THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal Nos. **S093 of 2017, P094 of 2017, P218 of 2016, S219 of 2016, P223 of 2016 & S224 of 2016**

BETWEEN

The Commissioner of Prisons
The Attorney General of Trinidad & Tobago
Her Worship Magistrate Marcia Ayers-Caesar

(Appellants/Defendants)

v.

Sasha Seepersad
Brian Seepersad
(by their kin and next friend Karen Mohammed)

(Respondents/Claimants)

Panel:
N. Bereaux J.A.
R. Narine J.A.
G. Smith J.A.

DATE DELIVERED: 19th December, 2018

Appearances:

Mr. F. Hosein SC and Mrs J. Baptiste-Mohammed instructed by Ms. A. Ramsook appeared on behalf of the 1st & 2nd Appellants

Mr. D. Mendes SC and Ms. K. Prosper, instructed by Ms. K. Mark appeared on behalf of the 3rd Appellant

Mr. A. Ramlogan SC, Ms. J. Lutchmedial, Mr. A. Pariagsingh and Mr. G. Saroop instructed by Ms. C. Stewart appeared on behalf of the Respondents

I have read the judgment of Narine J.A. and agree with it.

N. Bereaux,
Justice of Appeal.

I too, agree.

G. Smith,
Justice of Appeal.

JUDGMENT

Delivered by R. Narine, J.A

1. Before this court are substantive appeals filed by the appellants and two procedural appeals on the issue of costs filed by the respondents, all of which are against the decision of Kokaram J delivered on May 24, 2016 and the subsequent judgment on the issue of costs delivered by him on April 6, 2017.

BACKGROUND

2. Brian Seepersad (Brian) and his sister Sasha Seepersad (Sasha) were accused of committing murder and were jointly charged with two adults. The charges were laid on January 29, 2014 and they were brought before Her Worship the Chief Magistrate, Marcia Ayers-Caesar (the Chief Magistrate) on the same date. On this occasion they were denied bail pursuant to the Bail Act Chap. 4:60 and remanded pending the hearing of their preliminary enquiry. Brian, then aged 12, was remanded to St. Michael's at the Youth Training Centre (YTC), an Industrial School for young male offenders between the ages of 16 and 18. Sasha, then aged 16, was remanded to the Women's Prison, Golden Grove, Arouca. At the time that these orders were made, the Chief Magistrate was unaware of any holding facility in the country designed for child offenders and as such, she believed that it was the best and only option available.

3. Thereafter, on each occasion that Brian and Sasha were brought before the Chief Magistrate, they were remanded to YTC and the Women's Prison respectively.

4. Subsequent to this however, certain pieces of legislation were proclaimed on May 18, 2015. They were, the Children Act No. 12 of 2012, The Children's Community Residences, Foster Care and Nurseries Act 2000 and The Children's Authority Act Chapter 46:01, collectively referred to as the children legislation.

5. Significant to this appeal are sections 54(1) and 60(1) of the Children Act. Section 54(1) of the Children Act required a court on remanding or committing for trial a child who is not released on bail, to order that the child be placed in the custody of a community residence named in the Order for the period for which he is remanded or until he is brought before the Court. Additionally, section 60(1) of the Children Act provided that a Court shall not order a child to be detained in an adult prison.

6. After the proclamation of these provisions contained in the Children Act, the Chief Magistrate continued to remand Brian and Sasha to YTC and the Women's Prison respectively, because no community residences as envisaged by the Act had yet been created.

7. As a result of their detention, they both filed separate administrative claims which were brought by their mother and next friend: Brian on September 1, 2015 and November 6, 2015 and Sasha on September 16, 2015. They complained that the orders made by the Chief Magistrate remanding them to these institutions were unlawful. They also complained that the failure of the State to provide community residences under the children legislation amounted to a breach of their rights to due process, protection of the law and their right not to be exposed to cruel and unusual treatment. They sought declaratory reliefs declaring their detention null and void, orders of certiorari quashing the remand warrants of the Chief Magistrate and declarations of

constitutional breaches together with damages for breach of their constitutional rights.

8. Brian and Sasha claimed that there were reforms in the juvenile justice system as a result of the suite of children legislation which came into effect in May, 2015. They claimed that these reforms were designed to protect the rights of children such as section 54 of the Children Act, which expressly provided for children to be remanded at community residences if they were denied bail. Accordingly, as the YTC and the Women's Prison were not community residences they claimed that their detention was unlawful.

9. Interim relief was granted by the Court of Appeal at the interlocutory stage for Sasha to be removed from the Women's Prison and placed in a suitable community residence. In the case of Brian, the Children's Authority was granted access to him at the YTC.

FINDINGS OF THE TRIAL JUDGE

10. The trial judge held that neither YTC nor the Women's Prison was a community residence. He held that the detention of Brian and Sasha at these institutions was unlawful and illegal. He found that there were community residences at which Brian and Sasha could have been detained. As an alternative the trial judge held that they could have been remanded to the custody of the Children's Authority. He found that the Chief Magistrate had no jurisdiction, power or authority in law to order that they be detained at these institutions. Their detention was a breach of their constitutional rights guaranteed under the Constitution. The failure of the Attorney General to provide community residences upon the coming into force of the Children Act and the Children's Community Residences, Foster Homes and Nurseries Act,

where these young offenders could be remanded pending the hearing and determination of the preliminary enquiry into the criminal offence for which they were charged, was also a breach of their Constitutional rights.

11. It was therefore ordered that the decision to detain them at these institutions and the remand warrant issued by the Chief Magistrate be quashed by way of certiorari. Damages were awarded to Brian in the sum of $150,000.00 and in the case of Sasha, $300,000.00.

JUDGMENT ON THE ISSUE OF COSTS

12. After Brian and Sasha were successful in obtaining relief in their claim for judicial review and constitutional law proceedings, the trial judge ordered that the Attorney General in both proceedings pay 50% of Brian's and Sasha's assessed costs.

PRESENT STATUS OF BRIAN & SASHA

13. On January 24, 2016, Sasha turned 18 years of age and was transferred to the adult Women's Prison as she was no longer considered a child under the Children legislation. In April, 2016, Brian was sent to the St. Michael's Home for Boys. On October 25, 2017, Brian was committed to stand trial for murder and was removed from the custody of the Children's Authority and remanded to the Child Rehabilitation Centre, Arouca (formerly YTC).

SUBMISSIONS BY THE ATTORNEY GENERAL & THE COMMISSIONER OF PRISONS

14. Mr. Hosein submitted that although the YTC at the material time was not a licensed community residence, it performed much of the rehabilitative and

reformative work that a licensed community residence would be required to perform. There was no evidence of any lack of bona fides on the part of the State or any harsh treatment meted out to Brian while at the YTC. The State was alive to the problem and had facilitated arrangements for him to be housed in suitable accommodation by the Children's Authority. It was a significant factor that he had been charged for murder and did not qualify for bail and there was no question about his release prior to the determination of his matter before the court.

15. He added that there was evidence of the State providing juvenile safe facilities for Sasha during her incarceration at the Women's Prison. When she arrived at the Women's Prison she was housed at the Juvenile Dormitory with other juveniles. No adults were housed there. She had only limited contact with adult inmates and was under constant supervision. The adult inmates and juveniles did not dine together. She enjoyed daily activities such as using the computer, watching movies and going to classes. She had regular airings and saw the Psychologist on a weekly basis. Her daily routine included attending school, programmes such as music and craft, playing in the yard, attending religious services and counselling sessions. Following the order of the Court of Appeal made on November 12, 2015, the State worked towards the provision of a rehabilitation centre to which Sasha was to be moved before December 8, 2017, at St. Jude's School for Girls.

16. He contended that when the children came before the Chief Magistrate there were no community residences which were licensed and the Chief Magistrate, conscious of this, made the order for the remand of Brian and Sacha to the YTC and the Women's Prison respectively. Even if there were facilities that met the criteria established by the subsequent commencement of the Children's Community Residences, Foster Homes and Nurseries Act, the delegated legislation regime was not in place to facilitate the licensing of such

residences. The respondents cannot impute ill-will, mala fides or even lack of bona fides on the Chief Magistrate or the State. The constitutional reliefs sought by them are superfluous, excessive and constitutes an abuse of section 14 of the Constitution.

17. He added that any claim that Brian and Sasha would have had would only commence from May 18, 2015, the date when the suite of children legislation came into force. Prior to the commencement of the children legislation, males and females under the age of 18 were routinely remanded to the YTC or the Women's Prison or when convicted, detained at the YTC and Women's Prison to serve their sentences. He submitted that the commencement of the suite of children legislation could not instantly transform what was acceptable in law or which was the ongoing practice for more than 50 years into an illegality that is so egregious, that it violates the fundamental human rights and freedoms of Brian and Sasha.

18. Further, the rights defined in sections 4 and 5 of the Constitution of Trinidad and Tobago are not absolute. It is for the courts to decide on the extent of the protection afforded by these constitutional guarantees. Not every contravention of a statute can a fortiori amount to a breach of a fundamental human right and freedom. The fundamental right must be identified relative to the individual rights identified in sections 4 and 5 of the Constitution. Brian and Sasha would have to identify two ingredients to succeed under section 4(a) of the Constitution. They would have to show that they were deprived of their liberty and secondly this deprivation was not accomplished by due process. They were not entitled to their liberty since the Bail Act did not provide for bail in the event that someone, even a minor or child, is charged for murder. There was therefore no deprivation of liberty. Their detention was in accordance with due process and the omission by the State to licence the community residence, does not breach the due process requirements

because the requirement of due process would have resulted in a detention in any event.

