THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
(VIRTUAL HEARING)

Claim No: CV2020-00732

between

ISAIAH PRINCE

CLAIMANT

and

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

DEFENDANT

Before the Honourable Mr. Justice Kevin Ramcharan

Date of Delivery: 27th June, 2021

Appearances: Mr. Jagdeo Singh, Mr. Kiel Taklalsingh, Ms. Karina Singh *instructed* by Ms. Chelsea John for the Claimant

Mr. Rishi Dass, Ms. Maria Belmar-Williams and Ms. Sasha Sukhram *instructed by* Ms. A. Ramroop and Ms. Tiffany Kissoon for the Defendant

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JUDGMENT

INTRODUCTION

1. On the 22nd day of March, 2018, following the execution of a search warrant, the Claimant was charged with possession of camouflage clothing contrary to Section 213 (c) of the Customs Act, Chapter 78:01. He now seeks to challenge the constitutionality of the Legal Notice 33 of 1984 proclaimed by the then President His Excellency Sir Ellis Clarke, empowered under Section 44 of the Customs Act, which criminalizes the importation of Camouflage Pattern Material on the basis that it is (1) inconsistent with Section 53 of the Constitution of Trinidad and Tobago (hereinafter "the Constitution") which vests the responsibility for making laws in Parliament; (2) inconsistent with the tenets of a democratic society pursuant to Section 1 of the Constitution; (3) void pursuant to Section 2 of the Constitution; (4) it is unconstitutionally vague and/or overbroad and (5) it violates his constitutional rights to enjoyment of property, liberty and protection of the law pursuant to Sections 4 and 5 the Constitution.

2. By Fixed Date Claim Form dated the 19th day of February, 2020, the Claimant claims against the Defendant for the following reliefs:
    a. A declaration that Legal Notice No. 33 of 1984, which purports to criminalise the importation of "camouflage pattern material" by way of Presidential Proclamation, is inconsistent with the provisions of the Constitution (namely Section 53) and is therefore, void pursuant to Section 2 of the Constitution.
    b. A declaration that Legal Notice No. 33 of 1984, which purports to criminalise the importation of "camouflage pattern material" is unconstitutional in that it offends the Rule of Law and/or Principle of Legality and/or Separation of Powers doctrine thereby inter alia contravening Section 1 of the Constitution and is therefore, null, void and of no effect pursuant to Section 2 of the Constitution.
    c. A declaration that "camouflage pattern materials" listed as a prohibited good by Legal Notice No. 33 of 1984, is unconstitutionally vague and/or overbroad and therefore, null, void and of no effect.

d. A declaration that Legal Notice No. 33 of 1984, being vague and/or overbroad and/or contrary to Section 53 of the Constitution and/or contrary to the principle of Separation of Powers and/or principle of legality, infringe Section 1 of the Constitution of Trinidad and Tobago in that it is inconsistent and/or incompatible with the characteristics, features and tenets of a democratic state and therefore, void and of no effect pursuant to Section 2 of the Constitution.

e. A declaration that by subjecting the Claimant to stand trial to answer to the charges of possession of camouflage clothing pursuant to Legal Notice No. 33 of 1984 and/or Section 213 (c) of the Customs Act 1938, Chapter 78:01 is in contravention of the Claimant's constitutional rights to enjoyment of property, liberty and protection of the law pursuant to Sections 4 (a) and 5 (2) (e) of the Constitution of Trinidad and Tobago.

f. An order that damages for breach of constitutional rights be assessed.

g. Costs.

h. Such further and/or other relief that this Honourable Court deems fit.

3. In support of the Fixed Date Claim Form, the Claimant filed an affidavit on the 19th day of February, 2020. On behalf of the Defendant, the Affidavits of Gary Joseph, PC Williams Rg #17926 and Dexter Laurence Francis were filed on the 28th day of August, 2020.

4. The Claimant relies on the following grounds upon which he bases his Fixed Date Claim Form:

a. Legal Notice No. 33 of 1984, is unconstitutional in that it is contrary to Section 53 of the Constitution. Laws, in particular those which provide for criminal sanctions can only be enacted by Parliament for peace, order and good governance of Trinidad and Tobago pursuant to Section 53. The President cannot on his own by proclamation and/or any other means criminalise conduct of citizens without the approval of the democratically elected Parliament.

b. Legal Notice No. 33 of 1984, offends the Rule of law, principle of Separation of Powers and/or principle of legality. It is inconsistent with the characteristics, features and tenets of a democratic society in which a democratically elected Parliament must enact criminal laws pursuant to the democratic process.

c. Legal Notice No. 33 of 1984 and its effect when implemented in conjunction with Section 44 and Section 213 (c) of the Customs Act is overbroad and/or overreaches and/or is too sweeping as it criminalises conduct which has no rational connection to the purpose and intent of the law which deems specific items to be prohibited. It thereby criminalises ordinary and/or harmful and/or inoffensive conduct of the citizenry. The offensive conduct of possession and/or wearing attire resembling that of the Defence Force is captured by Section 98 of the Summary Offences Act 1921 and/or Section 219 of the Defence Act 1962.

d. The phrase "Camouflage Pattern Material" and/or the Legal Notice No. 33 of 1984, is unconstitutionally vague, uncertain and contrary to the Rule of law which ought to be struck out. In any event it is contrary to Section 1 of the Constitution and is null and void. Based on the Legal Notice No. 33 of 1984, a citizen cannot predict and/or understand and/or have fair notice of what conduct could lead to sanctions.

<u>THE EVIDENCE</u>

<u>Affidavit of the Claimant</u>

5. On the 21st day of March, 2018, he voluntarily presented himself to the West End Police Station after receiving information for being wanted in connection with an investigation. On the following morning around 4:30 am a search warrant was executed at his mother's residence in Diego Martin where she resided with his younger brother. At that time the Claimant lived with his grandmother in Petit Valley.

6. While the search was being conducted in the bedroom occupied by his brother, two (2) pairs of camouflage pants, one (1) long and one and three-quarter (1¾) were found in a chest of drawers. Even after informing the police that they did not belong to him. However,

he was charged with possession of camouflage clothing contrary to Section 213 (c) of the Customs Act.

7. The Legal Notice No. 33 of 1984, which criminalises the possession of camouflage pattern material has led to the criminal prosecution of the Claimant along with other citizens pursuant to Section 213 (c) of the Act. The Customs Act does not define or specify the type or types of camouflage pattern materials that are illegal under the Customs Act. In fact the Act does not make reference to camouflage at all.

8. Further, the Comptroller of Customs has published a document on its website which purports to deem as illegal pursuant to the Legal Notice No. 33 of 1984, a variety and/or heterogeneous items of clothing inclusive of various articles of clothing, including caps, purses, flip-flops and high heeled boots. The said notice states that camouflage pattern material includes all items of camouflage and all colour which is very wide, broad and unspecific.

Affidavit of Gary Joseph

9. Mr. Gary Joseph is the Acting Permanent Secretary of the Ministry of National Security. Reference was made to the Commission of Enquiry appointed to enquire until the Events surrounding the attempted coup D'état of the 27th day of July, 1990. The importation, possession and use of camouflage still gives rise to national security issues. Information from the Trinidad and Tobago Police Service over the period 2015 to the 6th day of August, 2020, reveals that a number of offences have occurred in relation to camouflage clothing.

Affidavit of PC Williams Regimental #17926

10. A search warrant was obtained on the 21st day of March, 2018, to search the Claimant's home for firearms and ammunition to assist in ongoing investigations of a report with shooting with intent which occurred on the 19th day of March, 2018. At 4:50 am on the following day, PC Williams met with the Claimant and took him out of the cell and carried

him to his home at Roxborough Street, Diego Martin, where he executed the search warrant.

11. Upon searching his room along with PC Pejias and other officers, he found in a drawer one (1) long camouflage pants and one and three-quarter (1¾) camouflage pants. He was subsequently charged for the offence of possession of camouflage contrary to Section 213 (c) of the Customs Act, Chapter 78:01.

Affidavit of Dexter Laurence Francis

12. He is the Chief Staff Officer in the Trinidad and Tobago Defence Force (TTDF). Reference was made to the prohibition of any person other than the member of the Defence Force from wearing the uniform or any portion of the uniforms of a member of the TTDF; or from wearing any costume or any article of clothing or apparel so closely resembling the uniform or any portion thereof, of a member of the TTDF as may cause such person to be mistaken for a member of the TTDF which would render such person liable on summary conviction to a fine of One Thousand Dollars ($1,000.00) and to imprisonment for eighteen (18) months according to Section 219 Defence Act Chapter. 14:01.

13. The TTDF utilises camouflage in a number of uniforms including military forces and in both training and operational manoeuvres. It is a key characteristic and component and a distinctive feature of National Security operations. It is used to eliminate visibility for tactical and defence operations not only for people but for equipment and to mask location in covert operations. Also, in public spaces it provides for easy visibility and recognition by members of the public which assists in upholding respect for the TTDF while enhancing its authority and distinction.

14. At times, criminal elements have been found unlawfully dressed in military uniforms which can mislead the public into thinking that they are being stopped by persons affiliated to the TTDF. The implementation of stringent members to ensure accountability of those

uniforms so that one may not engage in any criminal activity as it is dangerous to the public and the TTDF's reputation.

ISSUES

15. The following issues are to be determined:

a. whether the Legal Notice is saved by the savings clause provision;
b. whether the Legal Notice is vires the Customs Act;
c. whether there was a lack of parliamentary scrutiny and if so, was it unconstitutional;
d. whether the Legal Notice was vague and offended the Rule of Law;
e. whether the law is overbroad/the principle of overbreadth is applicable; and
f. whether Section 1 of the Constitution is applicable.

RELEVANT LAW

16. For ease of reference I will outline the pieces of law relative to this claim:

The Constitution of Trinidad and Tobago

1. (1) The Republic of Trinidad and Tobago shall be a sovereign democratic state.

(2) Trinidad and Tobago shall comprise the Island of Trinidad, the Island of Tobago and any territories that immediately before the 31st day of August, 1962, were dependencies of Trinidad and Tobago, including the seabed and subsoil situated beneath the territorial sea and the continental shelf of Trinidad and Tobago ("territorial sea" and "continental shelf" here having the same meaning as in the Territorial Sea Act and the Continental Shelf Act, respectively), together with such other areas as may be declared by Act to form part of the territory of Trinidad and Tobago.

2. This Constitution is the supreme law of Trinidad and Tobago and any other law that is inconsistent with this Constitution is void to the extent of the inconsistency.

53. Parliament may make laws for the peace, order and good government of Trinidad and Tobago, so, however, that the provisions of this Constitution or (in so far as it forms part of the law of Trinidad and Tobago), the Trinidad and Tobago Independence Act, 1962, of the United Kingdom may not be altered except in accordance with the provisions of Section 54.

80. (1) In the exercise of his functions under this Constitution or any other law, the President shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet, except in cases where other provision is made by this Constitution or such other law and without prejudice to the generality of this exception, in cases where by this Constitution or such other law he is required to act—

(a) in his discretion;

(b) after consultation with any person or authority other than the Cabinet; or

(c) in accordance with the advice of any person or authority other than the Cabinet.

(2) Where by this Constitution the President is required to act in accordance with the advice of, or after consultation with, any person or authority, the question whether he has in any case so acted shall not be enquired into in any Court.

(3) Without prejudice to any other case in which the President is authorised or required to act in his discretion, the President shall act in accordance with his own deliberate judgment in the performance of the following functions:

(a) in the exercise of the power to appoint the Prime Minister conferred upon him by Section 76(1) or (4);

(b) in the exercise of the powers conferred upon him by Section 78 (which relates to the performance of the functions of the Prime Minister during absence, illness or suspension) in the circumstances described in the proviso to subsection (2) of that section;

(c) in the exercise the power to appoint the Leader of the Opposition and to revoke any such appointment conferred upon him by Section 83.

6. (1) Nothing in Sections 4 and 5 shall invalidate—

(a) an existing law;

(b) an enactment that repeals and re-enacts an existing law without alteration; or

(c) an enactment that alters an existing law but does not derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right.

(2) Where an enactment repeals and re-enacts with modifications an existing law and is held to derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right then, subject to Sections 13 and 54, the provisions of the existing law shall be substituted for such of the provisions of the enactment as are held to derogate from the fundamental right in a manner in which or to an extent to which the existing law did not previously derogate from that right.

(3) In this section—

“alters” in relation to an existing law, includes repealing that law and re-enacting it with modifications or making different provisions in place of it or modifying it;
“existing law” means a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of this Constitution and includes any enactment referred to in subsection (1);
“right” includes freedom.

Customs Act Chapter 78:01

44. The President may be from time to time by Order prohibit the importation, carriage or exportation of any goods whatsoever and any such Order may prohibit importation, carriage coastwise or exportation until the revocation thereof or during such period as may be specified therein and may either absolutely prohibit importation, carriage coastwise or exportation or may prohibit importation, carriage coastwise or deportation except on compliance with any conditions which may be specified in the Order or importation from or exportation to any particular place named in the Order.

213. (c) Any person who knowingly harbours, keeps or conceals or knowingly permits or suffers or causes or procures to be harboured, kept or concealed any prohibited, restricted or uncustomed goods shall… incur a penalty on summary conviction in the case of a first offence, to a fine of fifty thousand dollars or treble the value of the goods, whichever is greater and to imprisonment for a term of eight (8) years.

Legal Notice No. 33 of 1984

"Now, therefore, I Ellis Emmanuel Innocent Clarke, President as aforesaid, in exercise of the powers conferred on me by Section 38 of the said Ordinance, do hereby prohibit the importation of camouflage pattern materials unless the Minister of National Security certifies that the importation thereof, is for the use of the Trinidad and Tobago Defence Force".

