IN REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 86 OF 2007

BETWEEN

IN THE MATTER OF THE CONSTITUTION OF TRINIDAD AND TOBAGO

AND

IN THE MATTER OF AN ASSESSMENT OF DAMAGES FOR BREACH OF CONSTITUTIONAL RIGHTS PURSUANT TO THE JUDGMENT OF THE PRIVY COUNCIL DATED 12TH OCTOBER, 2004.

BETWEEN

ROBERT PEREKEBENA NAIDIKE

Appellant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent

PANEL: A. Mendonça, J.A
P. Jamadar, J.A.
G.Smith, J.A.

APPEARANCES: Mr. P. Knox, Q.C. and Mr. J. Mobota for the Appellant
Mr. N. Byam for the Respondent

DATE OF DELIVERY: February 5th, 2013.

JUDGMENT

Delivered by A. Mendonça, J.A

1. This is an appeal from the assessment of damages by Rajnauth-Lee, J. pursuant to an order of the Privy Council. The award of damages has been challenged on various grounds to which I will refer later in this judgment, but first I will set out the relevant background.

2. The Appellant was at all material times a Nigerian citizen. He qualified in Nigeria as a medical practitioner and on February 17th, 1991 at the age of 28 he came to this jurisdiction to take up an internship with the Ministry of Health (the Ministry). He remained in the employment of the Ministry until June 7th, 1995, initially as a medical intern, and then as a temporary house officer.

3. To remain and work in this jurisdiction there was issued to the Appellant a work permit pursuant to regulations made under the Immigration Act and a certificate under section 9(2) of the Act. The last work permit expired on February 16th, 1995 and was not renewed. The certificate issued under section 9(2), permitting the Appellant to remain in this jurisdiction, also expired on February 16th, 1995.

4. Notwithstanding the expiration of the work permit and certificate, the Appellant continued in the employment of the Ministry and was stationed at the Port of Spain General Hospital. On June 7th, 1995 he was instructed to stop work by the Ministry. On September 21st, 1995 the Ministry's application for a further work permit for the Appellant was finally refused and on September 27th, 1995 the Appellant was instructed by the Chief Immigration Officer to make arrangement to leave the country. The Appellant promised to attend the Immigration Office on October 4th, 1995 with a valid departure ticket. The Appellant however failed to return and in late October or early November, 1995 the Chief Immigration Officer gave instructions for the Appellant to be arrested for remaining in the country illegally.

5. On November 28th, 1995 at about 10:00 a.m. the instructions of the Chief Immigration Officer were carried out when the Appellant was arrested by a number of police officers as he sat in a motor vehicle parked on St. Vincent Street outside the Twin Towers. At the time of his arrest the Appellant's two-year-old daughter and an acquaintance were in the motor vehicle with him. After his arrest he was detained.

6. On December 4th, 1995 the Appellant issued a writ of habeas corpus. This however was dismissed on December 8th, 1995. On December 20th, 1995 the Appellant began judicial review proceedings challenging his detention and the refusal of the Minister of National Security to renew his work permit.

7. On January 3rd, 1996 the Minister of National Security made a deportation order against the Appellant directing that he be detained and deported to Nigeria. That same day the Appellant obtained leave to pursue the judicial review proceedings and also obtained a stay of the deportation order. On January 26th, 1996 Warner J. made an interim order by consent in which it was ordered that the Appellant be released from detention under the following conditions, inter alia:

a. the Appellant be released under an order of supervision;

b. on the provision of a security bound guaranteed by a licenced bank in the sum of $13,000.00 Trinidad and Tobago currency;

c. that he should report every 14th day after his release to the Officer in charge of the Investigation Section of the Immigration Department, 67 Fredrick Street, Port of Spain unless the time and place be varied by the said officer; and

d. that he surrenders his passport on release to the Immigration officer.

8. The order of supervision, which was issued under the Immigration Regulations 1974, recited that a deportation order was made against the Appellant and that it was stayed. It referred to section 17(1) of the Immigration Act which permitted a person taken into custody to be released on an order of supervision upon such conditions in respect of the time and place at which he will report for examination, inquiry or deportation on payment of security and other conditions and ordered that the Appellant be released upon the following terms, inter alia:

(i) that the Appellant shall produce himself at time and place designated for deportation pursuant to the order of deportation;

(ii) that he shall upon request produce himself, at time and place designated, to furnish such information relating to his availability for deportation as may be deemed fit and proper; and

(iii) that he shall not travel outside Trinidad and Tobago.

9. The Appellant was released from custody on February 5th, 1996 having complied with the conditions of the order of Warner J. The Appellant subsequently filed fresh judicial review proceedings and a constitutional motion. Both judicial review proceedings were however stayed pending the outcome of the constitutional motion.

10. The Appellants constitutional motion challenged the refusal to renew his work permit and his arrest and detention in custody from November 28th, 1995 to February 5th, 1996 - a total of 69 days. He complained that the refusal to renew his work permit and his arrest and detention were violations of his fundamental rights and freedoms contrary to section 4(a) of the Constitution. Section 4(a) provides:

> *"4. It is hereby recognised and declared that in Trinidad and Tobago there have existed an 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;"*

11. Both the High Court and the Court of Appeal held that the non renewal of the Appellant's work permit did not amount to an infringement of his right to enjoyment of property. In relation to the arrest and detention of the Appellant it was held by the High Court that his detention for part only of the period was unconstitutional. The Court of Appeal, however, by a majority disagreed with the High Court and held that the Appellant's arrest and detention were lawful. The Appellant appealed to the Privy Council. On October 12th, 2004 the Privy Council dismissed his appeal in relation to the work permit but allowed the appeal with respect to the arrest and detention. The Privy Council was of the opinion that for the arrest and detention of the Appellant to be lawful there had to be made in relation to him, a declaration by the relevant Minister under section 9(4) of the Immigration Act to the effect that the Appellant was no longer permitted to remain in the country. There was however no such declaration and as a consequence the arrest of the Appellant and his detention for the entire period he was detained were unlawful and unconstitutional. The Privy Council also held that absent the ministerial order under section 9(4) the deportation order was not properly made. The Privy Council, therefore, held that there was a contravention of the Appellant's right to liberty and not to be deprived thereof without due process. The Privy Council concluded (at para 51) that the Appellant:

> *"is entitled to damages for his wrongful arrest on 28th November, 1995 and his wrongful detention from that date until his release on February 5th, 1996."*

The assessment of damages was referred by the Privy Council to a Judge of the High Court.

