The Republic of Trinidad and Tobago

IN THE COURT OF APPEAL

Civil Appeal No. P061/2021
Claim No. CV 2020-00858

Between

KESTON FELIX

Appellant

And

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent

PANEL:

R. Boodoosingh C.J.
N. Bereaux J.A.
P. Rajkumar J.A.

Date of delivery: 6th March 2026

APPEARANCES:
Mr. L. Merry SC instructed by Ms. V. Ramroop, Attorneys-at-law for the appellant
Mr. S Jaikaran instructed by Ms. A. Ramsook, Attorneys-at-law for the respondent

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

Ronnie Boodoosingh
Chief Justice

JUDGMENT

Delivered by Bereaux JA

(1) On 18th February 2021, Mohammed J ("the trial judge") dismissed a constitutional motion brought by Keston Felix ("the appellant") under section 14 of the **Constitution of the Republic of Trinidad and Tobago** ("the Constitution") challenging the constitutionality of sections 50A(3), 50J(1), 50K(3) and 50K(4) of the **Police Service Act Chap. 15:01** ("the Act"). Those provisions related to the taking and retention of fingerprint impressions and data without consent by the police. In the same proceedings, the trial judge struck down section 50(2) of the Act in relation to the retention of photographs and measurements of individuals by the police after acquittal as being an infringement of the right of the individual to respect for his private life in section 4(c) of the Constitution. There has been no appeal against the latter declaration and consequential orders.

(2) The appellant has appealed against the dismissal of his motion in respect of sections 50A(3), 50J(1), 50K(3) and 50K(4) of the Act. As required the Attorney General of Trinidad and Tobago is the respondent.

Background

(3) The appellant was arrested and charged by the police on 16th May 2017 with two summary offences to wit resisting arrest and using insulting language to the annoyance of others. After his arrest, the police took photographs of the appellant, recorded his weight and height and took impressions of his fingerprints.

(4) On 24th May 2019, the appellant was found not guilty of all charges and so exonerated. However, the police retained the records of his photographs, measurements and fingerprints pursuant to section 50(2), 50A(3), 50J(1), 50K(3) and 50K(4) of the Act. It is in those circumstances that the appellant alleged those provisions of the Act breached his section 4(c) right to respect for his private life. He contended that insofar as the provisions were enacted by Parliament in accordance with the enhanced majorities in section 13 of the Constitution to override the breach, the provisions were not reasonably justifiable in society that has a proper respect for the rights and freedoms of the individual. I note here that there has been no specific pleading in the fixed date claim that the provisions fall within the section 13 proviso but the matter has proceeded before us on that basis without objection from the respondent.

The Impugned Provisions

(5) The relevant sections for the purposes of this appeal are sections 50A(3), 50J(1), 50K(3) and 50K(4), the full provisions of which are as follows :

> ***50A. (1) A police officer may take and record for the purpose of identification the fingerprint impression of a person without consent—***
>
> ***(a) where the person is a detainee or an accused; or***
>
> ***(b) where—***
>
> ***(i) a fingerprint impression is derived from a crime scene; and***

(ii) there are reasonable grounds for suspecting that the person was involved in the commission of an offence related to the crime scene and believing that fingerprint analysis could confirm or disprove the suspicion.

(2) Where a fingerprint impression is taken as provided under subsection (1), the fingerprint impression shall be analysed.

(3) The data derived from the analysis under subsection (2) shall be kept and the Commissioner shall cause that data to be transferred to the National Fingerprint Database.

…

50J. (1) A fingerprint impression taken under section 50A, 50B, 50C, 50D, 50E or 50I shall be kept for a minimum period of five years from the date on which the data was entered into the National Fingerprint Database and thereafter the fingerprint impression may be destroyed.

(2) Notwithstanding subsection (1), a Court may order that a fingerprint impression that has been taken under this Act, shall not be destroyed if the Court is satisfied that the fingerprint impression might reasonably be required for the investigation or prosecution of an offence or for purposes of an appeal.

50K. (1) There is hereby established a database of analysed fingerprint impressions collected under this Act, to be known as the "National Fingerprint Database".

(2) The Commissioner shall have control and custody of the National Fingerprint Database and shall, in accordance with this Act, add to and remove data from the National Fingerprint Database.

(3) Where a fingerprint impression is taken from a person who is exonerated, the data from the fingerprint impression shall be destroyed and removed from the National Fingerprint Database, after the expiration of twenty years from the date of exoneration.

(4) Notwithstanding the destruction of a fingerprint impression under section 50J, where data from a fingerprint impression is retained from the period of the destruction of the fingerprint impression to the twenty-year period at subsection (3), the data from the fingerprint impression is deemed to be the data related to the fingerprint impression destroyed and the data may be used as evidence in any matter involving the person to whom the data relates. (emphasis added)

(6) There is no dispute between the parties that unless those sections of the Act are shown to be unconstitutional, the effect is that the police are entitled to take and record the fingerprints of anyone arrested (whether or not they are charged) and analyse those fingerprints. Both the impressions and the data may be kept by the commissioner of police in the National Fingerprints Database. The impressions may be destroyed after a minimum of five years but the data acquired from the analysis may be retained indefinitely except where the individual has been exonerated whereupon the fingerprint data must be destroyed and removed from the database after twenty years. If the individual is convicted or is released with no charge, there is no requirement to destroy or remove the fingerprint impressions or data from the database. Consequently, the individual who is released without charge is in a more disadvantageous position than the person exonerated since the fingerprint data in respect of the latter must be destroyed after twenty years while the former's can be held without limitation.

(7) The appellant falls within the category of exonerated persons and is not an individual who was arrested and released without charge. In my judgment, the appellant's status as an "exonerated person" gives him sufficient standing to challenge the constitutionality of these provisions in their entirety which includes the constitutionality of the entire scheme set up by sections 50A(3), 50J(1), 50K(3) and 50K(4) of the Act.

(8) These provisions were enacted by Parliament by Act No. 11 of 2014 which was passed in compliance with sections 13(1) and (2) of the Constitution; that is to say, that it contained the declaration that it *"shall have effect even though inconsistent with section 4 and 5"* and was passed in *"both Houses of Parliament by the votes of not less than three-fifths of all the members of that House."* The consequence of this 'override' is that the provisions have effect *"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."*

(9) Section 13(1) and (2) of the Constitution states:

> ***(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.***
>
> ***(2) An Act to which this section applies is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House.***
>
> ***(3) For the purposes of subsection (2) the number of members of the Senate shall, notwithstanding the appointment of temporary members in accordance with section 44, be deemed to be the number of members specified in section 40(1).***

(10) The approach to the proviso in section 13(1) of the Constitution was settled by the Judicial Committee of the Privy Council in **Dominic Suraj v Attorney General of Trinidad and Tobago [2022] UKPC 26** which was delivered on 20 June 2022 – over a year after the trial judge gave her decision in these proceedings.

The Decision of the Judge

(11) The trial judge at paragraph 41 of her decision followed the approach to construing the proviso in section 13(1) as adumbrated by Bereaux JA in **Francis v The State (2014) 86 WIR 418** that a proportionality test:

> *"…is still applicable but it must be applied with a degree of flexibility, in particular, if the legislation is disproportionate a Court can still find that it has effect because it is required in the public interest. Indeed the common thread in both Northern Construction and Barry Francis is that in considering the proviso under section 13(1) of the Constitution, a Court must have regard to the views of Parliament and that the Constitution permits Parliament to derogate from the fundamental rights once certain conditions are met*." (see paragraph 36 of her decision)

(12) In applying the test the judge made the following findings:

i. The legislative objective for the introduction of the impugned provisions, is the promotion of public safety by giving the police the necessary tools to assist in the detection and combatting of crime.

ii. The power given to the Commissioner of Police under the impugned provisions, to take and retain measurements, photographs and fingerprint

data of certain persons was designed to assist the police in the identification of any person who is or was involved in the commission of a crime or to eliminate any person who they may suspect of a particular crime. Therefore, the measures contained in the impugned provisions are rationally connected to the legislative intent;

iii. The differentiation in the impugned provisions for the retention of the measurements, photographs and fingerprint data is made by limiting the categories of persons to detainees and accused persons who have not been previously convicted of a criminal offence and or discharged or acquitted by a Court;

iv. One of the accepted standards of a civilised society which subscribes to democratic principles, is the rule of law and the principle that one is innocent until proven guilty by the State. It therefore appears to be inimical to this accepted standard that the Commissioner of Police can retain possession for an indefinite period, the measurements and photograph of a person who is arrested and or charged, who is later exonerated and who has no previous convictions;

v. On the other hand, the respective periods of retention of the fingerprint data of persons who have been exonerated is within the margin of appreciation of the State and necessary when the said periods are considered against the backdrop of the high number of serious crimes and the challenges in the criminal justice system;

vi. There are adequate safeguards with respect to the access to the fingerprint data.

(13) She concluded at paragraph 105 that:

> *….a person is not easily identifiable by his fingerprint impression. The purpose for the retention of the fingerprint data is consistent with the legislative objective of the detection and combatting of crime. Additionally, there is a limited period of retention for this data which operates after a person has been exonerated. This period of retention may appear to be long, but in the context of the national peculiarities in this jurisdiction as it relates to the delays in the criminal justice system, the period of retention is within the State's margin of appreciation. Further, there are added measures to protect the right of the individual, such as the Commissioner of Police has custody and control of the database which means that access to the said information is limited and the Commissioner has a discretion to destroy the fingerprint information as prescribed by section 50 J(1)*

The Appeal

(14) On appeal, the appellant contends that the trial judge erred in upholding the constitutionality of sections 50A(3), 50J(1), 50K(3) and 50K(4) of the Act.

(15) These are issues of law and the High Court enjoys no advantage over the Court of Appeal in their determination. The central issue for determination is whether the judge erred in finding the impugned provisions to be constitutional.

Analysis

Suraj – scope of section 4 rights

(16) In **Suraj**, the Board per Lords Sales and Hamblen settled the relevant tests to be applied in regard to breaches of section 4 rights and in regard to the section 13 requirement of reasonable justification. In doing so, the Board confirmed that, the rights in section 4 of the Constitution are qualified rights and are not absolute. This had been long settled by both the Court of Appeal and the Judicial Committee in a series of authorities including **Collymore v AG (1967) 12 WIR 5; Roodal v The State [2005]1 AC 328; Panday v Gordon [2006] 1 AC 427; Suratt v AG [2008] AC 655; Public Service Appeal Board v Maraj [2010].** Since the rights in section 4 are not absolute, they may be limited by Parliament by way of ordinary legislation without resort to section 13 provided the interference is proportionate to a legitimate aim. The Board accepted the interpretation of Baroness Hale at paragraph 58 of **Suratt** as correct (see paragraphs 59 and 97 of **Suraj**) when she held that:

> ***…it cannot be the case that every Act of Parliament which impinges in any way upon the rights protected in section 4 and 5 of the Constitution is for that reason alone unconstitutional…These are both qualified rights which may be limited, either by general legislation or in the particular case, provided that the limitation purses a legitimate aim and is proportionate to it.***

Where the interference with the right by Parliament is proportionate there is no inconsistency with or an abrogation of the right. It is for the State to justify any interference as being a proportionate limitation on the right. See paragraph 83 of **Suraj** and paragraph 25 of **Paponette v AG (2010) 78 WIR 474**.

