REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

(Sub-Registry, San Fernando)

CV2018-04400

RAVI BALGOBIN MAHARAJ

Claimant

AND

THE COMPTROLLER OF CUSTOMS AND EXCISE

First Defendant

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Second Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: July 29, 2020.

Appearances:

Claimant- Mr. A. Ramlogan SC, Mr. A. Pariagsingh and Ms. C. Stewart instructed by Mr. J. Jagroo.

Defendants- Ms. J. Baptiste-Mohammed instructed by Mr. S. Julien.

JUDGMENT

1. This matter is a mixed claim in the form of judicial review and a constitutional motion in which the claimant is seeking to review a policy implemented by the first defendant. The proceedings essentially concerns whether the policy of the Customs and Excise Division to consider adult toys or sex toys as prohibited goods, within the meaning of **Section 45 (1) (l) of the Customs Act, Chapter 78:01** ("the Act") is irrational, illegal and unfair.

2. Section 213 of the Act prohibits the importation of indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings, gramophone records or *any other indecent or obscene matter*.

3. The claimant states that the crux of his case involves an infringement of his constitutional rights and challenges the legality of the first defendant's policy. As such, the claimant contends that said policy has and can infringe his constitutional rights.

4. However, the defendants argue that the claimant is seeking to re-litigate issues that were determined in recent decision of this court, **CV2019-01002, Jesse Ryan Mark Rooplal v Comptroller of Customs and Excise** ("the Rooplal case").

5. The claimant seeks the following relief:

1. As against the First Defendant:

a) A declaration that the first defendant's decision by said action and or omission that adult toys are illegal and hence a prohibited good, the importation of which is restricted under

section 45 (1) (l) of the Customs Act, Chapter 78:01 is unfair, irrational and illegal;

b) A declaration that section 45(1) (l) of the Customs Act, Chapter 78:01 upon its true construction for all intents and purposes, does not include adult toys rendering it illegal and or a prohibited good, the importation of which is restricted.

2. As against the Second Defendant:

c) A declaration that there has been a violation of the claimant/intended claimant's right to liberty and enjoyment of property and the right to be deprived thereof except by due process of law in accordance with section 4(a) of the Constitution of the Republic of Trinidad and Tobago;

d) A declaration that there has been a violation of the claimant's right to respect for his private and family life in accordance with section 4(c) of the Constitution of the Republic of Trinidad and Tobago;

e) Damages including vindicatory damages for the breach of the claimant's aforesaid constitutional right.

3. As against the First and Second Defendant:

f) Costs; and

g) Such further and or other relief as the court may deem just and appropriate in the circumstance of this case.

FACTUAL HISTORY

6. It must be noted that this case does not involve a seizure or detention of goods. Further, that the above reflects the specific basis for and the relief claimed. To that end the fixed date claim form filed on December 10, 2018 has not been amended.

7. The claimant is a social, political and civil rights activist who claims to be in a committed relationship with his girlfriend. On August 21, 2018 the Daily Express Newspaper published an article that advised that pursuant to section 45(1) of the Act, adult toys fell under the words *indecent or obscene articles or matter*.

8. Another article was published on August 26, 2018 by the Daily Express Newspaper wherein the Honourable Minister of Finance advised that although the Act did not specifically refer to adult toys as a prohibited good it was the discretion of the Customs Division, the Comptroller and the courts to determine what items were indecent or obscene.

9. It is the claimant's case that he has always had access to adult toys by way of importation as well as by purchasing same from local stores. There was never any prohibition rendering the importation, purchase or use of adult toys as illegal and the policy of the first defendant a breach of his constitutional rights.

10. The claimant utilizes the local shipping company Websource Ltd to import his items. In or around August 21, 2018, the shipping company sent an email to its customers that the Customs and Excise Division restricted the importation of adult toys.

11. On August 28, 2018, the claimant sent a pre-action protocol letter to the Comptroller by which he is seeking clarification on whether or not there was a policy in place and what was the said policy regarding the restriction on adult toys. To date the first defendant has not responded.

12. The claimant is fearful as the Act imposes certain penalties for importation of certain prohibited goods and in theory, he may be impacted.

THE CLAIM FOR JUDICIAL REVIEW

The ruling of this court in the Rooplal case

13. It is convenient to set out this matter at this stage. The challenge the Rooplal case was to the policy of the first defendant in relation to the application of a particular qualifying test for imported items which it considered fell under the definition of indecent or obscene under section 45(1)(L) of the Customs Act Chap 78:01 (the Act). That subsection prohibits the importation of indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings, gramophone records or any other indecent or obscene matter. It is an offence to import any such goods under section 213 of the Act. The facts in ***Rooplal*** were that the claimant attempted to import a life size doll that made of silicone with very distinctive features of a woman's anatomy. The item was seized as being a prohibited item under section 45(1)(L) of the Act. The decision in ***Rooplal*** was delivered on January 20, 2020.

14. Two relevant issues in that case were;

    a. Did the defendant adopt and implement a policy whereby some goods which fall within a named sub category of goods are considered indecent or obscene when the goods closely resemble male and female genitalia without consideration of the ordinary and natural meaning of the words indecent and obscene as used in the Customs Act.

    b. If so, was the adoption and implementation of such a policy transparent and lawful.

15. This court found at paragraph 24 of ***Rooplal*** that there was very clear evidence of a long established practice of the defendant of implementation of an unwritten policy that any item which closely resembles the male or female genitalia is considered indecent or obscene. The court also found that it appeared to be the case notwithstanding a memo of the Director of Public Prosecutions in which he properly defined both indecent and obscene in the context of the law as it stood then and stands today.

16. Further, this court had this to say in ***Rooplal***;

> *26. The issue therefore arises as to whether the definition set out in the policy is overly restrictive. As set out above, the natural and ordinary meaning of the word Obscene is offensive or disgusting by accepted standards of morality and decency and repugnant. This definition admits of and is directly related to applicable societal standards of that which is moral, decent and acceptable. To classify an item as obscene therefore by the simple fact that it closely resembles the male or female genitals would be to ignore the other elements of the definition unrelated to description of the item. These other elements may be the prevailing accepted norms of society at the time or the accepted morality of Trinidad and Tobago society. There is a jurisprudential argument that morals and that which is accepted by society changes as society itself changes.*
>
> *27. By way of example, quite recently in this jurisdiction there has been an acceptance of same sex relationships, a relationship which would have been considered immoral by many in the past and which some still consider to be so. Similarly, the practice of smoking less than 30 grams of cannabis in private has been decriminalized in this territory*

quite recently. This again is a matter that may have been considered immoral or certainly unacceptable by this society in the past. So that it is reasonable to presume that a feature of all developing societies is that accepted standards of decency and morals change over time.

28. It follows therefore that what may be seen to have been indecent, immoral or unacceptable or repugnant decades ago may not necessarily be so considered today. In the court's view therefore, the definition of indecent or obscene under section 45(1)(L) of the Customs Act Chap 78:01 is coloured by the date and time in which the section is used and that this is so by design and not by coincidence in a recognition by the legislature that standards or morality and that which is acceptable are not stoic but are in fact dynamic features of societal existence.

29. The Customs Officer who is charged with applying the provision of the Act will have to make a determination as to whether the item which he examines appears to be that which at the lower end does not conform with generally accepted standards of behaviour or propriety, especially in relation to sexual matters in which case it may be indecent or at the higher end whether the item is offensive or disgusting by accepted standards of morality and decency, in which case it may be obscene.

30. The application of a blanket policy that relies solely on the description of an item in that regard may have the effect of removing essential elements of the criteria to be applied by any Customs Officer when acting pursuant to section 45(1) (L) of the Act. In other words, his consideration of whether an item may

be prohibited as being obscene or indecent may ignore societal norms and acceptable standards of morality thereby being unduly restrictive and artificial. The application of the section in such a manner would be repugnant to the legislation and would be unlawful.

19. In the result the court found at paragraph 54 and ruled as follows:

> *It is declared that the implementation of a policy by the defendant that any item considered a sex toy that closely resembles the male or female genitals is prohibited as being indecent or obscene contrary to section 45(1)(L) of the Customs Act Chapter 78:01 upon seizure of the mannequin belonging to the claimant on December 28, 2018 (the said good) as the basis for such seizure is unlawful.*

17. It should be noted that the challenge of the claimant in this case is a somewhat different one in that on the evidence, his complaint with specific reference to him is that his overseas courier company Websource indicated to him that it was informed by Customs that items described as "Adult Toys" are prohibited and must not be shipped. This is evident from the email to him attached as exhibit RBM1 to his affidavit in support of the Fixed date claim. The evidence in opposition filed by the Deputy Comptroller Bernard Nicholas specifically denies that there is a policy in relation to the prohibition of "Adult Toys" and deposes that the policy relates to items that closely resemble male and female genitalia.

18. In this regard it is to be noted that the claimant filed written submissions firstly on October 11, 2019 and in so doing changed his argument in a fundamental manner in that the submissions say that the relief sought is that the First Defendant's decision and/or policy that all

adult sex toys ***which closely resemble human genitals*** are to be treated as prohibited goods the importation of which should be prohibited under the Customs Act is unlawful, irrational and illegal. In so doing the claimant purports to refine the decision complained of but has not amended his fixed date claim nor has he sought an amendment to the claim.

19. In that regard the claimant submits that he would have only been made aware of the specific policy of the first defendant when the affidavit of Nicholas was filed in this matter on June 17, 2019. The court agrees with the claimant especially in light of the fact that there was no response forthcoming from the first defendant to the pre-action protocol letter sent by the claimant. Should the first defendant have indicated at that stage, the basis upon which he purported to act, the claimant would have had recourse to the precise nature if the unwritten policy to enable him to properly frame his relief.