19. It was contended that the failure of the State to comply with its obligation to provide a community residence and/or rehabilitation centre did not constitute a breach of section 4(a) of the Constitution nor did it impact on the lawfulness of Brian and Sasha's detention.

20. Further, not every breach of a statute amounts to a denial of the protection of the law since there are gradations in the level of default. The default alleged in this case is relative to two individuals and was rectified in a short space of time. The State had also complied with the orders of the trial judge pertaining to the accommodation for Brian.

21. Mr. Hosein admitted that when the suite of children legislation came into force, there were no licensed community residences. This did not constitute a failure by the State to make regulations or a failure to implement an Act but instead was a failure to have premises that met with the strict criteria established by the suite of children legislation. This was more in the nature of an omission. The omission was not confined to merely licensing the establishment but it required a Children's Authority to be established and for staff to be appointed as well. It also required extensive training of staff and the creation of manuals and protocols to guide the staff. It also involved the upgrading and construction of new facilities which could not have been completed in a short space of time. In these circumstances, the State should not have additional liability and made to pay damages when these resources could be better spent in achieving the purpose for which the suite of children legislation was created.

22. Mr. Hosein added that Brian and Sasha were not kept in such conditions as involved so much pain and suffering or such deprivation of the elementary necessities of life that they amounted to treatment which went beyond conditions that can be described as harsh and would in fact reach the threshold of cruel and unusual.

23. The fact that the children were kept initially at the YTC and at the Women's Prison which were not designated community residences, it was submitted, does not by itself offend the constitutional principle of presumption of innocence for the following reasons:

    (i) Convicted young male and female offenders as well as those held on remand have historically been housed at the YTC and the Women's Prison.

    (ii) There was no legislation which prohibited this.

    (iii) The conditions of incarceration cannot negate the presumption of innocence before a judicial officer or jury. It is a separate and distinct issue which is related to the adjudication of guilt and innocence and not to the conditions of incarceration.

24. In all aspects YTC was a community residence. In the event that this court holds that it was not a community residence and that the conditions in which Brian was held do not equate with that of a community residence, then the only relief that he is entitled to are declarations of statutory breach.

25. In order to be entitled to damages, Brian and Sasha must identify a fundamental human right, demonstrate that this action could not properly be brought by proceedings other than invoking the Constitution, demonstrate that there has been a gross misuse of State power, and prove that the facts upon which the allegation of a breach of the fundamental human right is made has crossed the threshold required to establish the breach. Even so, a

declaration without more would suffice as a sufficient remedy to satisfy the breaches proved.

26. Brian and Sasha would not be entitled to damages for false imprisonment, wrongful detention or deprivation of liberty since they were charged with murder for which they were not entitled to bail. If the Court holds that the conditions of their incarceration constituted cruel and unusual treatment having regard to the conditions in which they were held at the YTC and the Women's Prison, then they would be entitled to a nominal sum.

27. The period for which Brian would be entitled to damages would be May 18, 2015 to June 1, 2016 when he was taken into the custody of the Children's Authority. The period for which Sasha would be entitled to damages would be May 18, 2015 to December 7, 2015 when she was transferred to St. Jude's School for Girls. The period for which Brain was kept at YTC upon the change in law regarding children in conflict with the law was 332 days and in the case of Sasha it was 227 days which she spent at the Women's Prison.

28. During their time at YTC and the Women's Prison they were in the company of other young persons who were on remand or who were convicted. Brian was placed in a secured area away from the St. Michael's general dormitory area and Sasha was placed in a secured area away from the adult female prisoners. They both had their own rooms, outfitted with a bed, toilet, face basin and desk and were under the supervision of more than one officer.

29. There was no evidence of any lack of good intention on the part of the State. When the Children's Community Residences, Foster Homes and Nurseries Act was proclaimed, the accompanying regulations were not yet in force. These regulations came into force on May 18, 2015. Because the regulations were not in force, there was no law in force which could properly guide the

licensing of a community residence. YTC is now designated a Child Rehabilitation Centre having regard to the Designation Order made on May 15, 2017.

30. In relation to the issue of costs, Mr. Hosein submitted that costs should be left within the remit of the court to be assessed. The assistance by either side for this unique case which arose due to new legislation surrounding facilities for remanded children should be considered. The court is well seised to appropriately determine whether in the interest of all the parties, costs should be awarded in light of the subject matter of the claim.

31. The subjects broached in these proceedings concern an area of high public importance and feature special circumstances all of which ought to factor in any determination of the costs to be paid. It was submitted that this was an appropriate case in which each party should bear its own costs. It cannot be said that the court was wrong to award 50% of the respondents' costs in light of the pre-action protocol breach.

SUBMISSIONS BY THE CHIEF MAGISTRATE

32. The Chief Magistrate conceded that the Women's Prison where Sasha was detained was not a community residence. However she submitted that YTC is presumptively a rehabilitation centre as defined in the Children's Community Residences, Foster Homes and Nurseries Act and therefore a community residence as defined under that Act and under the Children Act. Given that YTC is statutorily declared to be a rehabilitation centre and therefore a community residence, its shortcomings cannot be the basis for declaring that the order remanding Brian to be detained there was unlawful. Neither can the shortcomings of YTC be the basis for holding that the Chief Magistrate had

no jurisdiction to make such an order. The trial judge was wrong to find that Brian was not detained at a community residence. It follows that the order remanding him to YTC was lawful. This however, does not prevent consideration of whether his rights were infringed by the conditions under which he was being kept at the YTC.

33. Mr. Mendes submitted that it was impossible for the Chief Magistrate to comply with the mandate of section 54 of the Children Act since there were no licensed community residences in existence and the Chief Magistrate was bound in law not to grant them bail. It was submitted that the trial judge was wrong to find that there were community residences in existence at which Brian and Sasha could have been detained. This submission was based on the affidavit evidence of Ms. Christalle Gemon. Ms Gemon had been asked by the court to provide the names and locations of suitable community residences capable of complying with the terms and provisions of the Children Act. Ms. Gemon indicated that there were 49 community residences including two industrial schools namely St. Michael's School for Boys and St. Jude's School for Girls. She however concluded that there was no suitable community residence for the accommodation of Brian and Sasha. She made this determination based on the lack of security arrangements needed for the detention of young offenders charged with a crime, inadequate rehabilitation, social and educational programmes and in relation to St. Michaels, the ill treatment of residents. It was submitted that the evidence of Ms. Gemon could only have been construed as finding the opposite of what the trial judge had found.

34. Mr. Mendes added that the trial judge ignored the Chief Magistrate's evidence of the absence, to her knowledge, of any place other than YTC and the Women's Prison where Brian and Sasha could have been detained and that those places were the best and only options. The Chief Magistrate also

claimed to know that there were no community residences established, and this was consistent with the evidence given by Ms. Gemon.

35. Further submissions were made that the Children's Authority was not a community residence. It was a legal entity and not a physical place which could accommodate anyone. The functions of the Children's Authority did not permit it to establish community residences of its own or to take children charged with criminal offences into its custody. While the Children's Authority was empowered by section 34(1) to provide, equip and maintain community residences, this was only for accommodation of children in its care. This did not include children with criminal charges who were denied bail. There was no provision empowering the Children's Authority to establish community residences for the purpose of detaining young offenders.

36. Further, there was no evidence that the Children's Authority had established any community residences at which a child who had been denied bail could have been accommodated. The trial judge had no jurisdiction to commit Brian to the custody of the Children's Authority. The Children's Authority had no lawful authority to keep him. The Children's Authority had no disciplinary powers, and without an order of the court, it had no power to receive a child into its custody and deprive him of his liberty. In compliance with the court's order, the Children's Authority was obliged to find and secure premises and hire security to detain Brian who was the only resident on the premises. The only option available to the trial judge was to order, or receive an undertaking from the State, either to establish a community residence within a reasonable period of time, or in the interim, take such measures in relation to YTC or any other suitable accommodation which in the trial judge's view could have constituted compliance with Section 54 of the Children Act. The responsibility for the establishment of community residences it was submitted, was the State's and not that of the Children's Authority.

37. It was also submitted that Parliament could not have intended a remand order to be invalid when it was not possible to comply with sections 54 and 60 of the Children Act. A statutory provision which is impossible to be obeyed, cannot be breached. The cannon of construction *lex non cogit ad impossibilia* – the law does not compel the impossible, ought to apply. A failure to comply with sections 54 and 60 where compliance is impossible cannot logically impact on the decision not to grant bail. Where it is impossible to comply with these two sections of the Children's Act, the court would be precluded from mandating that they be remanded to a community residence, because its order would be futile.

38. It was contended that the orders remanding Sasha to the Women's Prison and Brian to the YTC were valid, despite the contrary commands contained in sections 54 and 60(1) of the Children Act. In the absence of community residences and a secure place to house female children on remand, other than at an adult prison, sections 54 and 60(1) could not have been complied with and did not render the orders invalid.

39. The Women's Prison it was submitted, is a prison primarily for adults and therefore cannot be considered a community residence. Even though Sasha was detained in an adult prison, this does not automatically lead to the conclusion that she was deprived of her liberty arbitrarily. While the conditions in which she was detained were not ideal, the conditions cannot be described as "unduly harsh" or that there was some "quite fundamental shortcoming". Although she was kept in an adult prison, concerted efforts were instituted to ensure her continued educational, social and moral development. She was regularly counselled by a forensic psychologist and there had not been any complaint of any mental injury. While the conditions

in which she was kept were not the most appropriate, they were nevertheless appropriate in all the circumstances.

