Records Office has the highest level of information technology protection for security and safeguards, and access to the said database is very limited and controlled based on an officer's rank and where he/she is attached, as well as a number of other considerations.

17. Mr Hill stated that the information stored on the National Fingerprint Database and Criminal Records Office assists the courts in sentencing and bail applications. Additionally, the existence of this database serves the purpose of satisfying the court that the persons who have been charged and prosecuted are the correct individuals, as fingerprint identification is the most accurate form of identification.

The impugned provisions

18. The impugned provisions of the Police Service Act were enacted by virtue of the Miscellaneous Provisions (Administration of Justice) Act, 2014[8]. It is necessary to set out the entire section in order to appreciate the context of the impugned provisions and for clarity I will highlight the impugned provision.

19. Section 50 of the Police Service Act deals with the power of the TTPS to take and retain measurements or photographs of a person who is a detainee or an accused. A "detainee" is defined in section 3 of the Police Service Act as a person who has been arrested by the police in connection with a criminal offence and an "accused" means a person who has been charged with an offence. Section 50 states:

> (1) A police officer may take and record for the purpose of identification the measurement and photograph of a person who is a detainee or an accused.
>
> **(2) Where the measurement or photograph taken under subsection (1) is of a person who has not previously been convicted of a criminal offence, and such person is discharged or acquitted by a Court, all records relating to the measurement or photograph shall be kept by the Commissioner.**

[8] Act No 11 of 2014

20. Section 50A concerns the power of the TTPS to take and retain fingerprint information. It states:

(1) A police officer may take and record for the purpose of identification the fingerprint impression of a person without consent –

a. where the person is a detainee or an accused; or

b. where –

i. a fingerprint impression is derived from a crime scene; and

ii. there are reasonable grounds for suspecting that the person was involved in the commission of an offence related to the crime scene and believing that fingerprint analysis could confirm or disprove the suspicion.

(2) Where a fingerprint impression is taken as provided under subsection (1), the fingerprint impression shall be analysed.

(3) The data derived from the analysis under subsection (2) shall be kept and the Commissioner shall cause that data to be transferred to the National Fingerprint Database.

21. Section 50 J of the Police Service Act deals with the power of the TTPS to retain the fingerprint impression and the permitted period of retention. It provides:

(1) A fingerprint impression taken under section 50A, 50B, 50C, 50D, 50E or 50I shall be kept for a minimum period of five years from the date on which the data was entered into the National Fingerprint Database and thereafter the fingerprint impression may be destroyed.

(2) Notwithstanding subsection (1), a Court may order that a fingerprint impression that has been taken under this Act, shall not be destroyed if the Court is satisfied that the fingerprint impression might reasonably be required for the investigation or prosecution of an offence or for purposes of an appeal.

22. Section 50K concerns the National Fingerprint Database. It provides:

(1) There is hereby established a database of analysed fingerprint impressions collected under this Act, to be known as the "National Fingerprint Database".

(2) The Commissioner shall have control and custody of the National Fingerprint Database and shall, in accordance with this Act, add to and remove data from the National Fingerprint Database.

(3) Where a fingerprint impression is taken from a person who is exonerated, the data from the fingerprint impression shall be destroyed and removed from the National Fingerprint Database, after the expiration of twenty years from the date of exoneration.

(4) Notwithstanding the destruction of a fingerprint impression under section 50J, where data from a fingerprint impression is retained from the period of destruction of the fingerprint impression to the twenty year period at subsection (3), the data from the fingerprint impression is deemed to be the data related to the fingerprint impression destroyed and the data may be used as evidence in any matter involving the person to whom the data relates.

Common ground by the parties

23. The parties agreed that the right of an individual to respect for his private and family life is enshrined in section 4 (c) of the Constitution, and that right, which includes the right to private information of the person,[9] is broad in scope. There was also a consensus that no right is absolute[10] and Parliament has the ability to limit rights by enacting legislation for the peace, order and good governance of a society in accordance with section 53 of the Constitution.

24. This agreed position is consistent with the guidance set out in the Privy Council judgment of **Suratt v AG,**[11] Baroness Hale explained at paragraph 58 that:

> [58] It cannot be the case that every Act of Parliament which impinges in any way upon the rights protected in ss 4 and 5 of the Constitution is for that reason alone unconstitutional. Legislation frequently affects rights such as freedom of thought and expression and the enjoyment of property. These are

[9] S and Marper v United Kingdom App Nos 30562/04 and 30566/04 at para. 66
[10] Suratt v AG [2007] UKPC 55
[11] [2007] UKPC 55

both qualified rights which may be limited, either by general legislation or in the particular case, provided that the limitation pursues a legitimate aim and is proportionate to it. It is for Parliament in the first instance to strike the balance between individual rights and the general interest. The courts may on occasion have to decide whether Parliament has achieved the right balance."

25. In **Suratt,** Baroness Hale stated that the proportionality test has two limbs namely: (a) does the policy of the legislation pursue a legitimate object? (b) does the limitation or restriction of the constitutional right bear a reasonable or rational relation to the object of the legislation.

26. If an Act fails the proportionality test in **Suratt** and is inconsistent with sections 4 and 5 of the Constitution, it may still be valid if it is passed in accordance with section 13 of the Constitution which provides:

    (1) An Act to which this section applies may expressly declare that it shall have effect even though inconsistent with sections 4 and 5 and, if any such Act does so declare, it shall have effect accordingly unless the Act is shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

    (2) An Act to which this section applies is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House.

27. Under section 13 of the Constitution, for an Act which is inconsistent with sections 4 and 5 of the Constitution to be valid, it must have been passed by a three-fifths majority of all the members of that House and it must demonstrate that it is reasonably justifiable in a society that has proper respect for the rights and freedoms of the individual.

28. The Miscellaneous Provisions (Administration of Justice) Act 2014, [12] which amended the Police Service Act to include the impugned provisions, recognised that they were inconsistent with sections 4 and 5 of the Constitution and that the procedural requirement under section 13 (2) of the Constitution were satisfied. The preamble expressly stated:

> WHEREAS it is provided by section 13(2) of the Constitution, that an Act of Parliament to which this section applies is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House:
>
> And whereas it is necessary and expedient that the provisions of this Act shall have effect even though inconsistent with sections 4 and 5 of the Constitution"

Difference between the parties

29. The central difference between the parties was with respect to the substantive requirements under section 13 (1) of the Constitution, which is whether the impugned provisions are reasonably justifiable in a society that has proper respect for the rights and freedoms of individuals.