20. In any event the court considers firstly that the attempt by the claimant to refine his relief and argument is not a fundamental change from the relief sought ab initio, but merely qualifies the relief having regard to the evidence disclosed by the first defendant in the case. This is in no way objectionable and the court ought not to turn a blind eye to this aspect of the proceedings which could have been easily resolved by an amendment without prejudice to the defendants case.

21. Secondly the court is vested with the general power and perhaps duty to make whatever order suits the justice of the case. This includes the grant of suitable relief in terms of relief that may not have been originally sought by a claimant.

PRELIMINARY ISSUES

21. The defendants raised the following two preliminary issues.

    i. That the claimant has no locus standi to bring the instant proceedings; and

    ii. That the expert report of Dr. Giriraj Ramnanan does not comply with the provisions of Part 33 of the CPR and leave was not obtained by the court to file same.

Expert Report

21. It is best to treat with this issue first as the claimant has set out that his locus is in part based on his case being justiciable in the public interest in addition to being personally adversely affected. The defendants submitted that leave was not obtained to lead and rely on the expert report of Dr. Ramnanan dated November 21, 2018 and attached as RBM4 to the affidavit of the claimant in support of his claim. Further, his report has failed to meet the impartiality and objectivity test set out in Part 33.1 and 33.2 of the CPR and could not be viewed as impartial, independent or unbiased.

22. In essence, the defendants submitted that the report of Dr. Ramnanan is not cogent and is tainted with self-interest.

23. In opposition, the claimant submitted that leave was obtained as per the order of Gobin J, dated November 29, 2018. Nonetheless, the defendants have not stated how the report is biased or self-serving. Dr. Ramnanan has given his opinion on the positive uses of adult toys to assist the court. Further, Dr. Ramnanan's understood his duty under Part 33 of the CPR.

24. Counsel for the claimant also relied on the case of **Readymix (West Indies) Limited v Super Industrial Services Limited, CV2010-03435**, where Rampersad J concluded in the said case that expert evidence goes beyond factual observation.[1]

Law and Analysis

25. Expert witnesses are expected to have regard to Part 33 of the CPR and are to be specifically instructed pursuant to that rule. There are two factors involved in expert evidence namely cogency and relevance.

26. Cogency in the evidence of an expert requires that there is sufficient evidence of the expert's experience in the field in relation to which he purports to give evidence and his impartiality and usefulness which is the technical nature of the evidence to be reconciled and the focus of the issues to be determined.

27. Relevance speaks to establishing the primary facts of the case as well as to the issues of opinion on matter connected with the primary facts.

28. In **Kelsick v Kuruvilla CV App. No. P277 of 2012**, the Court of Appeal pointed out that these guidelines are not to be adhered to in the strict sense, but can be varied as the case may require. At para. 8, Jamadar J.A provided stated:

In determining whether permission should be granted to use expert evidence and what expert evidence is reasonably required to resolve the issues that arise for determination, a court ought to weigh in the balance the likelihood of the following (assuming admissibility):

(i) How cogent the proposed expert evidence will be; and

[1] See para. 26 of the judgment.

(ii) How useful or helpful it will be to resolving the issues that arise for determination.

In determining whether this evidence is reasonably required to resolve the proceedings justly, the following factors that allow one to assess proportionality should also be weighed in the balance:

(iii) the cost, time and resources involved in obtaining that evidence, proportionate to the quantum involved, the importance of the case, the complexity of the issues, the financial position of each party involved in the litigation, and the court resources likely to be allocated to the matter (in the context of the court's other obligations);

Depending on the particular circumstances of each case additional factors may also be relevant, as such:

(vi) fairness;

(vii) prejudice;

(viii) bona fides; and

(ix) the due administration of justice.

29. Further at para 12,

To ensure that there is no uncertainty we wish to clarify that the above factors are not to be understood as hurdles to be cleared when considering whether to grant permission for expert evidence. They are intended to function as guidelines to assist the court in determining whether to grant permission. We also wish to note, that the factors of cogency and usefulness/helpfulness may also be relevant at the stage in the proceedings when the trial judge has heard the evidence and is analyzing the expert evidence and determining the matter on the merits.

30. The court is of the view that the information presented in the report sufficiently articulates the qualifications of Dr. Ramnanan which would ordinarily qualify him as an expert. However, it is not the case and the court does not accept the submission of the claimant that the grant of leave to issue Judicial Review proceedings by Gobin J would have carried with it the grant of leave pursuant to Part 33 CPR to lead expert evidence from Dr. Ramnanan. This ought to have been brought by way of a separate application so that the court would have with the assistance of all parties been able to determine whether the criteria set out at Part 33 when taken with all the other relevant information as a whole was met, namely whether the evidence is reasonably required to resolve the proceedings justly.

31. The effect of not having applied for leave so to do is that Dr. Ramnanan would have been instructed with no input from the court. In this case, the consequence of so doing was in the court's view of major detriment to the reliance on his evidence. Should such an application have been, this court would have been better poised to treat with the undertakings given by the expert so as to ensure that amongst other matters there was in fact no conflict of interest by the expert.

32. In that regard Dr. Ramnanan has in his report set out that he knows of no conflict of interest other that any which he may have disclosed in his report. Under the rubric "The Expert Opinion" in the body of his report, he sets out as follows;

> *"There is a misnomer when it comes to the purchase and or use of sex/adult toys for years: a statement I can attest to having had a number of said items seized by Customs and Excise Division. The seizure is now the subject of high court proceedings CV2018-03206 between Giriraj Ramnanan and Total Image Incorporated Limited v The Comptroller of Customs"*

33. That matter was in fact before this court and same was subsequently determined partially in favour of Dr. Ramnanan. Clearly therefore, Dr. Ramnanan had an interest to serve in similar proceedings from which he would benefit should the decision have gone his way. It is precisely these situations that the oversight by the court seeks to avoid by ensuring that the expert is not only fair but is seen to be fair all in an effort to assist the court with unpolluted streams of expert opinion. It is not to say that this court is of the view that Dr. Ramnanan is incapable of being fair, but in the case where the expert himself is engaged in litigation involving issues that may be similar to the subject in respect of which he purports to give his opinion it is of utmost importance that the court be involved in the decision making process as to whether his evidence should be used at all to ensure that justice is seen to be done.

34. Further, in the court's view, having regard to the issues involved in this case and that of the matter filed by Dr. Ramnanan, the court is not satisfied that Dr. Ramnanan has demonstrated that he could have fairly disassociated his expertise from his own litigation and there was a real possibility that his opinion may have been tainted by his involvement as a litigant against the very defendant in this case on similar issues.

35. In the circumstances of this case, these considerations far outweigh the other matters set out in the guidelines provided by Their Lordships in ***Kuruvilla***. As a consequence the court will not permit the claimant to rely on the evidence of Dr. Ramnanan and exhibit RBM4 is stuck out.

Locus Standi

36. The defendants submit that the claim is premature in that although permission was initially granted to bring judicial review proceedings,

the claimant does not have sufficient interest to bring the instant proceedings.

37. The defendants argue that the claimant has not indicated whether the instant proceedings concerns an interpretation of section 45 of the Act. In addition, the issues raised by the claimant are a general grievance, does not refer to a specific event that has affected him and is more of a public interest matter.

38. In reply, the claimant submitted that the defendants should have raised this issue at the leave stage and not at a late stage in the proceedings and that in any event, section 7 of the Judicial Review Act 2000 has expanded the substantive law of judicial review by providing a new standing that did not exist at common law.

39. Counsel for the claimant argued that the modern law of judicial review is committed to a liberal approach to the issue of standing and the instant proceedings should be heard on its merits. In this regard, counsel for the claimant relied on the case of, **Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses [1982] AC 617** as a proposition that the focus of this court should be on the rule of law and the illegal action or abuse of power that is the subject of complaint.[2]

Law and Analysis

40. The learned authors in **Halsbury's Laws of England, (Volume 61A (2018)), para. 57** stated the following:

[2] Per Lord Diplock at p.644, "It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."

A person who has a genuine interest in seeking a remedy will not generally be refused permission on grounds of lack of standing even if the particular ground of challenge relied upon is not one in which he has a personal interest.

…………………………………………………

In most cases, however, the question of standing is determined on the substantive application for judicial review. Save in simple or clear cases the question whether the claimant has a sufficient interest will not be determined at the threshold stage as a preliminary issue independent of a full consideration of the merits of the complaint."

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Individuals have been recognised as having standing not only where their rights or interests are affected but in a broad range of situations where in some way they are affected by a decision. A public spirited citizen raising a serious issue of public importance may be recognised as possessing standing. Provided they can show a sufficient and genuine interest in the relevant claimed breach then the claimant does not necessarily have to come from the affected section of the community.

41. In **Walton v Scottish Ministers, 2013 SC (UKSC) 67**, Lord Reed stated at para. 94 that the courts should refer to 'standing' based upon a sufficient interest.

    [94] In many contexts it will be necessary for a person to demonstrate some particular interest in order to demonstrate that he is not a mere busybody. Not every member of the public can complain of every potential breach of duty by a public body. But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the

public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no one was able to bring proceedings to challenge it.

42. In **Public Defender v Attorney General of Jamaica (Tomlinson intervening), (2019) 94 WIR 406,** Morrison P stated:

[25] A good example of the modern approach is provided by R v HM Inspectorate of Pollution, ex p Greenpeace Ltd (No 2). In that case, an environmental protection organisation was treated as having a sufficient interest for the purposes of an application for certiorari to quash a decision to permit testing of a new thermal oxide reprocessing plant which would result in the discharge of liquid and gaseous radioactive waste. In rejecting the defendant's argument that the applicant was a 'mere' or 'meddlesome busybody', the court concluded (at 351) that it was 'eminently respectable and responsible and its genuine interest in the issues raised is sufficient for it to be granted locus standi.

