

IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2020-01436

BETWEEN

MUSTAPHA TOURAY

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr Justice Frank Seepersad

Date: 3 November 2020

Appearances:

1. Mr Gerald Ramdeen, Mr Umesh D. Maharaj instructed by Ms Dayadai Harripaul, Attorneys-at-law for the Claimant.
2. The State being unrepresented.

DECISION

1. Before the Court for its determination is the Claimant's Claim Form and Statement of Case filed on 22 June 2020 by virtue of which the Claimant sought the following relief:
 - a. Damages and all consequential loss suffered by the Claimant for false imprisonment of the Claimant by servants and/or agents of the State of Trinidad and Tobago acting in the course of his duties for the period 1 June 2018 to 5 July 2019, a period of 13 months and 4 days.
 - b. Aggravated damages for the mental suffering and humiliation suffered and experienced by the Claimant as a result of his incarceration.
 - c. Exemplary damages for the unconstitutional and oppressive conduct of the Defendant the particulars of which are set out in the Claimant's Statement of Case.
 - d. Costs of this claim to be paid by the Defendant to the Claimant on a prescribed costs basis.
 - e. Interest at a rate and for a period of time to be determined by the Court.
 - f. Such further and/or other relief as this Honourable Court deems fit in the circumstances of this case.
2. The Defendant failed to file a defence in this matter despite given ample opportunity to do so and notwithstanding the fact that the Court issued an unless order when the last extension of time was granted.
3. The Claimant is a Gambian citizen who entered this jurisdiction in March 2017. Subsequently, a deportation order was made against him on 14 August 2017 and he was detained pending his deportation at the Immigration Detention Centre (IDC). An attempt was made by the Defendant to execute the deportation order on 18 April 2018 however, the Claimant was refused entry to Turkey whilst in transit to Gambia and he was then returned to the jurisdiction on 20 April 2018 and thereafter detained at the IDC.

4. On 19 June 2019 the Claimant applied for the issuance of a writ of *habeas corpus ad subjiciendum* by virtue of CV2019-02422 Mustapha Touray v The Chief Immigration Officer (the first action). On the 5 July 2019 Charles J ordered that the Claimant be released. The court found that 6 weeks from his return and detention was a reasonable period for arrangements attendant to his deportation to have been made.
5. The Claimant pleaded and his witness statement outlined that he was falsely incarcerated without lawful authority by the Defendant and that the acts of the Defendant in detaining him from 1 June 2018 to 5 July 2019 were humiliating, undignified, occurred in distressing circumstances and caused him severe mental suffering, frustration and humiliation. At paragraphs 7, 8, 9, 10, 11, 12, 14, 16, 17 and 19 of his witness statement the Claimant said as follows:

7. "When I was returned to the Immigration Detention Centre I was being kept in a dormitory with approximately 17 other persons. At times the number of persons in the dormitory would be as much as 35 persons. The dormitory was approximately 16 feet x 16 feet in dimension and was very crowded and cramped by the number of detainees that were forced to share this area. I slept on the floor on a thin, dirty mattress as there were not enough beds. This was extremely uncomfortable and humiliating. Sometime when the number of persons in the dormitory fell low I would be able to access a bed to sleep. The dormitory was very dirty and usually littered with garbage. There were many men from different countries all sharing the same dormitory. The language barrier made it impossible to communicate with a large number of the detainees. There were frequent fights among other detainees which would on occasion become very violent. Tensions were always high and the risk of violence was always present. I felt afraid for my life on many occasions and was never able to feel safe from attack by the other detainees. I kept to myself mostly for fear of being attacked.