The applicable test

30. In this jurisdiction, the Court of Appeal has enunciated two approaches which a Court may use in determining what is "reasonably justifiable in a society that has proper respect for the rights and freedoms of individuals".

31. In 2009, Archie CJ in **AG v Northern Construction**[13] adopted the test advanced in **Nyambirai v National Security Authority**[14] and he set out the factors to be considered in relation to the proviso under section 13 (1) of the Constitution. The factors to be considered are whether:

[12] Act No.11 of 2014
[13] Civ App No 100 of 2002
[14] [1996] 1 LRC 64

(a) The legislative objective is sufficiently important to justify limiting a fundamental right;

(b) The measures designed to meet the legislative objective are rationally connected to it; and

(c) The means used to impair the right or freedom are no more than is necessary to accomplish the objective. (The "margin of appreciation" applies with respect to this last criterion.)

32. At paragraph 22 of the judgment in **Northern Construction**, Archie CJ explained the "margin of appreciation" as:

> 22. It is a heavy burden because the responsibility for balancing the rights of the individual with the necessity, for the good of the society as a whole, to have effective means of combatting crime lies in the first instance with Parliament. Courts must not intervene merely on the basis that a judge or judges form the view that more appropriate means could have been devised. There is always room for reasonable disagreement or what was described during the course of submissions as a 'margin of appreciation'.

33. Subsequently, in the majority decision in **Barry Francis and anor v the State,**[15] Bereaux JA adopted a different approach. At paragraphs 95 to 97 of his judgment Bereaux JA adopted the approach set out by Lord Templeman in **Morgan v The AG**[16] where he explained:

> "[95] The decision in *Morgan*,[17] which was decided before *Nyambirai*, is a decision directly on section 13(1) of the Constitution. Lord Templeman without resorting to any formulaic test considered whether rent restriction was a feature of democratic societies and how democratic societies would ordinarily apply rent legislation. In our judgment this is more consistent with the natural meaning of the term "reasonably justifiable in a society which has a proper respect for the

[15] Criminal appeal Nos 5 and 6 of 2010
[16] [1988] 1 WLR 297
[17] [1988] 1 WLR 297, 299 – 300.

rights and freedoms of the individual". The phrase itself provides the test and it is unnecessary to provide any further formula….

[96] The approach of Lord Templeman is the better approach to the section 13(1) considerations. In any event it is a decision of the Privy Council directly from Trinidad and Tobago and on the very question which arises in this appeal.

[97] The Nyambirai formula adopted in **de Freitas** are far too narrow and formulaic. Moreover, the third limb incorporates the proportionality principles which are appropriate to the question of inconsistency of an Act of Parliament with sections 4 and 5 of the Constitution rather than to reasonable justification under section 13(1). By such a yardstick, any Act of Parliament which is inconsistent with sections 4 and 5 because of disproportionality, will necessarily fail the reasonable justification question. It thus renders irrelevant the fact that the Constitution itself permits Parliament to derogate from the fundamental rights in the manner permitted.

34. At paragraphs 99 to 100, Bereaux JA set out the approach a Court should take when considering whether section 13 (1) of the Constitution is breached. He stated:

"[99]. In **Morgan,** Lord Templeman equated the phrase *"a society which has a proper regard for the rights and freedoms of the individual"* with a *"democratic society"* . We accept that. As an ideal for measuring what kind of society has proper regards for the rights and freedoms of individuals of the individual, a democracy is the most appropriate. In deciding whether section 13(1) of the Constitution is breached we can compare our legislation with comparable legislation from other democracies.

[100]. It requires a dispassionate and detached approach by judges. Certainly there will be a local flavour to legislation which will require judges to bear in mind our own national and cultural peculiarities but ultimately, the assessment must be made against norms and accepted standards of civilised

nations which subscribe to democratic principles, democratic systems of governance and the rule of law."

35. At paragraph 101, Bereaux JA explained that the approach set out in **Nyambirai** and which was adopted in **Northern Construction** was still relevant. He stated:

> [101] It is not to say that the **Nyambirai** approach may not be relevant. Proportionality may be relevant to any consideration of legislation under section 13(1) of the Constitution and may be used as a tool in construing section 13(1). But it cannot be applied inflexibly. Moreover, there may be legislation which is disproportionate and thus inconsistent with sections 4 and (5) of the Constitution (thus failing the proportionality test) but which may still be effectual because democracies recognise that some disproportion in aims and policy of the Executive, may be required in the public interest… While such legislation may be inconsistent with the human rights provisions, their social object may be consistent with democratic norms and ideals and therefore reasonably justifiable.
>
> [102] It is for this reason that the Constitution permits the elected representatives, by a requisite majority, to override the provisions of sections 4 and 5. It is also for this reason that the courts when considering the proviso in section 13(1) of the Constitution must be deferential to the views of the elected representatives in Parliament, recognising that there are limitations on and derogations from the fundamental rights, which are permitted by the Constitution.

36. In my opinion, the approach suggested by Bereaux JA is that the test set out in **Nyambirai** is still applicable but it must be applied with a degree of flexibility, in particular, if the legislation is disproportionate a Court can still find that it has effect because it is required in the public interest. Indeed the common thread in both **Northern Construction** and **Barry Francis** is that in considering the proviso under section 13(1) of the Constitution, a Court must have regard to the views of Parliament and that the Constitution permits Parliament to derogate from the fundamental rights once certain conditions are met.

37. The onus is on the Claimant to prove that the impugned provisions are not reasonably justified in a society which has proper respect for the rights and freedoms of the individual.

The submissions by the parties

38. It was submitted on behalf of the Claimant that in applying the test expounded by Bereaux JA in **Barry Francis,** the Court is obliged to consider whether similar provisions in other democratic societies, for the retention of personal data by the State after acquittal or without any charge being laid at all, are a feature of democratic societies. Counsel for the Claimant relied on the judgments of the European Court on Human Rights (ECtHR) in **S and Marper v United Kingdom**[18] and **Gaughran v UK**[19] and the judgment of the Supreme Court of the UK in **GC v The Commissioner of Police of The Metropolis**[20].