43. The starting point is to note that there are two claims before the court. The first is that of Judicial Review against the first defendant only. The decision being challenged is allegedly that of the first defendant to impose a general policy that sex toys are illegal and hence falls within the ambit of a prohibited good under section 45(1)(L) of the Customs Act on the basis that such a decision is unfair irrational and illegal. The second relief sought under this head is one which declares that the construction of the said section does not include "adult toys".

44. Before it is determined whether the claimant has the required locus standi there must in the court's view firstly be evidence of the implementation of such a decision or policy. Only if there exists same does the issue of locus standi arise. In that regard the evidence points

in one direction both on the facts presented by the claimant and those presented by the first defendant.

45. It is the claimant's evidence in brief that he is a social activist who is in a committed relationship. He owns and uses what he referred to as sex toys or adult toys having both imported and purchased locally. It is his evidence that he has never had any problems from the first defendant when importing such items. He also plans to continue importation of the items. The evidence relied upon by the claimant to found the claim for Judicial Review is as follows:

    a. As a customer of what may be commonly referred to as a skybox courier private company, Websource, he received an email from it in which the company states that Customs will be inspecting packages to ensure compliance with the law and will seize a list of items which list included "Adult toys".[3]

    b. The Express newspaper carried an article on August 21, 2018 in which comments attributable to the Minister of Finance were made.[4] The claimant alleges that the statements confirm the information provided by his courier.

    c. Another article of the Express newspaper, this time an editorial of August 26, 2018 in which he alleges that the Minister of Finance stated that it was up to Customs and the courts to determine what items were defined as indecent and obscene under section 45 of the Act.[5]

46. However, the evidence relied on by the claimant falls somewhat short of clear proof that the first defendant has implemented a decision or a

[3] Email is exhibited as RBM1 to affidavit filed November 26, 2018.
[4] Exhibit RBM2 to affidavit of November 26, 2018.
[5] Exhibit RBM3 to affidavit of November 26, 2018.

policy against the importation of a category of items called adult toys or sex toys for the following reasons:

a. Firstly, the email from Websource does not and cannot represent the decision or policy of the first defendant as the email provides no basis for the making of its broad statements. Simply put, as a matter of common sense, without confirmatory evidence from the Customs and Excise Division, the statements of Websource are merely the statements of a private company that may have lent its own interpretation to the implementation of a policy or decision.

b. Even if the court was to proceed on the presumption that the article set out at RBM2 contains accurate information (an issue on which it makes no pronouncement at this stage), the article is pellucid in that it purports to quote the Minister of Finance as stating that there is in fact no such category of items called "Adult toys". He went on to opine that it appears that Websource may have made a terrible error in sending out said emails because the law knows of no such category.

c. RBM3 is merely a repetition of the contents of the statements attributed to the Minister above, suffice it to say that he is reported to have stated that the issue of whether an item is indecent or obscene is a matter for Customs, which is in the court's view in keeping with the law.[6]

47. So that when one looks at the claimant's case alone, it may at first blush appear devoid of cogent or satisfactory evidence of a decision or implementation of a policy against the importation of items falling within an unascertained category of "adult toys" or "sex toys".

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[6] See this court's comments at paragraphs 26 to 30 of ***<u>Rooplal</u>***.

48. But when considered in the round, it is not, as the issue does not end with the claimant's evidence alone and must be considered together with the evidence by the first defendant as provided by the Deputy Comptroller of Customs Bernard Nicholas that there is no such policy in relation to adult toys or sex toys but that the Division has considered that items that closely resemble human genitals are considered prohibited under section 45(1)(L). The evidence provided by the witness is in large measure the same evidence provided by the very witness in the ***Rooplal*** case before this court so that the court repeats its finds from that case as being equally applicable to this one. This is what the court had to say;

> *"10. The defendant has deposed (see affidavit of Bernard Nicholas the Deputy Comptroller of Customs at para 6) that there is no such written policy but that the long employed unwritten practice of the defendant has been that any item which closely resembles the male or female genitalia is considered indecent or obscene. It sets out that this is its practice in relation to items "such as adult toys", the possible inference being that the practice does not apply to items used for other purposes such as medical purposes. At paragraph 12 Nicholas makes it clear that the Act does not speak of adult toys so that the Comptroller of Customs (COC) is called upon to interpret indecent and obscene and not adult toys. He also makes it abundantly clear that it is not the Comptroller's position that all adult sex toys are prohibited goods and that it is only in the case where the adult sex toy falls into the category of that close resemblance to male or female genitals that they are considered indecent or obscene (see paragraph 11 of his affidavit).*

11. Further, it is the evidence of Nicholas that as far back as 1981 the Censorship Committee (not a committee of the defendant) issued lists of books and magazines of a pornographic nature which were banned from importation. Pursuant thereto the Customs Division issued circulars to Customs Officers to be guided by same. Copies of said circulars are attached to his affidavit. He deposes that members of the public have access to the email address of the division to make enquiries should they be unsure of whether certain items are classified as indecent or obscene. The circulars attached actually go as far back as 1972.

*12. The defendant is also guided by a memorandum dated October 2, 2003 under the hand of the Director of Public Prosecutions in relation to advice sought by the then acting COC as to how to proceed in relation to the importation of adult toys. That memo sets out that as a matter of interpretation, the words indecent and obscene ought to be given their natural and ordinary meaning. That the standard imposed does not only apply to matters of a sexual nature but also those which offend against recognized standards of propriety generally with indecent being at the lower end and obscene being at the upper end of the scale. The memo also makes reference to the well known older cases of **R v Bow Street Stipendiary Magistrate** (1989) 89 Cr App R 121 and **R v Anderson** (1972) 1 QB 304 at 311. Finally, that the cases demonstrate that those words indicate the ambit of the English common law offence of outraging public decency.*

13. The evidence of all of the deponents for the defendant demonstrates that in applying the advice provided by the DPP, the defendant has adopted an approach that once the item

being imported closely resembles male or female human genitalia, it is considered obscene within the meaning of the Act and is thereby prohibited. (See the affidavits of Suzanne John at paragraph 15 and paragraph 7 of the affidavit of Zaid Mohammed filed in CV 2018 03206 attached to the claimant's affidavit in support of this claim filed on March 11, 2019).

14. It is therefore not in issue that this approach is one which is recommended to and applied by all officers of the defendant. In the court's view therefore it is either that the defendant has moved away from the test of application of the ordinary and natural meaning of the words indecent and obscene on a case by case basis and has created and applied its own internal policy which defines items with male and female genitalia as being obscene regardless of purpose of use or other considerations that are attendant upon the application of the ordinary and natural meaning of the said words or it has for convenience and the assistance of members of the public and other officers, applied a criteria that it considers to have come within the meaning of those words and has reduced that criteria into writing by way of circulars.

16. For completeness the relevant definitions set out in the authorities and the natural and ordinary meanings of both indecent and obscene as taken from the ***Concise Oxford Dictionary Eleventh Edition*** *are as follows;*
"Indecent – not conforming with generally accepted standards of behaviour or propriety, especially in relation to sexual matters.
Obscene – offensive or disgusting by accepting standards of morality and decency. Repugnant.

> *18. In the court's view, the preponderance of evidence set out above demonstrates adequately that while there has been no written policy, certainly the practice which has been commended and adhered to by the defendant is one which has the effect of policy, it having been followed for several decades. In that regard, on this issue what matters is the substance of the method used by the defendant and not the form. In the court's view therefore such a practice is akin to and ought to be considered as a policy albeit an unwritten one.*

49. After review the comparable features of custom in international law the court proceeded to find as follows;

> *24. That being the case, on the very clear evidence in this case set out above, the court finds that the long established practice of the defendant is in fact an unwritten policy. Further, that in any event, nomenclature as to whether it is a policy or practice makes no difference in the context of the substance of the claim that the actions of the Defendant are unlawful or illegal.*
>
> *25. The policy is well established by the evidence to be that any item which closely resembles the male or female genitalia is considered indecent or obscene. This appears to be the case notwithstanding the memo of the DPP which appears to define both indecent and obscene in the context of the law. All of the officers who have sworn to affidavits have deposed to.*

50. The court therefore wholly adopts its dicta in ***Rooplal*** set out above for the reasons stated therein so that on the case for the first defendant it is clear that whilst there exists no decision or policy that adult toys or sex toys as a general category are prohibited by the Customs and Excise Division when interpreting section 45 (1)(L) of the Act the policy is that

any item which closely resembles the male or female genitalia is considered indecent or obscene.

51. Further, the court is of the view that the implementation of such a policy has the potential to affect not only the claimant in the manner deposed to in his affidavits[7] but also many persons so that the challenge of the claimant though not specific to any particular item he has attempted to import, carries with it a very wide public interest component. The evidence of both parties in this claim when viewed in the round shows that the Websource correspondence although perhaps overstated or misworded, creates an inference that when Websource speaks of "adult toys" it is more likely than referring to the policy stated above and the court so finds.

52. The court reminds itself of the dicta of Lord Reed supra that not every member of the public can complain of every potential breach of duty by a public body. But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no one was able to bring proceedings to challenge it.

53. In the court's view the claimant has demonstrated to its satisfaction that he has sufficient interest in the matter to bring the violation of the public authority to the attention of the courts. His evidence demonstrates that the effect of the implementation of the policy will be to deprive not only he and his wife of the use of such items but also others who may use such items for a variety of lawful reasons.

[7] See also paragraph 10 of the affidavit of the claimant in reply sworn to on the July 22, 2019.

54. In that regard the claimant has also filed an affidavit by Dr Kryiaan Singh, a former temporary Senator and veterinarian which shows that after having sustained an accident in 2006 in which he broke his neck and was paralyzed from the shoulders down (save an except for the use of his hands and arms), he and his wife have since been reliant on the use of adult toys for stimulation and fertility. The witness condescended to particulars highlighting the importation and use of a medically graded penile vibrator which also aids his blood circulation. It is also used to erase the discomfort of a catheter. In addition, the witness annexed to his affidavit a photograph of what he referred to as a We Vibe, which he claims is another item upon which he depends for his fertility issues. It can reasonably be inferred that at least one of these items resembles the male genitals.

