REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civ. App No. S-302 of 2019
Claim No: CV 2017-03522

Between

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Appellant/Defendant

AND

JM (A minor by his kin and next friend NM)

Respondent/Claimant

AND

THE CHILDREN'S AUTHORITY OF TRINIDAD AND TOBAGO

AND

THE NORTH WEST REGIONAL HEALTH AUTHORITY AND

AND

ST. MICHAEL'S HOME FOR BOYS

Interested Parties

**Panel:**
**P. Rajkumar JA**
**C. Pemberton JA**
**M. Dean-Armorer JA**

**Date of Delivery: 11 August 2021**

**Appearances:**
Mr. Fyard Hosein SC leading Ms. Rachel Theophilus and Ms. Tinuke Gibbons-Glen instructed by Ms. Svetlana Dass and Ms. Diane Katwaroo for the Appellant/Defendant
Mr. Anand Ramlogan SC leading Ms. Jayanti R. Lutchmedial and Mr. Ganesh Saroop instructed by Mr. Jared Jagroo for the Respondent/Claimant
Mr. Justin Phelps, Mr. Charles Law, Ms. Salisha Baksh for the NWRHA
Mr. Damali Nicholls, Ms. Sharlene Jaggernauth instructed by Ms. Denelle Singh for the Children Authority
Ms. Kofi McIntyre instructed by Ms. Karen E. Piper for the St. Michael's Home for Boys

I have read the judgment of the Honourable Rajkumar JA. I agree with it and have nothing to add.

……..

Charmaine Pemberton

Justice of Appeal

I have read the judgment of the Honourable Rajkumar JA. I also agree and have nothing to add.

……..

Mira Dean-Armorer

Justice of Appeal

**Delivered by Peter A. Rajkumar JA**

**Background**

1. On September 27, 2012, JM[1] was removed from the custody of his mother when she was charged with child abandonment under the old Children Act[2]. On May 19, 2014, his mother was convicted of that offence. She now represents him as his next friend in this action.

2. JM suffers from Prader-Willi (PW) syndrome[3] caused by a chromosomal abnormality. His PW syndrome had not been diagnosed at the time of his removal. Its symptoms include inter alia, insatiable appetite, behavioural problems, and learning difficulties[4].

3. When JM's mother was brought before the court in September 18, 2012 the magistrate attempted to place JM in alternative accommodation. His initial placement was at Ferndean's Children's Home in Point Fortin. The management requested that he be removed as a result of behaviours that were affecting the other children in the home[5]. Similar complaints were raised by the management of St. Dominic's Home, another attempted placement. The result was his placement at St. Michael's School for Boys (St. Michael's). After an initial attempt by the management of that school to decline his admission on November 29, 2012, his admission there was continued. His placement there was confirmed when his mother was eventually convicted on May 19, 2014. (The record therefore clearly reveals that despite several attempts nowhere else could be

[1] Pursuant to an order of this court neither JM's full name, nor that of any family member through which he can be identified, can be published.

[2] Old Children Act, Chapter 46:01

[3] According to paragraph 14 of the affidavit of Vandana Siew Sankar Ali, page 86 of record of appeal volume one, Prader - Willi syndrome is a rare complex genetic disorder that has been estimated to occur in one in 12,000 to 15,000 persons. It is typically characterized by low muscle tone, short stature (when not treated with growth hormone), incomplete sexual development, cognitive disabilities, speech, sleep and motor problems, chronic feelings of insatiable hunger and a slowed metabolism that can lead to excessive eating and morbid obesity. Behavioral problems are also common and may include stubborn, angry, controlling, manipulative behaviors, temper tantrums especially when denied food, intolerance for changes in routine, obsessive compulsive or repetitive behaviors, anxiety and skin picking. Historical report identified all of these symptoms in the child prior to and at the time of assessment).

[4] Paragraph 105 judgment of trial judge.

[5] Paragraph 14 and 15 judgment of the trial judge.

identified that was equipped or prepared to accept the responsibility to manage the custody of a child with the behaviours that accompanied a child with PW syndrome).

4. JM remained at St. Michael s from September 26, 2012 to October 5, 2016 during which various incidents and attacks on him allegedly occurred. The complaint is that his placement at St. Michael's was unlawful and unconstitutional, and his detention there was a deprivation of his **right** not to be deprived of **liberty** without due process of law[6], (St. Michael's not being an orphanage or a legally designated place of safety). It was also contended that it was in breach of his right not to be **detained arbitrarily[7] and to the protection of the law[8]**. It was further contended that his treatment at St. Michael's was also unlawful to such a degree as to render it also unconstitutional, in breach of his right to **security of the person[9]** and the right not to be subjected to **cruel and unusual treatment or punishment[10]** (See paragraph 76 of the judgment[11])

5. In 2016 the environment at St. Michael's had become even more unsuitable as the dormitories were under repair, and the entire inmate population had to sleep in the dining hall during the renovations, resulting in increasing triggers and opportunities for attacks on JM. After yet another incident at St. Michael's, in an effort to remove him from therefrom, the psychiatrist who had first diagnosed JM as having PW Syndrome communicated with doctors at St. Ann's Psychiatric Hospital (the hospital or St. Ann's). Her request was to secure a temporary placement at the hospital. His admission thereafter was pursuant to a psychiatric evaluation. The complaint is that the **admission** to the hospital was unlawful and unconstitutional, amounting to **arbitrary**

[6] Contrary to section 4(a) of the Constitution.
[7] Contrary to section 5 (2) (a)
[8] Contrary to section 4 (b)
[9] Contrary to section 4(a)
[10] Contrary to section 5 (2) (b)
[11] *76. The claimant claims that the detention of JM in the circumstances that the court has found have resulted in breaches of his constitutional rights. …The claimant relies on the following sections of The Constitution: • Section 4(a) - "the right of individual to life,* ***liberty****,* ***security of the person*** *and enjoyment of property and* ***the right not to be deprived thereof except by due process of law****"; •* ***Section 4(b)*** *- "the right of the individual to equality before the law and* ***the protection of the law****"; • Section 5(2) Parliament may not (a) - "authorise or effect the* ***arbitrary*** *detention, imprisonment or exile of any person"; and • Section 5(2) Parliament may not (b) - "****impose or authorise the imposition of cruel and unusual treatment or punishment****".* (All emphasis added)

**detention**, and **deprivation of liberty** without due process of law, and that his **detention** there was equally so, in breach of the right to **protection of the law** and the right to **security of the person**. It was alleged also that his treatment there amounted to **cruel and unusual treatment or punishment**.

6. On an application for interim relief, the trial judge ordered the removal of JM from the hospital into the custody of the Children's Authority, (the Authority). He was removed on October 12, 2017 to the Child Support Centre (CSC) of the Authority. There he, exclusively, occupied the ground floor of the building, and had 12 nurses retained by the Authority involved in his care and supervision, at a cost of $108,000.00 per month[12]. JM has since attained the age of 18 and has been removed to another facility. Despite that, the hearing of this appeal was deemed urgent because of the nature of the allegations made, the fact that a child's rights were in issue, and the fact that constitutional breaches were alleged, with the potential for implications for others[13].

7. The trial judge found (at paragraph 215) that the following constitutional rights of JM had been breached.

   *"Based on the court's findings the claimant is entitled to the following declarations and the court now Declares:*

   *i. That the detention of (JM) at the **St. Michael's Home for Boys**;- St Michael's Home not being an Orphanage, a Community Residence or a place of safety, has breached his constitutional rights and freedoms guaranteed under **section 4(a)** the right of the individual to life, **liberty**, **security of the person** and enjoyment of property and the right not to be deprived thereof except by **due process of law**, **section 4(b)** the right of the individual to equality before the law and the **protection of the law**, **section 5 (2)** (a) freedom **from arbitrary detention**, imprisonment or exile of any person, and **Section 5(b)** freedom from **cruel and unusual treatment or punishment**; and*

[12] Volume 1 record of appeal page 117, paragraph 27 affidavit of S. Noel.

[13] The Authority undertook to prepare a report inter alia on the condition of JM, and the conditions under which he lives.

*ii. That the detention of JM at the **St. Ann's Psychiatric Hospital**; (sic) St. Ann's Psychiatric Hospital not being an Orphanage, a Community Residence or a place of safety, has breached his constitutional rights and freedoms guaranteed under section 4(a) the right of the individual to life, **liberty, security of the person** and enjoyment of property and the right not to be deprived thereof except by due process of law, section 4(b) the right of the individual to equality before the law and the **protection of the law**, **section 5 (2) (a)** freedom from **arbitrary detention**, imprisonment or exile of any person, and **Section 5(b)** freedom from **cruel and unusual treatment or punishment"**.* (All emphasis added)

8. The trial judge awarded damages in respect of the entire period of detention 1470 days, at St. Michael's from September 27, 2012 to October 5, 2016 and St. Ann's from October 6, 2016 to October 12, 2017, (371 days, see paragraph 225). In respect of detention at St. Michael's the sum of $450 per day was awarded, (totalling 661, 500. In respect of detention at St. Ann's the sum of $750 per day was awarded, totalling $278, 250, (paragraph 232, and 233). She found that the State (the appellant) was a proper party to the action. She further awarded vindicatory damages in the sum of $1 million (paragraph 236), and further ordered the creation of a trust with input from a Child Advocate appointed by the Children's Authority and his mother NM, JM's next friend, (paragraph 242).

9. The appellant appeals the findings of constitutional breach and the awards of damages.

**Issues**

**St. Michael's**

10.

A. Whether the <u>admission</u> of JM to St. Michael's was unlawful.

If so whether:

(i) it was in breach of his constitutional right not to be deprived of **liberty** without due process of law under section 4(a), and

(ii) it was in breach of his constitutional right not to be subject to **arbitrary detention** under s. 5(2)(a).

B. Whether the detention of JM at St. Michael's was in breach of his constitutional right to the **protection of the law**.

C. Whether the treatment of JM at St. Michael's was:

(i) in breach of his constitutional **right to security of the person**.

**(ii)** in breach of his constitutional right to protection against **cruel and unusual treatment or punishment.**

**St. Ann's.**

D. Whether the admission of JM to St. Ann's was unlawful.

If so whether:

(i) it was in breach of his constitutional right not to be deprived of **liberty** without due process of law under section 4 (a),

(ii) it was in breach of his constitutional right not to be subject to **arbitrary detention** under s. 5 (2) (a).

E. Whether the detention of JM at St. Ann's was in breach of his constitutional right to the **protection of the law**.

F. Whether the treatment of JM at St. Ann's was

(i) In breach of his constitutional right to **security of the person.**

**(ii)** in breach of his constitutional right to protection against **cruel and unusual treatment or punishment.**

G. (i) Whether the award of compensatory damages by the trial judge was supportable.

(ii) Whether the award of vindicatory damages was justified in law.

(iii) Whether the order regarding the establishment of a trust was justified in law.

**Conclusion**

11.

**St. Michael's**

A. The initial **admission** of JM to St. Michael's in 2012 was within the jurisdiction of the magistrate. After the conviction of his mother NM the Order on June 30, 2014 continuing his placement there was unlawful, as St. Michael's was not an orphanage. It was effected however pursuant to an order of a court at a trial. Therefore, although any order continuing the placement of JM at St. Michael's after June 10, 2014 was wrong in law, it was effected pursuant to due process of law. It therefore did not breach JM's constitutional right not to be deprived of liberty without due process of law. It was also for this reason not arbitrary and therefore could not constitute arbitrary detention.

B. The **detention** of JM after May 18, 2015 amounted to a breach of the **protection of the law**[14]**.** That is because upon the proclamation of the new Children Act on that date there was a duty on the State to have children's community residences or equivalent places of safety available. Their provision would have enabled the option of placing JM in one, as by then it had clearly been recognised, (as it in fact had been recognised from inception), that St. Michael's was not suitable for him in light of his youth, behavioural issues and physical and mental condition which made him a target of bullying and abuse. It would have avoided the need to consider St. Ann's Psychiatric Hospital as the only, and therefore by default, the best option, for his alternative placement.

[14] (See **Seepersad**).

C. i. The evidence reveals that the **detention** of JM at St. Michael's exposed him to **treatment** there as a vulnerable minor which in its repetition and severity amounted to a breach of his right to **security of the person**[15],[16].

C. ii. **Cruel and Unusual Treatment and Punishment**

However, the treatment to which JM was exposed did not have the hallmarks of deliberation and intention by the State or its agents that would have also characterised it as cruel and unusual punishment or treatment. The incidents of aggression towards JM were, except in one documented instance, effected by inmates, which the management of St. Michael's failed to effectively control. The evidence in its proper context demonstrated instances of good faith efforts to assist JM, on which there was no cross examination, which the trial judge failed to take into account. The attempt at these is not consistent with cruel and unusual treatment by those entrusted with his care, although the general ineffectiveness of these in preventing attacks and bullying did result in the breach of another of JM's constitutional rights, namely that to **security of the person**.

**St. Ann's – Admission**

D. i. The admission of JM to St Ann's was lawful. It was initially, on its face, pursuant to the Mental Health Act. There was a psychiatric evaluation conducted, recorded on a typed standard form which made reference to a mental illness. One cannot go so far as the trial judge did , and conclude that JM was not suffering from a mental illness and that PW syndrome, (or symptoms or behaviours manifested by JM), did not constitute a mental illness. The evidence before the trial judge was certification on that form, whether typewritten or not, of the finding on

[15] The submission was made by the appellant that this court should decline jurisdiction because matters involving treatment of a child are best suited for the specialised jurisdiction of the Children's court. This must be rejected because those matters are alleged to amount to breaches of the Constitution, over which this court and the trial court undoubtedly have jurisdiction. In any event, this was not argued in the court below, and those matters have already been the subject of findings of fact by a trial court. They are therefore properly the subject of the appellant's appeal.

[16] The State was properly found to be liable for this constitutional breach also, despite St. Michael' s being operated by the Anglican Board, because it had direct overall responsibility for the inmates there. It retained overall control of the institution, in, inter alia, its financing thereof, the payment of staff who were public servants, and the recognition that the inspector of orphanages was authorised to investigate incidents at the school, which was in fact done on 2 occasions.

examination by a psychiatrist, of mental illness. To conclude that he was not suffering from a mental illness would involve an impermissible substituting of the non-expert medical opinion of a court for the expert psychiatric opinions of not one, but several psychiatrists, including the one who diagnosed him with PW syndrome in the first place. It would also involve casting aspersions on their medical expertise in the absence of any contrary evidence whatsoever. The trial judge was plainly wrong to do so. The admission under the Mental Health Act, though effected in circumstances of expedience and necessity, was in accordance with due process of law. It did not therefore amount to breach of the right to **liberty** without due process of law.

D. ii. Neither therefore could the initial admission amount to **arbitrary** detention as it was not arbitrary, but effected pursuant to statute. There are two reasons why the admission was not unlawful. The omission to return to the magistrate's court for a variation of the order of that court would not render the **admission** unlawful because there was no statutory requirement under the Mental Health Act for that to be done before admission for treatment for a mental illness. There was a role for the Children's Authority in that process under statute. Despite the Authority not exercising the full panoply of powers available to it, its omission to do so would not render an admission **under the Mental Health Act** unlawful.

**Detention at St. Ann's**

E. However, the continued **detention** of JM at St. Ann's did amount to **breach of his right to protection of the law**. That is because the new Children Act 2012 had been proclaimed since May 18, 2015. As at October 2016, the option of a community residence, even with modifications to accommodate JM alone in part, should have been available, so that St. Ann's would not have been required as the only alternative temporary placement. There was no evidence that after his admission the limited medical treatment available for PW Syndrome required JM's long term, apparently permanent, detention in a psychiatric hospital where, despite being a minor, he was exposed to mixing with adults. The fact that the documented evidence is that his placement there was intended to be temporary was significant,

as was the fact that it ended up being anything but that, only coming to an end after a court order. The new Children Act and associated legislation as proclaimed were intended to avoid that situation. They were intended to provide, in respect of children, protection against detention in unsuitable accommodation. That legislation was not applied in this case to provide protection for JM against detention in unsuitable accommodation. His right to the protection of the law was thereby breached.

**F. Treatment at St. Ann's**

i. There is evidence that JM's **right to security** of the person was breached. There was a report of molestation. The fact that no physical evidence was found on physical examination, either with respect to this report or that from St. Michael's, does not detract from the fact that such a report acknowledges the possibility that molestation could have been attempted and that JM was exposed to that possibility. There are also complaints that medications were administered to him. There is no admissible evidence that the medications administered to him by trained professionals were not appropriate. Their administration in those circumstances cannot constitute a breach of the right to security of the person. Further the evidence does not support any conclusion that instances of being placed in the seclusion room resulted in either physical or psychological pain or trauma, or could amount to a breach of the right to security of the person. The trial judge's inferences to that effect, unsupported as they were by the evidence, were plainly wrong.

**Cruel and unusual treatment and punishment**

**Solitary confinement**

Issue F ii. The trial judge found that solitary confinement in the case of JM amounted to cruel and unusual punishment and a breach of his constitutional right not to be subjected thereto. This was plainly wrong both in fact and in law. The evidence in its proper context was that JM was placed in seclusion from time to time as a disciplinary measure when his

behaviour either was inappropriate or posed a danger to himself or others. Documented instances of such behaviour included groping nurses, making inappropriate overtures to inmates, and creating unhygienic situations. Those were situations where he had to be temporarily separated from those situations and from staff and other inmates[17].

Any finding that being in seclusion would have been physically painful was not a conclusion open to court on the evidence. Pain on standing and weight bearing due to obesity ignores the fact that there was no evidence that there would be pain on his sitting on the floor. Similarly, it was not open to the judge to infer psychological harm from being in that room for limited periods. The authorities on cruel and unusual treatment and punishment reveal that the treatment must attain a certain level of severity before it can be characterised as a breach of this right. The right would only be trivialised and diminished if it can be invoked in the limited instances of seclusion in those particular circumstances. Neither can the fact that seclusion would have been in breach of a regulation pertaining to community residences be sufficient to elevate those instances of seclusion to cruel and unusual treatment or punishment.

Exposure to mixing with adults does not attain the level of severity required to amount to a breach of this right. To the extent that JM may have been exposed to dangers from adult inmates this would be a matter for consideration under the right to the security of the person.

The fact that medication was administered to him on the direction of medical specialists, for same reasons as explained, cannot in the instant circumstances be equated to cruel and unusual treatment or punishment, and cannot constitute a breach of that right.

[17] The evidence is that the experience from Michael's demonstrates that creating uncomfortable situations for inmates there often provoked a backlash – e.g. pepper sauce incident.

**Issue G - Damages**

**Damages for breach of right to security of the person**

12. Accordingly,

i. the trial judge was correct to conclude that there had been breaches of JM's **right to security of the person** at **St. Michael's**. Those breaches were manifested by the attacks upon him as established by the evidence, and the opportunities for such attacks.

There was also evidence of a breach of his **right to security of the person** at **St. Ann's,** though to a lesser extent. Its primary manifestation was the alleged incident of molestation, and the unacceptable opportunity for interaction between adult inmates and JM. However, the administration of medically prescribed medication was by specialist medical practitioners. It would not therefore, in the circumstances described of necessary treatment for behaviours arising from the condition of PW syndrome, and in the absence of contrary admissible evidence, amount in law to a breach of the constitutional right to security of the person.

ii. The trial judge was also correct to conclude that his right to **protection of the law** had been breached, but erred in not recognising that the detention of JM at St. Michael's became unconstitutional as at the date of proclamation of the new Children Act on May 18, 2015. From that date he was deprived of the opportunity for a placement in a community residence or equivalent place of safety. Such accommodation was more consistent with the international conventions that this country had recognised and pledged to give effect to, and had then proclaimed legislation to this effect. It was a breach of the constitutional right to protection of the law to have deprived JM of the opportunity for the legal protections that the legislature had in effect promised.