39. The Defendant's position was that the impugned provisions are reasonably justifiable in a society that has proper respect for the rights and freedoms of the individual because:

    a. The legislative objective of the impugned provisions is sufficiently important to justify limiting the right to respect for private life;
    b. The measures designed to meet the legislative objective are rationally connected to it; and
    c. The means used to impair the right to private life are no more than is necessary to accomplish the legislative objective and are within the State's margin of appreciation.

40. To support the aforesaid submission, Counsel for the Defendant relied extensively on the **Hansard Reports** of both the Senate and the House of Representatives for the Miscellaneous Provisions (Administration of Justice) Bill, 2014; the decisions of the

[18] Appeals Nos 30562 /04 and 30566/04
[19] Appeal No 45245/2015
[20] [2011] UKSC 21

ECtHR in **S and Marper** and **PN v Germany**[21]; and the reasoning of Lord Steyn in the House of Lords decision **R (on the application of S) v Chief Constable of South Yorkshire; R (on the application of Marper) v Chief Constable of South Yorkshire**[22] **.**

41. The case law referred to the court by the parties were decisions of the ECtHR and the United Kingdom. I accept that the norms and standards applied by the ECtHR and the United Kingdom are that of a civilised nature which subscribed to democratic principles, a democratic system of government and the rule of law. In considering the application of the proviso in section 13 (1) of the Constitution to the impugned provisions, I have decided to follow the approach enunciated by Bereaux JA at paragraph 101 in **Barry Francis.**

What was the legislative intent?

42. The policy which motivated the decision to introduce the impugned provisions can be gleaned from the **Hansard Reports** concerning the Miscellaneous Provisions (Administration of Justice) Bill, 2014. The said Bill sought to amend two Acts, namely the Police Service Act and the Administration of Justice (DNA) Act 2012.

43. According to the **Hansard Report** from the House of Representatives on Friday April 11, 2014 on the Miscellaneous Provisions (Administration of Justice) Bill, 2014, at p.332 – 333 it stated:

> 2:30 p.m.
>
> In this country there has been a lot of legitimate concern about the detection rate in the police service. People have criticized the police for not increasing that detection rate. Whilst I say that is legitimate we must also listen to the cries of the police service. They cannot be called upon to improve the detection rate in the fight against crime in the country unless we give them the legislative legroom and the legislative tools that they need to fight crime. And if the police would like to retain a DNA sample and profile, even if a man is exonerated, because they have good reason from their practical experience to make such a request, I say let us

[21] App No 74440/17
[22] [2004] 4 All ER 193

support them and I will tell you why. You know how many cases we have seen where people get off on a technicality, you know how many cases in this country we have seem where people get off because they have the better lawyer than the State.

…[I]t remains a reality that there are many ways that a person can win a matter before the court, including wiping out the witness, murdering the witness, interfering with the jury, psychological intimidation in the court, eyeballing jurors, all sorts of innovative, enterprising ways that a man could win a case.

So, when the police say that they want to keep it, even if you are exonerated, they know what they are talking about. But add to that, the rather high rate of recidivism in this country – when you see the extent to which repeat offenders in this country are holding this country to ransom, it is a small minority of criminal elements in this society that are holding this country to ransom. And when I looked at the statistics provided by the police … you realize that the concept of repeat offenders is one that is very real in this country.

So, even if the man is exonerated here, he may be a repeat offender down the road, keep his sample and retain his profile. We have to deal with Trinidad and Tobago's problems which face our country and we have to deal with the raw and harsh reality that confronts our citizenry. We cannot make law based on America and Canada and the situation that confronts them, you know. We must base our laws on what we confront here. Our criminals are enterprising and innovative and ingenuous. It is a chess game between the State and the bandit, and right now they seem to be out manoeuvring us. So, as a Parliament we must be two steps ahead of them and we must therefore support this legislation so that the police can retain that sample.

44. The aforesaid remarks were made in relation to the Administration of Justice (DNA) Act, however, they are relevant in the instant matter as the impugned provisions were amended by the Miscellaneous Provisions (Administration of Justice) Act, 2014 which sought to amend a suite of legislation and which were piloted in both Houses of Parliament at the same time.

45. In the **Hansard Report** from the Senate on Tuesday July 15, 2014 (34th Sitting – 4th Session – 10th Parliament) at p.598, the then Attorney General, Anand Ramlogan SC described the legislative objective as:

> [T]he legislative objective here is to give the police service the legislative tools that they require to fight crime in this country. We are all terribly aware of the horrific crime situation in the country. We are also aware that the detection rate is abysmally low and totally unacceptable in Trinidad and Tobago. There is no gainsaying in that. But that cannot be viewed in a vacuum. The police have been saying for the past 10 years that we have been collecting fingerprint and DNA evidence from crime scenes, but that is of no use to improve the detection rate if we do not have a DNA database that we can get a match. And simply put, as a matter of common sense, the wider the DNA database, the greater the probability that you will get a match. And there is no point in having a restricted database when the police are collecting all these samples, but they cannot, in fact, feed it into the nodes of the system to get a realistic and feasible result that can assist them to solve the crime.

46. The stated legislative objective for the introduction of the impugned provisions, is the promotion of public safety by giving the TTPS the necessary tools to assist in the detection and combatting of crime.

47. The learning emanating from the ECtHR has recognised that the State in a democratic society, is empowered to curtail the right to privacy of an individual by obtaining and retaining personal information such as an individual's fingerprint information, in its pursuit of combatting crime.

48. In **S and Marper**, the ECtHR agreed with the Government of the United Kingdom that the retention of fingerprint and DNA information pursued the legitimate purpose of the detection and prevention of crime. In **S and Marper**, both appellants were arrested and charged and their fingerprints and DNA samples were collected by the South Yorkshire Police pursuant to section 64 (1A) of the Police and Criminal Evidence Act (PACE). Section 64 (1A) provided:

> Where – (a) fingerprints or samples are taken from a person in connection with the investigation of an offence, and (b) subsection (3) below does not require them to be destroyed, the fingerprints or samples may be retained after they have fulfilled the purposes for which they were taken but shall not be used by any person except for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution.

