THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P 307 of 2023

Claim No. CV 2021-04295

BETWEEN

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Appellant

AND

F.R.

(Anonymized pursuant to the Order of the Court dated 26th October 2022)

Respondent

PANEL:

Justice of Appeal Mark Mohammed

Justice of Appeal Peter Rajkumar

Justice of Appeal Maria Wilson

APPEARANCES:

Mr. Rishi P.A. Dass S.C., leading Ms. Coreen Findley and Ms. Sasha Sukhram instructed by Ms. Anala Mohan for the Appellant.

Mr. Lee Merry leading Ms. Rebecca Rafeek instructed by Mr. Larry Boyer for the Respondent.

DATE OF DELIVERY: 22nd July, 2024

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

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Peter A. Rajkumar

Justice of Appeal

I have read the judgment of Mohammed JA. I also agree with it and I have nothing to add.

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Maria Wilson

Justice of Appeal

JUDGMENT

Delivered by M. Mohammed J.A.

Introduction

1. In this matter, F.R. ("the Respondent") alleged that she was sexually assaulted on 31st March, 2017, when she was sixteen (16) years old by an adult known to her ("the accused"). The Respondent alleged that since her assault there have been significant delays and adjournments by the State ("the Appellant") in prosecuting the accused. As a consequence, the Respondent filed a constitutional motion complaining that the State has violated, and continues to violate, her fundamental rights under the **1976 Constitution of the Republic of Trinidad and Tobago** ("the **Constitution**"). On 6th September, 2023, a judge of the High Court delivered the decision in the Respondent's constitutional motion ("the trial judge" / "the judge"). In that decision, the judge found, among other things, that the Respondent's right under **section 4 (b) of the Constitution** was violated. The Appellant appealed.

2. There are four principal issues in this appeal. The first is whether a right to a speedy trial or a right to a trial within a reasonable time exists in the **1976 Constitution of Trinidad and Tobago**. The second issue is whether the Respondent's right not to be deprived of her security of the person except by due process of law under **section 4(a) of the Constitution** was violated. The third issue is whether her right to the protection of the law under **section 4(b) of the Constitution** was violated. The final issue is whether the judge erred in making the orders enumerated at paragraph 110 (II) and (III) of her decision.

Summary of Decision

3. For the reasons which appear below, the Appellant's appeal succeeds. First, on a proper analysis and interpretation of the **1976 Constitution**, there is neither a right to a speedy trial nor a right to a trial within a reasonable time in the **Constitution of Trinidad and Tobago**. Second, the

Respondent's right not to be deprived of her security of the person except by due process of law under **section 4(a) of the Constitution** was not violated by the Appellant. Third, the Respondent's right to the protection of the law under **section 4(b) of the Constitution** has not been violated. Finally, the judge erred in making the orders enumerated at paragraph 110 (II) and (III) of her decision. The appeal is therefore allowed. The cross-appeal is dismissed.

4. Notwithstanding the conclusions above, it must be said that the situation of victims of crime needs to be recognized and addressed in a sensitive, practical, and meaningful way. There are in many cases obvious physical, psychological, and financial consequences. These continue whether or not the criminal justice system has dealt with the alleged perpetrator. However, these are matters which have political, administrative, legislative, and financial implications which cannot properly be addressed by a Court's reading into the Constitution a right which neither its language, structure, nor precedent permit.

Relevant Facts

5. In large part, the facts of this matter are not in dispute. The Respondent alleged that on 31st March, 2017, she was sexually assaulted. At that time, she was sixteen (16) years old. The accused, who lived near to the victim's family, was charged some seven (7) months later on 16th October, 2017. He was charged with the offence of the sexual penetration of a child contrary to **section 18 of the Children Act**.[1]

6. According to the Respondent, after the alleged sexual assault, she became pregnant. The Respondent's evidence was that she did not want to bring the foetus to term, but she was encouraged by her mother to do so. Her evidence was also that she attempted to commit suicide on multiple occasions. The Respondent explained that after the alleged sexual assault, she was also diagnosed with several psychological illnesses. These included Post-Traumatic Stress Disorder ("PTSD"), Major Depression, and Generalised Anxiety Disorder.