DISCUSSION

WHETHER THE LAW IS SAVED BY THE SAVINGS CLAUSE PROVISION

17. The savings law clause saves all existing laws or pre-independence laws from constitutional challenge which are incompatible with the fundamental rights and freedoms in the Constitution. There have been numerous criticisms of the savings law clause some of which were outlined by Rampersad J in **Jason Jones v Attorney General CV2017-00720** at paragraphs 50-52:

> **"50. Margaret A. Burnham said in her article: "Meant initially as a shortcut method of marrying common law rights and constitutional protections, the clauses have presented particularly vexing problems of construction as appellate tribunals have attempted to reconcile international human rights norms with municipal law."**

51. In their writings, Robinson, Bulkan and Saunders stated: "With these savings law clauses colonial laws and punishments are caught in a time warp, continuing to exist in their primeval form, immune to the evolving understandings and effects of applicable fundamental rights. These clauses … operate in constant tension with the Bill of Rights and frustrate the aims and purpose of the constitutional guarantees."

52. Finally, Professor Richard Drayton, in his address to the Judicial Education Institute of Trinidad and Tobago on 2 March 2016 stated: "It is true that the parliaments of the Caribbean were always able to repeal old laws or introduce new ones, but the savings clauses wrapped an externally imposed legal order formed by centuries of despotism and structural inequality in a knot which naturally became encrusted with political and public inertia until it became our own. Like victims of a long period of confinement, we thus carry the manners of the prison even after our liberation." Professor Drayton went on to recognize: "The saving clauses' effect is in a toxic combination with the consequences of the Judicial Committee of the House of Lords acting as the final Court of Appeal. In Lord Devlin's notorious ruling in DPP v Nasralla (1967), for example, characteristic of the early postcolonial period, the Council rigorously protected colonial-era legislation and the social norms from examination on human rights grounds…. The impediment which the Privy Council poses to the emergence of a Caribbean jurisprudence is that, quite naturally, it seeks consistency with UK judicial and governance norms…. Indeed, human rights doctrine, particularly in the expansive post-1968 sense, must always take second place for the Privy Council to judicial coherence with common law precedent. Any evolution towards a Constitution suited, In Montesquieu or Bolivar's sense, to our climate and manners, is thus permanently postponed."

18. At paragraph 94 of **Dominic Suraj & Ors v Attorney General CV2020-01370,** Boodoosingh J as he then was, stated, "**Howsoever, much discomfort there may be that 58 years after Independence we are still relying on saved law, the situation is what it is. The highest court has indicated how saved law is to be treated (Matthews and Balwant cited above). While there has been some judicial chipping away of the effect of saved law, it remains relatively stable in its impact. It remains for Parliament to review saved laws and to decide if we still need to be reliant on a savings law provision. Just as the judiciary must fulfil its constitutional mandate, so too must the other arms of the State. However, the effect of the savings law clause in this case is determinative**".

19. The Caribbean Court of Justice (CCJ) took a different approach in **Jabari Sensimania Nervais v R** CCJ Appeal Nos. BBCR 2017/002. Section 2 of the Offences against the Persons Act, Chapter 141 of Barbados provides, "*Any person convicted of murder shall be sentenced to and suffer, death*". The issue was whether "shall" should be modified to "May" to bring the law in line with the fundamental rights and freedoms in the Constitution. In addressing the general savings clause in Section 26 of the Constitution at paragraphs 53-54, 58-59 and 68 the Court stated:

> **[53] "The proposition that judges in an independent Barbados should be forever prevented from determining whether the laws inherited from the colonial government conflicted with the fundamental rights provisions of the Constitution must be inconsistent with the concept of human equality which drove the march to independent status. It is also inconsistent with historical fact. The eminent jurist, Dr. Alexis in his article *"When is "An Existing Law Saved?*[54]*"* opened with the truism:**
>
> > **"Many an independence leader has personal experience with the arbitrary powers afforded by some pre-independence laws. They would therefore have known that those laws conflicted with what they were writing into the Constitutions."**

[54] Although he was addressing the executive power of the state, he demonstrated the manifest conflict between the existing laws and the constitutional provisions. The Constitutions reflected the transition from pre-constitutional dictatorial power to the obligation to act with reasonable justification. In states where the composition of the executive and the legislature were often substantially the same, the attractiveness to the executive of inheriting the power formerly exercised by the colonial administration highlights the value of the concept of the separation of powers and the importance of the role of the judiciary in the interpretation and application of the constitutional regimes. Ensuring that the laws are in conformity with the Constitution cannot be left to the legislature and the executive. That is the role of the judiciary, and accordingly it is the right of every person to depend on the judiciary to fulfil that role.

[58] "**The general saving clause is an unacceptable diminution of the freedom of newly independent peoples who fought for that freedom with unshakeable faith in fundamental human rights. The idea that even where a provision is inconsistent with a fundamental right a court is prevented from declaring the truth of that inconsistency just because the laws formed part of the inherited laws from the colonial regime must be condemned. Professor McIntosh in Caribbean Constitutional Reform: Rethinking the West Indian Polity (2002), commenting on section 26 noted that to give literal effect to the provision as written was to deny any special eminence to the Constitution and in particular, its fundamental rights over all other law. He emphasized that the "horror of this is brought home to the intelligent mind when one realizes that the literal consequence is to give prominence to ordinary legislation over the Constitution**."

[59] "It is incongruous that the same Constitution, which guarantees that every person in Barbados is entitled to certain fundamental rights and freedoms,

would deprive them in perpetuity from the benefit of those rights purely because the deprivation had existed prior to the adoption of the Constitution. With these general savings clauses, colonial laws and punishments are caught in a time warp continuing to exist in their primeval form, immune to the evolving understandings and effects of applicable fundamental rights.[59] This cannot be the meaning to be ascribed to that provision as it would forever frustrate the basic underlying principles that the Constitution is the supreme law and that the judiciary is independent".

[70] We are satisfied that the correct approach to interpreting the general savings clause is to give it a restrictive interpretation which would give the individual full measure of the fundamental rights and freedoms enshrined in the Constitution. This interpretation should be guided by the lofty aspirations by which the people have declared themselves to be bound by.[71] A literal interpretation of the savings clause has deprived Caribbean persons of the fundamental rights and freedoms even as appreciation of their scope have expanded over the years. Where there is a conflict between an existing law and the Constitution, the Constitution must prevail, and the courts must apply the existing laws as mandated by the Independence Order with such modifications as may be necessary to bring them into conformity with the Constitution.[72] In our view, the Court has the duty to construe such provisions, with a view to harmonizing them, where possible, through interpretation, and under its inherent jurisdiction, by fashioning a remedy that protects from breaches and vindicates those rights guaranteed by the Bill of Rights.

20. In **Dominic Suraj** the Claimants challenged the constitutionality of the restrictions imposed by the **Public Health [2019 Novel Coronavirus (2019-nCov)] Regulations, 2020,** (hereinafter referred to as "Regulations") made by the Minister under the **Public Health Ordinance Chapter 12 No. 4**. The Claimants were arrested and charged for breaching Regulation 3 (1) (b) of Regulations (No. 9). They contend that the Regulations infringe their

constitutional rights by the restrictions it has imposed on gatherings in a public place exceeding five (5) people. Regardless of the criticism of the savings law clause contained in academic writings and the approach taken by the CCJ, the Court held that it is bound by the authority of higher Courts.

21. At paragraphs 86 to 95 Boodoosingh J as he then was stated:

> **86. The starting point to determine whether the Regulations are constitutional is to start with the Ordinance. The Public Health Ordinance is saved law. It is under Section 105 that the Minister has made the Regulations. That section is saved giving the power to the Minister to make Regulations.**
>
> **87. Mr. Ramlogan in his Reply submissions mounted a fulsome critique of the savings law clause and how it operates. He points to the trenchant criticism of the savings law clause in academic writings. He sets out reservations about it expressed in judicial decisions. Rampersad J. in Jason Jones v The Attorney General, CV 2017 – 00720, called for a review of it. In that judgment Rampersad J. referred to an academic writer Ms Cynthia Barrow-Giles who noted that it weakens the Constitutional rights and creates ambiguity. Robinson's text has indicated it has kept us in a time warp. Professor Drayton in a lecture to the Judicial Education Institute on 2 March 2016 called it toxic. There is the suggestion that savings law clauses should have a time limit. The savings law clause stifles rights.**
>
> **88. This court, however, remains bound by authority of higher courts. The CCJ in R v Jabari Sensimania Nervais (2018) CCJ 19 (AJ) made a strong criticism of savings law clauses and the effect they have had on depriving citizens of rights. However the provision remains in this and other Caribbean jurisdictions. The solution which both the CCJ and other courts have found is to give savings law clauses a restrictive interpretation (See R v Jabari Sensimania Nervais). But this does not render the savings law clause inoperable. It remains for our Parliament, and other Parliaments, to repeal the clause if they are to be cast into history. It is telling that no Parliament**

in Trinidad and Tobago since Independence, although occupied by many different parties and distinguished legal minds and persons, has thus far passed a constitutional amendment to repeal it.

89. What then does a restrictive interpretation of the operation of the savings law clause yield in this case? Mr. Ramlogan in his reply suggested that what is saved is the Ordinance, and not the Regulations. The Regulations were made in 2020, not 1940, and therefore cannot be saved, he suggests. While it is true that the Regulations were not in existence before this year, the power to make them was saved and that power resident in Section 105 cannot be rendered inoperable. Thus the Minister cannot be left unable to make Regulations because that would neutralise the enabling power.

90. The Claimants' argument runs like this. The Ordinance is saved. But the Regulations are not. Thus, if the content of the Regulations breach Sections 4 and 5 of the Constitution, then it is the Parliament that has to enact those measures by special majority. The saving of the Ordinance cannot extend to the Regulations. But then what would become of the power conferred by section 105? The power to make Regulations to prevent or check the spread of the infectious disease must allow the Regulations made to do that. What in that context are the kinds of measures which can prevent or check the spread of infectious disease? Surely it must include the types of measures included in the Regulations and as justified by Dr. Parasram in his evidence. It seems to me that, necessarily, measures to prevent or check the spread of an infectious disease would involve and extend to some curtailment of rights such as freedom of movement or association. Prevention of spreading must in some way restrict the potential spreaders.

91. The Claimants attractively argue that they are challenging the Regulations and not the enabling Ordinance. But the Regulations would have no parent without the power of Section 105. They are derived from the Ordinance. Without the Ordinance

they could not have been made. The court cannot, in effect, disable the power under Section 105.

92. Thus even though the Regulations impact on rights and freedoms they are constitutional once they fall within the remit of the enabling power (Johnson and Balwant v The Attorney General [2009] UKPC 53).

93. Counsel for the Claimants has referred the court to case law calling for a broad and purposive approach to be taken to the Constitution; one that promotes fundamental rights and freedoms; one that allows the Constitution to breathe and develop and to respond positively to changes in society. He is pushing at an open door. I readily agree. But, as pointed out by Counsel for the Attorney General, the Constitution must be read as a whole. It must be read as one document. And that document contains a savings law clause. Judicial will, creativity and ingenuity can only carry us so far.

94. Howsoever, much discomfort there may be that 58 years after Independence we are still relying on saved law, the situation is what it is. The highest court has indicated how saved law is to be treated (Matthews and Balwant cited above). While there have been some judicial chipping away of the effect of saved law, it remains relatively stable in its impact. It remains for Parliament to review saved laws and to decide if we still need to be reliant on a savings law provision. Just as the Judiciary must fulfil its constitutional mandate, so too must the other arms of the State. However, the effect of the savings law clause in this case is determinative.

95. The real question is whether the Regulations and the various restrictions made can properly be said to be within the ambit of what the Ordinance allows. In other words are the Regulations within the scope of what is permitted by the Ordinance.

22. In **Matthew v The State (Trinidad and Tobago) 2004 UKPC 33** where Lord Hoffman stated, **"It is not suggested that there is any ambiguity about the Constitution itself. It is accepted that it is simply not susceptible to a construction, however, enlightened or forward-**

looking which would enable one to say that Section 6 (1) was merely a transitional provision which somehow and at some point had become spent. It stands there protecting the validity of existing laws until such time as Parliament decides to change them".

23. It was held that although the existence of the mandatory death penalty will be inconsistent with a current interpretation of Sections 4 and 5 of the Constitution, Section 6(1) prevents it from being unconstitutional. Further, the decision regarding the abolishment of the mandatory death penalty must be and as the Constitution intended to be, a matter for the Parliament of Trinidad and Tobago.

24. At paragraph 97 of the recent case of the **<u>Attorney General v Vijay Maharaj & Central Broadcasting Services Ltd Civ App No PO23 of 2020</u>** the Court stated, "**In considering how the savings law clause in Trinidad and Tobago Constitution operates, the JCPC in Matthew decided at the commencement of the Constitutions an existing law is saved from the Court's review of whether the law contravenes sections 4 and 5 of the Constitution**.

25. Counsel for the Defendant submits there can be no breach of Sections 4 and 5 where any executive action is taken further to a saved law. It is immune from challenge unless it is independently a breach of the constitution for example if the regulations were discriminatory in nature which was not authorised by the empowering legislation.

26. Counsel further, states that this would undermine the Constitution and remove the efficacy of the savings law regime. Removing any limitation prescribed by the Constitution itself would exceed the Court's role as an interpreter. In support Counsel submits **<u>Matadeen v Pointu (1999) 1 AC 98,</u>** where Lord Hoffman stated:

> "**It is however, a mistake to suppose that these considerations release judges from the task of interpreting the statutory language and enable them to give free rein to whatever they consider should have been moral and political views**

> **of the framers of the Constitution. What the interpretation of commercial documents and constitutions have in common is that in each case the court is concerned with the meaning of the language which has been used. As Kentridge A.J. said in giving the judgment of the South African constitutional court in State v Zuma 1995 (4) B.C.L.R. 401, 412: "If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination**".

