

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2009-03896

BETWEEN

FELIX JAMES

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES:

Mr. Mark Seepersad, Mr. Gerald Ramdeen instructed by Mr. Terrance Davis

**Mr. Mitra Bhimsingh, Christopher Sieuchand, and Ms. Renessa Tang Pack for the
Attorney General.**

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REASONS FOR DECISION

1. The claimant challenged the conditions attached to a conditional pardon granted by the President on June 30 2009. The challenge is premised on the following:

- (a) The President had no power under section 87 (1) of the Constitution to grant a conditional pardon in the circumstances of the claimant's case.
- (b) The conditions themselves were unlawful.

FACTUAL BACKGROUND

2. In 1971 the Claimant was charged with the offence of murder. At the trial, pursuant to section 66 of the Criminal Procedure Act the Claimant was found to be “guilty but insane” and a special verdict was recorded.

3. Acting pursuant to section 68 of the Criminal Procedure Ordinance, (now section 67 of the Criminal Procedure Act), the Claimant was ordered to be detained at Her Majesty’s Pleasure – later modified to be “President’s Pleasure”. The Claimant was thereafter detained pursuant to the said order at the State Prisons.

4. In 2003 the Claimant instituted proceedings under section 14 of the Constitution (HCA No. 2659 of 2003).

5. The Claimant thereafter instituted proceedings by way of Judicial Review (Cv 2007-0491) challenging a decision of the Attorney General.

6. Eventually after further proceedings the Attorney General took the decision to advise the President to release the Claimant.

THE IMPUGNED CONDITIONS

7. 1. On June 30th 2009, his Excellency the President of the Republic of Trinidad and Tobago (“the President”) purporting to act under Section 87(1) of the Constitution granted to the Claimant a pardon (“the Pardon”) in respect of the offence of murder subject to the following conditions:

- a. That the Claimant shall every six months for a period of three years from the date of the pardon report to the St. Ann’s Psychiatric Hospital for a periodic review and evaluation by the Psychiatric Hospital Tribunal in accordance with the requirements of the Mental Health Act, Chapter 28:02;
- b. That the said Tribunal forwards to the President each periodic report in respect of the said review and evaluation over the prescribed period;
- c. That the Claimant takes such medication as may be prescribed by his attending psychiatrist;
- d. That the Claimant resides with either Ms. Eugene Samuel or Ms. Prunella Alvarez;

- e. That the Claimant does not possess or use any firearms or weapons of any kind;
- f. That should the Claimant fail to comply with the above conditions he will be subject to arrest and his release will stand revoked and he will be detained until the President's pleasure is known.

THE CLAIMANT'S CASE

8. The claimant contends that:

- (1) The President should have exercised powers under s.68 of the Criminal Procedure Act. Under that provision the applicant was entitled to constitutional due process, and the President had no power to impose conditions, and.
- (2) Section 87 (1) of the Constitution was inapplicable in that there was no possibility of convicting the claimant and that provision only applied to pardon prior to conviction, where there was a real possibility of conviction. That being so the claimant was entitled to have the conditions attached to the conditional pardon set aside, and in fact to have the conditional pardon itself set aside.
- (3) In any event the conditions themselves were:
 - (a) Arbitrary.
 - (b) In breach of the Separation of Powers.
 - (c) Otherwise unconstitutional.

THE DEFENDANT’S CASE

9. The defendant contends:

- (1) That the President had complete authority under s. 87 (1) of the Constitution to grant a conditional pardon.
- (2) That the claimant agreed and accepted the conditions.
- (3) That the conditions were reasonable, lawful, and not unconstitutional.

ISSUES

10.

1. Whether the President was entitled in the circumstances of this case to exercise powers under s 87(1) of the Constitution to grant a conditional pardon.
2. Whether the exercise of the power of pardon by the President in any way offends the principle of separation of powers.
3. Whether the attachment of Conditions to the Pardon granted to the Claimant by the President is ultra vires the power conferred by section 87(1) of the Constitution.
4. Whether the Conditions themselves breach any of the Claimant’s constitutional rights and freedoms.
5. Whether the Claimant is entitled to the reliefs sought.

DISPOSITION

11. 1. The President was entitled to exercise powers under section 87(1) of the Constitution to grant a conditional pardon.
2. Such exercise did not infringe the principle of Separation of Powers.

3. The attachment of the conditions to the pardon was not ultra vires the powers conferred by section 87(1) of the Constitution.
4. The conditions themselves were not unlawful or unconstitutional, either individually or collectively.
5. The Claimant is not entitled to the reliefs sought.
6. The claimant's claim is dismissed with costs to be paid by the claimant to the defendant to be assessed in default of agreement.

ANALYSIS

THE LAW

12. The Claimant challenges the Pardon on the bases that:

- 1) The exercise of the power falls outside of the scope of section 87(1);
- 2) The President has no jurisdiction to exercise the power of pardon in the claimant's case;
- 3) The use of the pardon to attach conditions to the applicant's release is an abuse of that power.

The claimant also challenges the conditions to the Pardon as being unconstitutional.

13. Section 66 Criminal Procedure Act

*Where, in an indictment, any act is charged against any person as an offence, and it is given in evidence on the trial of such persons for that offence that he was insane, so as not to be responsible according to law for his actions at the time when the act was done, then if it appears to the jury before whom such person is tried that he did the act charged, but was insane as mentioned above at the time when he did the same, the jury shall return **a special***

verdict to the effect that the accused person was guilty of the act charged against him, but was insane as mentioned above at the time when he did the act.