[1] Act 12 of 2012

7. By Fixed Date Claim Form dated November 29th, 2021, the Respondent commenced constitutional proceedings against the State, as represented by the Attorney General of Trinidad and Tobago. In the Fixed Date Claim Form, the Respondent sought various reliefs including:[2]

> *1. A declaration that the State has a duty to victims of crime to put mechanisms in place and allocate sufficient resources to ensure that criminal matters can be concluded expeditiously.*
>
> *2. A declaration that the failure of the State to put mechanisms in place and allocate sufficient resources to ensure that criminal matters can be concluded expeditiously constitutes a breach of the constitutional rights of victims of crime guaranteed by sections 4 (a) and (b) of the Constitution.*
>
> *3. A declaration that the failure of the State to provide an adequate remedy to victims of crime for unreasonable delay in the determination of their matters constitutes a breach of their constitutional rights guaranteed by 4 (a) and (b) and 5(2)(h) of the Constitution.*
>
> *4. A declaration that the failure of the State to put mechanisms in place and allocate sufficient resources to ensure that the proceedings in information number 1203/17, case number CR-DC-PRI-403-2021-1 can be concluded expeditiously is in breach of the Claimant's right to protection of the law.*
>
> *5. A declaration that the failure of the State to put mechanisms in place and allocate sufficient resources to ensure that the proceedings in information number 1203/17, case number CR-DC-PRI-403-2021-1 can be concluded expeditiously is in breach of the Claimant's right to security of the person and the right not to be deprived thereof except by due process of law.*
>
> *6. A declaration that the Claimant's constitutional rights guaranteed by sections 4 (a) and (b) of the Constitution have been and are being infringed by the excessive and inexcusable delay in concluding the committal proceedings in respect of information number 1203/17, case number CR-DC-PRI-403-2021-1.*
>
> *7. A declaration that the Claimant's constitutional rights guaranteed by sections 4 (a) and (b) of the Constitution are likely to be infringed by the excessive delay in the conclusion of the Criminal High Court trial in respect of information number 1203/17, case number CR-DC-PRI-403-2021-1.*
>
> *8. An order of mandamus compelling the State to put mechanisms in place and allocate sufficient resources to ensure that the committal proceedings in*

[2] Record of Appeal, Volume I, Fixed Date Claim Form, page 62

information number 1203/17, case number CR-DC-PRI-403-2021-1, are completed expeditiously.

9. An order of mandamus compelling the State to put mechanisms in place and allocate sufficient resources to ensure that, if the accused is committed to stand trial in the proceedings in information number 1203/17, case number CR-DC-PRI 403-2021-1, the Criminal High Court trial in respect of those proceedings are completed expeditiously.

10. Damages.

11. Costs.

12. Such further or other relief as the Court deems fit.

8. The Respondent's evidence was that at the time of the filing of the Fixed Date Claim Form, the accused's committal proceedings/Preliminary Inquiry had not yet been completed. However, during the course of the constitutional proceedings before the judge, the accused was committed to stand trial at the High Court.

The judge's findings

9. The trial judge's findings may be summarised as follows:

   (a) The Respondent suffered psychological prejudice because of her alleged sexual assault.

   (b) Although the psychological prejudice stemmed from her alleged assault, such prejudice was accentuated by the trauma from the ongoing court proceedings.

   (c) The psychological prejudice experienced by the Respondent was serious.

   (d) The psychological prejudice caused by the ongoing court proceedings has infringed the Respondent's right to her security of the person.

(e) However, in determining whether the Respondent's right under **section 4(a)** has been violated, the Court had to examine the legal system as a whole to determine whether the right to security of the person was breached without regard to the principles of due process. According to the Court, the question was whether there was any avenue available to the Respondent to seek redress.

(f) The judge found that when the legal system was examined as a whole, there was redress available to the Respondent.

(g) Thus, while the Respondent's right to security of the person was infringed, she was not deprived of due process of law. Hence, **section 4(a)** was not violated.

(h) As to the right to the protection of the law, the judge found that that right is broad and expansive and can be interpreted having regard to the State's international obligations.

(i) She further noted that following Trinidad and Tobago's ratification of the **United Nations Convention on the Rights of the Child** ("**UNCRC**"), the Parliament either revised or enacted a suite of legislation to fulfil Trinidad and Tobago's obligations under the Convention. She also found that the obligations imposed in those international instruments were incorporated into domestic law.