40. The conditions to which Brian and Sasha were subjected did not reach the necessary minimum level of severity. There had been no complaint or evidence of physical or mental injury. There was no objective to humiliate either child. Measures were put in place to cater for their ages and to ensure they had continued intellectual and social development. The trial judge was therefore wrong to find that they were subjected to cruel and unusual treatment or punishment.

41. The mere failure of the Executive to carry out the law, does not amount to a violation of the right to protection of the law. Some element of arbitrariness, fundamental unfairness, irrationality or unreasonableness is required before a breach of the law is elevated to a constitutional violation. There were no such aggravating factors in this case. There had also been no suggestion of bad faith on the part of the Government or that access to court for a remedy would not prove to be effective, prompt and efficacious.

42. The right claimed in respect of Brian and Sasha was the right to protection of the law. The applicable law in this case was the Children Act which took effect upon its proclamation. It was submitted that until then, there was no law from which protection could have been sought. The trial judge was plainly wrong in finding that the children's right to the protection of the law was breached by the failure to establish community residences before the promulgation of the Act. The only viable complaint was the failure of the Executive to establish community residences immediately after the Children Act came into force after proclamation in May, 2015, and not before Brian and Sasha appeared before the Chief Magistrate to be remanded.

43. Submissions were also made that there is no requirement in the Constitution or in the Children Act that children on remand are to be treated any differently to children who had been convicted of offences in so far as conditions of detention were concerned. The fact that Brian was subjected to the same conditions as convicted children did not constitute a violation of the presumption of innocence. The presumption of innocence does not guarantee the right to any particular treatment in detention while awaiting such trial.

SUBMISSIONS BY THE RESPONDENTS

44. It was submitted on behalf of Brian and Sasha that the decision of the Chief Magistrate to remand them to the YTC and Women's Prison respectively, was unlawful and illegal and that the Chief Magistrate had no jurisdiction, power or authority in law to so order.

45. Submissions were made that the YTC at which Brian was detained between July 29, 2015 and April 14, 2016 was not a community residence as defined by the Children's Community Residences, Foster Homes and Nurseries Act. The Adult Women's Prison at which Sasha was detained between the period July 29, 2015 to September 16, 2015, was also not a community residence as defined under this Act.

46. It was contended that the trial judge was plainly right in finding that the YTC and the Women's Prison were not community residences and the analysis set out in the judgment cannot properly be challenged. The assessment reports which were introduced through the affidavit of Ms. Gemon made it clear that there was no suitable community residence or home for the accommodation of Brian. The assessment of the St. Michael's Home for Boys, an institution which was seen as an alternative to the YTC at the time, was found to meet

only 6 out of 52 requirements for the issuance of a license. No formal assessment of the YTC was done.

47. It was also submitted that Brian and Sasha were entitled to the protection afforded to them by sections 54 and 60 of the Children's Act. Sasha was denied her rights to the protection of the law because she was detained at an institution other than a community residence that is, she was detained in an adult prison. She was also allowed to associate with adult prisoners without the express permission of the court. Brian on the other hand was denied his rights to the protection of the law because he was detained on remand at an institution other than a community residence.

48. It was further submitted that their detention at these institutions between the aforementioned dates was unlawful and illegal. The detention of Brian at YTC violated his constitutional rights under sections 4(a), 4(b), 5(2)(b) and 5(2)(f)(i) of the Constitution. The failure of the State to provide community residences upon the coming into force of the children legislation to which Brian and Sasha could have been remanded pending the hearing and determination of the criminal proceedings, violated their constitutional rights under section 4(a), 4(b) and 5(2)(b) of the Constitution. The conditions under which Sasha was detained at the Women's Prison violated her constitutional rights under section 4(b) of the Constitution.

49. Section 4(a) of the Constitution expressly permits the State to act in contravention of an individual's right to liberty, provided such contravention occurs by due process of law. The concept of due process under section 4(a) it was submitted, is equivalent to the concept of protection of the law in section 4(b). Due process and protection of the law cannot be overridden by the action or inaction of the Executive. Once section 4(a) is triggered, in this case by the deprivation of the liberty of Brian and Sasha, the court must

determine whether such deprivation has occurred by the due process of law. The manner and method prescribed by the law for the deprivation of their liberty was not followed. Neither of them were detained at a community residence during the relevant period. Their deprivation of liberty was carried out in contravention of the children legislation and therefore did not occur by due process of law. The failure of the Executive to properly implement the terms of the children legislation did not cause the deprivation of liberty of Brian and Sasha. The objection is that the deprivation occurred in a manner and means different from that prescribed by law. That departure operated to their detriment and thus they are entitled to bring a claim in respect of the breach of their fundamental rights.

50. It was submitted that the decisions of the European Court of Human Rights in the cases of **Pretty v. The UK** 35 EHRR 1 and **A v. UK** 27 EHRR 611, offer useful guidance to this court when considering whether the treatment of Sasha amounted to cruel or unusual punishment. A decision to send any child with the characteristics of Sasha to the Women's Prison would likely amount to cruel and unusual punishment. This is an institution designed to house adults who have been convicted of criminal offences. Any young person incarcerated in those circumstances would therefore feel the effect of such treatment in a disproportionately acute manner.

51. It was highlighted that the State advanced an argument that the language of section 5(2)(b) of the Constitution must be read conjunctively such that a punishment is unconstitutional only where it is both cruel and unusual. It was however submitted that it would be absurd and fundamentally objectionable if a cruel form of punishment became constitutional by virtue only of the fact that it was inflicted in a manner so widespread that it could not be described as unusual.

52. It was also contended that Brian was entitled to the sum of $150,000.00 in damages and that Sasha was entitled to the sum of $300,000.00 in damages. Brian was entitled to an order that he be immediately placed in a suitable community residence to be determined by the Children's Authority, alternatively that he be placed in the custody of the Children's Authority until further order.

53. It was submitted, however, that the trial judge erred in concluding that the State should pay only 50% of the assessed costs of Brian and Sasha. The court erred in making this disproportionate reduction in costs because Brian and Sasha failed to issue pre-action letters. Having regard to the adversarial approach taken by the appellants, it is unlikely this would have made any difference. Judicial intervention was necessary in light of the claim for certiorari and declaratory relief. The fact that Brian and Sasha failed to secure their release was not sufficient to justify a 50% reduction in their costs. While the trial judge was right to take into account the public importance of this litigation, he erred in using this as a reason to justify the deprivation of costs in such a disproportionate manner. The trial judge failed to consider that the appellants were represented by powerful lawyers. Brian and Sasha were unlikely to have access to such resources and it was unfair to deprive them of their legal costs given that their claim was successful. Having regard to the novelty, complexity and importance of the issues raised in this case the court ought to have awarded them their full costs.

THE ISSUES

54. The issues which arise for determination may be summarized as follows:

    (i) Is the YTC a "community residence" within the meaning ascribed to the term in the legislation?

(ii) Is the Women's Prison at Golden Grove a "community residence"?

(iii) Assuming that the answer to (i) and (ii) are in the negative, were the orders of the Chief Magistrate detaining Brian and Sasha at these institutions, unlawful?

(iv) Did the detention of Brian at YTC constitute a breach of his right not to be deprived of his liberty except by due process of law as guaranteed by Section 4(a) of the Constitution?

(v) Did the detention of Sasha at the Women's Prison constitute a breach of her right not to be deprived of her liberty except by due process of law as guaranteed by section 4(a) of the Constitution?

(vi) Did the detention of Brian at YTC constitute a breach of his right to protection of law as guaranteed by section 4(b) of the Constitution?

(vii) Did the detention of Sasha at the Women's Prison constitute a breach of her right to the protection of the law as guaranteed by section 4(b) of the Constitution?

(viii) Was Brian's right not to be subjected to cruel and unusual punishment under section 5(2)(b) of the Constitution violated by the conditions under which he was detained at YTC?

(ix) Was Sasha's right not to be subjected to cruel and unusual treatment under section 5(2)(b) of the Constitution, violated by the conditions under which she was detained at the Women's Prison?

(x) Was there a breach of Brian's and Sasha's right under section 5(2)(f)(i), to be presumed innocent until proven guilty?

(xi) Assuming that the orders of the Chief Magistrate were unlawful, what is the appropriate remedy?

Issue (i): Is the YTC a "community residence"?

55. Section 3 of the Children Act defines "child" as a person under the age of 18 years. Section 54(1) of the Children Act provides for the accommodation of child offenders on remand or committed for trial:

> *"54. (1) A Court, on remanding or committing for trial a child who is not released on bail, shall order that the child be placed in the custody of a Community Residence named in the Order for the period for which he is remanded or until he is brought before the Court."*

56. The definition of "community residence" is to be gleaned from several legislative provisions. Section 2 of the Community Residences, Foster Care and Nurseries Act provides:

(i) "Children's Home" means a residence for the care and rehabilitation of children;

(ii) "Community Residence" means a Children's home or rehabilitation centre; and

(iii) "Rehabilitation Centre" means a residence for the rehabilitation of youthful offenders, in which youthful offenders are lodged, clothed, and fed as well as taught.

57. Section 64(1) of the Children Act provides:

"64. (1) A Court may order a child offender between the ages of ten and under eighteen years be placed in a Rehabilitation Centre until the offender attains the age of eighteen years."

58. Mr. Mendes for the Chief Magistrate, has submitted that the legislation virtually deems the YTC to be a rehabilitation centre, therefore bringing it within the definition of "community residence" under section 2 of the Community Residences Act.