14. **Section 67 Criminal Procedure Act**

*Where a person is found to be insane under section 64 or section 65, or has a special verdict found against him under section 66, the Court shall direct the finding of the jury to be recorded, and thereupon the Court may order such person **to be detained** in safe custody, in such place and manner as the Court thinks fit **until the President's pleasure** is known.*

15. **Section 68 Criminal Procedure Act**

The Court shall as soon as practicable, report the finding of the jury and the detention of the person to the President who shall order the person to be dealt with as a mentally ill person in accordance with the laws governing the care and treatment of such persons or in any other manner he may think necessary.

16. **Constitution**

*87. (1) The President may grant to any person a **pardon**, either free or **subject to lawful conditions**, respecting any offences that he may have committed. The power of the President under this subsection may be exercised by him either before or after the person is charged with any offence and **before** he is **convicted** thereof.*

17. The power of pardon is conferred upon the President by section 87 of the Constitution. Section 87(1) deals with the exercise of the power of pardon **before** a **conviction** for an offence.

18. Section 87(2) deals with the exercise of the power **following conviction**. Section 87(1) is wider than Section 87(2), providing for the exercise of the power **before** a person has been convicted of an offence.

19. The Claimant contends in summary that Section 87(1) cannot be legitimately be used to effect a conditional release of the Claimant in the manner done in the instant case and the entire pardoning exercise culminating in the pardon document is thereby invalid as under Section 87(1) there must be some “offence”.

20. In the instant case, **the element of offence cannot be made out**. The Claimant was in 1975 found to be guilty but insane and therefore did not have the requisite mens rea to ground a finding that he committed an offence because without the mens rea there is no offence to pardon.

21. Further the claimant **has not been convicted** of an “offence” under section 87(1). Therefore, section 87(1) cannot apply. Consequently, the pardon of the 30th June, 2009 is ultra vires section 87(1) and is thereby null and void and the pardon and its conditions ought to be quashed as being unconstitutional.

22. Furthermore, it is contended that under section 87(1) the grantee may receive a pardon before or after he is charged but the power must be exercised prior to there being a conviction. In cases where a person is found to be guilty but insane the criminal charge has been determined not by a conviction but by the recording of the special verdict. However, on a purposive construction “conviction” would encompass such a determination and I so construe it.

23. In any event it is clear that the alleged invalidity of the conditional pardon depends on an acceptance of the proposition that section 87 (1) of the Constitution is inapplicable on the basis that there must exist a **possibility of conviction** and that in the case of a special verdict under section 66 of the Criminal Procedure Act there is no such possibility.

24. I find there is no basis for this proposition as it relies on the further proposition that **words must be read into section 87 (1)** to the effect that there must exist a possibility of conviction before the jurisdiction to exercise the power of pardon comes into effect.

25. The claimant contends that **any condition must be lawful** according to the Constitution and section 87(1) is subject to the fundamental rights provisions under sections 4 and 5 of the Constitution. This is accepted.

26. The Claimant further contends that he could **only** be detained pursuant to the powers under section 67 and 68 but in releasing the Claimant the Executive sought to act under section 87 of the Constitution. Section 68 was allegedly, in law, the correct vehicle for the release of

the Claimant but the Executive chose not to use section 68 and release the Claimant and thereby subverted the Criminal Procedure Act.

27. This argument is rejected. Section **87 (1)** confers the appropriate jurisdiction on the President. There is no reason to confine jurisdiction to deal with the applicant solely to that conferred by section 68 of the Criminal Procedure Act.

Separation of Powers

28. It is contended by the Applicant that:

- (i) In granting the conditional pardon, or in attaching conditions to the pardon, the President exercised a sentencing function, and that exercise of such a function was a breach of the separation of powers.
- (ii) The granting the conditional pardon, or the attaching of conditions to the pardon, would be invalid as S.68 of the Criminal Procedure Act expressly recognised that judicial input into a sentence was necessary, requiring the reopening of an exercise of judicial discretion for sentencing an individual taking into account his own individual circumstances. Without such a judicial exercise of sentencing discretion the result would be sentencing by the Executive - in a clear breach of separation of powers.

29. A similar argument was raised before this court in the case of **Allan Henry and others v The Attorney General CV2007-03406, CV2007-03881, CV2007-03399, HCA. 2548 of**

2003, CV2007-04450, CV2008-01123 and after a review of the authorities, was rejected for the following reasons.

30. The argument that the fact that in that case the Executive, and not the Judiciary, determined punishment was considered in **Matthew v The State PCA 12 of 2004, [2005] 1 A.C. 433**.

31. In **Matthew v The State**, the Privy Council at paragraph 28 of its judgment stated as follows:

*“As their Lordships observed in **Boyce and Joseph v The Queen**, the principle of the separation of powers is not an overriding supra-constitutional principle but a **description** of how the powers under a real constitution are divided. **Most constitutions have some overlap between legislative, executive and judicial functions...As the constitution itself makes express provision** for the exercise of the power of commutation by the President and preserves the mandatory death penalty, their Lordships do not think there is some other principle by which laws these can be invalidated.”* (emphasis supplied)

32. It matters not that in that case the issue was whether the imposition of the death penalty was a decision ultimately for the Executive arm of the State. In the instant case the exercise of the power of mercy is similarly exercisable under S.87 of the Constitution. Therefore the fact that the punishment actually imposed (in amelioration of the sentence passed after due process

by the Judiciary), is imposed by the Executive, **as provided for in the Constitution**, similarly cannot be construed as a derogation from any principle of separation of powers.