27. Following oral submissions by the parties to the Court, the Court of Appeal delivered its decision in **Dominic Suraj**, dismissing the Appeal and holding that the law in Trinidad and Tobago is still that as outlined in **Matthew**. There the Court held with respect to regulations made vires the enabling legislation, that there was no automatic assumption that they were therefore, protected from challenge. A Court had to consider the regulations on a whole to determine whether they were unconstitutional or not. The legal context was of paramount importance.

WHETHER THE LEGAL NOTICE IS VIRES SECTION 44 OF THE CUSTOMS ACT

28. In their further submissions, the Claimants seemed to accept that the legal notice was in fact vires Section 44, however, for completeness sake, this will be considered.

29. In **R (Petsafe Ltd) v Welsh Ministers [2010] EWHC 2908 (Admin)** at paragraphs 84 – 86, Beatson J cited Bennion on Statutory Interpretation, Halsbury's Laws of England and previous authority to the following effect:

> [84] **"...First, the prime guide to the meaning of delegated legislation is the intention of the legislature as indicated in the enabling Act**: see Bennion on Statutory Interpretation 5th edition 262-3 and Halsbury's Laws of England volume 44(1) paragraph 1522. Bennion refers to this as "the rule of primary intention" and Halsbury's Laws stated:

> "The overriding principle in the interpretation of legislation made under powers conferred by statute is that it should be construed in the light of the enabling Act generally and in particular, so as to be consistent with its substantive provisions . . . ."

[85] Bennion, in his comment to s 59 of his code, also states, "the court will assume that the delegate intended to conform to the rule of primary intention, and will construe ambiguous provisions in the instrument accordingly". Notwithstanding Bennion's reference to "ambiguous provisions", the breadth of the principle is illustrated by R v Croydon Crown Court, ex parte Lewis (1994) 158 JP 886, [1995] Crim LR 44 in which the Divisional Court applied the principle to Regulation 6(6) of the Prosecution of Offences (Custody Time-Limits) Regulations 1987. That provided:

> "The Crown Court on being notified that an accused who is in custody pending trial there has the benefit of a custody time limit . . . and that the time limit is about to expire, shall grant him bail in accordance with the Bail Act 1976 as from the expiry of the time limit, subject to a duty to appear before the Crown Court for trial."

[86] It was argued that the words "subject to a duty to appear before the Crown Court for trial" made it clear that bail granted at the end of the custody time limit was to extend to the date of the trial. Balcombe LJ rejected that argument. He did so because, if that was the true construction of Regulation 6(6), it was clearly beyond the powers granted to the Secretary of State by the enabling provision in s 22(1) of the Prosecution of Offences Act 1985. Referring to the case of Raymond v Honey [1983] 1 AC 1, [1982] 1 All ER 756, [1982] 2 WLR 465, Balcombe LJ stated, "**There is a well-established principle . . . that any regulations are to be construed in such a manner as that they shall not be ultra vires**". As it was possible to give Regulation 6(6) a meaning which did not make it ultra vires the enabling Act because it did not expressly state that bail had to continue until the date of trial, he would so construe it. He did not refer to a requirement of ambiguity and the provision he was

considering was no more ambiguous than Regulations 2(1)(a) and (b) of the 2010 Regulations. [Emphasis added].

30. Counsel for the Claimant relies on the case of **<u>Simms v Secretary of State for the Home Department 1999 UKHL 33</u>** where Lord Hoffamn summarized the principle of legality:

"Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document"

"What this case decides is that the principle of legality applies to subordinate legislation as much as to acts of Parliament. Prison regulations expressed in general language are also presumed to be subject to fundamental human rights. The presumption enables them to be valid. But, it also means that properly construed, they do not authorise a blanket restriction which would curtail not merely the prisoner's right of free expression, but its use in a way which could provide him with access to justice".

31. In **<u>Simms</u>** Section 47(1) of the Prison Act 1952 enabled the Home Secretary to make rules for "the regulation and management of prisons … and for the … treatment, employment,

discipline and control of persons required to be detained therein". Under the Act the Secretary of State made the Prison Rules. Standing Order 5:37 provided that visits to inmates by Journalists or Authors in their professional capacity should in general not be allowed and the Governor has authority to refuse them. Standing Order 37A provided that where such permission to visit the inmate in a professional capacity or is allowed general access to the establishment he will be required to provide an understanding that no inmate will be interviewed except with permission of Governor and the inmate, that interviews will be conducted in accordance with conditions as considered necessary by the Governor and that any material obtained will not be used for any professional purposes except as permitted by the Governor. Upon being notified that Journalists were visiting the Appellants in prison, the Governor informed them that they could no longer visit unless an undertaking was signed in accordance with paragraph 37.

32. It was argued on behalf of the Home Secretary that that policy is enshrined in paragraphs 37 and 37A and that a complete ban on interviews can be imposed even if the sole purpose is for the prisoner to gain access to the investigative resources which can lead to a referral of his case to the Court of Appeal. On behalf of the Appellants, Counsel argued that the only right which he claims is the right for prisoners to have an oral interview with a Journalist confined to the question of whether he has been wrongly convicted which can lead to investigation of the safety of their conviction and publicize findings to gain access to justice. Counsel also sought a declaration that paragraphs 37 and 37A are ultra vires as he assumed that they authorise the described policy. Further, irrespective of the vires, the Appellant's case was that the policy was unlawful.

33. Until the imposition of this ban, the interviews undid a substantial number of miscarriages of justice. There was no evidence that these interviews resulted in an adverse impact on prison discipline. With the blanket ban was impossible for a Journalist to take up the case of a prisoner who alleged a miscarriage of justice.

34. Lord Steyn held, "**The only relevant issue in the present proceedings is whether paragraphs 37 and 37A are ultra vires because they are in conflict with the fundamental basic rights claimed by the prisoners. The principle of legality justifies the conclusion that paragraphs 37 and 37A have not been demonstrated to be ultra vires in the cases under consideration… My Lords, my judgment does not involve tearing up the rule book governing prisons. On the contrary I have taken full account of the essential public interest in maintaining order and discipline in prisons. But, I am satisfied that consistently with order and discipline in prisons it is administratively workable to allow prisoners to be interviewed for the narrow purposes here at stake notably if a proper foundation is laid in correspondence for the requested interview or interviews… Declarations should be granted in both cases to the effect that the Home Secretary's current policy is unlawful, and that the Governors' administrative decisions pursuant to that policy were also unlawful**". The prison rules and the standing orders did not impose a complete ban. It was the policy that did this.

35. Lord Hobhouse of Woodborough held that the Appeals would be dismissed to the extent that the declaration that paragraphs 37 and 37A were ultra vires. However, the Appeal was allowed to the extent that the policy of refusing visits by professional Journalists was unlawful. It was unreasonable and disproportionate and could not have been justified as a permissible restraint upon the rights of prisoners.

36. In **Simms**, it was the policy that was unlawful. A different meaning was placed on the standing orders in that case which amounted to a total ban which did not truly affect the language contained in them. However, those circumstances do not exist in the present case. The President, empowered by Section 44 which allows for him to prohibit certain items, which also remains unchallenged by the Claimant, acted within that scope when the proclamation was made. He did in fact ban "any goods whatsoever" which just happens to include camouflage pattern materials. As discussed above, there was no overriding of fundamental rights by general or ambiguous words. At best the President was given a

general and wide power, one which was authorized by Parliament. Further, while Counsel for the Claimant seeks a declaration that by subjecting the Claimant to stand trial to answer to the charges of possession of camouflage clothing contravenes his rights to enjoyment of property, liberty and protection of the law pursuant to Sections 4 (a) and 5 (2) (e) of the Constitution, there was no mention of this in the grounds upon which the Claimant relies, the submissions mainly focussed on Sections 1, 2 and 53 of the Constitution. This was unlike the case in **Simms** where extensive arguments were made on the particular rights that were being infringed.

37. Counsel for the Defendant submits that Section 44 is saved law and so Legal Notice cannot be deemed unconstitutional once it is intra vires. Further, any executive action taken to a saved law is immune from challenge unless it is found to be discriminatory in a manner not empowered by the legislation. However, Counsel for the Defendant submits no authority in support for which the Court's intervention is only limited to a ground of discrimination.

38. Boodoosingh J as he then was, in **Dominic Suraj** found that the measures contained in the Regulations were necessary to prevent and check the spread of the virus. In other words, the Regulations were properly made within the ambit of what the Ordinance allowed. However, his decision was appealed.

39. The Court has to consider what exactly does it means for subsidiary legislation to be vires the enabling power and whether that goes beyond examining the scope of the enabling legislation.

40. In **Dominic Suraj & Others v Attorney General CA 246 of 2020 and Satyanand Maharaj v Attorney General CA S-248 of 2020** (Dominic Suraj Appeal) Court considered whether the Regulations were unconstitutional notwithstanding the status of the Public Health Ordinance as an existing law. The trial judge had accepted the argument of the Respondent that the Regulations were constitutional as long as they fell within the ambit of the parent

statute. However, at paragraphs 83-98 the Court of Appeal referred to additional authorities:

[83] In the recent local authority of Permanent Secretary of Ministry of Social Development v Ruth Peters Civ App No. 366/2019, the Court of Appeal (TT) confirmed that the test of invalidity was compatibility with the enabling statute. In Peters, Mendonca JA cited R (on the application of the Public Law Project) v Lord Chancellor (2016) UKSC 39 where Lord Neuberger said:

> **"23. Subordinate legislation will be held by a court to be invalid if it has an effect or is made for a purpose which is ultra vires that is outside the scope of the statutory power to which it was made".**

Lord Neuberher continued:

> **"Accordingly when, as in his case, it is contended that subordinate legislation is ultra vires, it is necessary for a court to determine the scope of the statutorily conferred power to make that legislation".**

[84] Alternatively, in the words of Sachs J in Commissioner of Customs and Excise v Cure and Deely (1962) 1 Q.B. 340:

> **"A Court is bound to consider, before reaching a decision on the question whether a regulation is intra vires to examine the nature, objects and scheme of a piece of legislation as a whole, (our emphasis)..."**

[85] Subsidiary legislation is also presumed to be valid and the burden to prove otherwise is carried by those who impugn their validity. See R (Petsafe Ltd) v Welsh Ministers (2010) EWHC 2908.

[86] Contemporary authorities suggest, however, that the validity of subsidiary legislation was not protected merely by being intra vires the enabling Act. The most authoritative of these was R (on the Application of UNISON) v The

Lord Chancellor (2017) UKSC 51. This was a decision of the UK Supreme Court in respect of the Employment Appeal Tribunal Fees Order 2013, as made by the Lord Chancellor, in the exercise of statutory powers. There was no issue of vires with the enabling Act. The Order nonetheless held to curtail the right to access to justice. At paragraph 65, Lord Reid said:

> **"In determining the extent of the power conferred on the Lord Chancellor by,... the 2007 Act the Court must consider not only the text of the provision, but also the constitutional principles which underlie the text and the principles of statutory interpretation which give effect to those principles".**

[87] Ultimately the Supreme Court found at paragraph 104 that the Fees Order had the effect of rendering the right of access nugatory.

[88] More recently, in R (Al Enein) v Secretary of State for the Home Department (2020) 1 WLR 1349 the UK Court of Appeal considered the validity of the policy adopted by the Secretary of State for Immigration pursuant to Schedule I of the British Nationality Act 1981. Singh LJ expressed the view that subsidiary legislation, otherwise intra vires, could be struck down if it conflicted with statutory rights.

[89] In the course of his judgment Singh LJ referred to R v Secretary of State ex p Joint Council for the Welfare of Immigrants (1997) 1 WLR 275 a decision also relied on by the Supreme Court in UNISON. Singh LJ summarized the view of Simon Brown LJ IN THE Welfare of Immigrants case in this way:

> **"In R v Secretary of State ex p Joint Council for the Welfare of Immigrants, it was held that Regulations which had been made could be held to be unlawful if they contravened the express or implied requirements of a statute".**

[90] Singh LJ then quoted Waite L.J. in Welfare of Immigrants Case:

"Subsidiary legislation must not only be within the vires of the enabling statute but also be so drawn as not to conflict with statutory rights already enacted by other primary legislation".

[91] Singh LJ continued:

"A fundamental point of principle is that subsidiary legislation will be ultra vires if it seeks to cut down or negate rights already enacted by other primary legislation…"

[96] Most recently and on point with the pandemic, was the judgment of the Privy Council in AG of Turks and Caicos Islands v. Misick and Others. This was a unanimous judgment of the Board and concerned the lawfulness of subsidiary legislation relating to remote court sittings.

[97] In the course of the joint judgment delivered by Lord Hamblen and Lord Stephens, their Lordships underscored the need for the subsidiary legislation to be read in their context in the widest sense.[76] The Constitution was part of the legal context of the regulations and at paragraph 39, their Lordships expressed this view:

"The legal context includes the Constitution and a Court would not lightly infer that Regulation 4(6) is intended to override or displace basic tenets of the Constitution"

[98]. At paragraph 40, their Lordships defined the principle of effectiveness in these words:

"Also of potential relevance is the principle of effectiveness i.e. where possible as an enactment will be construed so that its provisions are given force and effect rather than rendered nugatory-see Bennion at paragraph 9.8".

Ultimately, at paragraph 61, their Lordships held that the Regulations were not ultra vires.