12. Damages were assessed by Rajnauth-Lee, J. on May 4th, 2007. On the assessment before the Judge the Appellant led further evidence as to the circumstances surrounding his arrest and detention. The Judge summarised the evidence as follows:

> *"6. Dr. Naidike was arrested on November 28th, 1995 at 10:00 a.m. in broad daylight in the vicinity of the Twin Towers, St. Vincent Street, Port of Spain, where he had gone in an attempt to see Government Minister, Wade Mark. He was accompanied by a medical colleague, a friend and his two-year-old daughter, Faith. While seated in the motor vehicle, Dr. Naidike was choked beaten and handcuffed to the steering wheel by the police. His friend and his daughter were screaming. A gun was pulled by the police during his arrest. A car was wrecked in the process. He bumped his head and he fainted. Some six police officers were involved in his arrest.*
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> *7. When Dr. Naidike regained consciousness he was in a pool of water in a cell in the Criminal Investigation Department. His shirt was torn and bloodied. Several plain clothes policemen threw water on his head and body. They made comments like "fake doctor", "quack" and even said "Minister of God, why doesn't your God help you."*
>
> *8. Dr. Naidike complained of the profane language used by the police officers. According to him, one WPC Edwards said, "he is still breathing; we thought he was dead".*
>
> *9. Dr. Naidike was eventually taken to the St. James' Police Barracks where he was examined by one Dr. Tom Pack. No medical treatment was given to him. He was then taken to the Immigration Department where he saw his daughter, much to his relief.*
>
> *10. He was taken back to the Port of Spain Criminal Investigation Department, where he was placed in a cell which was in a terrible condition. The cell smelt of faeces, urine and rotted food stuff. He spent about four hours there. He began to feel ill and called out for help. He was then taken to the Port of Spain General Hospital where he was warded under police guard for some days.*
>
> *11. Dr. Naidike has in his written statement of the March 23rd, 2007 [at paragraph 18] set out the injuries he suffered. His records at the Port of Spain General Hospital were admitted into evidence without objection and they verify the injuries suffered by Dr. Naidike. They also made clear that Dr. Naidike had to undergo a CT scan of the brain. He has progressively impaired vision in his left eye. In addition to the physical injuries, Dr. Naidike has suffered psychological trauma and severe depression as a result of his arrest and detention.....*
>
> *13. According to Dr. Naidike's written statement, his detention was continued under appalling conditions. He was stripped naked and force to squat in full view of other prisoners and prison officers. Dr. Naidike was detained until February 5th, 1996 under deplorable conditions. The Court accepts his evidence on same [see paragraphs 21-24 of his written statement filed on March 23rd, 2007."*

13. The Judge noted that the Appellant in his particulars of claim set out what he described as "Particulars of loss and damages suffered as a consequence of his unconstitutional arrest and detention (including depravation of full liberty between November 28th, 1995 and May 28th, 2002)". In those particulars the Appellant claimed, as a consequence of his being unable to leave the jurisdiction pursuant to the order of Warner J, loss arising from his inability to work abroad. The significance of May 28th, 2002 is that on that date the Appellant was notified that the deportation order made against him was in essence lifted, as were the conditions of the supervision order under which he was ordered by Warner J to be released. The Judge stated:

> *"Under this head, Dr Naidike has claimed, inter alia, loss suffered as a result of the depravation of the opportunity to pursue his profession in Nigeria and other places, to earn an income from the period November 28th, 1995 to May 28th, 2002, and to pursue post graduate specialization overseas."*

The Judge however rejected this claim. She was of the view that the assessment was limited to the period set out in paragraph 51 of the judgment of the Privy Council (see para 11 hereof). Accordingly the Court could not assess damages for any period of detention outside the period of November 28th, 1995 to February 5th, 1996.

14. The Judge considered the award of damages under two heads namely: (i) damages including aggravated damages; and (ii) vindicatory damages.

15. With respect to (i) the Judge correctly noted that it is the practice in this jurisdiction to make one award for compensatory damages which may include an award of aggravated damages. She was of the view that there were several aggravating factors namely:

> *"the public humiliation, the beating inflicted on Dr. Naidike, the humiliation in front of friends and especially his two year old daughter, the taunting and the use of profane language by the police officers, the belittling of the faith of Dr. Naidike (knowing that he held himself out to be a Minister of God), the post-traumatic stress syndrome, the terror, psychological trauma and severe depression suffered by him, the feelings of helplessness and uncontrollable feelings of sadness and the extended period of his detention for some 69 days. In addition, there was a special aggravating factor that Dr. Naidike was constantly worried for the welfare of his daughter, who was placed in a home. He was her only care-giver in this country. Further a charge was laid against Dr. Naidike which he had to defend. This charge was dismissed under the Privy Council judgment. In addition, charges were laid against the police officers and they were committed to stand trial."*

Having regard to all the evidence and the aggravating factors the Judge considered an award of $250,000.00 appropriate.

16. With respect to (ii) the Judge was of the opinion that this was an appropriate case for vindicatory damages and awarded a further sum under that head of $50,000. The Judge therefore made a total award of $300,000 for the unconstitutional infringement of the Appellant's liberty. The Judge also made orders regarding interest and costs.

17. The Appellant appeals to this Court. He argues three grounds of appeal. First, he contends that the Judge wrongly failed to take into account that a consequence of the wrongful arrest and false imprisonment was that he could not leave the country and earn a living abroad from February 5th, 1996 to May 28th, 2002, when he was notified that the restrictions imposed on him by the supervision order were lifted. Consequently, he sustained a substantial loss of earnings. Secondly, the Appellant contends that the Judge failed to take into account certain items of special damage. Thirdly, the Appellant submits that the awards of compensatory and vindicatory damages are too low.

18. With respect to the first ground Counsel submitted that the Judge in disallowing the Appellant's claim for loss of income beyond February 5th, 1996, when he was released under the order of Warner J, felt constrained by the order of the Privy Council so that she could not assess damages for any period of alleged detention that went beyond the period ending February 5th, 1996. Counsel submitted that this was too narrow an interpretation of the order. The order was wide enough to cover consequential damage occurring after that period. Counsel for the Respondent took a different view and argued that the Judge was correct to interpret the order in the manner she did.

19. I agree with the submissions of the Appellant. The Judge in coming to her conclusion referred to paragraph 51 of the Privy Council's decision (see para 11 of this judgment). That clearly reflected the issue before the Privy Council, which in broad terms was whether the arrest and detention of the Appellant was unconstitutional. The issue of damages was not before the Board and it is inadvisable to read into that paragraph any implied limitation that the Appellant would not be entitled to recover compensation for loss caused by his arrest and detention but occurring after February 5th, 1996.