8. *The hygiene of many of the detainees was disgusting. We all had to share two bathrooms and one toilet which was used by about 50 detainees. The stench of the bathroom was disgusting. Much like the rest of the dormitory, the bathrooms were not cleaned as often as they should have been. In addition to the stench there was muck on the walls and the floor and using the bathroom and toilet facility was a most humiliating experience. I was provided with a bar of soap, one roll of toilet paper and a small tube of toothpaste per month. At times supplies at the IDC would run short and I would not be provided with any supplies for two to three months. These supplies could not last a month and when they run out we would simply have to do without. When supplies ran out I would ask the officers if I could be provided with an additional roll of toilet paper but they would simply inform me that there were no more supplies and I would have to wash myself with water every time that I use the toilet. This was the same with the other detainees as well and this made the entire surrounding unsanitary, unhygienic and septic”.*

9. *“At times the smell from the toilet and bathroom would be so strong and disgusting that it would enter the space of the dormitory. The only thing more distressing than the sight and stench of the bathroom was the fact that I had to shower in full view of the other detainees. This was embarrassing as it was unpleasant. This experience reduced me to feel worse than an animal. At times when the dormitory was full, I would refuse a bath only because of the embarrassment that was associated with the experience. There were things that I had gotten accustomed to while being detained but this was one experience that I never was able to adjust to despite the prolonged period of time that I was incarcerated. I was provided with a towel by the IDC officers and I used this to dry myself after I showered. I felt like I was robbed of all my dignity by having been subject to this condition while incarcerated. I felt like my humanity was taken from me”.*

10. *"The air was so hot and dusty. The ventilation was old, dirty and rusty and circulated warm dirty air throughout the dormitory constantly. I constantly felt like I was suffocating. I was only aired for about an hour and a half a day, approximately six days a week. On many occasions I was not allowed to air for sometimes days on end due to staff shortages. During these times I would often beg the officer to allow me outside just to get some fresh air but even this was refused by the officers. I often begged to be aired, for my mental and physical health. I was so frustrated whilst I was kept inside. During the time that I was aired I would have to wash my clothes in a bucket and with pipe water and hang it out to dry. When I was not allowed to air, I was unable to carry out this task. There was a little broken television which showed static alone. Though it may be hard to understand, just staring at the broken television drove so many of the detainees, myself included, crazy".*

11. *The food at the IDC was absolutely disgusting. I am a Muslim so I only eat halal meats. I asked the officers whether the food was halal but I never got an answer to my question. I had no choice but to eat the food, even if it was not halal. This was distressing because I try my best to adhere to the strict tenets of my religion. It was either I ate it or I starved. I considered it a grave insult that no one could assure me that my food was halal. Aside from this, the food itself was sickening. It was always very little and very bland. Though I by no means expected quality food, I thought that it would at the very least be pleasantly consumable.*

12. *There were many occasions that I could not stomach the food. I often went hungry because the food was so little, it could not sustain an adult. There were also a few occasions when I was given sausage to eat but was not told what the meat the sausage was made of. No officer was able to assure me that the sausage was not pork. There were also instances where guards discriminated against me*

as a Muslim. I was told by one officer that he did not like Muslims because we were murderers. I could not understand why I was being treated in this manner by the officers and this made me even more frustrated and depressed”.

14. “Medical supplies were short and very limited. The cure for every disease was Panadol. That seemed to be the only drug which was given to me whenever I complained of an ailment or pain. Panadol was given for everything regardless of the severity of the condition. There were many times I couldn’t get proper medical care at the IDC. I was left to suffer from numerous pains and diseases during my time at the IDC”.

16. “The mental torture I endured during my time at the IDC was unbearable. Day in, day out my mind would think about my parents back at home who had no idea where I was. By the time I was released, they hadn’t heard from me for almost two years. They had no idea what I was going through. I kept worrying that they thought I had abandoned them in their old age. I wondered how they were surviving on their own without my help. I wondered if they were even still alive. They were on their own in the extremely poor village where I come from whilst I was locked away in a detention centre halfway across the world.

17. I had no one in Trinidad to support me. While I was detained, I would look with envy on those detainees who had the benefit of family members visiting them and bringing items for them to make their stay more comfortable. I did not have the privilege of having any such person visit me during my stay at the Immigration Detention Centre. I had no one to look out for me and no one to tell my family that I hadn’t abandoned them. I would often stay awake at night in anxiety and stress thinking about my family”.