59. The YTC was established by the Young Offenders Detention Act Chapter 13:05. Section 2(1) of the Act provides:

"2. (1) It shall be lawful for the Minister by Proclamation to establish an Industrial Institution (hereinafter referred to as "the Institution") in which young offenders whilst detained may be given such industrial training and other instruction, and be subject to such disciplinary and moral influences as will conduce to their reformation and the prevention of crime."*

60. The YTC at Golden Grove was proclaimed an "Industrial Institution" by Government Notice No. 85 of 1949.

61. Mr. Mendes submitted that the YTC is "presumptively" a "rehabilitation centre" having regard to the stated objective of the establishment of Industrial Institutions under section 2(1) of the Youth Offenders Detention Act, to give youthful offenders industrial training and other instruction, and to provide "disciplinary and moral influences as will conduce to their

reformation". The stated objective of the establishment of rehabilitation centres under the Children's Community Residences, Foster Care and Nurseries Act is the rehabilitation of youthful offenders. In Mr. Mendes' submission, since the YTC is presumptively a rehabilitation centre, it follows that it is presumptively a "community residence" as defined by section 2 of the the Children's Community Residences, Foster Care and Nurseries Act.

62. Mr. Mendes further submitted that this presumption is confirmed by section 83(a)(ii) of the Children Act which provides for the placement of a child who has escaped from a community residence "to the Rehabilitation Centre as established by the Young Offenders Detention Act for a term of three months". This, in Mr. Mendes' submission, confirms that the legislature considered the YTC established by the Young Offenders Detention Act to be a rehabilitation centre.

63. Further reliance was placed on section 54 of the Children's Community Residences, Foster Care and Nurseries Act, which provides that a reference to an industrial school in any written law is to be read as a reference to a rehabilitation centre.

64. Mr. Mendes referred us to the regulations made under section 5 of the Young Offenders Detention Act, as support for his submission that the YTC is a rehabilitation centre. The regulations provide for, inter alia:

- The appointment of a Medical Officer to be responsible for the hygiene of the institution and for the medical treatment of the inmates and staff (Regulation 16).
- The establishment of an infirmary (Regulation 22).

- The appointment of the educational instructors (Regulation 26) and an assistant instructor who will be responsible for the management of the library for the use of the inmates (Regulation 28).
- Visit by ministers of religion and the provision of religious instruction (Regulations 31-36).
- Categorisation of inmates into various grades (primarily on the basis of conduct and work), and the movement of inmates from one grade to another on the basis of a merit system (Regulations 37-54).

65. Both Mr. Mendes and Mr. Hosein have contended that although the YTC was not licensed as a community residence under section 3(2) of the Children's Community Residences, Foster Care and Nurseries Act, the YTC in substance operated as a facility for the rehabilitation of young offenders. Both attorneys made extensive reference to the affidavit of Elvin Scanterbury, Acting Superintendent of YTC, who gave evidence of the operations, treatment and training offered at the YTC. The relevant evidence may be summarised as follows:

- The YTC comprises 15 dormitories, a government school, a gymnasium, a cultural room, an information technology unit, a house of prayer, an agricultural area, an infirmary unit and a welfare department.
- The YTC has as part of its full time staff, a qualified psychologist and welfare officers who are trained social workers and a counsellor who visits twice a week.
- The YTC government school is headed by a Director of Education who is the principal, six contract teachers and a number of volunteer teachers.
- The school provides literacy programmes all the way up to CAPE level.
- YTC has technical-vocational programmes such as radio broadcasting, woodwork, welding, a food and beverage programme, as well as an Adolescent Development Programme.

- Remanded boys are enrolled in school, participate in sports, music, trade and several development activities.
- Remanded boys have access to educational facilities, medical care, individual counselling, welfare services and extra-curricular activities such as football and draughts.
- Remanded boys are exposed to interpersonal skills training via the Adolescent Development Programme and the Life Skills Programme.
- Remanded boys who stay more than one year are enrolled in vocational classes, for example, the Youth Training and Employment Programme, food preparation, woodwork, radio broadcasting, tailoring and welding.

66. In response, Mr. Ramlogan for the respondents, submitted that the contention of the appellants that the YTC operates de facto as a community residence ought to be rejected. He submits, inter alia:

(i) The YTC has not been licensed pursuant to section 3(2) of the Community Residences Act.

(ii) The regulatory framework of the YTC is plainly different to that of a community residence.

67. The trial judge verbalised his concept of what a community residence should be in paragraph 18 of his judgment:

> *"18. The definition of Community Residence includes a "rehabilitation centre" which is defined as "a residence for the rehabilitation of youth offenders in which youth offenders are lodged, clothed, fed as well as taught". It is no answer for the State to point to both the YTC and the Women's Prison to say that it is a place where youth*

offenders are lodged, clothed, fed and taught without reference to its character and purpose. A rehabilitation centre firstly and primarily, is as the definition states, "a residence". A residence is not a detention centre, nor is it a prison. It is a home. A place of rehabilitation is a place of care and nurturing where the primary concern is the best interests of the child where that child is shown empathy, care, understanding and love. Such an interpretation is consistent with the internal and external context of the legislation, the international Page 13 of 150 instruments and corpus of human or child rights law which create a superstructure for the protection of our Nation's children. In treating such juveniles in trouble with the law, it is recognized that they are from troubled homes and backgrounds. Therefore, their "biological residence" is being replaced by a "Community Residence" where, in such a home, a multifarious approach is adopted to treat and rehabilitate. They are not objects to whom people dole out treatment, but persons deserving of protection and individualized care to give effect to their sense of dignity and self-worth. Reformation is a related but different exercise and the legislators were careful to avoid the use of that word, which would have permitted practices that are not consistent with restorative rehabilitation approaches."

68. Against this concept the trial judge found that the YTC fell short in a number of respects. In paragraph 20 he sets out the perceived shortcomings:

- The YTC holds the characteristics of a prison or detention centre: a euphemism for a boys prison.
- It was not "demonstrated that the YTC's primary goal is the creation of a residence designed to rehabilitate, to treat the individual needs of BS (Brian) consistent with his best interest as distinct from a place of detention where he participates in a regime of educational and vocational activities".
- There was no manual or policy document produced to explain the rehabilitation policy of the YTC.
- The manual or policy document is in fact the Young Offenders Detention Act and the Regulations.
- YTC is governed by the Prison Rules. It maintains a disciplinary structure which punishes boys in a regime which includes solitary confinement, corporal punishment and restriction of meals – punishments which are expressly prohibited under the children legislation.
- There is no staff suitably qualified to deal with the boys' psychological and behavioural challenges.
- There are no individualised treatment plans for the welfare and best interest of Brian. There is a "cookie cutter" approach of submitting all the boys to a regime of standard education and vocational study without any emphasis on the assessment of the child's individual challenges.

69. The judge examined the regulations made under section 5 of the Young Offenders Detention Act. He found that:

- The regulations provide a regime under which the boys are seen as "inmates" serving a term of punishment by labour. He observed that the YTC falls within the ambit of the Prison Service, catering for young

offenders between the ages of 16 to 18 years. He identified some of the features which made the YTC far removed from a rehabilitation centre as contemplated by the Community Residences Act.

- The Young Offenders Detention Act stipulates that the YTC is intended for the detention and reformation of young offenders.
- The treatment received is not rehabilitative or restorative. The purpose is first and foremost detention. The provision of instruction is discretionary. It is along the lines of a retributive rather than a restorative approach of giving training, instruction, disciplinary and moral influence to reform the detainee to prevent crime.
- The Prisons Act applies to the YTC, giving the officers power to retaliate against inmates with arms.
- Treatment of children in the regulations appears regimented placing them in grades with an emphasis on manual labour.
- The approach does not cater for children's individual needs.
- The system reflects a "paramilitary" administrative regimen to enforce rules and discipline in an authoritative style consistent with a prison or detention centre.
- There is no distinction in the affidavit of Ag. Supt. Scanterbury between boys on remand and boys convicted of crimes, or those over the age of 18 years.

70. Mr. Mendes has submitted that the trial judge has presented a vision of what an ideal community residence for the detention of children should look like. The reality is that the law provides for the detention of children charged or convicted of criminal offences at community residences. It follows that there must be security arrangements that ensure that the children do no escape. There must be restriction of freedom of movement, disciplinary measures, and a system of rules that must be

obeyed. In other words, there must be a certain degree of regimentation, in such an organisation. This does not render it a paramilitary organisation.

71. Mr. Mendes further complained that the judge seems to have imported into the legislation provisions which are not there. There is no provision in the legislation for the hiring of trained psychologists, or for a manual or policy document setting out the rehabilitative goals and objectives of a community residence, nor is there a requirement that individualised plans must be devised for the treatment of each child.

72. This court agrees with Mr. Mendes that the judge appears to have set out an idealised vision of what a community residence should be. The court also agrees that the trial judge has imported into the legislation, requirements that have not been expressly included.

73. However, having considered the submissions of all the parties, and the reasons of the trial judge, this court is unable to conclude that the judge was wrong in finding that the YTC was not a community residence as envisaged by the legislation.

74. In the first place the Young Offenders Detention Act provides in section 7(1) for the detention of a person between the ages of 16 and 18 years who has been convicted of a criminal offence, for a period of not less than 3 or more than 4 years. Clearly the legislature did not intend that persons who are not convicted, and who are either over 18 years or under the age of 16 years, should be detained at the institution. In addition, the regulations made under section 5 of the Act are quite different in character from the Children's Community Residences Regulations 2014. The Young Offenders (Male) Detention Regulations set out a regimented

system of grading the "inmates" into Conduct, Penal, Discharge and Work Grades. Inmates in the Penal Grade are separated from "well-conducted inmates" and are made to perform "useful work of a hard and laborious" nature for which no payment is made. Work grades are divided into 5 classes of Tradesmen and 5 classes of Field Labourers. While the regulations provide for religious and education instruction for the "inmates" the flavour and ethos of the regulations is that of a rigid and regimented system, designed to detain, discipline and punish young men who have been convicted of non-capital criminal offences.