20. The point is made clear when reference is made to the order of the Privy Council signed by the Registrar of the Privy Council after the delivery of the judgment. The order is dated October 12th, 2004 and provides, so far as material, that "the Lordships do (1) allow the appeal of the ... Appellant in respect of his arrest and detention and remit that part of his constitutional motion for the assessment of damages by a Judge of the High Court". There is no limitation as to loss occurring after the Appellant was released on February 5th, 1996.

21. I do not believe that there could be any objection if the claim were for damages for continuing personal injury after his release but caused by his arrest and detention. Such a claim would be within the order of the Privy Council. Just as there could be no objection to that claim, in my judgment there could be no objection to a claim for loss of income occurring after the release of the Appellant, if it is a loss arising as a consequence of the Appellant's arrest and detention and is otherwise compensatable. Such a claim would also be within the order of the Privy Council.

22. Counsel submitted that the claim for loss of income to May 28th, 2002 is such a claim. He submitted that the Appellant could not lawfully work in this jurisdiction as he did not have a valid work permit. The Appellant is, however, a qualified medical practitioner and could have earned a living elsewhere. However, pursuant to the order of Warner J and the supervision order under which he was ordered to be released, the Appellant was required, inter alia, to surrender his passport and not travel outside the country. The Appellant was therefore deprived of his liberty to leave the country. This, it was submitted, had the effect of denying employment to the Appellant until those restrictions were removed in May 2002. The order of Warner J was a direct consequence of the Appellant's original arrest and detention. Counsel further argued that had the Appellant not been arrested unlawfully and made subject to an unlawful deportation order, he would not have been in the position he found himself. The order of Warner J would not have been made but for the prior wrongful arrest and detention. Thus his original arrest and false imprisonment had as a consequence that the Appellant was only able to get out of prison on the terms that he could not leave the country. Counsel therefore submitted that the cause of his loss was the original wrongful arrest and detention and the Appellant therefore had the right to be compensated for it.

23. There is no dispute that the Appellant remained in the country from the date of his release to May 28th, 2002 and there is no evidence that he was gainfully employed for that period -

approximately seven years and three months. The question is whether the Appellant is entitled to be compensated for loss of income for that period.

24. It can be stated as a basic proposition that the Respondent should not be liable for any damage which has not been caused by his wrongful act or omission. So that in relation to this case the Respondent should not be liable for any damage which has not been caused by the contravention of the Appellant's constitutional right to liberty and not to be deprived of it without due process. In this appeal the loss of liberty complained of is the loss of liberty to leave the country. This was occasioned by the order of Warner J. It was pursuant to that order that the Appellant was released under a supervisory order and had to surrender his passport and not leave the country. That order was premised on the validity of the detention as well as the validity of the deportation order. Both the deportation order and detention, as I mentioned earlier, were unlawful as a ministerial declaration under section 9(4) of the Immigration Act was not made. The order of Warner J was therefore itself open to challenge and may be said to be wrong in law.

25. However the fact that the order can be said to be erroneous does not however make it unconstitutional. Due process does not guarantee a system that is free from error. The fundamental right is not to a legal system that is infallible but one that is fair (see **R.L. Maharaj v The Attorney General of Trinidad and Tobago (No. 2)** (1978) WIR 310 **Forbes v The Attorney General** (2002) 60 WIR 462 and **Independent Publishing Co. Ltd. v The Attorney General and another** (2004) 65 WIR 338). The order of Warner J cannot be challenged for want of due process and it is in that order where the loss of liberty complained of by the Appellant is to be found. The depravation of liberty was not caused by the want of due process and was therefore not caused by breach of the Appellant's section 4(a) right.

26. The cause of the infringement to the Appellant's fundamental right was the executive action of the police in arresting and detaining the Appellant and the Chief Immigration Officer who gave the instructions for the arrest of the Appellant. These actions were held by the Privy Council to be unlawful for the reasons already stated. It was argued before the Privy Council that notwithstanding the arrest and detention of the Appellant were unlawful, he was not denied due process. The Privy Council rejected that argument. The Board stated that the fundamental right is to a legal system that is fair and that it is the legal system as a whole which must be looked at and not merely one part of it. The Privy Council concluded that the legal system as a whole is not "apt to encompass loss of liberty

through executive action such as was taken in the present case." Such executive action was not the cause of the Appellant's loss of liberty to leave the country. That loss was caused by the order of Warner, J which was made by the consent of the parties. It was under that order that the Appellant was not permitted to leave the jurisdiction. The loss complained of by the Appellant was pursuant to an order that was constitutional and one, which it was conceded, cannot be challenged for want of due process. The loss claimed therefore is not a loss arising from the violation of the Appellant's fundamental right under section 4(a).

27. Counsel for the Appellant submitted that it is clear from the judgment of the Privy Council that the habeas corpus proceedings did not end the period of unconstitutional detention. The High Court dismissed the habeas corpus application on December 8th, 1995 and must have considered that the detention of the Appellant was not unlawful. Yet this did not deter the Privy Council from holding that the entire period of the Appellant's detention, occurring before as well as after the determination of the habeas corpus proceedings, was unlawful. By analogy, Counsel submitted, the order of Warner J should make no difference. I however do not agree.

28. While it is to be assumed that in dismissing the habeas corpus application the High Court did not find the detention unlawful, the fact remains that the Appellant continued to be detained pursuant to the executive action of the police and the Chief Immigration Officer. The Court on the habeas corpus application did not order his continued detention. On the other hand, the order of Warner J provided that the Appellant be released under an order of supervision and could not leave the jurisdiction. That distinction is fundamental to the Appellant's claim for loss of income under section 4(a). As the Privy Council noted (at para 55):

> *"A mistake about the law giving a power of arrest cannot of itself found that power of arrest. Nor can the court's habeas corpus jurisdiction of itself operate to defeat Dr. Naidike's claim to have been deprived of his liberty otherwise than 'by due process of the law'. Had Dr. Naidike been arrested and detained pursuant to a court order... that would have been another thing."*

29. In the circumstances the claim for loss of income fails.

30. Even if the loss could properly be said to have arisen from the violation of the Appellant's section 4(a) right, in my judgment, it would fail for other reasons. There is no evidence before the Court that the Appellant had obtained employment outside Trinidad and Tobago which he could not take up because of his inability to leave the country. There are three letters in evidence that suggest the

Appellant sought employment outside Trinidad and Tobago but there is no evidence that he obtained employment. The first is a letter dated March 3rd, 2000 from Medical Associates Limited in St. Lucia. That letter is a response to an enquiry from the Appellant about employment at the Taipon Hospital in St. Lucia. The letter thanks the Appellant for his enquiry about employment opportunities at the hospital, but states that there is no position currently available to match his skill and qualification. The second is a letter dated March 21st, 2001 to the Nigerian High Commission in which the Appellant applies to be considered for any appropriate position in the medical field. There is no evidence that the Appellant received any response to the letter. The last is a letter to the Director General of Technical Aid Corporation that has as its caption "Application for Technical Aid Corp." in which the Appellant asked to be favourably considered "for the above position." Again there is no response to the letter. The Appellant's claim is that he was deprived of earning a living abroad. In the absence of evidence that he had obtained employment abroad, he has suffered no loss.

