THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

SAN FERNANDO

CLAIM NO. CV 2005-00710

BETWEEN

DERICK BAIN

CLAIMANT

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

DEFENDANT

Before the Honourable Madame Justice Rajnauth-Lee

Appearances

Mr. Anand Ramlogan and Mr. Sheldon Ramnanan instructed by Mr. Haresh Ramnath for the Claimant.

Mr. Douglas Mendes S.C. leading Miss Ayanna Humphrey instructed by Mrs. Deborah Jean-Baptiste-Samuel for the Defendant.

Dated the 23rd April, 2009

JUDGMENT

INTRODUCTION

RELIEF SOUGHT:

1. By his Amended Fixed Date Claim filed on the 7th November, 2006, Derick Bain, ("the Claimant"), a former inmate of the Golden Grove Prison claimed against the Attorney General of Trinidad and Tobago("the Defendant"), the following relief and/or redress pursuant to section 14 of the Constitution of Trinidad and Tobago ("the Constitution"):

(1) A declaration that the denial and/or prevention of the Claimant's right to vote or to exercise his vote as a person qualified to be a voter at general elections in Trinidad and Tobago while the Claimant was in prison contravened the provisions of section 4(a), 4(b), 4(d), 4(i) and 5(2)(h) of the Constitution;

(2) Damages and/or compensation for the loss of the right to vote;

(3) All such orders and directions as are necessary to enforce the Claimant's rights under sections 4 and 5 of the Constitution;

(4) Further or other relief.

(5) Costs.

GROUNDS OF THE APPLICATION:

2. The Claimant relied on the following grounds:

(1) The Claimant's rights to liberty as a citizen of Trinidad and Tobago over 18 years of age and the right not to be deprived thereof was contravened contrary to section 4(a) of the Constitution by the failure and/or refusal of the State to make or cause to be made arrangements to enable him to vote at general elections while he was in prison awaiting the hearing of his appeal.

(2) The failure and/or refusal of the State referred to in the preceding ground contravened the Claimant's right to equality before the law contrary to section 4(b) of the Constitution.

(3) The failure and/or refusal of the State further contravened the right of the Claimant to equality of treatment by the State and/or its servants and/or agents responsible for enabling voters to vote at a general election contrary to section 4(b) of the Constitution.

(4) The Claimant's constitutional right to equality of treatment from a public authority in the exercise of its functions was contravened when the Defendant allowed other prisoners who were similarly circumstanced to vote but denied the Claimant similar or equal treatment.

(5) The denial of arrangements to enable the Claimant to vote while he was in prison in the custody of the State at the time of the general elections and the denial of the exercise by him of his right to vote thereat contravened the right of the Claimant to freedom of expression contrary to section 4(i) of the Constitution.

(6) The failure of the State resulting in the denial of the Claimant's right to vote deprived the Claimant of the right to such procedural provisions as were necessary to give effect to the rights and freedoms guaranteed to the Claimant by section 4 of the Constitution contrary to section 5(2)(h) of the Constitution which operated to require the State to have a list of electors prepared with the Claimant's name thereon to enable him to vote at general elections while he was in prison.

THE AFFIDAVITS:

3. The original Claim Form was supported by the affidavit of the Claimant sworn to and filed on the 6th December, 2005 ("the Claimant's original affidavit"). The Claimant

filed a further affidavit on the 28th March, 2006 ("the Claimant's further affidavit"). The following affidavits were also filed on behalf of the Claimant:

* the affidavit of Khimraj Bissessar, retired Superintendent of Prisons on the 6th December, 2005.

* the affidavit of former prison inmate Allan Harvey on the 19th April, 2006.

4. Several affidavits were filed on behalf of the Defendant:

* the affidavits of Martin Martinez, Assistant Commissioner of Prisons, on the 8th February, 2006 and the 6th July, 2006 respectively.

* the affidavit of Bernard Dolloway, Corporal of Police, on the 8th February, 2006.

* the affidavit of Shirley-Ann Greenidge, Probation Officer, on the 6th July, 2006.

* the affidavit of Neisha Ali, Research Officer at the Elections and Boundaries Commission ("the EBC") on the 6th July, 2006.