41. The Court of Appeal in **Dominic Suraj (Appeal)** held that the Trial Judge fell into error in failing to consider the aforementioned authorities. However, there was no doubt that the Regulations made under the Public Health Ordinance had the effect of curtailing fundamental rights and freedoms and in the restriction of said rights and freedoms the Regulations fell within the ambit of the Ordinance. The Court of Appeal rejected the Appellant's submission that the Regulations found no protection in the parent statute and should be struck down if offensive to fundamental rights and freedoms and the Respondent's submission that the intra vires status of the Regulations led to a presumption in favour of their validity.

42. The Court considered the context of the Regulations in light of the enabling statute. The Public Health Ordinance empowers the Minister of Health to make the necessary decisions to ensure the protection of the population in the middle of a public health crisis. At paragraphs 106-108 the Court of Appeal stated:

> **[106]** "**The regulation-making power at section 105 of the PHO has survived the scrutiny of Parliament on the many occasions when this Ordinance was considered and amended by Parliament. Accordingly, the PHO is not a statute which has reclined dormant for decades and which simply hides behind the saving law provision. This a statute to which Parliament has been alive and which nonetheless has withstood the test of time. In the context of an enabling statute, which itself confers extensive powers for the preservation of the public survival, it seems that the Court should be slow to strike down subordinate legislation, as long as it has not strayed from the shelter of the parent statute**".
>
> **[107] Moreover, the authorities culminating with UNISON, must themselves be examined in context. In each of those cases, the subsidiary legislation offended the**

basic constitutional principles as in Khoyratty. In UNISON the impugned Order of the Lord Chancellor compromised the right of workers to access to justice, a basic right, on which all other rights depended for their vindication.

[108] In these proceedings, the Regulations do not affect the basic constitutional tenets of access to justice or separation of powers. In this way, we find these proceedings distinguishable from the UNISON type cases. We hold that the Regulations, being intra vires their enabling statute, and not affecting basic constitutional rights or principles, are not susceptible to being struck down."

43. Counsel for the Claimant also relies on **R on the application of Evans and another v Attorney General (2015) UKSC 21** where a request was made via the Freedom of Information Act for disclosure of certain documents from various government departments. However, the Attorney General issued a certificate pursuant to Section 53 of the Act stating that he had formed the opinion that the departments had been entitled to refuse disclosure. In applying the principle of Legality to Section 53 Lord Neuberger stated that this said provision could not override the fundamental rights or principle of rule of law without crystal clear provisions.

44. It is clear that the President was acting well within his powers under Section 44 when he issued the Legal Notice prohibiting the importation of camouflage material. That is the clear intent of Section 44, to enable the President to determine the legality of the importation of certain items.

WHETHER THERE WAS A LACK OF PARLIAMENTARY SCRUTINY/OVERSIGHT AND IF SO, WAS IT UNCONSTITUTIONAL

Preliminary issues/observations

45. Before making a determination on this issue the court wishes to address the following:

(a) The first ground upon which the Claimant bases his claim is that the President cannot on his own by proclamation and/or any other means criminalize conduct of citizens without the approval of the democratically elected Parliament. However, criminalization did not occur by way of the Legal Notice but is contained in Section 213 of the Customs Act. The Proclamation merely identified what the President wished to ban the prohibition of pursuant to his power in Section 44 of the Act. In any event, the Court took note of the cases submitted by Counsel for the Defendant particularly, **Boddington v British Transport Police (1999) 2 A.C. 143** submitted by Counsel for the Defendant where the Court validated the criminalization by way of delegated legislation and **Garvin Sookram v Commissioner of Police CV 2014-02199** where at paragraph 15 Gobin J stated, "**The prison rules which still govern our prisons were made under the West Indian Prisons Act of 1838. The Act empowered "the governor and council of such colony to make rules for the government of the prisons in her Majesty's Colonies in the West Indies and for the care and superintendence, and for the duties of the keepers and officers of such prisons". The rules were delegated legislation made under the Act in 1943 and their status is recognised by the Prisons Act Ch. 13:01, even today**". Also Section 63 of the Interpretation Act provides,

(1) Where a written law confers a power to make any statutory instrument there may be annexed to a breach of that statutory instrument a punishment by way of a fine not exceeding five hundred dollars.

(2) Where a written law confers power to make a statutory instrument an offence under that statutory instrument is punishable on summary conviction.

The Court also took note of Counsel for the Defendant's reference to Acts under which Regulations have been made with accompanying sanctions: Animal (Diseases and Importation) Act Chapter 67:02; Plant Protection Act Chapter 63:56; Fisheries Act Chapter 67:51; Proceeds of Crime Act Chapter 11:27; Motor Vehicles and Road Traffic

Act Chapter 48:50; Conservation of Wild Life Act Chapter 67:01 and the Anti-Terrorism Act Chapter 12:07.

(b) Notwithstanding that relief was not sought for Section 44, Counsel for the Claimant continued to pass the following criticisms in submissions:

i. Parliament could not have been presumed to have conferred on another body such as the executive and/or President the power to erode rights.

ii. Section 44 of the Customs Act cannot be construed to circumvent Section 53 of the Constitution whatsoever.

iii. Section 44 is populated with general and unspecified words as it purports to give the executive the power to prohibit "any goods whatsoever". Reference was made to **AXA General Insurance Ltd and others v The Lord Advocate and others (Scotland) 2011 UKSC** where the Supreme Court went on to state in paragraph 152, "**The principle of legality means not only that Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words, but also that it cannot confer on another body, by general or ambiguous words, the power to do so. As Lord Browne Wilkinson stated in R v Secretary of State for the Home Department Ex p Pierson (1998) AC 539 at p 575:**

> **"A power conferred by Parliament in general terms is not to be taken to authorize the doing of acts by the donee of the power which adversely affect… the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament."**

Lord Steyn said at p 591,

> **"Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law".**

iv. On a hypothetical analysis, approved in **R (The Good Law Project) v Electoral Commission (2018) EWHC 2424 Admin** as a standard testing method for the logic of a legal argument, the use of such a broad phrase without any form of parliamentary scrutiny and/or oversight is illogical as in an import based economy and society such as ours the executive could be permitted to prohibit any item which in its opinion saw fit to prohibit.

(c) Counsel for the Defendant submits that the Claimant was not charged pursuant to the Legal Notice for the importation of camouflage pattern material but rather under Section 213(c) of the Customs Act. This is immaterial. It is not that the Claimant could have been charged under the Legal Notice in any case as it simply purports to specify what exactly the imported good is prohibited pursuant to Section 44 of the Customs Act.

46. The Court will not interfere with Parliament's intention in Section 44 of the Customs Act especially in light of the fact that this was not specifically challenged. There is no circumvention of Section 53 of the Constitution which stipulates that Parliament makes the laws as it was Parliament itself who authorized the President to exercise that power in the Legal Notice. Further, Counsel for the Claimant relies on **Entick v Carrington** where Lord Camden articulated the need for law to justify a trespass. The principle that authority of law is required to intrude upon fundamental rights is the jurisprudential pearl which emanates from this hallowed case. Again, it is ironic that Counsel for the Claimant is in search of the authority given to the President to make the Legal Notice which is actually contained in Section 44 of the Customs Act.

47. In any event, the Court wishes to state that it is not that Parliament sought to override fundamental rights by general or ambiguous words or did so by granting such a power to the President by way of general or ambiguous words. Apart from Parliament's authorization of this power, in any event, it is saved from the constitutional challenge by

way of the savings clause provision. There is nothing general or ambiguous about "any goods whatsoever". It is simply wide in scope. A scope that is authorized and saved. Part (vi) was an obvious reference to Section 44 of the Customs Act, as it referred to "prohibit any item" as opposed to "camouflage pattern material". This was reinforced by counsel's reference to tobacco, alcohol, medicine, food items which could all be subject to arbitrary dictates. Again, if Parliament did not intend for the President to potentially have such a wide scope in banning the aforementioned items it would have put in the proper safeguards in Section 44.

Discussion

48. Counsel for the Claimant contends that the Legal Notice contravenes Section 53 of the Constitution which vests Parliament with the sole power to make laws and is void pursuant to Section 2. It undermines Parliamentary Scrutiny and oversight of executive action and is embedded in the Rule of Law principles, all of which are features of a sovereign democratic state.

49. Counsel relies on **Unison v The Lord Chancellor (2017) UKSC 51** at paragraph 68, where the Court stated, "**Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them".**

50. Counsel for the Claimant also relies on the case of **R (on the application of Miller) v The Prime Minister (2019) UKSC 41** and **Dominic Suraj** as authority for the significance of parliamentary oversight.

51. In **Miller (supra)** the Court stated:

> **"46. Ministers are accountable to Parliament through such mechanisms as their duty to answer Parliamentary questions and to appear before Parliamentary committees and through Parliamentary scrutiny of the delegated legislation which**

ministers make. By these means, the policies of the executive are subjected to consideration by the representatives of the electorate, the executive is required to report, explain and defend its actions, and citizens are protected from the arbitrary exercise of executive power".

52. In the case of **Dominic Suraj,** Boodoosingh J as he then was stated at paragraphs 110-111:

"**[110]** Even as stated in the Robinson text and the cases quoted above, there is some overlap in the law making functions between the executive and legislature. At the same time, the main function of the legislature is to make law and the main function of the executive is to frame policy, implement the law and govern. **Members of Parliament are elected to Parliament, to discuss, scrutinise, debate and pass laws, on behalf of citizens. In my view, there ought really to be no objection in principle to some form of Parliamentary scrutiny to Regulations being made which, even if justifiable, impact on the freedoms of citizens. There is no specific relief sought about modifications to the Ordinance as the Ordinance was not challenged and therefore, the court cannot make any such order. I would, however, urge the Attorney General to consider, at minimum, some form of appropriate Parliament scrutiny for Regulations made by the executive where normal every day freedoms are affected, as has occurred here**".

"**[111]** Second, I have noted that while there are laws in our statute books where penalties have been included in Regulations, these are for the most part enabled by primary legislation. Further, health regulations are part of a relatively limited few laws where this occurs. It must therefore be considered to be exceptional circumstances (such as the present) where incursions into rights and freedoms with criminal penalties attached to Regulations made by the executive may be considered acceptable. **This decision should therefore not be taken as encouragement to expand the areas of law where Regulations made by the executive restrict rights and freedoms of individuals without Parliamentary scrutiny or without considering**

whether a special majority is needed. It cannot become the norm for laws, in my view, especially with significant penalties attached, to be made without Parliamentary input".

53. In **Miller**, the Court held that the Prime Minister's action of advising the Queen to prorogue Parliament for five (5) weeks was unlawful. His action had the effect of frustrating the constitutional role of Parliament in holding the Government accountable. It was not a normal prorogation and it prevented Parliament from carrying out its role for five (5) out of a possible eight (8) weeks between the end of the summer recess and exit day on the 31st day of October, 2019. The Court went on to state that given the circumstances regarding the UK leaving the EU, its members might have thought that parliamentary scrutiny of the Government in the run-up to the exit was more important than going into recess. The House of Commons, the democratically elected representatives, has a right to voice on how that change comes about. The House of Commons has demonstrated, by its motions against leaving without an agreement and by the European Union (Withdrawal) (No. 2) Act 2019, that it does not support the Prime Minister on the critical issue for his Government.

54. It was held that if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions it is unlawful.

55. **Miller** is concerned with the prorogation of parliament for an extended amount of time where Parliament would have been prevented from asking questions of Ministers concerning the circumstances surrounding Brexit. This is not the case here. The Court agrees with the submission by Counsel for the Defendant that it is misleading to suggest that there has not been parliamentary oversight when Parliament is sitting now and has been for the past thirty-six (36) years and has had no difficulty with either Legal Notice or Section 44 of the Customs Act. It is not that Parliament has been prevented in performing

its role. Further, Counsel for the Claimant went on to state that they even accepted that modern legislative demands may require the executive to promulgate regulations but there is no proper authorization of Parliament in this case. The authorization of Parliament is rooted in Section 44 which remains unchallenged.

56. The Court also considered the reference made in **Dominic Suraj** by Boodoosingh J (as he then was) to the constitutional text Fundamentals of Caribbean Constitutional Law by Robinson, Bulkan and Saunders, (Sweet & Maxwell), 2015 at paragraph 7.014, where this point was made, "**There is no strong separation between legislative and executive power in the Anglophone Caribbean. While the power to make laws is constitutionally vested in Parliament, there can be a voluntary distribution of powers. Floissac CJ in Astaphan v Comptroller of Customs recognised that "the delegation or transfer of legislative power by the legislature to the executive is not per se inconsistent with the principle" of Separation of Powers. Effective control is maintained if the legislature limits the power or establishes guidelines or policy for its exercise. Courts police the boundary between legislative and executive power through judicial review of executive action. Caribbean courts have a duty to strike down administrative or executive action that exceed jurisdiction or undermines the authority of the legislature. The power to delegate legislative authority to the executive is justified on the bases of both necessity and constitutional efficacy. As the complexity of modern regulation increases, law making correspondingly requires highly specialised knowledge and experience. Additionally, the sheer volume of regulation to be undertaken means that if Parliament would monopolise legislative powers, it could easily become overwhelmed and unable to function effectively. Consequently, delegation of legislative authority to appropriate executive bodies which are concerned with the actual implementation of the law is both a rational and effective allocation of functions. Those bodies encompass a wide spectrum, including ministers, civil servants and government departments, municipalities, public bodies, and even the Cabinet as a whole**.

57. Counsel for the Claimant submits that the Legal Notice was not subject to either negative or affirmative resolution and has not been laid in Parliament in any form or fashion.