This is a period of 506 days during which concerns that his right to security of the person might have been breached were realised. Although he was detained in a place that was not an orphanage after June 10 2014 up to May 18, 2015 was not unconstitutional. Damages for breach of the right to security of the person would be separately awarded to address the way that the unsuitability of St. Michael's and St. Ann's was manifested in practice.

iii. The trial judge erred in awarding damages for breach of the right not to be subjected to cruel and unusual treatment or punishment. There was no evidence that amounted in law to a breach of that right**.**

iv. The trial judge erred in awarding damages for breach of the right not to be subjected to arbitrary detention.

**Damages for breach of protection of the law - 877 days**

13. Damages for breach of protection of the law would apply to hi**s s**tay at St Michael's from May 18, 2015 to October, 5, 2016 and to his stay at St Ann's for the entirety of his stay there from October 6, 2016 to October 12, 2017.

St. Michael's – May 18, 2015 to October 5, 2016 – 506 days at $450 per day
St. Ann's – October 6, 2016 to October 12, 2017 – 371 days at $450 per day
Total $394, 650.00

**Damages for breach of the right to security of person**

14. There is a need to avoid double compensation. Damages for breach of the right to security of person are awardable in respect of incidents on:
    i. March 6, 2013 – It is alleged that someone hit JM with a fist – evidence of a blue black discoloration on left lower lid causing him to be referred for a medical checkup;
    ii. **April 30, 2014 –** Burn Incident;

iii. **May 26 2014 –** JM was hit with a piece of wood by a staff member before he went missing. June 13, 2014 - inspector of orphanages (by then Director of National Family Services) appointed to investigate;

iv. **Early 2015** – management at St. Michael's changed
Renovations- sleeping in dining hall - a resident threw pepper sauce in his eyes[18]. There is also a report of 28 July 2015 by Ms. Charles who worked on the 2 to 9 shift of an inmate beating and threatening JM[19];

v. **June 30 2015**- alleged molestation – report to police- examination in July;

vi. May 2016 – Continued incidents of physical abuse;

vii. October 6, 2016 – JM was attacked with a piece of iron by residents of St. Michael's. Dr. S Pierre noted on his admission to St. Ann's that he had bodily scars consistent with burns and multiple scars about his chest abdomen and face, (page 199 supplemental record of appeal).
The documented or independent evidence of bullying and attacks by residents and in one case by a staff member, began in 2013 and only ended in October 2016 when he was removed from St. Michael's.

viii. October 2, 2017 alleged molestation at St. Ann's.

15. In respect of the documented incidents ii., iii., v. and vii. and viii. $75,000.00 each is awarded[20].

16. In respect of incidents i, iv, and vi which were accepted by the trial judge and reflected in her judgment, the sum of $25,000.00 each is awarded.

17. A total award therefore in respect of breach of JM's constitutional right to security of the person would be $450,000.00.

18. The total award for compensatory damages would therefore be $844,650.00.

[18] Paragraph 29 of the judgment
[19] See affidavit of Keisha Sullivan, paragraph 19 – letter 3 in bundle of exhibits marked "KS1".
[20] By way of comparison, the monthly government old age pension is $3000/month or $36,000 per year.

**Vindicatory damages**

19. There was no basis on the evidence for vindicatory damages. To the extent that damages have been awarded and declarations made JM's constitutional rights have been vindicated. To the extent that the court may want to express its abhorrence at what JM endured it is necessary in fairness to all parties to examine the evidence dispassionately and determine on the basis of cogent and admissible evidence a. what he endured, b. who was responsible and for what precisely, and c. whether the evidence so examined reveals for example, gross negligence, malice, highhandedness, cruelty, or oppressive behaviour. When such admissible evidence is examined in context, it does not reveal any basis for a further award of vindicatory damages.

**Trust**

20. Creation of any trust where there is the possibility of conflict between the duty of a trustee and his interest would be a flawed exercise of discretion. The order of the trial judge that such a trust be created with the involvement of NM is sufficiently vague to permit the possibility of such a conflict. Accordingly, there can be no role for JM's mother and next friend in the administering of any such trust.

21. There is no reason to treat this award in any manner different from that of awards to minor claimants in personal injury matters. Although JM is now 18 years old the undisputed evidence is that he is a vulnerable person with disabilities. For this reason it would be necessary for his continued protection that there be independent oversight of any damages awarded to him. Any award therefore is to be deposited into court to be placed by the Registrar in a discrete interest bearing account. Applications for payment thereout can be made to the Registrar or Master by any person appointed by a court or recognised by a court as being able to represent his interest. Any such applications are to be determined on the basis of whether they are for the benefit of JM and in his best interest. It is expected that any such application would be listed promptly and treated with expedition especially if it involves provision of medical services or accommodation for JM.

**Orders**

22. The Orders of the trial judge are set aside and the following Ord ers are substituted:

A. A declaration is granted that the detention of JM at St. Michael's from June 10 2014 was unlawful.

B. A declaration is granted that the detention of JM at the St. Michael's home for Boys from May 18, 2015 to October 5, 2016 and the St. Ann's Psychiatric Hospital from October 6, 2016 to October 12, 2017 breached his constitutional rights to protection of the law under section 4(b) of the Constitution of the Republic of Trinidad and Tobago.

C. A declaration is granted that the rights of JM to the security of person were breached

a. at St. Michael's

i. In or around March 6, 2013;

ii. April 30, 2014;

iii. May 26, 2014;

iv. In or around January 2015;

v. June 30, 2015;

vi. May 2016;

vii. October 6, 2016;

And b. at St. Ann's

viii. On October 2, 2017.

D. Damages are awarded, payable by the Appellant to JM in respect of the breach of the right to protection of the law for 877 days of detention at St. Michael's and St. Ann's at the rate of $450.00 per day, in the total amount of $394,650.00.

E. Damages are awarded, payable by the Appellant to JM in respect of breaches of his right to security of the person in the sum $450,000.00.

**F.** The total amount awarded of $844,650.00 is to be paid into court to be placed in an interest bearing account with payments thereout to be paid on application to the Registrar or a Master for expenses necessarily incurred in the care, treatment, welfare and accommodation of JM, or for such as other necessary expenses established to be in his best interests.

**Analysis**

**Chronology – Facts and Findings of Trial Judge**

23. (See also page 2263 of the Record of Appeal Vol. 5 supplemental submissions on behalf of the applicant with necessary modifications, as follows):

    i. **September 17th 2012** JM's mother was charged for the offence of Child Abandonment contrary to Section 3(1) of the previous Children Act Chapter 46:01[21]. Pursuant to Section 3 of that Act JM was placed in the Ferndean Children's Home. He was 9 years old at the time[22].

    ii. In the applicant's chronology it states - **September 26 2012** the Manager of the Ferndean Children's Home lodged a complaint at the Siparia Magistrate's Court that JM was beyond control. (In fact this is a misconception which emanates from the paragraph 14 of the affidavit of NM[23]). The Magistrate's note (at page 65) also records "NB – on 27th September 2012 child JM returned to court as being **uncontrollable** and i. stealing food, ii. fighting with adults, iii. attempting to run away, iv. has a history of sleep walking. Apparently the complaint by St. Dominic's personnel was misconstrued by NM as an order by the Magistrate.

[21] this was the precursor to the existing Children Act. The existing Children Act was proclaimed by Act Number 12 of 2012 on May 18th 2015 (See **Seepersad** loc.cit.)

[22] The order of the Magistrate transferring JM to the Ferndean Children's Home is not challenged. See page 2270 of the record of appeal, Vol. 5, paragraph 14(a). JM's initial detention at the Ferndean's Children's Home was legal.)

[23] page 31 of 266 supplemental record of appeal

The trial judge correctly found that JM had never been deemed beyond control.

The trial judge recorded at paragraphs 13 to 15 of the judgment as follows:

*"13. JM's mother first appeared at the Siparia Magistrate's Court on the 18th of September 2012. …JM was taken to the Ferndean's Place Children's Home.*

*14. The Manager of Ferndean's appeared in court on the 26th of September 2012 indicating that they could not manage him. The records reflect that he was aggressive, fighting other children, climbing over the gate, eating everything he could find at 3:00am and defecating all over the house. The court then "remanded" JM to St. Dominic's Children Home in Belmont"*[24]*.*

The trial judge recorded at paragraphs 15 to 16 as follows:

*"15. The next day, the 27th of September 2012, JM was returned to court, where St. Dominic's Children's Home personnel made similar complaints and the court made the order to "remanded [JM] to St. Michael's Diego Martin for safe keeping*

*16. From 27th September 2012 JM remained "remanded" at St. Michael's School for Boys ("St. Michael's") until 30th of June 2014".*

iii. May 19th 2014 – JM's mother was "*…convicted on the 19th May 2014 for 'being a parent of JM, a child, did wilfully abandoned (sic) and neglect the said JM to cause suffering or injury to his health' contrary to section 3 (1) of The Children's Act*[25] *Chapter 46:01 (hereinafter referred to as the "old Children's Act").* She was fined fifteen hundred dollars and in default four month's imprisonment with hard labour on that count. (There was another charge involving JM's sister arising out of the same circumstances in respect of which she was also convicted).

iv. **October 6th 2016** JM was transferred to St. Ann's Psychiatric Hospital.

[24] At page 65 of the Magistrate's notes it is recorded reflect that he was **very** aggressive but not much turns on this.

[25] page 64 magistrate's notes supplemental record of appeal

v. **October 12th 2017** JM was transferred to the Child Support Centre of the Children's Authority pursuant to the order of the Trial Judge.

**St. Michael's**

**Issue A. Whether the admission of JM to St. Michael's was unlawful**

**Admission to St. Michael's**

24. In determining whether JMs constitutional rights were breached and whether the trial judge erred in so finding, it is necessary to understand the process and orders which led to him being at St. Michael's in the first place. This involves examination of the magisterial record and is a question of mixed fact and law[26].

25. On September 27, 2012 JM was remanded to **St. Michael's** Diego Martin for safekeeping.

26. On 29 November 2012, there is another entry – "*the virtual complainant was remanded in custody in absentia at **St. Mary's Children's Home**, Tacarigua"*. It continues – "*the accused appeared – Mr. Singh and ready to proceed, probation officer's report incomplete"*. It further continues "*Mr. Collins of Boy's Industrial School present with a report re JM the virtual complainant and he advised that the best institution to house JM given his disabilities was the **Lady Hochoy Home** or **one of the orphanages with child section"***.

27. On November 30, 2012, the note reflects that JM was "*remanded"* at St. Michael's. On 6 December 2012 "*due to circumstances (see notes attached) child again before the court. Mr. Collins from St. Michael's also before the court and agrees to keep the child"*. The child was remanded in custody in absentia to St. Michael's to 27th of December 2012. Thereafter he continued to be "*remanded in custody*" at the St. Michael's Boy's Industrial School, Diego Martin.

[26] (See page 77 of the supplemental record - in particular entry 26th of September 2012 from the fly sheet of the Magistrate's Court)

28. In the notes on the fly sheet dated 27 September 2012 and 4 October 2012 it was recorded that – JM was "*remanded for safekeeping"* at St. Michael's . On the latter date it is recorded "urgent report". It is clear that despite the brevity of the note and the use of the term "remanded" on occasion the magistrate intended to exercise the jurisdiction for placement of a child victim and nothing more sinister needed to be read into the use of that term such as that he was mistakenly being treated as a **child offender**. See also for example notes dated 27th September 2012, 24th January 2013, 21st February 2013, 20th March 2013, 15th May 2013 – " ***Virtual Complainant*** *remanded in custody in absentia at St. Michael's"*[27]. The remanding in custody of a virtual complainant could not make sense unless it were in fact the remanding for safe keeping referred to earlier in that note.

29. It is also not the case therefore that he was immediately sent to St. Michael's. Rather the documentary evidence discloses that the Magistrate made efforts to explore the various alternatives. These included Ferndean's, St. Dominic's Home in Belmont, the St. Mary's Children's Home, Tacarigua, (an orphanage) and the Lady Hochoy Home. Attempts or at least orders, were made to place him at an orphanage, and to cater for his recognized disabilities, for example, by the suggestion of the Lady Hochoy Home.

30. His placement at St. Michael's was not for lack of effort in exploring suitable alternatives. It is the case that JM's condition and the manifestations thereof were such that those homes could not accommodate him.

31. The trial judge found that St. Michael's was an industrial school, and that JM, being a child victim, rather than a juvenile offender, the magistrate should not have ordered that he be placed in one. Rather he should have been placed in an orphanage. The most contemporaneous document on his placements is found in the fly sheet from the magistrate s court[28].

[27] Page 65 Magistrate's notes page 74 record of appeal.
[28] supplemental RoA page 76, from page 64 magistrates' notes.

32. The efforts at alternative placements were ineffective. The slippery slope by which he was first sent to St. Michael's despite the recognition of its unsuitability for JM and his placement there until age 18, are reflected in the magistrate's orders hereunder.

33. Even after his placement at St. Michael's the Magistrate's notes dated 12 June 2013 at page 66 record that "*JM was remanded in custody at Ferndean's home **in absentia***" The note dated 11 July 2013 records that he was remanded in custody in absentia at Ferndean's. The note dated 17 August 2013 records that "*court required suitability report from St. Michael's re JM*" and again on 4 September 2013. The note on 11 October 2013 – "*no report received. Requested again"*.

34. On 8 November 2013 the position was the same. As of 19 May 2014 that report was recorded as still outstanding. In fact, there is no further mention of it in the notes and on 30 June 2014, after NM had been convicted (on May 19, 2014) JM was "*committed*" at St. Michael's until he attained the age of 18[29]. Perusal of the actual evidence which led to this conviction in relation to each child of NM leaves one with a sense of disquiet and concern that it may have been disproportionate and insensitive. There now exists modernized legislation and specialized courts in this jurisdiction with a range of suitably trained personnel.

**Admission to St. Michael's – The legal framework**

35. The trial judge addressed this at paragraph 45 et seq (all emphasis added).

> *"45. During the pendency of the criminal proceedings, the care and safety of any child or virtual complainant was provided for by section 11 of the old Children's Act: "11. (1) A **constable**, a person referred to in section 15(l) (a) or any person authorised by a Magistrate, may take to a **place** of **safety** any child or young person in respect of whom an offence **under this Part** or any of the offences mentioned in the Schedule, has been, or there is reason to believe has been, or is likely to be, committed. (2) A child or young person so taken to a **place of safety,** and also any child or young person who seeks refuge in a place of safety, **may there be detained until** he can be(a) brought before a Magistrate, and such **Magistrate may make such order as is mentioned in the next following subsection, or may cause the child or young person to be dealt with as circumstances may admit and require, until the charge made against any person***

[29] page 75 magistrate's notes, page 85 supplemental record of appeal.

***in respect of any offence as aforesaid with regard to the child or young person has been determined by the conviction*** *or discharge of such person. (3) Where it appears to any Magistrate that* ***an offence under this Part****, or any of the offences mentioned in the Schedule, has been committed in respect of any child or young person who is brought before him, and that it is expedient in the interests of the child or young person that an order should be made under this subsection, the Magistrate may, without prejudice to any other power under this Act,* ***make such order as circumstances require for the care and detention of the child*** *or young person until a reasonable time has elapsed for a charge to be made against some person for having committed the offence, and,* ***if a charge is made against any person within that time, until the charge has been determined by the conviction or discharge of that person, and, in case of conviction, for such further time not exceeding twenty- one days*** *as the Court which convicted may direct, and any such order may be carried out notwithstanding that any person claims the custody of the child or young person."*

*46. The "place of safety" referred to is defined in Section 2 in the old Children's Act: "place of safety" means any place appointed by the Minister to be a place of safety for the purpose of the Act,* ***or*** *any hospital* ***or other suitable, secure place the occupier of which is willing temporarily to receive a juvenile".***

*48. (The offence created under Section 3 of the old Children's Act fell within "this part" as defined by Section 11 which authorises a child being taken to a place of safety.)*

*49. By virtue of Section 2, the options for JM when he was first presented at the Siparia Magistrate's Court were to be taken to a place appointed by the Minister as a place of safety, a hospital or othe****r suitable or secure place in which the occupier was willing to accept him. Suitable or secure place were not defined, but these words must have their ordinary and natural meaning as suitable and secure given the age and other relevant factors pertaining to the individual child".***

36. The trial judge appears to have overlooked the second part of the provision at s.11 of the old Children Act which also conferred a wider jurisdiction to deal with JM pending the determination of the charge against his mother, viz. ..- ***" <u>or may cause the child or young person to be dealt with as circumstances may admit and require,</u> until the charge made against any person in respect of any offence as aforesaid with regard to the child or young person has been determined by the conviction."*** The undisputed evidence on the record is that St. Michael's was the only place willing to accept him although other possibly more suitable places had been identified. The circumstances therefore required his placement there as it was the only practical option up to the time of conviction of NM.

37. The trial judge dealt with the magistrate's jurisdiction over JM post the conviction of his mother at para 50 of the judgment as follows:

> *"50. Where a person is charged and* ***convicted*** *with (sic) an offence under Part 1 or offences listed in the First Schedule to the old Children's Act is convicted,* (sic) *the Act, in addition to having made sentencing options available also* ***made provision for the status of the virtual complainant*** *in Section 12, which stated: "12. (1) Where a person having the custody, charge, or care of a child or young person has been— (a)* ***convicted*** *of committing in respect of such child or young person an offence under this Part or any of the offences mentioned in the Schedule; (b) committed for trial for any such offence; or (c) bound over to keep the peace towards such child or young person, by any Court,* ***that Court****, either at the time when the person is so convicted, committed for trial, or bound over, and without requiring any new proceedings to be instituted for the purpose, or* ***at any other time****,* ***may, if satisfied on enquiry that it is expedient so to deal with the child or young person****, order that the age (* sic) *the child or young person be taken out of the custody, charge, or care of the person so convicted, committed for trial, or bound over, and be committed to the care of a relative of the child or young person or some other fit person named by the Court (such relative or other person being willing to undertake such care), until he attains of sixteen years, or for any shorter period,* ***and that Court or any Court of like jurisdiction may of its own motion, or on the application of any person, from time to time by order, renew, vary, and revoke any such order. (7) Nothing in this section shall be construed as preventing the Court, instead of making an order as respects a child under this section, from ordering the child to be sent to an Orphanage in any case in which the Court is authorised to do so under Part III"***
>
> *51.* ***After conviction of the person who had care and custody of the child, the options for the child are clearly laid out, the child is placed with a relative or other fit person. If the child is not released from detention to a relative or fit person, the Court has the jurisdiction to make an order that the child be sent to an Orphanage pursuant*** *to the authorisations given in Part III, Section 44*[30]*.*
>
> *52. On the readings of sections 43 and Sections 44 of the old Children Act, it is obvious that there are to be separate and distinctive arrangements for the care of*

[30] *"44. (1) Any person may, without a warrant, bring before a Magistrate any person apparently under the age of fourteen years who— (a) is found begging or receiving alms (whether or not there is any pretence of singing, playing, performing, offering anything for sale, or otherwise), or being in any street, premises or place for the purpose of so begging or receiving alms; (b) is found wandering and not having any home or settled place of abode, or visible means of subsistence, or is found wandering and having no parent or guardian, or a parent or guardian who does not exercise proper guardianship; (c) is found destitute, not being an orphan and having both parents or his surviving parent undergoing imprisonment; Page (d) has no parent, guardian, or other personable and willing to provide for or control him; (e) is under the care of a parent or guardian, who, by reason of criminal or drunken habits, is unfit to have the care of the child.... and the Magistrate before whom a person is brought as coming within one of these descriptions, if satisfied on enquiry of that fact, and that it is expedient so to deal with him, may order him to be sent to a* ***certified Orphanage;…***

*children victims and children offenders and that those two groups of children are not to be accommodated in the same location. Section 4…43. Where a youthful offender is charged before the High Court or before a Magistrate with an offence punishable in the case of an adult by imprisonment, and in the opinion of the Court before which he is charged such youthful offender is ten years of age or upwards but less than sixteen years of age, the Court, if satisfied on enquiry that it is expedient so to deal with the youthful offender, may order him to be sent to a certified Industrial School.")*

*54. Orphanages are for children who are victims of crime, or who for different reasons do not have an adult parent or guardian willing or able to properly and sufficiently care for the child. This is distinct from the arrangements for Juvenile offenders - children or young persons who have committed crime and are to be accommodated at Industrial Schools which are defined in Section 2:…*

*55. There is no doubt therefore, that after JM's mother's conviction he not having been released to a relative or fit person, was supposed to have been accommodated at a certified* ***Orphanage*** *within the meaning of the old Children's Act".*

This conclusion by the trial judge appears to be correct.