(j) The judge then found that when one looks at the provisions in the suite of legislation, it was clear that once a Magistrate becomes aware that a matter in which a Virtual Complainant is a child, that matter was a "children matter" as defined in the **Family and Children Division Act** ("**FCDA**").[3] As such, it had to be referred to the Children Court.

[3] Act No. 6 of 2016

(k) The judge found that the criminal case lumbered through the Court without regard to the Respondent's status as a child and without the Respondent being treated as a child victim.

(l) Thus, while the Respondent was afforded access to the Court, such access was not effective as the matter was not transferred to the Children Court.

(m) Notwithstanding the above, the judge found that the State had neither failed to put mechanisms in place nor failed to allocate sufficient resources to ensure that criminal matters can be concluded expeditiously.

(n) However, given the law relating to children matters specifically, the Court was satisfied that the Respondent was not afforded the protection of the law. Therefore, the Respondent's **section 4(b)** right was violated.

The judge's orders

10. As a result of the judge's findings, she made the following orders:

I. The Court declared that the failure to ensure that children matters are expeditiously concluded, constituted a breach of the constitutional rights of child victims of crime to the protection of the law guaranteed by **section 4(b) of the Constitution**.

II. The Court granted an order of mandamus compelling the State to put mechanisms in place and allocate sufficient resources to ensure that, the accused who was committed to stand trial at the Criminal Assizes in the proceedings in information number 1203/17, be completed expeditiously.

III. The Court granted an order of mandamus compelling the State to provide the necessary psychological counselling for the Respondent while the proceedings in information number 1203/17 are pending. The Appellant was also obligated to

provide half-yearly reports to the Registrar of the Supreme Court on the arrangements made for the Respondent's counselling.

IV. The Appellant was to pay nominal damages in the sum of $60,000.00.

The grounds of appeal

11. There were nineteen (19) grounds of appeal filed against the judge's decision.[4] Broadly speaking, the Appellant's grounds of appeal can be summarised using the following heads:
    (a) An alleged breach of the Respondent's **section 4(a)** right;
    (b) An alleged breach of the Respondent's **section 4(b)** right;
    (c) The judge erred in awarding damages; and
    (d) The judge erred in making the orders and declarations that she did.

The Submissions

12. This Court will set out an overview of the parties' submissions. It will then delve deeper into those submissions when addressing each individual issue.

The Appellant's Submissions

13. First, Mr. Dass SC, Counsel for the Appellant, submitted that a constitution such as **the 1976 Constitution** represented the embodiment of deliberate political choices made by the constitutional framers and adopted by the democratically-elected legislature. As such, when interpreting the Constitution, a Court's task was to interpret it in such a way that respects the deliberate political and constitutional choices as embodied in the language and text of that document. In support of this submission, the Appellant referred to a range of authorities including **Pinder v The Queen**,[5] **Matadeen v Pointu** ("**Matadeen**"),[6] **Boyce v R** ("**Boyce**")[7] and most recently,

[4] Record of Appeal, Volume I, page 7
[5] [2003] 1 AC 620 at [15]
[6] [1999] 1 AC 98 at [7]
[7] [2005] 1 AC 400

Attorney General of Bermuda v Ferguson ("**Ferguson**").[8] The Appellant relied on the lattermost case for the proposition that reliance on international conventions and the constitutions of other countries does not trump the express language of the Constitution.

14. The Appellant's second plank of submissions concerned the existence of a right to a speedy trial. As to this matter, the Appellant submitted that it has long since been established that there was no constitutional right to a speedy trial. The Appellant cited the decisions of **DPP v Tokai** ("**Tokai**")[9] and **Sookermany v Director of Public Prosecutions** ("**Sookermany**").[10] According to the Appellant, those cases established that there was no right to a speedy trial for an accused. Thus, the Appellant reasoned that if there was no such right for an accused, it cannot be countenanced that there would be such a right for a victim. The Appellant's case was that the fair trial rights in our Constitution relate to the rights of the accused and not the victim. The Appellant submitted that victims' rights were left to be addressed by the Legislature.