* the affidavit of Omadath Sibaran, Prison Officer, on the 11th July, 2006.

THE FACTS:

5. On the 26th October, 1998 the Claimant was convicted of rape and sexual intercourse with a minor. On the 27th November, 1998 he was sentenced to 6 years hard labour. He appealed his conviction and sentence and was not admitted to bail pending his appeal. On the 14th January, 2003 the Court of Appeal allowed his appeal and set aside his conviction and sentence. The Claimant was released on that day.

6. While the Claimant was incarcerated pending appeal, three General Elections were held in 2000, 2001 and 2002, and one Local Government Election was held in 1999. The Claimant was not allowed to vote in any of the elections despite his requests to be permitted to vote.

THE ISSUES

7. The following issues fall to be determined by the Court:

(1) Whether the Claimant was a person disqualified from being registered as an elector within the meaning of the Constitution and the **Representation of the People Act Chap. 2:01.**

(2) Whether the Claimant's constitutional right to equality of treatment was infringed by the prison authorities when they permitted other prisoners remanded pending appeal to vote.

(3) Whether there exists a right to vote in Trinidad and Tobago, whether common law, constitutional or statutory.

THE LAW

ISSUE (1) - Persons disqualified from voting

8. Sections 12 and 13 of the **Representation of the People Act** ("the Act") provide for the qualifications of electors for elections in Trinidad and Tobago. On the other hand, section 15 of the Act provides for the disqualifications of electors.

In particular, section 15(1)(b) provides as follows:

> **15.** (1) No person is qualified to be or to remain registered as an elector who—
>
> *(b)* is under sentence of death imposed on him by a Court in any part of the Commonwealth or is serving a sentence of imprisonment (by whatever name called) exceeding twelve months imposed on him by such a Court or substituted by competent authority for some other sentence imposed on him by such a Court or is under such a sentence of death or imprisonment the execution of which has been suspended.

Accordingly, the key issue to be determined is whether the Claimant was a person under a sentence of imprisonment exceeding twelve months imposed on him by a Court, **the execution of which sentence had been suspended**.

9. It has been argued on behalf of the Claimant that by virtue of sections 48 and 49 of the **Supreme Court of Judicature Act** Chap. 4:01 the Claimant, having appealed his conviction, should have been treated as a prisoner on remand (awaiting trial), was qualified to vote and should have been allowed to vote. Sections 48 and 49 provide as follows:

> **48(1)** An appellant who is not released on bail shall, pending the determination of his appeal, be treated in like manner as prisoners awaiting trial.
>
> (2) The Court of Appeal may, if it seems fit, on the application of an

appellant, grant him bail pending the determination of his appeal.

49(1) The time during which an appellant, pending the determination of his appeal, is released on bail, and subject to any directions which the Court of Appeal may give to the contrary to any appeal, the time during which the appellant, if in custody, is specially treated as an appellant under this section, shall not count as part of any term of imprisonment under his sentence, and, in the case of an appeal under this Act, any imprisonment under the sentence of the appellant, whether it is the sentence passed by the Court of trial or the sentence passed by the Court of Appeal, shall, subject to any directions which may be given by the Court of Appeal, be deemed to be resumed or begin to run, as the case requires, if the appellant is in custody, as from the day on which the appeal is determined, and, if he is not in custody, as from the day on which he is received into prison under the sentence.

10. Mr. Ramlogan further argued on behalf of the Claimant that the above submission was assisted by the **Prisons Act** Chap. 13:01 which affords the same treatment to prisoners awaiting trial as to prisoners awaiting the hearing of their appeals. Sections 297 and 298 provide as follows:

297. Persons committed to prison in any of the following circumstances shall be classed as First Division Prisoners:-

(c) To await trial at the Assizes, or during the investigation of charges by any court

(d) To await the hearing of an appeal against sentence or conviction.

298. First Division Prisoners shall be detained in that part of the prison specially provided for them, and be kept apart from other prisoners as far as this is practicable.