38. The trial judge concluded that:

*"90. From the 27th of September 2012 JM remained "remanded" at St. Michael's until 30th of June 2014. On that day, JM's status changed from being "remanded" to being "committed to St. Michael's Boys Industrial School with effect from 30.6.14 until he attains the age of 18 years."*

39. The precise wording of the orders of the magistrate are not as important as the existence of her jurisdiction to make them. On the wording of the old Children Act there was apparently a wider jurisdiction as to the placement of child victims **before** conviction of a parent or guardian charged with a relevant offence against them, than after their conviction. Before conviction the magistrate had the wider jurisdiction to "***make such order as circumstances require for the care and detention of the child*** *…and,* ***if a charge is made against any person within that time, until the charge has been determined by the conviction or discharge of that person".***

40. That wider jurisdiction came to end 21 days after NM's conviction on May 19, 2014 after which the magistrate's jurisdiction was to place JM in an orphanage if the circumstances, upon inquiry, dictated.

41. The effect of these provisions is that the placement of JM at St. Michael's up to 21 days after the date of his mother's conviction on May 19, 2014 was within the jurisdiction of the magistrate. Thereafter after June 10, 2014 the jurisdiction of the magistrate was restricted to placing him in an orphanage[31].

42. The trial judge found that St. Michael's was an industrial school, not an orphanage. It is logical that under the relevant legislation there should be a distinction between places provided for juvenile offenders and places provided for child victims. Her careful and detailed analysis of the relevant legislation to this effect is logical and has not been shown to be flawed.

43. i. The initial admission of JM to St Michael's on September 27, 2012 was within the jurisdiction of the magistrate.

ii. The order on June 30, 2014 subsequent to his mother's conviction was flawed in that the jurisdiction then was to place JM in an orphanage if the circumstances dictated that course. There was no jurisdiction to place him in an industrial school, which the trial judge found St Michael's to be. It was in breach of primary legislation namely section 12 (7) of the old Children Act. His detention there after June 10, 2014 was unlawful.

**Issue A (i) Whether JM's placement at St. Michael s was in breach of his right not to be deprived of liberty without due process of law under section 4(a)**

44. The issue arises as to whether the orders of the magistrate relating to the admission and placement of JM at St. Michael's are unconstitutional in the above circumstances, such that JM was deprived of his liberty without due process of law. It was effected pursuant to orders of a court. Therefore, though the orders continuing the placement

[31] A possible explanation for the apparent dichotomy between the wider latitude afforded a magistrate on placement of a child virtual complainant **before** conviction of the parent or guardian of an offence against him may be that the old Children's Act probably contemplated such placement as a temporary situation pending trial, and the need for an urgent placement of the child in the interim, with a wider discretion being thus afforded to a magistrate to ensure such a placement. the situation in this case was probably not contemplated, where years would elapse between a charge thereunder and conviction.

of JM at St. Michael's after the conviction of his mother were wrong in law (because it was not an orphanage), it was effected after an independent and impartial court process before a duly constituted court. It was therefore pursuant to due process of law. It was also therefore not arbitrary. No constitutional right is necessarily infringed by an order of a court, which though it deprives a party of liberty, is wrong in law. The remedy is to appeal to a higher court. In this case, the magistrate's court could also have been approached to review its order based upon any change in circumstances under section 12 (6) of the old Children Act, and that alternative remedy was never pursued.

45. This point was recently emphasised in **Commissioner of Prisons and Another v Seepersad and Another [2021] UKPC 13.**

> *"42. The Board's analysis of the ambit and operation of the due process clause in these two cases is as follows. One element of the applicable laws, namely the Bail Act, required that the appellants be remanded in custody at all times. The orders which remanded both appellants to institutions other than those mandated by the Children Act were made by an independent, impartial and duly constituted court. The jurisdiction of this court extended to specifying the institutions in which the appellants were to be accommodated. There is no complaint about the procedural fairness or, indeed, any aspect of the conduct of the judicial proceedings. Nor is there any suggestion that the criminal justice protections to which the appellants were entitled were denied in any way. Furthermore, as in Lasalle, the absence of any suggested violation of any of the rights conferred on the appellants by section 5 of the Constitution is a material factor.*
>
> *43. The Board recognises that there were undeniable failings of significant dimensions on the part of the state throughout the relevant period. While the Board will examine the full legal outworkings of this in their consideration of the section 4(b) ground, one of its consequences was plainly detrimental to both appellants as they found themselves accommodated in institutions which were not suited to their ages and needs. However this, correctly analysed, was the deprivation of a substantive benefit which the Board considers remote from the due process clause in the circumstances of their cases.*
>
> *44. The Board considers that the due process clause is not designed to provide protection against this type of loss of benefit. Nor did the Chief Magistrate's inability to order the detention of the appellants in the kind of accommodation to which the newly commenced statutory provisions entitled them give rise to a breach of due process, for the reasons explained. Finally, the executive's failings did not impinge on the appellants' right of access to a court. As emphasised by the Court of Appeal, the remedies of an appeal against the offending remand orders*

*of the Chief Magistrate and a challenge by judicial review proceedings, which could also (and did) encompass a constitutional challenge, were available to the appellants at all times and were pursued by them. The real mischief was constituted by a failing on the part of the executive which the Board will scrutinise more fully in its consideration of the section 4(b) ground of appeal".*

As in that case, the orders in the instant case were made by an independent, impartial and duly constituted court. There is no complaint about procedural fairness or any aspect of the judicial proceedings and there was always a right to approach the magistrate's court to review the placement at St. Michael's. (See also **Duncan and Jokhan v AG [2021] UKPC 17**, which recently summarised previous authorities to this effect, in particular at paragraphs 20, 22, 25, 26, 33-35.)

**Issue A (ii) - Whether JM's placement at St. Michael s was in breach of his right not to be subject to arbitrary detention**

46. JM s initial placement at St. Michael's and the subsequent continuation of that placement after the conviction of his mother were pursuant to orders of a magistrate. Even though the latter order, in confirming a placement to an industrial school rather than an orphanage, was defective, it was not arbitrary. This is both because it was pursuant to an order of a Magistrate in court proceedings, and because the record of that court reflects that several attempts were made without success to explore alternative placements.

**Issue B - Whether the <u>detention</u> of JM at St. Michael's was in breach of his right to the protection of the law**

**Protection of the law**

**JM's Condition**

47. From paragraph 18 of the judgment the trial judge addressed the evidence as to JM's condition**.**

*"18. At St. Michael's JM appeared to be always hungry; sometimes stealing food to satisfy his insatiable hunger. He also exhibited difficulties in communication due*

*to speech impairments[32] . Between October 2012 and March 2013[33], the Care Plan team at St. Michael's conducted physical and mental assessments on JM. On the **6th March 2013** JM was diagnosed with a rare congenital disease PW Syndrome by Dr. Jacqueline Sharpe ("Dr. Sharpe"), a Consultant Psychiatrist contracted by St. Michael's"[34].*

48. St. Michael's then developed a care plan for JM. The care plan comprised dietary and exercise plans; recreational, occupational and speech and language therapy; and medical, audiological and psychological evaluations.

**Further Assessments**

49. Further assessments

*"105. It was noted that JM's diagnosis of PW Syndrome was said to be: "a rare congenital disorder caused especially by the absence of certain genes normally present on the copy of chromosome 15. The conditions is characterized by learning difficulties, growth abnormalities, poor muscle tone, sleep disorders, insatiable appetite and obsessive eating...Behavioral problems are common in patients, including temper outbursts, stubbornness, and compulsive behaviors"*

*21. Around the latter part of 2014 most of the medical treatment and therapy ceased when the management of St. Michael's changed following the State's intervention. In July 2015 the Children's Authority of Trinidad and Tobago ("the Authority") conducted a multidisciplinary assessment of JM.*

*22. The assessment of JM revealed that the poor knowledge and understanding of JM's medical condition resulted in inadequate management and care for him; the caregiver ratio at St. Michael's did not allow for suitable supervision; and St. Michael's was not conducive to ensuring the success of the interventions or the provisions of long term care and management of JM's diagnosis. Furthermore, JM's association with peers who taunted him and encouraged his maladaptive behaviours also rendered St. Michael's an unsuitable environment for his growth and development.*

*23. Recommendations included that JM be placed in specialist therapeutic foster care trained to deal with his challenges providing individualised and nurturing care. However, due to the limited availability of this option, the alternative recommendation required that JM remain in **a structured setting** with access to*

[32] Affidavit of Keisha Sullivan filed 27th November 2017.

[33] Paragraphs 10, 11 and 12 of Affidavit of Allison Jacobs-Joseph filed 20th April 2018. During this period, he was also enrolled at the Lady Hochoy School for a short time and after receiving complaints on behaviour, we were asked to remove him.

[34] At paragraph 95 of the judgment the trial judge refers to evidence of a different date, the 12th of April 2013), but nothing turns on this.

*the appropriate therapies along with* ***high levels of supervision*** *to* ***monitor his behaviours****.*

*A treatment plan pursuant to the assessment was completed on the 26th November 2015. …"*

50. The evidence therefore clearly established that JM's condition: i. had been evaluated, ii. was one which was difficult to manage, iii. was one which required numerous therapeutic interventions, some of which had been commenced but not continued, and iv. was not capable of being managed effectively at St. Michael's. From May 18, 2015 the new Children Act catered for this situation. It conferred on the Children's Authority the jurisdiction to take steps for the protection of children who needed it, and for community residences or equivalent places of safety, to be available. The fact that there was no specialist therapeutic foster care available is irrelevant. What is relevant is that the option of a safe environment, possibly in a community residence, was not made available despite the legislation expressly providing for them. The evidence is that it was no secret that JM needed a safe environment and St. Michael's was not one. These matters are relevant to his claim for protection of the law.

51. There is a careful and thorough recitation of the evidence and relevant statutes in the judgment of trial judge.

**Regulatory framework**

52. Under section 35 of the old Children Act the Minister had the power to withdraw a certificate of an industrial school which had been certified by him under section 34. He could do so for example, if dissatisfied with the condition of such school[35].

53. The conclusion of the judge at paragraph 58[36] makes it clear that any contention that the State can escape liability for treatment of JM at St. Michael's would be

[35] See discussion of the regulatory framework by the trial judge at paragraph 57 of the judgment.

[36] *58. There were only two possible arrangements under which Industrial Schools and Orphanages could have existed and operated in Trinidad and Tobago, either Government Industrial Schools and Orphanages or Government Certified Industrial Schools and Orphanages. In both cases, government operated or government*

misconceived. Apart from regulatory oversight, it provided funding for St. Michael's and employed its staff. The trial judge correctly appreciated, after a review of the legislation, that the State had overall **supervisory responsibility** over St. Michael's. It therefore could not claim ignorance of, or deny responsibility for, the conditions there. There was also provision for the post of Inspector of Orphanages and industrial schools. (s.31). That officer twice had cause to investigate incidents of attacks on JM. The State therefore had actual knowledge of JM's situation via the reports which had been made to the Inspector.

**Children's Homes and Community Residences**

54. The trial judge noted at paragraphs 67- 68 of the judgment:-

> *"67. Provisions for the safety of children are covered under Part IX of the new Children Act. Children who are **in need of care and protection**, are to be taken to a place of safety. Such "place of safety" in the new regime for children protection, means a Reception Centre established under section 14 of the Children's Authority Act - a Community Residence **or any place appointed by the Authority to be a place of safety** for the purpose of the new Children Act.*
>
> *68. The Children's Community Residences Act was Partially Proclaimed by Legal Notice 74 of 2015 where sections 1, 2, 3(3); 4, 5, 7, 8, 9, 10, 11, 11A, 12, 13,14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 52A, 53 and 54 of the Act were proclaimed.*
>
> *69. Section 2 of The Children's Community Residences Act defines Children's Homes and Community Residences as follows: 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".*

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*certified, the government had primary responsibility. In the case of Government Industrial Schools and Orphanages, the government had the responsibility for the financing out of government funds. Those operations included the provision of staff who were to be public servants. The public servants were to make periodic reports to "the Minister".*

*60. With respect to Government Certified Industrial Schools and Orphanages, the Minister with responsibility for Industrial Schools and Orphanages, had the responsibility for certification and de-certification, of both. For certification, the Minister had to be satisfied of a number Page 23 of 92to things, including the conditions, rules and general fitness and suitability for the reception of juvenile victims and juvenile offenders. If after being certified the Minister became dissatisfied with them then it was within his power and authority to de-certify them.*

55. The trial judge concluded[37], that because the law, (section 4 of the Children's Community Residences Act), provided for three months for the making of an application by existing community residences for a licence, and six months for the Authority to issue or refuse a licence, there was a nine month transition period for the requirement of community residences. This would have deferred any breach of JM's right to protection of the law, and in particular protection of that law, until February 18, 2016. She concluded that: *"Therefore the fact that there did not exist any certified Children's Homes when the new Children Act was proclaimed did not breach anyone's Constitutional rights".* However based upon **Seepersad** (supra) delivered subsequently by the Privy Council, this was not correct. JM's right to the protection of the law was breached from May 18, 2015, the day that the new Children Act was proclaimed and came into force. This is particularly so in this case because St. Michael's was not simply an unlicensed community residence awaiting certification by the Authority. It was on the evidence an unsuitable environment which was eventually shut down after representations by the Authority itself. There was no likelihood therefore of its transitioning to licensed community residence status.

**Children's Authority – Duties**

56. The duties of the Children's Authority were carefully considered by the trial judge at paragraphs 73 to 75 of the judgment as follows:

> *"73. The evidence revealed that one of the Interested Parties, the Children's Authority, assumed a role as far as recording the events relating to JM's care, reporting that the care and accommodation was inappropriate as well as insufficient and even making recommendations for JM's detention and treatment. The jurisdiction given to the Children's Authority are wide and powerful. The jurisdiction is not limited to regulatory oversight. Sections (sic) 5 of the Children's Authority Act is where the Authority derives its powers and functions, which states: "5. (1) The Authority may have and exercise such powers and functions as are conferred on it by this Act and in particular may (a) provide care, **protection** and rehabilitation of children in accordance with Part III of this Act; ….(d) **investigate complaints** or **reports of mistreatment of children**; (e) upon investigation, remove a child **from his home** where it is shown that the **child is in imminent danger**; (f) **monitor** community residences, foster homes and nurseries and **conduct periodic reviews** to determine their compliance with such requirements as may be*

[37] at paragraph 71

*prescribed; ….and (i) do all such things as may be necessary or expedient for the proper performance of its duties…"*

*But the Children's Authority has power and authority to do more than investigate, monitor, advise and issue and suspend licences of community residences. Section 6 of the Children's Authority Act imbues the Children's Authority with certain* ***duties****, namely: "6. (1) It shall be the duty of the Authority to …; (d) take all reasonable steps to ensure the availability of accommodation necessary for compliance with this Act; …(f) take all reasonable steps to prevent children from suffering* ***ill-treatment*** *or neglect; … (h)* ***exercise such powers*** *as are conferred on it by this Act and as may be necessary with respect to any child so as to serve the* ***best interests of that child****; (i) make use of such facilities and services available for children that are provided by other agencies or institutions, as appears reasonably necessary to the Authority. (2) When determining what is in the* ***best interest of a child****, the Authority shall take into consideration: … (h) domestic violence or* ***any other form of abuse****, regardless of whether the violence was directed against or witnessed by the child;…*

*75. Section 22 of the new Children Act mandates that it is lawful for the Children's Authority to receive in its care a child in need of a place of safety. The Children's Authority will then, under Sections 22 and 25 of the new Children Act, bring that child to the court and the court is authorized to make any one of a number of orders. The Children's Authority did not exercise their jurisdiction under Part III of the new Children Act. However, this cannot deflect or distract that there was a subsisting order made at the Siparia Magistrates' Court which determined that JM was a child in need of a place of safety and that place should be provided to him until he is 18. The State remains responsible although it is clear that the Children's Authority did not use the full force of the jurisdiction and authority provided to them to (sic) the care and protection that JM deserved and was entitled to".* (All emphasis added)

The above summary of the Authority's powers and duties under the new Children Act cannot be improved upon. It demonstrates why when the new legislative framework was finally put in place on May 18, 2015 JM's right to the protection of the law was not given effect.

57. In the context of the international conventions on the rights of the child the local legislative framework in place from May 18, 2015, and the several ways these were being breached in relation to a minor with PW Syndrome, it is appropriate to declare that JM's right to the protection of the law was breached.

**United Nations Convention on the Rights of the Child**

58. The trial judge referred to international conventions, inter alia at paragraphs 80 and 82 as follows:

> *"80. …the United Nations Convention on the Rights of the Child ("UNCRC") …the UNCRC …came into force on the 2nd September 1990, and was ratified by Trinidad and Tobago on the 5th September 1991…*
>
> *82. Additionally, the claimant relies on the following Articles of the UNCRC **in establishing liability against the State for the breach of JM's constitutional rights**: "Article 23 (Children with disabilities):Children who have any kind of disability have the right to special care and support, as well as all the rights in the Convention, so that they can live full and independent lives. Article 24 (Health and health services): Children have the right to good quality health care - the best health care possible - to safe drinking water, nutritious food, a clean and safe environment, and information to help them stay healthy. Rich countries should help poorer countries achieve this. Article 25 (Review of treatment in care): **Children who are looked after by their local authorities, rather than their parents, have the right to have these living arrangements looked at regularly to see if they are the most appropriate. Their care and treatment should always be based on "the best interests of the child". (**see Guiding Principles, Article 3) Article 26 (Social security): Children - either through their guardians or directly - have the right to help from the government if they are poor or in need. Article 27 (Adequate standard of living): Children have the right to a standard of living that is good enough to meet their physical and mental needs. Governments should help families and guardians who cannot afford to provide this, particularly with regard to food, clothing and housing. Article 28: (Right to education): All children have the right to a primary education, which should be free. Wealthy countries should help poorer countries achieve this right. Discipline in schools should respect children's dignity. For children to benefit from education, schools must be run in an orderly way - **without the use of violence**. **Any form of school discipline should take into account the child's human dignity. Therefore, governments must ensure that school administrators review their discipline policies and eliminate any discipline practices involving physical or mental violence, abuse or neglect**. The Convention places a high value on education. Young people should be encouraged to reach the highest level of education of which they are capable. Article 29 (Goals of education):-Children's education should develop each child's personality, talents and abilities to the fullest.*
>
> *Article 31 (Leisure, play and culture): Children have the right to relax and play, and to join in a wide range of cultural, artistic, and other recreational activities.*
>
> *Article 37 (Detention and Punishment): No one is allowed to **punish children in a cruel or harmful** way. Children who break the law should not be treated cruelly. They should not be put in prison with adults, should be able to keep in contact with their families, and should not be sentenced to death or life imprisonment without possibility of release.*

*Article 39 (Rehabilitation of child victims): Children who have been neglected, abused or exploited should receive special help to physically and psychologically recover and reintegrate into society. Particular attention should be paid to restoring the health, self-respect and dignity of the child".* (All emphasis added)

59. All of those are commendable goals. Many are clearly aspirational for example, the ones underlined above. However if not incorporated in domestic statutes these are too vague to give rise to enforceable rights, e.g., Article 31 other articles however are far more specific. They can be utilised to inform the content of domestic law in the case of ambiguity, and even the content of constitutional rights. So for example, Article 25 – review of arrangements for children in care, and Article 28 - no physical or mental mistreatment. Even in the absence of subscribing to an international convention, some of these, e.g. Article 28 and 37 as highlighted would be capable of amounting to a breach of domestic law or the Constitution. Some articles, like Article 25, and the underlined portion of Article 37, embody common sense and best practice. Their recognition therefore, in an international convention, even though unincorporated, would serve to corroborate the existence of their subject matter as rights in domestic law also, (even prior to May 18, 2015).