(17) The Board, at paragraph 51 of **Suraj** set out the test of proportionality, as follows:

(i) whether its objective is sufficiently important to justify the limitation of a fundamental right;

(ii) whether it is rationally connected to the objective;

(iii) whether a less intrusive measure could have been used; and

(iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community

The proportionality test under section 13(1)

(18) The test in regard to section 13 was propounded as follows:

90… In the Board's view, (1) the correct interpretation of the Constitution is that the rights in section 4 are to be read as incorporating an implied proportionality test as set out in Suratt, para 58, for all the reasons set out above; (2) the proviso to section 13(1) also incorporates a proportionality test; but (3) the framing of the test in each case is different, so there is no inconsistency or incoherence involved. The proportionality test inherent in the rights in section 4 is the conventional and usual proportionality approach originally explained in de Freitas v Permanent Secretary and refined thereafter, which is more demanding from the point of view of the state than that under section 13(1). Another way of putting this is to say that the test of proportionality appropriate under section 13(1) involves a lesser intensity of review by the courts and a wider margin of appreciation or discretion for the state, acting by legislation passed by a super-majority in both Houses of Parliament.

(19) The proportionality test in relation to the proviso is unique in the sense that it must give substantial weight and deference to the democratic judgment of Parliament in determining not only the public interest but the primacy of the public good over individual rights. The fact that the legislation has been enacted using the formal procedure of declaration and enhanced majorities in section 13, there is necessarily an impact on every stage of the proportionality test. As the Board explained at paragraph 94:

> ***94. Nonetheless, in the Board's view the test to be applied under the proviso in section 13(1) is still a version of the proportionality test, albeit one framed in a way which gives especially strong weight to the judgment of Parliament regarding the imperative nature of the public interest. Where legislation has been passed by a supermajority, that is capable of affecting each of the four stages in the proportionality test (para 51 above). It shows that Parliament considers the public interest objective to be very important indeed (stage (i)), which in turn is likely to affect assessment of whether there is a sufficient degree of connection between the measure in issue and that objective (stage (ii)), whether the trade-offs in public policy terms in using that measure as opposed to others are acceptable (stage (iii)) and the question at stage (iv) (sometimes called proportionality in the strict sense). The essential question posed under the proviso, taking account of this framework, is whether the Act in question strikes an acceptable balance between the rights and freedoms of individuals and the general interest of the community.***

(20) At paragraphs 91 – 92, the Board attempted to place into context the impact of the will of Parliament on the proportionality test:

> ***91. The proportionality approach for bringing into account both individual rights on the one hand and the general interest of the community on the other is aimed***

at ensuring that a balance is struck between the two. The stronger the public interest in issue, the greater the interference with individual rights which may be permitted without there being any violation. Generally, in a democracy, it is the democratic institutions which have the primary responsibility to identify the public interest and what is required to promote it. As Baroness Hale put it in Suratt, para 58: "It is for Parliament in the first instance to strike the balance between individual rights and the general interest". Where Parliament gives expression to the public interest not merely by legislation passed in the usual way, but by an Act passed by a super-majority in each House pursuant to section 13 and which records expressly on its face that it is to have effect "even though inconsistent with sections 4 and 5", Parliament will have identified in a particularly clear and forceful way its opinion as to where the public interest lies. In a democratic state, the courts must be expected to be especially respectful of the choice made by Parliament to pass legislation in that form and slow to substitute their own view of the necessity for and proportionality of the measure taken

92. That the proportionality framework may be affected by the extent of the engagement of the democratic institutions of the state is well attested by decisions in other jurisdictions: see Draon v France (2006) 42 EHRR 40, para 108; Animal Defenders International v United Kingdom (2013) 57 EHRR 21, paras 108-109 and 113-116; and R (SC) v Secretary of State for Work and Pensions [2021] UKSC 26; [2022] AC 223, paras 208-209 ("SC"). In the context of the Constitution, where an Act has been passed using the super-majority procedure in section 13, "the democratic credentials of the measure" are especially strong (in the language used by Lord Reed in SC at para 209). Accordingly, although the court has to make the ultimate judgment whether the proviso in section 13(1) has been satisfied or not, it is obliged in doing so to give especially great weight to the judgment of Parliament regarding the importance of the public interest which is

sought to be promoted by the measure in question. In the context of section 13 it is clear that the intention is that the weight to be given to the judgment of Parliament regarding the importance of the public interest and how individual rights should be accommodated in relation to that is even greater than in relation to an ordinary proportionality assessment, because the Constitution provides that Parliament may override the ordinary application of the rights in section 4 where it judges that the public interest requires this, provided that it faces up directly to the possibility that the measure may be inconsistent with sections 4 and 5 and uses the super-majority procedure. The proviso in section 13(1) is a long-stop check against abuse of that power and cannot be taken merely to replicate the ordinary proportionality standard inherent in the rights in section 4.

(21) That approach to proportionality recognises that Parliament was cognisant of the fact that the measure may be inconsistent with sections 4 and 5 but had chosen to employ the special procedure in section 13 to enact the measure and the focus of the court is not whether there was a breach but the reasonableness of the provision in the context of the public interest. In other words, the proviso is a check on whether the measure is a bona fide abrogation of right in the public interest or an abuse of power.

(22) In relation to the impugned provisions in this case, Parliament has made it clear that it intended the provisions to have effect whether or not they are found to be inconsistent with any right or freedom in sections 4 and 5 of the Constitution. There is no dispute between the parties that fundamental right in issue is section 4 (c) which is the ***"right of the individual to respect for his private and family life."***

(23) The trial judge at paragraph 105 found that *"sections 50A (3), 50 J(1) and 50K (3) and 50K (4) do not infringe an individual's right to a private life and are therefore valid."* She then explained:

I have arrived at this position because a person is not easily identifiable by his fingerprint impression. The purpose for the retention of the fingerprint data is consistent with the legislative objective of the detection and combatting of crime. Additionally, there is a limited period of retention for this data which operates after a person has been exonerated. This period of retention may appear to be long, but in the context of the national peculiarities in this jurisdiction as it relates to the delays in the criminal justice system, the period of retention is within the State's margin of appreciation. Further, there are added measures to protect the right of the individual, such as the Commissioner of Police has custody and control of the database which means that access to the said information is limited and the Commissioner has a discretion to destroy the fingerprint information as prescribed

The content of section 4(c) right

(24) Section 4(c) of the Constitution provides for *"the right of the individual to respect for his private and family life."* For the purposes of this appeal, I shall refer to this right as the "privacy right" or the "right to respect for private life". It is important at the outset to establish whether the privacy right is engaged at all. In other words, it must be shown that the matter sought to be protected falls within the scope of respect for the appellant's private life.

(25) **In re JR 38 [2016] AC 1131,** the Supreme Court of the United Kingdom considered the question of when Article 8 of the European Convention of Human Rights is engaged. In that case the appellant challenged the publication by the police of images of him while he was still a minor in connection with certain acts of public disorder in Londonderry. He alleged that the publication of the photographs of him constituted a violation of his rights under Article 8 of the European Convention for Human Rights. Article 8.1 (like section 4(c))

provides that *"[e]veryone has the right to respect for his private and family life, his home and his correspondence."*

(26) The Supreme Court held that it did not because the circumstances of the publication of the photographs did not fall within the scope of Article 8 at all so there was no need for justification by the State. Relying on Strasbourg jurisprudence, Lord Toulson opined of Article 8 as follows:

> ***84 In the leading case Von Hannover v Germany (2004) 40 EHRR 1, concerning press photographs of the applicant engaged in various informal activities with members of her family or friends in locations outside her own home, the Strasbourg court said, at paras 50–52:***
>
> > ***"50. The court reiterates that the concept of private life extends to aspects relating to personal identity, such as a person's name (see Burghartz v Switzerland (1994) 18 EHRR 101, para 24) or a person's picture (see Schüssel v Austria (Application No 42409/98) (unreported) given 21 February 2002).***
> >
> > ***"Furthermore, private life, in the court's view, includes a person's physical and psychological integrity; the guarantee afforded by article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings: see, mutatis mutandis, Niemietz v Germany (1992) 16 EHRR 97, para 29, and Botta v Italy (1998) 26 EHRR 241, para 32. There is therefore a zone of interaction with others, even in a public context, which may fall within the scope of 'private life': see, mutatis mutandis, PG v United Kingdom (2001) 46 EHRR 51, para 56, and Peck v United Kingdom (2003) 36 EHRR 41, para 57.***

> ***"51. The court has also indicated that, in certain circumstances, a person has a 'legitimate expectation' of protection and respect for his private life. Accordingly, it has held in a case concerning the interception of telephone calls on business premises that the applicant 'would have had a reasonable expectation of privacy for such calls': see Halford v United Kingdom (1997) 24 EHRR 523, para 45.***
>
> ***"52. As regards photos, with a view to defining the scope of protection afforded by article 8 against arbitrary interference by public authorities, the Commission had regard to whether the photographs related to private or public matters and whether the material thus obtained was envisaged for a limited use or was likely to be made available to the general public: see, mutatis mutandis, Friedl v Austria (1995) 21 EHRR 83, Friendly Settlement, Commission opinion, at paras 49–52; PG v United Kingdom 46 EHRR 51, para 58; and Peck v United Kingdom 36 EHRR 41, para 61."***

85 This passage highlights three matters: the width of the concept of private life; the purpose of article 8, ie what it seeks to protect; and the need to examine the particular circumstances of the case in order to decide whether, consonant with that purpose, the applicant had a legitimate expectation of protection in relation to the subject matter of his complaint. If so, it is then up to the defendant to justify the interference with the defendant's (sic) [claimant's] privacy.

Lord Clark of Stone-Cum-Ebony, concurring with Lord Toulson summarized at paragraph 105 the state of law succinctly into the principle that "***the touchstone for the engagement of article 8.1 is whether the claimant enjoys on the facts a "reasonable expectation of privacy"."***

At paragraph 88, Lord Toulson explained:

> ***…The principled reason for the "touchstone" is that it focuses on the sensibilities of a reasonable person in the position of the person who is the subject of the conduct complained about in considering whether the conduct falls within the sphere of article 8. If there could be no reasonable expectation of privacy, or legitimate expectation of protection, it is hard to see how there could nevertheless be a lack of respect for their article 8 rights.***

At paragraph 98 the continued ***"…the reasonable or legitimate expectation test is an objective test. It is to be applied broadly, taking account of all the circumstances of the case (as Sir Anthony Clarke MR said in Murray's case) and having regard to underlying value or values to be protected."***

(27) I accept this as a correct statement of the law. The right to respect for one's private life is only engaged where in the circumstances of the case the claimant has a reasonable expectation of privacy. Absent a reasonable expectation of privacy, there is no relevant interference with personal autonomy.

(28) **R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland [2015] AC 1065** is useful. That case concerned the systematic collection and retention by police authorities of electronic data about individuals which the claimants alleged to be contrary to article 8 of the European Convention on Human Rights. Each of them accept that it was lawful for the police to make a record of the events in question as they occurred, but contends that the police interfered with their rights under article 8 of the Convention by thereafter retaining the information on a searchable database.