19. I expected that arrangements would be made for me to be returned to my homeland soon after I was refused entry on my trip but this was wishful thinking. As the days turned into weeks and the weeks turned into months and the months turned into a year, I felt that I would never be released and I would at times contemplate if it were not better for me to take my own life rather than subject myself and my family to this torture and suffering. What made this situation worse was the fact that the other detainees who were detained at the IDC would be allowed to make one phone call per month to their family members but I was not allowed this facility because my family members were abroad.

6. The Claimant further pleaded that the Defendant's actions towards him were oppressive, unconstitutional and arbitrary and that the Defendant should be held liable for exemplary damages.
7. The Court in its determination had to consider the following issues:
 - a. Whether the Claimant is entitled to the damages sought and;
 - b. If yes, what is the quantum and extent of such damages.
8. Although the claim is undefended, this Court must determine whether the Claimant has discharged his burden to prove on a balance of probabilities that he was falsely imprisoned by the Defendant.
9. At the hearing before Charles J, the judge held at paragraph 11 that detention should be used as a last resort to pursue the statutory objects of the power of deportation and where the immigration department is unable to put the arrangements in place to deport an immigrant then they ought to make him the subject of a supervisory order and release him until those arrangements can be put in place.

10. Pursuant to the provisions of the Immigration Act Chap. 18:01, Parliament outlined the statutory basis for detention and section 16 requires that the discretion to lawfully detain a subject must be exercised in strict accord with the statute. Where detention is pending deportation then the deportation must be effected within a reasonable time period. As pointed out in **R v Governor of Durham Prison ex parte Singh [1984] 1 All ER 983** and restated by Lord Browne Wilkinson in **Tan Te Lam v Superintendent of Tai A Chau Detention Centre [1997] AC 97** the court should construe strictly any statutory provision purporting to allow the deprivation of individual liberty by administrative detention and should be slow to hold that statutory provisions authorize administrative detention for unreasonable periods or in unreasonable circumstances.

11. In accordance with the decision of the Court in the first action the Claimant should not have been detained beyond 6 weeks after he was returned to this jurisdiction in 2018 and his detention from 1 June 2018 to 5 July 2019 did not accord with Section 16 of the Act and was unlawful. For this period the Claimant was falsely imprisoned.

12. After such reasonable time and Justice Charles found that 6 weeks was reasonable, it was open to the State to have imposed a conditional release order under section 17 of the Act. In **CV2016-02258 Christopher Odikagbue v the Attorney General of Trinidad and Tobago** the Court stated at paragraph 37:

“What is clear however, having regard to the power to grant a conditional release, is that where it is apparent that an inquiry cannot be held within a reasonable period of time the immigrant ought to be released pursuant to section 17 of the Immigration Act on conditions unless there is good reason to do otherwise.”

13. In **Kamaldaye Maharaj v. P. C. Hobbs and ors (Kamaldaye Maharaj v. P.C. Hobbs, P.C. Charles & the A.G., HCA No 2587 of 1998** at page 10–11 per Mendonca J.) Mendonca J. (as he then was) stated that :

“In a case of false imprisonment a successful Plaintiff may recover damages for injury to liberty. Damages may also be recovered for injury to feelings, that is to say, indignity, mental suffering, disgrace and humiliation suffered by the Plaintiff as well as for any physical injury as well as injury to reputation. With respect to pecuniary loss, such loss which is not too remote is recoverable.

14. In **Thadeus Clement v The AG of Trinidad & Tobago Civ. App. 95 of 2010 at paragraph 12**, Jamadar J (as he then was), outlined that in assessing damages for false imprisonment, the court should considered the following three heads:

- (i) Injury to reputation – to character, standing and fame;
- (ii) Injury to feelings – for indignity, disgrace and humiliation caused and suffered;
and
- (iii) Deprivation of liberty – by reason of arrest, detention and/or imprisonment.