31. There is also no evidence that the Appellant had any intention to leave the country. While the letters referred to above demonstrate the willingness to earn a living abroad, the inference is that that willingness was on the condition that he obtained employment. Had he intended to leave the country one would have thought that the Appellant would have attempted to vary the order to allow him to leave the jurisdiction, but there is no evidence of this. The legal challenges made by the Appellant to his arrest and detention were aimed at allowing him to stay in the jurisdiction. The Appellant could not have reasonably thought that the relevant authorities would not have been prepared to allow him to leave the country. The order of Warner J was made by consent and could have been varied by consent. There is no evidence that any attempt was made to obtain the variation of the order and that points to the conclusion that the Appellant never really intended to leave the jurisdiction.

32. It was submitted by Counsel for the Appellant that nothing was raised in the Court below as to whether the Appellant ever requested to vary the order and so it is unfair to the Appellant that it be raised in this Court. This however is a public law matter and there is a duty of full disclosure. Moreover, the onus is on the Appellant to establish his claim to compensation. The obligation is therefore on the Appellant to say whether he requested to vary the order and if not provide an explanation that his failure to do so was reasonable.

33. I turn now to the second ground of appeal which relates to items of special damage claimed by the Appellant. Counsel for the Appellant claims that the Judge overlooked the following items:

1. $5,092.82 owed to Mr. Mobota for raising the security in the sum of $13,000.00 under the order of Warner J.;

2. $60,600.00 in transportation costs in travelling to and from Court over the 7-year period after his release;

3. $4,000.00 for costs of the habeas corpus application;

4. $750.00 clothing costs.

34. The item at 1 above is an expense said to be incurred in posting the security bond under the order of Warner J to obtain the Appellant's release. It seems that the Appellant's Attorney, Mr. Mobota, assisted the Appellant in obtaining the security. This was an expense incurred by Mr. Mobota, which was repaid to him by the Appellant. There has been no dispute that this expense was incurred. It was incurred to secure the release of the Appellant and was therefore incurred as a consequence of the Appellant's unconstitutional detention. It is a cost incurred by reason of the infringement of his section 4 (a) right and is, in my judgment, recoverable.

35. With respect to item 2, the transportation costs were said to have been incurred in travelling between February 5th 1996 to May 28th 2002 to and from the Magistrate's Court, the High Court and the Court of Appeal This claim being in the nature of special damage should be strictly proved. According to the evidence the Appellant arranged with Mr. Babafemi to provide transport "to and from to attend these court hearings". He does not provide particulars of the matters but it seems from an answer provided by the Appellant in cross-examination to a question regarding consolidation of outstanding claims that there were two judicial review proceedings (one to challenge the illegal deportation order and the second to challenge the refusal of a work permit), a matter involving a criminal charge brought by the Appellant against two police officers, and a malicious prosecution action arising out of a charge brought against the Appellant by a police officer. These proceedings should also be included as well.

36. In so far as the criminal charge and the malicious prosecution action are concerned it seems to me that any claim in respect of those matters is too remote and is therefore not recoverable. There is however no breakdown of the transportation costs claimed so I am unable to say what is attributable to the criminal charge and the malicious prosecution action. It seems to me that they may well be responsible for the majority of the claim. In any event, the Appellant has failed to strictly prove what is recoverable. Further, the Appellant has available to him road taxis that would have been much cheaper than what he has claimed he paid to Mr. Babafemi for each occasion he provided

transportation. The Appellant has a duty to act reasonably and has not given any explanation to why he has failed to use the road taxis.

37. Notwithstanding the above it seems undisputed that the Appellant would have had to travel to the High Court and the Court of Appeal in the course of vindicating his right. That should be taken into account in the determination of general damages for inconvenience which I will refer to below.

38. Item 3 relates to the costs of the habeas corpus proceedings. The common law allows for the recovery of the costs of prior proceedings in which the claimant procures his discharge provided that the action brought to secure his discharge was necessary, that the costs had not been refused by the Court and that the costs incurred were reasonable (see **McGregor on Damages** (17th ed.) at 17-009 supra).

39. Applying the common law principles to this matter, the costs of the habeas corpus proceedings would not be recoverable. Those proceedings did not procure the release of the Appellant. However as it turned out the habeas corpus proceedings were not correctly decided, but, had they been, they should have secured the discharge of the Appellant. In the public law context the Court is not bound to apply common law principles. I do not think that the common law strictures should all be applicable as they impose an unnecessary element and one that is likely to produce an unfair result. It seems to me that where the costs are reasonably incurred and are themselves reasonable in amount and are as a consequence of the infringement of the Appellant's right those costs should be recoverable whether or not they have been incurred in proceedings which have procured the discharge of the Appellant.

40. In this matter there is no issue as to the reasonableness of the action or of the reasonableness of the quantum of the costs claimed. There is also no denying that they were incurred as a consequence of the infringement of the right. In those circumstances in my judgment the Appellant is entitled to recover the costs of the habeas corpus proceedings.

41. With respect to item 4, the Appellant claims that at the time of the arrest he was wearing a black tie, shirt and watch which were taken away from him and have not been returned. He alleges that the value of the tie was $100.00, the shirt $150.00 and the watch $500.00. There is no denial of this by the Respondent.

42. This claim is also in the nature of special damage which should be strictly proved. The Appellant produced no bills or receipts to substantiate the costs of the items. This evidence was however unchallenged and I see no basis on which it should be rejected. Certainly the Judge gave no indication that she had rejected the evidence. Moreover I do not consider it unreasonable for the Appellant to be unable to produce bills or receipts for items such as these. The Judge failed to treat with this claim and I see no reason why it should not be allowed.

43. I turn now to consider the award of compensatory and vindicatory damages. The objection in general terms is that the sums awarded are too low.

44. The principles on which an appellate court should interfere with an award of damages by a trial judge are limited. In Civil Appeal 159 of 1992 **Bernard and another v Nixie Quashie**, de la Bastide, C.J. stated the principles in this way:

> *"Essentially in order to justify [an appellate court] interfering it ought to find either that the Judge had misdirected himself on the law or on the facts, or that the award was a wholly erroneous estimate of the damage suffered. It is not proper for a court of appeal to substitute its own award merely because it considers that the Judge's award is too high or too low. The gap between what the court of appeal considers to be within the range of a proper award, and the award actually made by the Judge, must be so great as to render the latter a wholly erroneous estimate of the loss of suffering."*

45. The Appellant submitted that the Judge did not properly direct himself on the facts and failed to take into account certain undisputed facts. Counsel contended that the Judge did not take into account (a) the injury to the left eye of the Appellant and (b) the publicity in the printed media attendant on the arrest of the Appellant. It was submitted that had these facts been taken into account they would serve to enlarge the award.