(29) The Supreme Court unanimously held that article 8 was 'engaged.' At paragraph 4 Lord Sumption stated:

> ***4 In common with other jurisdictions, including the European Court of Human Rights and the courts of the United States, Canada and New Zealand, the courts of the United Kingdom have adopted as the test for what constitutes "private life" whether there was a reasonable expectation of privacy in the relevant respect: see Campbell v MGN Ltd [2004] 2 AC 457, para 21 (Lord Nicholls of Birkenhead) and Kinloch v HM Advocate [2013] 2 AC 93, paras 19-21 (Lord Hope of Craighead DPSC). In one sense this test might be thought to be circular. It begs the question what is the "privacy" which may be the subject of a reasonable expectation. Given the expanded concept of private life in the jurisprudence of the Convention, the test cannot be limited to cases where a person can be said to have a reasonable expectation about the privacy of his home or personal communications. It must extend to every occasion on which a person has a reasonable expectation that there will be no interference with the broader right of personal autonomy recognised in the case law of the Strasbourg court. This is consistent with the recognition that there may be some matters about which there is a reasonable expectation of privacy, notwithstanding that they occur in public and are patent to all the world. In this context mere observation cannot, save perhaps in extreme circumstances, engage article 8, but the systematic retention of information may do.***

In the instant case, we are concerned with the concept of personal autonomy in its most intimate sense. An individual's fingerprints are a unique identifier of the individual. It forms an inherent part of a person's identity. But what is the colour placed on this aspect of personal autonomy?

(30) The jurisprudence of the European Court of Human Rights provides helpful guidance. In **S. and Marper v. The United Kingdom [2009] 48 EHHR 50**, the applicants complained to the European Court of Human Rights that the authorities in the United Kingdom had continued

to retain their fingerprints and cellular samples and DNA profiles after criminal proceedings against them had ended with an acquittal or been discontinued. They alleged that this amounted to a breach of their rights under article 8 of the European Convention of Human Rights.

(31) At paragraph 86 the court held that:

> ***…while it may be necessary to distinguish between the taking, use and storage of fingerprints, on the one hand, and samples and profiles, on the other, in determining the question of justification, the retention of fingerprints constitutes an interference with the right to respect for private life.***

(32) The learned authors of **Halsbury's Laws of England(2018) Vol 88A at paragraphs 399** state:

> ***"The taking and retention, or publication, of photographs and the collection of cellular samples, fingerprints and DNA profiles during criminal investigations engages Article 8, and in determining whether the storage of personal information such as fingerprints and DNA interferes with private life, regard is to be had to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which the records are used and processed and the results that may be obtained: a blanket or indiscriminate power of retention without provision for independent review or for an acquitted individual to have the data destroyed may not strike the necessary balance."***

See also **S v United Kingdom (2008) 48 EHRR 1169** where the Strasbourg court held that article 8 was engaged by the mere storage of cellular samples, DNA profiles and fingerprints: see paras 77, 86. This was because of the sensitivity and amount of the

personal information in question, and the uses to which it might "conceivably" be put: paras 70-86.

(33) Similarly, in the Canadian case of **R v Dore [2002] OJ No. 2845**, the Ontario Court of Appeal considered the issue of the police retaining an individual's fingerprints after acquittal. Feldman JA held:

> ***64 On the issue of whether a person does retain any expectation of privacy in the informational component of fingerprints, I conclude that there is no basis in the case law or otherwise, to infer that a person who was subjected to fingerprinting upon arrest will not have some reasonable expectation of maintaining or regaining his or her privacy in fingerprint information if the charge is disposed of in his or her favour. There is no reason to differentiate the expectation of privacy that an acquitted person has in such information from the expectation that a person who has never been charged with an indictable offence would have, because it is information about and from one's body not normally available without one's consent. Added to that in the context of retention is the nature of the storage by the police which tends to stigmatize as a criminal the person whose fingerprints are retained. Although it may be that because of the nature of that information, the expectation of privacy is minimal when compared, for example, to information which can disclose the genetic make-up of the person and not merely the person's identity, I conclude that a person can have some privacy interest in the retained fingerprints.***

(34) In my judgment, both exonerated persons and persons who were arrested but never charged have a reasonable expectation of regaining privacy in the fingerprint impressions and data when they were exonerated or released without charge. That is enough to trigger section 4 (c) of the Constitution. The onus will ordinarily shift to the State to justify the retention of the impressions and data as a lawful limitation on the right to privacy.

However, Parliament has overridden sections 4 and 5 by the procedure in section 13 of the Constitution. The burden is now placed squarely on the appellant to show that the legislation is reasonably justifiable with a wide latitude of appreciation to be given to the views and objectives of Parliament.

The **Suraj** considerations in regard to section 13

Is the objective of the impugned provision sufficiently important to justify the limitation of a fundamental right

(35) Mr. Merry rightly accepted that the impugned provisions do pursue the legitimate aim of improving crime detection by giving the police an additional tool to investigate crime. That this objective is sufficiently important one need look no further than the exponential rates of serious crime particularly murders and burglaries vis-à-vis the abysmal detection rate of the police service. That is a matter of great public notoriety requiring no evidence. So too the fact that crime, particularly violent crime, is now a major source of concern for us all in this country. The creation of a database into which the police can delve in furtherance of their investigations can only be helpful in its efforts to detect and solve crimes. There can be no gainsaying the *bona fides* of this objective. Fingerprint analysis has long been critical forensic crime fighting tool. To be effective there must be a pool of samples against which new specimens can be tested. Given that crime has become a major issue in Trinidad and Tobago, the legislative objective of improving detection is sufficient to justify limiting individuals' rights to privacy.

Are the impugned provisions rationally connected to the objective

(36) Mr. Merry submitted that *"there is no connection between the legislative provisions and the objective. This is because acquitted persons (and persons who have never been charged) are presumed innocent. They are in the same position as persons who have never had any interaction with the police whatsoever."* It cannot assist in combatting crime to have the data of law abiding citizens in any fingerprint database involuntarily.

(37) It is true that the challenge in these proceedings is not to the existence of a fingerprint database but to the retention of fingerprint impressions and data for twenty years from persons who have been exonerated and indefinitely from persons who were arrested and never charged. These two classes of individuals, so far as the law is concerned, are presumed to be innocent of all crime in the same way as persons who were never arrested by the police. An arrest is not a finding of guilt and cannot and should not be used as a justification to invade an individual's fundamental rights further than is necessary for the purposes of a subsequent prosecution.

(38) But Mr. Jaikaran for the Attorney General, contends that the retention of the fingerprint impressions and data derived from their analysis is rationally connected to the legislative objective of detecting and combatting crime because a larger database provides a greater the chance of identification and detection. However, this rationale cannot justify or explain why exonerated persons and persons who were arrested but never charged, are treated differently by the impugned provisions from persons who were never arrested at all.

(39) In that context I recognise that Parliament may have considered that the success of fingerprint analysis depends upon the banking of fingerprint impressions into the database and that a significant portion of those impressions need to be obtained from persons who have been arrested irrespective of whether they were subsequently released without charge or acquitted by the court; that is to say, an acquittal or a release without charge does not necessarily mean that the individual concerned does not have a criminal history

and that the use of his harvested data may be important in the future. That is a rational connection. Whether it goes too far is another question.

Could a less intrusive measure have been used?

(40) Parliament has opted to utilize the fingerprints of those persons who have been arrested simpliciter and legislated that those fingerprints should be kept indefinitely save for individuals who have been exonerated. For exonerated persons the impressions and data are to be destroyed after twenty years. Buy there were less intrusive measures available. These included only retaining the fingerprints of persons who have been convicted and excluding from the database the impressions and data from persons who were arrested but released without charge or acquitted. Safeguards could also have been provided in the legislation for periodic reviews of the use data of persons who were never charged or who were acquitted or simply to give an election to those individuals by which they could choose to consent to their fingerprints being retained or destroyed.

Whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community

(41) The existence of less intrusive measures do not render Parliament's choice unreasonable. The question in this final limb of the analysis is whether a fair balance has been struck between the rights of the individual and the public interest. In **Akili Charles (No. 2),** Lord Hamblen and Lord Sales at paragraph 67 pointed out that ***"[u]nder this heading it is relevant to consider the extent of the inconsistency with sections 4 and 5."*** Use and retention of an individual's fingerprints are protected by the privacy right in section 4(c) of

the Constitution as discussed above. The impugned provisions also impact upon the presumption of innocence in section 5(2)(f)(i) of the Constitution.

(42) Several countries across Europe, the United Kingdom and Canada make legislative provisions for the compulsory harvesting and retention of fingerprints in the context of criminal proceedings. The issue is not so much the harvesting of the impressions but their retention in the particular circumstances of exoneration or release without charge at all. In relation to exonerated individuals section 50(k)(3) of the Act allows the police to retain the data for twenty years after exoneration. In respect of persons who were arrested but never charged there is no time limit in the Act for the retention of impressions and the data derived therefrom. So far as the latter is concerned the impressions and data can be retained indefinitely. It is this retention policy of the impugned provisions which must be shown *"not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual."*

(43) The European Court for Human Rights ("ECHR") have considered this question on at least two prior occasions. And while the jurisprudence of that court is not binding upon me, I find the approach and conclusions of the ECHR to be highly persuasive. The first of those cases is the **Case of S. and Marper v. The United Kingdom (supra)** where the Strasbourg Court had to determine whether the retention of the fingerprint and DNA data of the applicants, as persons who had been suspected, but not convicted, of certain criminal offences, was justified under Article 8 of the Convention. The court held:

> ***119. In this respect, the Court is struck by the blanket and indiscriminate nature of the power of retention in England and Wales. The material may be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender; fingerprints and samples may be taken – and retained – from a person of any age, arrested in connection with a recordable offence, which includes minor or non-imprisonable***

offences. The retention is not time-limited; the material is retained indefinitely whatever the nature or seriousness of the offence of which the person was suspected. Moreover, there exist only limited possibilities for an acquitted individual to have the data removed from the national database or the materials destroyed (see paragraph 35 above); in particular, there is no provision for independent review of the justification for the retention according to defined criteria, including such factors as the seriousness of the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances.

122. Of particular concern in the present context is the risk of stigmatisation, stemming from the fact that persons in the position of the applicants, who have not been convicted of any offence and are entitled to the presumption of innocence, are treated in the same way as convicted persons. In this respect, the Court must bear in mind that the right of every person under the Convention to be presumed innocent includes the general rule that no suspicion regarding an accused's innocence may be voiced after his acquittal (see Rushiti v. Austria, no. 28389/95, § 31, 21 March 2000, with further references). It is true that the retention of the applicants' private data cannot be equated with the voicing of suspicions. Nonetheless, their perception that they are not being treated as innocent is heightened by the fact that their data are retained indefinitely in the same way as the data of convicted persons, while the data of those who have never been suspected of an offence are required to be destroyed.

123. The Government argue that the power of retention applies to all fingerprints and samples taken from a person in connection with the investigation of an offence and does not depend on innocence or guilt. It is further submitted that the fingerprints and samples have been lawfully taken and that their retention is not related to the fact that they were originally

suspected of committing a crime, the sole reason for their retention being to increase the size and, therefore, the use of the database in the identification of offenders in the future. The Court, however, finds this argument difficult to reconcile with the obligation imposed by section 64(3) of PACE to destroy the fingerprints and samples of volunteers at their request, despite the similar value of the material in increasing the size and utility of the database. Weighty reasons would have to be put forward by the Government before the Court could regard as justified such a difference in treatment of the applicants' private data compared to that of other unconvicted people.