55. As a matter of pure common sense, the inference can readily be drawn that Dr. Singh is not unique in that regards that it is more likely than not that he is representative of several others who require the use of such items for similar or medically related purposes. To that extent therefore the claimant falls under section **5(2)(a)** of the **Judicial Review Act** Chap 7:08 as a person whose interests are adversely affected. He also falls within the category of persons under **5(2)(b)** being a person in respect of whom the application is justifiable in the public interest in the circumstances of this case. The court therefore finds that the claimant does in fact possess the relevant locus standi to bring the claim.

The substantive Judicial Review claim

56. This court finds no reason to derogate from its principal reasons and ratio delivered in the ***Rooplal*** case and to the extent that the ratio

applies to this case, same is adopted mutatis mutandis. The rational of the court in that case bears repeating:

> *"Natural and Ordinary meaning of the words of the statute*
>
> *26. The issue therefore arises as to whether the definition set out in the policy is overly restrictive. As set out above, the natural and ordinary meaning of the word Obscene is offensive or disgusting by accepted standards of morality and decency and repugnant. This definition admits of and is directly related to applicable societal standards of that which is moral, decent and acceptable. To classify an item as obscene therefore by the simple fact that it closely resembles the male or female genitals would be to ignore the other elements of the definition unrelated to description of the item. These other elements may be the prevailing accepted norms of society at the time or the accepted morality of Trinidad and Tobago society. There is a jurisprudential argument that morals and that which is accepted by society changes as society itself changes.*
>
> *27. By way of example, quite recently in this jurisdiction there has been an acceptance of same sex relationships, a relationship which would have been considered immoral by many in the past and which some still consider to be so. Similarly, the practice of smoking less than 30 grams of cannabis in private has been decriminalized in this territory quite recently. This again is a matter that may have been considered immoral or certainly unacceptable by this society in the past. So that it is reasonable to presume that a feature of all developing societies is that accepted standards of decency and morals change over time.*
>
> *28. It follows therefore that what may be seen to have been indecent, immoral or unacceptable or repugnant decades ago*

may not necessarily be so considered today. In the court's view therefore, the definition of indecent or obscene under section 45(1)(L) of the Customs Act Chap 78:01 is coloured by the date and time in which the section is used and that this is so by design and not by coincidence in a recognition by the legislature that standards or morality and that which is acceptable are not stoic but are in fact dynamic features of societal existence.

29. The Customs Officer who is charged with applying the provision of the Act will have to make a determination as to whether the item which he examines appears to be that which at the lower end does not conform with generally accepted standards of behaviour or propriety, especially in relation to sexual matters in which case it may be indecent or at the higher end whether the item is offensive or disgusting by accepted standards of morality and decency, in which case it may be obscene.

30. The application of a blanket policy that relies solely on the description of an item in that regard may have the effect of removing essential elements of the criteria to be applied by any Customs Officer when acting pursuant to section 45(1) (L) of the Act. In other words, his consideration of whether an item may be prohibited as being obscene or indecent may ignore societal norms and acceptable standards of morality thereby being unduly restrictive and artificial. The application of the section in such a manner would be repugnant to the legislation and would be unlawful.

Unlawfulness

31. Unlawfulness in this case must be examined under two general headings. Firstly, that of the implementation of a policy

which has not been published thereby lacking transparency and legal certainty. Secondly, the application of section 45(1)(L) in a manner that would have disregarded fundamental elements of the considerations necessary in applying the provision."

57. In relation to the second consideration on unlawfulness the court, in finding that the purpose of use is a relevant consideration in making the determination as to whether the item is prohibited had this to say;

> *"42. The policy is therefore an arbitrary one in the court's view it having imposed a restriction unknown to the law. So too is its application. Further, it is vague in terms as it creates a category which is indeterminate in that the defendant has created a category of items called sex toys that is itself unknown to law and in respect of which he has applied a policy that uses criteria that is unknown to law. Such a policy is applied based on the element of purpose of use and not on whether the item (sex toy or not) is Indecent (does not conform with generally accepted standards of behaviour or propriety, especially in relation to sexual matters) or obscene (offensive or disgusting by accepted standards of morality and decency). In so doing the defendant has applied an unduly restrictive definition which derogates from the law set out at section 45(1)(L). The application of such a policy is therefore not transparent and in keeping with the rule of law.*
>
> *43. It may well be that the item detained falls within the definition provided by the section but the application of the arbitrary policy has tainted the assessment made by the officers on the day of seizure in that the elements required for detention would not have been considered but the policy would have been slavishly applied.*

44. It follows that the application of such a policy is unlawful. In so finding it must be borne in mind that at the time of making an assessment, the officer is not required to by the Act and is not making a finding of fact as to whether the item is indecent or obscene. That is a matter upon which a judicial officer is required to pronounce in a court of law."

58. The court having held that the application of a policy that is to be implemented by the First defendant is one in which items that closely resemble human genitals is prohibited as being obscene or indecent is unlawful and that the claimant is adversely affected by the application of such a policy it will make a suitable order on the Judicial Review claim.

THE CONSTITUTIONAL CLAIM

Locus standi on the constitutional claim

59. On this issue the claimant relied on the case of **C.A.CIV.S.090/2017, Vijay v Ministry of Agriculture, Land and Fisheries and ors**, a claim that involved judicial review issues and a breach of the appellant's right to equality under 4(d) of the Constitution. The Court of Appeal in that case made declarations in relation to both the constitutional claim and the judicial review claim.

60. Both parties cited the case of **John Dumas v The Attorney General, CA Civ P218/2014** regarding the constitutional jurisdiction of the court. At para. 119, Jamadar J.A. observed:

Historically, seeking the public interest, including the observance of the rule of law, was exclusively the responsibility of the Attorney General. However, we note that in Trinidad and Tobago there is no

established tradition of the Attorney General seeking the public interest in these circumstances. Australia, as shown above, follows that tradition and the courts are not prepared to intervene, preferring to leave any change to the legislature. However, in other countries, such as Zambia, Canada and India, and even here in the Caribbean, the courts have not been shy to exercise their jurisdiction and power to enlarge the standing rules in the area of public interest constitutional review litigation.

61. In **Attorney General v Dumas (Trinidad and Tobago), [2017] UKPC 12,** Their Lordships of the Privy Council agreed with the decision of the Court of Appeal. Lord Hodge stated the following:

    [15] ………………………It is the task of the judiciary to uphold the supremacy of the Constitution and thereby the rule of law. In Bobb v Manning [2006] UKPC 22 the Board at para 12 quoted counsel's submission that the courts should not abdicate their important function of constitutional adjudication and also his citation of the judgment of Bhagwati J in the Supreme Court of India in State of Rajasthan v Union of India AIR [1977] SC 1361 para 143 in which he stated: "This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and, if so, what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law.

62. Section 14(1) of the Constitution provides;

    (1) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being,

or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.

The import of this section is clear in its vesting of the jurisdiction of the court the duty to guard the fundamental provisions of the constitution and its application to the citizenry jealously to ensure that justice is done in the event of a breach and a likely breach. For the reasons set out above when treating with the issue of locus on the claim for Judicial Review, the court finds that the claimant does in fact have the requisite locus standi to bring the proceedings under the Constitution. It would be a contradiction in terms should the court find in favour of locus standi on one claim but not on the other. The court therefore agrees with the claimant that there is that inherent overlap in both public law matters as in this case the claimant submits that he is being adversely affected and is likely to be further adversely affected by the implementation of the policy and the court has accepted his evidence of same.

BREACH OF FUNDAMENTAL RIGHTS UNDER THE CONSTITUTION

63. The claimant contends that section 45(1) violates his constitutional rights and he risks confiscation and conviction. He has sought redress for anticipated infringements of some of his fundamental rights namely his right to property under section 4(a) right to liberty and the enjoyment of property and the right not to be deprived thereof except by due process of law and 4(c) the right of the individual to respect for his private and family life. The backdrop of these is his expressed desire to freely import, own and use adult toys.

64. The sections provides:

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.

……………………………………….

(c) the right of the individual to respect for his private and family life;

The section 4(a) right

Submissions of the claimant

65. It is the claimant's case that the enjoyment of his property now and in the future is likely to be breached by the first defendant's policy. The claimant has previously imported adult toys. He submits that he runs the risk of incurring a penalty by virtue of sections 213(a) and 246 of the Act.

66. Thus, he argues, that the potential risk of criminal prosecution is itself an interference with the right to enjoy his property. Underlying his position is the assumption that all adult toys that resemble human genitals are going to be confiscated without due process of law, and that a discretion granted under section 45 (1) (l) is reliably one that always translates into confiscation.

67. He submitted that the secret policy implemented by the first defendant that has not been published and as such is fundamentally unfair, unlawful and in breach of the rule of law.[8]

68. In addition, the policy is unclear as it can affect a wide range of adult toys. The issue as to whether a policy affecting a wide-range of items is by definition unfair, is not self-explanatory as to what items are obscene or indecent. In addition, the claimant has sought to quash the first defendant's policy and is seeking constitutional relief.

69. It was also submitted that what is considered obscene and indecent must be determined in light of modern and contemporary standards. It was further submitted that the law is an organic creature, which responds to changing morals and values. What might be obscene and indecent may vary from one society, culture or period to others. The determination of what is considered indecent and obscene must be judged according to modern and contemporary standards and will therefore vary over time.

70. That said, laws do not become automatically archaic with the passage of time. Any changes in the law and its relevant discretionary clauses which may prompt variations in interpretation, cannot be executed anywhere other than at the level of the Parliament.