JUDICIAL SENTENCING V EXECUTIVE ACT

33. In **Jones v Attorney General of the Bahamas** [1995] 1 WLR 891, Lord Lane considered at pages 896 to 897 as follows:

*“The judicial function is at an end when the judge passes sentence of death. The provisions of sections 3, 4 and 5 are directed at **the exercise of the prerogative of mercy.**”*

34. In **Reyes v Queen** [2002] 2 A.C. 235 Lord Bingham, (at p. 257 paragraph 44):

*It is plain that the Advisory Council has a most important function to perform. But it is not a sentencing function and the Advisory Council is not an independent and impartial court within the meaning of section 6(2) of the Constitution. Mercy, in its first meaning given by the Oxford English Dictionary, means forbearance and compassion shown by one person to another who is in his power and who has no claim to receive kindness. Both in language and literature mercy and justice are contrasted. The administration of justice involves the determination of what punishment a transgressor deserves the fixing of the appropriate sentence for the crime. **The grant of mercy** involves the determination that a transgressor need not suffer the punishment he deserves,*

*that the appropriate sentence may for some reason be remitted. The former is a judicial, **the latter an executive,** responsibility.*

35. The grant of a conditional pardon is **an executive amelioration of sentence**, not a sentence itself. **The one requirement of section 87 is that it must result in an amelioration of the sentence imposed.** Accordingly the issue of executive punishment does not arise under section 87. What does arise, as revealed by the cases previously referred to, **is executive amelioration of a sentence judicially imposed after due process.**

(i) Section 87 is not a sentencing provision, nor does it provide for a sentence. It provides instead for a punishment which is less than the punishment imposed as a result of a lawful judicial sentence.

(ii) As recognised in **Matthew**, as the Constitution itself so provides, it does not and cannot breach the separation of powers principle.

36. The grant of a pardon, even including the imposition of conditions to which the pardon is made subject, cannot therefore be considered a sentencing exercise, or one which belongs exclusively to the Judiciary. It is a power specifically reserved to the President to be exercised in accordance with the advice of the Attorney General in accordance with the Constitution. It cannot, therefore, impinge upon the separation of powers as **described** in that Constitution.

37. Further in **Hoffa v. Saxbe (1974) 378 F.Supp. 1221**, District Judge Pratt stated at page 1239 as follows:

“To say that the President is "legislating" when he attaches a condition such as the one at issue here is simply to beg the question; ... if the President's power includes the authority to attach conditions to pardons or commutations, the fact that the resulting condition is similar to legislatively-imposed restrictions does not make the condition a legislative act. The separation of powers doctrine has not been so stringently applied.”

38. **Section 87 of the Constitution** in its entirety provides as follows:

*“(1) The President may grant to any person a pardon, either free or subject to lawful conditions, respecting any offences that he may have committed. The power of the President under this sub-section may be exercised by him either before or after the person is charged with any offence and **before he is convicted** thereof.*

(2) The President may—

(a) Grant to any person convicted of any offence against the law of Trinidad and Tobago a pardon, either free or subject to lawful conditions;

(c) Grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence;

(d) Substitute a less severe form of punishment for that imposed by any sentence for such an offence; or

(e) Remit the whole or any part of any sentence passed for such an offence or any penalty or forfeiture otherwise due to the State on account of such an offence.

(3) The power of the President under subsection (2) may be exercised by him in accordance with the advice of a Minister designated by him, acting in accordance with the advice of the Prime Minister.

THE EFFECT OF SECTION 87 OF THE CONSTITUTION

39. It is clear:

That all the options under sections 87 (2) and 87 (1) are for the purpose of alleviating, ameliorating, mitigating, or reducing a punishment previously imposed by a sentence.

No sentencing power of Executive

40. This is clearly not a breach of separation of powers - The initial sentencing power was **never removed from the Judicial arm. Section 87 of the Constitution recognises the Executive's** separate power to ameliorate and mitigate judicial sentences.

41. The exercise of section 87 constitutional powers by the executive can only result in a mitigation, amelioration, reduction, or removal of a lawful judicially imposed sentence. The instant exercise of the power of pardon by the President does not therefore infringe the separation of powers principle.

42. In **Attorney-General of Trinidad and Tobago and Another v. Lennox Phillip and Others** [1995] 1 A.C. 396, it was considered as follows at page 410:

“Section 87(1) of the Constitution has to be compared with the power which the President has under section 87(2) to pardon the subject of a pardon after he has been convicted. Prior to the Constitution there was already power to grant a pardon after conviction but the power contained in section 87(1) before conviction was created for the first time by the Constitution.

*In his judgment on the earlier appeal to the Board in this case, Phillip v. Director of Public Prosecutions [1992] 1 A.C. 545 , 550-551, Lord Ackner **considered that the new power had been modelled on the power to pardon given to the President by the Constitution in the United States.** He referred to the observation of Alexander Hamilton in 'The Federalist No. 74' (1788), at p. 222, that it existed because 'in seasons of insurrection or rebellion there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth.' In an article 'The President's Power to Pardon: A Constitutional History' by William F. Duker in William and Mary Law Review (1977) vol. 18, No. 3, p. 475, **it is pointed out that the power of the President of the United States to pardon is in turn inherited from the prerogative or common law power of the monarch in England and, at p. 508, the United States courts 'have looked to English jurisprudence for the meaning of a presidential power that corresponds to a power of the English Crown.'**”*

43. In **Schick v. Reed**, 419 U.S. 256 (1974), Chief Justice Burger quoted at page 261 of his opinion from the 6th edition of Hawkins' Pleas of the Crown and stated as follows:

*“At the time of the drafting and adoption of our Constitution, it was considered elementary that the **prerogative** of the English Crown **could be exercised upon conditions**:*

"It seems agreed, That the king may extend his mercy on what terms he pleases, and consequently may annex to his pardon any condition that he thinks fit, whether precedent or subsequent, on the performance whereof the validity of the pardon will depend." 2 W. Hawkins, Pleas of the Crown 557 (6th ed. 1787)."