49. Neither party was convicted of the offence with which they had been charged but their fingerprints and DNA samples were retained by the police. Both appellants asked the Police Chief Constable for this data to be destroyed but their requests were denied.

50. Both parties applied for judicial review of the decision of the Police Chief Constable on the grounds that the retention of their fingerprints and DNA sample, as permitted by Section 64(1A) of PACE, contravened their right to a private life under Article 8 of the European Convention on Human Rights ("the Convention") and their right not to be discriminated against under Article 14 of the Convention. They also asserted that the Police Chief Constable had acted in a manner incompatible with their rights under Articles 8 and 14 of the Convention.

51. The Divisional Court, the Court of Appeal in the United Kingdom and the ECtHR all found that the retention of the fingerprints and DNA information of an individual by the State, pursued the legitimate purpose of the detection and prevention of crime. The ECtHR noted that "[w]hile the original taking of this information pursues the aim of linking a particular person to a particular crime, its retention pursues the broader purpose of assisting in the identification of future offenders." [23]

52. In **P.N. v Germany**, the applicant was a repeat offender who had been arrested and charged with an offence. The Dresden police ordered that the applicant's identification data — fingerprints, palm prints and photographs were to be collected

[23] See paragraph 100

by the police, as permitted by Article 81b, second alternative, of the Code of Criminal Procedure which stated:

> "Photographs and fingerprints of persons suspected of having committed an offence may be taken, even against their will, and measurements and other similar measures carried out with regard to them, in so far as this is necessary for the purposes of conducting the criminal proceedings or for the purposes of the police records department."

53. The applicant was not convicted of the offence with which he had been charged but his identification data was retained by the police. The applicant lodged an administrative appeal wherein he asserted that the Dresden police order was disproportionate.

54. The applicant unsuccessfully appealed this decision in the various domestic courts in Germany. He appealed to the ECtHR which found that the collection and storage of the applicant's personal data constituted a proportionate interference with his right to respect for his private life and that it was necessary in a democratic society to combat crime.

55. In my opinion, a feature of a democratic society is to recognise, respect and protect an individual's right to privacy. It is also equally a feature of a democratic society to empower the Parliament, including the elected representatives of the citizens, to pass legislation which can curtail the rights of an individual in instances where the public interest outweighs those rights. Some of the most heinous crimes which can be committed in a society has the effect of depriving an individual of his right to life (murder), liberty (kidnapping) and property (burglary, robbery, fraud, larceny, and other related offences). The State has a duty to enact legislation to protect citizens from the arbitrary interference of their right to life, liberty and property and in this regard, the stated legislative intention for the impugned provisions is consistent with the State's duty to the public.

Were the measures designed to meet the legislative objective?

56. Counsel for the Claimant argued that the measures in the impugned provisions were not designed to meet the legislative objective, as the effectiveness of a database is not based on the quantity of data but rather the quality of that data. Counsel argued further that having the data of a law abiding citizen in the database, does not assist in the detection of crime and the harvesting of such data cannot be rationally connected to the aim of crime detection.

57. It was submitted on behalf of the Defendant, that the measures in the impugned provisions were rationally connected to the legislative objective of assisting the police service in the detection, combatting and prosecution of criminal matters. The information obtained by the police pursuant to the impugned provisions, results in the creation of large databases of measurements, photographs and fingerprint information which can be used to quickly identify whether a person was at a crime scene or not, and in the investigation and prosecution of a crime or in the prevention of crime.

58. The measures introduced in the impugned provisions authorize the Commissioner of Police to retain from a person who was arrested or charged with a criminal offence, even after his discharge or acquittal, certain personal information such as records relating to *photographs* and *measurements* of the said person (section 50 (2)), *fingerprint impressions* and data derived from the analysis of the fingerprint impressions (section 50A(3)).

59. The impugned provisions also enable the Commissioner of Police to transfer the data of the fingerprint impression to the National Fingerprint Database (section 50A(3)) and to retain the said information for a minimum of 5 years (section 50J(1)), but where a person has been exonerated the said data must be destroyed after 20 years from the date of exoneration (section 50 K(3)). However, if the fingerprint impression was destroyed in accordance with section 50J, but the data relating to the said fingerprint impression was retained from the date of destruction to the 20 year period, the data

may be used as evidence in any matter involving the person to who it concerns (section 50 K(4)).

60. The effect of the impugned provisions is that they permit the Commissioner of Police to take and retain the measurements and photographs of a detainee or an accused even after the person has been discharged or acquitted. It also allows for the creation of a National database of fingerprint impressions and analysis of fingerprint impressions which identifies certain persons (section 50).

61. In **S and Marper** the ECtHR provided the following guidance to be adopted when examining whether the measures adopted in the legislation met the legislative objective. At paragraph 104 the ECtHR stated:

> "the interests of the data subjects and the community as a whole in protecting personal data, including fingerprints and DNA information, may be outweighed by the legitimate interest in the prevention of crime. However, the intrinsically private character of this information calls for the Court to exercise careful scrutiny of any State measure authorising its retention and use by the authorities without the consent of the person concerned."

62. I accept that the Defendant has failed to put any evidence before this Court on how the measures introduced in the impugned provisions have assisted the TTPS, in the detection and combatting of crime since its introduction approximately 6 years ago. In my opinion, this evidence would have been a useful indicator of assessing if or how the measures in the impugned provisions rationally met the legislative intent.

63. However, even in the absence of such evidence, I am of the opinion that the power given to the Commissioner of Police under the impugned provisions, to take and retain measurements, photographs and fingerprint data of certain persons was designed to assist the TTPS in the identification of any person who is or was involved in the commission of a crime or to eliminate any person who they may suspect of a particular crime. For this reasons, I am of the view that the measures contained in the impugned provisions are rationally connected to the legislative intent.

Are the means used to impair the right to private life no more than is necessary to accomplish the legislative objective and are within the State's margin of appreciation?

64. It was argued on behalf of the Claimant that the impugned provisions run afoul the terms of necessity for the following reasons: (i) there are excessive time periods for the retention of the fingerprint data and an indefinite period of retention for measurements and photographs; (ii) there is a lack of categories of offences for which personal information can be taken without consent; (iii) no discretion is given to the Commissioner of Police to immediately destroy the fingerprints, measurements and photograph of an individual after he/she has been acquitted; and (iv) no restriction is placed on the dissemination of the harvested information by the Commissioner of Police.