**Protection of the Law**

60. The content to the right to protection of the law was explained in ***Seepersad***. There the Privy Council endorsed the interpretation and reasoning of the CCJ in the case of **Maya Leaders Alliance v AG [2015] CCJ 15**, to the effect that the interpretation of the content of this right could be wider than the more limited protection, traditionally recognized, of access to the court system. This decision is of particular application in this case, involving as it did minors who were detained pending trial for murder. In that case there was a specific statutory requirement that they be detained in a community residence as provided for by the new Children Act. In the instant case, there is no such specific statutory requirement. However an analysis of i. the circumstances in which JM came to be detained, ii. his condition, iii. the evidence of the demonstrated unsuitability of St. Michael's for JM, iv. obligations of this State under international conventions, and v. the legislative framework introduced under the Children Act and associated legislation, on May 18, 2015, all necessarily lead to the conclusion that the law that came into

existence on May 18, 2015 provided for JM to be housed in a safe environment. Therefore failure to provide it amounted, as in ***Seepersad***, to a breach of the protection of the law in relation to him.

61. The following extracts from the case of ***Seepersad*** make this conclusion clear. It is therefore necessary to set these out extensively, with all emphasis added.

> *"52. The section 4(b) jurisprudence was developed in a further decision of the Caribbean Court of Justice, The Maya Leader's Alliance v Attorney General of Belize [2015] CCJ 15. The Board would offer the following summary of this lengthy judgment: i) The right asserted by the appellants, namely a right to protection of Maya customary land tenure, was protected by the relevant provisions of the Belize Constitution.* ***ii) By section 3(a) of the Constitution of Belize every person in Belize enjoyed, amongst other "fundamental rights and freedoms of the individual … the protection of the law". iii) While this right has "traditionally" been considered to guarantee access to courts and tribunals which are independent and impartial, the court considered this an unduly "narrow interpretation": see paras 39-41.Page 26 iv) The right to protection of the law encompasses "access to and the enjoyment of the fundamental rules of natural justice": see para 42****. v) This right "…* ***goes well beyond the issue of access to judicial*** *or quasi-judicial* ***proceedings****": para 44. vi) It is a "broad spectrum right": para 45. vii) This right also "…* ***encompasses the international obligations of the state*** *to recognise and protect the rights of indigenous people …* ***to honour its international commitments****".*
>
> *53. The judgment of the court, which was unanimous, contains the following passage of particular note, at para 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' [Attorney General v Joseph and Boyce at para 20]. 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." The court concluded that the Government of Belize had contravened the constitutional right of the appellants to the protection of the law on account of its failure to take appropriate positive measures to provide practical and effective protection for the substantive constitutional right in play, specifically - in the language of para 59 - "the obligation to put in place special measures to give recognition and effect to these rights so that the protection of the law can be enjoyed". The court decided that the remedy of non-pecuniary damages was appropriate".***

62. ***Seepersad*** itself dealt with children detained for a criminal offence. JM was not detained for a criminal offence. He was removed from the custody of his mother and placed at St. Michael's supposedly for his protection. The Privy Council above first considered the general provisions relating to the rights of children. It then proceeded to examine the special provisions made for children in the criminal justice system. Although JM was not in the criminal justice system as an offender there is no reason in logic or principle why his status as a victim should be any less deserving of protection. In fact, he was being detained at an industrial school and there is no evidence to demonstrate that his treatment there was any different from juvenile offenders there. In relation to his actual treatment, it would be a distinction without a difference. So for example, rules 13.4 and 13.5 of the Beijing Rules referred to paragraph 59 of ***Seepersad*** hereunder must be construed as being equally applicable to JM. Rule 13.5 is especially applicable. In fact, even without subscribing to an international convention it is self-evident that a challenged child of 9 was entitled to protection in view of his age, personality, and his mental and physical condition. Those protections were described and explained by the Privy Council in the following paragraphs:-

> *"56. A significant contextual feature of this case is that the relevant provisions of sections 54 and 60 of the Children Act were intended to give domestic effect to internationally recognised rights embodied in the United Nations Convention on the Rights of the Child ("UNCRC"), which was ratified by Trinidad and Tobago in 1991. Article 37(c) of UNCRC provides: "Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances."*

*59. The special treatment to be accorded to children in the criminal justice system is reflected in other international instruments. The most prominent of these is probably the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules"), adopted by General Assembly Resolution 40/33 of 29 November 1985. Its provisions address a wide range of issues such as privacy, due process guarantees, special training for the police and diversionary measures. Rule 13, under the rubric "Detention Pending Trial", has a series of prescriptions: "13.1 Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time. 13.2 Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home. 13.3 Juveniles under detention pending trial shall be entitled to all rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations. 13.4 Juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults. 13.5 While in custody, juveniles shall receive care,* ***protection*** *and all necessary individual assistance-social, educational, vocational, psychological, medical and physical-that they may require* ***in view of their age****, sex and personality." Notably, the prohibition in rule 13.4 is expressed in absolute terms, a feature which the following Commentary reinforces: "****no minors shall be held in a facility where they are vulnerable to the negative influences of adult detainees*** *and … account should always be taken of the needs particular to their stage of development." Similarly, the requirements of rule 13.5 relating to (inter alia) social, educational and vocational facilities are expressed in terms which admit of no exception.*

*62. The Board considers that in any case where the court is required to determine whether there has been a breach of the protection of the law clause in section 4(b) of the Constitution of Trinidad and Tobago, it is necessary first to identify, and then evaluate, all material facts and considerations. Material in this context denotes those matters which have a bearing on the question of whether the right protected has been breached.* ***This will in every case be a fact sensitive and case specific question.***

*65. The Board would draw together the material facts and considerations in the following way. First, sections 54(1) and 60(1) and (5) of the Children Act, couched in Page 31 mandatory terms, were plainly designed to provide persons such as the appellants with substantive benefits and protections which the legislature had deemed necessary.* ***These statutory provisions failed the appellants as they were impotent throughout the periods under scrutiny.***

*66. Second,* ***this failing had a single cause, namely the failure of the executive to ensure that at the time of bringing these provisions into operation the requisite detention facilities were in place, a failure which continued thereafter.***

*67. Third,* ***the executive's aforementioned failure was in clear defiance of what Parliament had laid down in the legislation. The purpose of the legislation was***

***frustrated by the executive's failure to ensure that, once commenced, it would have immediate and practical effect.*** *The conduct of the executive, consisting of both acts and omissions, obstructed the proper operation of the legislation. Their Lordships consider that the conduct of the executive was not harmonious with the separation of powers.*

*68. Fourth, one major consequence of the executive's conduct was that the Chief Magistrate was driven to make successive remand orders which were unlawful. This is a matter of unquestionable gravity. The Chief Magistrate was precluded from remanding the appellants to community residences because none had been provided by the executive. In this way the Chief Magistrate was compelled to discharge the judicial function in a manner which failed to give effect to the will of the legislature. In this respect also the conduct of the executive was antithetical to the separation of powers.*

*70. Furthermore, the conduct of the executive was* ***incompatible with a series of international law provisions and standards****. In particular****, it had the effect of stultifying the operation of article 37(c) of UNCRC which had progressed from being an unincorporated provision of international law to a provision of duly enacted domestic primary legislation in the legal system of Trinidad and Tobago****. In addition,* ***the state of affairs brought about by the executive's unlawful acts and omissions was in conflict with the Beijing Rules.***

*71. Finally, it is necessary to consider the impact of the executive's conduct on the two children concerned. This had both legal and factual elements. The legal element is that the conduct was an interference with the liberty of the appellants. It is no answer to suggest that deprivation of their liberty was inevitable by reason of the Bail Act as the legislature had prescribed how the deprivation of their liberty was to operate.* ***Furthermore, although the fact that they would have been detained in any event is a relevant factor, the right to be detained in a designated place with a particular environment, culture, conditions and facilities is an aspect of the fundamental right to liberty which the Constitution of Trinidad and Tobago protects.*** *For example, if house arrest were permitted by a given law the detention of a person in prison would engage the protection of the law under the aegis of their right to liberty. (Compare for example R v Pinder, Re Greenwood (1855) 24 LJQB 148 and In re S-C (Mental Patient: Habeas Corpus) [1996] QB 599.)*

*72. The factual dimension of the relevant acts and omissions of the executive concerns the resulting adverse impact on the two appellants. It is no answer, in this respect, that the domestic courts ultimately found that they had not suffered cruel and unusual treatment. That is not the applicable benchmark in this context. Indeed, a breach of section 54(1) or section 60(1) or (5) of the Children Act would readily give rise to a presumed adverse impact on the child concerned. However, resort to presumptions is unnecessary given the extensive evidence before their Lordships of the appellants' conditions of detention and the assessment of Kokaram J highlighted above. In short, as regards the children,* ***the consequences***

***of the executive's conduct cannot be dismissed as trivial or technical****. They were, rather, real and substantial.*

*75. The Board would summarise the relevant acts and omissions of the executive and their consequences in the following way.* ***Fundamentally, the executive brought into operation the material provisions of the Children Act without having first put in place the arrangements necessary to give effect to their mandatory requirements, in a context where the intended beneficiary cohort of these measures, namely children, had been identified by both international law and domestic law as deserving of special protection. This had a series of substantial consequences: the operation of several interrelated provisions of primary legislation was rendered impotent during a protracted period; the aforementioned cohort was deprived of the benefits and protections prescribed by the legislature; international norms were violated; the appellants were thereby exposed to conditions, environments and influences which the frustrated legislative provisions were designed to avoid; the Chief Magistrate was compelled to make a series of unlawful remand orders; the Appellants were deprived of their liberty pursuant to such orders; and the legal system of Trinidad and Tobago did not provide them with timeous and efficacious remedies.*** *Finally the executive has failed to offer any explanation of, much less any justification for, its acts and omissions. Taking into account all of the foregoing, the Board considers that the exercise by the executive of its legal powers was arbitrary, as the appellants contend".*

63. In the instant case, as summarised by the Privy Council at paragraph 75 above in ***Seepersad***, the executive brought into operation the material provisions of the new Children Act without having first put in place the arrangements necessary to give effect to them. JM was a vulnerable child who had been identified in both international law and domestic law as deserving of special protection. The failure to have in place as at May 18 2015 Community residences or equivalent places of safety rendered that legislation impotent.

64. It is no argument that a community residence would not have been suitable because of any danger he may have posed to other residents there and that a supervised therapeutic foster care, of which there was none, was required. The evidence is that he was eventually placed in a residence where he occupied one floor, demonstrating that such an arrangement in a community residence, though presenting challenges in terms of resources and security of other residents, was at least a possible starting possible point if one had then existed.

65. JM was therefore deprived of the benefits and protections prescribed by the legislature, and international norms were violated. JM was exposed to conditions, environments, and influences which the frustrated legislative provisions were designed to avoid. The Children's Authority was unable to provide a suitable environment for JM in the absence of community residences or equivalent places of safety. Even if an application had been made to the magistrates' court for a review of his placement it would have been ineffective in the absence of any community residence or place of safety. In that regard the legal system would not have provided JM with a timeous or efficacious remedy since the options available on May 18 2015 were no different from that at the time of his placement.

**Issue C (i) - Whether the <u>treatment</u> of JM at St. Michael's was in breach of his right to security of the person**

**Treatment - The evidence**

66. Each such matter is fact specific[38]. The trial judge carefully assessed and analysed the affidavit evidence. Although it was not tested on cross-examination in large part the matters that relate to JM's admission to and detention at both St. Michael's and St. Ann's, and his treatment there are not seriously disputed, (with the exception of allegations of molestation at both places). There is also a wealth of contemporaneous documentation that was available to the trial judge which she considered and on which findings were made. An appellate court must exercise great caution in overturning findings of fact by a trial court. Its jurisdiction in this regard is limited to situations where the trial judge was "plainly wrong" as explained in numerous cases including **Beacon Insurance Company Limited v Maharaj Bookstore Limited Privy Council Appeal No. 102 of 2012**, **Harracksingh v Attorney General of Trinidad and Tobago [2004] UKPC 3**, and most recently **Pleshakov v Sky Stream Corporation and others [2021] UKPC 15.**

[38] (See Seepersad at paragraph 64)

**Revisiting findings of fact**

67. In **Beacon Insurance Company Limited v Maharaj Bookstore Limited Privy Council Appeal No. 102 of 2012** the Judicial Committee of the Privy Council reiterated that an appellate court should only exceptionally contemplate reversing a trial judge's findings of fact. The circumstances in which an appeal court can interfere with findings of fact were discussed as follows:-

> *The role of an appeal court*
> *11. It is important to recall the proper role of an appellate court in an appeal against findings of fact by a trial judge. This is relevant to the third of the grounds on which the Court of Appeal overturned the judgment of the trial judge.*
>
> *12. In Thomas v Thomas [1947] AC 484, to which the Court of Appeal referred in its judgment, Lord Thankerton stated, at pp 487-488: "I Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."*
>
> *In that case, Viscount Simon and Lord Du Parcq (at pp 486 and 493 respectively) both cited with approval a dictum of Lord Greene MR in Yuill v Yuill [1945] P 15, 19: "It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge had formed a wrong opinion." It has often been said that the appeal court must be satisfied that the judge at first instance has gone "plainly wrong".*
>
> *See, for example, Lord Macmillan in Thomas v Thomas at p 491 and Lord Hope of Craighead in Thomson v Kvaerner Govan Ltd 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: Piggott Brothers & Co Ltd v Jackson [1992] ICR 85, Lord Donaldson at p 92. Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the*

*evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence: Choo Kok Beng v Choo Kok Hoe [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169.*

*13. More recently, in In re B (A Child)(Care Proceedings: Threshold Criteria) [2013] 1 WLR 1911, Lord Neuberger (at para 53) explained the rule that a court of appeal will only rarely even contemplate reversing a trial judge's findings of primary fact. He stated: "This is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it. This can also be justified on grounds of policy (parties should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals can be expensive), delay (appeals on fact often take a long time to get on), and practicality (in many cases, it is very hard to ascertain the facts with confidence, so a second, different, opinion is no more likely to be right than the first)."*

*14. The Board has adopted a similar approach in this jurisdiction. See Harracksingh v Attorney General of Trinidad and Tobago [2004] UKPC 3 in which it referred (at para 10) to the formulation of Lord Sumner in SS Hontestroom (Owners) v SS Sagaporack (Owners) [1927] AC 37, 47: "… not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. … If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should … be let alone."*

*15. There are further grounds for appellate caution. In McGraddie v McGraddie [2013] UKSC 58, [2013] 1 WLR 2477, 2014 SC (UKSC) 12, Lord Reed (at para 4) cited observations adopted by the majority of the Canadian Supreme Court in Housen v Nikolaisen [2002] 2 SCR 235, para 14: "The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders and rulings being challenged."*

*16. In Piglowska v Piglowski [1999] 1 WLR 1360, 1372 Lord Hoffmann referred to the advantage that a judge at first instance had in seeing the parties and the other witnesses when deciding questions of credibility and findings of primary fact. He suggested that an appellate court should also be slow to reverse a trial judge's evaluation of the facts and quoted from his earlier judgment in Biogen Inc v Medeva plc [1997] RPC 1, 45: "The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."*

These principles have been reiterated in several cases since then culminating in the Board's recent decision in **Pleshakov v Sky Stream Corporation and Ors [2021] UKPC 15** delievered 14 June 2021. In the instant case the evidence was documentary in nature and no cross examination of witnesses occurred.

68. The trial judge addressed the treatment of JM inter alia, at paragraphs 124 and 125 of the judgment as follows:

*"124. What is not in dispute is that during JM's placement at St. Michael's, he was subjected to various forms of **physical** abuse. No doubt the frequency and severity of the abuse and the subsequent **failure to treat or stop such abuse** is akin to the nature of the harm described in Blencoe [supra] thereby breaching JM's section 4(a) constitutional right".*

69. The trial judge had referred to Blencoe at paragraph 86 of the judgment as follows:-

*"86. The meaning attributed to Section 4 (a) "security of the person" was considered by Justice Bastarache in the case of Blencoe -v- British Colombia (Human Rights Commission) [2000] 2 SCR: "Security of the person concerns **psychological harm**. It **must be established** that the **state caused actua**l **psychological harm**, and that there have been **serious injuries.** Moreover, he further reiterated that each right was independent of the other by stating that the right to security of person is triggered where a person suffered **serious** harm **as a result of actions of the state.**"* (All emphasis added)

**Constitutional Interpretation**

70. A useful reminder as to the principles applicable to constitutional interpretation was delivered by the Privy Council in ***Seepersad*** at paragraph 21 where it cited inter alia:

> *"21. ….the judgment of Lord Bingham in Reyes v The Queen [2002] 2 AC 235…., at para 26: "….It is unnecessary to cite these authorities at length because the principles are clear. As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the Constitution as if it were found in a will or a deed or a charterparty.* ***A generous and purposive interpretation is to be given to constitutional provisions protecting human rights****. The court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and* ***ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society****:……" Lord Bingham added, at para 28, that it is* ***appropriate to take into account international instruments incorporating relevant norms to which the state in question has subscribed****. The Board will elaborate on this in considering the section 4(b) ground of appeal".* (All emphasis added)

71. There is no reason to limit the application of that right to psychological harm. The trial judge, in referring to physical abuse at paragraph 124 did not so limit it and was correct in doing so. There can be no doubt that both the frequency and severity of the abuse that JM had to endure and the failure to prevent such abuse contributed both to actual physical harm and the likelihood of constant fear of such harm. This would be sufficient to establish a breach of JMs right to security of the person. This is because the State both directly in its supervisory and regulatory role and through its paid employees at St. Michael's, was in a position to end this and did not.

> *"125. Apart from the i.* ***abuse*** *at St. Michael's, there were a number of other factors in play: ii. the inadequacies in funding to house JM safely and appropriately; iii. the failure to ensure the implementation of an appropriate treatment plan; iv. the failure to provide adequate training and guidance to the staff charged with JM's care; v.* ***the failure to ensure sanctions*** *were put in place to* ***deter incidents of abuse****; and vi****. the failure to put mechanisms in place to ensure JM's safety from abuse"****.*(Paragraph 125 edited to add numbering and redact name and include JM)

Items i, v, and vi above in this case can and do fortify the claim to a breach of the right to security of the person although items ii, iii, and iv could not in this case.

72. JM's right to security of the person at the time of his initial placement at St. Michael's from September 27, 2012 was breached from inception and continued to be breached

throughout his stay. The magisterial record reflects that St. Michael's personnel knew, and the Magistrate was told, that St. Michael's was not suitable for JM. Returning him to his mother's care was apparently not even considered even though proceedings against her were inexplicably and indefensibly protracted. The record does not reflect why this was so. It appears to reflect a perception that that was not an option.