75. Significantly, the regulations provide for punishment to be awarded by the Inspector, Commissioner or Assistant Commissioner of Prisons. These punishments include corporal punishment with a rod, solitary confinement on a diet of bread only, separation from "well-conducted" inmates and reduction to penal grade work. In addition, under the Young Offenders Detention Act section 13 of the Prisons Act apply to the institution as if it were a prison within the meaning of the Prison Act. This means that a prison officer may use firearms or any other "mode of force" for the purpose of prevention, escape, violent assault or suppressing mutiny, without being responsible for the consequences of such use.

76. It must be noted that section 15 of the Children's Community Residences Regulations 2014, contains an absolute prohibition against corporal punishment and solitary confinement.

77. An important factor to consider is the requirement contained in section 3(2) of the Community Residences Act that no child is to be placed at a community residence unless a residence licence has been issued by the Children's Authority in respect of such residence. The regulations provide a detailed code for the issue of such a licence including such matters as

lighting, ventilation, furnishings, structural repair, cleanliness, laundry, amenities for sleep and study, privacy in the bathrooms, potable water, safe handling of food and daily sanitization of the kitchen. There is no requirement for licencing of an industrial institution under the Young Offenders Detention Act. Nor is there any provision in the Act or regulations setting out a minimum standard for the physical amenities and facilities to be afforded to the inmates of these institutions.

78. For these reasons, this court is of the view that the trial judge was correct in finding that the YTC is not a community residence within the meaning of the children legislation.

Issue (ii) – Is the Women's Prison at Golden Grove a community residence?

79. Commendably in our view, Mr. Mendes, for the Chief Magistrate, has conceded that the Women's Prison is not a community residence. Mr. Hosein, for the Attorney General and the Commissioner of Prisons, does not concede the issue. He contends that there are no facilities equivalent to the YTC to house female children in conflict with the law, and Sasha was housed at "juvenile safe" facilities at the Women's Prison.

80. At the time of her arrival at the Women's Prison, Sasha was housed at the same section as the Juvenile Dormitory with other juveniles. No adult prisoners were housed there. In June, 2014, she was moved to the Juvenile Dormitory. On July 3, 2015, Sasha was moved to Division X. No adults were housed at the Juvenile Dormitory or at Division X. Admittedly, Sasha had limited contact with adult inmates. She was under the constant supervision of a prison officer, whose responsibility was to look after her safety and welfare, to ensure that she received training and counselling and to limit her interaction with adult inmates. After she was moved to

Division X in September, 2015, interaction with adult inmates was reduced even further. Adult inmates did not dine with the juveniles. In September, 2015, the juveniles dined in their cells at Division X. Sasha attended school, and enjoyed daily activities involving music, craft, using the computer and watching movies. She attended religious services and counselling sessions. At Division X, Sasha had exclusive access to a shower and toilet facilities. She was closely monitored during classes when adults were present, and was not allowed to sit at the same desk with an adult. During religious services she had no contact with adults. She had regular weekly sessions with a Forensic Psychologist, who deposed that Sasha had adjusted well to the environment.

81. The evidence led on behalf of the Attorney General and the Commissioner of Prisons, seeks to establish that Sasha was well treated at the Women's Prison, and every effort was made to keep her isolated from the adult population, and to provide for her physical, psychological and religious needs. Assuming this evidence to be true, it is laudable that such efforts were made to provide for her safety and wellbeing. However, there can be no denial that Sasha was detained at the Women's Prison at Golden Grove which is expressly recognised as a prison in sections 3 of the Prisons Act Chapter 13:01. It also cannot be disputed that the prison at Golden Grove is a facility at which adult prisoners are housed.

82. Section 60(1) of the Children Act expressly prohibits a court from ordering the detention of a child at an adult prison. However well-intentioned the prison officers at the Women's Prison may have been, there is no escaping the absolute prohibition contained in section 60(1). By no stretch of the imagination can a facility designed for the detention of adult prisoners, be

construed as falling within the definition of community residence as set out in the Community Residences Act.

83. In an earlier ruling in **Sasha Seepersad v. The Attorney General & Ors.** Civil App. No 244 of 2015, the Court of Appeal acknowledged that section 60(1) of the Children Act prohibited the detention of Sasha at an adult prison (at paragraph 69).

84. The trial judge was correct in holding that the Women's Prison at Golden Grove is not a community residence.

Issue (iii) – Were the orders for the detention of Brian to the YTC, and Sasha at the Women's Prison, unlawful?

85. It was the evidence of Christalle Gemon, Director of Care, Legal and Regulatory Services of the Children's Authority, that at the time of the proclamation or partial proclamation of the children legislation there were 49 community residences, including 2 industrial schools (St. Michael's School for Boys and St Jude's School for Girls) which were to become rehabilitation centres. Ms. Gemon noted that the licensing requirements for rehabilitation centres are more stringent having regard to the fact that the children are not allowed to leave the centres. There is therefore a need for increased security and supervision of the children to avoid instances of sexual abuse and assault, to prevent access to the premises by unauthorised persons, and to constantly monitor children for signs of hostility, depression and other behaviours.

86. In August, 2015, the Authority carried out an assessment of conditions at St. Michael's School for Boys. The resulting report revealed that St. Michael's was in compliance with only 6 of the 52 requirements for the

issuance of a licence as a rehabilitation centre. The report noted that the areas of non-conformity included inadequate infrastructure, lack of suitable facilities for recreation and study, high staff absenteeism and poor supervision of residents, lack of surveillance monitoring systems, ill treatment and verbal and physical abuse of residents, poor security and a high rate of absconding.

87. The Authority also visited the YTC in August, 2015. Ms. Gemon interviewed Ag. Supt. Scanterbury, who informed her that the level of security at YTC was adequate. However, residents complained of being disciplined for failing to adhere to the rules. Ms. Gemon further noted that the dormitories at YTC were generally in a state of disrepair, with unsanitary toilet and bathroom conditions.

88. Ms. Gemon further deposed that the Authority contacted all 47 community residences, and none of them was found to meet the minimum requirements for a rehabilitation centre, and in many cases there were age and gender restrictions that would not have accommodated Brian. The Manager of St. Michael's, indicated that he would have been willing to receive Brian. However, he was unable to do so having regard to the fact that Brian was a high risk resident and the perimeter fence was in need of repair. Three other homes indicated their willingness to accommodate Brian, however they did not meet the criteria for rehabilitation centres and were found to be unsuitable.

89. Based on the findings and investigations conducted by the Authority, the Authority concluded that there was no suitable community residence to accommodate Brian at the material time.

90. The Authority carried out a similar exercise with respect to accommodation for Sasha. The Authority carried out an assessment of conditions at St. Jude's School for Girls. It found that there was compliance with 15 out of 52 requirements for the issue of a licence. Among the areas of deficiency were:

- the ratio of staff to residents was not optimal, resulting in a high incidence of absconding,
- inadequate security, surveillance and patrols on the compound,
- inadequate rehabilitation and special education programmes,
- available staff are not trained to care for high risk residents and
- the dormitories are overcrowded and the school was unable to provide separate accommodation for Sasha.

91. Based on its investigation, the Authority expressed the view that there was no suitable community residence for the accommodation of Sasha.

92. The trial judge accepted Ms. Gemon's evidence that as at May 18, 2015, there were 48 (Ms. Gemon in fact said 49) community residences in existence. He did not question the basis of Ms. Gemon's evidence on this issue. Significantly, Ms. Gemon did not state anywhere in her evidence that any of these residences had been licensed in accordance with section 3(2) of the Community Residences Act. In fact the tenor of her evidence appears to suggest that none of these residences had been so licensed. In fact, it is clear from her evidence that the proposed rehabilitation centres (St. Michael's and St. Jude's) at which child offenders were to be housed, fell far short of the minimum licensing requirements.

93. Ms. Gemon's evidence that the Authority's findings indicated that there were no suitable community residences to accommodate Brian and Sasha,

does not appear to have resonated with the judge, since in paragraph 233 of his judgment he criticises the Chief Magistrate for not remanding the children to St. Michael's or St. Jude's, although she was aware of these homes, but having made her own assessment of these homes, she remanded them to institutions which were plainly not community residences.

94. The judge appears to have taken the view that the issue of licensing or suitability was not relevant to the Chief Magistrate's decision as to where to remand the children. The law requires that the children be remanded to a community residence. The issue of licensing was a matter to be determined by the Authority, and Parliament had clearly intended a grace period to allow the residences to come up to an appropriate standard at which time the Authority would consider the grant of licences.

95. The Chief Magistrate did not have the benefit of Ms. Gemon's evidence. As far as she knew, there were then no community residences in existence. She considered that she was bound in law not to release Brian on bail, since he was charged with a capital offence. She remanded him to St. Michael's at YTC, a facility used to house young male offenders in need of stricter supervision. The Chief Magistrate was not cross-examined. There was accordingly no challenge to her belief that there were no community residences in existence, or to her bona fides in deciding that St. Michael's at YTC was her best option.