71. The above matters (save and except the issue of the potential of criminal prosecution) were all considered by this court in ***Rooplal*** prior the court making a determination that the implementation of the stated policy was unlawful and the court therefore adopts the dicta in

[8] The claimant cited the case of **R (Lumba) v Secretary of State for the Home Department, UKSC 12** in which it was made clear that it is unlawful and contrary to the principle of legality for the executive to operate a policy that is unpublished, especially where such policy may violate his fundamental rights or where he may be held liable for breach of such policy.

that case in full. To that end a full copy of ***Rooplal*** has been appended to this judgment.

72. It is also the claimant's evidence that adult toys assist those with medical conditions and who require rehabilitative therapy. Therefore to deem adult toys as obscene or indecent would be demeaning and degrading to these persons, and would therefore mean a failure to recognize their dignity and equality.

73. In light of the above, the claimant submitted that section 45(1) is irrational and violates the section 4(a) right.

Submissions of the defendants

74. The defendants submit that the approach to determine the constitutionality of the section is firstly to recognize the presumption of constitutionality and thereafter to determine whether the limitation of the fundamental right pursues a legitimate aim and whether that limitation is proportionate to the said aim. In that regard the defendants submit that the effect of the section is that not all adult toys and would offend section 213(a) of the Act. That implementation is guided by both legislation and policies which have been regularly forthcoming over time since 1981.

75. The defendants also submitted that there is no evidence of breaches to the claimant's right to liberty or danger regarding his right to the enjoyment of property. As such, there is no true violation of his right to protection of the law.

Law and Analysis

76. Section 213(a) of the Act provides:

Any person who—

(a) imports or brings or is concerned in importing or bringing into Trinidad and Tobago any prohibited goods, or any goods the importation of which is restricted, contrary to such prohibition or restriction, whether the goods are unloaded or not; … shall, in addition to any offence for which he may be convicted under any written law, incur a penalty—

(i) on summary conviction in the case of a first offence, to a fine of fifty thousand dollars or treble the value of the goods, whichever is the greater, and to imprisonment for a term of eight years;

(ii) on summary conviction in the case of a second or subsequent offence, to a fine of one hundred thousand dollars or treble the value of the goods, whichever is the greater, and to imprisonment for a term of fifteen years; and

(iii) on conviction on indictment, to imprisonment for a term of twenty years, and in any case the goods may be forfeited.

77. Section 46(g) of the Summary Offences Act, Chap. 11:02 provides:

46. A person convicted a second time of being an idle and disorderly person, and a person apprehended as an idle and disorderly person violently resisting any constable apprehending him and who is subsequently convicted of the offence for which he was apprehended, and a person who commits any of the offences mentioned below in this section, may be deemed a rogue and vagabond, and shall be liable to imprisonment for two months-

(g) any person who offers for sale or distribution or who exhibits to public view, any profane, indecent, or obscene book, paper, print, drawing, painting, or representation;

78. The court accepts that the approach advocated by the defendants is the proper approach in the circumstances. [9]Therefore, section 45(1)(L) is presumed to be constitutional unless the contrary is shown. In keeping with its previous findings above, the court also finds that while there is no evidence of seizure of goods belonging to the claimant or charges laid as a result of such seizure, his claim is that of a likely breach to be made in relation to him under section 14 of the Constitution so that the absence of other evidence of the importation of prohibited goods is of no relevance to the issues before the court.

79. What then is the legitimate aim of the section and is that aim proportionate to the said aim. In embarking on the task it must be borne in mind that the section does not specifically prohibit any item that closely resembles human genitals but permits the exercise of a discretion by the first defendant to determine whether there is reasonable and probable cause to believe that an item is obscene or indecent.

80. In this regard the court accepts the submission of the defendants that the legitimate aim of the section is that of the preservation of public morality and decency. This aim does not derogate from the principle that the virtues of morals and decency are to be interpreted by recourse to the change in societal norms and customs. In fact, the ambit of the section is wide enough to encapsulate those very changes, hence the discretion provided to those who are to enforce the section, the first defendant and his officers.

81. Where this court disagrees with the submissions of the defendants is on the issue of whether the limitation of prohibiting those adult toys that closely resemble human genitals is proportionate to the aim of

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[9] See Surratt v AG (2007) 71 WIR 391, Mootoo v AG (1979) 30 WIR 411, Ferguson and Galbaransingh v AG Civ App 185 of 2010.

preservation and protection of public morality and decency. In the court's view such a policy is wholly disproportionate for the following reasons:

a. The section admits of no such restriction and is wide in application.
b. The court repeats its comments at paragraph 26 of ***Rooplal*** that the natural and ordinary meaning of the word obscene is offensive or disgusting by accepted standards of morality and decency and repugnant. This definition admits of and is directly related to applicable societal standards of that which is moral, decent and acceptable. To classify an item as obscene therefore by the simple fact that it closely resembles the male or female genitals would be to ignore the other elements of the definition unrelated to description of the item for example medical requirements. These other elements may be the prevailing accepted norms of society at the time or the accepted morality of Trinidad and Tobago society. There is a jurisprudential argument that morals and that which is accepted by society changes as society itself changes.
c. Quite recently in this jurisdiction there has been an acceptance of same sex relationships, a relationship which would have been considered immoral by many in the past and which some still consider to be so. Similarly, the practice of smoking less than 30 grams of cannabis in private has been decriminalized in this territory quite recently. This again is a matter that may have been considered immoral or certainly unacceptable by this society in the past. So that it is reasonable to presume that a feature of all developing societies is that accepted standards of decency and morals change over time.

d. It follows therefore that what may be seen to have been indecent, immoral or unacceptable or repugnant decades ago may not necessarily be so considered today. In the court's view therefore, the definition of indecent or obscene under section 45(1)(L) of the Customs Act Chap 78:01 is coloured by the date and time in which the section is used and that this is so by design and not by coincidence in a recognition by the legislature that standards or morality and that which is acceptable are not stoic but are in fact dynamic features of societal existence.
e. The application of a blanket policy that relies solely on the description of an item in that regard may have the effect of removing essential elements of the criteria to be applied by any Customs Officer when acting pursuant to section 45(1)(L) of the Act. In other words, his consideration of whether an item may be prohibited as being obscene or indecent may ignore societal norms and acceptable standards of morality thereby being unduly restrictive and artificial.
f. Further, there may be other valid considerations when making a determination as to whether an item is obscene or indecent under section 45(1)(L). These considerations must include the purpose of use of the item in that items or goods to be used for medical purposes inclusive of sexual therapy may fall within the restrictive definitions imposed by the policy but not fall within the meaning of obscene or indecent as prescribed in the law.

82. However, it has been the finding of this court that the universal application as it were of the policy is unlawful in the context of the meaning and import of the section. It follows that the section is not unduly restrictive without the superimposition of the restrictive policy. The court is required to examine the proportionality of the section on

the assumption that the section is interpreted and applied in the manner in which it ought to be applied. So that while the policy imposed upon the section would not doubt be disproportionate to the legitimate aims of the section, the court is of the view that the section is not similarly disproportionate.

83. Two Canadian authorities both relied on by the defendants are of particular assistance to the court in this regard. Firstly, there is the case of ***R v Butler*** (1992) Can LII 124 in which the Canadian Supreme Court accepted what it referred to as the community standard of tolerance test being a test concerned not with what the national community would not tolerate being exposed to themselves but that which they would not tolerate other members of the community being exposed to. This test admits to prohibition of goods that persons would consider harmful to society as a whole.

84. The second is that of ***Little Sisters Book and Art Emporium v Canada*** (Minister of Justice) [2000] 2 S.C.R. 1120. In that case, in relation to the issue of whether imported goods were considered obscene, the court opined that the use of national community standards as the arbiter of what materials are harmful and therefore obscene remained the proper approach.

85. Consideration of the subtle differences in the relevant statutes of Canada and section 45(1) of the local Act, notwithstanding, the court is of the view that the legitimate aim of the section is to ensure that as a general standard, imported goods that are harmful to the morality or decency of the national community is prohibited. However, the ambit and proper application of the section is wide enough so as to encapsulate and give effect to the changings morals, norms and values of the society. The restriction imposed by the section is therefore not disproportionate to the legitimate aim of the legislation and the court

so finds. Put another way, the complaint of the claimant substantively lies with the imposition of an unlawful policy that ultimately results in the section being applied in manner that is wholly disproportionate to the legitimate aim of the legislation but this complaint does not in law apply to the section when applied in its proper form.

86. Greater intrusions into the fundamental rights of individuals by the state require stronger justification. In this case, the intrusion created by section 45(1)(L) is in the court's view not one that requires strong justification.

87. On the other hand, the imposition of a policy that items that resemble human genitals is considered as obscene and is therefore a prohibited good is wholly disproportionate to the legitimate aim of the legislation for the reasons set out above. In that regard the court endorses the dicta of my brother Seepersad J in ***Sanctuary Workers' Union and Mitoonlal Persad v the Minister of Labour and Small Enterprise Development*** CV2019-01113, in which he sets out at paragraphs 54 and 55 after a comprehensive view of the approach to proportionality in several jurisdictions, the following;

> *54. Where a decision, effected by a public authority, impacts upon a fundamental right, the decision maker must consider all the relevant criteria and adopt a proportional approach. Before such a decision is made, the decision maker should address the following questions:*
>
> *1) Whether the objective of the measure is sufficiently important to justify the limitation of a protected right.*
>
> *2) Does the factual matrix present several appropriate or applicable options.*

3) Which option would occasion the least harm, prejudice or detriment, having regard to the ultimate objective of the decision to be made.

4) Will the contemplated decision impose disproportionate disadvantages upon the individual to whom the intended decision relates?