73. The notion that St. Michael's would have been a better option for his placement justifying his removal from his mother's care seems surprising based upon the written record from the Magistrate's Court. Instead, he was, at age 9, sent to St. Michael's, and after NM's conviction, it was ordered that he stay there until he was 18, in a situation which had the obvious potential for bullying and mistreatment. He was obviously younger than the other inmates, overweight, and with communication challenges. He suffered from a genetic condition which left him developmentally challenged. No one can therefore claim to be surprised by the ensuing bullying and attacks by older inmates. What is surprising is not the potential for bullying, which was always foreseeable, or even the fact of bullying when that potential was actualised. Rather it is the horrific nature of the incidents of abuse that did occur, as well as the fact that they were allowed to be repeated.

74. A chronology of the serious documented incidents is set out hereunder. In those circumstances, there can be no doubt that an interpretation of the Constitution is mandated which results in a declaration that the right of JM to security of the person was breached. It is not even necessary to expand the interpretation of that fundamental right to "ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society". That is because it was always obvious that standards of decency in this society should never have permitted the treatment outlined hereunder. Repeated incidents causing actual physical harm, reasonably foreseeable by the institutional personnel, must constitute a breach of this right.

**Treatment at St. Michael's**

75. There were several **documented** incidents in relation to JM. These were noted in the judgment as follows:-

> *"96. The care plan for JM is dated the **6th March 2013**. Under "history", on the first page of that health plan is noted "blue-black discoloration on the left lower lid (allegedly somebody hit him with a fist several days ago)".*
>
> *26. On the 30th April 2014 Joshua suffered a first-degree burn to his left arm caused by the deliberate actions of three residents of St. Michael's using insect spray and a lighter 10. The Inspector of Orphanages, Ms. Vidya Pooransingh investigated the incident. Ms. Pooransingh interviewed Joshua and his mother and acknowledged that St. Michael's was not the appropriate environment for Joshua.*
>
> *98. Two noteworthy -incidents were reported in 2014. On the 30th April 2014, it was reported that three residents used a full tin of insecticide to spray Joshua's arm. A lighter was used to ignite the sprayed area thereby causing burns to Joshua's arm. In addition to Joshua's age and the other circumstances that made Joshua defenseless, he was lying down when the attack was perpetrated upon him".*

76. Even from then the Inspector acknowledged that St. Michael's was not the right environment for JM.

> *"100. Ms. Salandy responded by letter dated the 29th May 2014 to the Permanent Secretary Ministry of Gender, Youth and Child Development and copying Children's Authority. The letter detailed another unrelated incident. Joshua went missing from St. Michael's on 26th May 2014. He was later reported to be located at City Police in Port of Spain. The police noted marks of violence on the child which they reported to personnel at St Michael's. The officer from St. Michael's explained to the police the incident that resulted in Joshua being burned.*
>
> *101. It was later revealed that the police observed **marks of violence unrelated to the burning incident**. It appeared that JM was beaten by a member of staff before he "absconded". JM had a bruise on his stomach as a result of being **beaten with a piece of wood by the staff member**. JM gave the police the name of the member of staff. The staff member named by JM was later positively identified as having perpetrated the battery on JM following an independent investigation conducted by St. Michael's personnel".*
>
> May 2016- personal security guard assigned.
>
> *"32. In or around May 2016 incidents of physical abuse continued intermittently despite the placement of a personal security guard assigned to JM. After 30 days,*

*the guard complained JM threw faeces at him, threw tantrums and administered punches to the guard. As such, the guard requested to be re-assigned and no one was willing to take his place".*

77. On **30 June 2015**[39] there is evidence of an incident of molestation at St. Michael's Home for Boys.

78. On July 2, 2015, the Authority undertook a forensic medical examination at the Mt. Hope Assessment Centre. There was no physical evidence of an assault revealed on such examination. However, that is not conclusive of a situation where there was no assault.

**Molestation – St. Michael's and St. Ann's**

79. As to the allegations of molestation at both St. Michael's and St. Ann's the trial judge found them to have been proven. The evidence of his mother about what she says JM reported to her would be hearsay, even if JM did not have the mental disabilities associated with his condition. So too would the references in the reports of social workers of non-verbal indications by JM which they interpreted. However there are documented instances at each institution of incidents. Those were considered by staff at both institutions to be sufficiently credible as to, justify a report to, and investigation by, the police, in the case of St. Michael's, and in the case of St. Ann's, to justify activation of their protocols in the case of such reports. Although physical examinations in both cases did not reveal physical evidence of trauma this could not be conclusive of the absence of attack or molestation. In both cases, the evidence reveals that JM was exposed to situations where the possibility of an attack or molestation was real. The Trial judge's finding that the incidents at least occurred, whatever their physical manifestations may have been, is consistent with the evidence.

[39] See paragraph 11 of that affidavit filed on the 7th of November 2017, page 86 record of appeal volume 1??, that evidence is a report by JM himself which resulted on the 1st July 2015 in the request by WPC Johnson-Eckles of the Child Protection Unit of the TTPS for the authority's assistance for a forensic medical examination to be carried out on JM.

**Summary of Incidents**

80.

i. **March 6, 2013 -** It is alleged that someone hit JM with a fist – evidence of a blue black discoloration on left lower lid causing him to be referred for a medical checkup;

**ii. April 30, 2014 –** Burn Incident**.** On May 12, 2014, Magisterial record reflects that NM told the Magistrate that she observed burns on JMs arm when she visited him at St. Michael's[40].

iii. **May 26 2014 –** JM was hit with a piece of wood by staff member before he went missing. June 13, 2014 - inspector of orphanages/ by then director of national family services appointed to investigate.

iv. **Early 2015** – management at St. Michael's changed
Renovations- sleeping in dining hall - a resident threw pepper sauce in his eyes[41]. There is also a report of 28 July 2015 by Ms. Charles who worked on the 2 to 9 shift of an inmate beating and threatening JM[42].

v. **June 30 2015**- alleged molestation – report to police- examination July

vi. May 2016 – Continued incidences of physical abuse.

vii. October 6, 2016 – JM was attacked with a piece of iron by residents of St. Michael's. Dr. S Pierre noted on his admission to St. Ann's that he had bodily scars consistent with burns and multiple scars about his chest abdomen and face[43].

The documented or independent evidence of bullying and attacks by residents and in one case by a staff member, began in 2013 and only ended in October 2016 when he was removed from St. Michael's. By May 2014 it was abundantly clear to the State from the attacks and resulting investigations by the Inspector of Orphanages that St. Michael's was unsuitable for JM. His security was constantly at risk and the responses were reactive rather than proactive.

[40] Page 68 supplemental record of appeal
[41] Paragraph 29 of the judgment
[42] See affidavit of Keisha Sullivan, paragraph 19 – letter 3 in bundle of exhibits marked "KS1".
[43] (Page 199 supplemental record of appeal).

81. JM, being in the care of the State, there was a duty to protect him. The State did not comply with its duty. JM was vulnerable and a minor in an unsuitable environment. He was different, overweight, and had communication issues. He was an easy target and he was targetted. The evidence discloses horrific instances of attacks by inmates - and one by a member of staff. One does not need to speculate that if there were these there would have been others less apparent in their effects, coupled with the constant fear of other attacks, sufficient to render the stay at St. Michael's a living hell.

Security of the person – St. Michael's

*"127. There is **no doubt** that JM suffered **psychological harm** from the time he was placed at St. Michael's. The independent reports spoke to his vulnerability by being placed among child offenders, that he could not protect himself and that he was being constantly subjected to horrific abuse. No one can seriously doubt**, **in the court's opinion, that JM suffered serious psychological harm"**.*

82. A court cannot make a finding of psychological harm without expert evidence to that effect. In the case of his detention at St. Michael's there is no such evidence. However there is sufficient evidence to justify a finding of an environment of insecurity with sufficiently regular but unpredictable serious attacks to justify an inference that someone, especially a young child in such an environment would have been living in constant fear. That would be sufficient in this case to support a conclusion that in those circumstances JM's right to security of the person would have been breached throughout the entirety of his stay at St. Ann's.

83. His right to **security of the person** over that entire period was breached by permitting the possibility of these attacks and failing to prevent those that occurred. The detention at St. Michael's facilitated the abuse and treatment and exposure to violent and bullying behaviour - the very matters that the old Children Act and then its replacement were designed to avoid. Further, this country since 1991 was a signatory to the UNCRC. Although the relevant sections of the new Children Act came into effect on May 18, 2015 when proclaimed, that convention can be utilised to understand the content of the right to protection of the law as it identifies standards of security of the person of particular application to a minor, especially one who is not even an offender but a victim.

**Issue C ii. Whether the <u>treatment</u> of JM at St. Michael's was in breach of his right to protection against cruel and unusual treatment or punishment**

84. It was necessary to consider the entire context in which JM was placed at St. Michael's and at St. Ann's, and the treatment to which he was exposed there before concluding, as the trial judge did, that his treatment at both institutions amounted to cruel and unusual treatment or punishment. As to **placement** the evidence is that numerous alternatives were explored for a more suitable placement. However they were simply not available to him because of the behaviours associated with his condition.

85. The evidence is also that attempts were made to diagnose JM's rare condition, devise a treatment plan, and implement it. From April 2016 to October 2017 the Authority explored without success other placement options for JM including St. Dominic's Children Home, the Lady Hochoy Home, the Princess Elizabeth Home, Bridge of Hope and Olive House Residential Facility for the elderly, which all indicated that they did not have the requisite skill set or resources to care for such a child.

86. The record, as reflected in the judgment of the trial judge, indicates that the difficulty posed by a child with the manifestations of PW syndrome cannot be minimized. In a relatively small society with constraints on available resources the ideal placement of JM in therapeutic foster care was simply not available. The children's homes, which did exist and undertook the care of disadvantaged children and children with disabilities, recognized their inability to provide for his particular condition and behaviours and declined to accept him. So too the homes for the elderly. The reality is that his placement posed extreme difficulty, as the resources to manage JM did not exist. When he was eventually placed under the direct care of the Children's Authority they depose that it required a round the clock team of 12 nurses at a cost of $108,000 per month- a very significant sum in this society, with a ground floor of a building dedicated exclusively to JM. The difficulty in his placement in those circumstances, and the apparent lack of action up to this point in that context becomes far more explicable.

**Assessment and Treatment plan**

87. In or about March 2012 JM was diagnosed by Dr. Sharpe consultant psychiatrist contracted by St. Michael's School for Boys as being a child affected by PW syndrome. Jomo Thomas[44]deposed in his affidavit that he was advised that after that diagnosis various interventions were arranged for JM and implemented by St. Michael's. Those interventions were based on an intensive care plan that was developed to meet JM's specific needs. The plan included: a) **recreational therapy** October 2014 to January 2015, b) **dietary plan** 2014 by Dr. Pooran, c) **exercise plan** 2014 by Dr. Pooran, d) **occupational therapist** 2013 with Natasha Sexius, e) **speech and language therapy** 2013 with Kasher Lindsley, f) **medical evaluation** 2013 at Community Hospital of Seventh Day Adventist, g) **audiological evaluation** 2013 at Trinidad and Tobago Association for the Hearing Impaired, and h) **psychological assessment** 2012 at Champion Medical and Counseling Medical Centre.

88. Assessment commenced on July 14, 2015 shortly after the Children Act was proclaimed. In the treatment plan dated November 26, 2015 the multidisciplinary assessment team made recommendations that a) JM be placed in **specialist therapeutic foster care**, with a foster care giver who was trained to deal with his challenges and to provide individualized nursing and nurturing care[45]. This was not available. Numerous other therapeutic interventions were recommended by the multidisciplinary team[46]. Clearly, the JM's condition optimally required several interventions by a range of specialists in a multitude of disciplines.

89. In the affidavit of NM, filed on July 16 2018[47], she deposed "*many times when JM was in the care of St. Michael's they will call me and beg me to take him back. I was between a rock and a hard place. I felt like no one wanted my son and I couldn't manage to take care of him by myself. As a result of the constant calls I decided to take JM back for brief*

[44] Page 101 of record of appeal Vol. 1 paragraph 5 filed on behalf of the Children's Authority.
[45] (Paragraph 17 of the affidavit)
[46] (at paragraph 18)
[47] at page 1089 of the record of appeal at paragraph 29

*periods. This only happened on a few occasions at the insistence of St. Michael's management"*.

90. JM's mother's role in this situation cannot be ignored. She was only prepared to take him back for brief periods. Yet she complains that St. Michael's Home did not continue the interventions that were recommended for him after a year had passed. This implicitly recognizes that efforts had been made by the Home to put in place a treatment plan for JM and to comply with it at least for a period up to around 2014.

91. Clearly therefore there was some attempt to a) create a treatment plan for JM and b) implement it. At paragraph 7 of that affidavit, Jomo Thomas deposes that he was advised by Ms. Sullivan, ( the Treatment Plan Assistant), that she made efforts to enroll JM into the Lady Hochoy Home. However these were unsuccessful due to his behavioral issues. He was also advised that before his placement at St. Michael's JM had previously been placed at both the St. Dominic's Children's Home and St. Mary's Children's Home. However due to his behavioral issues there was placement breakdown at both.

**St. Michael's treatment**

92. At paragraph 10 of the affidavit of Allison Jacob-Joseph the deponent states that JM had been enrolled at the Lady Hochoy School for a short time, but they had asked that he be removed after one week. She deposes that a care plan was identified and implemented for JM after his diagnosis[48]. Several professionals examined and assessed JM. He was enrolled in speech and occupational therapy, aqua therapy and placed on a special diet[49]. JM's mother was invited to attend speech therapy sessions but never did. He was a patient at the ENT Clinic at the San Fernando General Hospital.

93. It was recognized that St. Michael's was not the right environment. His mother was requested to locate a suitable apartment for which St. Michael's was to be responsible and JM would continue to attend the therapy sessions. His mother denies this and contends that this would have been in breach of the order of the Magistrate's Court in

[48] Page 980 record of appeal volume 3
[49] Paragraph 12

any event. At paragraph 17 of Allison Jacob-Joseph's affidavit, she deposes that his mother often declined offers to take JM home on leave. She took him home on two occasions. On one of those occasions,[50] JM travelled from Curepe to Marabella where his father resides using public transport, and his mother did not miss him from the home.

94. At paragraph 27 of her affidavit, she deposed that in May 2016 St. Michael's assigned a personal security guard to JM. However after 30 days the guard complained of JM's behaviour to him detailed in more specificity in the affidavit, and which behavior included kicking, screaming and punching the guard. The guard asked to be reassigned and there was no one willing to take his place.

95. It cannot therefore be said on the evidence that no attempts were made to address the situation presented by JM. Those attempts were not always effective but there can be no allegations of malice in this regard. The evidence is that at St. Michael's there were documented attacks on him as outlined previously. Those were, except in one case, committed by other inmates. The corroborated documented evidence cannot support any conclusion that they were part of any systematic actions by the staff or administration of St. Michael's or condoned by them. The evidence does suggest however that the steps that they took if any to prevent such attacks were ineffective and when eventually taken, were too late.

**Cruel and Unusual Treatment and Punishment**

96. Despite the horrific incidents at St. Michael's by the inmates there is no evidence of treatment there that was cruel in the sense of connoting any element of intent or malice by the staff of administration of St. Michael's.

97. There is therefore no persuasive evidence capable of amounting to treatment or punishment that was cruel such as to amount to a breach of that constitutional right. . This however is not evidence of any systematic treatment or punishment. While the one documented incident of a brutal assault by a member of staff was horrific and probably

[50] Paragraph 18

unlawful, to categorize it as a breach of the constitutional right not to be subject to cruel and unusual treatment or punishment would only trivialize that constitutional right, especially when it can be compensable as a breach of another constitutional right – the right to security of the person.

98. The evidence in context is that attempts were made to address his situation and condition as outlined above. These are inconsistent with any finding of treatment or punishment that is either cruel or unusual. Neither is there any evidence that his treatment there was unusual in the sense that he was subject to any treatment that was not usual for residents of an institution like that one. Such incidents as did occur there would be compensable under JMs right to security of person.

99. The trial judge also referred at paragraph 154 to undisputed acts of violence perpetrated on JM while he was at St. Michael's, including the beating with a piece of wood perpetrated by a member of staff and concluded that these amounted to cruel and unusual treatment or punishment.

100. The evidence however is: i. that there was one documented beating with a piece of wood by a member of staff, ii. it was not condoned by the administration of St. Michael's, far less by the State, which launched an investigation into to it by the Inspector of Orphanages, iii. that the other undisputed acts of violence were perpetrated on JM by inmates iv. there were attempts by St. Michael's personnel to address them, most notably by the hiring of a security guard specifically assigned to JM.

101. As outlined previously those efforts were ineffective and did not prevent a repetition of those incidents. Those incidents are capable of amounting, and this court has found that they do amount, to a breach of his right to the security of the person. However, they are not part of any system or pattern of conduct of sanctioned behaviour or deliberate or malicious actions by the State such as to constitute deliberate acts of punishment or treatment, and therefore cannot constitute a breach of the right to cruel and unusual treatment or punishment.

102. The evidence in this regard was i.) not subject to cross-examination and ii.) is the same evidence that is before this court. The trial Judge's assessment of that evidence and application to it of the law of what constituted a breach of the right to cruel and unusual treatment or punishment, are matters that can be reviewed by an appellate court.

103. At paragraph 140 of the judgment the trial judge referred to the several incidents at St. Michael's but erred in not appreciating that the attack there, with one exception, were all by other residents. There was no evidence referred to of active complicity by the staff or administration in the commission of those acts. That was a material consideration in determining whether they satisfied any test for cruel or unusual treatment or punishment.

104. They were acts that occurred when JM was in the custody of the State but they were not acts by the State. They are acts that are therefore compensable under the breach of the right to security of the person because, as discussed above, the State would be ultimately liable for failing to prevent them. However, that is a different matter from characterizing acts by such parties as satisfying the test for cruel and unusual treatment. There is no evidence that JM was treated either cruelly or unusually ,except for the one instance of the attack by a staff member. That attack was not sanctioned by the institution. It was the subject of an investigation by the Inspector of orphanages. The very fact that it was investigated demonstrates that the State was in no way condoning such treatment and that it was not part of any sanctioned action by the State. In those circumstances, its characterization, together with the actions of residents, equally not sanctioned by the State, could not be characterized as a breach of the right to protection against cruel and unusual treatment or punishment.

105. At paragraph 141, the trial judge considered that JM was the victim of repeated abuse. The evidence in this regard is that there was one incident which was investigated. The trial judge erred in: i) not appreciating the nature of the evidence in this regard, ii) not appreciating that such evidence as did exist was in relation to actions by residents, and,

iii) that there was no evidence that the servants or agents of the State were complicit in it or deliberately or intentionally omitted to take steps to prevent it.

106. Given the type and duration of abuse at St. Michaels, the fact that he entered at age 9, and was the target of constant bullying, even if there were no actual psychological harm there was the constant threat of serious physical harm, which was actually manifested on the occasions described previously.

107. It is clear that St. Michael's was not equipped to provide optimal care for JM. However, it is equally clear that there was no other institution that was so equipped. There is also ample evidence that his mother was not able to provide such care. The blameworthiness in the care of JM does not stem from the inability to continue implementation of a detailed and resource intensive care plan in the context of constrained physical and financial resources. Rather it arose in:
    i. failing to ensure protection of JM knowing that he was vulnerable thereby breaching his right to security of the person,
    ii. failing to provide the option of a community residence or equivalent place of safety from 18 May 2015 despite proclaiming legislation which contemplated its existence, thereby breaching his right to protection of that law.

108. His treatment however did not amount in law to cruel or unusual treatment or punishment. The absence of intention, deliberation, or malice, and the good faith efforts of many of the parties both agents of the State, and of the NWRHA, who interacted with JM removed this case from the category where a breach of that right could be discerned far less established on the evidence.

109. Accordingly, there would be an evidential basis for a finding that his right to security of person was breached. This however was mitigated by attempts to devise and implement a treatment plan tailored to his condition. The evidence is not that the staff and agents of the state were complicit in the treatment that he was subjected to by inmates. With one notable exception of an attack upon him by a member of staff, the evidence is that attempts, not always effective, were made to address his condition.