65. Counsel for the Defendant submitted that the impugned provisions are not excessive or disproportionate as: (i) they are narrow in scope since they only affect a limited category of persons; (ii) they do not permit the indefinite retention of fingerprints or related data from persons who have been acquitted or exonerated and the periods of retention of this information in the impugned provisions, are reasonable in the context of the deficiencies of criminal justice system in this jurisdiction; (iii)the failure by the impugned provisions to make any distinction between certain types of offences or between persons who have been reasonably suspected to have committed an offence, or those who have been charged and convicted and those who have been charged and acquitted are justified, as any differentiation would frustrate the efficacy of the database in the detecting and combatting of crime which was the legislative purpose; and (iv) the provisions do not prevent a person who has been exonerated to apply to the Commissioner of Police to have his information destroyed.

Scope of the impugned provisions/lack of differentiation

66. According to the learning from the ECtHR and the United Kingdom, legislation which takes and retains information from an individual, on the basis that the retention of this information was in the public interest in order to combat crime and which fails to

draw any distinction by category of offences or by a person who has been arrested and not convicted, is not within the State's margin of appreciation.

67. In **S and Marper**, the ECtHR stated that section 64(1A) of the Police and Criminal Evidence Act amounted to a violation of Article 8 of the Convention. It concluded that the nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of those applicants, failed to strike a fair balance between the competing public and private interests and the United Kingdom had overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constituted a disproportionate interference with the applicants' right to respect for private life and could not be regarded as necessary in a democratic society.

68. Although the Defendant relied on the House of Lords judgment of Lord Steyn in **R (on the application of S) v Chief Constable of South Yorkshire; R (on the application of Marper) v Chief Constable of South Yorkshire**[24] **,** the ECtHR judgment in **S and Marper** overturned the House of Lords decision and the subsequent decision by the Supreme Court of the United Kingdom in **GC**, applied the ECtHR decision in **S and Marper** and arrived at a similar conclusion. In arriving at the same conclusion as in **S and Marper**, Lady Hale stated at paragraph 61 in **GC**:

> "Whether and in what circumstances the police should be able to keep the DNA samples and profiles, fingerprints and photographs of people who have been arrested but not convicted is a deeply controversial question. The Government is promoting the Protection of Freedoms Bill which will adopt in England and Wales the present system in Scotland. This allows retention only for a limited period and in respect of certain crimes. It reflects a strong popular sentiment that the police should not be keeping such sensitive material relating to "innocent" people, even if they are only allowed to use it "for purposes related to the prevention or detection of crime, the investigation of an offence, the conduct of a prosecution" (Police and Criminal Evidence Act

[24] [2004] 4 All ER 193

1984, s 64(1A), as substituted by the Criminal Justice and Police Act 2001, s 82). If the popular press is any guide to public opinion, the decision of the European Court of Human Rights in S and Marper v United Kingdom (2008) 48 EHRR 1169 is one which captures the public mood in Britain much more successfully than many of its other decisions."

69. In **Gaughran**, the applicant had been convicted of driving with driving with excess alcohol contrary to the Road Traffic (Northern Ireland) Order. On the day of the applicant's arrest, the Northern Ireland police collected his photograph, fingerprints and DNA sample. Though the applicant's DNA sample was destroyed, the Northern Ireland police indefinitely retained his photograph, fingerprints and DNA profile. The applicant challenged the police's continued retention of this information on the grounds that its indefinite retention was unlawful and constituted an unjustifiable interference with his right to respect for private life under Article 8 of the Convention.

70. The ECtHR stated that there was a narrowed margin of appreciation available to States when setting retention limits for the biometric data, and in establishing a regime it was important to take into account the seriousness of the offending and the need to retain the data, and the safeguards available to the individual. [25]

71. In **GC v The Commissioner of Police of The Metropolis**, the United Kingdom Supreme Court found that with respect to section 64(1A) of the Police and Criminal Evidence Act, Parliament had not intended to require a scheme whose essential elements included an obligation that, save in exceptional circumstances, the data taken from all suspects, regardless of their age and the nature of the alleged offence should be retained indefinitely. It stated that:

> "… section 64(1A) clearly delimits the exercise of the discretion. It must be exercised to enable the data to be used for the statutory purposes. I would add that the discretion must be exercised in a way which is proportionate and rationally connected to the achievement of these purposes. Thus, for example,

[25] Paragraph 88.

the police could not exercise the power to retain the data only of those suspected of minor offences; or only of serious offences of a particular type; or only of suspects of a certain age or gender; or only for a short period. But it is possible to exercise the discretion in a rational and proportionate manner which respects and fulfils the statutory purpose and does not involve the indefinite retention of data taken from all suspects, regardless of their age and the nature of the alleged offence. "[26]

72. The impugned provisions do not empower the police to take and retain any type of personal information from all persons in this jurisdiction. There is also no distinction made in the impugned provision for the retention of personal information based on (i) the types of offences; (ii) persons who have been arrested and later released without charge; (iii) charged and acquitted; or (iv) charged and convicted. However, there are different categories of differentiation created in the impugned provisions for the retention of personal information which has been taken by the TTPS.

73. The differentiation in the impugned provisions for the retention of the measurements, photographs and fingerprint data is made by limiting the categories of persons to detainees and accused persons who have not been previously convicted of a criminal offence and or discharged or acquitted by a Court. The impugned provisions also include in Section 50A(1)(b)(i) and (ii) of the Police Service Act, another category of persons with respect to the retention of fingerprint impressions. It permits the retention by the police of a fingerprint impression of a person, that is derived from a crime scene and who they have reasonable grounds for suspecting that the person was involved in the commission of an offence related to the crime scene and they believe that fingerprint analysis could confirm or disprove the suspicion.

74. As previously stated, a “detainee” is defined in section 3 of the Police Service Act as a person who has been arrested by the police for a criminal offence and an “accused” means a person who has been charged with an offence. A person can only be arrested

[26] Paragraph 26

or charged for an offence if the police service has reasonable and probable cause to do so. While the threshold to effect an arrest may be lower than that required before proffering a charge, in both instances the police service can only take such action if there is a sufficient evidential basis.