125. In conclusion, the Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society. This conclusion obviates the need for the Court to consider the applicants' criticism regarding the adequacy of certain particular safeguards, such as too broad an access to the personal data concerned and insufficient protection against the misuse or abuse of such data.

(44) I shall consider the provisions in relation to exonerated persons and persons who were released without charge in turn. There is no constitutional difference between someone who is exonerated and someone who was never charged. The impugned provisions take no account of the circumstances of the exoneration. For example, whether the case was dismissed on the merits or procedurally or whether there was any basis for the charge at all or the existence of a malicious prosecution.

(45) There is also no differentiation between the seriousness of the charges for which a person was exonerated. Everyone is painted with the same broad brush. Someone charged and acquitted of using annoying language is treated in the same way as a person acquitted of murder.

(46) There is no independent review of the retention of the fingerprint impressions and data or for the individual to elect to leave the information in the fingerprint database or to request its removal. There is also no evidence or other indication of any administrative practice of the police destroying data on request or on a needs basis having regard to circumstances of an acquittal. There is also no evidence of a practice (in accordance with the commissioner's power to add or remove data from the database) in which the commissioner of police allows an individual to make representations and to request the removal of his fingerprint data from the database.

(47) On the other side of the scale, the retention is for a period of twenty years. This appears excessive at first blush but Mr. Jaikaran has submitted that in the context of the slow pace of criminal investigations in this country any shorter period will be useless. Bearing in mind the high margin of appreciation to be afforded to Parliament, it is important to note that Parliament is better positioned to understand the state of the detection inadequacies of the police service than this court.

(48) But does the retention of an exonerated persons fingerprints for twenty years strike the right balance between that person's right to respect for his privacy and the need to fight crime in the context of the absence of almost every other safeguard? Twenty years is a significant period of time. Section 13 of the Constitution in this country gives the Parliament the power to consciously override sections 4 and 5 of the Constitution. Great weight is to be given to the choice of Parliament than would be given in the application of the ordinary proportionality test. The retention of the fingerprints of exonerated individuals breach

section 4 (c) of the Constitution but Parliament in its wisdom has decided that that data should be retained for a further period of twenty years. **Akili Charles (No.2)** is distinguishable**.** No liberty issues arise here. A balance had to be struck between the individual's expectation of privacy and the public interest. That was a decision best suited to Parliament. It is not an abuse of power for Parliament to retain the fingerprint data for exonerated individuals for twenty years from the date of the exoneration.

(49) I now turn to the retention of fingerprints and data from persons who were arrested but never charged. The same challenges and risks apply to this category. But in this case because no charges have been laid, or no conviction obtained, Parliament is effectively justifying the retention of the data on the *ipse dixit* of the arresting police officer. The police can decide that a person's fingerprints can be retained for an indefinite period of time even though no charge had ever been laid ,or without any evidence having ever been obtained, or any regard for the seriousness of the allegation for which he may have been arrested and not charged.

(50) That no provision was made to limit the period of retention for persons who were never charged is quite startling, given that provision is made for exonerated persons in the legislation by providing a twenty year limitation. It is for Parliament in the first place to ***"strike the right balance between individual rights and the general interest"*** (see **Suratt** at paragraph 58). No such balance was struck here.

(51) Even if there can be some justification for retaining the fingerprints of someone who was charged but exonerated because of the engagement of the criminal justice system, there can be no such justification in relation to someone who was never charged. The criminal judicial process was never engaged. There is no independent adjudication. Insofar as the impugned provisions authorize the retention of fingerprints and data therefrom collected from individuals who were arrested and never charged those provisions go too far. It is deeply unfair and oppressive. That the decision of whether or when to release is effectively left to the police, is also quite arbitrary. In my judgment, that is not what is to be expected

in a society which has a proper regard for the rights and freedoms of the individual. Parliament has effectively abused its power, consistent with what Lords Sales and Hamblen described in Suraj as an abuse of power.

(52) Rajkumar JA has also found that the retention of the fingerprint data in respect of individuals who were never charged is unconstitutional but he has sought to read into the legislation the twenty-year limitation period that is applicable to the data of exonerated individuals. Boodoosingh CJ concurs with this approach. I respectfully disagree. The court has power to read words into legislation in very limited circumstances; as for example to correct obvious drafting errors. See **Fazal Ghany v AG [2015] UKPC 12** at paragraphs 14 and 15. Lord Lloyd-Jones' dictum at paragraph 14 is particularly relevant. He said:

> ***14. The circumstances in which it is open to the courts in interpreting legislation to correct obvious drafting errors are strictly confined, not least because the role of the courts must be limited to interpreting the statute and must not trespass into legislating. Nevertheless, in appropriate circumstances it is open to the courts to read words into a statute in order to correct an error. The applicable principles were stated by Lord Nicholls in Inco Europe Ltd v First Choice Distribution [2000] 1 WLR 586 as follows:***
>
> > ***"It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross's admirable opuscule, Statutory Interpretation, 3rd ed (1995), pp 93–105. He comments, at p 103:***
> >
> > > ***'In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or***

the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role.'

This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see Lord Diplock in Jones v Wrotham Park Settled Estates [1980] AC 74, 105-106." (at p 592 E-H)

I am not persuaded that this was an error or omission which allows the court to read words into the statute. In my judgment, if in fact this was an omission then it is for Parliament to correct not the court. It is not the type of omission that attracts or requires judicial correction.

(53) The majority's reasoning is that Parliament's omission to include a mandatory limitation period on the retention of the fingerprint impressions and data of persons arrested and released without charge *"was an obvious drafting error."* I do not agree. In my judgment, it was an omission. If the omission was inadvertent it means that Parliament has not

treated with the issue of retention of the fingerprint data and impressions of persons who were arrested but not charged. It may well be that a shorter period of retention would have been selected. It is also plausible that had Parliament sufficiently engaged the issue that its retention beyond the period of detention may not have been included at all. Indeed, in such a case it is arguable that the true omission of Parliament is to not have excluded altogether the retention of the finger print impressions and data of persons arrested but never charged. If, on the other hand, the omission is deliberate then Parliament has deliberately (and unreasonably) chosen to set a minimum period with an unlimited discretion thereafter to the police as when the information should be discarded. It is all too speculative.

(54) Consequently, there is no warrant in this court arbitrarily tacking on a limitation period used in respect of persons acquitted on the basis that it is a *"drafting mistake."* Different considerations apply to both classes of people. The court's function is to ensure that in exercising the section 13 override, Parliament remains faithful to striking a *bona fide* balance between the public interest and the individual's right in every instance. Where Parliament has failed to meet this standard then it is the duty of the court to grant the appropriate relief including striking down the legislation, when required.

Conclusion

(55) The conjoint effect of sections 50A(1)(3) and 50J(1) of the Act is to give the commissioner of police the discretion to retain beyond five years, the fingerprint impressions and data harvested from persons who were merely arrested and never charged. Such an unfettered discretion is the epitome of arbitrariness. In fact, a person who was arrested and released without charge is certainly more disadvantaged than one who was charged but exonerated in respect of whom section 50K (3) mandates the destruction of the impressions and data after twenty years.

(56) Consequently, I will allow the appeal in part and declare that sections 50A(1)(3) and 50J(1) insofar as they apply to the retention of fingerprint impressions and data harvested from

a person who was arrested but not charged, are inconsistent with section 4(c) of the Constitution and are not reasonably justifiable in a society which has a proper respect for the rights and freedoms of the individual. They are null void and of no effect. The appeal against the judge's finding that the retention of the fingerprint impressions and data harvested from a person charged but acquitted (exonerated) is constitutional, is dismissed.

Order

i. Sections 50A(1)(3) and 50J(1) of the Act, insofar as they apply to the retention of fingerprint impressions and data harvested from a person who was arrested but not charged, are inconsistent with section 4(c) of the Constitution and are not reasonably justifiable in a society which has a proper respect for the rights and freedoms of the individual. They are null void and of no effect;

ii. That portion of the appeal in regard to the retention of fingerprints harvested from a person charged but acquitted(exonerated)is dismissed;

iii. In the High Court the appellant was awarded assessed costs in the sum of seventy eight thousand one hundred and seventy five dollars ($78,175.00). This was no doubt in respect of the portion of the claim that succeeded before the judge. No award of costs was made in favour of the respondent. Having regard to my conclusions herein, I will hear the parties on the impact of the same on the order for costs in the High Court and on the costs of this appeal.

Nolan Bereaux
Justice of Appeal

Delivered by Rajkumar JA

(57) The instant appeal arises in relation to a challenge to the constitutionality of section 50 (A) – (L) of the Police Service Act Chapter 15:01 (the Act) introduced by amendment in Act 11 of 201. It was passed by a special majority pursuant to section 13 (1) of the Constitution, notwithstanding expressed inconsistency with sections 4 and 5 of the Constitution. Those sections provide for the collection and retention of information from persons who are detained, or accused. Section 50 (2) provided for the collection and retention of photographs and measurements. Section 50 (A), 50 (J), and 50 (K) (together referred to as "the challenged provisions") provide for the collection and retention of fingerprint impressions and data.

(58) In relation to photographs and measurements the Trial Judge found that section 50 (2) was unconstitutional as it had not been shown to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual, (the further requirement or the reasonable justifiability requirement). Accordingly, those provisions were struck down. There was no appeal of that portion of the decision.

(59) In relation to fingerprint collection and retention the trial judge declined to strike down the challenged provisions. This appeal is in relation to that conclusion. It is contended that those portions of the legislation should have been struck down because they did not satisfy the reasonable justifiability requirements as explained in **Suraj v AG**[1].

Issue

(60) Whether the provisions of section 50 of the Act, and in particular the challenged provisions, (which provide for the collection and retention of fingerprint impressions and data) are unconstitutional, despite having been passed by the requisite three fifths majority of both houses of Parliament, in not satisfying the further requirement, (that, though inconsistent with sections 4 and 5 of the Constitution, they are nevertheless reasonably justifiable in a society which has a proper respect for the rights and freedoms of the individual).

[1] [2022] UKPC 26.

Conclusion

(61) It was not in dispute that the sections of the Police Service Act which provide for the **collection** and **retention** of **fingerprint** impressions and data from persons who are detained, accused, or connected with a crime scene, did infringe the right to respect for private life[2].

(62) Their unconstitutionality was presumed and resulted in the passage of that legislation by the requisite majority. The only issue therefore is whether having been so passed, that legislation in relation to retention of fingerprints and fingerprint data is reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

(63) Apart from the specific category of persons who were detained but released without being charged the challenged provisions do satisfy the test in **Suraj**. For the reasons explained hereunder, they do strike a fair balance between the rights of the individual and the interests of the community[3].

(64) The legislation satisfies the test of proportionality because: (i)**its objective is sufficiently important** to justify the limitation of a fundamental right; (ii) it is **rationally connected to the objective**; (iii) while the argument can be made that **a less intrusive measure** could have been used, especially strong weight has to be given to the judgment of Parliament regarding the imperative nature of the public interest and the necessity for measures of this level of intrusiveness; and (iv) having regard to these matters and to the severity of the consequences, **a fair balance has been struck between the rights of the individual and the interests of the community** especially giving strong weight to the judgment of Parliament regarding the imperative nature of the public interest[4].