However, there was no evidence of actual deliberate cruel and unusual treatment by the majority of members of staff or the administration of St. Michael's. Accordingly, there would be no evidential basis for a finding that his right not to be subject to cruel and unusual treatment of punishment was breached. The law on the content of that right will be addressed hereinafter when JM's treatment at St. Ann's is considered.

**Issue D - Whether the admission of JM to St. Ann's was unlawful**

**St. Ann's admission**

110. According to paragraph 29 of her affidavit, Dr. Sharpe was approached in October 2016 and based on her advice JM was admitted to St. Ann's Hospital on October 6, 2016.

111. The transfer to St. Ann's psychiatric hospital was addressed by the judge at inter alia paragraphs 35, 108 and 109:

> *"35. In response to an escalating severity of abuse, on or around the 6th October 2016, the management of the St. Michael's School for Boys, upon the recommendation of Dr. Sharpe, made a decision to transfer JM to the St. Ann's Psychiatric Hospital ("St. Ann's"). The transfer was supposed to be a temporary arrangement as a result of the renovations and physical conditions at St. Michael's. Mrs. Schulere-Yorke, a psychiatric social worker at St. Michael's also outlined that JM's transfer was **temporary** and done in the best interests of his safety and well-being. In addition, Dr. Stafford Pierre the examining medical practitioner believed that JM was mentally ill and ought to be detained by St. Ann's in the interest of his health, safety and protection of others.*
>
> *108. JM remained at St. Michael's until he was transferred to St Ann's Hospital. The evidence of JM's transfer and stay at St. Ann's comes primarily from the affidavit of Dr. Abiodun Dosumu sworn filed on the 27th March 2018. JM's transfer was precipitated by a request from Dr. Sharpe. This is the same Dr. Sharpe who made JM's diagnosis of PW Syndrome in 2013. In a letter dated the 4th of October 2016, Dr. Sharpe wrote to Dr. O'Brady-Henry thanking him for agreeing to admit JM as an inpatient at St. Ann's Psychiatric Hospital. Dr. Sharpe wrote that JM "is being physically abused by them and he is unable to defend himself well". Dr. Sharpe wrote that the arrangement would be a **temporary** one until renovation of the dormitories at St. Michael's was completed.*
>
> *The St. Ann's Hospital Initial Psychiatric Assessment report 44 noted that the Stressor(s) were (1) Physically Abused (2) Emotionally abused - both by staff and other members of the home".*

112. Dr. Sharpe was the consultant psychiatrist who had diagnosed JM with PW syndrome initially. Unfortunately, her intervention to secure a temporary admission of JM to the St. Ann's Hospital to extricate him from the difficult and deteriorating situation that he was facing at St. Michael's resulted in its own legal challenges which are the subject of the instant action.

113. There is no evidence that the admission to St. Ann's was based on anything but good intentions. To suggest otherwise, particularly in relation to the involvement of Dr. Sharpe would be unfair and completely unjustified on the evidence. It was an attempt to extricate him from a highly difficult and unsatisfactory situation. Admission to St. Ann's was based upon the Mental Health Act. Once St. Michael's was not available there appeared to be no other suitable place available for JM's placement. Other homes had been tried and had refused to accept him because of the significant challenges that his condition and behavior as a result presented. His mother was not in a position to take him back even though according to her, St. Michael's had asked her to do so.

114. It is consistent with i. the fact that it had been recognized that there were issues with the placement of JM and an attempt to deal with those issues, ii. the fact that resources available for the treatment of those issues were inadequate and were being overwhelmed, and iii. a last ditch effort, after several unsuccessful attempts to place him otherwise, to transfer JM on a temporary basis to St. Ann's, where it was hoped that there would be removal from the increasingly violent and unsuitable physical environment that St. Michael's had demonstrated itself to be. It is therefore not an accurate characterization of the situation to say that the transfer of JM to St. Ann's was an attempt to sweep the problems under the rug.

**Issue D i. Whether it was in breach of his constitutional right not to be deprived of liberty without due process of law under section 4 (a)**

**Issue D i. Whether it was in breach of his constitutional right not to be deprived of liberty without due process of law under section 4 (a)**

115. The evidence is that JM had been admitted to St. Ann's under the Mental Health Act after he had been admitted and diagnosed by a specialist medical practitioner, a

psychiatrist independent of St. Michael's, as suffering from a mental illness[51]. The admission was in circumstances which clearly show that it was an attempt to temporarily extricate him from a horrible situation. Though intended to be temporary there is no evidence that his admission was improper, or that he did not qualify for admission under the Mental Health Act, or the procedures for his admission were not followed. The court therefore erred in concluding[52] despite the expert evidence that JM was not mentally ill. Accordingly, there is no evidence of a lack of due process so as to constitute a breach of this right.

**Issue D ii. Whether it was in breach of his right not to be subject to arbitrary detention**

116. For the same reasons as above, there is no evidence that his admission to St. Ann's, being under the Mental Health Act, was arbitrary.

**Issue E. Whether the <u>detention</u> of JM at St. Ann's was in breach of his right to the protection of the law.**

**Protection of the law**

117. Post May 18, 2015 community residences were supposed to be in place because the Children Act as proclaimed provided for them within a statutory structure that had become law. The failure to provide these from that date was, for reasons previously set out a breach of JM's right to protection of the law. His detention at St. Michael's from that date was in breach of that right.

118. His detention at St. Ann's (as opposed to his admission), was unconstitutional for the same reasons as his detention post May 18, 2015 at St. Michael's. If a community residence or equivalent place of safety had been available, it would not have been necessary to even consider St. Ann's as the only alternative for a temporary placement.

[51] See paragraph 13 of the affidavit of Dr. Dusumu filed March 27, 2018, volume 2 record of appeal page 474, and 485.
[52] (at paragraph 171)

119. Therefore, during the entire period of his detention from October 6, 2016 to October 12, 2017, at St. Ann's (371 days), his right to protection of the law would have been continually breached.

120. The protection of the new Children Act was not afforded to him from the 18 May 2015. It was only when the High Court made orders on the 12th of October 2017 that he was transferred from St. Ann's into the care of the Children's Authority and the Child Support Care Centre. The evidence was that his placement at St. Ann's was a temporary arrangement. Although JM was admitted as an urgent admission patient and certified as suffering from a mental illness, his temporary stay there was becoming permanent.

121. The evidence is that JM was placed at St. Ann's, not because he was a danger to others, but because others were a danger to him. The medical evidence that his admission there was under the Mental Health Act cannot be challenged. However, there is no evidence that his detention there was required if an alternative, such as a community residence or other place of safety, was available. In fact, the records at St. Ann's suggest at one point a recognition that he was vulnerable on the Ward and that his transfer therefrom was desirable.

122. In the context of: i) the international conventions on the rights of the child referred to by the trial judge, (and the Privy Council in ***Seepersad***), ii) the several ways these were being breached in relation to a minor with PW syndrome, and iii) the requirements under the statutory regime with effect from May 18, 2015 to have community residences and places of safety available, it is appropriate to declare that JM's constitutional right to protection of the law continued to be breached by his detention instead at St. Ann's, a psychiatric hospital.

**Issue F – i. Whether the <u>treatment</u> of JM at St. Ann's was in breach of his right to security of the person**

**St. Ann's**

**Molestation**

123. There is a report of an assault on October 2, 2017 at the St. Ann's Hospital, (See page 77 of exhibit AD1 preliminary assessment attached to the affidavit of Alana Bouchon sworn on November 6, 2017 at page 7 of that report). The report documents, (although hearsay as to the truth of the report, though not as to the existence or fact of the report), that a nurse had reported witnessing an alleged perpetrator attacking JM at approximately 2.00 p.m. on 2 October 2017. A report was made to the police on the same day. JM was taken by the police to be examined by the DMO on 2 October 2017.

124. Again, as in the case of the St. Michael's incident the physical examination did not confirm the attack. However, this could not be conclusive of any determination that there had been no such attack. The report was sufficiently credible to have resulted in the involvement of the police and the commencement of prophylaxis treatment for gonorrhea and chlamydia. On the evidence that was before the trial judge there is no basis for concluding that she was plainly wrong to have found that both incidents did occur. At minimum, those reports established that there was the opportunity at each institution for those reported attacks and that would itself be a breach of JM's **right to security of the person**. This would be especially so given that under the UNCRC children and adults should not have been mixing in that environment.

**Prescription of Medication**

125. Medication was prescribed by Dr. O'Brady Henry for JM by the consultant psychiatrist attached to the ward. Dr. Dusomu also placed JM on Depakote 500 milligrams twice daily to manage impulsive behaviour[53]. Dr. Dusomu is a psychiatrist at the St. Ann's Psychiatric Hospital. The allegation therefore that JM was prescribed medication inappropriately cannot be borne out. The medication was prescribed by medical professionals and there is no evidence that it was not required in the circumstances.

[53] (See also page 432 record of appeal Vol. 1)

126. The report of Dr. Sharpe dated 8th of March 2018[54] notes that "because of his significant impulsivity and because he is prone to be emotionally labile JM was started on Depakote 500 milligrams twice daily. This dosage is being maintained currently but is reviewed at his clinic visits and it would be modified if he loses weight. The trial judge reviewed the evidence in this regard inter alia at paragraph 37.

> *"37. While at St. Ann's JM was placed on a **low caloric** diet with weekly weight monitoring. He engaged in **physical therapy**, was **treated with Haldol** twice daily and was also prescribed Haldol through the intramuscular route as necessary until this was switched to Chlorpromazine. Dr. Abiodun Dosumu (Acting Specialist Medical Officer at the material time) avers that JM was treated with the **accepted reasonable standard for persons with his condition** and there were no resources for additional treatment to patients with this disorder".*

127. There is no evidence that the medications that JM received were in any way inappropriate. They were all prescribed by medical specialists. To the extent that the trial judge found that he was prescribed psychiatric medications when he did not suffer from a psychiatric condition, that is simply not a conclusion was available to the trial judge on the evidence, far less the evidence that the court actually referred to. A judge is not a medical specialist. While a judge may assess competing or conflicting medical evidence and draw conclusions thereon, there is no medical evidence that JM was prescribed medications inappropriately.

128. The trial judge seems to have performed a google search on the drugs prescribed and administered to JM. If so this was plainly wrong. A court cannot introduce into a case its own material unless it falls within a category recognised as capable of judicial notice. Uncontradicted evidence of expert medical treatment without any cross-examination thereon could hardly be the subject of contradiction via google search. Internet searches and speculation could not suffice to displace the actual evidence of the medical professionals.

[54] (page 457 record of appeal)

**Seclusion**

129. The trial judge carefully addressed the evidence as to seclusion in particular at paragraphs 38, 111, and 112-114. (All emphasis added)

> *"38. JM's was resistive to instructions from staff and was **verbally and physically hostile to staff and other patients** at St. Ann's. Attempts at counselling were not always successful and when this failed there was no option left but to place **JM in the seclusion room** of the ward in accordance with St. Ann's policy or to **give him medication** PRN via the intramuscular route.*
> *FN 27 The behaviour which warranted admission into the seclusion room is stated in the Continuation Sheet, Current Illness and Progress Notes Nurses Notes exhibit "A.D.5" Affidavit of Dr. Abiodun Dosumu filed 27th March 2018 at paragraphs 16 and 17.*
>
> *111. By the 8 th of January 2017, the records noted concerns about JM's stay at St. Ann's and the need to speak to Dr. Sharpe about JM's placement at St. Michael's. During the duration of housing at St. Ann's the staff complained about different things at different times. The complaints included what appeared to be JM's sexualized behaviour towards staff and other patients. A major part of the plan for management of JM's needs became placement in the seclusion room. This is evident in JM's medical records from St. Ann's Hospital, for example, by the following notations on the "Continuation Sheet":*
> *i. 6 th December 2016. 10:13am "Place in seclusion room for **one (1) hour**"*
> *ii. 20th March 2017. 7:15pm "Patient placed **since 6:15pm**. Upon observation of patient in seclusion:- entirely naked, **sitting quietly on floor**". On the 24th of March the notes asked that there be an update about JM's placement **"JM vulnerable on this ward"***
> *iii. March 2017. Mitchell placed in seclusion for disrespectful behaviour to staff this morning as per hospital protocol seen in seclusion room....**Max, seclusion 2 hrs**. The record on that same page noted concerns about the patient being "UNDERAGE" and on ward since 6.10.16*
> *iv. 24th July 2017. Patient **placed in seclusion due to strange behaviour** hypersexuality.*
> *v. 20 th August 2017. 10:29 hrs. Report that JM received trauma to his head that required sutures. It was reported that JM was requesting "coitis" from another patient who attacked him. The laceration was approximately 2-5cm.*
> *vi. August 2017. The notes reveal a **request for a transfer** to Ward 14 whenever space was available but that patient to be removed within 7-10 days.*
> *vii. 2th October 2017 4:08pm. Informed by nurse pt sexually assaulted by another patient today at 2:10pm. The staff on checking on patient (JM) found another patient on top him. JM reported discomfort to his anal site. It was reported in the notes following that JM was assaulted by a 24 year old patient (name stated in records).*
> *viii. 4th October 2017 4:45pm. The patient was reported to be making sexual advances to and invitations to other patients via physical gestures. "In light of the previous events in which the patient was assaulted by other patient, patient was*

***placed in seclusion in attempt to avoid further assaults****...seclusion as per policy x 72hrs."*
*ix. 9th October 2017. Patient noted to be inappropriately hypersexual on ward "Plan: Seclusion as per hospital policy".*

*112. There are other medical records that are titled as "Prescription Sheet". These Prescription Sheets appear to have information about drugs: when ordered, dosage and time the dosage given. Those sheets include a column called "NURSING INSTRUCTION - OTHER TREATMENT".*
*In that column there appear notations such as:*
*i. 12 th October 2016 - Seclusion*
*ii. 25 th October 2016 - Seclusion*
*iii. 16 th December 2016-Seclusion and Restraints*
*iv. 17 th January 2017 - Seclusion/Physical restraints*
*v. 4 th October 2017 - Seclusion Room / 4 point restraints vi. 6 th October ~ seclusion room*

*113. Still different medical records are titled "NURSES NOTES". Some of the notes in those records are as follows:*
*i. 10th October 2016, 10:40am - "At 10:20 Attendants, two (2) male arrived on the ward. Patient continues to demonstrate non-compliance to nursing instructions disruptive and unpredictable behaviour. Patient was placed in* ***protective care*** *@10:25 am for* ***settling purposes****...Patient was removed from protective care a 12:45pm".*
*ii. 17th October 2016 at* ***2:05pm*** *patient began using obscene language. He was placed in "non stimulating environment". Patient removed from non-stimulating environment at* ***5:30pm****.*

*114. Dr. Abiodum Dosumu averred that JM was provided with the accepted treatment for PW Syndrome and was treated with the accepted reasonable standard for persons with his condition. He did say however, that the additional resources required for additional treatment was not available. Dr. Dosumu further averred: "16. Whilst at the St. Ann's Hospital, JM however displayed unacceptable forms of behavior which included resistive responses to instructions from staff, verbal* ***hostile abuse directed a staff and other patients****. Attempts at counselling JM were not successful. When this failed, there was no option left by to place JM in the seclusion room of the ward in accordance with the St. Ann's Hospital's policy for same or to give him medication..."*

*115. The complaints in notes from St Ann's Psychiatric Hospital about JM's behaviour that led to him being placed in seclusion, sometimes in restraints, are precisely what were revealed as the behavioural norms to be expected by a person diagnosed with Prader Willi Syndrome. Further the description of the hyper-sexualized behaviour supports what was averred by Nicola Mitchell and others about JM being sexually attacked on numerous occasions".*

130. That evidence as carefully set out by the trial judge reveals that:

i. JM was placed in seclusion for limited periods when his behaviour left no other option.

ii. He was on those occasions placed there either for his own protection or the protection of staff or patients.

iii. He was not usually placed there for more than a few hours at a time usually around two though in one case three and a half.

iv. There was an occasion on October, 4, 2017 when he was secluded for 72 hours for his own protection after the report of the assault upon him.

v. There is no evidence that he would stand while in the seclusion room or that he would experience pain while doing so. In fact, such evidence as exists is that on March 20, 2017 while in seclusion he was observed sitting quietly on the floor.

131. At paragraph 142 of the judgment the trial judge concluded that placing JM repeatedly in the seclusion room was akin to solitary confinement and as such his constitutional right to be free from cruel and unusual punishment was violated. However, this is a conclusion, not a finding of fact of the evidence. Further, it is a conclusion not justified on the evidence that was before the trial judge. Placement in the seclusion room was not akin to solitary confinement of the nature being referred to in the authorities. The evidence is that his placement in the seclusion room was i. for limited periods ii. on occasions and iii. in circumstances where protection of other inmates or staff was required in circumstances of outbursts or inappropriate behavior. This is a completely different order of magnitude from the behavior contemplated in the cases which deal with actual solitary confinement for the purpose of punishment for prolonged periods. It cannot seriously be argued that being placed in a seclusion room alone on occasion for periods of less than three hours could amount to complete sensory deprivation. Far less can it be argued that this could constitute a breach of the fundamental constitutional right to be free from cruel and unusual treatment or punishment. That right cannot be so easily trivialized.

132. The trial judge concluded that JM ought to have been afforded the protection of regulation 15(b) of the Community Residences Regulations 2015 wherever he was housed, and that JM's placement at St. Ann's was a breach of a constitutional right. Even

if the content of that regulation were applicable to inform the conditions under which JM was to be housed it is a leap of logic to equate such a breach of regulation on occasion to a breach of the right to protection from cruel or unusual treatment or punishment.

133. However, his **detention** at St. Ann's was a breach of the separate right to **protection of the law** which is compensable under that head.

134. JM's **treatment** at St. Ann's insofar as it was inappropriate and amounted to a breach of the right to security of the person was also compensable but under that head. It is therefore not necessary to elevate the instances of seclusion actually-established on the evidence to a level of severity which the evidence simply did not support. Neither was it necessary to then characterise it as a breach of the right to the protection from cruel and unusual treatment or punishment.

135. In those circumstances and on that evidence any inference that the right to security of person was breached by being placed in seclusion, and on occasion in restraints, in the circumstances was unjustified on the evidence and wrong in law. JM, other patients, and staff all required and deserved protection from any behaviour that could pose a threat, or from harassment. The actual evidence of seclusion and the circumstances thereof outlined previously do not support any conclusion or inference that the seclusion in the instant case, for limited and defined periods, could be equated with the type of solitary confinement that was being addressed in the cases to which the judge referred. Neither the seclusion described by the court itself, nor the administration of medication prescribed by medical professionals, could in the circumstances constitute a breach of the right to security of the person.

**Issue F (ii) Whether the <u>treatment</u> of JM at St. Ann's was in breach of his right to protection against cruel and unusual punishment**

**Seclusion**

136. The trial judge addressed this at inter alia at paragraphs 117, 121, and 122.

> *"117. The NWRHA submitted that solitary confinement on its own is not an actionable breach of a person's constitutional rights as it is a matter of degree, duration and the circumstance in consideration with many other factors. JM was*

*a patient with a diagnosed medical condition, **not a mental disease**. He was placed in a mental hospital and subjected to **cruel and unusual punishment** guised (sic) as **treatment** because St. Ann's was not the proper place for him".*

However, JM's treatment at St. Ann's could not be categorized as cruel and unusual punishment just because St. Ann's not the proper place for him. That matter was addressable under his right to the protection of the law. The treatment itself has to be assessed to determine if it constitutes or amounts to cruel or unusual treatment or punishment.

