REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 118 of 2010
H.C.C. No. CV2009-00409

BETWEEN

MUKESH MAHARAJ

Appellant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent

Civil Appeal No. 67 of 2011
H.C.C. No. CV2009-00409

BETWEEN

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Appellant

AND

MUKESH MAHARAJ

Respondent

PANEL: **I. ARCHIE, CJ**
N. BEREAUX, JA
M. RAJNAUTH-LEE, JA

APPEARANCES: **M. Seepersad for the Appellant**
G. Armorer and L. Merry instructed by K. Mohammed-Carter for the Respondent

DATE DELIVERED: 25 March 2015

JUDGMENT

Delivered by Archie, CJ

[1] I have read in draft the judgment of Bereaux, J.A. and I agree that both appeals should be allowed for the reasons he gives. However, with respect to the appeal by Mr. Mukesh Maharaj as to the quantum awarded by the judge, I wish to add a few observations of my own in the hope that they will provide guidance to trial judges in the future and further explain the unanimous conclusions of this Court.

[2] The first arises from the obvious concern that it might seem incongrous that a person convicted of such a heinous crime, and in respect of whom a psychiatrist recommended *"long term treatment in an institution"* should stand to benefit from a substantial award of damages measured from a period beginning only 5 years after his confinement. That has also caused me some disquiet but we are restricted in this case by the fact that the tribunal which, at the time, was considered competent to conduct a periodic assessment of his case, recommended immediate release.

[3] There is no evidence whether specific attention was paid to the legal distinction between a finding of insanity and one of diminished responsibility at a criminal trial. In the former case no criminal responsibility is attributed to the defendant. That does not apply in the latter case where there is a finding of guilt. It does not follow, therefore, that if one is suffering from a treatable mental condition at the time of commission of the offence, the only option available after that condition is brought under control is immediate release.

[4] The disposition of the matter, including the question whether a further period of detention otherwise than in a 'mental hospital' is warranted, remains a matter for the discretion of the Court. That necessarily follows from the words *"or in any other manner [the Court] may think necessary"* in section 4A (7) of the Offences Against the Person Act Chap. 11:08 since there may remain a

degree of culpability that justifies further detention without the need to manage the guilty person in a mental institution.

[5] The second observation relates to the award of *'vindicatory damages'* under a separate head. It has always been my view that this expression is somewhat misleading and that there should be a single award of damages to take into account all that is reasonable and just in the circumstances. I am fortified in this regard by the observations of Lord Toulson in the most recent Privy Council case of **Alleyne & ors v The Attorney General**[1] where he acknowledges that any award under section 14 of the Constitution, however described, '*has the character of a general award'* and that does not change by virtue of the fact that it may be outside of what may be regarded as quantifiable pecuniary loss.

[6] A brief historical excursion may serve to illustrate the terminological difficulties that may be spawned in an effort to do justice in a particular case. The expression *'vindicatory damages'* first arose in the case of **Ramanoop**[2] at a time when it was not clear whether exemplary damages could be awarded in constitutional motions. The common law and constitutional streams of jurisprudence were seen as separate and never mixing and there was no analog to the common law concept of exemplary damages in constitutional law, where the courts were concerned only to 'compensate' for the breach of a constitutional right.

[7] Of course the courts at all levels were concerned in **Ramanoop** to underscore their disapproval for the outrageous and violent conduct of the officers involved and explicitly recognised that the quantum of the award should be adjusted to reflect that disapproval, the seriousness of the rights concerned and to act as a deterrent. Accordingly, the Privy Council, while rejecting the direct application of common law terminology, acknowledged that common law principles could still be employed as a guide.

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[1] [2015] UKPC 3 paras 40,41
[2] [2005] UKPC 15

[8] So, to make it clear, 'compensation' or 'damages' in the context of an award or 'redress' pursuant to section 14 of the Constitution may include, but have never been confined to compensation in the sense of readily quantifiable pecuniary loss. In fact the Court, in the exercise of its discretion to afford redress is concerned only with what is appropriate in the circumstances and is not obliged to compensate the complainant for pecuniary loss.

[9] Indeed most of the cases that come before the courts are concerned only with granting relief to persons who have been wrongfully detained and/or subjected to violence and there is no claim for pecuniary loss. Conceptually, it is therefore rather artificial to add another category of non-pecuniary, non-punitive compensation and, for that purpose, there is no reason why the word *'redress'* that appears in section 14 of the Constitution should not be sufficient.