(65) In the case of a person who is released without charge, he does not fall within the category of *exonerated*[5] persons[6]. Because persons who were detained but never charged could not fall

[2] See paragraph 29 of the respondent's written submissions
[3] See paragraph 51 Suraj (supra)
[4] See paragraph 94 of Suraj
[5] Under the definition section of the Police Service Act
[6] That is because:

within the definition of persons who were exonerated, there is no mechanism otherwise provided for the removal of their data or fingerprint impressions from the National Fingerprint Database. A requirement must therefore be read into the legislation that such a person must have the right to apply to the Commissioner for the removal of his fingerprint impressions and data from the National Fingerprint Database (The Database) after 5 years.

(66) Rather than striking down the legislation as unconstitutional, because of the omission to provide for that limited category of persons, its constitutionality can be preserved by making appropriate declarations. The first such declaration would be that section 50(K)(2), (which expressly provides that the discretion of the Commissioner of Police is retained with respect to addition or deletion of data from the National Fingerprint Database), is to be read as including the additional words after "Database", the words "including data from persons who have been detained and then released without being charged". Secondly it would be necessary to declare that section 50 (K) (3) of the Act is to be read as including, after the word "exonerated", the further words "or is detained and then released without being charged".

(67) That overcomes the difficulty with respect to persons who have been detained but not charged who do not fall within the definition of "exonerated", because there would otherwise be no mechanism by which they could have their data expunged from the Database. In fact under Section 50(K)(2) they could make an application to the Commissioner for that purpose, after a period of five years, the minimum provided for in respect of fingerprint impressions[7].

(68) The Appellant seeks in this appeal an order that section 50 (A) (3), 50 (J) (1), 50 (K) (3), 50 (K) (4) of the PSA 15:01 infringe on (sic) the Claimant's (Appellant's) right to private life and are not

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i] He is not a person who has been found not guilty by a court at a trial. (He cannot be because there was no possibility of trial in that case); or

ii] He was not charged with an offence and therefore could not have had any charges dismissed; and

iii] He would not have been a person who was otherwise discharged from criminal liability in relation to a particular offence. That is because there is no mechanism in relation to a person who was detained but not charged for being discharged from criminal liability.

[7] 50 (J)

reasonably justifiable in a society which has a proper respect for the rights and freedoms of the individual. The Respondent has not filed a counter notice of appeal but asks the court to declare that those sections are constitutional and that any interference with the Claimant's (Appellant's) right to private life are reasonably justifiable in accordance with section 13 (1) of the Constitution. That is in fact the effect of this Court's disposition of this appeal in rejecting the appellant's contentions, save with respect to a very limited class of persons identified above.

(69) Accordingly, subject to the declarations below, the appeal is therefore allowed in part. The challenged provisions, subject to the declarations below are not unconstitutional and they are reasonably justifiable in a society which has a proper respect for the rights and freedoms of the individual.

Orders

(70) The appeal is allowed only to the extent that:

I] It is declared that section 50 (K) (2) of the Police Service Act is to be read and construed as if the additional words "including in relation to exonerated persons" were inserted at the end of that section immediately after the word "Database".

II] It is declared that section 50 (K) (3) of the Police Service Act is to be read as including after the word "exonerated", the words "or is detained and then released without being charged".

Analysis

The Legislation

(71) The relevant provisions of the Police Service Act were enacted by the Miscellaneous Provisions (Administration of Justice) Act, 2014 and are set out hereunder (all emphasis added):

A "detainee" is defined in section 3 of the Police Service Act as "*a person who has been arrested by the police in connection with a criminal offence"* and an "accused" is there defined as "*a person who is charged with an offence*".

Also defined at section 3 of the Police Service Act, *"exonerated", in relation to a person, means:*

a] A person who had been found not guilty by a court at trial in relation to a particular offence;
b] A person who was charged with an offence and had his charges dismissed in relation to that particular offence; or
c] A person who has been otherwise discharged from criminal liability in relation to a particular offence.

50. *(1) A police officer may take and record for the purpose of identification the measurement and photograph of a person who is a detainee or an accused.*
(2) Where the measurement or photograph taken under subsection (1) is of a person who has not previously been convicted of a criminal offence, and such person is ***discharged*** *or* ***acquitted by a Court****,* ***all records*** *relating to the measurement or photograph* ***shall be kept*** *by the Commissioner.*

50A. *(1) A police officer may take and record for the purpose of identification the fingerprint impression of a person without consent—*
(a) where the person is a ***detainee*** *or an* ***accused****; or*
(b) where—
(i) a fingerprint impression is ***derived from a crime scene****; and*
(ii) there are reasonable grounds for suspecting that the person was involved in the ***commission of an offence related to the crime scene*** *and believing that fingerprint analysis could confirm or disprove the suspicion.*
(2) Where a fingerprint impression is taken as provided under subsection (1), the fingerprint impression shall be analysed.
(3) The data derived from the analysis under subsection (2) shall be kept and the Commissioner shall cause that data to be transferred to the National Fingerprint Database.
……

50D. *(1) Where a police officer is required to serve a summons on a person to appear before a Court as* ***a defendant in a criminal case****, the police officer may also serve on the person a Notice requiring that person to attend on such date and time and at such place as specified in the Notice for the purpose of giving a fingerprint impression.*
(2) Where ***a fingerprint impression*** *is taken under this section, the fingerprint impression shall be analysed.*
(3) The Commissioner shall cause the data derived from the analysis of the fingerprint impression under subsection (2) to be transferred to the National Fingerprint Database.
(4) A fingerprint impression collected and analysed under this section shall not be destroyed but shall be retained by the Commissioner.

50J. *(1) A fingerprint impression taken under section 50A, 50B, 50C, 50D, 50E or 50I shall be* ***kept*** *for* ***a minimum period of five years*** *from the date on which the data was entered into the National Fingerprint Database and thereafter* ***the fingerprint impression may be destroyed****.*

(2) Notwithstanding subsection (1), a Court may order that a fingerprint impression that has been taken under this Act, shall not be destroyed if the Court is satisfied that the fingerprint impression might reasonably be required for the investigation or prosecution of an offence or for purposes of an appeal.

50K. *(1) There is hereby established a database of analysed fingerprint impressions collected under this Act, to be known as the "National Fingerprint Database".*
(2) ***The Commissioner shall have control and custody*** *of the National Fingerprint Database and shall, in accordance with this Act,* ***add to and remove data*** *from the National*
Fingerprint Database.
(3) Where a fingerprint impression is taken from a person **who is exonerated*, the data from the fingerprint impression shall be destroyed and removed*** *from the National Fingerprint Database,* ***after the expiration of twenty years from the date of exoneration****.*
(4) ***Notwithstanding the destruction of a fingerprint impression*** *under section 50J,* ***where data from a fingerprint impression is retained*** *from the period of the destruction of the fingerprint impression to the twenty-year period at subsection (3), the data from the fingerprint impression is* ***deemed to be the data*** *related to the fingerprint impression destroyed and the data may be used as evidence in any matter involving the person to whom the data relates.*

(72) Under Section 50(A) fingerprint impressions can be taken from a person without his consent:-

a] Where the person is a detainee or an accused; or

b] Where the fingerprint impression is derived from a crime scene and there are reasonable grounds for suspecting that the person was involved in the commission of an offence related to the crime scene and believing that fingerprint analysis could confirm or disprove his suspicion.

(73) The effect of section 50 (K) is that while a fingerprint impression may be destroyed the data from that fingerprint impression may be retained for a period of up to 20 years.

(74) Under Section 50(K)(3) it is provided where a fingerprint impression taken from a person who is **exonerated**, the **data** and the fingerprint impression shall be destroyed and removed from The National Fingerprint Database, after the expiration of twenty years from the date of exoneration. The legislation provides for the automatic destruction of fingerprint data after the expiration of twenty years in the case of persons who have been **exonerated**.

(75) Where a person is a detainee, he may be detained and subsequently charged. Alternatively, however he may simply be detained but released without charge. A person who is **detained and then charged with an offence or who is accused** could expect in the normal course to have his accusations or charges dealt with by the courts resulting in either a conviction or an acquittal. In those circumstances, if found not guilty by a Court at a trial, or if his charges were dismissed, or if he were otherwise discharged from criminal liability, he would fall within the class of persons **exonerated** and the provisions for the eventual removal of his fingerprints from the Database would apply.

(76) In the case of the person who is detained but then released without charge, he would not fall within the category of exonerated persons in respect of which there is provision for eventual removal from the Database of his fingerprint impressions and data. The Act provides for the collection and retention of fingerprint impressions and data from such persons, but unlike in the case of exonerated persons, makes no provision for their eventual removal from the Database. Such a person does not fall within the category of exonerated persons set out above because:

i] He has not been found not guilty by a court at trial. He cannot be because there was no possibility of trial if he was released without charge;

ii] Similarly such a person was not charged with an offence and therefore could not have had his charges dismissed in relation to any offence; and

iii]Equally he would not have been a person who was discharged from criminal liability in relation to a particular offence because there is no mechanism in relation to a person who was detained and then released but not charged for being discharged from criminal liability.

(77) It would therefore be unreasonable and unjustifiable for such a person to have his fingerprint impressions and data retained indefinitely, even beyond the expiration of a period of twenty years that would have been applicable in the case of an exonerated person.

(78) In those circumstances the only possibility that exists for him to have his fingerprint impressions and data destroyed and removed from The National Fingerprint Database must be derived from

the Commissioner's discretion under section 50(K)(2) to add to or remove data from that database. Such a person therefore must have the right to apply to the Commissioner for the removal of his fingerprint impressions and data from the National Fingerprint Database.

(79) Unlike the situation in Canada, there is no evidence of any policy by the Commissioner of Police of destroying fingerprint records of persons who were acquitted of an offence. Similarly, there is no evidence here of any policy of removal from the database of the information of persons who have been detained but never charged.

(80) Those provisions of the Act, in failing to provide adequate safeguards for the eventual removal of fingerprint impressions and data of such persons from the Database would not satisfy the further requirement of being reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual. It amounts to unnecessary, disproportionate and unjustifiable interference with the right to respect for the individual's private life.

(81) It may even result in unequal treatment in that this category of persons is subject to indefinite retention of their data while other categories of persons, including those actually charged with an offence, have the benefit of a mechanism provided for eventual removal of their fingerprint data. This would be another matter demonstrative of the fact that retention of their data constitutes an unjustifiable and disproportionate interference with their constitutional rights and freedoms.

(82) This would not invalidate the entirety of the challenged provisions however as appropriate declarations can be made to address that limited situation as set out above.

Whether the challenged provisions are unconstitutional

(83) Legislation, including the impugned provisions, had been passed by a special majority comprising at least three fifths of both houses of Parliament. Their constitutionality therefore had to be judged by reference to the test set out in section 13 of the Constitution, namely whether they were reasonably justifiable in a society which has a proper respect for the rights and freedoms of the individual.