*121. Furthermore, the court agrees that placing JM in a seclusion room akin to solitary confinement **had the ability to affect his psychological state**. As aforementioned, JM is already more vulnerable to harm. If placement of juvenile offenders in solitary confinement can affect their mental health, who are more than likely not as vulnerable as JM, the court can only envision a more damning effect on the latter.*

However, there is no evidence of psychological harm from seclusion and it cannot be inferred in these particular circumstances.

*"122. The placement in the seclusion room, having regard to the fact that JM is a disabled child suffering from multiple physical, psychological and behavioural impairments renders him more vulnerable to harm in the sense prescribed by **Blencoe** [supra]. Further, as set out in the treatment plan of 2018, JM has pain in his legs upon weight bearing, which would include **standing**. Therefore, placement in a room without furniture would have been an uncomfortable and potentially painful experience for him".*

However, there is no evidence that he stood for the duration of his stay in the seclusion room.

**Alleged Molestation at St. Ann's**

137. The trial judge addressed the evidence in relation to this at paragraph 119 and 120.

*"119. In relation to the incident of buggery which allegedly took place on the 2 nd October 2017, the NWRHA submits that apart from the allegations given by Ms. Mitchell, there is no evidence in support of that attack. The results of the examination conducted shortly after by Dr. Castillo, revealed "nil abnormalities were observed nor any signs of trauma or bleeding at the anal site." This was also confirmed by the findings of Dr. Naidike at the St. James Health Facility.*

*120. Evidence of nil abnormalities cannot be proof that the incident did not occur. Rather all the actions taken by the staff do point, to the contrary that the incident did occur. The staff acted and took precautions to ensure that the JM was medically attended to after the buggery occurred".*

In relation to the allegation of molestation the trial judge's reasoning cannot be faulted.

138. The trial judge addressed the question of seclusion at St. Ann's and concluded that JM must have suffered serious psychological harm as a result.

> *"126. The claimant submitted that placement in the **seclusion room for prolonged periods** caused **JM psychological and physical harm**. In so doing they relied on Rule 67 of the UN Rules for the Protection of Juveniles Deprived of their Liberty ("the Havana Rules") which states: Page 47 of 92"All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, **closed or solitary confinement** or any other punishment that may compromise the physical or mental health of the juvenile concerned."*

139. The trial judge concluded that:-

> "128. *If JM did not suffer psychological harm at St. Michaels, he must have suffered **serious psychological harm** at St Ann's Psychiatric Hospital. He was placed in the seclusion room. There were times that he was placed in restraints. This is even ignoring he was **in a mental hospital without a mental illness** and housed with adults".*

140. The evidence however is that he was placed there on occasion when the circumstances left little alternative. The trial judge usurped the expertise of the medical experts in finding that he was placed in a mental hospital **without** a **mental illness**. The evidence in fact is that on admission JM was evaluated and with the knowledge that he suffered from PW Syndrome was certified as having a mental illness. (Whether it was a mental illness which mandated long-term confinement of a child in a mental hospital was a different issue, which has been addressed in relation to his right to protection of the law).

> "129. *The fact that JM is a disabled child suffering from multiple physical, psychological and behavioural impairments renders him more vulnerable to harm in the sense prescribed by Blencoe [supra]. What about the fact, as set out in the treatment plan of 2018, that JM has pain in his legs upon weight bearing, which would include **standing**. The seclusion involved placement in a room without*

*furniture, where he had to **sit** on the ground. This must have been an uncomfortable and potentially very painful experience for him causing not only more serious physiological harm but also psychological harm".*

141. The latter conclusion of physiological harm or that sitting in the seclusion room was painful or caused psychological harm is without any evidential foundation. It is an important pillar of the trial judge's finding that his treatment at St. Ann's amounted to cruel and unusual treatment or punishment. However, there is nothing in the evidence to support that conclusion that being placed in seclusion for limited periods, as a result of inappropriate behaviour which was potentially threatening to inmates and staff, was either i. cruel or unusual, or ii. attained the level of severity necessary to justify the extremely serious finding that they constituted cruel or unusual treatment or punishment. In the absence of an evidential foundation of either physical or psychological harm, resulting from limited instances of seclusion, this could not amount to breach of his right to security of the person. Neither therefore was there any evidential foundation that it amounted to cruel and unusual treatment or punishment.

**Occasional Seclusion or Solitary Confinement**

142. While he was confined for periods by himself to equate this with solitary confinement as dealt with in the case law cited by the court itself, is unjustified on the facts as found by the trial judge herself in the following paragraphs:

*"134. The case of Ahmad v United Kingdom [2013] 56 EHRR 1 illustrated that solitary confinement falls within the definition of "torture or inhuman or degrading treatment or punishment" in Article 3 of the European Convention on Human Rights: "205. The **circumstances** in which the solitary confinement of prisoners will violate Article 3 are now well-established in the Court's case-law. 206. **Complete sensory isolation**, coupled with **total social isolation**, can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason (Van der Ven v. the Netherlands, no. 50901/99, § 51, ECHR 2003- II). 207. **Other forms of solitary confinement which fall short of complete sensory isolation may also violate Article 3.** Solitary confinement is one of the most serious measures which can be imposed within a prison (A.B. v. Russia, cited above, § 104) and, as the Committee for the Prevention of Torture has stated, **all forms of solitary confinement** without appropriate mental and physical stimulation are likely, **in the long term**, to have damaging effects, resulting in deterioration of mental faculties and social abilities (see Iorgov v. Bulgaria, no. 40653/98, § 83, 11 March 2004) Indeed, as the Committee's most recent report makes clear, the damaging effect of solitary confinement **can be** immediate and **increases the longer the measure lasts and the more***

***indeterminate it is*** *(see the Committee's 21st General Report, summarised at paragraph 116 above).* (All emphasis added)

*132. The test for cruel and unusual treatment was set out in the case of BS and SS [supra] 45: "The test however should be whether the treatment attains a* ***minimum level of severity*** *and involves actual bodily harm or* ***intense physical or mental suffering****. "Where treatment humiliates or debases an individual showing a* ***lack of respect*** *for or* ***diminishing*** *his or her* ***human dignity*** *or arouses feelings of fear and anguish or inferiority capable of breaking an individual's moral and physical resistance it may be characterized as degrading." Pretty v UK 35 EHRR 1."*

These cases describe a completely different factual matrix to the evidence which was being considered by the trial judge.

143. JM's placement in seclusion was, on the evidence proportionate to the situation that it was designed to address, namely outbursts of inappropriate behaviour which posed a threat to himself, other residents, and staff. The periods of seclusion did not amount to solitary confinement and could not be described as akin to solitary confinement in the sense that term was used in the cases.

144. While in principle i. seclusion could amount to solitary confinement and ii) solitary confinement could attain a level of severity that would amount to or allow it to be characterised as a breach of the right to cruel and unusual treatment or punishment, each case is fact specific and context sensitive.

145. In this case, the facts and the context did not bear any construction that those instances could amount to cruel and unusual treatment or punishment.

146. The placement of JM in the seclusion room occurred in the circumstances outlined previously when his behaviour was affecting staff or other inmates. It was not for an indeterminate period. There is no evidence that it was ever overnight. With respect to St. Ann's even the Guidelines referred to by the trial judge at paragraph 139 of the judgment make it clear that restraint by means of drugs or medication could be based on therapeutic needs. The prohibition referred to in the Guidelines cited and relied upon by the trial judge was that these should never have been employed without evaluation

and prescription by a specialist. However, the evidence is that JM was in a psychiatric hospital environment and that his treatment and medication were under medical supervision. The guideline referred to at **clause 97** contemplated that "use of force in restraint of whatever nature should not be authorized unless strictly necessary for safeguarding the child's or others' physical or psychological integrity, in conformity of the law, in a reasonable and proportionate manner and as respect to the fundamental rights to the child.

147. The evidence is that the use of restraints was necessary to safeguard both JM's and others' physical integrity. There is no evidence that it was used in circumstances where the situation required it or that they were utilized in a manner not proportionate to the situation.

148. The trial judge erred in not taking into account that JM was in an environment where there were other residents and inmates and that their rights to the protection of their physical person as well as that of the staff there, were also deserving of protection while he was there. The very Guidelines being referred to recognized that context was essential.

149. There is a suggestion that he was isolated for his protection after the incident of molestation but there is no evidence that this was in the same seclusion room observed by the trial judge. There is no evidence otherwise that it ever lasted more than a few hours at a time. There is no evidence that it caused psychological harm, and any inference in the circumstances that it did could not be justified as it went beyond the expertise of a court.

150. In those circumstances to consider in a vacuum the treatment that was administered to JM, without considering those circumstances, constituted an error in the application of law as well as the failure to consider relevant and undisputed evidence.

151. At paragraph 53, the trial judge placed emphasis upon the fact that the UN guidelines for the alternative care of children which the Authority referred to as being applicable,

strictly prohibited solitary confinement for children in alternative care. The fact is that JM was not in solitary confinement. He was warded in St. Ann's Hospital. This itself was not the ideal placement and constituted a breach of the right to protection of the law. While there he was occasionally placed in seclusion in circumstances described above. That is not the same as solitary confinement. Such occasional seclusion could not constitute a breach of the fundamental right not to be subjected to cruel and unusual treatment or punishment.

152. The trial judge erred in the application of the law cited to the facts found by the court itself. There was no evidence that the placements in the seclusion room attained or even gave rise to the minimum level of severity or intense mental suffering required to found a breach of the constitutional right not to be subjected to cruel and unusual treatment or punishment.

153. Insofar as JM was at St. Ann's that is addressable under the constitutional right to protection of the law. Insofar as JM's treatment there resulted in proven physical or psychological harm that would be addressable and compensable under his right to the **security of the person**. However, the evidence in this case did not support any finding that the placement, detention, or seclusion, fell short of any standards of treatment to the degree that amounted also to a breach of the right to protection against cruel or unusual punishment or treatment. The uncontested evidence is that at all times he was under the supervision of medical personnel at St. Ann's who had a duty to other inmates and to staff to address the situation and outbursts that occurred.

**Remedies**

**Issue G (i) Whether the award of compensatory damages by the trial judge was supportable.**

154. In the circumstances, damages are awardable for breach of JM's constitutional rights to protection of the law and his right to security of the person. They are not awardable for breach of his right not to be deprived of liberty without due process of law, for breach of his right not to be subjected arbitrary detention or breach of his right not to be

subjected to cruel or unusual treatment or punishment because those were not breached.

**Detention at St. Michael's**

155. The Order authorising continued detention of JM at St. Michael s after his mother was convicted was not justified in law. This is because the magistrate's jurisdiction at that point only included placing him in an orphanage and it was not an orphanage. However, it was an order made in the course of a trial and no due process right therein was complained of or was infringed.

156. No alternative common law claim has been made in respect of this detention. However, there is nothing precluding a declaration being made that it was unlawful as the status of the entire period of detention was thoroughly addressed in the comprehensive submissions of the appellant and on behalf of JM. As in ***Seepersad*** a declaration will therefore be granted that the detention of JM at St. Michael's from June 10, 2014, (21 days after the date of conviction of his mother NM) to May 18, 2015 was unlawful.

**Protection of the law**

157. Prior to the proclamation of the new Children Act on May 18 2015, there was no statutory obligation to have available community residences. That changed after the proclamation of that Act. By that date the record clearly reveals that it was obvious to all that St. Michael's was not a suitable place for a childlike JM with PW syndrome. There was a duty under the Children Act for the Authority to remove him from an environment where he was suffering abuse. There was a duty on the State to provide the community residences or equivalent place of safety where he could be accommodated because that is what the Legislature had stipulated. The absence of those led to the inability of the Authority to comply with its statutory mandate and caused JM to remain at St. Michael's beyond that date, and then to be transferred to St. Ann's, as a supposedly temporary measure which became anything but that. JM was therefore denied the protection of the law for the period May 18 2015 to October 12, 2017 when he was finally, and commendably, removed from St. Ann's as a result of the intervention of the trial judge.

158. While the magistrate had jurisdiction to order detention of JM in an orphanage his detention at St. Michael's was different from that to be expected in an orphanage, in respect of the i. the ages of the other residents, ii. the exposure to juvenile offenders who would have been expected at an Industrial School, which the trial judge found St. Michael's to be, iii. the increased likelihood for bullying as a result of those matters, iv. the danger that the distinction would not always be made between his status as a victim and the status of numerous other residents who may have been offenders (sent there as provided for under the legislation considered by the trial judge), and that his treatment may have suffered as a result. Those are matters which would have affected him every day that he was at St. Michael's and at St. Ann's. Accordingly, it would be logical to assess those damages as the trial judge did, on a per diem basis.

**Security of the person**

159. At St. Michael's the evidence is clear that JM's person was not kept secure. Although there was one documented attack by a member of staff, for which the State would be directly liable, there were several documented attacks by residents, and a failure to prevent these for which the State was equally culpable.

160. At St. Ann's the evidence is that JM was vulnerable. In respect of the reports of molestation at both St. Michael's and St. Ann's while physical examination did not confirm them, this would not be determinative. At minimum, the evidence suggests that there was the opportunity for such attack at St. Ann's. There was no separation of bathroom facilities for children and adults and such mixing was not desirable. While his security was at risk, he was on a ward in a supervised environment as demonstrated by extensive nurses' notes documenting his stay.

161. He would be entitled to damages for breach of the right to security of the person at both St. Michael's and St. Ann's taking into account the specific documented incidents established by evidence.

162. There is of course the danger of double compensation for what are two distinct breaches. The period of detention post May 18, 2015, was in breach of his right to

protection of the law. This exposed him to the likelihood of the incidents which did occur, and the incidents themselves, which caused physical trauma, as well as the fear that would be necessarily engendered of any such incident occurring. A logical basis to avoid such double compensation would be a baseline per diem rate for “incident free” detention in respect of the right to protection of the law, with a further separate determination in respect of the incidents demonstrated on the evidence.

**Cruel and unusual treatment or punishment**

163. There would be no basis for an award of damages under this head. The evidence does not support any such breach and the trial judge erred in concluding otherwise. At St. Michael's there was no pattern of deliberate punishment or an active pattern of unusual treatment. The instance of physical abuse by a staff member, though horrible, is not evidence of any pattern or system of abusive treatment as to attain the minimum level of severity necessary to amount to cruel or unusual treatment or punishment.

164. Similarly at St. Ann's, occasional seclusion in the circumstances detailed in the evidence were not akin to the type of solitary confinement referred to in the authorities referred to by the trial judge, and did not attain the minimum level of severity to constitute a breach of that right. Neither did the alleged molestation by the inmate. It was not treatment or punishment, although it is compensable under an award for breach of the right to security of the person. Further, administration of medically prescribed drugs in the circumstances, in the absence of evidence to the contrary, could not constitute a breach of that right.

**Security of person**

**Issue G (ii) Whether the award of vindicatory damages was justified in law**

165. There is no basis on the evidence or the law for an award in this regard. Although JM ended up at both St. Michael’s and St. Ann’s by default, the evidence is clear that other children’s homes were approached which were not able to accommodate him because of his condition.

166. His mother was not cooperative in taking him back in an apartment that St. Michael's would pay for. Her role and responsibility were ignored by the trial judge. St. Ann's was intended to be a temporary placement and was based on good intentions. None of this is compatible with nature of vindicatory damages. i) The absence of an evidential basis for a finding that his treatment at either St. Michael's or St. Ann's was cruel or unusual, and ii) the fact that the constitutional rights found to have been breached can be compensated by both declarations to that effect **and** the award of substantial damages as above, negate the legal basis for any further award of vindicatory damages. Accordingly, the trial judge's award/order in this regard is set aside.

**Issue G (iii) Whether the order regarding the establishment of a trust was justified in law**

167. The documented evidence is the NM has a history of unexplained unavailability at critical times[55]. The fact that she has now championed JM's cause does not justify ignoring the potential for conflict of interest and moral hazard in having her involved in administering any trust.

168. Safiya Noel deposes[56] that based on JM's presentation specific homes have been approached to provide house (sic) him including St. Dominic's Children's Home Lady Hochoy, Princess Elizabeth, Bridge of Hope and Olive House Residential Facility for the Elderly. All facilities indicated that they did not have the requisite skills set to care for such a child. She also deposes to various attempts to consider utilizing geriatric homes for other children and at paragraph 15 deposes to the fact that JM's placement at the CSC will be in excess of a hundred thousand dollars per month as the facility will now be used to accommodate one child whereas it was used to accommodate numerous children before this order was made.

[55] See affidavit of Jacobs-Joseph. Agreement was reached with JM's mother, NM that she would locate a suitable apartment to house herself, JM and his 2 other siblings, St Michael's would be financially responsible...Further, Ms. Mitchell often declined offers to take JM home on leave... On one of the 2 occasions while JM was with Ms. Mitchell he travelled from Curepe to Maraballa where his father resides using public transport. It was reported that his mother did not miss him from the home.

[56] See the affidavit of sworn on 6 November 2017 filed on 7th of November 2017, at paragraph 8.

169. Ms. Noel deposes, at page 117 paragraph 27 of her affidavit, that the present arrangement at that time pursuant to the Court's order was costing one hundred and eight thousand dollars per month just for the nurses alone and required the isolation of female residents to the upstairs portion of the CSC for their own protection. JM himself was housed downstairs. In the meantime, since the order of the court JM has attained the age of 18 and is therefore an adult. It should also be noted that the Authority has therefore spent, at the rate of one hundred and eight thousand dollars per month, in excess of a million dollars.

170. The submission was made by the appellant that this court should decline jurisdiction because matters involving treatment of a child are best suited for the specialised jurisdiction of the Children's court. This must be rejected because those matters are alleged to amount to breaches of the Constitution, over which this court and the trial court undoubtedly have jurisdiction. In any event, this was not argued in the court below, and those matters have already been the subject of findings of fact by a trial court. They are therefore properly the subject of the appellant's appeal.

**Damages - Law**

171. The trial judge referred to the case of ***AG v Dillon*** and set out the applicable principles as follows:

> *"218. The Court of Appeal in the case of Civ. App. No. P245 of 2012 The Attorney General -v- Selwyn Dillon cited with approval the following summary from Rampersad J (the judge of first instance), regarding the applicable principles in the assessment of damages for constitutional breaches: "20. Rampersad J., at paragraph 53 of his judgment, carefully, correctly and comprehensively set out the evolution of the law and principles governing the consideration and assessment of damages for constitutional breaches. There is therefore no need to rehearse this history or the relevant authorities in this judgment. The main points in summary are as follows: (1) the award of damages is discretionary; (2) the nature of any award of damages is always with the intention and purpose of upholding and/or vindicating the constitutional right(s) infringed and in furtherance of effective redress and relief for the breaches; (3) whether an award of damages is to be made depends on the circumstances of the case, including consideration* ***whether a declaration alone is sufficient to vindicate the right(s) infringed*** *and whether the person wronged has suffered damage; (4) in determining the sufficiency of a declaration and/or the need for damages, the effect(s) of the breach on the party*

*seeking relief is a relevant and material consideration; (5)* ***compensation can thus perform two functions*** *-* ***redress*** *for the in personam damage suffered and* ***vindication*** *of the constitutional right(s) infringed; (6) compensation per se is to be assessed according to the ordinary settled legal principles, taking into account all relevant facts and circumstances, including any* ***aggravating factors****; (7) in addition to compensation per se, an additional monetary award may also need to be made in order to fully vindicate the infringed right(s) and to grant effective redress and relief; (8) such an additional award is justified based on the fact that what has been infringed is a constitutional right, which adds an extra dimension to the wrong, and the additional award represents what may be needed to reflect the sense of public outrage at the wrongdoing,* ***emphasise the importance of the constitutional right and the gravity of the breach****, and/or to* ***deter further similar breaches****; (9) the purpose of this* ***additional award*** *remains, as with compensation, the* ***vindication of the right(s) infringed*** *and the granting of effective relief and redress as required by section 14 of the Constitution, and* ***not punish*** *the offending party; and (10) care must be taken to* ***avoid double compensation****, as compensation per se can also take into account similar considerations, including relevant aggravating factors and is also intended to uphold and/or vindicate the right(s) infringed".*

172. At paragraph 220, the trial judge referred to Lord Nicholls in ***Attorney General - v- Ramanoop [2005] UKPC 15*** as follows:

> *"Section 14 recognises and affirms the court's power to award remedies for contravention of chapter I rights and freedoms. This jurisdiction is an integral part of the protection chapter I of the Constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against misuse of state power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the state's violation of a constitutional right. This jurisdiction is separate from and additional to ("without prejudice to") all other remedial jurisdiction of the court. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation.* ***The comparable common law measure of damages*** *will* ***often be a useful guide*** *in assessing the amount of this compensation. But* ***this measure is no more than a guide because*** *the* ***award of compensation under section 14 is discretionary*** *and, moreover,* ***the violation of the constitutional right*** *will not always be coterminous with the* ***cause of action at law".*** (All emphasis added)

173. At paragraph 221, the trial judge referred to the case of **Atain Takitota v the AG of the Bahamas and Ors [2009] UKPC 11** at paragraph 11, which established that in awarding

compensatory damages the court may take into account an element of aggravation. Lord Carswell in the case of **Takitota** explained that:

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

**Period of Detention**

174. At paragraph 224, the court found that JM's unlawful detention commenced on 27th of September 2012, and it continued when he was committed to St. Michael's on 30 June 2014.