[10] Although the advice of the Board in **Ramanoop** did contain the expression *"additional award"* the Board refrained from using the expression *"vindicatory damages"* which by that time was gaining currency and indeed had been used in the Court of Appeal. The Board considered that the single word *"redress"* which does appear in section 14 of the Constitution was apt to encompass all of those concerns.[3]

[11] In **Merson v Cartwright [2005] 67 WIR 17** the Board merely reaffirmed that the nature of damages awarded may exceed a purely compensatory amount and that the purpose of 'vindication' was not punishment. Thus, while I am consciously avoiding the importation of common law terminology, for the purposes of analogy, I understand the Board to have been saying that the augmentation of any award to take into account the nature of the particular infringement and the circumstances of that infringement could more be likened to aggravated as opposed to punitive or exemplary damages, and it

[3] [2005] UKPC 15 @ para 19

would not therefore require the award of a separate sum. Indeed the notion of exemplary damages in constitutional motions was expressly rejected.

[12] To the extent, therefore, that the courts in Trinidad and Tobago in cases like **Ramanoop** and **Merson**, when using the word 'compensation' have always been primarily concerned with the deprivation of the fundamental rights to 'liberty' and/or 'security of the person' per se, it has always been the case that the award of damages in those cases is intended to 'vindicate' the particular rights and, strictly speaking, the use of the word 'vindicatory' that first appeared in **Ramanoop** to underscore the courts' displeasure at the way in which the rights were infringed, was superfluous.

[13] By the time the case of **Alphie Subiah v The Attorney General**[4] came before the Court of Appeal, use of the expression 'vindicatory damages' appeared to have been endorsed, inter alia, by the then Chief Justice, although at the time the Master in that case assessed the damages, he did not have the benefit of the Privy Council decisions in **Ramanoop** and **Merson** and he made no reference to it. Thus it was that while both the Court of Appeal and the Privy Council sought to give deference to the expression, the Board considered that the Master was *"..clearly intending to award the appellant full redress for the constitutional wrong he had suffered"* and that *"...he fully recognised the gravity of the appellant's constitutional complaint".*[5] All this without the need for reference on the Master's part to 'vindicatory damages' and in the context of the rejection of exemplary damages by all concerned. The Master's award was reinstated.

[14] I make the observation here that the very raison d'être of constitutional relief, where there is a parallel common law remedy, can only be to 'vindicate' constitutional rights. I am therefore left, finally, with a short and somewhat puzzling passage in **Subiah**[6]**.** I quote it verbatim:

[4] [2008] UKPC 47
[5] [2008] UKPC] 47 @ para12
[6] [2008] UKPC 47 @ para 11

> *"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 this is not already reflected in the compensatory award****" [my emphasis]*

[15] The highlighted words beg the question why is it necessary to consider a separate award if all of the relevant circumstances can be taken into account in the first place in assessing the quantum of compensation. How does one avoid overlap and an element of 'double compensation' otherwise by the most artificial intellectual gymnastics?

[16] One should also not lose sight of the fact that the starting point of constitutional redress is the vindication of the victim's constitutional right. It is for that reason that it has been said, in **Ramanoop** for example, that where there is an adequate common law remedy, one should not seek constitutional redress unless there is some unusual feature of the case that renders it an appropriate course of action.

[17] If the purpose of any 'additional award' is not punitive then any other intended purpose can be achieved by its explicit recognition in the overall quantum awarded without any need to set out a separate sum. Returning to the analogy of aggravated damages for the moment, it was acknowledged in **Subiah** that, unlike some other jurisdictions, it is not the practice in Trinidad and Tobago to award a separate sum for aggravated damages.

[18] In summary, therefore, the expression "vindicatory damages" in the sense of a separate award has a rather tenuous lineage. A careful reading of the authorities convinces me that it has never really been expressly approved by

the Privy Council (at least as a requirement), and its use may be misleading in that it may tempt trial courts to artificially and doubly compensate claimants in respect of breaches that are properly compensable by a single and undifferentiated award of 'damages'. It is my hope that this expression will no longer trouble us in the future.

[19] In the present case, there is no evidence that the appellant was deliberately targeted or the subject of any malicious conduct. His case appears to have "fallen through the cracks" and, while the administrative inertia is to be disapproved and some element of warning and deterrent is to be included in the quantum of the award, I can see no basis for a very substantial augmentation and consider that the award of $450,000 is sufficient redress in the circumstances.

[20] For the avoidance of doubt I wish to make it clear that no diminution in the award is contemplated by virtue of the fact that a reasonable tribunal may well have considered that such culpability as is attributable to the appellant may have militated against his immediate release. As previously indicated the award of constitutional relief is predicated on his entitlement to be released.

I. Archie
Chief Justice

Delivered by Bereaux, JA

History

[21] These are two appeals from the decision of the High Court. The first is the appellant's appeal from the judge's award of compensation in the sum of two hundred thousand dollars ($200,000.00) for breach of the appellant's rights under

sections 4(a) and 5(2) of the Constitution. The second is the Attorney General's appeal against the judge's award of one hundred and eighty thousand dollars ($180,000.00) in costs to the appellant.