58. Counsel relies on **<u>Halbury's Laws of England Vol 78 2018</u>** in support of the need for parliamentary scrutiny over subsidiary legislation:

> [608] "**Where Parliament has delegated to another authority such as a minister or a public department, the power to make a statutory instrument or other similar subordinate legislation, some measure of control is usually reserved to Parliament if the exercise of power is of a general nature and is sometimes reserved if the exercise of is a local nature.**
>
> **Many instruments are subject to parliamentary proceedings, and all general instruments are scrutinized by a joint select committee of both House of Parliament or on relation to financial instruments by a select committee of the House of Commons**".

59. Again, the delegation of the power to the executive by Parliament is authorized in Section 44 of the Customs Act. A strict Separation of Powers is not a feature of the Constitution and legislative framework in Trinidad and Tobago. There may be overlap as noted in **<u>Dominic Suraj.</u>** Counsel for the Defendant also succinctly outlined the various ways in which delegated legislation can be subjected to scrutiny:

    (a) express requirement to be subject to further Parliamentary approval by way of negative or affirmative resolution. However, this is not required in all cases and is not a constitutional requirement;
    (b) Ministerial questions can be posed;
    (c) setting up of Joint Select Committees under Section 66A of the Constitution;
    (d) Standing Orders of the House of Representative and the Senate under which there is a power to establish elective Joint Select Committees on whatever the Parliament determines appropriate; and

(e) each House of Parliament is also given express Constitutional authority to regulate its own procedure by Section 56 of the Constitution.

60. Further, 66A (1) of the Constitution provides:

[66A] **(1) Subject to subsection (2), it is hereby declared that—**

(a) in addition to any other Joint Select Committee which Parliament is empowered to appoint under its Standing Orders, Parliament shall, within one calendar month—

(i) after the commencement of the Constitution (Amendment) Act, 1999;

(ii) of the first meeting of the House of Representatives after any General Election, or such time as the Parliament may resolve not being later than three months thereafter, appoint Joint Select Committees, to inquire into and report to both Houses of Parliament in respect of—

(A) Government Ministries;

(B) Municipal Corporations;

(C) Statutory Authorities;

(D) Enterprises owned or controlled by or on behalf of the State or which received funding from the State of more than two-thirds of its total income in any one year; and

(E) Service Commissions, in relation to their administration, the manner of the exercise of their powers, their methods of functioning and any criteria adopted by them in the exercise of their powers and functions.

61. There was no submission made by Counsel for the Claimant that the aforementioned avenues were rejected and that the Legal Notice was in any way prevented from being scrutinized. There is nothing in the Constitution or the relevant Act of Parliament to suggest

that a Joint Select Committee is mandated to be set up to examine the contents of the Legal Notice as the Claimant seems to suggest.

62. Counsel for the Defendant also referred to the fact that the Minister of National Security brought the recommendation of banning the importation of camouflage pattern material before Cabinet which was considered and discussed by Cabinet in Cabinet Minute ………… dated the 6th day of October, 1983, before referring it to the Attorney General to have the proclamation issued. As such it was not the result of an ad hoc, whimsical process by the executive of express powers vested by primary legislation. It may not have been ad hoc but it was certainly lacking in scrutiny by the body under the Constitution entrusted to make laws.

63. The Legal Notice, which has the potential to affect the rights and freedoms of citizens and one which has been made by the executive under such a wide power granted under the Act, should be subject to some level of scrutiny. This was encouraged by Boodoosingh J (as he then was) in **Dominic Suraj** even in circumstances which required swift action to control the spread of a virus in the middle of a public health crisis. There is no reason why there should not be similar persuasion to do so. In any event, like **Dominic Suraj**, the savings law clause is central to the outcome as well as the determination of whether the Legal Notice is vires the Customs Act.

64. The Court of Appeal in **Dominic Suraj** considered the question of delegated legislation and held firmly that delegated legislation in of itself does not offend the principles of the Separation of Powers. The Court noted that:

> **75. We considered, nonetheless whether the Regulations contravene the principle of Separation of Powers. For that purpose, it becomes necessary to consider the meaning of Separation of Powers in 'Westminster Model' constitutions such as ours.**

76. **The doctrine of Separation of Powers does not require watertight boundaries. Durga Das Basu, in the 6th edition of Administrative Law, explained the modern significance of the doctrine by asserting:**

> **"In modern practice, the theory of Separation of Powers has come to mean an organic separation or a separation of functions viz, that one organ of government should not usurp or combine functions belonging to another organ."**

Basu noted however that any rigid separation in impracticable under modern conditions where the problems of government are interdependent.

> **"Hence, a distinction is made between 'essential' and 'incidental' powers of an organ of government. One organ cannot claim to exercise the powers essentially belonging to another organ but may, without the violation of the principle of separation of powers, exercise some of the incidental powers of another organ"[48]**

Basu opined that enforcement of a rigid conception of separation of powers would make modern government impossible.

77. **In like vein, Robinson, Bulkan and Saunders, authors of Fundamentals of Caribbean Constitutional law had this to say of the Separation of Powers:**

> **"There is no strong separation between legislature and executive power in the Anglophone Caribbean."**

78. **In respect of delegated legislation, they wrote:**

"While the power to make laws is constitutionally vested in Parliament there can be a voluntary distribution of powers. Flossiac CJ in Astaphan v Comptroller of Customs recognised that the delegation or transfer of legislative power by the legislature to the executive is not per se inconsistent with the principle of separation of powers provided that the legislature retains effective control of its powers."

79. **The Regulations, in these appeals, were made by the Minister of Health, as authorised under Section 105 of the PHO. As delegated legislation they were**

an instance of the voluntary sharing of legislative power, which, has become a systemic feature of Caribbean Constitutions 53. Similar examples of legislative power sharing abound. They include regulations made under the Motor Vehicles and Road Traffic Act; the Animal Disease and Importation Act; the Plant Protection Act, and the Fisheries Act.

80. The Regulations, here, have been under the control of the legislative arm of Government for many decades. The PHO has been brought to Parliament on many occasions since 1976. It is clear that there was nothing to prevent Parliament from pruning powers conferred on the Minister of Health, at Section 105. It was well within Parliament's power to do so, more particularly when they revisited and amended the Public Health Ordinance on two occasions in 2020 by Acts 4 and 23 of 2020.

81. It is therefore, our view that the Regulations do not infringe the Separation of Powers doctrine, which affords Parliament the facility to share its legislative power, by providing for the creation of subsidiary legislation. As attractive as this argument promised to have been, we feel compelled to disagree with the Appellants on this ground and to affirm the decision of the Trial Judge.

WHETHER THE LEGAL NOTICE WAS VAGUE AND OFFENDED THE RULE OF LAW

65. Before the substantial issue is dealt with the Court has determined that the rule of law is to be used only as an interpretive tool as submitted by Counsel for the Claimant as opposed to being used as a separate limb argument capable of offending Section 1 and/or the Separation of Powers as advanced by the Claimant.

66. The case of **Attorney General v Vijay Maharaj & Central Broadcasting Services Ltd** is instructive on this point. At paragraph 142 the Court stated:

> "**Further, if it is alleged that an Act is vague and uncertain and offends the rule of law principle, the question cannot be resolved by recourse to Section 1. We agree with Mr. Hosein that the rule of law argument is misplaced in this context. Section**

1 does not lend itself for use in that way. We do not agree with the approach taken by either the trial judge or by the Respondent in its arguments and submissions".

It was held that the 'rule of law' principle is not 'wrapped up' in the provisions of Section 1, sovereign democratic state which was made clear from a critical examination of Khoyratty and that vagueness and uncertainty as legal principles cannot reside under the provisions of Section 1.

67. At paragraphs 102 & 106 the Court went on to state:

[102]. In oral arguments before the court, Mr. Hosein submitted that the rule of law has different facets, for example, (i) the circumstances surrounding compliance with the law and the trial of an accused and (ii) use as an "interpretative lens" where the statute is vague. He submitted that in the particular context of this case, which concerns the interpretation of statute, the rule of law cannot be considered in a "macro", jurisprudential sense as contended for by the respondent but rather, it must be considered on a "micro level", as an interpretation tool in order to conform with, among other things, the interpretation rules and the principle of legality. He relied on the decision in Boucher v R115 in support of the proposition that the court can interpret the Sedition Act in a manner that is consonant with modern principles of justice. Mr. Hosein, in his oral arguments, referred to the introduction of laws to abolish the general elections as an example of what he conceived to be the operation of the rule of law at a "macro" level.

[106]. We agree with Mr. Hosein's argument that the aspect of the rule of law which has been interrogated in this case, the principle of certainty, is one, to use his terminology, which exists at the "micro level", that is, which involves an exercise of interpretation. There are no deeper constitutional, structural issues implicated which require examination of the rule of law at a "macro", jurisprudential level, as contended for by Mr. Maharaj. Two examples of the operation of the rule of law at a "macro level" would be the introduction of legislation to abolish general elections

and the removal of the question of bail from the purview of the Judiciary. The former would involve the violation of a core rule of law principle of sovereign democratic governance and the latter would violate the fundamental principle of the Separation of Powers. No such "macro level" issues are remotely implicated in this challenge.

68. Counsel for the Claimant submits that the Rule of Law is a fundamental feature of a democratic society which requires legal certainty, foreseeability and predictability, all of which vague laws violate. Vague and uncertain legal instruments with penal consequences are contrary to the rule of law and should be struck down.

69. Laws must sufficiently clear and certain and accessible so as to enable a citizen to regulate his conduct in that, with the appropriate advice, he must be able to foresee to a reasonable degree what conduct is forbidden and consequences of a given action: **R v Mirsa (2005) 1 Cr App R 328,** **Sabathee v The State (1999) 4 LRC 403** & **Gallagher (2019) UKSC 3.** Lord Sumption went on to state that the provisions must be published and comprehensible.

70. The Claimant relies on the case of **R v Mirsa,** where at paragraph 31 the Court stated, "**a vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad box and subjective basis, with the attendant dangers of arbitrary and discriminatory application**". Further, at paragraph 34 of **R (Gillian) v Commissioner of Police of the Metropolitan (2006) 2 AC 307** the Court in discussing the Rule of Law stated, **"The exercise of power by public officials, must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predeluction or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis of legality".**

71. Counsel for the Defendant submits that a mere lack of precision does not render a statute unconstitutional. A reading down of the statute to prevent ambiguity may be required but

a Court will only do so or quash where regulations have no possible ascertainable meaning. There is no breach of the rule of law as the criminal offences established are clear, accessible and are known to all. Counsel relies on **R v Misra and Srivastava**, **Percy v Hall (1997) 3 WLR 573** and **R v Rimmington (2006) 1 AC 459.**

72. Counsel for the Defendant also relies on **United Nurses of Alberta v. Alberta (Attorney General), [1992] 1 S.C.R. 901** **and** **Irwin Toy Ltd. v. Quebec (Attorney General) [1989] 1 SCR 927** where the majority noted at paragraph 63:

> "**Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no "limit prescribed by law"**."

73. In **Quincy Mc Ewan & ors v Attorney General of Guyana (2018) CCJ 30,** the Appellants had challenged the validity of Section 153 (1) (xlvii) of the Summary Jurisdiction (Offences Act) which criminalizes a man dressing in female attire or for a woman dressing in male attire in a public place for an improper purpose as it was vague, uncertain, irrational and discriminatory.

74. At paragraphs 80-84, Saunders J held:

> **[80] A penal statute must meet certain minimum objectives if it is to pass muster as a valid law. It must provide fair notice to citizens of the prohibited conduct. It must not be vaguely worded. It must define the criminal offence with sufficient clarity that ordinary people can understand what conduct is prohibited. It should not be stated in ways that allow law enforcement officials to use subjective moral**

or value judgments as the basis for its enforcement. A law should not encourage arbitrary and discriminatory enforcement.

[81] Section 153 (l) (xlvii) fails these tests. No details or examples of conduct that would fall under the umbrella of "improper purpose" are discernible, whether in the specific law itself or elsewhere. The cross-dressing person has no clue, and receives no guidance, as to whether contemplated conduct is forbidden by the statute. The section facilitates discriminatory application.

[82] It was suggested to us by the Solicitor General that any potential vagueness could be removed if, when a person is charged, details are given of the improper purpose that prompted the laying of the charge. This is not an effective solution to the problem. It seeks to cure the vagueness after the individual has been arrested for the offence. On the contrary, individuals require advance notice of any proscribed conduct so as to regulate their behaviour so as to avoid getting into trouble.

[83] If, as the courts below insisted, the cross-dressing was by itself not really an issue, but the "improper purpose" was in fact the essence of the offence, then two things readily suggest themselves. Firstly, by criminalising only a purpose, and a vague, undefined and extremely broad one at that, the offence represents an unprecedented extension of criminal liability. Secondly, the alleged improper purpose must necessarily itself relate to the taking of some step to commit a known offence. In the latter case the law is entirely otiose as, without it, the individual may still be prosecuted for committing or attempting to commit that other known offence.

[84] Layered on top of this is the premise, inherent in the law, that there is attire that is wholly and exclusively male or female. This is not borne out by everyday

practice. Indeed, many clothing establishments advertise and sell unisex clothing. Section 153(1)(xlvii), is therefore, predicated on the faulty notion that outward attire is necessarily exclusively male or female. The fact that no one can say with certainty what an 'improper purpose' is or what male or female attire looks like, leaves transgendered persons in particular in great uncertainty as to what is and is not allowed. And to aggravate that injustice, it gives law enforcement officials almost unlimited discretion in their application of the law.

[85] The rule of law requires that legislation which is hopelessly vague must be struck down as unconstitutional. 55 For all these reasons we hold that section 153(1)(xlvii) is unconstitutionally vague and, as it stands, fulfils no legitimate purpose.