15. The Appellant explained that part of the reason for this deliberate political choice was the fact that the rights guaranteed under the Constitution in respect of services to be provided by the State do not extend to specific guarantees as to any particular standard of service to the public: see **Prime Minister v Comprehensive Nephrology Services Ltd** ("**Nephrology Services**"),[11] **R v Commissioner of Police of the Metropolis ex parte Blackburn**[12] and **R v East Sussex County Council, Ex p Tandy**.[13] According to the Appellant, the Respondent's case concerned the manner in which the prosecution was being carried out. However, such an argument ran up against the well-established principle that absent bad faith or the existence of exceptional circumstances, judicial interference in the conduct of prosecutions will not be countenanced. The Appellant cited **Matalulu v Director of Public Prosecutions**,[14] **Mohit v Director of Public Prosecutions of Mauritius**,[15] and **Sharma v Brown-Antoine**[16] in support of this submission.

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[8] [2022] UKPC 5
[9] [1996] AC 256
[10] [1996] 2 LRC 292 at 295e
[11] Civ. App. No. S-161 of 2021 Prime Minister v Comprehensive Nephrology Services Limited
[12] [1968] QB 118
[13] [1998] AC 714
[14] [2003] 4 LRC 712 at pp 735-736
[15] [2006] 1 WLR 3343 at [17] and [21]
[16] [2007] 1 WLR 780 at [14] 1 - 6

16. The Appellant's third main submission was that there has been no breach of the Respondent's right to due process of law. According to the Appellant's submissions, the core right protected under **section 4(a) of the Constitution** was the right to due process. The Appellant relied on the decisions in **Lasalle v The Attorney General**[17] and **Thomas v Baptiste**[18] which state, among other things, that due process related to the understanding that legislative and executive action would not be conducted in a high-handed manner, but rather, would be conducted with procedural fairness. Bearing this in mind, the Appellant submitted that under **section 4(a)**, the State may interfere with the rights delineated in **sections 4 and 5 of the Constitution**, once due process was observed. Thus, if as the Respondent alleged, a breach to security of the person was found, the constitutional right would still not be contravened if there had been due process. The Appellant contended that the judge found that there was a breach of the right to security of the person but that, by itself, was insufficient to establish a breach of **section 4(a)**. What the Respondent had to show was that the infringement was without due process.

17. The Appellant's fourth submission related to the question of whether the Respondent's right to security of the person was infringed. According to the Appellant, the right to security of the person does not include the protection of a victim from unreasonably long court proceedings. The Appellant submitted that it was erroneous to elide the distinction between cases where the State has intentionally harmed persons or enacted laws which caused harm, and cases in which a complaint was being made as to the standard of care in the delivery of services by the State. In its submissions, the Appellant then distinguished the cases relied upon by both the Respondent, and the judge in the Court below to illustrate that they do not support a finding that the delay in trying an accused infringed an individual's right to security of the person. After having engaged in this distinguishing exercise, the Appellant submitted that the decision of the Supreme Court of Canada in **Blencoe v. British Columbia (Human Rights Commission)** ("**Blencoe**")[19] was a more persuasive precedent which the judge ought to have considered.

18. The Appellant examined the decision of **Blencoe** in some detail. According to the Appellant, the *ratio* in **Blencoe** was that there must be a direct causal connection between State interference

[17] (1971) 18 WIR 379 at 391 G
[18] (1998) 54 WIR 387 at 421A
[19] [2000] 2 SCR 307

and psychological integrity. The Appellant submitted that that could only be found where the State directly interfered with personal choice. Thus, State-imposed delay *simpliciter* does not violate the right to security of the person.

19. The Appellant proceeded to consider the issue of delay as it related to an alleged breach of the Respondent's right under **section 4(a)**. The Appellant's case was that in this jurisdiction, there was no constitutional protection against unreasonable delay, but even if there was such delay, it must be considered in the context of local conditions. In light of these principles, the Appellant submitted that there was no delay in the criminal proceedings that concern this appeal. In support of that submission, the Appellant cited the Judicial Committee's decision in **Dyer v. Watson**.[20] That decision established that what was needed was a period, which on its face and without more, gave ground for real concern and that the threshold was a high one which was not easily crossed. Bearing all of this in mind, the Appellant submitted that there was no unreasonable delay in the criminal proceedings that concern this appeal.