[22] On 10th November 1999, the appellant, Mukesh Maharaj, pleaded guilty to manslaughter on the basis of diminished responsibility pursuant to section 4A of the **Offences Against the Person Act Chap 11:08**. He had been diagnosed as suffering from schizophrenia. The appellant was homeless and living on the streets of San Fernando. He had bludgeoned to death a fellow vagrant who had taken his sleeping spot. The appellant was charged with murder. While the murder charge was pending, he was admitted to the St. Ann's Hospital on 11th October 1999, by order of the High Court. The consultant psychiatrist, Dr. Hamid Ghany, in his report, concluded on 21st October 1999, that the appellant was suffering from *"such an abnormality of mind, namely, chronic schizophrenia, that it seriously interfered with his mental response at the time within".* He added that the appellant was in need of *"long term treatment in an institution."*

[23] Baird J, sitting in the Criminal Assize, ordered that the appellant be detained in safe custody at the forensic unit of the St. Ann's Mental Hospital or such other appropriate place *"until the President's pleasure is known"*. This was pursuant to section 4A (6) and (7) of the Offences Against the Person Act which provide:

> ***"(6) Where on a trial for murder -***
>
> ***(a) evidence is given that the accused was at the time of the alleged offence suffering from such abnormality of mind as is specified in subsection (1); and***
>
> ***(b) the accused is convicted of manslaughter,***
>
> ***The Court shall require the jury to declare whether the accused was so convicted by them on the ground of such abnormality of mind and, if the jury declare that the conviction was on that ground, the Court may, instead of passing such sentence as is provided by law for that offence, direct the finding of the jury to***

be recorded, and thereupon the Court may order such person to be detained in safe custody, in such place and manner as the Court thinks fit until the President's pleasure is known.

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

At the forensic unit of the St. Ann's Hospital, patients detained at the President's pleasure, are the subjects of periodic reviews by a specially appointed Psychiatric Hospital Tribunal (the Tribunal) which decides whether the patient should be recommended for release.

[24] The appellant's case for release was rejected several times. No reasons were provided to the court, neither were dates provided of when his applications for release were made nor of when they were rejected but the rejection of his applications could only have been on the basis that he was still suffering from the effects of schizophrenia. However, on 14th March 2004, five years after his guilty plea, the Tribunal recommended his release from the Hospital. The authority to advise the President on the release resided with the Cabinet of Trinidad and Tobago. But no action was taken on the appellant's release until 5th January 2006 when the Cabinet agreed to his release and directed that *"the Attorney General cause to be prepared the relevant warrants"* to effect his release. Despite this decision and the specific Cabinet directive to the Attorney General, the appellant remained in detention at the St. Ann's Hospital.

[25] His eventual release was effected not by executive order but by order of the High Court. The order was made on 3rd April 2009 in these proceedings brought by the appellant on 6th February 2009, by which he challenged, inter alia, his continued detention as unconstitutional and sought damages. The release of the appellant was thus due to his resort to constitutional redress rather than to any

process within the criminal justice system, or within the executive by which the appellant's continued detention could be reviewed. The absence of such a process within the criminal justice system or the executive by which the *"President's pleasure"* could be carried into effect was a breach of the appellant's right to the protection of the law under section 4(b) and to procedural provisions under section 5(2)(h).

The judge's decision

[26] The judge granted the following declarations (as set in his order):

- **That Section 4A (6) and (7) of the Offences Against the Persons Act Chapter 11:08 ("the Act") is unconstitutional as it offends against the doctrine of the separation of powers.**

- **That Section 4A (6) of the Act be modified by deleting the words *"until the President's pleasure is known"* and substituting the words *"until the Court's pleasure is known".***

- **That the order of the Honourable Mr. Justice Baird pronounced on 10th November 1999 is unconstitutional to the extent that it reads *"the Claimant be detained until the President's pleasure is known"* and be varied to read and have the effect that *"the Claimant be detained until the Court's pleasure is known".***

- **That the Defendant's failure to inform the Claimant of the results of the reviews of the Psychiatric Hospital Tribunal and the failure of the Defendant, its servants and/or agents to discharge the Claimant out of the custody of the St. Ann's Hospital as a result of the recommendation of the Tribunal was unconstitutional and illegal being a violation of the Claimant's fundamental rights under Section 4(a)(b) and Section 5(2) of The Constitution.**

(The appellant is referred to in the order as the Claimant.)

[27] The judge awarded damages in the sum of two hundred thousand dollars ($200,000.00) with interest at six percent per annum from the date of service of the claim form to the date of judgment. In that sum was included the sum of twenty-five thousand dollars ($25,000.00) as *"vindicatory damages"*. It is in respect of this award that the appellant has appealed ("the quantum appeal"). The respondent Attorney General has not appealed against any of the declarations or in respect of the award. The judge subsequently assessed the appellant's costs in the sum of one hundred and eighty thousand dollars ($180,000.00). It is from that assessment of costs that the Attorney General has appealed ("the costs appeal"). No reasons for his assessment of costs have been provided by the judge.