175. For the reasons explained above, while JM detention from 27th of September 2012 was not unlawful, being within the wider jurisdiction of the magistrate, it became unlawful 21 days after the conviction of his mother NM on May 19, 2014 when the jurisdiction of the magistrate to order his detention at St. Michael's expired.

176. His unlawful detention at St. Michael's therefore commenced on June 10, 2014 and continued thereafter for the remainder of his stay there, until the October 6, 2016 when he was transferred to St. Ann's. For the reasons explained previously, the fact that his detention was unlawful did not render it automatically a breach of his right to liberty without due process of law. That is because the order for his detention at St. Michael's was a. subject to re-visitation and review before the magistrate or b. subject to appeal and no such review or appeal was even initiated or requested. No fundamental constitutional right was therefore infringed.

177. The constitutional position changed however on the May 18, 2015 when the suite of children's legislation was proclaimed. For the reasons explained previously, JM's constitutional right to the protection of the law was infringed from that date when a

community residence or place of safety as specifically provided for under by the legislature under that legislation was not available. That deprived JM of the opportunity to be placed in either leaving the only practical alternative to St. Michael's being a placement at St. Ann's, which was neither. That period of unconstitutional detention was: i. in respect of St. Michael's from May 18, 2015 to October 5, 2016 (506 days) and ii. in respect of St. Ann's from October 6, 2016 to October 12, 2017. The judge found at paragraph 225 that his detention at St. Ann's was 371 days.

178. The trial judge calculated his unlawful detention as 1,470 days. As explained above it in fact began on June 10, 2014 and not on September 27, 2012. It therefore was for a period of 877 days.

179. The trial judge's calculation of compensation on a per diem basis at St. Michael's for 1470 days was erroneous because i. the period of unlawful detention began on June 10, 2014 and not September 27, 2012 and ii. unlawful detention by itself did not give rise to a breach of the constitutional right to liberty without due process of law on the facts of this case and iii. that a claim for constitutional relief in relation to a breach of the right to protection of the law arose only on May 18, 2015 and spanned the period May 18, 2015 to October, 12, 2017.

180. The court considered, (at paragraph 226 of the judgment) that a per diem figure should be utilized. For the reasons discussed above, in respect of the breach of the right to the protection of the law, a per diem figure would be appropriate. *(In respect to the breach of the right to security of the person an additional award would be appropriate in respect of each incident established on the evidence).*

181. In this regard, the trial judge considered that detention at St. Ann's justified a higher per diem rate of $750.00 per day. However, the evidence does not disclose that the right to the protection of the law was breached to any further degree at St Ann's than it was at St. Michael's. At St. Ann's he was in a structured environment, with a high level of supervision, as recommended in one of the reports of the Children's Authority. While it is accepted that his placement at St. Ann's was not ideal, he was under the

supervision of medical professionals. While there were incidents at St. Ann's, they were not qualitatively worse than the incidents at St. Michael's. This is especially so when the factors of seclusion and administration of medication are removed, which for the reasons explained above, they had to be.

182. In fact the evidence suggests, that while at St. Michael's he was being bullied and subject to unpredictable attacks, at St. Ann's the evidence is more consistent with JM on occasion being the one manifesting aggressive and provocative behavior. Although there was one documented attack by an inmate it appeared to be responsive to JM's behavior rather than the result of systematic bullying. The evidence therefore does not justify a higher per diem rate for breach of the protection of the Law at St. Ann's. The trial judge erred in so concluding.

183. The reasoning of the trial judge to justify the differential in per diem rates between detention at St. Michael's and detention at St. Ann's is not borne out by the court's analysis. It is influenced by a perception contrary to the expert evidence, that JM was not properly diagnosed with, or treated for, a mental illness. It is also based on the erroneous perception and that occasional instances of seclusion could be equated with solitary confinement, which could in turn be equated with cruel and unusual treatment or punishment.

184. At paragraph 229, the trial judge repeats the erroneous assessments that there were also the periods of solitary confinement and other forms of treatment appropriate for the care of patients with a mental illnesses (sic) but not for a child with PW syndrome.

> *"229. The court finds that the criteria for awarding compensatory damages as set out in Attorney General -v- Ramanoop [supra] is appropriate in this case as it requires more than declaratory reliefs. Joshua is entitled to an award of compensatory damages for the harm done to him. That harm was detailed throughout this judgment but it bears repeating. It includes more than just being housed at a place contrary to law from the age of nine (9). It also includes being placed with child offenders, being placed with adults, not receiving the proper care that it was determined he needed, the severe abuse meted out to him by other residents as well as by staff. There was sexual assault, he was burnt and beaten. There were also the periods of* ***solitary confinement*** *and other forms of* ***treatment appropriate for the care of patients with a mental illnesses but not for a child with PW Syndrome****. Further, all these facts were identified and highlighted by*

*different persons and agencies as occurring as well as being detrimental to JM".* (All emphasis added)

185. There was no expert evidence to contradict that of the medical experts in this case. Any conclusion that the treatment that was utilized for JM at St. Ann's in terms of medication, and in terms of seclusion, (wrongfully equated with solitary confinement), was not justified, because it was not supportable on the undisputed evidence.

> *"230. Although it is difficult to determine which was worse, the conditions at St. Ann's Psychiatric Hospital has caused the court to conclude that Joshua suffered more harm at St. Ann's Psychiatric Hospital than he did at St. Michael's".*

186. The trial judge at paragraph 230 stated that the conditions at St. Ann's caused the court to conclude that JM suffered more harm at St. Ann's Psychiatric Hospital than he did in St. Michael's. The court in addition to the documentary evidence paid a visit to St. Ann's and to the seclusion room. However, the evidence of mixing with adults and the fact that court found that the seclusion rooms were tiny, gloomy and scary could not be sufficient to displace the documentary evidence that the conditions at St. Michael's were no better than the conditions at St Ann's. The per diem rate of seven hundred and fifty dollars $750.00 for St. Ann's could not therefore be justified if a rate of four fifty $450.00 per day was being utilized for detention at St. Michael's.

187. The court's reasoning with respect to the choice of the per diem rates was set out at paragraph 232 of the judgment.

> *"232. This court has determined that damages calculated per diem, is the appropriate approach in light of the aggravated factors of the age of the child, the physical, mental, emotional and sexual abuse as per the judgment in Atain Takitota -v- The Attorney General of the Bahamas [supra]. The court considered the authorities submitted by the parties and decided that the per diem rates of $450.00 and $700.00 are appropriate when calculating the damages to be awarded to Joshua for his remand and committal at St. Michael's Home for Boys and his detention at St. Ann's Psychiatric Hospital respectively. Those per diem rates would meet the justice of this case in its award of compensatory damages".*

188. There is, despite this being a lengthy judgment, no analysis as to how those rates were arrived at. Such an analysis was required. See **Sharma v DPP and Ors [2006] UKPC 57** at paragraph 26.

> *"Thirdly, by referring compendiously to "the totality of the evidence raised by the [Chief Justice]" the judge gave no indication of the particular evidence which she found persuasive. A judge must of course, when giving reasons for an interlocutory ruling of this kind, make plain that she is not finding any facts and that the evidence relied on may turn out to be incorrect, incomplete or misleading. But it is ordinarily the duty of a professional judge to give reasons (Flannery v Halifax Estate Agencies Ltd [2000] 1 WLR 377, 381), and her failure to do so fully justified the Court of Appeal in making its own analysis".*

189. The courts calculation of damages was in the sum of ($661,500.00) six sixty-one thousand five hundred dollars –1470 days at a per diem rate of ($450.00) in respect of detention at St. Michael's.

190. The errors in that calculation are with respect to the number of days. As explained previously the relevant period is May 18, 2015 to October 5, 2016.

191. With respect to St. Ann's the sum of $259,700.00 was based on a per diem rate of $750.00 for 371 days. The error in that award is with respect to the per diem rate being unjustifiably different from that applied to detention at St. Michael's.

192. Even accepting the per diem rate used by the trial judge for St. Michael's the award with respect to the protection of the law should be for a period of 506 days at St. Michael's and 371 days at St. Ann's. At the rate of $450/day, this produces a total of **877 days by $450 per day - $394, 650.00**.

**Damages – Security of the Person**

193. Damages are also awardable for any documented incident or instance occurring from the commencement of unlawful detention at both St. Michael's and St. Ann's even prior to the commencement of the new Children Act. That is because JM was a vulnerable minor in the care of the State, his placement at St. Michael's was known to be unsuitable, and the State's duty to secure his person from physical or psychological harm in those

circumstances existed prior to, and was not dependent upon, the proclamation of the new Children Act.

**Summary of Incidents**

194.

i. **March 6, 2013** – It is alleged that someone hit JM with a fist – evidence of a blue black discoloration on left lower lid causing him to be referred for a medical checkup;

**ii.** **April 30, 2014 –** Burn Incident**.** On May 12, 2014 Magisterial record reflects that NM told the Magistrate that she observed burns on JMs arm when she visited him at St. Michaels[57];

iii. **May 26 2014 –** JM was hit with a piece of wood by staff member before he went missing. June 13, 2014 - inspector of orphanages by then director of national family services appointed to investigate;

iv. **Early 2015** – management at St. Michael's changed. Renovations - sleeping in dining hall - a resident threw pepper sauce in his eyes[58]. There is also a report of 28 July 2015 by Ms. Charles who worked on the 2 to 9 shift of an inmate beating and threatening JM[59];

v. **June 30 2015** - alleged molestation – report to police- examination on July. By May 2014, it was abundantly clear to the State from the attacks and resulting investigations by the Inspector of Orphanages that St. Michael's was unsuitable for JM. His security was constantly at risk and the responses were reactive rather than proactive;

vi. **May 2016** – Continued incidents of physical abuse;

vii. **October 6, 2016** – JM was attacked with a piece of iron by residence of St. Michael's. Dr. S. Pierre noted on his admission to St. Ann's that he had bodily scars consistent with burns and multiple scars about his chest abdomen and face[60]. The documented or independent evidence of bullying and attacks by

[57]Page 68 supplemental record of appeal

[58] Paragraph 29 of the judgment

[59] See affidavit of Keisha Sullivan, paragraph 19 – letter 3 in bundle of exhibits marked "KS1".

[60] Page 199 supplemental record of appeal.

residents and in one case by a staff member, began in 2013 and only ended in October 2016 when he was removed from St. Michael's;

viii. **October 2, 2017** alleged molestation at St. Ann's.

In respect of the documented incidents ii., iii., v., vii. and viii. $75,000.00 each is awarded[61].

In respect of incidents i., iv., and vi. which were accepted by the trial judge and reflected in her judgment, the sum of $25,000.00 each is awarded.

A total award therefore in respect of breach of JM's constitutional right to security of the person would be $450,000.00.

The total award for compensatory damages would therefore be $844,650.00.

**Vindicatory Damages**

195. The purpose of vindicatory damages was stated in the case of **James v the AG** PCA 112 of 2009 paragraph 38 and was set out at paragraph 234 of the judgment.

> *"234. The purpose of vindicatory damages was stated in the case of James - v- The Attorney General PCA No. 112 of 2009: "38. It should be noted that this additional award referred to in Ramanoop has been called 'vindicatory damages' by Lord Bingham in Subiah, and the elements of it are described by Lord Nicholls. They are to: (1) reflect the sense of public outrage; (2) emphasise the importance of the constitutional right and the gravity of the breach; and (3) deter further breaches. With respect to the second element we are of the view that in determining the gravity of the breach, a court is required to look at the circumstances giving rise to the breach and the consequences of the breach."*

196. When the circumstances giving rise to the breaches in this case are examined it is clear that they did not occur as the result of malice on the part of anyone, ill will or deliberate behavior or systematic ill treatment. Rather they occurred as a result of institutional inertia and were more the result of omissions on the part of the authorities that were responsible for ensuring that they did not occur, rather than part of any deliberate pattern of conduct. This is so in the case of the breach of the right to the security of the person. When one examines the treatment at JM at St. Michael's and the treatment of

[61] This is a significant figure in this jurisdiction given that by way of reference the monthly government old age pension is $3000/month or $36,000 per year.

JM at St. Ann's it is clear that institutional resources were overwhelmed but that there was no intention to subject JM to conditions which breached his security of the person. The fact that those breaches did occur, and that the steps that were taken to prevent them were ineffective, would not suffice to justify an award of vindicatory damages.

197. The consequences of the breaches were unfortunate and horrific instances of attacks on JM which breached his constitutional right to the security of the person. However that constitutional right is capable of and is being compensated for by awards of damages in respect of each such breach. The need for a further award, especially in circumstances outlined above, would not be justified.

198. In the case of the breach of the protection of the law Community Residences or equivalent places of safety were not available. This set in train a series of events which led to JM remaining at St. Michael's far beyond the point when it had been shown to be unsuitable, and being transferred to St. Ann's when the suitability of placement at that institution was also clearly in doubt. This does give rise to a claim for compensation. That compensation is being assessed on a per diem basis for every single day that the right has been breached. However the need for some further award in vindication of that right is not justified. The institutional inertia, as oppose to deliberate inaction or malice or other deliberate conduct, could not be a circumstance that could give rise to an award of vindicatory damages.

199. The trial judge's reasoning in this regard at paragraphs 234 and 235 does not support the conclusion either: a) that such damages should be awarded, or b) that such damages should exceed every single previous award referred to in the table set out by the Judge[62]. That award of one million dollars is completely unsupported by any of the authorities and it is completely out of line with any previous award.

200. As indicated previously however the breaches that are justified in the evidence are i) the breach of the right to protection of the law and ii) a breach of the right to security of the person. With respect to the breach of the **right to security of the person** the incidents

[62] At paragraph 235 of the judgment.

above are compensable under this head, and matters of aggravation can be taken into account in assessing these. With respect to the **breach of the protection of the law,** there is therefore no need for an enhancement to damages awardable on a per diem basis, given that the matters in aggravation in relation to his detention at St. Michael's and St. Ann's are compensable under an award of damages for breach of the right to security of the person.

201.

i. As a matter of law an award of vindicatory damages was not appropriate; and
ii. Further and in any event, the quantum of such award was unjustified even on the authorities cited.

The award of one million dollars as vindicatory damages must therefore be set aside.

202. With respect to the daily award for detention at St. Michael's the basis on which an appellate court can interfere with an award of damages is explained, inter alia, in the case of **Terrance Calix v The Attorney General [2013] 4 All ER 401 at 410-411** (all emphasis added)

> ***"Appeals from compensation awards***
>
> ***[28]*** *It is well settled that before an appellate court will interfere with an award of damages it will require to be satisfied that the trial judge erred in principle or made an award so inordinately low or* ***so unwarrantably high that it cannot be permitted to stand****. In Flint v Lovell [1935] 1 KB 354 at 360, [1934] All ER Rep 200 at 202–203, Greer LJ said:*
>
> *'In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court,* ***an entirely erroneous estimate of the damage to which the plaintiff is entitled****.'*
>
> ***[29]*** *A statement to like effect was made by Viscount Simon in Nance v British Columbia Electric Rly Co Ltd [1951] AC 601 at 613:*
>
> *'[T]he appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance … [I]t must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some*

*relevant one); or, short of this, that the amount awarded is either so inordinately low or* ***so inordinately high that it must be a wholly erroneous estimate of the damage****."*

(See also **Bernard & Airports Authority v Nixon Quashie Civ App 159/1992** delivered October 1998 at page 4 per De La Bastide CJ and **Uric Merrick v The Attorney General of Trinidad and Tobago and John Rougier, the Commissioner of Prisons Civil Appeal No. 146 of 2009** at page 13, 17[63] to the same effect), (all emphasis added).

In the latter case the Honourable Smith JA noted the following at paragraph 22:

*(iii) The adequacy of the award of damages*

At paragraph 22 of that judgment he noted that *"in the exercise of assessing general damages for the tort of false imprisonment there will probably be a wide range within which an award could reasonably be made without interference from a court of appeal".*

203. Accordingly, the daily rate for detention at St. Michael's was within the discretion of the trial judge. However, the differential in daily rates for detention at St. Michael's and St. Ann's is not justified in principle or on the evidence. The rates for detention at each will therefore be the same.

**Orders**

204. The Orders of the trial judge are set aside and the following Orders are substituted:

A. A declaration is granted that the detention of JM at St. Michael's from June 10 2014 was unlawful.

B. A declaration is granted that the detention of JM at the St. Michael's home for Boys from May 18, 2015 to October 5, 2016 and the St. Ann's Psychiatric Hospital

63 *(i) General principles upon which a court of appeal will interfere with an award of damages*
13. Both parties agree that there are two circumstances where a court of appeal will interfere with an award of damages. Firstly, where a trial judge has misdirected himself on the law or the facts. Secondly, where the award is a **wholly erroneous estimate of the damage suffered**.
17. Further in cases where there are no, or no sufficient reasons for an award of damages:
"... **the Court of Appeal is entitled to look at the matter afresh and come to its own conclusion as to how the discretion** (to award damages) **ought to have been exercised.**" (See **Romauld James v The Attorney General** Civil Appeal 154 of 2006 at paragraphs 5 and 6; and see also **Angela Inniss v The Attorney General of Saint Christopher and Nevis** P.C. Appeal No. 29 of 2007 at paragraph 16.)

from October 6, 2016 to October 12, 2017 breached his constitutional rights to protection of the law under section 4(b) of the Constitution of the Republic of Trinidad and Tobago.

C. A declaration is granted that the rights of JM to the security of person were breached

a. at St. Michael's

i. In or around March 6, 2013;

ii. April 30, 2014;

iii. May 26, 2014;

iv. In or around January 2015;

v. June 30, 2015;

vi. May 2016;

vii. October 6, 2016;

And b. at St. Ann's

viii. On October 2, 2017.

D. Damages are awarded, payable by the Appellant to JM in respect of the breach of the right to protection of the law for 877 days of detention at St. Michael's and St. Ann's at the rate of $450.00 per day, in the total amount of $394,650.00.

E. Damages are awarded, payable by the Appellant to JM in respect of breaches of his right to security of the person in the sum $450,000.00.

F. The total amount awarded of $844,650.00 is to be paid into court to be placed in an interest bearing account with payments thereout to be paid on application to the Registrar or a Master for expenses necessarily incurred for the care, treatment, welfare and accommodation of JM, or for such as other necessary expenses established to be in his best interests.

**……**

**Peter A. Rajkumar**

**Justice of Appeal**