46. I will first refer to the injury to the Appellant's eye. There is evidence that the Appellant sustained an injury to his left eye as a result of the beating he received at the time of his arrest. This was not disputed by the Respondent.

47. As far as the nature of the injury is concerned, there are two medical reports that speak to it. In the report dated December 7th, 1995, shortly after the incident, it is stated that the Appellant was complaining of "blurred vision" in the left eye. In a report of February 16th, 2005 the Appellant is said to be complaining of "floaters" in the left eye. The report further states that:

"On examination, his intra occular pressures were 16 in the right eye and 15 in the left. His vision was 6/9 in the right eye and 6/60 in the left.

He was found to have a dense macular scar in the left eye with a posterior vitreous detachment and he was advised to return in two (2) months."

The Appellant in his affidavit described the effects of his injury as "progressively impaired vision as to date in my left eye". The Judge accepted this evidence as she described the injury to the left eye as "progressively impaired vision". This has not been challenged and I think it is a fair conclusion from the totality of the evidence.

48. The Appellant accepts, as he must, that the Judge does refer to the injury but contends that the Judge did not specifically take it into account. I however do not agree. The fact that the Judge did refer to the injuries suffered by the Appellant and specifically mentioned the injury to the left eye cannot be ignored. Having referred to the injuries sustained by the beating inflicted upon the Appellant, including the injury to the eye, the Judge in just a few paragraphs later in her judgment, refers to what she considered to be the relevant aggravating factors, which included the beating inflicted on the Appellant, and then concluded:

"Having regarded to all the evidence and the aggravating factors the Court considers an award of $250,000.00 appropriate."

49. Having considered the text of the judgment I cannot say that the Judge did not have in mind and take into account the injury to the Appellant's eye and it seems to me that she did. Whether the award is too low in the light of the injuries and all the circumstances of the case is a matter that I will consider below.

50. With respect to the publication in the media, there is no doubt on the evidence that the Appellant's case was publicized in the print media. The articles referred, inter alia, to the arrest, detention and deportation order against him. In one article reference is made to the deportation order under the headline "Those Illegal Nigerians".

51. The Appellant in his statement refers to the publication and he says that *"he lost his reputation as a human being, a husband, a father, a medical doctor and a licenced Minister of God".* From the Appellant's perspective, the publicity impacted the injury to his reputation consequently from the arrest. The arrest was carried out in broad daylight in a busy part of down town Port of Spain. The fact

that the arrest would attract attention and publicity is to be expected and is indeed a natural incidence of the arrest in this case. The Judge does not refer to the publicity in her judgment or the injury to the Appellant's reputation. Whether she was right to disregard it is a matter that I will consider below. It is however appropriate to look at that question in the context of whether the award is too low, or in other words an erroneous estimate of the damage to which the Appellant is entitled.

52. In considering whether the award made by the Judge is too low, it is convenient to set out the object of an award of damages in constitutional law.

53. The award is made in the exercise of the Court's jurisdiction under section 14 of the Constitution. This give to the person whose rights are infringed, the right to apply to the High Court for redress. In granting redress the Court is concerned to "uphold or vindicate" the constitutional right which has been violated. In some cases a declaration articulating the fact of the violation will suffice but in most cases more will be required. In **The Attorney General v Siewchand Ramanoop** [2005] UKPC 15 the Privy Council explained:

> *"18... If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of his compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law*
>
> *19. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphisize the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much of the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award."*

54. In Privy Council Appeal No. 61 of 2003 **Tamara Merson v Cartwright and The Attorney General** Lord Scott in giving the judgment of the Board summarized the principles expressed in **Ramanoop** in these terms:

"18... If the case is one for an award of damages by way of constitutional redress - and their Lordships would repeat that "constitutional relief should not be sought unless the circumstances on which complaint is made include some feature which makes it appropriate to take that course. (See para 25 in Ramanoop) - the nature of the damages awarded maybe compensatory but should always be vindicatory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount. The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages may seem to be necessary."

55. And more recently in Privy Council Appeal 39 of 2007 **Alphie Subiah v The Attorney General of Trinidad and Tobago,** Lord Bingham, who delivered the judgment of the Board, stated (at para 11):

"The Board's decisions in ***Ramanoop,*** *paras 17-20 and* ***Merson,*** *para 18, leave no room for doubt on a number of points central to the resolution of cases such as the present. The Constitution is (literally) of fundamental importance in states such as Trinidad and Tobago and (in* ***Merson's*** *case) the Bahamas. Those who suffer violations of their constitutional rights may apply to the Court for redress, the jurisdiction to grant which is an essential element in the protection intended to be afforded by the Constitution against the misuse of power by the state or its agents. Such redress may, in some cases, be afforded by public judicial recognition of the constitutional right and its violation. But ordinarily, and certainly in cases such as the present (in those of* ***Ramanoop*** *and* ***Merson****), and other cases cited), constitutional redress will include an award of damages to compensate the victim. Such compensation will be assessed on ordinary principles as settled in the local jurisdiction, taking account of all the relevant facts and circumstances in the particular case and the particular victim. Thus the sum assessed as compensation will take account of whatever aggravating features there may be in the case, although it is not necessary and not usually desirable... for the allowance for aggravated damages to be separately identified. Having identified an appropriate sum (if any) to be awarded as compensation, the court must then ask itself whether an award of that sum affords the victim adequate redress or whether an additional award should be made to vindicate the victim's constitutional right. The answer is likely to be influenced by the quantum of the compensatory award, as also by the gravity of the constitutional violation in question to the extent that is not already reflected in the compensatory award. As emphasised in* ***Merson****, however, the purpose of such additional award is not to punish but to vindicate the right of the victim to carry on his or her life free from unjustified executive interference, mistreatment or oppression."*

56. In the light of those decisions it can be seen that in granting redress under section 14 of the Constitution, the Court is concerned to uphold or vindicate the constitutional right that has been violated. In some cases a declaration articulating the fact of the violation will be sufficient. In most cases more will be required. When more is required and the Court sees it fit to award compensation, the comparable common law measure of damages is a useful guide. In determining the appropriate compensation, the Court is nevertheless concerned to vindicate or uphold the constitutional right. The nature of the damages awarded should therefore always be vindicatory. That means that in appropriate cases the award may exceed more than a purely compensatory amount. The Court therefore having identified an appropriate amount as a compensatory award must ask itself whether that sum affords adequate redress or whether an additional award should be made to vindicate the person's constitutional right. Where it is appropriate to award more than a purely compensatory amount, the purpose of this additional award is to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach and to deter further breaches.