55. The decision maker should ultimately adopt a cautious and considered approach and should comprehensively and completely weigh all the relevant factors as well as the possible consequences which the decision may occasion, before the decision is made. The decision must be fair and must relate to a clearly defined objective. The objective should be characterised by a degree of importance which justifies its implementation notwithstanding the impact which will be occasioned to entrenched rights. When the Court is tasked with the mandate to review any decision which materially impacts upon a fundamental right, it should be guided by a merit based approach, as it must be robust in its defence of entrenched rights. Whenever such exceptional circumstances arise, the Court cannot stay within the traditional strictures imposed by the principle of "due deference' and confine itself to considerations of Wednesbury reasonableness.

88. When viewed in this light the court finds that the objective of the policy was not sufficiently important to justify the limitation imposed on the right having regard to the automatic prohibition made by such a policy thereby excluding several valid considerations and reasons for the importation as set out above. In that regard the purpose of use is fundamental to the determination of whether the item is obscene but the imposition of the policy removes all such considerations. Further there are several other option available to the first defendant, the

primary one being to determine each case on its own merits having regard to the natural and ordinary meaning of the words used in the section and any relevant explanation and information provided by the person importing. To that end it also becomes obvious that the imposition of the policy imposes disproportionate disadvantages to the importer.

89. Further, In the court's view section 45(1)(L) is not irrational and does not lie in violation of the section 4(a) right for the very reasons set out above. A proper application of the section would include considerations of the medical needs of the individual whether for rehabilitative therapy or otherwise so that while the application of the policy may be considered an irrational one, the same cannot be said for section 45(1) in the absence of the application of the said restrictive policy. To that end the argument of the clamant is misconceived on their original submissions.

90. However, the court finds that the restrictive policy imposed is in fact an irrational one for the reasons set out above and violates the section 4(a) right.

Due Process and protection of the law

91. In ***Wrenwick Theophilus v the Attorney General of Trinidad and Tobago***, *CV2009-01683 at para. 14, Rajkumar J, as he then was, in determining whether the right to the protection of* the law had been infringed helpfully laid out the following:

> *In Christopher Lezama and others v. The Commissioner of Prisons and The Attorney General of Trinidad and Tobago H.C.A. 2098 of 2002 the Honourable Justice Stollmeyer, (as he then was) stated:*

The right to the protection of the law would also seem to include the right to due process. The fundamental concept of due process includes "the right to be allowed to complete a current appellate or other legal process without having it rendered nugatory by executive action before it is completed…[is part of the fundamental concept of due process] " (See Thomas v. Baptiste (PC) [2002] 2 AC 1 per Lord Millet at page 24). It must also include the right to be allowed to initiate that process. The protection of the law therefore includes access to the appellate process, and in the instant case by the Applicants to the Appeal Court." page 9 (emphasis added)

Lord Millet said in Thomas v Baptiste [2000] 2 AC 1 at 22: "In their Lordships view "due process of law" is a compendious expression in which the word 'law' does not refer to any particular law and is not a synonym for common law or statute. Rather it invokes the concept of the rule of law itself and the universally accepted standards of justice observed by civilised nations which observe the rule of law…"

Thomas v Baptiste [pg 24] - It is the general right accorded to all litigants not to have the outcome of any pending appellate or other legal process pre empted by executive action. This general right is not created by the Convention; it is accorded by the common law and affirmed by S. 4 (a) of the Constitution.

92. His Lordship went on to state at para. 16:

Due process of the law invokes the concept of the rule of law. Protection of the law includes the right to due process and therefore equally invokes the concept of the rule of the law. Its interpretation must be consistent with this. Protection of the law is however a wider right than the right to due process.

93. See **<u>Lassalle v the Attorney General (1971) 18 WIR 379, Dilip Kowlessar v The Attorney General H.C.A. No. S-350 of 1997, Mark Jones v Noor Kenney Mohammed H.C.A No. 191 of 1998</u>**. Phillips JA in Lassalle supra at 391 defined due process of law as "the antithesis of arbitrary infringement of the individual's right to personal liberty..."

94. In **<u>Maya Leaders Alliance and others v Attorney General of Belize (2015) 87 WIR 178</u>**, the Caribbean Court of Justice at para. 47 explained the evolving concept of *protection of law* encompassed the responsibility of the State to comply with its international obligations.

    However, the concept … includes the right of the citizen to be afforded, "adequate safeguards against … fundamental unfairness" … The right to the protection of the law may … require the relevant organs of State to take positive action in order to secure and ensure the enjoyment of basic constitutional rights.

95. In the court's view, the application of section 45(1)(L) by the first defendant is not likely to deprive the claimant of the right to the enjoyment of property without due process as the process of seizure admits to several stages provided for in the detailed scheme of the legislation.

96. Section **220(1)** of the **Customs Act** Chap 78:01 sets out the process as follows[10]. Where goods are seized, notice must be given in writing

[10] (1) "Whenever a seizure is made, unless in the possession of or in the presence of the offender, master or owner, as forfeited under the Customs laws, or under any written law by which Officers are empowered to make seizures, the seizing Officer shall give notice in writing of the seizure and of the grounds thereof to the master or owner of the aircraft, ship, carriage, goods, animals or things seized, if known, either by delivering it to him personally, or by letter addressed to him, and transmitted by post to, or delivered at, his usual place of abode or business, it known; and all seizures made under the Customs laws or under any written law by which Officers are empowered to make seizures shall be deemed and taken to be condemned, and may be sold or otherwise disposed of in such manner as the President may direct, unless the person from whom such seizure shall have been made, or the master or owner thereof, or some person authorised by him, within one calendar month from the

(personally or by letter addressed to the owner); the owner then has one month from the day of the seizure of the goods to give notice of his claim. If he fails to do so then the goods are deemed to have been seized and can be sold or disposed of. The Act therefore places a legal burden on the owner to give notice to the Comptroller within that one calendar month of the date of seizure in writing. So long as such notice is given, the goods cannot be sold or disposed and the onus then lies on the Comptroller to then take proceedings for forfeiture and condemnation (except where the goods are animals or perishable in which case it can be sold and proceeds kept in the event the goods are ordered restored to the owner upon the outcome of forfeiture proceedings).

97. By section **220(2)**[11] it is apparent that proceedings for forfeiture and condemnation is taken before a Magistrate who may order delivery of the goods to the claimant upon payment of security until determination of proceedings. It is at this stage that the issue of whether the goods have been lawfully detained will fall to be determined by the Magistrate.

98. Forfeiture proceedings may be brought even in the circumstance where a criminal charge has not been laid but the goods have been detained. The proceedings before the Magistrate on the summons are in substance condemnation thereof; but if animals or perishable goods are seized, they may by direction of the Comptroller be sold forthwith

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day of seizure, gives notice in writing to the Comptroller that he claims the thing seized, whereupon proceedings shall be taken for the forfeiture and condemnation thereof; but if animals or perishable goods are seized, they may by direction of the Comptroller be sold forthwith by public auction, and the proceeds thereof retained to abide the result of any claim that may legally be made in respect thereof"

[11] (2) "Where proceedings are taken pursuant to subsection (1) for forfeiture and condemnation, the Magistrate may order delivery of the aircraft, ship, carriage, goods, animals or things seized to the claimant, on security being given for the repayment to the Comptroller of the value thereof in case of condemnation".

by public auction, and the proceeds thereof retained to abide the result of any claim that may legally be made in respect thereof.

99. Where a criminal charge has also been laid it follows that the outcome of the forfeiture and condemnation proceedings would have to abide the decision of the court on the criminal charge. Where no criminal charge has been laid, the legislation provides an opportunity for the determination of whether the goods are prohibited by way of the forfeiture and condemnation proceedings before the Magistrate. In that case the legislation confers no presumption in law that the goods are so prohibited, and the burden remains with the defendant to so prove. (See section 220(2) of the Customs Act which also provides that the Magistrate may in fact order the goods to be returned to the person upon payment of security until the issue of forfeiture or condemnation is determined).

100. The legislation also contemplates the position where a person may be found not guilty of the importation of a prohibited good not on the basis that the good does not amount to one that is prohibited but on some other basis. This leaves the issue of whether the good is a prohibited one pursuant to section 213 of the Customs Act to be determined at the hearing of a summons subsequently.

101. The process therefore permits for a determination to be made by a judicial mind as to whether the items are in fact obscene or indecent. The provision for judicial oversight and determination means that the usual safeguards as regards the presumption of innocence, right to bail and entitlement to a fair trial are all afforded to the person who imports the goods. This is the entitlement of the claimant which accords with a universal standard of a system of justice that is fair and protects the fundamental rights of the individual. So that the prohibition imposed by section 45(1)(L) does not in the court’s view

deprive the claimant or the individual from the deprivation of the right to enjoyment of property or his liberty without due process of law.

102. In relation to the imposition of the policy however, it is clear that same lies in conflict with section 45(1)(L) of the Customs Act in that it superimposes a more restricted definition in place of obscene and indecent. While one may argue that at the end of the day, the Magistrate is the one who applies the law and may well decide that the good is not obscene or indecent, the effect is that the individual is in the meantime deprived of both his goods and the right to the enjoyment thereof and in some case his liberty awaiting the outcome of a trial. Due process encompasses safeguards of not only judicial oversight or determination but it requires in this case that the state acts in accordance with the law. This is a fundamental part of due process. It follows that the imposition of the restrictive policy circumscribes the applicable law in such a manner that its application deprives the individual of the due process to which he is entitled prior to a judicial determination being made as to whether his goods are obscene or indecent and the court so finds.

Right of the individual to respect for his private and family life section 4(c)

Submissions of the claimant

103. The crux of the claimant's submissions lies in the entitlement to sexual autonomy by the individual such autonomy extending to sexual activities in private life. Attorney for the claimant relied on a plethora of authorities which established the jurisprudence in relation to discrimination on the basis of sexual orientation. In addition, the claimant submitted that his right to privacy is linked to human dignity.