75. Unlike Quincy, it is not that the Court cannot find conduct which falls within the meaning of "camouflage pattern materials" when the ordinary meaning is quite clear. It is not indiscernible and the Claimant has sufficient advance notice of such conduct.

76. The Court considered **R v Nova Scotia (1992) 2 SCR 606** where the Supreme Court of Canada stated:

"The "doctrine of vagueness" is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion. Fair notice to the citizen comprises a formal aspect -- an acquaintance with the actual text of a statute -- and a substantive aspect -- an understanding that certain conduct is the subject of legal restrictions. The crux of the concern for limitation of enforcement discretion is that a law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute. The threshold for finding a law vague is relatively high. The factors to be considered include (a) the need for flexibility and the interpretative role of the courts; (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more

appropriate, and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist".

"The doctrine of vagueness can be summed up in one proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate -- that is, for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. The term "legal debate" is not used to express a new standard or one departing from that previously outlined by this Court. It is rather intended to reflect and encompass the same standard and criteria of fair notice and limitation of enforcement discretion viewed in the fuller context of an analysis of the quality and limits of human knowledge and understanding in the operation of the law".

77. **R v Misra and Srivastava [2004] EWCA Crim 2375,** also referred to in the recent case of **Attorney General v Vijay Maharaj & Central Broadcasting Services Ltd Civ App No. PO23 of 2020** the Court of Appeal (Criminal Division) opined as follows:

[33] Recent judicial observations are to the same effect. Lord Diplock commented:

> **"The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it. (Black-Clawson International Limited v Papierwerke Waldhof-Aschaffenberg AG [1975] AC 591 at p. 638)."**

In Fothergill v Monarch Airlines Ltd [1981] AC 251 at 279 he repeated the same point:

> **"Elementary justice or, to use the concept often cited by the European court**, **the need for legal certainty, demands that the rules by which the citizen is to be bound should be ascertainable by him (or more realistically by a**

competent lawyer advising him) by reference to identifiable sources that are publicly accessible."

[34] No further citation is required. In summary, it is not to be supposed that prior to the implementation of the Human Rights Act 1998, either this Court, or the House of Lords, would have been indifferent to or unaware of the need for the criminal law in particular to be predictable and certain. Vague laws which purport to create criminal liability are undesirable, and in extreme cases, where it occurs, their very vagueness may make it impossible to identify the conduct which is prohibited by a criminal sanction. If the court is forced to guess at the ingredients of a purported crime any conviction for it would be unsafe. That said, however, the requirement is for sufficient rather than absolute certainty.

[35] The ambit of the principle, as well as its limitations, were clearly described in the Sunday Times v United Kingdom [1979] 2 EHRR 245. The law must be formulated:

> **"... with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee to a degree that is reasonable in the circumstances, the consequences which any given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unobtainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice."**

Moreover, there is a distinction to be drawn between undesirable, and in extreme cases, unacceptable uncertainty about the necessary ingredients of a criminal offence, and uncertainty in the process by which it is decided whether the required

ingredients of the offence have been established in an individual case. The point was highlighted in Wingrove v United Kingdom [1996] 24 EHRR 1:

> **"It was a feature common to most laws and legal systems that tribunals may reach different conclusions, even when applying the same laws to the same facts. This did not necessarily make the laws inaccessible or unforeseeable."**

[36] We can see the practical application of these comments in Handyside v United Kingdom [1974] 17 YB 228, where the Commission considered the definition of obscenity in the Obscene Publications Acts, 1959-1964. This offence is concerned with items which have a tendency to deprave and corrupt, a very general definition, certainly capable on forensic analysis of being criticised on the basis of uncertainty. The Commission nevertheless concluded that the offence was adequately described. In Wingrove itself, the court rejected the argument that blasphemous libel - that is, libel defined in very broad terms as "likely to shock and outrage the feelings of the general body of Christian believers" - was insufficiently accessible or certain.

78. In the case of **Sabapathee v The State (Mauritus)** Lord Hope said:

"**As the Board held in Ahnee v Director of Public Prosecutions [1999] 1 WLR 1305 there is to be implied in s.10(4) the requirement that in criminal matters any law must be formulated with sufficient precision to enable the citizen to regulate his conduct. So the principle of legality applies, and legislation which is hopelessly vague must be struck down as unconstitutional. But the precision which is needed to avoid that result will necessarily vary according to the subject matter. The fact that a law is expressed in broad terms does not mean that it must be held to have failed to reach the required standard. In an ideal world it ought to be possible to define a crime in terms which identified the precise dividing line between conduct which was, and that which was not, criminal. But some conduct which the law may quite properly wish to prescribe as criminal may best be described by reference to the nature of the activity rather than to particular methods of committing it. It may**

be impossible to predict all these methods with absolute certainty, or there may be good grounds for thinking that attempts to do so would lead to undesirable rigidity. In such situations a description of the nature of the activity which is to be penalised will provide sufficient notice to the individual that any conduct falling within that description is to be regarded as criminal. The application of that description to the various situations as they arise will then be a matter for the courts to decide in the light of experience. In this way the law as explained by its operation in practice through case law will offer the citizen the guidance which he requires to avoid engaging in conduct which is likely to be held to be criminal. (Emphasis added)

79. Counsel for the Claimant submits that the Legal Notice is unclear and uncertain. As such, a citizen is unable to determine what conduct, type of material and/or coloured pattern could cause him to be sanctioned as any item which has a patterned colour scheme and is placed against a similar backdrop could be construed as "camouflage pattern material".

80. "Camouflage pattern materials" is sufficient to describe the nature of what is prohibited in the Legal Notice within the meaning of **Sabapathee (supra).** Camouflage material carries a specific meaning in the dictionary and in looking at whether a person is in breach of the Legal Notice, a Court can have recourse to that to determine whether the material is in breach of the Legal Notice. The Claimant made reference to a Notice in the Customs Website in which several items were said to be contrary to the Legal Notice. It is to be observed that this is not a determinative document as it is merely how the Customs Department interprets the Legal Notice and this Court makes no comment on whether such interpretation is correct or not. At the end of the day, it is for the relevant Court considering all the relevant material to determine whether an item offends the Legal Notice.

81. The Court also took note of **Halsbury Laws of England Rights and Freedoms vol. 88A 2018,** referred to by Counsel for the Defendant where a list of offences were provided which have been held to be sufficient despite the breadth of the language employed. This includes:

obscenity; perverting the course of justice; materially contributing to the extent of insolvency by gambling; gross negligence manslaughter; public nuisance; possessing a document or record containing information likely to be useful to a person committing or preparing an act of terrorism; collecting or making a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism and selling and distributing terrorist publications; encouraging or assisting offences believing that one or more would be committed; murder through participation in the show trial of the political opponents of a totalitarian regime, resulting in the conviction and execution of those opponents; conduct prejudicial to military discipline and the export of waste contrary to regulations.

82. Counsel for the Claimant submits that the Custom Division notice is the best evidence of the vague nature of the law because of the wide criminal spectrum of potentially prohibited items of clothing as it includes, "Vagueness" and "overbreadth" are concepts which can be either intertwined and interrelated in some cases or capable of distinction which will now be discussed. It is actually this evidence which the Claimant seeks to rely on coupled with the ordinary meaning that gives the Legal Notice the feature of legal certainty that the Claimant disputes.

83. In coming to this conclusion the Court considered the case of **R v Heywood 1994 3SCR 761** where the Court stated**, "Overbreadth and vagueness are different concepts, but are sometimes related in particular cases. As the Ontario Court of Appeal observed in R. v. Zundel (1987), 58 O.R. (2d) 129, at pp. 157- 58, cited with approval by Gonthier J. in R. v. Nova Scotia Pharmaceutical Society, supra, the meaning of a law may be unambiguous and thus the law will not be vague; however, it may still be overly broad. Where a law is vague, it may also be overly broad, to the extent that the ambit of its application is difficult to define. Overbreadth and vagueness are related in that both are the result of a lack of sufficient precision by a legislature in the means used to accomplish an objective.**

In the case of vagueness, the means are not clearly defined. In the case of overbreadth the means are too sweeping in relation to the objective…"

84. Counsel for the Claimant also submits that the vagueness and overbreadth argument are exacerbated by the fact that there is an absence of parliamentary scrutiny or authority and that the vague words are symptomatic of a lack of parliamentary scrutiny wherein members of parliament could have deliberated and fashioned a proper prohibition to capture the concerns of the executive. The Court cannot make assumptions about what the proclamation would have been had scrutiny taken place. As stated above, Parliament did authorize the power granted to the President under Section 44 which remains unchallenged. At the end of the day, given that Parliament had the power to delegate in the way that it did, there can be no constitutional complaint on the lack of Parliamentary scrutiny.

85. Counsel for the Claimant submits that it is conjecture for the Defendant to suggest that it is well known among the citizenry the type of pattern that is labelled as camouflage. The Court finds that it is reasonable to assume that members of the public will be familiar with the attire worn by the members of the Defence Force. However, as discussed the Claimant had fair notice of what is prohibited based on the ordinary meaning of the words in the Legal Notice. The Court agrees with the Defendant's submission that the Legal Notice is not ambiguous. It is not impossible for one to identify exactly what conduct is prohibited. According to **Oxford English Dictionary 7th Edition** "camouflage" means, "*A disguise of guns, ships etc. effected by obscuring with splashes of various colours, smoke-screens, foliage, etc,; means of disguise or evasion, 2. Hide by camouflage*". With the appropriate legal advice, a consideration which must be made when determining the scope of a law, a person can be properly advised as to what constitutes camouflage pattern material and a Court can determine what constitutes camouflage material within the meaning of the Legal Notice.

WHETHER THE LEGAL NOTICE IS OVERBROAD/PRINCIPLE OF OVERBREADTH IS APPLICABLE

Whether the law is overbroad

86. The case of **R v Heywood** stated, "i**n determining whether a provision is overly broad and not in accordance with the principles of fundamental justice, it must be determined whether the means chosen to accomplish the provision's objectives are reasonably tailored to effect its purpose**".

87. The Claimant submits that the Legal Notice is unconstitutionally overbroad as it criminalizes conduct which has no relation to the intent of the legislation and relies on **R v Khawaja 2012 SCC, R v Appulonappa 2015 SCC 59, R v Heywood (1994) 3 SCR 761**. A law such as this is inherently arbitrary which is the antithesis of the Rule of Law. It is when the challenged law or the means selected by the legislator have gone too far/is broader/too sweeping than necessary to achieve the state objective: At paragraph 35 in **R v Heywood** it also stated, "**Criminal laws that restrict liberty more than is necessary to accomplish that goal violate the fundamental principles of justice**". The Claimant also refers to **Carter v Canada (2015) SCC 5** which stated, "**a law that is drawn broadly to target conduct that bears no relation to its purpose "in order to make enforcement more practical" may therefore be overbroad (see Bedford at paragraph 113)".**

88. Counsel for the Defendant submits that the concepts of overbreadth properly arise only in relation to parts of the Constitution which are capable of being abrogated, Sections 4 and 5. It is sometimes relied upon as part of the reasonably justifiable analysis employed by Section 13 of the Constitution.

89. In **Carter v Canada** Sections 241 and 14 of the Criminal Code which makes physician assisted death an offence were held to be unconstitutional as it infringed Section 7 of the Constitution Act which provides for the right to life, liberty and security of the person. Section 241 makes it an offence to counsel, aid or abet a person to die and Section 14 stated that no person can consent to have death inflicted on them. The object of the law is to

protect vulnerable persons from abusing the system to commit suicide at a moment of weakness. However, the prohibition was too broad as it also covers those from using assisted suicide who seek death as a response to grievous and irremediable disabilities. In order to justify this infringement under Section 1 of the Charter it must be shown that the law has a pressing and substantial object and that the means chosen are proportional to that object.

90. The Court held that the Government must show that the absolute prohibition of physician assisted dying is rationally connected to the goal of protecting the vulnerable. It is clearly rational that a law that bars all persons from accessing assistance to suicide will achieve this objective. The means are logically connected with the objective. However, one has to ask whether the limit on the right is reasonably tailored to the objective, in other words, whether there are less harmful means of achieving the legislative goal. The Court agreed with the trial judge that a properly administered regulatory regime with sufficient safeguards is capable of protecting the vulnerable from abuse or error. A blanket prohibition was not necessary to substantially meet the Government's objective.

91. In **R v Heywood** the Respondent challenged Section 179 (1) of the Criminal Code for unconstitutionality as it made it an offence for persons convicted of specified offence to be found loitering in or near a school ground, playground, public park or bathing area which infringes his right to life, liberty and security of the person, to be presumed innocent until proven guilty, not to be tried and or punish for an offence again, not to be subjected to any cruel and unusual treatment or punishment and right to equal protection without discrimination. Having been convicted of two counts of sexual assault, he was subject to this prohibition.

92. First the Court determined that the word "loiter" was to be given its ordinary meaning, namely to stand idly around, hang around, linger, tarry, saunter, delay, dawdle etc. there was no question that Section 179 (1) (b) restricts the liberty of those to whom it applies. The next issue was one of overbreadth in addressing whether the restriction was in

accordance with the principles of fundamental justice. Again, this entailed examining whether the means chosen by the state were necessary to achieve the state objective. The purpose of the law was to protect children from becoming victims of sexual offences as the places identified in the section are where children are likely to be found.

93. The law was found to suffer from overbreadth on the basis of geographical ambit as public parks, which can include vast and remote wilderness parks and bathing areas, which include lakes with public beaches, as not all such places are where children are likely to be found. It was also, overly broad as the section applies for life without a possibility of review. As such, one who has ceased to be a danger to children or even never was is subject to the prohibition which constitutes cruel and unusual punishment and violates the principles of natural justice. Finally, the section applied to all persons convicted of the listed offences without regard to whether they constitute a danger to children which can lead to the effect of it being applying to a man convicted at age 18 of sexual assault on an adult woman who was known to him in a situation aggravated by alcohol. Even if he never committed another offence and was not considered a danger to children at age 65 he would still be banned from attending the aforementioned places.