57. It is common ground between the parties that in this case an award of monetary compensation was appropriate. The Judge was of the view that a purely compensatory award was insufficient and made an additional award to satisfy the vindicatory function of the award of damages. The Appellant says that both are too low. I will consider first the purely compensatory element of the award and then the additional element that the Judge thought necessary to vindicate the constitutional right contravened.

58. As mentioned, the comparable common law measure of damages will often be a useful guide in assessing the amount of compensation. Here the comparable common law measure of damages is with respect to the tort of false imprisonment. The Judge was in fact guided by the common law measure of damages in false imprisonment and this has not been criticized by the parties.

59. In an award of damages for false imprisonment the principal heads of damage (not including pecuniary loss) are injury to liberty, injury to feelings i.e. the indignity, mental suffering, disgrace and humiliation with any attendant loss of social status and injury to reputation. In addition there may be recovery for any resulting physical injury, illness or discomfort (see **McGregor on Damages** (17th ed.) at paras 37 007-009).

60. Aggravated damages are, at common law, an element of compensatory damages. Such damages can be awarded where there are aggravating features about the case which would result in a plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award. The aggravating features can include indignity and humiliation arising from the circumstances of the arrest or the imprisonment (see **Thompson v Commissioner of Police of the Metropolis** [1998] QB 498, 516) as was said in **Takitota v The Attorney General** [2009] UK PC11 (at para 11):

> *"In awarding compensatory damages the court may take account of an element of aggravation. For example, in a case of unlawful detention it may increase the award to a higher figure than it would have given simply for the deprivation of liberty, to reflect such matters as indignity and humiliation arising from the circumstances of arrest or the condition in which the claimant was held. The rationale for the inclusion of such an element is that the claimant would not receive sufficient compensation for the wrong sustained if the damages were restricted to a basic award."*

61. Although at common law the compensatory award may include an element of aggravated damages it is not the practice in this jurisdiction to identify the allowance made for aggravated damages. One award is made for compensatory damages which would include where appropriate the award of aggravated damages.

62. As mentioned above one of the principal heads in an award of damages at common law is injury to reputation. In this case the Court was invited by Counsel for the Appellant to take account of the damage to the Appellant's reputation as a consequence of the arrest and the attendant publicity referred to earlier. It is fair in this case to assume injury to the Appellant's reputation as a consequence of the wrongful arrest and detention, which would have been exacerbated by the publicity given to the arrest. It was however submitted by Counsel for the Respondent that in determining monetary compensation under section 4(a) of the Constitution for loss of liberty without due process, the Court cannot award damages for injury to reputation. As authority for that proposition Counsel referred to **Maharaj v The Attorney General No. (2),** supra, where Lord Diplock in giving the majority judgment to the Board stated (at page 321):

> *"Finally, their Lordships would say something about the measure of monetary compensation recoverable under s. 6 (now section 14 of the Republican Constitution) where the contravention of the claimant's constitutional rights consists of depravation of liberty otherwise than by due process of law. The claim is not a claim in private law for damages for the tort of false imprisonment (under which the damages recoverable are at large and would include damages for loss of reputation). It is a claim in public law for compensation for the*

depravation of liberty alone. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration. Counsel for the appellant has stated that he does not intend to claim what, in a case of tort would be called "exemplary" or "punitive" damages. This makes it unnecessary to express any view whether monetary compensation by way of redress under (s. 6(1) include an exemplary or punitive award."

63. It is relevant to note that these observations do not form part of the ratio of the case. The issue in that case was whether there was a breach of the appellant's right not to be deprived of his liberty without due process and if so, was he entitled to monetary compensation. How that compensation was to be determined was not an issue before the Board. The matter was referred to the High Court for the compensation to be assessed. The observations were not binding.

64. If Lord Diplock intended it to say that compensation could not be awarded for loss of reputation there was no explanation for it. The fact that damages are discretionary and are not at large does not offer an explanation. If damages are within the discretion of the Court why should the Court not award compensation for loss of reputation if that is the result of the breach of the constitutional right and it is a loss suffered by the applicant.

65. Indeed the courts have awarded damages for intangibles such as injury to feelings as a consequence of the violation of the right. That the Court should stop short of awarding compensation for loss of reputation does not appear to be logical. As was said in **Ramanoop**, section 14 of the Constitution under which an applicant may apply for redress, presupposes that the Court will be able to provide effective relief in respect of the infringement of his constitutional right. The Court is concerned to uphold or vindicate the right which has been contravened. Where effective relief is an order for compensation and not simply a declaration as to the infringement, the Court in its quest to grant effective relief should make an award that is just and appropriate to compensate the applicant for the harm suffered. The Appellant should be placed, as far as possible, in the same position as if his rights were not infringed. While the nature of the damages awarded may be compensatory only, they should always be vindicatory. Where the case is an appropriate one for compensation the breach of the right is not vindicated without adequate compensation. If the damage to the applicant's reputation is caused by the infringement to his constitutional right, not to award compensation for that injury is not to grant effective relief. It is to deprive the applicant of the redress to which he is entitled under section 14 and amounts to a failure to properly vindicate the right. An approach to constitutional damage which does not award damages for loss of reputation, to adopt the words of Sharma JA (as he then

was) in **Jorsling v The Attorney General** (1997) 52 WIR 501, 514 would sit "uneasily and certainly uncomfortably with the broad and generous approach the Privy Council has consistently taken when it came to the interpretation of rights under the Constitution".

66. I, however, do not think that Lord Diplock intended to lay down any rule that would exclude compensation for loss of reputation as a consequence of the violation of the right to liberty. That passage from the judgment of Lord Diplock quoted above in my view cannot be read as laying down any such rule. That was certainly the way Lord Hailsham in delivering the minority judgment saw it. He stated (at p 332):

> *"As a result of the majority decision the case will return to the High Court with a direction to assess damages. I doubt whether their task is as easy as might be supposed. We are told that this is not an action of tort... But if it is not a tort, but something sui generis, the question arises on what principles are damages to be assessed? Are punitive damages available on the basis of* ***Rookes v Barnard****.... and* ***Cassell Co. Ltd. v Broome****... and if not why not? How far may aggravated damages be awarded, inasmuch as the judge is not a servant and the State's liability is said not to be vicarious? Are damages to include an element for injured feelings, or damage to reputation? No doubt all these questions are capable of solutions, especially if tort is taken to be a sound analogy. But on what principle is a sound analogy? At present to the sea is an uncharted one, as no similar case has ever been brought, and the action is not in tort.*

Lord Hailsham was, therefore. of the view that the majority had not decided the principles on which monetary compensation was to be determined and more importantly, for the purpose of this discussion, he clearly was of the opinion that the majority had not decided whether compensation should include an element for injury to reputation. I share his opinion.