96. The Chief Magistrate followed a similar process in remanding Sasha to the Women's Prison. Sasha was also charged with a non-bailable offence. The Chief Magistrate was not aware of any holding facility in the country for female children on remand. She was aware that St Jude's does not have sufficient security arrangements in place to house girls charged with

criminal offences. This is in fact supported by the evidence of Ms. Gemon, who also concluded that St. Jude's was unsuitable to house young female offenders. She remanded Sasha to the Women's Prison as it was the best and only option available to her. It was customary to remand female juveniles to the Women's Prison.

97. The Chief Magistrate found herself in an unenviable position. She is mandated by the Bail Act to refuse bail to persons charged with murder. But she is also mandated by section 54(1) of the Children Act to remand the children to a community residence. As far as she was aware at the time of remand, there were no community residences in existence. Exercising what she thought was the best options available to her, she remanded Brian and Sasha to St Michael's at YTC, and to the Women's Prison respectively.

98. Curiously, faced with the evidence of Ms Gemon that there were no suitable community residences to accommodate Brian and Sasha, the trial judge found himself in a similar position to that of the Chief Magistrate. He found a way out of the dilemma by ordering that Brian be placed in the custody of the Children's Authority, which is clearly not a community residence. As submitted by Mr Mendes, the Authority is a legal entity created by the Act to carry out certain functions. It is not a physical place that can accommodate children. While the Authority is mandated by section 5(1)(a) to provide care, protection and rehabilitation of children, it is not empowered by the Children Act to establish community residences for the purpose of detaining child offenders. This is clearly the duty of the State. Accordingly, this court holds that the trial judge was wrong to order that Brian be placed in the custody of the Children Authority. In our view the appropriate order should have been for the State to provide a suitable community residence to accommodate Brian, within a reasonable time.

99. Mr Mendes contended that the orders remanding Brian and Sasha to the YTC and the Women's Prison are not invalid, since the Chief Magistrate was placed in a position where it was impossible to comply with section 54(1) and 60 of the Children's Act. The Chief Magistrate had no choice but to remand them to the most suitable places available. Mr Mendes prays in aid the cannon of construction *"lex non cogit ad impossibilia"* – the law does not compel the impossible. In support of this proposition Mr Mendes referred us to **R (on the application of Warden and Fellows Winchester College) v. Hampshire County Council** [2009] 1 WLR 138 at 152, **Mayer v. Harding** (1867) LR 2 QB 410 and **Finney v. Godfrey** (1870) LR 9 Eq. 356.

100. The proposition is an attractive one, which accords with common sense. Where a court is faced with a situation where it is not possible to comply with two conflicting statutory mandates, it must do the best that it can in the circumstances. The Chief Magistrate found herself in a position where one statute gave her no discretion to grant bail, but another statute mandated her to place the child offenders in an institution which, as far as she knew, did not exist. Having considered her options she did the best that she believed she could do in the circumstances.

101. The inescapable fact though is that in making the orders for remand she was plainly contravening the express provisions of sections 54(1) and 60 of the Children's Act. While the court is not unmindful of or unsympathetic to her position, the contravention of these provisions plainly renders her orders unlawful. We shall consider the consequences of this finding later in this judgment.

Issue (iv) & Issue (v) – Was there a breach of due process as provided by section 4(a) of the Constitution?

102. Section 4(a) of the Constitution guarantees the right of the individual to liberty, and the right not to be deprived thereof except by due process of law.

103. The respondents allege that they have been deprived of their liberty without due process of law. The argument is syllogistic:

(i) The children are not to be deprived of their liberty except by due process of law.

(ii) Due process requires that deprivation of their liberty may be affected only by placing them in a community residence.

(iii) Since they were not placed in a community residence, it follows that they were deprived of their liberty without due process.

104. It is important at this stage to recognise two basic points. The first is that the children were charged with murder, which is a non-bailable offence. The Chief Magistrate had no choice but to remand them in custody. The deprivation of their liberty was a decision required by law. The loss of liberty was not caused by any arbitrary act of the Chief Magistrate or the State. The second point is that there is no constitutional right to be detained in any particular place. Section 54 of the Children Act specifies that children who are not released on bail must be placed in the custody of a community residence. The respondents' case appears to equate the right to be placed in a community residence with the right to due process. It is therefore important to examine the concept of due process in order to see whether the detention of a child at a particular place is part of his right to due process.

105. In **Lasalle v. A.G.** [1971] 18 WIR 379 at 391G, Phillips JA expressed his view of what the concept of due process of law means:

> "*The concept of "due process of law" is the antithesis of arbitrary infringement of the individual's right to personal liberty; it asserts his "right to a free trial, to a pure and unbought measure of justice." While it is not desirable and, indeed, may not be possible to formulate an exhaustive definition of the expression, it seems to me that, as applied to the criminal law (in which category I include offences against military law), it connotes adherence, inter alia, to the following fundamental principles:*
>
> *(i) reasonableness and certainty in the definition of criminal offences;*
>
> *(ii) trial by an independent and impartial tribunal;*
>
> *(iii) observance of the rules of natural justice.*"

106. In **Maharaj v. AG of T & T (No. 2)** [1978] 2 All ER 670 at 679F, Lord Diplock gave his opinion of the kind of judicial error that would give rise to an infringement of the right not to be deprived of liberty except by due process of law under section 1(a) (now section 4(a)) of the Constitution:

> "*In the first place, no human right or fundamental freedom recognised by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. When there is no higher court to appeal to then none can say that there was error. The fundamental*

human right is not to a legal system that is infalliable but to one that is fair."

107. In **Thomas & Anor. v. Baptiste & Ors.** [1998] 54 WIR 387 at 421 a, Lord Millette considered the concept of due process:

> "*The 'due process' clause requires the process to be judicial; but it also requires it to be 'due'. In their lordships' view 'due process of law' is a compendious expression in which the word 'law' does not refer to any particular law and is not a synonym for common law or statute. Rather, it invokes the concept of the rule of law itself and the universally accepted standards of justice observed by civilised nations which observe the rule of law; see the illuminating judgment of Phillips JA in Lassalle v Attorney-General (1971) 18 WIR 379, from which their lordships have derived much assistance.*
>
> *The clause thus gives constitutional protection to the concept of procedural fairness. Their lordships respectfully adopt the observation of Holmes J in Frank v Mangum, 237 US 309 (1915) at page 347:*
>
> > *'Whatever disagreement there may be as to the scope of the phrase "due process of law", there can be no doubt that it embraces the fundamental concept of a fair trial, with opportunity to be heard.'"*

108. In **The State v. Boyce** [2006] 68 WIR 437, Lord Hoffman considered the meaning of the term "due process", in the context of an accused person

having been acquitted on a no case submission being exposed to a second trial pursuant to a statutory right of appeal given to the State to appeal the acquittal. The respondent contended that the possibility of such a trial amounted to a denial of the respondent's right to due access. Lord Hoffman rejected the argument at page 444:

> "*[13] This proposition was skilfully and persuasively deployed before the Board by Mr Hudson-Phillips QC, but their lordships think that it is wrong and that it derives plausibility only from an ambiguity in the term 'due process'. In one sense, to say that an accused person is entitled to due process of law means that he is entitled to be tried according to law. In this sense, the concept of due process incorporates observance of all the mandatory requirements of criminal procedure, whatever they may be. If unanimity is required for a verdict of a jury, a conviction by a majority would not be in accordance with due process of law. If the accused is entitled to raise a defence of alibi without any prior notice, a conviction after the judge directed the jury to ignore such a defence because it had not been mentioned until the accused made a statement from the dock would not be in accordance with due process of law.*
>
> *[14] But 'due process of law' also has a narrower constitutional meaning, namely those fundamental principles which are necessary for a fair system of justice. Thus it is a fundamental principle that the accused should be heard in his own defence and be entitled to call*

witnesses. But that does not mean that he should necessarily be entitled to raise an alibi defence or call alibi witnesses without having given prior notice to the prosecution. A change in the law which requires him to give such notice is a change in what would count as due process of law in the broader sense. It does not however mean that he has been deprived of his constitutional right to due process of law in the narrower sense. Lord Millett made this point in Thomas v Baptiste (1999) 54 WIR at p 415, when he said (at pp 421 and 423) that the term 'due process' in the Constitution –

> *'does not refer to any particular law and is not a synonym for common law or statute. Rather, it invokes the concept of the rule of law itself and the universally accepted standards of justice observed by civilised nations which observe the rule of law … It does not guarantee the particular forms of legal procedure existing when the Constitution came into force; the content of the clause is not immutably fixed at that date.'"*

109. The principles that may be gleaned from the above cited dicta are:

(i) The breach of the due process of law requirement involves an arbitrary infringement of the individual's right to liberty;

(ii) Due process requires a trial by an independent and impartial tribunal;

(iii) Due process requires observance of the rules of natural justice;

(iv) No fundamental human right is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law. The remedy for this kind of error is to appeal to a higher court;

(v) The fundamental human right is not to a legal system that is infallible but to one that is fair;

(vi) Due process of law invokes the concept of the rule of law and the universally accepted standards of justice observed by civilised nations which observe the rule of law;

(vii) The due process clause gives constitutional protection to the concept of procedural fairness;

(viii) While the due process of law incorporates observance of all the mandatory requirements of criminal procedure, it also has a narrower constitutional meaning, namely those fundamental principles which are necessary for a fair system of justice.

110. In so far as the Chief Magistrate is concerned, there is no issue of arbitrary or high-handed action on her part. As far as she was aware there were no community residences in existence to which she could remand the children. She had no discretion to grant bail or to release the children into the care of their mother. She considered the possibilities which were available to her, and eventually remanded Brian to St Michael's at YTC, and Sasha to the Women's Prison. There is no question raised as to her bona fides in doing so.