Summary of decision

[28] Both appeals are allowed. As to the quantum appeal, the judge's global award is inordinately low and is insufficient to compensate the appellant for the breach of his rights and to vindicate them. The award is increased to four hundred and fifty thousand dollars ($450,000.00). This sum is sufficient to compensate the appellant for the breaches of his rights and also to vindicate them. There is no necessity for an additional sum. As to the costs appeal, no reasons were provided by the judge for his award. In the absence of those reasons, the award cannot stand. We have no basis upon which to assess how he arrived at his decision. The claims set out in the bill of costs are disproportionately high and in some cases are duplicated. There is no rational relation between the sums claimed and the services provided. The judge's order is set aside and the assessment is remitted to him for reconsideration.

The quantum appeal

[29] Mr. Seepersad for the appellant submitted that the award of damages is inordinately low. In giving judgment, the trial judge considered a number of decided cases on the question of assessment of constitutional damages. He held, rightly, that the court is entitled to make an award of monetary compensation for

infringement of a constitutional right without proof of consequential damage. He found that declaratory relief in this case was insufficient to vindicate the appellant's rights. At paragraph 65 of the judgment he stated that he took the following into account in arriving at the award:

- The appellant's unlawful detention;
- There is no evidence of considerable grief;
- There is no account of inhumane prison conditions;
- There is no loss of reputation nor physical assault;
- There is no account of misery and distress suffered by the Claimant. He was simply uncertain as to his status.

[30] The judge found that the claim was restricted to the question of the appellant's mental anguish brought on by his uncertainty as to whether he would be released. His anxiety began at least in 2004 but heightened in 2008 after the appellant contacted his attorney at law and was forced to institute these proceedings *"for fear that the authorities had forgotten him."* The judge added that he had also considered this court's decision in **The Attorney General v. Subiah, Civil Appeal No. 10 of 2005** (unreported).

What is the relevant period of detention for the purposes of the assessment

[31] The appellant had sought and failed to obtain a specific declaration that the continuing failure to discharge him out of custody from 14th March 2004 was a breach of his rights under 4(a)(b) and 5(2)(a), (b) and (h) of the Constitution. Mr. Armorer in his written submissions contended that, consequent upon this, *"there was nothing that has come from the High Court that shows that 14th March 2004 or any other date was taken into consideration by the judge in assessing the award of damages."*

[32] I do not agree. A close reading of the declaration set out at paragraph 6 shows that the breach of which the court was concerned was the failure of the executive to release the appellant consequent upon the recommendation of the

Tribunal. It is also clear from paragraph 65 of the judgment, to which I have earlier referred at paragraph 8, that the order for damages was directed at the appellant's detention from March 2004 onwards. Paragraph 60 of the judgment is also instructive. In effect, the judge found that the continued detention of the appellant (between 2004 to 2009) after the recommendation of the Tribunal *"was arbitrary and a callous disregard of the [appellant's] rights"*. The period of detention which the judge contemplated thus spanned the period from 14th March 2004 to 3rd April 2009 when the appellant was released.

[33] There has been no appeal by the respondent in respect of the quantum of the award. The quantum therefore cannot be reduced but to the extent that the judge may have misconstrued the principles upon which the assessment was made, the Court of Appeal can correct them.

[34] In my judgment the judge erred in two respects. First, in failing to take into account that any recommendation of the Tribunal would have required a reasonable period of time for it to have been implemented. But it is not a significant error. Second, his assessment of damages was inordinately low and was a wholly erroneous estimate of the compensation properly to be awarded to the appellant.

[35] Taking into account the workings of the administrative process in Trinidad and Tobago, a Cabinet decision on the appellant's release should not have exceeded three months from the date of the recommendation. Thereafter the appellant should have been released within a further period of no more than ten working days after the decision of the Cabinet to allow for the administrative arrangements to put its decision into effect. At latest therefore, the appellant should have been released towards the end of June 2004. He was not released at all; that is, until ordered by the Court on 6th February 2009. The relevant period of assessment therefore is from the period 1st July 2004 to 6 February 2009.

The appellant's entitlement to compensation

[36] The appellant was convicted of the lesser crime of manslaughter and ordered to be detained at the St. Ann's Hospital until the President's pleasure was known. After a mere five years in prison, the Tribunal recommended his release. The release was not effected for another five years and was found to be unconstitutional, with result that he is entitled to compensation for the breach of his rights. The trial judge noted at paragraph 2 that *"it may seem strange that the perpetrator of such a crime should in any way stand to benefit at all from an award of damages in challenging the constitutionality of his detention. However, the focus of these proceedings is not on the commission of the criminal offence but on the procedure established by our law to deal with persons found guilty pursuant to section 4A(6) of the Offences Against the Person Act."* I agree. In this case, the sentence of detention of the appellant was made to allow for treatment and his ultimate recovery. No consideration appears to have been given to whether further incarceration was appropriate in the event of his full recovery. That recovery appears to have occurred sooner that Dr. Ghany expected, given his advice that the appellant was in need of *"long term treatment in an institution"*. We must accept therefore that once a recommendation was made for his release, in respect of which there were no medical reasons to object, there was no obstacle to his release.