104. Counsel for the claimant sets out some examples of the European jurisprudence over article 8, which says, *everyone has the right to respect for his private and family life, his home and his correspondence*. It must be noted that decisions from the European Court of Human Rights are not binding on this court, but reflective of the essence of the right.

105. In **Dudgeon v United Kingdom (1981) 4 EHRR 149** the issue was whether Northern Ireland legislation criminalising homosexual acts between consenting adult males breached the right to private life. The majority held that particular sexual activities is an interference with an inherent aspect of private life. Further, legislation that makes it a criminal offence for consenting adults to engage in homosexual acts in private offends art 8 of the Convention.

[52] ….However, not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation. The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of Article 8(2).

……

[60]….As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied….

106. In **R. (on the application of Countryside Alliance) v Attorney General, [2007] UKHL** 52 the House of Lords explained the purpose of

article 8 (the right to respect private and family life within the European Convention on Human Rights). Their Lordships expressed significant differences of opinion as to the potential reach of article 8. The claimant has cited Baroness Hale's identification of one of the values reflected in article 8, being the inviolability of "the personal and psychological space within which each individual develops his or her own sense of self and relationships with other people". At para. 116 she stated;

> *Article 8, it seems to me, reflects two separate but related fundamental values. One is the inviolability of the home and personal communications from official snooping, entry and interference without a very good reason. It protects a private space, whether in a building, or through the post, the telephone lines, the airwaves or the ether, within which people can both be themselves and communicate privately with one another. The other is the inviolability of a different kind of space, the personal and psychological space within which each individual develops his or her own sense of self and relationships with other people. This is fundamentally what families are for and why democracies value family life so highly. Families are subversive. They nurture individuality and difference. One of the first things a totalitarian regime tries to do is to distance the young from the individuality of their own families and indoctrinate them in the dominant view. Article 8 protects the private space, both physical and psychological, within which individuals can develop and relate to others around them*.

107. The court notes the general statement made by Lord Bingham's description of the purpose of article 8 at paragraph 10; *It is to protect the individual against intrusion by agents of the state, unless for good reason, into the private sphere within which individuals expect to be*

left alone to conduct their personal affairs and live their personal lives as they choose.

108. The claimant also cited the commonwealth case of **National Coalition for Gay and Lesbian Equality v Minister of Justice, [1998] 3 LRC 648**. Under the common law and the Constitution of the Republic of South Africa 1996, same-sex unions were denied any form of legal protection and were regarded as immoral and their consummation by men could attract imprisonment. In relation to an infringement of the rights to dignity and privacy, the court stated the following;

> *[31]…… This court has considered the right to privacy entrenched in our constitution on several occasions. In Bernstein v Bester NO [1996] 4 LRC 528 at 568 it was said that rights should not be construed absolutely or individualistically in ways which denied that all individuals are members of a broader community and are defined in significant ways by that membership:*
>
> *'In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community …*
>
> *….*
>
> *[32] Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy*.

109. In **<u>Jones v Attorney General of Trinidad and Tobago (Equal Opportunity Commission and others, interested parties)</u>** CV2017-00720 my brother Rampersad J, cited the case of ***<u>Puttaswamy v Union of India</u>***, [2018] 5 LRC 1 in which the Bench of the Indian Supreme Court found that privacy is a facet of article 21 of the Constitution of India Pt III, and was firm in its view that privacy is inextricably linked to the dignity of an individual.

Per Chandrachud J;

[96] Over the last four decades, our constitutional jurisprudence has recognised the inseparable relationship between protection of life and liberty with dignity. Dignity as a constitutional value finds expression in the Preamble. The constitutional vision seeks the realisation of justice (social, economic and political); liberty (of thought, expression, belief, faith and worship); equality (as a guarantee against arbitrary treatment of individuals); and fraternity (which assures a life of dignity to every individual). These constitutional precepts exist in unity to facilitate a humane and compassionate society. The individual is the focal point of the Constitution because it is in the realisation of individual rights that the collective well-being of the community is determined. Human dignity is an integral part of the Constitution. Reflections of dignity are found in the guarantee against arbitrariness (art 14), the lamps of freedom (art 19) and in the right to life and personal liberty (art 21).

…….

[107] To live is to live with dignity……Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the

individual and it is only when life can be enjoyed with dignity can liberty be of true substance….

[168] ……Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual.…Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life.

…..

[169] Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself…… Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary state action. It prevents the state from discriminating between individuals. The destruction by the state of a sanctified personal space whether of the body or of the mind is violative of the guarantee against

arbitrary state action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination.

110. The claimant also relied on several authorities to demonstrate that the right to privacy extends to the sexual activities of the individual. In those decisions, the courts held that sexual conduct is a significant aspect of human life and the importance of sexual health and empowerment is increasingly recognised in global jurisprudence. Once such case was that of **Orozco v Attorney General (Commonwealth Lawyers Association and others, interested parties), [2016] 4 LRC 705**, in which the Supreme Court of Belize in finding that the right to a private life extends to an individual's sexual activities opined that the provisions of the Belize Criminal Code that criminalized private consensual sexual conduct between adults of the same sex, (which though rarely used), violated the applicant's rights of privacy, liberty and dignity. Benjamin CJ also relied on the case of **Dudgeon v UK**, supra, wherein the court observed that the existence of the legislation directly affected private life.[12]

111. This court can add nothing to the erudite statements pronounced in the cases above, suffice it to say that it is of the view that the claimant has effectively argued that his use of adult toys (inclusive of those that resemble male and female genitals) is an important component of the expression of sexuality between the claimant and his partner. That his sexual activities in that regard form part of his right to respect for his privacy and that dignity informs and is integral to the giving full effect to that right.

[12] See the discussion in paras. 74-86 of the judgment.

Submissions of the defendants

112. The defendants argument remains the same in that the applicable test of whether an Act of Parliament is unconstitutional is the consideration of whether the limitation of the fundamental right pursues a legitimate aim and whether that limitation is proportionate to the aim. As such, the concept of public morality is subjective and the aim of section 45(1) (l) is to preserve and protect public morality and decency. This court has already pronounce on this aspect of the argument in relation to the rights under section 4(a). For the very reasons the court rule in the same way in relation to the alleged breach of section 4(c).

113. The defendants maintained that there was no direct injury to the claimant and that no items regarding adult toys was seized by or on behalf of the first defendant. As such, the claimant has not crossed that evidential burden of how he was personally aggrieved by the first defendant's policy. Importantly, the claimant continues to enjoy the benefit of the adult toys in his possession.

114. The defendant went on to distinguish the case of Jason Jones, supra, Rampersad J did not make any specific declarations as to the breach of the claimant's right to privacy and family life, but one declaration that sections 13 and 16 of the Buggery Act was unconstitutional. (See para 88, 89 of Jason Jones, supra).

Law and Analysis

115. The learned authors in **Halsbury's Laws of England, Rights and Freedoms (Volume 88A (2018)), 385** said the following regarding private life.

The notion of 'private life' is a broad one, which is not susceptible to exhaustive definition. The underlying principle has been identified as the protection of human autonomy and dignity, and the touchstone of 'private life' as being whether in respect of the relevant facts the person in question has a reasonable expectation of privacy. 'Private life' includes the ability of a person to establish and develop relationships with other human beings and the outside world, including through activities of a professional or business nature. It is not limited to the notion of an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude the outside world, but extends also to those features which are integral to a person's identity or ability to function socially as a person. It can embrace multiple aspects of a person's physical and social identity, such as gender identification, name, reputation, sexual orientation and sexual life. Personal information, in particular about a person's health or ethnic identity, is an important element of private life, and the concept of 'private life' extends also to elements relating to a person's right to their image.

116. There is a reasonable expectation of privacy in relation to the sexual activities, even unconventional, of consenting adults on private property- **See the Civil Court Practice 2020 (The Green Book), Article 8 Right to respect for private and family life)**.

117. The court therefore wholly accepts the submissions of the claimant that his right to privacy encompasses and includes one's sexual conduct and practices. This in turn must necessarily include whatever treatment or therapy is employed towards the treatment of

sexual health. The authorities above are replete with examples and together they make for reasoned thinking on the subject. The court therefore is of the view that there is more than sufficient in the body of authority to find that these matters are all included within the section 4(c) right and it does so find.

118. However, the claimant has a bigger hurdle to surmount. This case is not only distinguishable from the ***Jones*** case in terms of the order made in that case but it is manifestly different in substance owing to the nature of the challenge being one to a completely different law that speaks not only to matters of a sexual nature. The definition of obscene or indecent as set out above in their natural and ordinary meanings are in no way restricted only to matters of sex as was the case with the relevant provision of the law relating to the offence of buggery in the ***Jones*** case. Matters that are capable of being considered as obscene on the higher end of the spectrum may reasonably include those relating to abuse (not necessarily sexual abuse), child pornography, particular types of killings (snuff), beatings and assaults of children, animal cruelty, suicide videos, mercy killings and many others. In today's world the list is as long as it is novel to the majority of persons in a relatively small society such as ours.

119. It follows that the legitimate aim of the section must as a matter of reason include the protection against the harm that may be brought about to the society as a whole with the introduction of such matters. This is the legitimate aim that the prohibition in the section is designed to protect and it is one that is much wider than that of an intrusion on sexual conduct of the individual in his private life.

120. The aim being a substantial one, the justification for the intrusion on the fundamental right to privacy carries considerable weight in the court's view. As with all of the rights, the right to privacy

is not an absolute one and must be balanced with the protection of the public especially the more vulnerable members of the society. It follows that section 45(1)(L) does not in the court's view infringe the right to privacy.

121. However, as with the breach of the section 4(a) right, the imposition of the policy for which there is no legitimate basis and which is highly restrictive thereby changing the complexion of the prohibition contained in section 45(1)(L) cannot be justified as it is wholly disproportionate to the legitimate aim of the section. In that regard the court relies on the analysis provided supra.