67. However, in **Crane v Rees and others** (2000) 60 WIR 409 this Court apparently treated Lord Diplock's observations as binding and held that compensation under section 14 could not be recovered "per se" for loss of reputation. The Court was however of the view that loss of reputation should be taken into account in determining distress and inconvenience suffered by the applicant. In that case Hamel-Smith J.A stated (at p 13):

> "*As regards the claim for loss of reputation, I have already indicated that damages per se for such loss are not available in this case. It is not a claim in tort for common law damages. It is one in public law for monetary compensation for beach of one's constitutional right. But that having been said, I do not accept that the question of reputation should be ruled out altogether. It must be a factor that has to be taken into account in determining the distress and inconvenience suffered by the appellant....*

> *It cannot be doubted that injury to one's reputation will generally have an effect on the victim in that amongst other things, it will cause him distress and grief. The fact that distress is also an ingredient that is taken into account in an award in defamation at common law should not, in my view, preclude a court in a constitutional matter from taking that very distress into account. The fact that there may be some overlap is of no consequence."*

68. I for my part can see no difficulty in principle in treating loss of reputation as a separate head of loss. The **Rees** case is, however, binding authority on the approach of this Court in dealing with a claim for injury to reputation under the Constitution. I do not, however, think that approach should make any practical difference in financial terms in determining the compensation to which an applicant is entitled. It follows, however, that in this case the Judge was wrong not to have taken into account the injury to the Appellant's reputation and the consequent publication and therefore has erred in principle.

69. The question remains whether the award is too low or in other words, a wholly erroneous estimate of the damage to which the Appellant is entitled. For it to be considered a wholly erroneous estimate it must fall outside the range which may be regarded, on an objective basis, as either the least sum or the most to which the Appellant is entitled as compensation. Awards made in comparable cases are a useful guide in determining the range in which the award should fall. As mentioned earlier the tort of false imprisonment provides a useful guide so I will refer to awards given in cases of false imprisonment as well as in claims under the Constitution for infringement to the fundamental right to liberty.

70. In High Court action 801 of 1997 **Ronnie Abraham v The Attorney General of Trinidad and Tobago** the plaintiff was unlawfully arrested and imprisoned for some seventy (70) days. He was imprisoned in conditions similar to those in this case but there was no issue of loss of reputation or of assault and consequential injury. In constitutional proceedings he was awarded the sum of $125,000.00 on February 26th, 1999.

71. In High Court Action S-1555 of 2002 **Ted Alexis v The Attorney General of Trinidad and Tobago** the plaintiff was wrongly incarcerated for two and a half (2½) months. In an action in false imprisonment and malicious prosecution he was awarded the sum of $100,000.00 as general damages on March 17th, 2008.

72. In High Court Action S-1452 of 2003 **Curtis Gabriel v The Attorney General of Trinidad and Tobago** the plaintiff was wrongly detained for a total of eighty-four days. He was assaulted by two police officers to extract a confession while in custody and was placed in a cell that was filthy and he was not provided with proper or adequate food. He was awarded the sum of $125,000.00 as general damages, which included an element of aggravation, in an action in false imprisonment on June 24th, 2008.

73 In CV of 2008-04811 **Chabinath Persad v PC Deonarine Jaimongal and another** the claimant was wrongly detained for seven-six (76) days. He complained of being strip searched and of the conditions of his incarceration, including the conditions of the cell, which lacked sanitation. He was awarded the sum of $110,000.00 on November 15th, 2011 as general damages (including aggravated damages) for unlawful arrest false imprisonment and malicious prosecution.

74. There are two other recent cases that offer some assistance. The first is Civ. 2009-1832 **Kedar Maharaj v The Attorney General**. Judgment in this matter was delivered on February 2nd, 2010. In this case the claimant was detained at the St. Ann's Hospital for many years. On March 6th, 2009 he was ordered to be immediately released by a High Court Judge. He was not released until April 3rd, 2009. He then brought proceedings for false imprisonment for his detention from March 6th, 2009, when he was ordered to be released, to April 3rd, 2009 when he was in fact released; a period of twenty-nine (29) days. Loss of reputation was not a factor. The Judge alluded to the conditions in which the claimant was kept but did not describe them. The claimant was awarded $280,000.00 as compensatory damages and a further sum of $50,000.00 as exemplary damages.

75. The second case is Civ. 2007-04388 **Victor Romeo v The Attorney General**. There is no written decision in this case but from an affidavit filed in the proceedings it can be seen that the claimant was unlawfully detained for twenty-nine (29) days. He described his prison conditions in terms similar to this case. There appears to be no issue of loss of reputation. He was awarded as compensatory damages on March 3rd, 2010 the sum of $210.000.00 in addition to exemplary damages of $15,000.00.

76. I consider the award in **Ronnie Abraham** to have been appropriate at that time. That was an award made on February 26th, 1999. The **Gabriel, Alexis** and the **Persad** cases appear not to have placed appropriate reliance on the **Ronnie Abraham** case, as having regard to the fall in the value of money, the awards in those cases, ought to have been substantially higher. I therefore do not propose

to rely on them as I consider those awards too low. The awards in the **Victor Romeo** and **Kedar Maharaj** cases I, however, consider to be more appropriate. Those two cases appear to be consistent with each other and with the **Ronnie Abraham** case when adjustments are made for the fall in the purchasing power of the dollar. The position is however not as clear when reference is made to other cases.

77. In High Court Action 1785 **Stanislaus v The Attorney General**, the Court awarded the sum of $225,000.00 for a wrongful detention of 691 days. The Judge found that there were no aggravating circumstances to increase the award.

78. In Civil Appeal 101 of 2002 **Solozano and Mitchell v The Attorney General**, the Court of Appeal in reviewing a 2002 decision of the Master in an action for malicious prosecution held that the Master failed to take into account periods of detention experienced by the appellants totaling 385 days. The Court increased the award for each appellant by $180,000.00 to reflect the appellant's loss of liberty.

79. In High Court action 3342 of 2004 **Perry Matthew v The Attorney General** in constitutional proceedings challenging the wrongful detention of the applicant as a breach of his section 4(8) right the Court awarded $350,000.00 as his compensation for distress and inconvenience for 409 days of of unconstitutional detention.