75. The other category of persons, to whom the retention of fingerprint data applies, are persons who the police may suspect on the sole basis that the person was at the crime scene, but the police require the fingerprint to confirm or eliminate the suspicion. This is another limited category of persons, since the section is not general to include all the persons whom the police suspect are involved in the crime but it limits it to persons who were at the physical location namely the crime scene. The provision also limits the purpose for the taking of the fingerprint for this category of persons which is to confirm or disprove suspicion.

76. There is also a differentiation on the type of personal information, which the impugned provisions permit the police to retain. In the case of the detainee and accused person, the TTPS can retain photographs, measurements and fingerprints. With respect to the other category of persons, only the fingerprint impression derived from a crime scene can be retained.

77. In the ECtHR decision in **S and Marper,** the Court considered the retention of photographs, fingerprint impression and DNA of an individual by the police. At paragraph 120, the Court made the following comment on all three types of personal information:

> "The Court acknowledges that the level of interference with the applicants' right to private life may be different for each of the three different categories of personal data retained. The retention of cellular samples is particularly intrusive given the wealth of genetic and health information contained therein. However, such an indiscriminate and open-ended retention regime as the one in issue calls for careful scrutiny regardless of these differences."

Period of retention

78. The impugned provisions empower the Commissioner of Police to retain measurements, photographs and fingerprint data from certain persons as set out in section 50 of the Police Service Act. Section 50J(1) authorizes the retention of fingerprint impressions for a minimum of five years, after which they can be destroyed. This is unless the fingerprint impressions might reasonably be required for the investigation or prosecution of an offence or for the purposes of an appeal (Section 50J(2)). Section 50K(3) mandates the destruction and removal from the database, the data obtained from analysis of a person's fingerprint impressions, after twenty years from the date of the said person's exoneration.

79. With respect to the measurements or photographs of a detainee or an accused who has not been previously convicted of any criminal offence and who has been discharged or acquitted by a Court, Section 50 (2) permits the Commissioner of Police to retain the said information indefinitely, as there is no time period which limits the retention of this information.

80. In **S and Marper**, the ECtHR found that section 64 (1A) of PACE violated Article 8 of the Convention on the basis that it allowed for the indefinite retention of the fingerprints and DNA data of the applicants, who had been suspected, but not convicted of certain criminal offences. It stated that that this was a disproportionate interference with the respective applicants' right to respect for private life and not necessary in a democratic society and surpassed what was necessary to accomplish the legislative objective.

81. In **Gaughran**, the ECtHR found that the indefinite retention of photographs (and fingerprints/DNA) of persons who were convicted of a criminal offence could not be justified. The Court stated at paragraph 95:

> "In that connection, in respect of photographs, the Court considers it of interest that the regime in England and Wales was changed after RMC to permit persons convicted of less serious recordable offences, to request deletion of their photographs after six years, with a presumption of deletion (see paragraph 39

above). It underlines however that the test of proportionality is not that another less restrictive regime could be imposed. The core issue is whether, in adopting the measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it.

For the reasons set out above, the Court finds that the indiscriminate nature of the powers of retention of the DNA profile, fingerprints and photograph of the applicant as person convicted of an offence, even if spent, without reference to the seriousness of the offence or the need for indefinite retention and in the absence of any real possibility of review, failed to strike a fair balance between the competing public and private interests."

82. The legislative provisions in **Gaughran** and **S and Marper** were materially the same. In **Gaughran**, the ECtHR relied on the principles it had previously explained in **S and Marper** and found that the indefinite retention of the applicant's biometric data — DNA profile, fingerprints and photograph as a person convicted of an offence, constituted a disproportionate interference with the applicant's right to respect for private life and could not be regarded as necessary in a democratic society.

83. Similarly, in **P N v Germany**, the ECtHR applied the principles it had previously set out in **S and Marper**. As it related to the duration for the retention of the identification data, the Court found that the domestic legislation had provided for specific deadlines to review whether the continued storage of the data was still necessary. Accordingly, a fair balance had been struck between the competing public and private interests and fell within Germany's margin of appreciation. The impugned measures constituted a proportionate interference with the applicant's right to respect for his private life and could be regarded as necessary in a democratic society.

84. In the **Hansard Report** from the House of Representatives on Friday April 11, 2014 at p.331, the following remarks were made in relation to the Miscellaneous Provisions (Administration of Justice) Bill, 2014 which sought to amend *inter alia* the Administration of Justice (DNA) Act, 2012 and the Police Service Act. Even though the

remarks were made in relation to the Administration of Justice (DNA) Act, they are relevant because of the same 20-year retention period:

> The difficulty, of course, we face is that there are so many unsolved cases in Trinidad and Tobago, Mr. Speaker, that many of these cases have been shelved and in cold storage. And the research shows that when in countries where they operationalized the DNA law, it was so helpful in solving and tackling some of those older cases that one ought to tread with some caution, once the sample and profile is obtained, to go to destroy it.
>
> The advice we have received, which the Government respects and accepts, is that the longest possible period that the State, through the police service and the Custodian, can retain these samples and profile, the better the country's chances are at fighting crime. (Emphasis added)

85. In the **Hansard Report** from the Senate on Tuesday July 15, 2014 at p. 609, Parliament's rationale for the 20-year retention period in tackling the particular deficiencies in solving crimes in Trinidad and Tobago was articulated thus:

> The retention policy in this Act is 20 years, Mr. President, and one must bear in mind why 20 years. Given the fact that we have had a low detection rate in this country for over 20 years, from Akiel Chambers come up, there are crimes that remain unsolved in this country, that the police have advised us if they get a proper DNA database cold cases may come to life, and we must, therefore, take the 20-year retention policy for this amendment in the context of our own backlog of unsolved cases. … [Y]ou see all the American programmes where they use DNA evidence and solve cold cases dating back to more than 20 years in some cases. But we feel a period of 20 years is reasonable, legitimate and justifiable, having regard to what confronts us in Trinidad and Tobago, and the amount of unsolved cases, particularly murders in this country.
>
> > The police have also advised that in many cases they have intelligence, but there is a big difference between intelligence and admissible evidence. To convert intelligence into admissible evidence, it takes a quantum leap in police investigation work and sometimes they do not have the legislative tools to make that leap. But oftentimes, the police suspect that one man – if you

have 100 murders, it does not mean you have 100 murderers, Mr. President. It could be that you have five murderers, each of whom murdered 20 people, and therefore, if we have a retention policy for 20 years, it may very well be that it might have a multiplier effect in terms of solving cases if and when you catch someone by virtue of a match on the DNA database.