44. It was further stated by the learned Recorder Mr. Adair. In **The King v. Aickles** (168) E.R. 297 at page 300 as follows:

*“Now I agree that when the King's pardon is broken, the pardon is void. This was the principle on which the Court acted in the case of Rex v. Madan (ante, page, 223 case 111) which case is similar to the present case, excepting that he was not indicted for a new felony. On being put to the bar he confessed that he was the same person, and not being able to assign any lawful excuse for being at large, he was remanded to **prison under his former sentence**; for the condition of the King's pardon being broken, **the pardon was gone, and the prisoner remained precisely in the same situation as he was before the pardon was granted**. This is precisely the situation of the present prisoner.”*

45. In *Hoffa v. Saxbe* (1974) 378 F.Supp. 1221 the learned District Judge Pratt considered as follows at page 1245 in relation to a conditional pardon:

*“Finally, we find plaintiff's argument that he was entitled to a due process hearing before the President could attach the challenged condition to be clearly specious. An applicant for a presidential pardon or commutation may present in his petition whatever facts and representations he deems appropriate. It is up to the President then to act on that petition as he sees fit. **The President has no power to force the applicant to accept a resulting offer of pardon or commutation, whether conditional or not.** Under these circumstances, rights are not being involuntarily taken from the prisoner and thus the requirement of a due process hearing does not come into force. We hold, therefore, that attaching **the challenged condition** to the plaintiff Hoffa's commutation, **without first notifying and hearing from Mr. Hoffa, did not contravene the Due Process Clause.**”*

46. In **Hoffa**, the learned District Judge also considered the decision in **Burdick v. United States** **236 U.S. 79** and recognized as follows at page 1243:

*“The Court explicitly rejected the government's principal argument: “[that] a pardon by its mere issue has automatic effect resistless by him to whom it is tendered. . . .” 236 U.S. at 90. **The pardon could be rejected** because it might involve “consequences of even greater disgrace than those from which it purports to relieve.” Id. The consequences and the pardon run together; because the prisoner might decide that no pardon would be better than a pardon under the circumstances presented, **he always has the right to reject the pardon.** The acceptance concept is a principle designed to protect the individual from unwanted consequences of a forced grant of clemency. In the case at bar there is no claim that the commutation is being forced on **the plaintiff but only that the condition is; the***

*answer is that the plaintiff Hoffa has the same right as any prisoner offered a commutation, that is, to accept the whole or reject the whole. Since the undisputed facts clearly show unequivocal conduct on the part of Hoffa reflecting his clear intent to accept the commutation despite his continuing awareness of the attached condition, he is bound by that condition. Whether at this late date he can change his mind and reject the whole we need not now decide; but until such time as the plaintiff manifests such a desire **he must be deemed to have accepted the condition of the commutation as long as he continues to accept the benefits of that commutation.**”*

47. The Claimant was afforded an opportunity to consider the Conditions and indicate his acceptance of the same by signing the Pardon. He admitted this at paragraph 28 of his affidavit. Though he disingenuously states that it was not read over to him he was told that there were conditions which he chose not to read.

48. In keeping with the reasoning in the above decisions

- a) The Claimant is free to reject a conditional pardon, or
- b) Where the Claimant accepts the benefit of the conditional pardon, however, it is not open to him to challenge those conditions on the basis of reasonableness as his enjoyment of the benefit necessitates his acceptance of the said conditions.
- c) The claimant is free to render it of null effect through non-performance of the said conditions and, consequently, non-enjoyment of the benefit conferred thereby.

CONSTITUTIONAL VALIDITY OF THE CONDITIONS

49. The claimant seeks inter alia a declaration that the imposition of the conditions listed at (a) to (f) of the Presidential Warrant dated 30th June 2009 by the President are in breach of the claimant's fundamental rights under Sections 4 (a) and (b), (d), (g) and sections 5 (2) (c) (iii), (e), (h) of the Constitution, which for convenience are set out hereunder:

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

(a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;

(b) the right of the individual to equality before the law and the protection of the law;

(d) the right of the individual to equality of treatment from any public authority in the exercise of any functions;

(g) freedom of movement;

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

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

(c) deprive a person who has been arrested or detained– (iii) of the right to be brought promptly before an appropriate judicial authority;

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations:

(h) deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms.

50. The Claimant submits that **the conditions imposed as part of his release constitute fetters upon his liberty which have been imposed other than by due process** and his right to liberty is likely to be breached by the fact that the imposition of the conditions is backed by a summary power of arrest.

51. The learned Judge in **Hoffa** further considered as follows at page 1234 of his opinion:

*“Again this is not to say that any condition, even when freely accepted by the prisoner, is by that fact alone legally valid. Considered within the framework of our constitutional system, wherein the rights and liberties of the individual are accorded a position of paramount importance, **there are obvious limits** beyond which the President may not go **in imposing and subsequently enforcing such conditions**. On the other hand, every condition which to some degree impinges on those rights and liberties is not thereby unenforceable.”*

Challenges to the conditions generally

52. The Claimant challenges the imposition of the conditions on a collective basis on the grounds

- (a) That they were imposed in an arbitrary manner,
- (b) That they are disproportionate and
- (c) That the Claimant was not afforded a right to be heard in relation to the conditions.