11. Mr. Mendes submitted on behalf of the Defendant that it was undisputed that the Claimant was sentenced to a term of imprisonment exceeding twelve months and, at the time that the elections were held, was not serving his sentence of imprisonment. Mr. Mendes further argued that by virtue of sections 48 and 49 of the Supreme Court of Judicature Act, the Claimant could not be said to be serving his sentence of imprisonment. Accordingly, it was argued on behalf of the Defendant that where a person has not yet begun to serve a sentence of imprisonment which has not been extinguished and which he may be required to serve at some time in the future, the execution of the sentence can only be described as having been suspended.

12. Much argument centred on the question: how is the execution of a sentence of imprisonment suspended under the laws of Trinidad and Tobago. **Black's Law Dictionary** (5^{th} ed.) defines the term "to suspend" as "to interrupt; to cause to cease for a time; to postpone; to stay, delay or hinder; to discontinue temporarily, but with an expectation or purpose of resumption…. To postpone, as a judicial sentence….." The same text defines the term "suspension of sentence" as meaning "either a withholding or postponing the sentence of a prisoner after the conviction, or a postponing of the execution of the sentence after it has been pronounced."

13. Attorneys for both parties accept that at common law the courts exercise the power of reprieve whereby the execution of a sentence is suspended (**Archbold Pleading, Evidence & Practice in Criminal Cases** (1966) 36th edition paragraph 620). What they do not agree on is whether Parliament had in mind only that common law power to suspend a sentence when section 15(1)(b) of the Act was enacted. Mr. Ramlogan argued that when section 15(1)(b) of the Representation of the People Act was passed in 1967, since Parliament used similar phrasing as contained in **Archbold** (a leading text book used at that time by all criminal practitioners in both England and Trinidad and Tobago), Parliament must have intended that section 15(1)(b) should be construed to refer only to sentences suspended by virtue of the exercise of the common law power of the courts to grant such a reprieve. The Court agrees with Mr. Mendes that this submission is unsustainable.

14. Apart from section 15(1)(b) of the Act, the only written law which refers specifically to the power of the court to suspend a sentence is section 3(1) of the **Community Service Orders Act** Chap. 13:06 which empowers the court to suspend *the operation of the whole or part of the sentence* where a person over the age of sixteen years has been sentenced for a period of imprisonment of twelve months or less. Such sentence can be suspended for a period not exceeding two years. The court may then make a community service order requiring him to perform unpaid work in accordance with the provisions of the Act.

15. Other statutory provisions, though not specifically mentioning the term *the suspension of a sentence*, have the effect of suspending or staying the execution of a sentence of imprisonment. For example, by virtue of section 87(2)(b) of the **Constitution**, the President of the Republic of Trinidad and Tobago is empowered to grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on a person for the commission of an offence.

16. Section 72 of the **Interpretation Act** Chap. 3:01 empowers a court of record having a criminal jurisdiction to have ancillary to that jurisdiction, the power to bind over to keep the peace, and the power to bind over to be of good behaviour, a person whose case is before the court, by requiring him to enter into his own recognisances and committing him to prison for any period not exceeding twelve months if he does not comply. In the case of a person convicted of an offence other than a capital offence, this power may be exercised in lieu of or in addition to any other punishment the court may have power to impose for the offence. It would appear that under this section the person convicted is not necessarily under a sentence of imprisonment, and it is not always to be regarded as a case of a court suspending a sentence.

17. By virtue of section 71 of the **Summary Courts Act** Chap. 4:20, a Magistrate, who thinks that a charge has been proved, but is of opinion that having regard to the character, antecedents, age, health, or mental condition of the person charged or to the trivial nature of the offence or to the extenuating circumstances in which the offence was committed, may, *without proceeding to conviction*, make an order either dismissing

the charge or discharging the offender conditionally on his entering into a recognizance to be of good behaviour and to appear for conviction and sentence when called upon to do so (during a period not exceeding three years). Although this provision has been loosely regarded as having the effect of suspending a sentence, it cannot strictly be regarded as that, since there is no conviction of the person and no sentence passed.