122. In summary therefore the court finds that section **45(1)(L)** of the Customs Act does not breach or is not likely to breach the rights of the claimant under sections **4(a)** and **4(c)** of the Constitution but that the policy implemented by the first defendant to treat all items that resemble male or female genitals as obscene and therefore prohibited is likely to breach the rights of the claimant enshrined under section **4(a)** and **4(c)** of the Constitution.

Policies that conflict with the Act and the Constitution/ transparency

123. In addition, the claimant contends that the State cannot be allowed to make laws or policies that interfere with his constitutional rights without compelling reason and with the court agrees. A policy is unlawful if it contravenes the principles of transparency, legality and legal certainty, all overlapping concepts and it is unlawful for a public authority to implement, enforce, and prosecute persons in accordance with a policy that is obscure, ambiguous, has been concealed from the public and most importantly is one that derogates from legislation and infringes guaranteed rights. That if the first defendant is to operate

and implement such a policy at all, transparency demands that same is widely published and is consistent with the objectives of the legislation under which the policy purportedly is made is operate. This is so as the implementation of the policy carries the consequence of affecting not only the property rights of the individual but as in this case, the right to respect for his private life and right not to be deprived of his liberty without due process.

124. In ***Gallagher [2019]*** UKSC 3, a case concerning the interplay between the right of privacy and retention of personal data for criminal record keeping, Lord Sumption articulated the principles as follows:

"The accessibility test speaks for itself. ***For a measure to have the quality of law****, it must be possible to discover, if necessary with the aid of professional advice, what its provisions are. In other words,* ***it must be published and comprehensible****. The requirement of foreseeability, so far as it adds to the requirement of accessibility, is essentially concerned with the principle summed up in the adage of the American founding father John Adams, "a government of laws and not of men". A measure is not "in accordance with the law" if it purports to authorise an exercise of power unconstrained by law. The measure must not therefore confer a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself. Nor should it be couched in terms so vague or so general as to produce substantially the same effect in practice. The breadth of a measure and the absence of safeguards for the rights of individuals are relevant to its quality as law where the measure confers discretions, in terms or in practice, which make its effects insufficiently foreseeable. Thus a power whose exercise is dependent on the judgment of an official as to when, in what circumstances or against whom to apply it, must be sufficiently constrained by some legal rule governing the*

principles on which that decision is to be made. But a legal rule imposing a duty to take some action in every case to which the rule applies does not necessarily give rise to the same problem. It may give rise to a different problem when it comes to necessity and proportionality, but that is another issue. If the question is how much discretion is too much, the only legal tool available for resolving it is a proportionality test which, unlike the test of legality, is a question of degree".

125. In ***R (Gillan) v Commissioner of Police of the Metropolis*** [2006] 2 AC 307 at page 34**,** the court framed these principles within the context of the Rule of Law:

> "The lawfulness requirement in the Convention addresses supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis of legality. This is the test which any interference with or derogation from a Convention right must meet if a violation is to be avoided."

126. Therefore, to give effect to any such policy, its promulgation must be done in a manner that informs the public of the decision of the authority to apply the policy. Further, that such a policy must conform with and must not derogate from the criteria set out in the applicable law that confers on the authority the power to act as same may result in the infringement of the fundamental rights of the individual guaranteed under our Constitution. That such a requirement is a feature of the rule of law principle. This of course

ensures that the action of the public authority is not done without public oversight.

127. A public authority is entitled to issue or change a policy under which it operates. To be lawful and effectual such a change must be rational and must be made in full view of the public by way of notification and publication thereby affording the public access to the proposed change and knowledge that the change is to be expected and most importantly the opportunity to have a say on it. Transparency in the promulgation of the policy is therefore fundamental to the rule of law.

128. However, the absence of transparency on its own will not vitiate the application of the policy unless it can be shown that the policy does not conform with the applicable law within which the public authority is duty bound to act or is ultra vires the powers conferred unto the authority. The distinction lies with the consequences of applicability of the policy in that on the one hand so long as there is conformity with the applicable law there is likely to be no illegality of action on the part of the authority outside the law and on the other hand the contrary may be true where the policy derogates from the statutory duty of the authority. In this way, the issue is one that involves overlapping principles of transparency, rule of law and unlawfulness.

129. Having regard to the ruling of the court above, it is pellucid that the policy implemented by the first defendant conflicts with and is inconsistent with the scheme of the Customs Act and in particular the provisions of section 45(1)(L). It follows in this case that even if the policy had been published and it was promulgated in a transparent manner, such a course would not have remedied the effect of the conflict with section 45(1)(L). This therefore provides another sound basis for setting aside the policy.

DAMAGES

130. The claimant has sought compensatory (inclusive of aggravated damages) and vindicatory damages.

131. Senior counsel for the claimant submitted that monetary compensation is available as part of the *redress* for the breach of a citizen's fundamental rights. Importantly, the rationale for the award of damages in constitutional claims is the need to vindicate same.

132. However, Counsel for the defendants argued that there must be proof of damage and the instant proceedings is not one fit for damages.

133. In ***The Attorney General of Trinidad and Tobago v Selwyn Dillion***, CA. CIV P 245/2012 a case cited by both parties, the Court of Appeal approved the dicta of Rampersad J (the judge at first instance) at paragraph 53 in which he awarded compensatory and vindicatory damages. Jamadar J.A. at paragraph 20 of the judgment of the Court of Appeal set out the following principles:

> *(1) the award of damages is discretionary;*
>
> *(2) the nature of any award of damages is always with the intention and purpose of upholding and/or vindicating the constitutional right(s) infringed and in furtherance of effective redress and relief for the breaches;*
>
> *(3) whether an award of damages is to be made depends on the circumstances of the case, including consideration whether a*

declaration alone is sufficient to vindicate the right(s) infringed and whether the person wronged has suffered damage;

(4) in determining the sufficiency of a declaration and/or the need for damages, the effect(s) of the breach on the party seeking relief is a relevant and material consideration;

(5) compensation can thus perform two functions - redress for the in persona damage suffered and vindication of the constitutional right(s) infringed;

(6) compensation per se is to be assessed according to the ordinary settled legal principles, taking into account all relevant facts and circumstances, including any aggravating factors;

(7) in addition to compensation per se, an additional monetary award may also need to be made in order to fully vindicate the infringed right(s) and to grant effective redress and relief;

(8) such an additional award is justified based on the fact that what has been infringed is a constitutional right, which adds an extra dimension to the wrong, and the additional award represents what may be needed to reflect the sense of public outrage at the wrongdoing, emphasise the importance of the constitutional right and the gravity of the breach, and/or to deter further similar breaches;

(9) the purpose of this additional award remains, as with compensation, the vindication of the right(s) infringed and the granting of effective relief and redress as required by section 14 of the Constitution, and not punish the offending party; and

(10) care must be taken to avoid double compensation, as compensation per se can also take into account similar considerations, including relevant aggravating factors and is also intended to uphold and/or vindicate the right(s) infringed.

134. The claimant also relied on the recent Privy Council decision in **Minister of Energy and Energy Affairs v Maharaj, [2020] UKPC 13** where it was held that the appellants were entitled to damages for breach of their rights under section 4(a) of the Constitution and remitted the cases to the local courts for the quantum of such damages to be determined. As such, the claimant's argument is that although the claim concerned judicial review, damages was awarded for breach of constitutional rights.

135. The defendants maintained that there is no constitutional right to damages, that the power to give redress is discretionary and further, a declaration that there has been a violation of the constitutional right may be sufficient.

136. Also cited by the parties is the Privy Council decision of **Attorney General of Trinidad and Tobago v Ramanoop, [2006] 1 AC 328**, where the Board recognized that what has been termed 'vindicatory damages' can be awarded in proceedings for violation of constitutional rights. Lord Nicholls, stated the circumstances in which such an award will be appropriate:

> *[18] When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of*

the constitutional right will not always be coterminous with the cause of action at law.

[19] An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in s 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award.

137. Similarly, in **Inniss v Attorney General of Saint Christopher and Nevis, [2008] UKPC 42**, Lord Hope stated at para. 27:

The purpose of the award, whether it is made to redress the contravention or as relief, is to vindicate the right. It is not to punish the Executive. But vindication involves an assertion that the right is a valuable one, as to whose enforcement the complainant herself has an interest. Any award of damages for its contravention is bound, to some extent at least, to act as a deterrent against further breaches. The fact that it may be expected to do so is something to which it is proper to have regard.

Findings

138. In this case, the claimant has suffered no measurable or ascertainable damages. No award is therefore necessary as suitable declarations shall suffice to compensate for the wrong likely to be suffered by him. However, it is the court's view that a declaration alone will not suffice to vindicate the rights having regard to the importance of the rights infringed and the wide ranging effect the imposition of the policy is likely to have had and will have on the those who import such goods as a whole. In that regard the superimposition of the policy is likely to be a grave breach of the guaranteed rights deserving of an award that reflects the gravity of the breach.

139. The order of the court is therefore as follows;

a. It is declared that the implementation of a policy by the first defendant that any item that closely resembles the male or female genitals is prohibited as being indecent or obscene contrary to section 45(1)(L) of the Customs Act Chapter 78:01 (the Act) and is therefore a prohibited good under section 213(a) of the Act (the policy) is irrational and unlawful.

b. The decision to implement the policy is moved into the High Court and is quashed.

c. It is declared pursuant to section 14 of the Constitution that the policy is likely to contravene the rights guaranteed to the claimant by sections 4(a) and 4(C) of the Constitution, namely the right of

the individual to the enjoyment of property and not to be deprived thereof except by due process of law and the right of the individual to respect for his private and family life respectively.

d. The defendants shall pay to the claimant vindicatory damages in the sum of $10,000.00.

e. The defendants shall pay to the claimant the costs of the claim certified fit for one Senior Counsel and one Junior Advocate to be assessed by a Registrar in default of agreement.

Ricky Rahim

Judge