111. In addition, no question has been raised that the Chief Magistrate did not constitute an independent and impartial tribunal. If the Chief Magistrate made an error of law in remanding the children to places which were not

community residences then the legal system provides avenues of redress in the form of judicial review, or an appeal of the decision.

112. Likewise, there is no question of arbitrary or high handed conduct on the part of the State or the Commissioner of Prisons in depriving the children of their liberty. No issue has been raised that there was a failure by the State or the Commissioner of Prisons to observe any rule of natural justice in depriving the children of their freedom. The issue that has been raised is whether the failure of the State to provide licensed community residences suitable to accommodate the children at the time that the suite of children legislation was proclaimed, amounted to a breach of the right to due process.

113. The legislation required the State to construct new facilities, or to upgrade existing facilities. It required the establishment of a Children's Authority, the training of staff, and the creation of manuals and protocols to guide the new staff. It required the formulation of regulations and requirements for the licensing of community residences. Unfortunately, the legislation was proclaimed before the State had done all that it was required to do to provide licensed community residences suitable to house children in the position of Brian and Sasha. The evidence is that during the pendency of these proceedings, the YTC was refurbished and staff were trained, making it possible to designate the YTC a child rehabilitation centre by Legal Notice No. 39 dated May 15, 2017. There was the evidence of Juliana Johan-Boodram, Permanent Secretary in the Ministry of Social Development and Family Services, of the State's plans to construct two rehabilitation centres at Wallerfiled to address the needs of male and female child offenders.

114. Mr Hosein has strenuously argued that there was bound to be a period of transition after the proclamation of the children legislation during which the requirements imposed by the legislation would be put in place so as to conform with the legislation. Mr Hosein submitted that the State has acted throughout in good faith, which has not been called into question. The failure of the State to complete the infrastructural works required, and to train staff within the self-imposed deadline, in Mr Hosein's submission, does not amount to the breach of any fundamental right. This court agrees with that submission.

115. Mr Mendes has formulated his submission in a different way based on the definition of due process formulated by Lord Hoffman in **Boyce** (supra). While he acknowledges that the concept of due process of law incorporates the provisions as contained in sections 54(1) and 60(1) of the Children Act, which require that children are to be detained at community residences, Mr Mendes argues that this is not the constitutional sense in which the term due process is used. The issue is whether the provisions of the Children Act form part of due process in its narrower sense as a fundamental right, as explained by Lord Hoffman in **Boyce** (supra). The issue becomes whether the breach of the statutory mandate to place child offenders in community centres under the circumstances as they existed at the time, renders the system of justice unfair. This court believes that the breach in these circumstances did not.

116. For these reasons, the court concludes that there has been no breach of the right to liberty, and the right not to be deprived thereof except by due process of law, in this case.

Issues (v) and (vi) – Whether there has been a breach of the right to the protection of the law as guaranteed by section 4(a) of the Constitution.

117. Mr Ramlogan contends that the children's right to protection of the law was breached by the appellants for the following reasons:

(i) They were entitled to the protections afforded to them by sections 54 and 60 of the Children Act.

(ii) Under section 54, both children were entitled to the protections afforded by being detained in a community residence.

(iii) Under section 60, Sasha was entitled to the protection associated with the prohibition against a court ordering her to be placed at an adult prison, and allowing her to associate with adult prisoners without the express permission of the court.

118. It is now well recognised that the right to "due process of law" and the right to the "protection of the law" are closely related. They both incorporate the concept of the rule of law. However, the right to the protection of the law is wider in scope and includes the right to due process of law. The similarity between the two rights was explained by Rajkumar J (as he then was) in **Wrenwick Theophilus v. The Attorney General** (unrep.) CV 2009-01683:

> "*16. Due process of the law invokes the concept of the rule of law. Protection of the law includes the right to due process and therefore equally invokes the concept of the rule of the law. Its interpretation must be consistent with this. Protection of the law is however a wider right than the right to due process.*"

119. In **The Attorney General of Trinidad & Tobago v Mc Leod** [1984] 1 WLR 522, the Privy Council held in essence that the right to protection of the

law is not breached as long as the judicial system affords a procedure for redress.

120. Since then the courts have taken a far broader view of the scope of the protection afforded by the right. In **The AG of Barbados and Ors. v. Joseph and Boyce** [2006] CCJ 3 (AJ), a joint judgment of de la Bastide P and Saunders J (as he then was) the CCJ opined at paragraph 60:

> "…*Indeed, the right to the protection of the law is so broad and pervasive that it would be well nigh impossible to encapsulate in a section of a constitution all the ways in which it may be invoked or can be infringed…"*

121. In **The Maya Leaders Alliance v. The AG of Belize** [2015] CCJ 15 (AJ), a joint judgment of Sir Dennis Byron P and Winston Anderson J, the CCJ gave a particularly lucid exposition of the right to the protection of the law, and how it is evolving (at paragraph 47):

> "*The law is evidently in a state of evolution but we make the following observations. The right to protection of the law is a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property. It encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any*

breaches of their constitutional rights. However the concept goes beyond such questions of access and includes the right of the citizen to be afforded, "adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power." The right to protection of the law may, in appropriate cases, require the relevant organs of the State to take positive action in order to secure and ensure the enjoyment of basic constitutional rights. In appropriate cases, the action or failure of the State may result in a breach of the right to protection of the law. Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the citizen's rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy."

122. There are several basic principles which are incorporated in the concept of the protection of the law as may be gathered from the above cited dictum:

- The right to protection of the law is grounded in fundamental notions of justice and the rule of law.
- It protects against acts of the State which arbitrarily or unfairly deprive individuals of their basic constitutional rights.
- It encompasses the right of every citizen to access the courts for relief of the breach of their constitutional rights.

- It goes beyond access to the courts.
- It includes the right to be afforded adequate safeguards against irrationality, unreasonableness and fundamental unfairness or arbitrary exercise of power.
- It is breached where citizens are denied rights of access and procedural fairness demanded by natural justice.
- It may require the State to take positive action to ensure the enjoyment of basic constitutional rights.

123. One can readily discern the similarities between the right to due process and the right to the protection of the law. A feature which immediately catches the eye is the engagement of the right where arbitrary action of the State impacts on the basic constitutional rights of the individual. In addition both rights incorporate fundamental concepts of natural justice, observance of the rule of law and the notion of procedural fairness.

124. As noted earlier in this judgment, no issue has been raised with respect to any arbitrary action on the part of the appellants. The bona fides of the Chief Magistrate and the State have not been called into question. In addition, no issue has been raised that there has been any breach of the rules of natural justice, or that the respondents have been denied access to the courts, or procedural fairness.

125. The conduct that has been targeted by the respondents is the placement of the children into institutions that were not designated as community residences by the Chief Magistrate, their admission by the Commissioner of Prisons into these institutions and the omission of the State to provide licensed community residences at the time that the legislation was proclaimed.

126. The appellants have argued that assuming that this court finds (as it has) that the YTC and the Women's Prison are not community residences, extensive efforts were made by the authorities to provide facilities, albeit not ideal, that were rehabilitative in nature including educational facilities and programmes that catered for the physical and mental well-being of the children. In the case of Brian, the YTC provided literacy programmes up to CAPE level, and technical-vocational programmes such as radio broadcasting, woodwork, welding, tailoring and food and beverage. There was also an Adolescent Development Programme which exposed the children to interpersonal skills training. Brian was taught English Grammar, Comprehension, Vocabulary, Spelling, Mathematics and Reading. He earned 88% in his end of term report in June 2015. He successfully completed the programme in Adolescent Development, wood burning, agriculture and radio broadcasting. He also participated in football, cricket and table tennis. Among the staff at YTC there were welfare officers and a qualified psychologist. Brian saw the psychologist on 14 occasions.

127. In the case of Sasha, she was housed at the Juvenile Dormitory on the northern side of the prison, which is designed to accommodate young female offenders. There were dedicated officers for juveniles and a programme of activities specifically designed for juveniles. The activities included classes in Maths and English, balloon craft, sewing, food nutrition and religious instructions. Counselling sessions and religious activities were also included. Sasha attended weekly counselling sessions which were conducted by forensic psychologists who reported that Sasha had adjusted well to the environment. Sasha was permitted to use the computer facilities and watch movies in the school building, and use the school library. She participated in music theory, business management, floral arrangement, mentorship and self-empowerment classes, and

received certificates of participation. The prison officers accompanied the juveniles at all times so as to minimise any interaction with adults.

128. While the facilities and services provided to Brian and Sasha may not have been ideal, and may not have approximated to the standards contemplated by the children legislation, the State has submitted that the arrangements were the best that could be provided in the transitional period between the proclamation of the legislation and the provision of licensed community centres. The State maintains that it has acted in good faith throughout. It has complied with the orders of the court and within a fairly short space of time several community residences were licensed having satisfied the requirements stipulated by the Community Residences Act in terms of accommodation, training, care, food and segregation.

129. It is to be noted as well that both Brian and Sasha accessed the courts within a short space of time with a view to enforcing their rights under the children legislation. In the case of Brian he was first remanded to YTC in January 29, 2014. On the seventeen occasions that the matter was called before the Chief Magistrate he was remanded to YTC. The first occasion that the matter was called after May 18, 2015 (the date the legislation was proclaimed), was June 2, 2015. The Chief Magistrate made the same order of remand to YTC. Brian brought his claim in the High Court for judicial review and constitutional relief on November 9, 2015. On May 24, 2016, the trial judge gave judgment in his favour, ordering that he immediately be placed in a community residence and in default, be placed in the custody of the Children's Authority. Pursuant to the order on June 2, 2016, Brian was placed in rented accommodation by the Authority, which was solely occupied by him. On October 25, 2017, Brian was

remanded to YTC (now a community residence) having been committed to stand trial for murder.