Arbitrary and Disproportionate

53. The Claimant submits that without any evidence as to the basis for the imposition of the conditions it is not possible to objectively justify their imposition or their precise terms. The conditions are therefore disproportionate, arbitrary and irrational, particularly as the conditions are backed by the power of arrest and indefinite detention.

54. Further, because of their arbitrariness and want of proportionality the conditions are in breach of the due process provision.

Section 5 (2) (e) – fair hearing:

55. The Claimant submits that:
- a. Under Section 5(2) (e) the Claimant is entitled to a fair hearing in relation to the imposition of the conditions as the decision which was taken in relation to the conditional pardon was a decision which affected the liberty of the Claimant.
 - b. The Claimant is entitled to the right to be heard together with all attendant rights such as disclosure of relevant materials. Following **Lewis v AG** the right to be heard applies to an exercise of the power of pardon.
 - c. That the conditions which form the subject matter of the claim herein are not of general application: each condition is designed to apply only to the Claimant.

56. However the reasoning in **Hoffa** which I consider persuasive establishes that the applicant could have rejected the pardon and its conditions if he considered them arbitrary, that as no right was being taken away from him he did not need to be afforded a hearing before the imposition of the conditions, and that the opportunity to reject the conditions was sufficient safeguard against the imposition of unreasonable or arbitrary conditions.

Individual challenges to the condition - Constitutionality

57. It was recognized in **Attorney General of Trinidad and Tobago and Another v. Lennox Phillip and Others** [1995] 1 A.C. 396 as follows at page 410:

“Where a pardon is subject to a condition, then the protection provided by the pardon may not be conferred until the condition has been complied with.”

58. The Claimant challenges each of the conditions on the grounds that the individual conditions breach and are likely to breach his fundamental rights under sections 4 and 5.

59. The defendant contends:

That the constitutionality of the Conditions must be considered within the factual matrix of the Claimant’s particular circumstances citing District Judge Pratt in **Hoffa** where he considered at page 1235:

“...it would be unrealistic to consider the restriction placed on plaintiff Hoffa's commutation except in the context of his status as a felon twice convicted for activities arising out of his union office and serving a combined sentence of thirteen years imprisonment. This point of reference is significant to the decision of the instant case

because Hoffa's "[constitutional] rights of necessity are conditioned by the situation in which [his] convictions placed [him]."

**Vague, unenforceable against the Claimant and inability to comply with the conditions -
due process**

60. Conditions (a) and (b):

- a. That the Claimant shall every six months for a period of three years from the date of the pardon report to the St. Ann's Psychiatric Hospital for a periodic review and evaluation by the Psychiatric Hospital Tribunal in accordance with the requirements of the Mental Health Act, Chap/ 28:02;
- b. That the said Tribunal forwards to the President each periodic report in respect of the said review and evaluation over the prescribed period;

61. The Claimant challenges conditions (a) and (b) on the bases that:

- (i) He is not able to comply with the conditions as the conditions are not directed to him but to another party and he is thereby unable to comply with the conditions; and
- (ii) The conditions are not sufficiently precise.

62. The claimant contends that the condition by itself is not directed to the Claimant but to the Psychiatric Hospital Tribunal. Where the Claimant complies with condition (a) and attends the tribunal as directed but the Tribunal does not forward the report to the President the Claimant will be in breach of the condition.

63. In fact however, condition (b) is simply the mechanism by which compliance with condition (a) can be ascertained. Judicial oversight, for example by application for writ of habeas corpus, would be an adequate procedural mechanism to ensure that the applicant does not face sanctions for any default by the Tribunal.

64. The obligation is in any event a limited one, expiring on June 30th 2012, and cannot be considered to be disproportionate in the circumstances.

65. The Claimant's obligation is to **report** for the review. In any event whether or not the arrangements have put in place for his review this is not a matter for which he is liable to face sanctions. It is speculative to assume such arrangements have not been put in place. There is no basis for inferring any breach of section 5 (2) (h) of the Constitution.

66. Condition (a) is also sufficiently precise to enable the applicant to know what is required of him, namely to **report**.

67. Condition (c)

c. That the Claimant takes such medication as may be prescribed by his attending psychiatrist;

As to condition c) the Claimant has deposed at paragraph 36 that he has never been on medication either at St. Ann's or in prison, and that he is unaware of having an attending psychiatrist.

68. If that be the case then there would be no obligation placed on him.

69. The analysis of the Court of Appeal in **The Attorney General v Northern Construction** C.A.CIV.100/2002 establishes **that judicial oversight can be curative**. The same would apply here in relation to the conditions imposed.

70. Further, failure of third parties e.g. – the Tribunal, to review the Claimant and perform its function of sending the report to the President, or the failure to communicate the prescription and provide same to the Claimant, would not render the Claimant liable to be arrested and detained at the President's Pleasure as procedural *due process* must be implied, for example application for writ of habeas corpus, and hearing as to whether the conditions have been breached before any sanction is imposed.

71. Condition (d):

d. That the Claimant resides with either Ms. Eugene Samuel or Ms. Prunella Alvarez;

The Claimant claimed that this condition infringes his rights under Sections 4(g) – **freedom of movement** and c) **respect for private and family life** but no longer pursues relief in relation

to Section 4(g) freedom of movement. The Claimant also makes complaint that the condition violates his **right to liberty** under the due process clause – Section 4(a).

RIGHT TO LIBERTY

72. The Claimant deposes (at paragraphs 30 and 31 of his affidavit)

(a) that he cannot say for how long he will be allowed to live with either Alvarez or Samuel, that they are elderly persons and he has no idea as to what will be his position once they have passed away,

(b) that he would like to form relationships of his own and that the living circumstances may not permit this.