15. Injury to liberty refers to the time which was lost by the Claimant as a result of the tort and it is considered from a non-pecuniary perspective. On the instant undisputed facts, the Claimant was detained for some 13 months and 4 days.

16. Injury to feelings include mental suffering, loss of dignity, humiliation, loss to reputation and loss to social status which arose as a result of the tort.

17. In **CV2014-03082 Rasheed Khan v Conrad Barrow (The Commissioner of Prisons) and the Attorney General** the Court stated at paragraph 21 :

21. In cases such as these where there is an extensive period of detention, the Court would consider all of the circumstances and determine if tapering the award in relation to the softening of the initial shock of being incarcerated is appropriate or some other method is appropriate. In the case of Ronnie Abraham v The

Attorney General of Trinidad and Tobago HCA 801 of 1997 Smith J (as he then was)
stated:

“...additionally there is a strong element of shock to the system during the early part of an arrest which merits a higher award than at later stages of detention, hence a reducing scale of compensation ... When the time of incarceration is as drawn out as here, it is difficult to ascertain the principles and methods to be applied in deciding on the reduction in the scale and the time from which each reduction is to take effect; in fact no guidance was presented to the court to assist in this task”.

18. In **Josephine Millette v. Mc Nicholls (2000) 60 WIR 362**, the court provided guidance in assessing damages involving lengthy detentions. At page 367 de la Bastide CJ (as he then was) said:

“It is important, however, that judges approach the assessment of damages in cases like this in the round. I do not think that one can divide the award strictly into different compartments, one for initial shock, another for the length of the imprisonment and so on. All factors have to be taken into account and an appropriate figure arrived at.”

19. The Court must ultimately consider each case on its own peculiar facts with due regard to the impact of the imprisonment upon the litigant and it is mandated to quantify, *inter alia*, the loss, physical and mental stress that the imprisonment imposed.

20. The Court may also consider aggravating factors in arriving at an award for false imprisonment and this Court is guided by the dicta of de la Bastide CJ (as he then was) in **CA Civ 159/1992 Bernard v Quashie**.

21. Based on the facts of the instant case the Court considered the following assertions advanced by the Claimant:

- a. The prolonged detention at the IDC;
- b. Overcrowded dorms at the detention centre with as much as 35 persons in a room measuring 16 feet by 16 feet with two bathrooms and one toilet to be used by up to 50 detainees;
- c. The Claimant's religious belief;
- d. The fact that there was limited opportunity to be aired;
- e. The dorm was poorly ventilated;
- f. Provision of inadequate drinking water and medication;
- g. The assertion that the Claimant was the breadwinner of his family who resided in Gambia and he was unable to get in contact with them and inform them of his situation;

22. The Claimant also considered the following cases:

- a. CV00312 of 2011 Curtis Barker and Jason Titus v the Attorney General- this was a case for damages for false imprisonment and malicious prosecution. The Second Claimant in this case was detained for 2 separate periods totaling 3 years 9 months. Prison conditions were similar to the instant case. **General damages were assessed in the sum of \$620,000.**
- b. CV2007-02202 Dyer v Attorney General- the period of incarceration was 186 days and conditions which the claimant was kept were similar to the instant case. **Award was \$250,000 inclusive of aggravated damages.**
- c. CV2010-04134 Peter Deacon v Attorney General- period of incarceration was 255 days. **Award of \$900,000 which included an element of aggravated damages was awarded.**
- d. CV2008-02309 Anthony Scott v Attorney General- claimant detained for 37 days. **Award of damages was the sum of \$150,000.**