94. As the violation of the right has been established the Court went on to consider whether the section may be saved by Provision 1 of the Charter which guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. It was held, "**The objective of s. 179(1)(*b*) is certainly pressing and substantial. The protection of children from sexual offences is obviously very important to society. Furthermore, at least in some of their applications, the means employed in s. 179(1)(*b*) are rationally connected to the objective. However, for the same reasons that s. 179(1)(*b*) is overly broad, it fails the minimal impairment branch of the s. 1 analysis**".

95. In **Canada (Attorney General) v Bedford** the applicants challenged three provisions of the Criminal Code for being unconstitutional which criminalize various activities related to prostitution. They were primarily concerned with preventing public nuisance, as well as the exploitation of prostitutes. Section 210 made it an offence to be an inmate of a bawdy-house, to be found in a bawdy-house without lawful excuse or to be an owner, landlord, lessor, tenant or occupier of a place who knowingly permits it to be used as a bawdy-house. Section 212(1) (j) made it an offence to live on the avails of another's prostitution. Section 213(1) (c) made it an offence to either stop or attempt to stop or communicate or attempt to communicate with, someone in a public place for the purpose of engaging in prostitution or hiring a prostitute. The applicants alleged that all three provisions infringe Section 7 of the Canadian Charter of Rights and Freedoms by preventing prostitutes from implementing certain safety measures — such as hiring security guards or "screening" potential clients — that could protect them from violent clients. The applicants also alleged that Section 213(1) (c) infringes Section 2 (b) of the Charter and that none of the provisions are saved under Section 1.

96. With respect to the infringement of rights in Section 7 of the Charter the Court stated the prohibitions at issue do not merely impose conditions on how prostitutes operate. They go a critical step further by imposing dangerous conditions on prostitution; they prevent people engaged in a risky — but legal — activity from taking steps to protect themselves from the risks. The Judge agreed with the application Judge in that the bawdy-house prohibition materially increased the risk prostitute's face under the present regime which involves only street prostitution and "out-calls". It negatively impacted the security of the person. Hiring drivers, receptionists and bodyguards, could increase prostitutes' safety but Section 212, prevents them from doing so which affects rights under Section 7.

97. The Judge also agreed with the application Judge in that by prohibiting communication in public for the purpose of prostitution, the law prevented prostitutes from screening clients

and setting terms for the use of condoms or safe houses which significantly increased risks. This also engaged Section 7 of the Charter.

98. The objectives of the bawdy-house provision are to combat neighbourhood disruption or disorder and to safeguard public health and safety but the negative impact of the bawdy-house prohibition on the applicants' security of the person is grossly disproportionate to its objective. It was unnecessary to decide whether the prohibition is overbroad insofar as it applies to a single prostitute operating out of her own home as gross disproportionality, which applied in extreme cases, asks a different question from arbitrariness and overbreadth. The same was said about the communication provision as it is an "essential tool" to avoiding violent or drunken clients. The Court agreed with the application Judge who concluded that the harm imposed by the prohibition on communicating in public was grossly disproportionate to the provision's object of removing the nuisance of prostitution from the streets.

99. The objective of Section 212 is to target pimps and the parasitic, exploitative conduct in which they engage. The Court agreed with the Courts below that the provision is overbroad as it captured a number of non-exploitative relationships which are not connected to the law's purpose. It did not make a distinction between those who exploit and those who could increase the safety and security of prostitutes such as legitimate drivers, managers, bodyguards, accountants or receptionists. In those ways, the law included some conduct that bore no relation to its purpose of preventing the exploitation of prostitutes which makes it overbroad. Alas, it was not necessary to consider a Section 1 analysis as the Attorney General has not seriously argued that the laws, if found to infringe Section 7, can be justified under Section 1 of the Charter.

100. In Canada, Section 1 of the Charter is engaged after a finding that a right or freedom has been infringed. Section 1 of the Canadian Charter of Rights and Freedoms provides, "**The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in**

it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". In analyzing the impugned law under this section the Oakes test is applied. This is seen in the case of **Egan v Canada (1995) 2 SCR 513**, where Lacobucci J stated, "**Section 1 allows *Charter* violations to be upheld if these violations are reasonably justifiable in a free and democratic society. The test to establish whether a statutory provision constitutes a "reasonable limit" was first advanced by former Chief Justice Dickson in *R. v. Oakes*, *supra*, at pp. 138-39. A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right**". Also in **Carter v Canada** at paragraph 94 the Court stated, " **In order to justify the infringement of the Appellants' Section 7 rights under Section 1 of the *Charter*, Canada must show that the law has a pressing and substantial object and that the means chosen are proportional to that object. A law is proportionate if (1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law: *R. v. Oakes*, [1986] 1 S.C.R. 103**".

101. In order to deal with the issue of overbreadth one must first identify the substantial objective which can be gleaned from the affidavit evidence of the Defendant. In particular, Mr. Dexter Laurence Francis and Mr. Gary Joseph referred to criminal elements being found dressed in military uniforms and criminal offences being carried out in relation to

camouflage. Reference was also made to the attempted coup D'état on the 27th day of July, 1990 and that the importation of such still gives rise to national security issues[1].

102. Counsel for the Defendant also submits that the need for this ban was set out in the said Cabinet Minute and Note of 1983 which reflects that a consideration in recommending the proclamation of Legal Notice No. 33 was "the problems affecting general security which will arise should military uniforms made the materials indicated above be used by persons who may be intent on making mischief in the country."

103. Further, the Court takes account of the submission by Counsel for the Defendant that the country has not passed unscathed from the militarized uprising in the 1990 attempted coup where quasi military group training in military garb sought to overthrow the Government. He went on to state that it is well known that military equipment and uniforms were imported and used to train the members of the Jamaat in that criminal enterprise. Further, it is for this reason that a considerable body of law has arisen in relation to the need for deference in matters of national security.

104. The objective of Legal Notice is not one which the Courts will second guess as Counsel for the Defendant submits that such matters relating to national security are often restricted, in the interests of the safety, to the executive and in particular the security services are specially attuned in a way that the Courts cannot be. Counsel relies on **Secretary of State for the Home Department v Rehman [2003] 1 AC 153 and Dpp ex p Kebeline (2002) 2 AC 366, 381** where Lord Hope stated:

> "**In this area difficult choices may need to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to**

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[1] It is to be noted that the 1990 Coup postdates the Legal Notice, but the principle to be drawn, that is that persons can use camouflage material to impersonate Defence Force personnel is still relevant

be in compatible with the Convention ... It will be easier for such an area of judgment to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection.

105. Cory J held in **R v Heywood, "for the same reasons that the law is overly broad, it fails the minimum impairment branch of Section 1 analysis**". Overbreadth was an aspect of the minimum impairment branch under the Oakes test. In applying that standard the Court has to ask whether the law has gone too far. As stated in **Canada (Attorney General) v Bedford**, "**overbreadth allows courts to recognize that the law is rational in some cases but that it overreaches in its effect in othe**r". As was held in **R v Heywood,** not all places identified in the impugned legislation are where children frequent.

106. However, as the Customs Notice which depicts an array of colours not worn by the Trinidad and Tobago Defence Force, including pink flip flops, blue shorts, green high heels and reddish wallets is not determinative of the law, the Court does not agree with the Claimant that the law prohibits all camouflage pattern material with no official military associations which can expose a potentially large class of citizens to prosecution by having in their possession items that are far beyond the scope intended by the state. It achieves this purpose solely by way of the legal notice owing to the precise definition of "camouflage pattern materials". While the law is wide, it is not impermissibly so and therefore, is not overbroad.

WHETHER THE PRINCIPLE OF "OVERBREADTH" IS APPLICABLE IN THE INSTANT CASE

107. In **R v Heywood**, **Carter v Canada** and **Canada (Attorney General) v Bedford**, the Court considered whether the law that infringed the rights under Section 7, that being, the right to life, right liberty and right to security of the person and the right not to be deprived

thereof except in accordance with the principles of fundamental justice was overbroad in nature. Thereafter, the Court had to consider whether the rights and freedoms are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society under Section 1 of the Charter. This is the equivalent of an analysis that would be conducted in Section 13 of the Constitution.

108. The principles of fundamental justice concept is unique to Section 7 of the Canadian Charter. They include the principles against arbitrariness, overbreadth and gross disproportionality. The authority for this can be found in the case of **Canada (Attorney General) v Bedford** where the Court stated at paragraph 96, "**The *Motor Vehicle Reference* recognized that the principles of fundamental justice are about the basic values underpinning our constitutional order. The Section 7 analysis is concerned with capturing inherently bad laws: that is, laws that take away life, liberty, or security of the person in a way that runs afoul of our basic values. The principles of fundamental justice are an attempt to capture those values. Over the years, the jurisprudence has given shape to the content of these basic values. In this case, we are concerned with the basic values against arbitrariness, overbreadth, and gross disproportionality**". Also, in **R v Heywood** at page 764 the Court stated, "**An enactment, before it can be found to be so broad...must clearly infringe life liberty or security of the person in a manner that is unnecessarily broad**...".

109. At paragraph 125 in **Canada (Attorney General) v Bedford** the Court shed some light on the relationship between Sections 7 and 1 of the Charter, "**Section 7 and Section 1 ask different questions. The question under Section 7 is whether the law's negative effect on life, liberty, or security of the person is in accordance with the principles of fundamental justice. With respect to the principles of arbitrariness, overbreadth, and gross disproportionality, the specific questions are whether the law's purpose, taken at face value, is connected to its effects and whether the negative effect is grossly disproportionate to the law's purpose. Under Section 1, the question is different —**

whether the negative impact of a law on the rights of individuals is proportionate to the pressing and substantial goal of the law in furthering the public interest. The question of justification on the basis of an overarching public goal is at the heart of Section 1, but it plays no part in the Section 7 analysis, which is concerned with the narrower question of whether the impugned law infringes individual rights".

110. The Court took note of paragraphs 129-132 in **Jason Jones v The Attorney General CV2017-000720,**

> **129. Dickson CJ, at paragraph 62, set out the provisions of Section 1 of the Canadian Charter of Rights and freedoms which provides:**
>
> > **"1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." [Emphasis added]**
>
> **130. For ease of reference, Section 13 (1) of the 1976 Republican Constitution is once again reproduced for comparison: "13. (1) An Act to which this section applies may expressly declare that it shall have effect even though inconsistent with Sections 4 and 5 and, if any such Act does so declare, it shall have effect accordingly unless the Act is shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual." [Emphasis added]**
>
> **131. Bereaux JA in Francis accepted that the section 13 (1) reference to "a society that has a proper respect for the rights and freedoms of the individual" referred to "a free and democratic society".**
>
> **132. Accordingly, the test seems to be substantially the same between Section 1 of the Charter and Section 13 of the Constitution with the only apparent difference being a limit which is reasonable and can be demonstrably justified, in the case of**

the former, as opposed to one which is reasonably justified, in the case of the latter. To my mind, there is no material difference."

111. The Court has made the following observations:

a. The Claimant seeks declaratory relief in that by subjecting him to stand trial to answer to the charges of possession of camouflage pursuant to the Legal Notice and/or Section 213 (c) of the Customs Act it will be in contravention of his rights particularly under Section 4 (a) and 5 (2) (e) of the Constitution.

b. The "principles of fundamental justice" was only referred to in Section 5 (2) (e) of the Constitution which provides,

> "5. (2) Without prejudice to subsection (1), buts subject to this Chapter and to Section 54, Parliament may not—
>
> > (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;"

c. This language is not contained in Section 4 (a) of the Constitution which provides:

> "It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely: (a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law".

d. Section 13 of the Constitution is wholly inapplicable in the present case. The analysis of the infringed law in the Canadian cases made under Section 1 of the Charter, having regard to its substantial similarity to Section 13 of the Constitution, cannot be made in the instant case. As established above, both the savings clause provision and the issue of subsidiary legislation being vires the principal legislation are central to the instant case.

112. Counsel for the Claimant also submits that the Court cannot use its powers of interpretation to restrict the Legal Notice to only apply to military uniforms as it would constitute a strained interpretation plainly different to the wording of the legal notice. Reference was made to the case of **R v Appulonappa** where the Appellants challenged Section 117 of the Immigration and Refugee Protection Act SC 2007 c 27 which criminalizes organizing, inducing, aiding and abetting people coming into Canada on the ground that it infringes the right to life, liberty and security of the person. It was held to be unconstitutional insofar as it permits prosecution for those who provide humanitarian aid to undocumented entrants, mutual assistance amongst asylum seekers or assistance to family members.

113. The Act provided for two processes dealing with entry- the immigration process and the refugee protection process. The concern for the latter is the threat of entry of unauthorized persons outside of the lawful refugee system. Hence, the reason for the provision which sanctions those helping others to enter the country without the required documents by border authorities. The Court agreed with the purpose of Section 117 as advanced by the Appellants, that being, to combat human smuggling as opposed to criminalizing family or humanitarian assistance, makes the law overbroad.

114. At paragraph 72, the Court stated, **"The scope of s. 117(1) is plain. The provision admits of no ambiguity. Parliament itself understood when it enacted Section 117 that the provision's reach exceeded its purpose by catching those who provide humanitarian, mutual and family assistance to asylum-seekers coming to Canada, but argued that this overbreadth was not a problem because the Attorney General would not permit the prosecution of such people. We cannot avoid the overbreadth problem by interpreting Section 117(1) as not permitting prosecution of persons providing humanitarian, mutual or family assistance. Such an interpretation would require the Court to ignore the ordinary meaning of the words of Section 117(1), which unambiguously make it an offence to "organize, induce, aid or abet" the undocumented entry. To adopt this suggestion would violate the rule of statutory interpretation that the meaning of the**

words of the provision should be read in their "grammatical and ordinary sense": Sullivan, at p. 28."