Whether the challenged provisions are unconstitutional

(84) Both parties accept that the answer to this question depends upon the application of the guidance of the Judicial Committee in **Suraj** (a decision that was not yet available at the time of the hearing) on the circumstances in which legislation passed by a special majority could nevertheless yet be unconstitutional. According to the Judicial Committee in **Suraj**, a proportionality test would be applicable, although a different proportionality test from that applicable when considering whether legislation is incompatible with sections 4 and 5. The following extracts of that judgment are particularly relevant. (All emphasis added)

> *51. The relevance of a proportionality test in Caribbean constitutions was first examined by the Board in its judgment in de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69. That case concerned the constitution of Antigua and Barbuda which set out fundamental rights and contained a provision which allowed for interference with such rights unless it "is shown not to be reasonably justifiable in a democratic society". In a judgment which has proved influential, this was interpreted as imposing a proportionality test. The test has been somewhat refined in the caselaw since then: see T Robinson, A Bulkan and A Saunders, Fundamentals of Caribbean Constitutional Law, 2nd ed (2021), pp 473-475. It is now taken to conform with the modern conventional approach to issues of proportionality, which involves asking in relation to a measure* ***(i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community****: see Huang v Secretary of State for the Home Department [2007] 2 AC 167, para 19 (Lord Bingham of Cornhill) and Bank Mellat v HM Treasury (No 2) [2013] UKSC 39, [2014] AC 700, paras 20 (Lord Sumption) and 73-74 (Lord Reed).*
>
> 91. *The proportionality approach for bringing into account both individual rights on the one hand and the general interest of the community on the other is aimed at ensuring that a balance is struck between the two. The stronger the public interest in issue, the greater the interference with individual rights which may be permitted without there being any violation. Generally, in a democracy, it is the democratic institutions which have the primary responsibility to identify the public interest and what is required to promote it.* ***As Baroness Hale put it in Suratt, para 58: "It is for Parliament in the first instance to strike the balance between individual rights and the general interest". Where Parliament gives expression to the public interest not merely by legislation passed in the usual way, but by an Act passed by a super-majority in each House pursuant to section 13 and which records expressly on its face that it is to have effect "even though inconsistent with sections 4 and 5",***

Parliament will have identified in a particularly clear and forceful way its opinion as to where the public interest lies. In a democratic state, the courts must be expected to be especially respectful of the choice made by Parliament to pass legislation in that form and slow to substitute their own view of the necessity for and proportionality of the measure taken.

92. *That the proportionality framework may be affected by the extent of the engagement of the democratic institutions of the state is well attested by decisions in other jurisdictions: see Draon v France (2006) 42 EHRR 40, para 108; Animal Defenders International v United Kingdom (2013) 57 EHRR 21, paras 108-109 and 113-116; and R (SC) v Secretary of State for Work and Pensions [2021] UKSC 26; [2022] AC 223, paras 208-209 ("SC"). In the context of the Constitution, where an Act has been passed using the super-majority procedure in section 13, "the democratic credentials of the measure" are especially strong (in the language used by Lord Reed in SC at para 209).* ***Accordingly, although the court has to make the ultimate judgment whether the proviso in section 13(1) has been satisfied or not, it is obliged in doing so to give especially great weight to the judgment of Parliament regarding the importance of the public interest which is sought to be promoted by the measure in question. In the context of section 13 it is clear that the intention is that the weight to be given to the judgment of Parliament regarding the importance of the public interest and how individual rights should be accommodated in relation to that is even greater than in relation to an ordinary proportionality assessment, because the Constitution provides that Parliament may override the ordinary application of the rights in section 4 where it judges that the public interest requires this, provided that it faces up directly to the possibility that the measure may be inconsistent with sections 4 and 5 and uses the super-majority procedure. The proviso in section 13(1) is a long-stop check against abuse of that power and cannot be taken merely to replicate the ordinary proportionality standard inherent in the rights in section 4.***

93. ***That this is the intended effect of the proviso is reinforced by the fact that under it the onus is cast upon the person who contests the compatibility of the measure in question with the Constitution to show that it is not reasonably justifiable.*** *This is to be contrasted with the position under the ordinary proportionality test inherent in the rights in section 4, where if the measure is shown to constitute an interference with a right the onus is on the state to justify it: see Paponette, paras 25 and 36-43; Webster v Attorney General of Trinidad and Tobago (above), para 21; and Robinson et al, Fundamentals of Caribbean Constitutional Law, pp 472-473. Where the court poses the question whether, according to the long-stop test in section 13(1), a measure is "reasonably justifiable" and the onus is on the complainant to show that it is not, according to unspecified bedrock principles which underpin a democratic society and one which "has a proper respect for the rights and freedoms of the individual", in the absence of being able to refer to a clear standard set out in positive law a court will be slow to conclude that this has been shown: compare SC (above), para 208. As Archie*

CJ rightly observed in Northern Construction, paras 5 and 21-22, section 13(1) places a "heavy burden" on the complainant.

94. Nonetheless, in the Board's view the test to be applied under the proviso in section 13(1) is still a version of the proportionality test, albeit one framed in a way which gives especially strong weight to the judgment of Parliament regarding the imperative nature of the public interest. ***Where legislation has been passed by a super-majority, that is capable of affecting each of the four stages in the proportionality test (para 51 above). It shows that Parliament considers the public interest objective to be very important indeed (stage (i)), which in turn is likely to affect assessment of whether there is a sufficient degree of connection between the measure in issue and that objective (stage (ii)), whether the trade-offs in public policy terms in using that measure as opposed to others are acceptable (stage (iii)) and the question at stage (iv) (sometimes called proportionality in the strict sense). The essential question posed under the proviso, taking account of this framework, is whether the Act in question strikes an acceptable balance between the rights and freedoms of individuals and the general interest of the community.*** *The proportionality test has been developed as the appropriate way to answer this question across a range of contexts and, since it is readily capable of being adapted in a suitable way to be applied here as well, there is good reason to conclude it should be used in the context of section 13(1). …*

Rationale for Retention – Reasonable justifiability

(85) The Trial Judge considered the reasoning behind the retention of fingerprint impressions and data and concluded that the retention of such material for a period of at least five years was justifiable in a society which had a proper respect for the rights and freedoms of the individual. Her reasoning is found in particular at paragraphs 92 and 105 of her judgment.

On the other hand, I am of the opinion, that the respective periods of retention of the fingerprint data of persons who have been exonerated is within the margin of appreciation of the State and necessary when the said periods are considered against the backdrop of the high number of serious crimes and the challenges in the criminal justice system.

On the other hand, I have found that sections 50A (3), 50 J(1) and 50K (3) and 50K (4) do not infringe an individual's right to a private life and are therefore valid. I have arrived at this position because a person is not easily identifiable by his fingerprint impression. The purpose for the retention of the fingerprint data is consistent with the legislative objective of the detection and combatting of crime. Additionally, there is a limited period of retention for this data which operates after a person has been exonerated. This period of retention may appear to be long, but in the context of the national peculiarities in this jurisdiction as it relates to the delays in the criminal justice system, the period of retention

is within the State's margin of appreciation. Further, there are added measures to protect the right of the individual, such as the Commissioner of Police has custody and control of the database which means that access to the said information is limited and the Commissioner has a discretion to destroy the fingerprint information as prescribed by section 50 J(1).

(86) While at paragraph 105 she reasoned curiously that a person is not easily identifiable by his fingerprint impression this aspect of her reasoning was not essential to her conclusion, based upon the other matters set out above, that the challenged provisions satisfy the reasonable justifiability test in **Suraj** as set out hereunder.

(87) At paragraphs 64 and 65 of her judgment set out hereunder she identified the competing arguments on behalf of the appellant and respondent under the heading ***Are the means used to impair the right to private life no more than is necessary to accomplish the legislative objective and are within the State's margin of appreciation?*** as follows*:*

64. It was argued on behalf of the Claimant that the impugned provisions run afoul the terms of necessity for the following reasons: (i) there are excessive time periods for the retention of the fingerprint data and an indefinite period of retention for measurements and photographs; (ii) there is a lack of categories of offences for which personal information can be taken without consent; (iii) no discretion is given to the Commissioner of Police to immediately destroy the fingerprints, measurements and photograph of an individual after he/she has been acquitted; and (iv) no restriction is placed on the dissemination of the harvested information by the Commissioner of Police.

65.Counsel for the Defendant submitted that the impugned provisions are not excessive or disproportionate as: (i) they are narrow in scope since they only affect a limited category of persons; (ii) they do not permit the indefinite retention of fingerprints or related data from persons who have been acquitted or exonerated and the periods of retention of this information in the impugned provisions, are reasonable in the context of the deficiencies of criminal justice system in this jurisdiction; (iii)the failure by the impugned provisions to make any distinction between certain types of offences or between persons who have been reasonably suspected to have committed an offence, or those who have been charged and convicted and those who have been charged and acquitted are justified, as any differentiation would frustrate the efficacy of the database in the detecting and combatting of crime which was the legislative purpose; and (iv) the provisions do not prevent a person who has been exonerated to apply to the Commissioner of Police to have his information destroyed.

(88) She referred also to the Hansard Reports from the House of Representatives and the Senate. In the House of Representatives the justification was provided for a long period of retention based on its potential impact upon cold (long unsolved) cases. She emphasised the following statement: *"The Advice we have received, which the Government respects and accepts, is that* ***the longest possible period that the State, through the Police Service and the Custodian, can retain these samples and profile, the better the country's chances are at fighting crime***". (Emphasis added by the trial judge).

(89) She also emphasised the following statement from Senator Ramlogan's contribution in the Senate at paragraph 86 of the judgment. "***The gathering of evidence from a crime scene, whether it is a fingerprint or DNA evidence, is only as useful and as valuable as the database or bank that they have to match it against***".

(90) She therefore accepted the argument that a long period of retention was necessary and that it was consistent with the legislative objective of the detection and combatting of crime. It was in that context that she concluded: *"This period of retention may appear to be long, but in the context of the national peculiarities in this jurisdiction as it relates to the delays in the criminal justice system, the period of retention is within the State's margin of appreciation"*[8]*.*

(91) She also considered that while the legislation curtailed the rights of some individuals, the public interest outweighed those rights[9]. She reasoned that heinous crimes had the effect of depriving individuals of their right to life, liberty, and property. The legislation is therefore consistent with the State's duty to the public.

[8] Paragraph 105

[9] See paragraph 55 of her judgment *In my opinion, a feature of a democratic society is to recognise, respect and protect an individual's right to privacy. It is also equally a feature of a democratic society to empower the Parliament, including the elected representatives of the citizens, to pass legislation which can curtail the rights of an individual in instances where the public interest outweighs those rights. Some of the most heinous crimes which can be committed in a society has the effect of depriving an individual of his right to life (murder), liberty (kidnapping) and property (burglary, robbery, fraud, larceny, and other related offences). The State has a duty to enact legislation to protect citizens from the arbitrary interference of their right to life, liberty and property and in this regard, the stated legislative intention for the impugned provisions is consistent with the State's duty to the public.*

(92) She also referred to the extract from the Hansard Report which recognized that the fact that a person had been exonerated by a court did not mean that the usefulness of retention of his fingerprints and data came to an end, given that persons who might be repeat offenders could have been acquitted on technicalities[10]. She accepted that the references in Hansard, including the above, supported the respondent's position that the challenged provisions were reasonably justifiable in a society that had a proper respect for the rights and freedoms of the individual because:

> *a. The legislative objective of the impugned provisions is sufficiently important to justify limiting the right to respect for private life;*
> *b. The measures designed to meet the legislative objective are rationally connected to it; and*
> *c. The means used to impair the right to private life are no more than is necessary to accomplish the legislative objective and are within the State's margin of appreciation[11].*

(93) She accepted the argument that retention of the fingerprints and data of persons even if exonerated was nevertheless necessary to enhance the ability of the police to investigate possible further crimes which may be committed by them.

(94) The trial judge considered that the safeguards provided in respect of persons who were exonerated struck the balance between the rights of individuals whose fingerprints had been collected and retained, and society in general whose rights to life, liberty, and protection of property were all at risk from criminal activity.