23. There can be no dispute that the Claimant was deprived of his liberty but he was previously detained in 2017 until his unsuccessful deportation in 2018 and his detention from April 2018 could not have “shocked” his system. It is also not lost upon this Court that the Claimant has breached the immigration laws of this Republic and he is here illegally.
24. This Court has dealt with numerous immigration matters and is aware that deportation is expensive and complicated. The process, where there are no direct flights to the subject’s home country, can be taxing and involve several stops across multiple continents. Often law enforcement personnel may have to accompany the subject, visas may have to be obtained and as happened in the past, the State may even have to charter a flight. The Court takes judicial notice of the fact, having travelled to the African continent that there are no direct flights to any African country from this jurisdiction and our citizens require visas to visit many African nations. The situation becomes more complicated where in-transit visas are required and the subject may even refuse to sign the requisite visa form.
25. It is unfortunate that the State has abdicated its responsibility to assist the Court and it did not file a defence nor was any explanation proffered as to what are the operative circumstances which militated against the Claimant’s deportation and why a decision was taken to detain him at tax payers’ expense for over 400 days.
26. The Court appreciates that the resources of the State are not unlimited. Now, more than ever, the nation’s future and the welfare of citizens is contingent upon a cautious and proportionate use of the limited funds standing in the Treasury.
27. The immigration laws are dated and complex. The laws are woefully inadequate and do not effectively address the evident reality that this Republic is faced with a worrying migrant mess. The authority to administer the provisions of the Immigration Act vests in the Chief Immigration Officer and the discharge of this statutory mandate imposed by the

legislation has been ineffective, lax and inefficient. It appears that the Immigration Department is in crisis.

28. Urgent immigration law reform has to be prioritized so as to addresses the number of illegal migrants who continue unabated and with impunity to infiltrate our borders and tax the already overburdened organs of the State.
29. The conditions at the IDC as outlined by the Claimant are disturbing but so is the plight which faces tens of thousands unemployed, hungry and hopeless citizens whose conditions have deteriorated with the economic downturn, low energy prices and the ongoing Covid pandemic. Many citizens are stranded abroad and even if exemptions are granted, flights are expensive, yet, the State is not obliged to pay for these citizens to return home. In contrast, the State must however pay to deport a subject who has breached the immigration laws of this land and whose presence here is unauthorized. Limited resources have to be prudently managed and the best interest of citizens have to be prioritized. The immigrations laws as they currently stand are problematic and require urgent attention.
30. Illegal immigration burdens the society as it deprives taxpaying citizens and lawful residents of jobs and resources. Stricter immigration and vetting policies should be implemented for visitors who require entry visas, especially, in relation to those who come from countries, where the statistics show a prevalence of persons at the IDC. Bonds to cover return airfare, for example, could be considered or agreements enacted with those nations to permit visa free entry provided that the said foreign state agrees to bear the cost of deportation if its citizen runs afoul of this nation's immigration laws. In addition, Parliament may wish to consider the formalization of a policy on migrants and effect clear and cohesive legislation which regulates same in a fair, transparent, equitable unbiased manner which upholds democratic principles and accords with human rights and international law obligations. The legislature may also wish to pursue criminalizing the engagement of work by illegal immigrants so that persons engaged in same can be

arrested and charged separate and apart from immigration proceedings. With alarming regularity many illegal immigrants are hired but exploited and in the ensuing vicious cycle, their rights are eviscerated while law abiding citizens also suffer as they remain unemployed.

31. The Court also noted that by his own evidence the Claimant indicated that he was concerned about his elderly parents back in Gambia as he provided for them. Evidently, the Claimant had a plan and that involved staying and working in Trinidad and Tobago illegally. Throughout his detention, he could have purchased his own ticket but there is no evidence that any such attempt was meaningfully engaged.
32. Although the evidence suggests that the Claimant, intentionally flouted the immigration laws, under the law, the State is bound to strictly comply with the statutory requirements, as they stand. If as is evident, the State was unable to make the appropriate arrangements within a reasonable time frame, then the Claimant should have been conditionally released under section 17.
33. Based on the factual matrix before it, the Court is of the view that there are special factors which operate. The State should not have detained the Claimant for as long as he was but the Claimant was not an innocent victim of circumstance, he was and is complicit as he elected to breach the laws of this Republic in the pursuit of his desire to provide for his family in Gambia. The conditions to which he was subjected at the IDC were not specific to him and there is no evidence to suggest that he was physically assaulted, singled out or specifically targeted. The Court cannot hold that bathing in the view of other men was particularly distressing or humiliating and no evidence of any resulting psychological issue was adduced. Similarly, the Court cannot conclude that he was subject to religious discrimination based on his "uncertainty" that the meals he ate were not prepared with halal meat. On his evidence, the Claimant came from a poor village and the Court had difficulty in accepting that the dirty cell and overcrowding at IDC occasioned significant