73. The Claimant submits that the right to liberty extends further than the total deprivation of liberty in terms of imprisonment. The claimant's circumstances were that he was imprisoned for a long period. Having a place to stay upon his release must necessarily be an important factor facilitating his reintegration into society. This condition cannot be said to be unreasonably restrictive of his liberty, or unreasonable.

74. It is difficult to fathom why the residency condition which the claimant voluntarily accepted should now be considered to be in violation of any of his constitutional rights, far less his right to liberty.

RIGHT TO PRIVATE AND FAMILY LIFE

75. It is alleged that the condition is arbitrary- having regard to the fact that it appears to be life long and it is thereby contrary to due process. That is rejected. It was voluntarily accepted by the claimant and does not appear to be unreasonable. Rather than being an imposition on the claimant's liberty, this condition in fact facilitates his liberty and integration into society. No concrete alternative has been suggested to demonstrate that this condition is an unreasonable imposition upon the claimant which restricts him from pursuing some definite alternative mode of living.

76. The suggestion that by the terms of the condition the Claimant is precluded from choosing where to live and the duration of that residency ignores the fact that the claimant had a choice and made it. He could have chosen to remain in detention. Instead he accepted condition (d). The contention that because it is imposed other than by a judicial process it is without due process is flawed. It was imposed by a constitutionally provided process, and a choice was afforded.

77. The Claimant has deposed at paragraph 31 of his affidavit that his residence does not afford him any privacy because he lives with his sister and must conform to the rules of the house, and that he wishes to form a relationship and invite friends and family to his house.

78. This is not a situation so uncommon that its existence implies a violation of constitutional rights. The applicant accepted this condition.

79. Condition (e) – The firearms and weapons restriction.

That the Claimant does not possess or use any firearms or weapons of any kind.

80. The Claimant has deposed at paragraph 32 of his affidavit that

- (i) He is a builder and construction worker who possesses a variety of tools and implements which may or may not fall under the definition of weapon;
- (ii) He is unclear as to what items fall within the scope of the condition;
- (ii) Even if he were to apply for a firearm user's license he is prohibited from possessing a firearm by the condition;
- (iii) If he is prevented from using tools he will be unable to earn a living or return to his previous activity of gardening.

81. It is alleged that:

- 1. There is no definition of "weapon". Under the Prevention of Crime (Offensive Weapons) Act Chapter 11:09 [The Act], an offensive weapon is defined as anything made, adapted or intended to cause injury and the act criminalises possession of same in a public place without lawful cause.
- 2. This definition is extremely wide and can embrace anything from a hammer and screwdriver to a cutlass and hunting knife,
- 3. In any event, there is no definition of weapon included in the condition, nor is there any reference to either the definition under the Prevention of Crime Act or other enactment.

82. There is no mystery about what a weapon is. If the intention to cause injury can convert a gardening implement, e.g. a fork, into an offensive weapon, this is not peculiar to or directed at the claimant. Furthermore, everyone is precluded from possessing offensive weapons under the Act, not just the applicant.

EQUAL PROTECTION OF THE LAW

83. It is alleged that the condition provides a new prohibition on the possession of firearms and weapons which,

(a) is aimed solely at the Claimant and thereby deprives the Claimant of the **equal protection of the law** under Section 4(b) and

(b) that the condition therefore represents a breach of the **separation of powers**, with the Executive performing a legislative function by extending the prohibition against the possession of firearms and weapons specifically in relation to the Claimant and usurping the legislature's judgment in relation to the Prevention of Crimes Act and the Firearms Act.

84. With respect to firearms it is alleged that though the Firearms Act Chapter 16:01 lays down the framework by which the Claimant can lawfully possess and use a firearm in the instant case the Claimant is prohibited from possessing a firearm even though he may comply with the provisions of the Firearms Act.

85. This condition cannot be considered a breach of the separation of powers for the reason set out in **Matthew**.

86. Further, the condition cannot be considered to be unreasonable in the circumstances.

87. Finally, the applicant accepted this (and all the others) as conditions of his release, which corroborates its lack of unreasonableness.

88. **Condition (f):**

That should the Claimant fail to comply with the above conditions he will be subject to arrest and his release will stand revoked and he will be detained until the President's pleasure is known.

89. **Arrest** – It is contended that in the instant case, the Executive has extended the power of arrest other than by legislative authority and that this is in breach of the separation of powers. In fact the applicant's right to liberty is not absolute but subject to the conditions, which I have found to be not unreasonable, not unconstitutional and not unlawful.

90. If he is in violation of the freely accepted condition, (and I do not accept that he did not freely accept them) then he reverts to his original position of detention. That status has to be given effect to.

91. It is only logical that the power of arrest be vested in the persons already recognised at law as having it. The enforcement of the power of detention conferred by the original judicially imposed (after due process) sentence cannot be considered an extension of the power of arrest.

92. The Claimant is being re-subjected to the initial order imposed upon him by due process after losing the benefit of executive amelioration of the initial judicial sentence.

DETENTION AT PRESIDENT'S PLEASURE

93. Further, it is clear from the Court of Appeal's decision in **The Attorney General v Seepersad and Panchoo C.A.CIV.125/2005** that for detention at President's Pleasure must be read detention at the Court's Pleasure.

94. Further as to Condition (f) even if there is no express provision for any judicial input with the attendant safeguards this must, constitutionally, be implied. There is no deprivation of the right under 5(2) (c) (iii) right to be brought promptly before an appropriate judicial authority as there must be a determination by a judicial authority on the issue of whether there has been a breach of condition.