[37] The procedure set up to consider whether he had in fact recovered was a review by the Tribunal. Once the Tribunal was satisfied of his fitness to return to society then, having regard to the order of Baird J (and by extension the order of the President having regard to section 4A(7) of the Offences Against the Person Act) there was no impediment to his release there being no medical basis on which to object. But the appellant spent a further five years in detention. The compensation due to the appellant is as a result of the failure of the legal system or the executive's administrative process to have an effective procedure for his release. His continued detention was a breach of his right to the protection of the law, his right to liberty and his right under section 5(2)(h) of the Constitution.

[38] It may well offend the public's sense of morality that the appellant has to be compensated having taken a life. I well understand. However, constitutional rights, more so the breach of the liberty provision, are not to be trifled with. It may well be that the appellant having served five years in detention, should have been required to serve further imprisonment upon his recovery. But that was not the purport of the order of Baird J.

[39] Further section 4A (7) provides that the President, upon being informed by the trial judge that a person has been convicted of manslaughter on grounds of diminished responsibility, *"shall order the person to be dealt with as a mentally ill person in accordance with the law governing the care and treatment of such persons or in any other manner he may think necessary."* However it has not been suggested in this case, having regard to the tail piece of that provision such an order may include further imprisonment after he has been deemed to have fully recovered. In any event no such order was made. Given that any future orders under sections 4A (6) and (7) will now be at the court's pleasure and in the court's discretion, the question of further imprisonment after an accused has fully recovered, will now be in the discretion of the court. The court may thus order that the convicted person be dealt with *"in any other manner it may think necessary".*

Assessment of damages for the constitutional breach

[40] The grant of redress under section 14(1) of the Constitution is discretionary. An order granting redress may include an order for assessment of damages or it may be confined to a declaration or a mandatory order. There is no constitutional right to damages. See Lord Hope in **Seepersad & Anor. v. The Attorney General of Trinidad and Tobago (2004) 64 WIR 378**. The court in its constitutional jurisdiction is concerned to uphold or vindicate the constitutional right which has been contravened. See **Uric Merrick v The Attorney General & Ors., Civil Appeal No. 146 of 2009** (unreported) paragraph 57.

[41] *"Vindication"* of the right applies in both the widest and narrowest of

senses. To the extent that a compensatory award is granted in respect of the breach of the right and as *"recompense for the inconvenience and distress suffered during the illegal detention"* (per **Maharaj v. The Attorney General (No. 2) (1978) 2 ALL ER 670**), such an award is, in the widest sense, a vindication of the right. An additional sum may also be awarded *"to reflect the sense of public outrage, - emphasise the importance of the constitutional right and the gravity of the breach and deter future breaches"* (per Lord Nicholls in **The Attorney General v. Ramanoop (2006) 1 AC 328**). This is a vindication in the narrowest sense.

[42] In **The Attorney General v. Ramanoop (supra)**. Lord Nicholls of Birkenhead at paragraph 17 provided an analysis of the constitutional jurisdiction as it relates to damages. He said:

> ***"Section 14 recognises and affirms the court's power to award remedies for contravention of chapter 1 rights and freedoms. This jurisdiction is an integral part of the protection chapter 1 of the Constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against misuse of state power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the state's violation of a constitutional right. This jurisdiction is separate from and additional to ("without prejudice to") all other remedial jurisdiction of the court.***
>
> ***When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing***

the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action at law.

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, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in 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 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."

[43] Lord Nicholls's dictum speaks of vindication of the right by way of compensation as well as the award of a *"not necessarily substantial"* but additional sum in circumstances in which the award of compensation *"may well not suffice"*. The decision of the Privy Council in **Romauld James v The Attorney General Privy Council Appeal No. 0112 of 2009** (unreported) at paragraph 42, (per Lord Kerr) makes it clear that the additional sum is a separate award from the compensatory award. But not all the decisions of the Privy Council have made the distinction. In **Merson v Cartwright [2005] 67 WIR 17**,

an appeal from the Bahamas, Lord Scott of Foscote after citing Lord Nicholls' dictum noted at paragraph 18 that:

> ***"[18] … the nature of the damages awarded may be 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."***

The Board found in that case that the appellant's rights were grievously infringed and a *"substantial award"* to vindicate her rights was *"clearly justified".*

[44] **Inniss v Attorney General of Saint Christopher and Nevis [2008] 73 WIR 187** was a case under the Constitution of St. Christopher and Nevis in which the appellant's employment was terminated without a recommendation by the Judicial and Legal Service Commission as required by section 83(3) of the Constitution. Section 83(3) afforded Ms. Inniss protection from arbitrary termination by the Government of St. Christopher and Nevis. The appellant's right under section 83(3) to protection from such arbitrary termination was therefore breached. But it was not considered a breach of a fundamental right under Chapter II of the Constitution. The question was whether such a breach entitled the appellant to *"relief"* under section 96(i) of the Constitution.