(95) In this case the legislation presumptively infringes sections 4 and 5, as certified thereon, but has been passed by special majorities of both Houses of Parliament in recognition of this. The appropriate test therefore is as set out above.

(96) The appellant contends that the legislation does not satisfy the requirements in **Suraj** of:

a] Being proportional;

b] Being rationally connected to their intended purpose, and

[10] Paragraph 43
[11] paragraph 39 a b c of the judgment

c] Satisfying the test of whether a less intrusive means of achieving that objective could have been utilized.

(97) In particular the appellant contends that the legislation falls afoul of those requirements because allegedly:

a] Insofar as the legislation provides for a period of **twenty years** for the retention of fingerprint data that is **excessive** and not justifiable in a society which has proper respect for fundamental rights and freedoms;

b] In relation to persons who have been exonerated there is no justification for the retention of their data for any period once they have been so exonerated;

c] It makes no provision for the removal of fingerprints and fingerprints data from the National Fingerprint Database in respect of some persons who do not fall within the category of exonerated persons, leading to a situation where their data can be retained indefinitely or permanently on the National Database;

d] That it removes the discretion entirely of the Commissioner of Police to determine when and in what circumstances fingerprint impressions and data could be removed from the database including where persons have been acquitted or exonerated;

e] There is no provision for any application to be made to the Commissioner of Police in respect of fingerprint impressions (and also therefore fingerprint data) within any period less than five years. This constitutes an unacceptably stringent restriction on the Commissioner's discretion and is not reasonably justifiable for that reason also;

f] It draws no distinction between different categories of offences before making provision for the retention of fingerprint impressions and fingerprint data and its incorporation into the National Fingerprint Database;

g] It makes no provision or distinction between children and vulnerable members of society, and others.

(98) In order to assess the validity of these submissions it is necessary to first examine the challenged provisions within the context of the legislation as a whole. Insofar as it is contended that the retention of data of persons generally is inconsistent with the presumption of innocence, there are provisions which demonstrate that there is no link between the retention

of fingerprint impressions or data in the National Fingerprint Database and any presumption of guilt or criminal wrongdoing. Section 50(C) provides for the collection and retention of fingerprint impressions from persons entering the country. There is no suggestion that this is linked to any allegation of wrongdoing.

(99) The respondent accepts that the retention of fingerprint impressions and data could amount to infringement of the right to respect for the individual's private life. It is assumed for the purpose of his judgment that section 4 of the Constitution is potentially infringed by the legislation and the impugned provisions, and that Parliament recognized this. Hence the passage of the legislation by a special majority and the express recognition by section 2 of the Miscellaneous Provisions (Administration of Justice) Act 2014 that it was passed notwithstanding inconsistencies with section 4 and 5 of the Constitution which were potentially infringed by the challenged provisions.

(100) Section 50(J) (1) of the Act provides that a fingerprint **impression** shall be kept for a **minimum period of five years** from the date on which the data was entered into the National Fingerprint Database and thereafter the fingerprint impression may be destroyed.

(101) Under Section 50(K)(2) it is provided that *"The Commissioner should have control and custody of The National Fingerprint Database and shall, in accordance with this Act, add to and **remove data** from the National Fingerprint Database".* The Commissioner therefore has the power to add to and **remove data** from The National Fingerprint Database. Implicit in this is that this discretion/power can be exercised upon application made to him.

(102) Under Section 50(K)(3) it is provided "Where a fingerprint impression is taken from a person who is exonerated, the **data** from the fingerprint impression shall be destroyed and removed from the National Fingerprint Database, after the expiration of **twenty years** from the date of exoneration. Section 50(K)(3), unlike Section 50(J)(1) does not provide for any minimum period of retention. Rather it provides for retention for a period of twenty years.

(103) Section 50(K)(3) provides for a **maximum period of retention**, given the fact that the discretion at section 50(K)(2) conferred upon the Commissioner to add to or destroy data from the National Fingerprint Database, is not expressed to be restricted by any mandate to retain the data for a period of twenty years.

(104) Section 50(K)(3) therefore provides for a maximum period of retention of the data from a fingerprint impression in respect of a person who was exonerated, while retaining the **discretion** of the Commissioner to add to or **remove data** from the Database before the expiration of twenty years subject to the statutory minimum retention period of five years in the case of fingerprint impressions and data.

(105) The discretion of the Commissioner of Police is especially provided for at 50(K)(2) "in accordance with this Act". The Act confers discretion upon him to remove data from the Database but it does not provide that the retention of fingerprint data for a period of twenty years is the minimum or mandatory period for retention.

(106) With respect to persons who do not fall within the definition of "exonerated", and in particular persons who have been detained but released without being charged, provided that the Act is construed to include them in and equate them to the definition of exonerated persons, they too could make an application under Section 50(K)(2) to have their data expunged from the Database after a period of five years, the minimum provided for in respect of fingerprint impressions.

(107) The trial judge concluded that those portions of section 50 (A) to (K) (which relate to fingerprint impressions and data) set out above do not infringe an individual's right to respect for private life and are therefore valid. This conclusion is difficult to follow because:

i] the legislation itself accepts the possibility of its inconsistency with sections 4 and 5 of the Constitution,

ii] the extracts from Hansard record statements from the Honourable Attorney General as he than was, who in piloting the legislation accepted that it could invade the right to privacy[12],

iii] all of the cases cited by the trial judge supported the proposition that retention of biometric data including fingerprints constituted interference with the right to respect for private life[13]. The further issue in those cases is whether the retention of fingerprint data constituted a disproportionate interference with that right. It was not in dispute however that the right was infringed,

iv] the respondent's written submissions, though inconsistent on this issue, appeared to accept that the right to privacy was infringed though the infringement was reasonably justifiable[14],

v] in any event a citizen is entitled to a reasonable expectation of privacy in relation to personally identifiable information and even more so when that information comprises unique biometric data[15].

(108) She did however address and analyse the issue of whether the provisions were reasonably justifiable under section 13 of the Constitution and concluded that they were, although the provisions with respect to photographs, (not the subject of this appeal) were not.

Whether the objective of the legislation is sufficiently important to justify the limitation of a fundamental right

(109) This requires consideration as to the legislative objective of the challenged provisions. The legislative objective on its face, (as well as supported by the Judge's findings, based upon the Hansard which was introduced by the parties in the court below), was to provide an effective tool for the police in the fight against crime by providing a database with as much information as possible. One consideration in achieving this was to provide for the information collected to be retained therein for as long as reasonably possible.

[12] Paragraph 86 judgment of trial judge
[13] See S and Marper, Gaughran cited by the trial judge at paragraphs 80 -82
[14] See paragraph 29 of the respondent's written submissions
[15] See paragraph 64, 69, 70 of Devant Maharaj v The Commissioner of Valuations and AG CA S119/2018

(110) The objective was: i] to populate the Database which would allow for the collation of sufficient fingerprint impressions and data to compare with that collected from a crime scene and ii] to provide for the information therein to be sufficiently long-lasting to enable police to detect whether a person who fell within the categories under section 50(A) was as far into the future as possible associated with fingerprints related to a subsequent investigation or a crime scene.

(111) A legislative choice was made to have the **retention period** as long as twenty years and to provide a minimum period for the retention of fingerprint impressions for five years. It is recognized that there could have been shorter periods than this but the Legislative choice was made for those periods to be incorporated in the Legislation because the more extensive the database the greater the possibility of obtaining a match.

(112) The choice as to the retention of data from persons who were exonerated or detained but released without subsequent charge took into account the fact that in this jurisdiction an acquittal of a person charged or accused may occur in circumstances which fall short of a full hearing at a trial, (for example, inter alia failure of a witness to attend, or exoneration on a technicality), while recognising the possibility of repeated criminal behavior by such a person.

(113) There can be no presumption of guilt given that the purpose of a database is not only to be implicative of persons but also to be potentially exonerative if their fingerprints do not match those at a subsequent crime scene.

Whether the challenged provisions are rationally connected to the legislative objective

(114) As revealed on the evidence before the trial judge the legislative objective was to provide the police with adequate and effective tools for the investigation of crime, with the ultimate aim of increasing the rate of detection, convicting the guilty and reducing the overall level of crime. Those are matters that are entrusted to Parliament. The legislation provided for retention of fingerprint impressions and data from persons, even after they had been discharged, acquitted or exonerated for a minimum period of five years and a maximum period of twenty years. Those

provisions were intended to create a very wide database. On the evidence the intention of Parliament was the wider the database the more effective it would be as a tool for investigating and prosecuting criminal matters, as well as potentially exonerating as suspects persons shown not to be at a crime scene. In the instant case there is therefore a rational connection between the legislative objective and the challenged provisions. It has also been demonstrated that they are designed to pursue a legitimate aim.

Whether proportionate

(115) The appellant has contended that the provisions are disproportionate because of the following[16]:

> *6. The Claimant stated that he was advised by his Attorneys at law, that the impugned provisions prohibit him from applying to the relevant authorities for the immediate destruction of the information which was harvested from him on his arrest, despite now being acquitted of all charges. The Claimant was also advised by his Attorneys at law that the impugned provisions infringe on his constitutional right to private life; they do not pursue any legitimate aim; and in any event they are clearly disproportionate and/or unreasonable as:*
> *a. The Commissioner of Police has no discretion to immediately destroy/remove harvested information upon a person's discharge or acquittal;*
> *b.* (not relevant to this appeal)
> *c. The Commissioner of Police may only exercise a discretion to destroy a fingerprint impression after five years from the date on which the data was entered on the National Fingerprint Database (section 50J(1));*
> *d. The Commissioner of Police is only mandated to destroy the fingerprint data from the National Fingerprint Database twenty years after a person is exonerated (section 50K(3));*
> *e. No distinction is made between persons suspected of or charged with serious offences as opposed to minor offences;*
> *f. No restrictions are placed on the dissemination of the harvested data by the Commissioner of Police; and*
> *g. The restrictions placed on the time period for which the harvested data shall be held are wholly disproportionate and/or unreasonable.*

(116) Arguments a, c, and d, relate to the period of retention. As indicated above this was a legislative choice given the high rates of crime and the low incidence of detection which gave rise to the need to populate the Database in a manner and to an extent to render it as effective as reasonably possible.

[16] Paragraph 6 of judgment of trial judge

(117) Arguments e and f were considered by the trial judge but were not accepted as evidence of lack of proportionality and her finding and conclusions in this regard are unimpeachable.

(118) The appellant raised concerns about victimization based upon access to his personal data retained in the Database. The evidence was that in relation to fingerprint impressions and data access was restricted and systems were in place to prevent unauthorized or unjustified access.

(119) Further, these arguments were considered by Parliament in seeking its approval to pass the legislation, notwithstanding its inconsistency with sections 4 and 5 of the Constitution. Parliament accepted those arguments and made a choice that a period of twenty years would be the maximum period for retention of fingerprint data in respect of exonerated persons. It recognized at the same time that a shorter period could have been used but chose not to do so based upon its recognition, as gleaned from Hansard, that in this jurisdiction:

a] There is an extraordinarily high crime rate;

b] There is an extraordinarily low rate of detection of crime;

c] That matters proceed at a glacial pace in the criminal courts.