20. Finally, the Appellant submitted that **Blencoe** stated that there must be a direct causal connection between the State's action and the alleged psychological harm. Relying on the United Kingdom Supreme Court decision in **Purchase v Ahmed** ("**Ahmed**"),[21] the Appellant contended that there must exist a necessary "proximity" in the relationship between parties to make it just to impose a duty of care for causing psychological injury. In that case, the Court held that the duty of doctors did not extend to the psychological effects of a family member witnessing a person's death. Applying this principle, the Appellant contended that the trauma and damage suffered in having to attend criminal proceedings and in respect of the delay were too remote to be met with State liability. Further, the complaints of psychological distress were caused by a third party, the alleged perpetrator, and not the State. Therefore, the Appellant submitted that there was no breach of the right to security of the person.

21. The Appellant's fifth submission considered whether there was a violation of the right to protection of the law. The Appellant submitted that there was no breach of the protection of the law without the identification first of some law, breach of which has been occasioned. Further, it

[20] [2004] 1 AC 379
[21] [2024] UKSC 1

submitted that the right was not infringed whenever an event occurs which someone does not like and which does not involve an identifiable breach of the law. The Appellant contended that the judge was wrong to declare a breach of the Respondent's right to the protection of the law. The Appellant explained that the Respondent did not plead a breach of any specific law in her Fixed Date Claim Form nor was the Appellant given the opportunity to address the Court on this issue: see **Primeo Fund v. Bank of Bermuda (Cayman) Ltd & Anor**.[22]

22. Further, the Appellant submitted that the judge found that protection of the law can be interpreted having regard to a State's international obligations. However, when that is done, a Court has to exercise caution to ensure that the international obligations do not conflict with actual rights chosen to be incorporated on the domestic plane. In support of this, the Appellant cited **Chandresh Sharma v The Attorney General of Trinidad and Tobago**[23] and **Attorney General v Hadeed** ("**Hadeed**").[24]

23. In its submissions, the Appellant then addressed the issue of the judge's evaluation of the **FCDA**, the **Children Act**, and the **Children Court Rules** ("**the Rules**") all of which constituted the "law" which the judge explained was breached. According to the Appellant, nothing in any of these statutes or rules provided that where a victim of a crime was a minor, that matter must be heard exclusively in the Children Court.

24. The Appellant's contention was that the regime of the children legislation was to protect a child accused. The Appellant submitted that a clear reading of **section 3(1)(f) of the FCDA** demonstrated that not every matter in which a child is a victim or an affected bystander falls within the definition of a "children matter" which required a hearing before the Children Court. Furthermore, the Appellant also submitted that **section 62(2)(a) of the FCDA** allowed for a matter in which a child is the accused to continue in the High Court or Magistrate's Court provided that the proceedings began in those courts before the commencement of the **FCDA**. According to the Appellant's submissions, it could not be sensible that for matters in which the accused was a minor, they could continue in the High Court or Magistrate's Court, but for matters where the

[22] [2023] UKPC 40 at [148] – [149]
[23] CA No. 115 of 2003
[24] Civil Appeal P310 of 2019

victim was a minor, the proceedings started in those Courts cannot continue in them. This would, in effect, constitute a procedural anomaly.

25. As a consequence of these submissions, the Appellant submitted that the judge erred in finding that the Respondent's right to the protection of the law was breached. According to the Appellant, the judge failed to properly consider the proper effect of the **FCDA** as a whole and, more particularly, the provisions of **sections 3, 25 and 62 of that Act**.

26. The Appellant's sixth contention related to the judge's orders. According to the Appellant, various difficulties emerge from the judge's orders. First, the Appellant stated that the orders were inconsistent with the judge's findings. Second, the Appellant submitted that the orders violated the doctrine of the separation of powers. According to its submissions, the Appellant explained that members of the Judiciary are not constitutionally entitled to direct the allocation of State resources. That is a policy decision which ought to be made by members of the Legislature and the Executive. As such, the judge impermissibly violated the doctrine of the separation of powers when she arrogated unto herself the power to direct the dispersal of State resources. In that regard, the Appellant relied on **DPP ex p Kebeline**[25] and **Nephrology Services**.[26] Finally, the Appellant argued that the judge's orders were vague and insufficiently precise to permit compliance.