130. In the case of Sasha, she appeared before the Chief Magistrate on the same dates, and she was remanded to the Women's Prison on each occasion. She first accessed the High Court on September 11, 2015, seeking similar relief. On November 12, 2015, the Court of Appeal ordered that she be placed in a community centre on or before December 8, 2015. On December 7, 2015, Sasha was placed at St Jude's School for Girls. In January 27, 2016, Sasha was remanded to the Women's Prison, having attained 18 years of age.

131. It is clear from the above facts that both children were able to access the courts within a short space of time, and the court acted expeditiously to protect their rights.

132. For these reasons, this court finds that there has been no breach of the respondents' right to protection of the law under section 4(b) of the Constitution, and the trial judge was wrong in so finding.

Issues (viii) and (ix) – Was there a breach of Brian's and Sasha's right not to be subjected to cruel and unusual treatment under section 5(2)(b) of the Constitution?

133. The trial judge found that the conditions of detention of Brian were unsatisfactory and not rehabilitative. There were no special programmes designed specifically for Brian's needs and development, and he was exposed to convicted inmates and boys over 18 years. He was exposed to disciplinary measures which included corporal punishment, although Brian was not actually subjected to this measure. The judge also found that

Sasha was treated as a "miniature adult prisoner" and subjected to treatment to which no civilised nation should subject its children. The judge found in effect that their detention in places that did not have the characteristics of community residences as required by the legislation rendered their treatment cruel and harsh in the circumstances.

134. Brian was 13 years old when he was first remanded to YTC. When the children legislation was proclaimed in May, 2015, he would have been 14 years old. His mother swore to an affidavit on his behalf in which she stated that he was afraid of bigger boys in the institution who took advantage of him and stole food that she bought for him. His mother was also fearful that the other boys were sexually interfering with him, although Brian had not admitted this to her.

135. In the case of Sasha, she was 16 years old when she was first remanded to the Women's Prison. In May, 2015, she would have been 17 years and 5 months old. She complained in her affidavit of conditions at the prison, and being exposed to adult inmates.

136. It must be borne in mind that both children were prisoners on remand charged with the offence of murder. There must be some level of security discipline and restraint of their freedom wherever they were detained. The fact of deprivation of their liberty at an institution must involve some level of distress, discomfort and even harshness.

137. However, a breach of the constitutional right not to be subjected to cruel and unusual treatment entails more than the level of mental suffering usually associated with being confined. Mr Mendes has referred us to a few authorities which define the threshold for breach of the right.

138. In **R (On the application of N) v. Secretary of State for the Home Department** [2003] EWHC 207 Admin, Silber J summarised the established principles concerning the ambit of cruel and unusual treatment at paragraph 81:

> *"(i) . . . . . .*
>
> *(ii) "ill-treatment must attain a minimal level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental aspects and, in some circumstances, the sex, age and state of health of the victim" (A v. United Kingdom (1998) 27 EHRR 611 [20])*
>
> *(iii) in determining whether treatment is "degrading" within the meaning of Article 3, the Court has to have regard to whether its objective is to humiliate and deface the person concerned as that is a factor to be taken into account, but the absence of any such intention "cannot conclusively rule out a violation of Article 3" (Peers v. Greece (2002) 33 EHRR 51 [74])*
>
> *(iv) treatment can be described as "inhuman" if it "causes intense physical or mental suffering" (Ireland v. United Kingdom (1978) 2 EHRR 25)*
>
> *(v) the facts constituting violation must be proved beyond a reasonable doubt, but it may be proved by inferences or unrebutted presumptions of fact" (Ireland v. United Kingdom (1978) 2 EHRR 25 [161])*

(vi) . . . . . .

(vii) deterioration in the mental health of a person is capable of constituting inhuman or degrading treatment if it reaches the appropriate level of severity. In Arts v. Belgium Q2000) 29 EHRR 50), the European Court did not uphold a finding by the Commission of an Article 3 breach because of the acute anxiety caused by the claimant's conditions or detention expressly on the basis that "there is no proof of deterioration of [the claimant's] mental health" [66]

(viii) the test to be applied before finding a breach of Article 3 is becoming stricter, and significantly the Strasbourg court has observed that:-

"having regard to the fact. that the Convention is a "living instrument which must be interpreted in the light of present day conditions, the Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably, requires greater firmness in assessing breaches of the fundamental values of democratic societies" (Selmuni v. France (2000) 29 EHRR 403 [101]).

(ix) the kinds of ill-treatment which fall within the scope of Article 3 are very serious as "the [Strasbourg] Court's case law refers to ill-treatment that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering" (Pretty v. United Kingdom (2002) 35 EHRR 1 [52] with my emphasis added)."

139. In **Ramirez Sanchez v. France** [2007] 45 EHRR 49 at paragraph 119 the European Court of Human Rights made the point that to breach the right

the act must go beyond the level of suffering to be expected in incarceration:

> "*119. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see, among other authorities, V v UK [1999] ECHR 24888/94 at para 71; Indelicato v Italy [2001] ECHR 31143/96 at para 32; Ilascu v Moldova and Russia [2004] ECHR 48787/99 at para 428; and Lorse v Netherlands [2003] ECHR 52750/99 at para 62)."*

140. While this court appreciates the heartfelt sentiments of the trial judge in advocating for more ideal conditions for the detention and rehabilitation of child offenders, one must also consider the limited resources of the State in societies that do not have the resources of more developed countries. This reality was recognised by Lord Millett in the Privy Council decision in **Thomas v. Baptiste** (1998) 54 WIR 387 at 427:

> "*The expression is a compendious one which does not gain by being broken up into its component parts. In their lordships' view, the question for consideration is whether the conditions in which the appellants were kept involved so much pain and suffering or such deprivation of the elementary necessities of life that they amounted to treatment which went beyond the harsh and could properly be described as cruel and unusual. Prison conditions in third-*

world countries often fall lamentably short of the minimum which would be acceptable in more affluent countries. It would not serve the cause of human rights to set such demanding standards that breaches were commonplace. Whether or not the conditions in which the appellants were kept amounted to cruel and unusual treatment is a value judgment in which it is necessary to take account of local conditions, both in and outside prison. Their lordships do not wish to seem to minimise the appalling conditions which the appellants endured. As the Court of Appeal emphasised, they were and are completely unacceptable in a civilised society. But their lordships would be slow to depart from the careful assessment of the Court of Appeal that they did not amount to cruel and unusual treatment."

141. Having regard to the evidence of the conditions under which Brian and Sasha were detained, this court is satisfied that their treatment did not attain the minimum level of severity which is required for breach of the right. There was no medical evidence of actual bodily harm or intense physical or mental suffering. There is no evidence of any deliberate act to humiliate or cause distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. In fact there was evidence of programmes put in place to provide for training and practical skills, for basic classes in language and mathematical skills, and counselling to soften the psychological impact of incarceration.

142. Accordingly, this court finds that the trial judge was wrong in his finding that there was a breach of the children's rights not to be subjected to cruel and unusual treatment.

Issue (x): Was there a breach of Brian's and Sasha's right to be presumed innocent until proven guilty under section 5(2)(f)(i) of the Constitution?

143. The trial judge granted declarations that the right of Brian and Sasha to be presumed innocent until proven guilty were breached by their detention in places where convicted persons were also detained. There clearly was no evidential basis for the grant of this relief. The mere fact that the children were detained at places where convicted offenders were also accommodated, cannot on its own support a finding that their right to the presumption of innocence has been breached. Accordingly, this court finds that the judge was wrong to grant these declarations.

Remedies

144. This court has found that there was no breach of the respondents' constitutional rights as claimed. However, because there were no licensed community residences in existence on June 2, 2015, the order for remand of Brian to St Michael's at YTC and Sasha to the Women's Prison, was in contravention of section 54(1) and 60(1) of the Children's Act. The children were detained in exactly the same conditions as before the proclamation of the legislation of May 18, 2015. No claim was made that the detention of the children was unlawful before that date, or that their constitutional rights were breached by reason of their detention before that date, or that they were entitled to damages for such breaches before their detention before the date of proclamation. In addition there was no claim for damages at common law for false imprisonment.

145. Accordingly, the respondents will be entitled to a declaration that the remand warrants were in contravention of sections 54(1) and 60(1) of the Act.

THE CROSS APPEAL

146. It follows that the respondents were not entitled to their full costs before the trial judge, nor are they entitled to their full costs on appeal.

DISPOSITION

147.

1. It is hereby declared that:

   (a) The decision of the Chief Magistrate made on or about July 29, 2015 ordering that Brian Seepersad be remanded to the Youth Training Centre until April 14, 2016 is in contravention of sections 54(1) and 60(1) of the Children's Act.

   (b) The decision of the Chief Magistrate made on or about July 29, 2015 ordering that Sasha Seepersad be remanded to the Adult Women's Prison, Golden Grove, Arouca until September 16, 2015 is in contravention of sections 54(1) and 60(1) of the Children's Act.

2. Save for the declarations granted at 1(a) and (b) the appeals are allowed and the Judge's orders are set aside.

3. The cross appeal is dismissed.

148. We will hear the parties on costs.

Dated the 19th day of December, 2018.

R. Narine,
Justice of Appeal