distress upon him. Of course from a humanitarian perspective the State must ensure that detention conditions are not unusual or cruel. On the evidence, the Court does not conclude that during his detention the Claimant was unduly deprived of his dignity. The Claimant referenced warm dirty air at the Centre but adduced no evidence to establish any respiratory impact. He also complained that there was a lack of bottled water and that the tap water caused his throat to scratch. Fortunately for the Claimant, though often brown, the tap water in this Republic is safe to drink. The Court was particularly taken back by his complaint that there was no functional television at the IDC. The Claimant notwithstanding his assertion that the only medication available was Panadol and his blanket assertion that he suffered many pains and diseases, never particularized same. The Claimant also testified of the mental torture he endured when he thought of his parents and the fact that they did not know where he was but he failed to outline what attempts or requests he made to contact them nor did he outline how and when these requests or attempts were denied.

34. It is surprising that the welfare of his family bothered him when he elected to come here, where he had no relatives, relations or work permit and he consciously decided to disregard the laws of the Republic of Trinidad and Tobago. Ultimately, the Court felt that the majority of the Claimant's complaints were overstated, exaggerated and designed to increase the award of damages and the Court rejected as disproportionate, absurd and unrealistic, the submission advanced that the Claimant should be awarded damages between \$1,200,000 to \$1,500,000.

35. This Court is of the view that the Claimant should be awarded \$500,000 inclusive of an uplift for aggravated damages together with interest thereon at a rate of 2.5 % per annum from the date of the filing of the instant proceedings until judgment and thereafter interest is to accrue at the statutory rate of interest.

36. With regard to the award of exemplary damages, in **Rookes v Barnard [1964] AC 1129**, Lord Devlin stated that exemplary damages may be awarded in circumstances where the

conduct by servants of the government can be viewed as “oppressive, arbitrary, or unconstitutional”. In light of this, the Court considered the following factors in determining whether to grant an award of exemplary damages:

- a. The fact that the Defendant is mandated to comply with the provisions of the Immigration Act;
- b. The fact that the Court felt in the first action that the Defendant should have arranged a return ticket to Gambia for the Claimant within 6 weeks but kept him detained for over a year;
- c. The fact that the Defendant has an obligation to ensure that the conditions at the IDC accord with human dignity and are not unusual or cruel.

37. In **Civil Appeal No. 84 of 2005 Aaron Torres v Point Lisas Industrial Port Development Corporation Limited** Mendonça JA at paragraph 57 stated the following considerations with regard to an award for exemplary damages:

57. A proper award must therefore look at proportionality in several dimensions. Some of these which can impact on the quantum of the award were identified to be: (1) proportionate to the blame worthiness of the Defendant’s conduct; (2) proportionate to the degree of vulnerability of the plaintiff; (3) proportionate to the harm or potential harm directed specifically at the plaintiff; (4) proportionate to the need for deterrence; (5) proportionate even after taking into account the other penalties both civil and criminal which have been or are likely to be inflicted on the defendant for the same conduct; and (6) proportionate to the advantage wrongfully gained by a defendant from the misconduct

38. The Court considered all the operative circumstances including the conduct and complicity of the Claimant as well as the conduct of the State and is resolute in its view that an award for exemplary damages is not warranted or proportionate having regard to the need for deterrence.

39. The Defendant shall also pay to the Claimant 45% of the prescribed costs on the sum awarded.

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FRANK SEEPERSAD
JUDGE