Whether less intrusive measures could have been utilized

(120) The legislature recognized that less intrusive measures could have been used in relation to the period of retention and the pool of persons to populate the Database. However to achieve the legislative objective of providing an effective tool to deal with the worsening crime situation it also recognized that shortening the period of retention of data carried the risk that that data may have been required to be expunged before it could be meaningfully utilized given the slow pace of detection. The longer the retention period the more effective would be the Database.

(121) The choice was therefore made not to eviscerate the legislation by providing the tool of the Database on the one hand while providing too short a period for the retention of data in that Database. Instead, Parliament made the choice to utilize a period of twenty years, recognizing that a shorter period could have been utilized but with the intention of ensuring that the database provided maximum utility by having fingerprints and data therein accessible for a

period of at least five years and up to twenty years. It therefore struck a proportionate balance by making that choice

(122) In striking such a balance, the courts are required to allow a margin of appreciation in respect of Parliament's choice. While it is accepted that the court may strike down the legislation as being unconstitutional if it falls afoul of the proviso in section 13, (it must be reasonably justifiable in a society which has the proper respect for fundamental rights and freedoms), the court cannot construe that as a licence to second guess the legislative choice on policy made by a majority of three fifths of both houses of Parliament as to where that balance should be struck.

Summary

(123) In this case even if the challenged provisions infringed the right to privacy/or respect for private life, by providing for the retention of fingerprint data, even in the case of exonerated persons, for a minimum period of five years and a maximum period of twenty years, they are nevertheless proportionate for the following reasons:

i] The period of twenty years is the maximum period for which fingerprint data can be retained;

ii] Although under Section 50(J) the minimum period of five years is provided, with no proviso for review of the decision to retain the data within that period, that was a legislative choice justified by inter alia:

a] The extremely high crime rate;

b] The extremely low rate of detection;

c] The glacial pace at which investigations proceed;

d] The glacial pace at which criminal prosecutions proceed.

(124) It was contended that this justified the longest possible period of retention in order to maximize the effectiveness of detection, investigation and prosecution, as enhanced by utilizing such a

database. One intended benefit therefore would be that cold cases would not be destined to remain permanently unsolved.

(125) Despite that minimum period section 50(K)(2) recognizes the discretion of the Commissioner of Police to add to or remove data from the National Database. A mechanism therefore exists for the removal of data in relation to persons who have been exonerated. That mechanism can equally apply**, provided suitable declarations** are made herein, in respect of persons whose information has been collected under section 50(A), but who otherwise could not be considered to be exonerated, (because they were detained but then released and were never charged). In that event, such persons could apply to have their data expunged after the minimum period of five years. The five-year period itself is not unreasonable given the circumstances explained during the passage of the legislation.

(126) Nothing requires section 50(K)(3) to be construed as providing for a minimum period of retention. The retention is not indefinite in respect of exonerated persons. If the twenty-year period of retention in respect of exonerated persons was intended to establish a minimum period, then Parliament had language available to it which it utilized in Section 50(J) to demonstrate that that is what it intended. Since it did not do so, section 50(K)(3) properly construed provides for a **maximum** period of retention.

(127) Coupled with section 50(K)(2) the Commissioner would have a discretion, to be exercised upon application made to him, for the removal of data from the National Fingerprint Database any time after the minimum period of five years has elapsed. That therefore constitutes a safeguard with respect to the retention of information and any infringement of privacy associated therewith.

Whether having regard to these matters and to the severity of the consequences a fair balance has been struck between the rights of the individual and the interest of the community

(128) For the several reasons advanced during the passage of the challenged provisions, and accepted by the trial judge in her judgment, it cannot be disputed that an acceptable balance has been struck between the rights of individual and the interest of the community in enhancing the detection and prosecution of crime.

(129) The challenged provisions, subject to the limited issue identified above, have not been demonstrated to be unconstitutional under section 13 of the Constitution.

Conclusion

(130) It was not in dispute that the sections of the Police Service Act which provide for the **collection** and **retention** of **fingerprint** impressions and data from persons who are detained, accused, or connected with a crime scene, did infringe the right to respect for private life[17].

(131) Their unconstitutionality was presumed and resulted in the passage of that legislation by the requisite majority. The only issue therefore is whether having been so passed, that legislation in relation to retention of fingerprints and fingerprint data is reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

(132) Apart from the specific category of persons who were detained but released without being charged the challenged provisions do satisfy the test in **Suraj**. For the reasons explained hereunder, they do strike a fair balance between the rights of the individual and the interests of the community[18].

(133) The legislation satisfies the test of proportionality because: (i)**its objective is sufficiently important** to justify the limitation of a fundamental right; (ii) it is **rationally connected to the objective**; (iii) while the argument can be made that **a less intrusive measure** could have been used, especially strong weight has to be given to the judgment of Parliament regarding the imperative nature of the public interest and the necessity for measures of this level of intrusiveness; and (iv) having regard to these matters and to the severity of the consequences, **a fair balance has been struck between the rights of the individual and the interests of the**

[17] See paragraph 29 of the respondent's written submissions
[18] See paragraph 51 Suraj (supra)

community especially giving strong weight to the judgment of Parliament regarding the imperative nature of the public interest[19].

(134) In the case of a person who is released without charge, he does not fall within the category of *exonerated*[20] persons[21]. Because persons who were detained but never charged could not fall within the definition of persons who were exonerated, there is no mechanism otherwise provided for the removal of their data or fingerprint impressions from the National Fingerprint Database. A requirement must therefore be read into the legislation that such a person must have the right to apply to the Commissioner for the removal of his fingerprint impressions and data from the National Fingerprint Database (the Database) after 5 years.

(135) Parliament by a special majority determined that a police officer may take and record for the purpose of identification the fingerprint impression of a person without consent *"(a) where the person is a detainee or an accused"*. That legislative choice was made by Parliament exercising a special majority, expressly recognizing that it was to have effect "*even though inconsistent with sections 4 and 5*". Parliament thereby identified as in ***Suraj*** "*in a particularly clear and forceful way its opinion as to where the public interest lay*."

(136) The flaw in this legislation arose with respect to its lack of provision for treating adequately or at all with the retention of fingerprint data from detainees who had never been charged. The role of a constitutional court in those circumstances is not to strike down Parliament's deliberate legislative choice to harvest fingerprint data from them. The oversight lay in making such provision for exonerated persons but not for detainees who did not fall within that definition. This was an obvious drafting error.

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[19] See paragraph 94 of Suraj

[20] Under the definition section of the Police Service Act

[21] That is because:

iv] He is not a person who has been found not guilty by a court at a trial. (He cannot be because there was no possibility of trial in that case); or

v] He was not charged with an offence and therefore could not have had any charges dismissed; and

vi] He would not have been a person who was otherwise discharged from criminal liability in relation to a particular offence. That is because there is no mechanism in relation to a person who was detained but not charged for being discharged from criminal liability.

(137) A constitutional court could hardly strike down the legislation on this basis when it is open to it to remedy the clear oversight in relation to a limited category of persons by making the appropriate declarations below. This is not judicial legislation. Rather it is the exercise by the constitutional court of its clear and undoubted jurisdiction to correct a plain case of a drafting mistake.

(138) The intended purpose of the statute was to permit collection of, inter alia, fingerprint data from wide classes of persons including "detainees", which includes persons who have been arrested but not subsequently charged.

(139) It is obvious that by inadvertence while provision was made for the eventual removal from the National Fingerprint Database of fingerprint data with respect to persons who were subsequently exonerated, no such provision was made with respect to that class of detainees who were arrested but never subsequently charged. There can be no explanation for that other than an inadvertent drafting mistake.

(140) The substance of the provision that Parliament would have made had the error been noticed is equally obvious. It would have provided a mechanism for the eventual removal of data from the fingerprint database of such persons just as it had done with respect to persons who had been exonerated. The mechanism for doing so therefore would obviously have been the same with respect to each category of detainee, those exonerated, and those released without charge. There is no reason for it to have been otherwise.

(141) The declarations below fall well within the jurisdiction of a constitutional court. They are clearly permitted on an application of the principles stated by Lord Nichols in **INCO Europe Limited v First Choice Distribution** [2000] 1 W.L.R 586 and approved by the Judicial Committee of the Privy Council in the case of **Fazal Ghany v The Attorney General** [2015] UKPC 12 at paragraphs 14 and 15. This is not exclusively a matter for Parliament.

(142) The potential for abuse by police officers arresting persons without charging them subsequently was recognized by Parliament, expressly making provision for collection of their fingerprints nonetheless. It also chose to harvest fingerprint data from a wide range of persons

whose fingerprints on the data base were not synonymous with criminal wrongdoing. It is not for the court to second guess that legislative choice and policy by a special majority by invalidating the legislation to this extent, when the obvious oversight in language can be addressed.

(143) A legitimate concern arises as to the use of that information. While it may be legitimately utilised in the detection and investigation of crime, extreme care must be taken in the dissemination and characterization of it in other contexts to ensure that it is not open to misuse. One example may be in the provision of certificates of good character - essential for a wide range of occupations. If as a result of a detainee's fingerprint being recorded in the National Database it is recorded on such a certificate, provided at his request, that that person has been arrested and released without charge then this would be a misuse. Other examples can be envisaged.

(144) While a deliberate legislative policy choice has been made for a legitimate purpose, the Commissioner has a duty to ensure that the informational tool provided to that office is not misused.

(145) Rather than striking down the legislation as unconstitutional, because of the omission to provide for that limited category of persons, its constitutionality can be preserved by making appropriate declarations. The first such declaration would be that section 50(K)(2), (which expressly provides that the discretion of the Commissioner of Police is retained with respect to addition or deletion of data from the National Fingerprint Database), is to be read as including the additional words after "Database", the words "including data from persons who have been detained and then released without being charged". Secondly it would be necessary to declare that section 50 (K) (3) of the Act is to be read as including, after the word "exonerated", the further words "or is detained and then released without being charged".

(146) That overcomes the difficulty with respect to persons who have been detained but not charged who do not fall within the definition of "exonerated", because there would otherwise be no mechanism by which they could have their data expunged from the Database. In fact, under

Section 50(K)(2) they could make an application to the Commissioner for that purpose, after a period of five years, the minimum provided for in respect of fingerprint impressions[22].

(147) The Appellant seeks in this appeal an order that section 50 (A) (3), 50 (J) (1), 50 (K) (3), 50 (K) (4) of the PSA 15:01 infringe on (sic) the Claimant's (Appellant's) right to private life and are not reasonably justifiable in a society which has a proper respect for the rights and freedoms of the individual. The Respondent has not filed a counter notice of appeal but asks the court to declare that those sections are constitutional and that any interference with the Claimant's (Appellant's) right to private life are reasonably justifiable in accordance with section 13 (1) of the Constitution. That is in fact the effect of this Court's disposition of this appeal in rejecting the appellant's contentions, save with respect to a very limited class of persons identified above.

(148) Accordingly, subject to the declarations below, the appeal is therefore allowed in part. The challenged provisions, subject to the declarations below are not unconstitutional and they are reasonably justifiable in a society which has a proper respect for the rights and freedoms of the individual.

Orders

(149) The appeal is allowed only to the extent that:

I] It is declared that section 50 (K) (2) of the Police Service Act is to be read and construed as if the additional words "including in relation to exonerated persons" were inserted at the end of that section immediately after the word "Database".

II] It is declared that section 50 (K) (3) of the Police Service Act is to be read as including after the word "exonerated", the words "or is detained and then released without being charged".

[22] 50 (J)

Peter Rajkumar
Justice of Appeal