86. The **Hansard Report** from the House of Representatives on Friday June 13, 2014 at p.44-45, stated the following:

> In Trinidad and Tobago, we have had the police service, they have been visiting crime scenes and collecting data, collecting fingerprints and collecting DNA evidence, but you know what? No one has bothered to ask the police service what it is that is holding back the solving of those cases.
>
> You know what it is? The gathering of evidence from a crime scene, whether it is a fingerprint or DNA evidence, it is only as useful and as valuable as the database or bank that they have to match it against. There is no point in collecting fingerprints and DNA evidence from crime scenes, murder scenes, little children being murdered, and you have nothing to match it to**.** Because why? Some people say we must respect the privacy and the fundamental rights of citizens. The time has come to rebalance the scales of justice in Trinidad and Tobago and the Government makes absolutely no apology for saying that the time has come for the scale to be heavier by two ounces in favour of the hard-working, decent, law-abiding citizens of this country. [*Desk thumping*] And if to do that and solve crime it means that there must be a constitutional invasion of one's privacy, then so be it. (Emphasis added)

87. At page 47, Senator Ramlogan SC continued:

> …[T]he fact remains we have cases in this country that are unsolved that go back to 15 and 16 years. Akiel Chambers' name must ring an echo in this Chamber and DNA evidence from that case is still there.
>
> … If we had inherited, as a Government, a proficient system that was very quick and we say we had a turnover and we could feel confident that if in five years'

time a crime was not solved we could destroy the DNA and fingerprint sample, no problem, we could do that. But we do not have such a system.

88. The deficiencies in the criminal justice system in Trinidad and Tobago prior to 2014 has been alluded to in the **Address of the Honourable Chief Justice, Mr. Justice Ivor Archie, O.R.T.T. in Commemoration of the 2013/2014 Law Term of the Supreme Court of Judicature.** In describing the criminal justice system, Archie CJ stated:

> I now turn to an issue that is of pressing concern to everyone in this country and a major focus for this year, the Criminal Justice system. There can be no dispute that the system is in crisis. Not the Judiciary, not the DPP, not the Police – the whole system. A brief look at the High Court statistics will illustrate the point. The 42% increase in disposition of indictments from 64 to 91 in the last term is modest having regard to the fact that indictments filed increased from 116 to 339. If we take one non-bailable offence alone, murder, I regret to inform you that as I speak there are 575 persons in custody awaiting trial in respect of 468 murders. With the length of the average murder trial running into several weeks, we could have 10 judges assigned to try nothing but murder cases for the next 5 years and we still will not have cleared the backlog (assuming that all the matters go to trial). This is not a new problem, it existed when I assumed office and it resists efforts to address it because up to now we have not been able to effect comprehensive reform.

89. On that occasion, Archie CJ also spoke about the investigative capacity required in the criminal justice system and he stated:

> It has been observed in many quarters and on diverse occasions that the ability to convict the guilty is dependent on the quality of evidence placed before the courts, which in turn is dependent on the forensic evidence gathering capabilities of the investigative agencies. I do not wish to debate or dispute the reasons for disbanding SAUTT but by whatever the name or the structure, the capabilities and training that had become available are desperately needed. I echo His Excellency's concern expressed on Independence Day that investigations cannot end with a confession statement. Faster testing of narcotics and firearms is also a must. We

can't have 21st century justice without 21st century police investigations and that requires investment in and facility with the latest available technology.

90. The deficiencies in the criminal justice system in Trinidad and Tobago continues to exist and there is a severe backlog despite the best efforts of the court system. In the recent **Address of the Honourable Chief Justice, Mr. Justice Ivor Archie, O.R.T.T. in Commemoration of the 2020/2021 Law Term of the Supreme Court of Judicature,** Archie CJ spoke about the backlog that exists in the Criminal High Court and stated that the "criminal justice system is near collapse owing to factors beyond the judiciary's control."

91. In my opinion, one of the accepted standards of a civilised nature which subscribes to democratic principles, is the rule of law and the principle that one is innocent until proven guilty by the State. It therefore appears to be inimical to this accepted standard that the Commissioner of Police can retain possession for an indefinite period, the measurements and photograph of a person who is arrested and or charged, who is later exonerated and who has no previous convictions. While a person is not easily identifiable by his measurements, a person is easily identifiable by a photograph. It is for these reasons, I have found that the indefinite retention of the measurements and photograph of an individual is not within the margin of appreciation of the State even if applied with a great degree of flexibility.

92. On the other hand, I am of the opinion, that the respective periods of retention of the fingerprint data of persons who have been exonerated is within the margin of appreciation of the State and necessary when the said periods are considered against the backdrop of the high number of serious crimes and the challenges in the criminal justice system.

Discretion of the Commissioner of Police to destroy any of the harvested information

93. Counsel for the Claimant argued that there is no express provision which gives an individual, who has been exonerated, the right to apply to the Commissioner of Police

to destroy his personal information which was harvested by the TTPS under section 50 of the Police Service Act. Counsel also submitted that the Defendant failed to produce any evidence before the Court on whether such applications have been actually made by members of the public, or entertained by the Commissioner of Police and the Defendant also did not provide any statistics on the numbers of fingerprint impressions destroyed pursuant to such applications. Counsel further submitted that the destruction of the fingerprint impression is of little practical effect where the fingerprint data is still retained pursuant to section 50K of the Police Service Act.

94. It was submitted on behalf of the Defendant that there appears to be no prohibition on persons applying to have their fingerprint impressions destroyed after the 5 year period identified in 50J(1).

95. The custodian of the personal information obtained by the TTPS pursuant to the impugned provisions is the Commissioner of Police. With respect to the measurements and photograph of an individual, there is no discretion under section 50 which empowers the Commissioner of Police to destroy this information and it appears to me that he must retain this indefinitely.

96. The Commissioner of Police has a very limited power to destroy the fingerprint impression and this is after the expiration of 5 years from the date it was entered into the National Fingerprint Database. This is of course if there is no order of the Court stating that the said fingerprint impression is not to be destroyed for a particular purpose. The Commissioner has no discretion with respect to fingerprint impressions in the National Fingerprint Database, as he is only able to destroy it 20 years after the date the person was exonerated.