115. Counsel for the Defendant submits that it is clear that a neutral term such as 'loiter' in the case of **R v Heywood** which possesses a wide range of meanings may not properly inform persons as to what conduct is prohibited. He referred to the dissenting judgment which stated that its statutory meaning could be discerned from the legislation as a whole and that the section should be read down to remove any possible overbreadth. He goes on to state that in the present case there is no possible confusion or ambiguity identified by Counsel for the Claimant to justify overbreadth.

116. As discussed above, there is no ambiguity or lack of precision having regard to the ordinary meaning of "camouflage pattern materials". Further, the Court takes judicial notice of the fact that in normal usage, camouflage takes on a certain meaning, that is to say with reference to military wear. These are things which a Court dealing with a prosecution under Section 213 and the Legal Notice would have to take into consideration in determining whether an item offends the Legal Notice.

117. Counsel for the Claimant submits that the Summary Offences Act and the Defence Force Act creates sufficient offences for the prohibition of wearing military style uniforms. For that same reason the Defendant relies to show consistency alluding to its validity:

Section 98 of the Summary Offences Act provides:

"**98. (1) A person not serving in the Trinidad and Tobago Defence Force shall not wear, without the Minister's permission, the uniform of any member of that Force, or any dress having the appearance or bearing any of the regimental or other distinctive marks of any such uniform: This enactment shall not prevent any person from wearing any uniform or dress in the course of a stage play performed in a place duly licensed or authorised for the public**

performance of stage plays, or in the course of any bona fide military representation.

(2) Any person who contravenes this section is liable to a fine of two hundred dollars.

(3) Any person not serving in the Trinidad and Tobago Defence Force who wears, without the Minister's permission, the uniform of any member of those Forces, or any dress having the appearance or bearing any of the regimental or other distinctive marks of any such uniform, in such a manner or under such circumstances as to be likely to bring contempt upon that uniform, or employs any other person so to wear that uniform or dress, he shall be liable to a fine of four hundred dollars.

<u>**Section 219 of the Defence Force Act**</u> provides:

"**219. A person, other than a member of the Defence Force, who without lawful excuse (the proof whereof shall lie on him)—**

(a) wears the uniform or any portion of the uniforms of a member of the Defence Force; or

(b) wears any costume or any article of clothing or apparel so closely resembling the uniform or any portion thereof of a member of the Defence Force, as may cause such person to be mistaken for a member of the Defence Force, is liable on summary conviction to a fine of one thousand dollars and to imprisonment for eighteen months".

118. The Claimant submits that the provisions of the Defence Act and Summary Offences Act are drafted with some level of care and attention and satisfy any real concerns the Defendant harbour. However, the aforementioned pieces of legislation relate to the wearing of uniforms of members of the Defence Force as opposed to importation of camouflage pattern materials. Notwithstanding the fact that the law is wide, in order to achieve the objective of such a prohibition, there also needs to be control with respect to

how camouflage pattern materials enter the country which will work in harmony with the above-mentioned pieces of legislation.

WHETHER SECTION 1 OF THE CONSTITUTION IS APPLICABLE

119. Counsel for the Claimant contends that Section 1 of the Constitution was infringed. The declaration of being a sovereign democratic state is of utmost importance and binding in nature in written constitutions both interpretatively and substantively as recognized in the cases of **State of Mauritius v Khoyratty (2007) 1 AC 80** and **Belize International Services Ltd v The Attorney General of Belize (2020) CCJ 9.** This is the context within which Section 53 must be interpreted as that provision is infused with preambular intent and declaration. Congruent with Section 1 is the preamble of the Constitution which declares:

> "**Whereas the People of Trinidad and Tobago-**
>
> > **(c) have asserted their belief in a democratic society in which all persons may, to the extent of their capacity, play some part in the institutions of the national life and thus develop and maintain due respect for lawfully constituted authority".**

120. Counsel for the Claimant also submits the executive has created an offence and severe penalties without accountability, scrutiny and approval by Parliament which is inconsistent with Section 1 of the Constitution. It was already established that the Legal Notice did not create the offence as is contained in Section 213 of the Customs Act.

121. Counsel for the Defendant submits that resort to Section 1 is reserved for exceptional and foundational breaches of constitutional norms which, if left unchallenged, will impugn the status of the republic as a sovereign democratic state: **State v Khoyratty (2006) 4 LRC 403**.

122. In **Khoyratty** by virtue of Section 5 (3A) of the Constitution, as inserted by Section 2 of the Constitution of Mauritius (Amendment) Act 1994 and Section 32 of the Dangerous Drugs Act 2000, the Court had no power to grant bail pending trial in such a case. By Section 5

(3A), one could not be granted bail pending trial where the offence was one of a number related to terrorism or drugs, including those specified in the Dangerous Drugs Act and the suspect had already been charged with or convicted of a similar offence. On a constitutional reference by the district magistrate, the Supreme Court held that Section 5 (3A) represented an interference by the legislature into functions which were intrinsically within the domain of the Judiciary. It therefore, infringed the provision in Section 1 of the Constitution that "Mauritius shall be a democratic state."

123. Lord Mance at paragraph 36 stated, "**To remove the court's role – and in the process to prescribe automatic detention in custody pending trial whenever prosecuting authorities have reasonable grounds to arrest for a prescribed drug offence – is not merely to amend section 5, it would be to introduce an entirely different scheme. The new scheme would contradict the basic democratic principles of the rule of law and the separation of judicial and executive powers which serve as a primary protection of individual liberty and are entrenched by the combination of sections 1 and 47(3)**".

124. In the recent case of **Attorney General v Maharaj & CBSL Civ App PO23 of 2020** the Court of Appeal agreed with Mr. Hosein's, Counsel for the Appellant, interpretation of the case of **Khoyratty.** Mr. Hosein's submissions were summarised at paragraph 128 (b) to (d):

> **(b) Counsel distinguished the decision in The State v Khoyratty from the case at bar. The distinction lay in the fact that the similar declaration in the Mauritius Constitution that Mauritius was a democratic state was not merely preambular in nature. It was "an operative binding provision". It is an entrenched provision by virtue of the mechanism for amendment contained in Section 47(3) of that Constitution which militated against the abolition of a right to bail by ordinary legislation. This gave the State the responsibility to consolidate and protect the democratic foundation of society.**
>
> **(c) Our section 1 is not entrenched, as any amendment is subject to a simple majority. In Khoyratty, the legislation under review sought to circumscribe the Judiciary's oversight on the granting of bail. It was argued that the impugned**

section violated the doctrine of the Separation of Powers, which was enshrined by the declaration contained in Section 1 of that Constitution.

(d) If an act is deficient at all or whether it is uncertain, it cannot fall to be resolved by alleging that there has been a breach of Section 1 of the Constitution. Section 1 does not import the rights contained in Sections 4 and 5 of the Constitution.

125. At paragraphs 107, 139-140 & 151 the Court went on to state:

> **[107]. In the decision of the CCJ in Belize International Services v The Attorney General of Belize, 118 Jamadar JCCJ, in examining the 'deep structure' doctrine which originated in India, 119 said at paragraphs 304 and 329:**
>
> [304] ...clues as to what is constitutive of the basic and fundamental features, principles, and values of Belizean constitutionalism, are not limited to the literal content of the Constitution as text per se. Some are predictably unwritten, to be discerned from overall structure, context, and content, albeit of the Constitution itself, as well as from broader historical, cultural, and socio-legal contexts. **Constitutional common law, as developed by independent Caribbean Judiciaries (as the third arm of Government) and elsewhere, has also discovered and revealed structural and substantive features and values that constitute this basic 'deep' structure. Three are now uncontroversial – the separation of powers, the rule of law (as including both due process and protection of the law) and, the independence of the judiciary (with the associated power of judicial review in relation to both constitutional and administrative actions).**
>
> [329] **Robinson, Bulkan and Saunders**, in what is essentially a commentary on the Belizean jurisprudence, warn however, that: 'What the Belizean cases fail to do is offer clear guidance and restraints on when this exceptional power of judicial review will be exercised; in other words, what is the threshold for the doctrine?' **(In the context of striking down constitutional amendments that satisfy procedural requirements but run afoul of the basic structure.) In this specific context, they**

seem to suggest that the basic 'deep' structure doctrine should only be invoked if a constitutional amendment 'amounts to a substantial threat' to these basic 'deep' structure constitutional values and principles. While that may be true in such instances, this is not a case of constitutional amendments. However, their caveat is important; the use of the basic 'deep' structure to review governmental action ought not to be lightly invoked, and is most justifiable when what is at stake is a serious threat to, or undermining of, fundamental and core constitutional values and principles. (Emphasis added)

139. Section 1 does not create fundamental rights. We agree with Mr. Hosein that the section does not create rights in addition to the fundamental human rights that can be enforced under Sections 4 and 5. It is a statement, by which the State embraces through its declaration of sovereignty, democracy and statehood, the existence, entrenchment and protection of those rights for its people. The fundamental statement of our nationhood is not meant to give life to litigation alleging breaches of Sections 4 and 5.

140. Should it be argued that an Act or provisions of an Act violate the fundamental rights and freedoms, its challenge must face the question, 'is it law that is saved by Section 6?' That question cannot be evaded by resorting to any suggestion that it violates the very foundation of our Republic as stated in Section 1. Section 1 is not a fall back section to be used if challenges under Sections 4 and 5 are blocked by Section 6.

151. Having come to those conclusions, we do not agree with either the trial judge or Mr. Maharaj on the treatment of Section 1 or Section 2 of the Constitution as paths to impugn an Act or Sections of an Act, which they complain of being in violation of Sections 4 and 5 in that there is a fetter on freedom of speech. Sections 1 and 2 cannot be used in this way. If there is a clear violation of Sections 4 and 5 then the attack must be brought there. There is no need to pray in aid any other

section to achieve the ends of that mission. If that mission must fail because of Section 6, then any challenge must fail. Based on our findings in this case, this court cannot depart from the JCPC's clear exposition of the law in Matthew and no amount of legal gymnastics will allow us to travel along that other road.

126. The circumstances in the instant case do not mirror those identified in the case of **<u>Khoyratty.</u>** A law which did not fail for want of legal certainty and one which is seemingly overbroad (regardless of the application of the "overbreadth" principle) does not offend the sovereignty and democracy of a state. This is further exacerbated by the fact that Section 1 does not create any fundamental rights and is not entrenched like the Constitution in the State of Mauritius.

127. Again, after the submissions of the parties with respect to the Court of Appeal decisions in **Dominic Suraj** and **Vijay Maharaj**, the Privy Council issued the Judgment in **Sasha Seepersad and Anor v The Attorney-General of Trinidad and Tobago and Anor [2021] UKPC 13.** Counsel for the Claimant urged the Court to consider paragraphs 24 and 26 of the judgment in determining this matter. Those paragraphs state as follows:

> **"24. The exercise of construing both section 4(a) and section 4(b) will also be informed by the immediate context of these provisions. They are contained in Chapter 1, the subject matter whereof is "The Recognition and Protection of Fundamental Human Rights and Freedoms". Furthermore the Preamble, which overarches the entire instrument, must also be considered. In the context of these appeals the phrases which resonate in the Preamble are "faith in fundamental human rights and freedoms ... the dignity of the human person ... belief in a democratic society ... (and) respect for ... the rule of law". The overarching purpose of the Constitution is to -**
>
> > **"enshrine the above-mentioned principles and beliefs and make provision for ensuring the protection in Trinidad and Tobago of fundamental human rights and freedoms."**

In this way the Constitution proclaims and establishes a constitutional democracy.

26. Taking into account the guidance to be distilled from the decided cases considered above and later in this judgment, the assessment of the Board is as follows. The Board considers that Section 4(a) and Section 4(b), in common with many constitutional provisions, are protean in nature. Constitutions are living instruments. They are to be construed by reference to the situation of and conditions prevailing in the society which they serve as these evolve from time to time. It is for this reason that the approach of the interpreting court should ordinarily be more liberal than it would be in construing, for example, a measure of legislation or legal instruments such as deeds and contracts. In short, the court is enjoined to adopt a broader perspective."

128. What these paragraphs confirm is that the Court must apply a broad and pervasive interpretation of the constitution when considering whether there has been a breach of Sections 4 or 5 of the Constitution. It does not derogate from the conclusions of the Court of Appeal in **Vijay Maharaj**, that a law cannot be struck down for being in breach of Sections 1 or 2 of the Constitution. These sections do not confer any rights on persons.

129. The Court is of the view that even in the widest interpretation of the relevant sections of the Constitution, one cannot hold that the Legal Notice is in contravention of either Sections 4 or 5 of the Constitution or Section 53 or in breach of the doctrine of the Separation of Powers. Given the discernible meaning of the phrase "Camouflage Pattern Materials" and the power given to the President under Section 44, a person can with certainty obtain legal advice to ascertain whether they are in violation of the law and a Court can reasonably and objectively make a determination as to whether a particular item constitutes "Camouflage Pattern Material".

130. In the circumstances, the Claimant's claim must fail and the order of the Court is that the Claim Form filed on the 19th day of February, 2020, is dismissed with Costs to be paid by the Claimant to the Defendant to be assessed by a Registrar if not agreed.

KEVIN RAMCHARAN
JUDGE

Judicial Research Counsel: Sarita Maharajh