18. In the case of a conviction involving the sentence of death or corporal punishment, section 51 of the Supreme Court of Judicature Act makes special provision therefor. The section provides inter alia that the sentence shall not be executed until after the determination of the appeal where notice of appeal has been given. Both Mr. Mendes and Mr. Ramlogan agree that this section described by its marginal note as "Stay of Execution" has the effect of suspending the sentence in the case on a person sentenced to death or corporal punishment.

19. In the Privy Council Appeal of **Leslie Tiwari v The State** [2002] UKPC 29, Lord Hutton delivering the judgment of the Board, cited the judgment of the Court of Appeal in **Jagessar v The State (No. 2)** 1990 41 WIR 373, and noted the observations of the Court of Appeal with respect to section 48(1) of the Supreme Court of Judicature Act. [para.39 of **Tiwari**]:

"The Court then stated that the Prison Rules (C11, No 5) prescribed the manner in which prisoners awaiting trial were to be treated and in the judgment set out a number of those rules from which it is apparent that such prisoners are given a considerable number of privileges not afforded to convicted prisoners who have not

appealed, such as the privileges of wearing their own clothing, ordering food for themselves, being permitted a number of visits by relatives and friends, being allowed to see their own doctor and being permitted to receive books and newspapers."

20. Their Lordships in **Tiwari** concluded:

"The Lordships appreciate that a convicted prisoner in custody who has served notice of appeal is given a considerable number of privileges which are withheld from a convicted prisoner who has not appealed, but it appears to their Lordships that this consideration is greatly outweighed by the fact that an appellant who has served notice of appeal and who has not been admitted to bail has lost his liberty and is confined to prison, albeit with a number of special privileges. Their Lordships also appreciate that the distinction between a convicted prisoner who appeals and one who does not is a distinction recognised by section 48(1) and by the Prison Rules, but nevertheless section 49(1) expressly gives the Court of Appeal a discretion to direct that the time in custody after service of notice of appeal shall count as part of the term of imprisonment. In these circumstances their Lordships consider that there is much force in the appellant's submission that time that is spent in prison in Trinidad and Tobago awaiting determination of an appeal should, as in England, count as part of the term of imprisonment passed on the appellant, unless the appeal is one devoid of any merit." (para. 42).

21. The matter of the exercise of the discretion under section 49(1) was remitted to the Court of Appeal. In the subsequent Privy Council Appeals of **Kumar Ali v**

The State and **Leslie Tiwari v The State** [2005] UKPC 41, their Lordships held *inter alia* that the making of orders backdating sentences to the date of conviction should not be restricted to exceptional cases [para. 17].

22. What the appeals of **Ali** and **Tiwari** make clear is that the Court of Appeal ought to backdate sentences to the date of conviction or to some date shortly thereafter, in ordinary cases, unless of course the appeal is one devoid of any merit. Until the Court of Appeal backdates the sentence of an appellant who has lost his appeal, however, the appellant cannot be said to be serving his sentence. In the view of the Court, in those circumstances, and by virtue of the provisions of section 49(1) of the Supreme Court of Judicature Act, his sentence is to be regarded as a sentence of imprisonment the execution of which has been suspended for the purposes of section 15(1)(b) of the Act. The Court cannot accept Mr. Ramlogan's contention that section 48(1) of the Supreme Court of Judicature Act (which provides that an appellant who is not admitted to bail, shall pending the determination of his appeal, be treated in like manner as a prisoner awaiting trial) has to be given the interpretation that this treatment *in like manner as a prisoner awaiting trial* includes the right of the appellant to be registered as an elector. Section 48(1) cannot be construed to have the effect that a prisoner who is not admitted to bail is eligible to be registered as an elector, while a prisoner who is admitted to bail is not eligible to be registered as an elector. The Court agrees with Mr. Mendes that Parliament could not have intended such an irrational interpretation. In the view of the Court, this treatment *in like manner* referred to in section 48(1) has to be interpreted as the appellant's entitlement to

the special privileges contained in the Prison Rules and referred to by their Lordships in the appeal of **Tiwari** (*supra*).