95. Section 4(b) of the Constitution

The protection of the law

Section 4 of the Constitution provides, *inter alia*, as follows:

"It is hereby recognized 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-

(b) the right of the individual to equality before the law and the protection of the law;"

96. In delivering the judgment of the Privy Council in **Boodram v. The Attorney General** [1996] A.C. 2 842, Lord Mustill considered the right of the individual to protection of the law. He agreed with and quoted, at pages 851 and 852, the dictum of the Honourable Mr. Chief Justice Sharma in the Court of Appeal in that said matter and stated as follows:

*“I am of the opinion the “the protection of the law” that the applicant is entitled to receive in these circumstances is his **access** to the Constitutional Court and the criminal courts where the judge will apply all the necessary procedural steps and substantive law to ensure a fair trial... (emphasis added)*

*Protection of the law was also discussed in Attorney- General of Trinidad and Tobago v. McLeod (1984) 1 WLR 522, 531; 32 W.I.R. 450,459. Applying the principles therein set out to the instant case it would appear that so long as the **judicial system** of Trinidad and Tobago **affords a procedure** by which the applicant as a person interested in establishing that he cannot get a fair trial can obtain from the courts a declaration to this effect then in these circumstances he cannot complain that he is deprived of the protection of the law. **Access to the court for that purpose itself is protection of the law to which he is entitled and of course trial by the court itself would be ‘due process’ to which he is also entitled.**” (emphasis added)*

97. In **Central Broadcasting Services and Anor. v. The Attorney General** P.C.A. 49 of 2005, the Honourable Lord Mance delivered the decision of the Judicial Committee of the Privy Council and considered section 4(b) of the Constitution as follows (at paragraph 20):

*“Section 4(b) is in the Board’s view directed to equal protection as a matter of law and in the courts: see **Bhagwandeem v. Attorney General of Trinidad and Tobago** at paragraph 14. There is here no suggestion that either the law itself or its administration by the courts was discriminatory.”*

98. This right was considered by this court in **Wrenwick Theophilus v The Attorney General of Trinidad and Tobago** HCA NO. CV 2009 – 01683 delivered April 26 2010 as follows:

Principles

The following principles can be extracted from the authorities:

- a) Protection of the law includes the right to due process: **Lezama v The Commissioner of Prisons HCA 2098 of 2002, Lewis v Attorney General [2001] 2 AC 50 at 84.***
- b) Protection of the law **covers the same ground** as entitlement to due process. (para 15)*

It is clear from authorities cited above that the right to the protection of the law encompasses:

- (a) the right to access to a tribunal,*
- (b) the right to a fair hearing, and*
- (c) the right to such procedural provisions to give effect to that right.(para.21)*

Felix Augustus Durity v. The Attorney General of Trinidad and Tobago, [2009] 4 LRC 376, at paragraph 15 is applicable:

*“It is trite law that so long as the judicial system of Trinidad and Tobago affords a person **access to the Courts**, there can be no denial of the protection of the law or indeed a denial of natural justice. [Emphasis added] (para. 25)*

99. Should the Claimant be arrested based on any allegation that he has failed to comply with the conditions of the Pardon, nothing deprives him of the protection of the law as he would be entitled to challenge his detention, for example, by way of an application for the issue of a writ of habeas corpus on the ground (if applicable) that he did not in fact breach any of the Conditions or that he was unable to comply with the Conditions.

EQUALITY OF TREATMENT

100. Section 4 of the Constitution of the Republic of Trinidad and Tobago provides inter alia as follows:

“It is hereby recognized 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 rights and freedoms, namely-

(d) the right of the individual to equality of treatment from any public authority in the exercise of any functions.”

101. **In order to establish the breach of constitutional right to equality of treatment, the Claimant must show that he was treated differently from persons similarly**

circumstanced. At paragraph 18 of the judgment delivered by Lord Mance in **Mohanlal Bhagwande v. The Attorney General** P.C.A. No. 45 of 2003, he noted as follows:

“A claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons, described by Lord Hutton in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] 2 All E.R. 26 at paragraph 71 as actual or hypothetical comparators. The phrase which is common to the anti-discrimination provisions in the legislation of the United Kingdom is that the comparison must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.”

102. Apart from this requirement other matters that needed to be established were considered by this court in **Suzette Martin v The Attorney General of Trinidad and Tobago** CV 2009-00376 (delivered February 1 2010) at pages 40 - 41 as follows :- (emphasis added)

- 1. A claimant who alleges breach of the constitutional right to equality of treatment can do so by proving mala fides.*
- 2. If he does so then the onus of proving this lies on him.*
- 3. Mala fides can include proof of "some element of deliberateness in the selection of a person for different treatment." (See judgment of Justice of Appeal Mendonca in the Maha Sabha case at paragraph 34).Further" if someone is singled out for different treatment, albeit favourable treatment, that is evidence from which Mala Fides may be inferred. It is on the face of it arbitrary which may provide evidence of mala fides" per the Honourable Justice of Appeal Mendonca at paragraph 42 of his judgment in the Maha Sabha case.*

4. *If unequal treatment is proved, in some such situations mala fides may be inferred from overt acts and circumstances, subject to rebuttal evidence by the respondent - the onus then shifts to the respondent to rebut such inference of mala fides.*

5. *Failure to prove mala fides is not fatal to a claim under section 4 (d) of the Constitution. If a claimant fails to prove mala fides he may still succeed if he proves the deliberate and intentional exercise of a power (or discretion), by the defendant /respondent the exercise of which was arbitrary and unreasonable in the circumstances which resulted in treatment in relation to him that was less favourable to him than in relation to others **similarly circumstanced**.*

103. The Claimant has failed to demonstrate any inequality of treatment or any arbitrary distinction made between him and any other persons similarly circumstanced to him.