[45] At paragraph 27 Lord Hope of Craighead referred to both **Ramanoop** and **Merson** in which there were breaches of fundamental rights and found that their guidance was of assistance. He said:

> ***"[27]…But the fact that the guidance that was offered in those cases was given in that context does not deprive it of its value in case such as this, where the provision that has been breached is to be found elsewhere in the Constitution. Allowance must of course be made for the importance of the right and the gravity of the breach in the assessment of any award. The fundamental points are of general application, however. The purpose of the award, whether it is made to redress the contravention or as relief, is to vindicate the right. It is not to punish the executive. But vindication involves an assertion that the right is a valuable one, as to whose enforcement the complainant herself has an interest. Any award of damages for its contravention is bound, to some extent at least, to act as a deterrent against further breaches. The fact that it may be expected to do so is something to which it is proper to have regard.***
>
> ***[28] Applying those principles to this case, the Board is satisfied that a relatively substantial award is justified…"***

[46] Earlier at paragraph 21, in considering whether an award of damages would be appropriate at all, Lord Hope stated:

> ***"the function that the granting of relief is intended to serve is to vindicate the constitutional right. In some cases a declaration on its own may achieve all that is needed to vindicate the right. This is likely to be so where the contravention has not yet had any significant effect on the party who seeks relief."***

[47] The **Ramanoop** approach was however endorsed in **Alphie Subiah v.**

The Attorney General of Trinidad and Tobago [2009] 4 LRC 253. Lord Bingham delivering the judgment of the Board at paragraph 11 said:

> ***" [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 of (literally) 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 (and 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 of 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 (contrary to the practice commended by the Court of Appeal of England and Wales for directing juries in Thompson v Commissioner of Police of the Metropolis [1998] QB 498, 516 D-E) 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 this 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. In its recent judgment (given after argument of this appeal) in Angela Inniss v Attorney General of St Christopher and Nevis [2008] UKPC [42] , the Board derived valuable assistance from the judgments of the Supreme Court of New Zealand in Taunoa and others v Attorney General [2007] 5 LRC 680, which in turn cited (paras 253-254) the judgments of Didcott J in Fose v Minister of Safety and Security [1998] 1 LRC 198, para 82, and Ngcobo J in Hoffmann v South African Airways [2001] 2 LRC 277, para 45, but these judgments, while illuminating the approach outlined above, do not alter it."

[48] The **Ramanoop** approach of awarding an additional sum to vindicate the constitutional right is therefore well settled. But I find it difficult to conceive of the need to award an additional sum to vindicate the right, when in virtually every case the gravity of the constitutional violation will already have formed part of the compensatory award. Such an additional award in my judgment has more than just a suggestion of double counting, if not of punishment.

[49] The trial judge awarded the sum of two hundred thousand dollars ($200,000.00). His reasoning I have set out at paragraph 8. Included in that award is the *"additional"* sum of twenty-five thousand dollars ($25,000.00) for the vindication of the appellant's constitutional rights. Mr. Seepersad submitted that the global award was too low. He submitted that the award should be in the vicinity of one million four hundred thousand dollars ($1.4 million) to one million six hundred thousand dollars ($1.6 million). He added that we should consider equivalent awards in common law actions albeit as a guide but I do not consider any of those awards to be helpful if only because of the nature of this case and

gravity of the breaches.

[50] I agree however that the global award was inordinately low and does not reflect a proper estimate of the sum required to compensate the appellant, particularly for the unlawful deprivation of his liberty or to vindicate his rights. While I agree with the judge's reasoning in respect of the aggravating factors which he considered and to which I have referred at paragraph 8, I do not consider that he gave sufficient weight to the period of detention and to the nature of the rights which were the subjects of the breaches. The appellant in this case spent a total of five years in detention after the recommendation for his release was made (four years and six months for the purposes of the assessment). Within that period the Attorney General took a year and ten months to bring the recommendation to the Cabinet. After approval was obtained from the Cabinet for his release, nothing further was done to facilitate it. The appellant remained in detention until he obtained the assistance of his attorney at law and initiated these proceedings. His ultimate release was brought about by these proceedings and had nothing whatever to do with any review process with the criminal justice system or by the executive. The appellant's continued detention thus had all the elements of arbitrariness which Phillips JA in **Lassalle v. The Attorney General, Civil Appeal No. 2 of 1971** described as *"the antithesis of due process"*.