23. In the circumstances, there is no ambiguity in the provisions of section 15(1)(b) of the Act. Further, the Court has examined the majority judgment of the Privy Council in the appeal of **Boyce and another v The Queen** [2004] UKPC 32 and Lord Hoffmann's statement that the fundamental rights provisions of the Constitution are to be regarded as a "living instrument" and require to be periodically re-examined in its application to contemporary life. While the Court is in whole-hearted agreement with the statement, nothing in that judgment impacts on the Court's determination of any of the issues before the Court.

24. In addition, having regard to the Court's findings, I do not consider it necessary to decide whether section 48(1) of the Supreme Court of Judicature Act is to be interpreted as *always speaking* so as to treat it as embodying eligibility to vote. In any case, eligibility to vote is "an altogether different category" from the special rights and privileges provided for in the Prison Rules and contemplated by section 48(1). [See Lord Hoffmann in the Privy Council Appeal of **Matthew v State of Trinidad and Tobago** (2004) 3 WLR 812, para. 26.] Accordingly, in the view of the Court, section 15(1)(b) of the Act and section 48(1) of the Supreme Court of Judicature Act are to construed separately and distinctly. The Court agrees with Mr. Mendes that the provisions of the **Representation of the People Act** provide a complete code in relation to the persons

qualified to vote, and it is unhelpful (and incorrect, may I add) to turn to section 48(1) for the answer as to whether the Claimant was eligible to be registered as an elector.

25. Accordingly, the Court finds that the Claimant was a person under a sentence of imprisonment exceeding twelve months, the execution of which was suspended pending the outcome of his appeal and was accordingly disqualified from being registered as an elector by virtue of section 15(1)(b**)** of the Representation of the People Act.

ISSUE 2 - Equality of treatment

26. The Claimant has contended that his constitutional right to equality of treatment from a public authority was contravened when the Defendant allowed other prisoners, who were similarly circumstanced, to vote but denied the Claimant similar or equal treatment.

27. The test for inequality of treatment was succinctly set out in the Privy Council Appeal of **Mohanlal Bhagwandeen v. The Attorney General of Trinidad and Tobago** (2004) 64 WIR 402 at paragraph 18:

> "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] UKHL 11, [2003] 2 All ER 26 (at para. 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."

28. It is not in disputed that Allan Harvey and Donaldson Alby Forbes, two prisoners who were convicted, sentenced to terms of imprisonment exceeding twelve months, had appealed their convictions, and were not admitted to bail pending appeal, were allowed to vote. Accordingly, it cannot be disputed that Allan Harvey and Donaldson Alby Forbes were persons similarly circumstanced to the Claimant.

29. It has been contended on behalf of the Defendant that the right to equality of treatment is not infringed where a benefit is bestowed on persons similarly circumstanced to the Claimant to which none of them is entitled and indeed the grant of which is unlawful. Martin Martinez, Assistant Commissioner of Prisons, in his affidavit filed on the 8th February, 2006, explained the practice of the Prison Administration as it relates to prisoners being allowed to vote. According to Martinez, the practice is that no prisoner who is serving a sentence of imprisonment of more than one year is allowed to vote. Prisoners who have been sentenced to terms of imprisonment greater than one year and who have appealed against conviction or sentence are still treated as convicted prisoners

and are not allowed to vote. Prisoners who are in prison custody on remand, that is to say, those who have not yet been convicted but are in custody awaiting trial because not admitted to bail, are allowed to vote (para. 6).

30. Mr. Khimraj Bissessar in his affidavit filed on behalf of the Claimant on the 6th December, 2005, also deposed that the long established policy of the prison administration was that no convicted prisoner who had an appeal pending was allowed to vote (para. 3).

31. Persaud J.A. in the case of the **Attorney General v KC Confectionery Ltd** (1985) 34 WIR 387 explained that in cases of inequality of treatment where *mala fides* is not alleged (as is the case here) an applicant must prove a deliberate and intentional exercise of power. He stated as follows at page 404-405:

> "If, on the other hand, the allegation is that the official merely contravened the law……. All that needs to be proved in such a case is the deliberate and intentional exercise of the power, not in accordance with law, which results in the erosion of the complainant's right the entitlement to which may become vested in him either from the Constitution itself or from an Act of Parliament."