80. In Civil Appeal 14 of 2000 **Josephine Millette v Sherman Mc Nicolls** the Court of Appeal upheld an award of $145,000.00 for 132 days of detention. The Court of Appeal, however, thought the award on the 'low side". There was no issue as to the conditions of detention. Similarly injury to reputation or physical injury were not issues in the case.

81. Lastly in Civ. 2008-01595 **Lynch v The Attorney General**, which was also constitutional proceedings, the Court made an award of $450,000.00 in relation to 672 days of unlawful detention. The Judge made reference to the claimant having given evidence of feelings of embarrassment and indignity as a consequence of being imprisoned and made reference to the conditions of detention being cramped and insanitary.

82. At first blush the awards in **Victor Romeo** and **Kedar Maharaj** may seem disproportionate to the awards in the other cases referred to above since the period of detention in the other cases were

considerably longer. It should, however, be noted that it is usual and proper when dealing with an extended period of unlawful imprisonment to reduce the level of damages by tapering them (see **Takitota** supra). It is also relevant to note that the **Stanislaus, Millette, Solozano** and **Mitchell** cases predate the awards in **Kedar Maharaj** and **Victor Romeo** by 8 to 10 years and regard must be held to the fall in the purchasing power of the dollar. However, taking these factors into account, it may still be difficult to reconcile the awards in **Kedar Maharaj** and **Victor Romeo** with the awards in the other cases where the periods of detention were considerably longer as there does not appear to be any feature in the **Kedar Maharaj** and **Victor Romeo** cases that set them apart. If indeed they cannot be reconciled then the awards in **Kedar Maharaj** and **Victor Romeo** represent, in my judgment, more appropriate compensation than the other cases and the level of awards for protracted periods of detention may need to be reconsidered.

83 In **Rees** it was said that since **Maharaj,** supra, the Courts appeared to have confined the monetary compensation for a breach of a constitutional right to recompense for inconvenience and distress suffered as a result of the breach (in addition to pecuniary loss) . **Rees** was however not a case concerned with loss of liberty and therefore whether loss of liberty should be treated as a head damage did not arise. There is certainly nothing that Lord Diplock said in **Maharaj** that should exclude compensation for loss of liberty. As Lord Diplock said the compensation "would include" recompense for inconvenience and distress. It need not be limited to those two heads and there is no need to mould the loss of liberty into a claim for distress and inconvenience.

84. As I have mentioned the comparable common law measure of damages is a useful guide but it is no more than a guide. The wholesale transplanting of the common law measure of damages and the strict application of common law principles to the assessment of compensation for an infringement of a constitutional right will not always be appropriate and the Court is certainly not bound by them. I, however, find that in this case, the heads of damage in the common law tort of false imprisonment are all relevant factors to be taken into account in this case, so that loss of liberty and injury to feelings, (which I do not think conveys anything different from distress and inconvenience) are relevant and so too injury to reputation. Of course, injury to reputation will need to be assessed in the context of distress and inconvenience.

85. This was a particularly bad case. The Appellant was arrested in broad daylight in a very public place. He was beaten and detained for 69 days in deplorable conditions. No complaint has been made

that the aggravating factors mentioned by the Judge (see paragraph 16 above) are not relevant to this matter. There is also the travelling to and from court mentioned above as sounding in compensation for inconvenience. The **Kedar Maharaj** and **Victor Remeo** cases would suggest an award in this case, having regard to the length of detention (and taking into account that this case was decided earlier than those cases) in the region of $250,000.00 to $300.000.00. But there are features in this case that take it outside that range. While in **Kedar Maharaj** and **Victor Remeo** reference is made to the conditions in which the claimant was detained so as to suggest that they were not suitable, there was no issue of the beating as in this case, the injuries and trauma suffered, the effects of some of which continued to the assessment, and the injury to reputation. In my judgment an award of $350,000.00 is appropriate in this case. I would therefore vary the compensatory award made by the Judge.

86. I should mention that it was submitted by Counsel for the Appellant that a factor that should be taken into account in assessing compensatory damages is the Appellant's inability to take his daughter out of the jurisdiction to be with her mother. This it seems was raised as an aggravating factor but the basis of it was not properly explained. It would however follow from my earlier ruling relating to the loss of income that the Appellant cannot put this forward as a relevant factor to be considered.

87. In addition to the compensatory award the Judge awarded a further sum of $50,000.00 as vindicatory damages to effectively vindicate the Appellant's constitutional right. There is no issue in this appeal that a vindicatory award is required over and above the compensatory award. It has been challenged, however, by the Appellant, as being too low.

88. The purpose of the additional vindicatory award is not to punish although it may cover the same ground in financial terms as an award of exemplary damages. In cases where it is appropriate its purpose is to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of its breach and deter further breaches. In those circumstances the sum should not be token or nominal. It should be no less an effective remedy as the compensatory award but it is necessary to bear in mind that the quantum of the compensatory award may go some way to achieve the purpose of the vindicatory award. As was noted in **Subiah**, supra, "having identified an appropriate sum (if any) to be awarded as compensation, the court must then ask itself whether an award of the sum affords the victim adequate redress or whether an additional award should be made to vindicate the victim's constitutional right." The quantum of the vindicatory award is likely therefore to be influenced by the quantum of the compensatory award and also by the particulars of the infringement

and the circumstances relating to it to the extent that they are not already reflected in the compensatory award.

89. The right infringed in this matter was the right to liberty. There is no doubt that that is one of the most essential of the fundamental rights. The particulars of the infringement were very grave. The appellant was descended upon by about six police officers as he sat in his vehicle with his two year old daughter and an acquaintance in broad daylight in a busy part of down town Port of Spain. The police began battering the appellant about his head and body, pulling his tie and choking him. A gun was pulled by the police in the course of the arrest. He was cursed and ridiculed by the arresting officers. These actions are representative of an outright abuse of power, and cannot be tolerated in a society that has a proper respect for the rights and freedoms of the individual. The conditions the Appellant experienced during the period of his unlawful detention serve to inflame the gravity of the breach. In the circumstances of this case and having regard to the increased compensatory award, it appears to me that the award of vindicatory damages made by the trial Judge is still insufficient to properly vindicate the infringement of the Appellant's constitutional right and falls outside of the range properly within the Judge's discretion. In my judgment an award of $75,000 is appropriate to vindicate the infringed right and I would therefore vary the vindicatory award accordingly.

90. In the circumstances the appeal is allowed and the award of compensation made by the Judge is varied to $434,842.82. The Respondent shall pay to the Appellant two thirds of the costs of the appeal.

Dated the 5th day of February, 2013.

A. Mendonça,
Justice of Appeal