27. The final plank of the Appellant's submissions was the issue of damages. As to that issue, the Appellant submitted that the Respondent's constitutional rights were not contravened. Consequently, she was not entitled to damages. However, the Appellant submitted that even if there were breaches to the Respondent's rights, the declarations and orders made would suffice to correct any wrong: **Romauld James v The Attorney General of Trinidad and Tobago**[27] and **Romauld James v The Attorney General of Trinidad and Tobago**.[28]

[25] [2002] 2 AC 366, 381
[26] supra
[27] Civ App. No. 154 of 2006
[28] [2010] UKPC 23

The Respondent's Submissions

28. According to the Respondent, this claim was about the extent of the State's obligations to victims of crime under the Constitution. The Respondent's first submission was that a court is the guardian of the Constitution and it has a duty to uphold the supremacy of same. The Respondent explained that in so doing, the Court was not constricted by old remedies, but could fashion new ones where the justice of the case required it: see **Jorsingh v Attorney General** ("**Jorsingh**").[29]

29. Further, the Respondent contended that the Court must adopt a generous interpretation to the Bill of Rights provisions of the Constitution. She argued that a Court must interpret those provisions in a manner that ensures contemporary protection of the rights. In so doing, the Respondent argued that the Court could consider international instruments to which the State has subscribed as being indicative of contemporary human rights norms.

30. The Respondent's second submission concerned whether her right to security of the person was infringed. The Respondent submitted that the judge erred in finding that the legal system as a whole was fair to her because there were various avenues for redress available to her. These avenues included that (i) she could have "appealed" to the Director of Public Prosecutions to "*manage the prosecution of the case*", (ii) she could have made a "direct appeal" to the Chief Magistrate and Chief Justice "*regarding the pace of the preliminary enquiry*", and (iii) she had available to her these constitutional proceedings, in which she has sought an order of mandamus compelling the expedition of the proceedings. The Respondent challenged each of these findings.

31. In relation to (i) and (ii), the Respondent sought to distinguish the decision in **Desmond Renne v Attorney General** ("**Desmond Renne**")[30] which the judge relied on. She explained that there was no law which stated that a person may request the Director of Public Prosecutions to manage a particular case, or may request from the Judiciary that his case be expedited. According to the Respondent, there was simply no authority to support the judge's finding that the ability to

[29] (1997) 52 WIR 501
[30] Civ. App. No. P57 of 2013

request that a public officer take some form of action, constituted an efficacious remedy so as to enable its classification as a component of the legal system as a whole. In any event, the Respondent submitted that even if she could have made requests of the various officeholders, there was no guarantee that they would have been acceded to.

32. As to (iii), the Respondent argued that the judge adopted circular reasoning on this point. She explained that the judge found that the legal system as whole was fair since the Respondent could institute constitutional proceedings. Further, the Respondent advanced that in those constitutional proceedings, she sought injunctive relief. However, because the judge found that the legal system as a whole was fair, she was not entitled to the injunctive relief sought. As such, the Respondent explained that since she could not obtain injunctive relief from her constitutional proceedings that made the legal system unfair.

33. The Respondent then proceeded to discuss the issue of due process. According to her, in **Attorney General of Trinidad and Tobago v Seepersad** ("**Seepersad**"),[31] the Judicial Committee explained what the concept of due process entailed.

34. In that case, in dealing with the question whether the Appellant's right to due process was violated, the Judicial Committee stated that it was relevant to consider whether there was any suggested violation of the rights under **section 5 of the Constitution**. The Court also held that the Claimants therein had a right to appeal against the Magistrate's order which meant that they had access to a court to remedy the breach. Applying these principles, the Respondent argued that she had no right to appeal or to bring any other judicial proceedings in respect of the failings of the State. Thus, the institution of constitutional proceedings was the sole method of obtaining an effective remedy.

35. In her submissions, the Respondent made the point that her rights under **section 5 (2) (b)** were also being infringed since the acts or omissions of the State which caused mental suffering fall squarely within the definition of "cruel and unusual punishment" as that term was envisaged in the Constitution. According to the Respondent, the **section 5(2)(b)** right of our Constitution has

[31] [2021] UKPC 13

the same meaning as the right in **Article 3 of the European Convention of Human Rights** ("**ECHR**")**.** Thus, treatment causing mental suffering could constitute cruel and unusual punishment. In support of this contention, the Respondent relied on the learning contained in **Lester, Pannick & Herberg, Human Rights Law and Practice, at para 4.3.8**.