32. In the unreported case of **Michael Dindayal v. The Attorney General of Trinidad and Tobago** H.C.A. No. S-1680 of 2003 Dean-Armorer J. gave her interpretation of Persaud J.A.'s statement at page 59:

"…The term '*deliberate*' according to the Concise Oxford English Dictionary means, '*done consciously and intentionally fully considered not impulsive*….' The word '*intentional*' bears a similar meaning and is synonymous with '*deliberate*.'

Whereas the words of Persaud, JA are not legislative and are not susceptible to the precision with which the rules of interpretation are applied to legislation, it is necessary to define their ambit in order to decide whether they are applicable to the instant situation.

In my view a '*deliberate and intentional exercise of power*' refers to positive action on the part of a public official as opposed to omissions caused by negligence or oversight."

33. In the unreported case of **Romauld James v. The Attorney General of Trinidad and Tobago** H.C.A. No. S. 1112 of 2004 Kokaram J. expressed his doubts as to whether an applicant claiming inequality of treatment could base his claim on an unlawful benefit given to another person. At para. 6.14, he said:

> **"**It would appear that the applicant in a discrimination case must have been asserting that a lawful right has been denied to

him, while it has been conferred on others. It is doubtful whether the applicant can insist on an illegality being perpetuated even though others may have benefited from such an illegality."

34. In the case of **Sahadeo Maharaj v. Teaching Service Commission** Civil Appeal No. 26 of 2003 Archie J.A., as he then was, set out his conclusion as to the appellant's claim of inequality of treatment. He said at page 2, para 1:

"This case is about the ability of a public body to reverse a decision taken in error when a person affected has relied upon and enjoyed the benefit of that decision. The Teaching Service Commission erroneously confirmed the Appellant's appointment to the office of Teacher II on an effective date earlier than his date of first appointment to that office. The effect of that was to give him a seniority date ahead of persons who had been originally appointed before him. It had no power to do so. The appellant's claim of discrimination and inequality of treatment fails because the removal of a benefit to which he was not lawfully entitled cannot constitute discrimination or inequality of treatment."

35. At paragraph 10, Archie J.A. went on to make the following observations:

"Neither reliance nor effluxion of time can alter the nature of an illegal act so as to confer a permanent substantive benefit or legitimate expectation. A public body cannot, by mistaking its own powers, enlarge them beyond what is conferred by statute. The Commission has an overriding duty to

obey the statute. The doctrine of estoppel must give way to the principle of *ultra vires.* The fact that that a decision of a public authority may remain effective until declared to be a nullity by the Court does not estop the authority from asserting lack of vires."

36. In the present case there was no deliberate or intentional exercise of power contrary to the law. Because of an unexplained error, which error was in contradiction of the Prison Administration's long established policy, Allan Harvey and Donaldson Alby Forbes were allowed to be registered as electors and to vote contrary to the provisions of section 15(1)(b) of the Act. In the judgment of the Court, the Claimant cannot complain of inequality of treatment when he was not entitled to be registered as an elector and in circumstances in which the above two prisoners were in error and unlawfully allowed to be registered. In the circumstances, the Claimant's claim to discrimination and inequality of treatment must fail.

ISSUE 3 - The Right to Vote

37. Having regard to the above findings of the Court, the Court does not consider it necessary that the Court should decide in this judgment whether there exists in Trinidad and Tobago a right to vote , whether constitutional, common law or statutory.

38. The Court has examined the submissions of Attorneys advanced on behalf of the parties with respect to the issue of costs. I can see no proper reason to depart from

the general rule that the unsuccessful party should pay the costs of the successful party. [CPR. Part 66.6(1)]. On the 6th July, 2006, the Court set a costs budget in the sum of $140,000.00. Having regard to the complexity of the issues before the Court, the Court will not vary the budget set by the Court.

ORDER

The Court hereby orders as follows:

(1) The Claimant's Amended Claim filed on the 7th November, 2006 is hereby dismissed.

(2) The Claimant shall pay to the Defendant costs of the claim in the sum of $140,000.00.

MAUREEN RAJNAUTH-LEE

JUDGE