[51] I am led to conclude that the appellant was forgotten and left to languish at the forensic unit. His plight was not unlike many mentally ill patients in Trinidad and Tobago and his abandonment very much consistent with the approach adopted in respect of the mentally ill in Trinidad and Tobago. I would increase the award to four hundred and fifty thousand dollars ($450,000.00). In increasing the award to four hundred and fifty thousand dollars ($450,000.00), I have taken into account the period of detention and the nature and gravity of the breaches. The judge's assessment of the aggravating factors is correct and I have taken them into account. I also consider that the increased award is sufficient compensation for the breaches of his rights and is appropriate to vindicate them. It is not necessary to make an additional award.

[52] The award will carry interest at a rate of 6% from the date of service of the claim form to the date of judgment.

The costs appeal

[53] I turn to the costs appeal. The trial judge assessed costs in the sum of one hundred and eighty thousand dollars ($180,000.00). He gave no reasons for doing so. His assessment was based on a bill of costs submitted to the court for assessment by Mr. Seepersad.

[54] The appellant in this appeal is the Attorney General but for the good order of this judgment I shall continue to refer to Mr. Mukesh Maharaj as the appellant. The judge assessed costs pursuant to rule 56 (4) and (5) of the **Civil Proceedings Rules 1998** (CPR). Thereafter his assessment had to take into account the provisions of rule 67.12 of the CPR which provides for the general assessment of costs in any matter or proceeding (other than a procedural application) where costs fall to be assessed. Mr. Armorer for the Attorney General submitted, however, that the assessment should have been made under the general rule referred to in rule 67.8 of the CPR as opposed to rule 56.14(5). He submitted that according to rule 67.5(2) of the CPR, the appellant was entitled to prescribed costs which are calculated on the basis of the two hundred thousand dollars ($200,000.00) awarded to him, amounting to a total of the thirty-nine thousand dollars ($39,000.00) in prescribed costs.

[55] The issue was definitively decided in **Nizam Mohammed v. The Attorney General, Civil Appeal No. 75 of 2013** in which it was held that costs in respect of claims for administrative orders are to be assessed under rules 56.14(4) & (5) of the CPR. See the judgment of Mendonça JA in which he addressed the identical issue. He said, starting at paragraph 7, as follows:

> ***7. The Judge was of the opinion that "assess" in rule 56.14(5) conveyed its literal meaning "to calculate or to compute". It was not a reference to the assessment contemplated by rule 67.12. It***

was, the Judge said, a relic from pre-docket times and all that it did was "provide that the Judge hearing the case must compute or calculate the costs". In other words 56.14(5) was simply a requirement that the Judge hearing the matter, and no one else, was to assess the costs. This assessment was to be done on the prescribed costs scale. Rule 56.14(5) was therefore not an exception to rule 67.5 which provides that as a general rule prescribed costs apply.

8. I do not agree with the Judge's interpretation of rule 56.14(5). The CPR was carefully drawn to distinguish between the different methods of quantifying costs. In the CPR where prescribed costs are referred to, the word "assess" does not appear. Instead the draftsman uses different language, so that at 67.5 prescribed costs are "to be determined in accordance with Appendices B and C" (see 67.5(1)) and are to be "calculated in accordance with the percentage specified in column 2 of Appendix B against the appropriate value" (see 67.5(3)).

9. The term "prescribed costs" appears in other places in the CPR and on each occasion it appears, similar language for the quantification of the costs is used and the draftsman avoids any reference to the word "assess" or any derivatives of that word. So that in 67.6(1)(b) a party may apply to the Court at a case management conference to direct, where the likely value of the claim is known, that the prescribed costs "be calculated" on the basis of some lower or higher value.

Part 36 deals with offers to settle. Rule 36.16(1) provides that where an offer to settle is accepted the parties may agree on the amount of costs to be paid. Where, however, the parties fail to agree rule 36.16(2) provides that the general rule is that the costs shall be "determined in accordance with the scale of prescribed

costs contained in Appendix B and Appendix C to part 67". Similar language is used in rule 38.7 where costs "shall be determined in accordance with the scale of prescribed costs contained in Appendix B and Appendix C to part 67".

10. The use of such language with reference to prescribed costs is hardly surprising since once the value of the claim is known the quantification of costs on the prescribed costs scale is nothing more than an arithmetical calculation. The assessment of costs on the other hand is very different. It requires an assessment of the work done and a determination of the value of that work. While the prescribed costs scale can be taken into account in the assessment of costs, the assessment is not confined to that and a practice guide has been issued (Practice Guide to the assessment of costs dated December 20th, 2007) providing, inter alia, guidelines as to the applicable hourly rates for attorney's fees where the Court is required to assess costs under rules 67.11 and 67.12. It is therefore not surprising that when the CPR directs the Court to assess costs, putting aside 56.14(5), nowhere can it reasonably be taken to refer to a determination of costs on the prescribed costs scale (see for example rules 28.6(4), 29.15(4), 36.16(3) 38.17(1) and 48.6). In all of these rules the only reasonable interpretation is that costs are to be assessed under 67.11 or 67.12)."