Dissemination of the information by the Commissioner of Police

97. It was submitted by Counsel for the Claimant that the use made of photographs by the TTPS means that there is a heightened risk that serious breaches of privacy will occur if the indiscriminate retention of photographs is permitted. In this regard, Counsel argued that there is a fairly recent practice of the TTPS displaying images of

"wanted" persons on a weekly basis on TTPS sanctioned television programmes, such as "Beyond the Tape", of which the Court can take judicial notice. Additionally the TTPS often shows photographs of persons wanted for very minor offences, such as failing to pay fixed ticket fines for traffic violations. Counsel argued further that there is also a practice of displaying photographs of "wanted" persons on public notice boards in Police Stations which has been the subject of litigation.[27] Counsel submitted that the effect of the impugned provisions coupled with the actions of the TTPS, is that for the remainder of the Claimant's life, if he is ever *suspected* of having committed a minor offence such as failing to pay a traffic ticket, he runs the risk of having his mug shot displayed on prime time national television or in a police station. However, a person who has never been detained by the police runs no such risk and there is no possible justification for this disparity.

98. At paragraph 13 of the Claimant's affidavit, the Claimant asserted that he feels betrayed by the TTPS and he does not trust them due to the actions of some of its members. He also stated that he is fearful of what the TTPS may use his fingerprints, height measurement, photographs and other personal information for. However, the Claimant did not state in his affidavit that the TTPS has a practice of displaying photographs of "wanted" persons in police stations and that there is a fairly recent practice of the TTPS displaying images of "wanted" persons on a weekly basis on TTPS sanctioned television programmes, such as "Beyond the Tape". In my opinion, in the absence of such evidence, the Defendant was deprive of the opportunity to put any evidence before the Court to dispute these assertions made by the Counsel for the Claimant. It is also difficult for the Court to take judicial notice of these assertions, as there is no evidential basis that the said photographs came from the database of photographs which is in the custody of the Commissioner of Police.

99. Paragraph 10 of the Hill Affidavit set out the safeguards with respect to the dissemination of the measurements, photographs and fingerprint data. He stated:

[27] CV 2014-00033 Derek Carrington v AG paragraph 31

"10.There are restrictions on the dissemination of data stored on the TTPS database as well as software and firewalls to prevent unauthorized access to data stored on the database. Further, no information is disseminated without an application in writing made to the Commissioner of Police and dissemination is done only after the Commissioner of Police grants permission to do so. Additionally, the database at the Criminal Records Office has the highest level of information technology protection for security and safeguards. Access to the CRO database is very limited and controlled based on rank and where the officers are attached along with a number of other considerations."

100. Based on the Hill Affidavit, access to the fingerprint data can only be obtained with the permission of the Commissioner of Police, while the database which contains the photographs and measurements can be accessed by police officers without the permission of the Commissioner of Police.

101. In my opinion, based on the Hill Affidavit, there are adequate safeguards with respect to the access to the fingerprint data. However, with respect to measurement and photographs, the impugned provisions have not set out any safeguards and given that a person can be more easily identified by a photograph, the safeguards mentioned in the Hill Affidavit are inadequate.

Whether sections 50(2), 50A (3), 50 J(1) and 50 K (3) and 50 K (4) of the Police Service Act are valid after applying the proviso in section 13(1) of the Constitution

102. When I weigh all the factors which a Court ought to consider in determining the proviso in section 13(1) of the Constitution, it is my opinion that section 50 (2) which empowers the Commissioner of Police to retain the measurements and photographs of an individual for an indefinite period after his exoneration, infringes the right to a private life of an individual under section 4 of the Constitution, if he has been exonerated and has no criminal charges pending before the Court. Section 50(2) has met the legislative intent of giving the TTPS the ability to compile a database of photographs and measurements of persons who were either arrested or charged with

a criminal offence after they have been exonerated, and it has limited the said ability to only persons who have been arrested and charged.

103. However, the said information can be used to easily identify an individual and the lack of any safeguards namely, (i) the indefinite retention of this information; (ii) the ability of any police officer to have access to the said information; and (iii) the failure by the section to bestow a discretion on the Commissioner of Police to destroy the said information within any specified period of time after a person has been exonerated, are inconsistent with a society which has a proper respect for the rights and freedoms of individuals in a democratic society, where one of the principles of the rule of law is a person is innocent until proven guilty by the State.

104. In my opinion, the failure of the legislation to state a period of retention and to give the Commissioner of Police any power with regards to the destruction of such information, means that a person who has been acquitted remains "under the eyes" of the police for the rest of his life even if he is innocent. Additionally, section 50(2) is outside of the margin of appreciation for the State, as there are no safeguards to ensure that the said information is not easily accessible by any member of the TTPS.

105. On the other hand, I have found that sections 50A (3), 50 J(1) and 50K (3) and 50K (4) do not infringe an individual's right to a private life and are therefore valid. I have arrived at this position because a person is not easily identifiable by his fingerprint impression. The purpose for the retention of the fingerprint data is consistent with the legislative objective of the detection and combatting of crime. Additionally, there is a limited period of retention for this data which operates after a person has been exonerated. This period of retention may appear to be long, but in the context of the national peculiarities in this jurisdiction as it relates to the delays in the criminal justice system, the period of retention is within the State's margin of appreciation. Further, there are added measures to protect the right of the individual, such as the Commissioner of Police has custody and control of the database which means that access to the said information is limited and the Commissioner has a discretion to destroy the fingerprint information as prescribed by section 50 J(1).

Order

106. It is declared that section 50(2) of the Police Service Act infringes on the Claimant's right to private life.

107. It is declared that section 50 (2) of the Police Service Act is unconstitutional, illegal, null, void, invalid and are of no effect.

108. The Commissioner of Police shall immediately destroy the measurement, and photograph information harvested from the Claimant.

109. The Commissioner of Police shall immediately destroy the measurement and photograph information harvested from persons who have not been convicted of a criminal offence and who have no criminal charges pending before the Courts.

110. The Court will hear the parties on the issue of costs on 8 March 2021 at 9:45 am virtual hearing.

/S/ Margaret Y. Mohammed

Judge