104. Section 5 of the Constitution provides inter alia as follows:

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

(c) deprive a person who has been arrested or detained-

(iii) of the right to be brought promptly before an appropriate judicial authority;

105. While condition (f) of the Pardon expressly recognizes that the Claimant would be “subject to arrest” in the event of non-compliance with the Conditions the Claimant would be entitled to bring, for example, a Habeas Corpus application in order to contend that he did not in fact breach any of the conditions at all.

Section 5(2) (e) of the Constitution

106. Section 5(2) of the Constitution provides inter alia as follows:

“Without prejudice to subsection (1), but subject to this Chapter and to section 54,

Parliament may not-

*(e) deprive a person of the right to a fair hearing in accordance with
the principles of fundamental justice for the determination of his rights
and obligations.*

107. The Claimant appears to rely on the fact that he was not given an opportunity to be heard in respect of the Conditions to which the Pardon would be subject.

108. It is accepted that

- a) The Claimant was entitled to refuse the benefit of the Pardon if he genuinely had fundamental concerns with the Conditions, but this he did not do.
- (b) It was open to the Claimant, after rejecting the Pardon to petition the President for a pardon on such conditions as he may have thought justified.
- (c) The Claimant instead, having this choice, voluntarily accepted the Conditions, by signing the Pardon and enjoying the benefits thereof. He cannot therefore say that the conditions were imposed on him while he was denied an opportunity to be heard. See **Hoffa** supra.

REASONABLENESS

109. District Judge Pratt in Hoffa considered as follows at page 1235:

*“At least one measure of the lawfulness of a condition is that it be reasonable and neither illegal nor against public policy. ... In the state courts it has often been held that conditions attached to a pardon or commutation are valid "provided they are not **unlawful, unreasonable, immoral or impossible of performance.**" We find in these admittedly imprecise standards two overriding concerns in determining the lawfulness of a condition. First, there is a public policy concern, which can best be expressed in terms of the President's duty to exercise his discretion under the pardoning power in the **public interest**. Second, there is the concept of illegality, which in some instances may be painfully apparent, but which, for the purposes of cases like the one at bar, must also be taken to reflect the concern that a condition might unduly override the rights and liberties of the convicted person in a manner **constitutionally impermissible**. Based on our study of the precedents, we therefore arrive at a two-pronged test of reasonableness in determining the lawfulness of a condition: first, that the condition be directly related to the public interest; and second, that the condition not unreasonably infringe on the individual commuttee's constitutional freedoms.”(emphasis added)*

THE PUBLIC INTEREST

110. The public has an interest in the treatment and care of mentally ill persons and the protection of the public from persons reasonably suspected to be suffering from some form of mental illness, moreso when that condition, whether or not it now persists, has resulted in death. The findings of the Psychiatric Hospital Tribunal as contained in the letter dated May 3rd 2004 and the minutes of the Psychiatric Hospital Tribunal meeting held on November 8th 2004 suggest that the Claimant was fit to be released but with out-patient follow-up a month after discharge.

111. It is not unreasonable to require further follow up twice a year for a period of 3 years, especially as the applicant will now be in a different and unsupervised environment for the first time in decades.

112. Conditions (a) and (b) of the Pardon which require the Claimant to submit himself for review and evaluation are consistent with **the public interest in the Claimant's follow-up care and treatment.**

113. Condition (c) of the pardon is equally consistent with that public interest as the claimant may be prescribed medication as a result of his periodic reviews. He had been diagnosed in the past as suffering from paranoid schizophrenia and had received medication. It is not unreasonable to at least provide for the possibility that in future medication may be prescribed.

114. Condition (d) of the Pardon is equally consistent with that public interest as the Claimant is required to be accommodated and cared for by his family in the persons of Ms. Eugene Samuel or Ms. Prunella Alvarez.

115. The medical evidence of Dr. Iqbal Ghany as contained in a letter to Dr. Chen dated March 24th, year unknown as well as the Social Worker's Report of Mr. Rajpaul Sinanansingh dated March 5th 2004 both consider that the Claimant ought to be and would in fact be properly accommodated and cared for by his family.

The Public Interest in Safety and Security

116. Condition (e) of the Pardon is consistent with the public interest in the safety and security of citizens. It is consistent with a balancing exercise of the rights of the applicant and the public and is not unreasonable. It borders on the bizarre to suggest that the claimant should be entitled to possess or use weapons or firearms and it is unconstitutional to deprive him of that opportunity as a condition of his pardon.

117. Condition (f) of the Pardon is a necessary enforcement provision providing for the consequences of breach of the condition. It is consistent with the public interest in safety and security as the treatment, care, safety and security concerns inherent in such conditions, are in the public interest.

CONCLUSION

118.

1. The President was entitled to exercise powers under S. 87(1) of the Constitution to grant a conditional pardon.
2. Such exercise did not infringe the principle of Separation of Powers.
3. The attachment of the conditions to the pardon was not ultra vires the powers conferred by section 87(1) of the Constitution
4. The conditions themselves were not unlawful or unconstitutional, either individually or collectively.
5. The Claimant is not entitled to the reliefs sought.
6. The claimant's claim is dismissed with costs to be paid by the claimant to the defendant to be assessed in default of agreement.

119. Finally, I wish to express the court's indebtedness to counsel for all parties and their teams for the diligence and industry which characterised their submissions and their invaluable assistance provided to the Court.

Dated this 28th day of April, 2011.

.....

Peter A. Rajkumar

Judge.