The judge was right to assess costs under rule 56.14(5) and rule 67.12. The submission therefore fails.

[56] As to the actual bill of costs upon which the judge assessed costs, Mr. Armorer submitted that the appellant claimed fees on brief in his bill of costs without stating the lengths of time spent on the relevant work items. He added that –

(a) the time spent on the item of work and

(b) the period of practice of the attorney who performed the work

needed to be stated in order for the costs of the item of work to be properly assessed.

[57] In the alternative, Mr. Armorer submitted that the claims in the bill of costs should be completely disallowed or greatly reduced because:

(a) the items have neither the length of time nor the name of the attorney-at-law who performed the relevant item of work stated for several of them;

(b) the items are claims for unreasonably long lengths of time allegedly spent on work and those lengths of time are disproportionate to the amount of money involved and the complexity of the issues in the court matter;

(c) the items are for fees on brief but the items have not stated the lengths of time spent on the relevant items of work;

(d) the items are claims for disbursements without providing proof, vouchers bills or receipts to support the claims (this is especially important because the claim for costs here is in essence a claim against public funds and such claims must be carefully scrutinized and required to have a high degree of probity).

He submitted that the matter should be remitted to the High Court for an item by item consideration to be done.

[58] In reply Mr. Seepersad submitted that:

(a) the appeal was filed out of time

(b) the award of costs was a matter for the discretion of the judge. It was within his discretion to apply his judgment to each item and to ensure that the overriding objective was achieved. The principles of proportionality and the relevant factors are applied to the assessment as a whole. In giving his oral decision he relied on **Panday v. Espinet, H.C.A. No. 2265 of 2008** which refers to these principles.

Conclusion

[59] Mr. Seepersad's submission that the appeal should have been made at the

time when the court ordered that costs be assessed on the 22nd April 2010 (when the judgment on the substantive decision was made) is without merit. The actual order for the award of one hundred and eighty thousand dollars ($180,000.00) was made on 24th March 2011. It was then that the quantum was assessed and it was then that the appellant became aggrieved by the quantum.

[60] Secondly, while it is true that the award of costs are discretionary, the Court of Appeal will intervene when it is shown that the judge was plainly wrong, in that he took into account irrelevant considerations, or made a decision against the weight of the evidence. (See **Roland James v. The Attorney General of Trinidad and Tobago, Civil Appeal No. 44 of 2014**). We have been provided with no reasons for the decision. In the absence of reasons the appellate court is entitled to look at the matter afresh. It is not that the judge's decision will necessarily be reversed if on the facts, there is a proper basis for it. In this case however I am satisfied that the matter must be remitted to the judge for reconsideration. We have no basis upon which to assess how the trial judge came to his decision.

[61] More importantly some of the claims made in the bill of costs appear to have no basis, are disproportionately high and in some cases are duplicated. In addition to areas of duplication there is no rational connection between the sums claimed and the services provided, as Mr. Armorer contended. We have no idea whether the judge considered each item individually or not or how he arrived at the global figure. At item 87 of the bill of costs the appellant claims the sum of one hundred and fifty thousand dollars ($150,000.00) as the fee on brief in this matter. It is unclear for whom such a fee is charged. There is no record of the extent of advocate counsel's experience to justify the claim. A similar difficulty arises in respect of the fifty thousand dollar ($50,000.00) fee charged in respect of instructing attorney's services.

[62] Further, although a claim for one hundred and fifty thousand dollars ($150,000.00) is made for the fee on brief at item 87, there is another claim for a fee on brief in the sum of seventy-five thousand dollars ($75,000.00) made at item

68. Mr. Seepersad sought to explain that discrepancy by saying that in respect of that latter fee, the trial had been aborted and the hearing treated as pre trial review. The fee was thus for the cost of an aborted trial. That did not sit well with this court. If the hearing was treated as a pre trial review, it meant simply that the trial was adjourned. The fee on brief could be in no way affected by that adjournment.

[63] Both counsel accepted that the decision was simply announced and the sum awarded without any substantive reasons advanced. That of itself may not have been unsatisfactory if the bill of costs could be followed with any degree of precision. But it cannot.

[64] For those reasons I consider that the order must be set aside and the costs assessment be sent back to the judge to be re-assessed. We will hear the parties on costs.

Nolan P.G. Bereaux
Justice of Appeal

I agree with the judgments of Archie CJ and Bereaux, JA, which I have read in draft. I have nothing to add.

M. Rajnauth-Lee
Justice of Appeal