36. Additionally, the Respondent asserted that her right to a fair hearing under **section 5 (2) (e) of the Constitution** was also violated. The Respondent argued that alleged delay in the conclusion of the proceedings was likely to have an effect on the prospects of a conviction and that this was likely to prejudice her ability to participate in the trial and was procedurally unfair.

37. Finally, on this plank of the Respondent's case, she submitted that unless she was granted a remedy, there would be significant delay in the conclusion of the criminal proceedings. According to the Respondent, this alleged delay would likely cause serious psychological harm to her. She also contended that her reasoning as to how her right to security of the person was being violated applied equally to a continuing future breach of that right.

38. The Respondent's third plank of her submissions rested on the right to protection of the law. According to the Respondent, the Judicial Committee has adopted an expansive approach to the interpretation of this right: see **Seepersad**. In her submissions, the Respondent referenced the Judicial Committee's reliance on the **UNCRC** in **Seepersad**. According to her arguments, the Respondent contended that pursuant to **Article 40 of that Convention**, a child has a right to have her matter determined "without delay" and that **Article** has to be considered when making provisions for children.

39. The Respondent submitted that to give effect to the obligations imposed on the State by the **UNCRC**, the State enacted a suite of legislation governing issues pertaining to children. This included the **FCDA**, and the **Rules**. The Respondent argued that the **Rules** required the court to "*avoid delay in the proceedings of the case*" and to prepare and manage cases to "*ensure that the summary trial or preliminary enquiry can be completed without delay*". The Respondent stated that those principles demonstrated that the speedy trial of matters involving children is a norm recognised by the State.

40. In the Respondent's submissions, she relied on the **Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women** ("**the Convention of Belém do Pará**") which was ratified on January 4th, 1996, to buttress her claim. The Respondent also relied on the decision of **Maria Da Penha Maia Fernandes v Brazil**,[32] from the Inter-American Commission of Human Rights. In that case, the Inter-American Commission found that the delay in that case was unwarranted and unjustified and demonstrated a failure in the factual matrix of that case to fulfil the obligations with respect to prosecuting, obtaining a conviction, and preventing the degrading practices which were the subject matter of that case.

41. Further, the Respondent discussed at some length the enactment of the **Domestic Violence Act**.[33] According to the Respondent's submissions, the **Domestic Violence Act** was enacted to assist the State in discharging its obligations under the **Convention of Belém do Pará**. The Respondent submitted that this enactment of domestic legislation in the form of the **Domestic Violence Act** was an act to ensure that Trinidad and Tobago complied with its international obligations to grant a prompt remedy to women who were victims of violent crime. The Respondent argued that such a course of action demonstrated that the need to grant a prompt remedy to victims of violent crime was a norm recognised by the State.

42. On the issue of delay, the Respondent criticised the judge's reasoning. She stated that the judge's finding that the delay in this case was not serious enough to warrant a finding that her right to the protection of the law had been infringed was plainly wrong. According to the Respondent, the judge looked at the length of the delay too myopically. The Respondent's case was that there would be a delay in excess of ten years between the accused being charged and the outcome of a trial. This, the Respondent said, was unacceptable and was not in keeping with the State's obligation to determine cases expeditiously.

43. The Respondent then cited the Judicial Committee's decision in **Akili Charles v Attorney General of Trinidad and Tobago** ("**Akili Charles**").[34] The Respondent referred to that decision as authority for the proposition that there were three questions that a Court must consider in resolving the

[32] Case 12.051, Report No. 54/01
[33] Chap 45:56
[34] [2022] UKPC 49

question of whether the right to protection of the law had been breached. The Respondent contended that those questions were: (i) whether there was an irrational, unreasonable, fundamentally unfair or arbitrary exercise of power; (ii) if so, whether this caused real and substantial prejudice to the Applicant, and (iii) whether there was a prompt and effective legal remedy. The Respondent also submitted that another relevant consideration were the international obligations of the State.

44. On the first question i.e. the nature of the State's actions, the main thrust of the Respondent's submission was that the State failed to explain why there had been a backlog of sexual offence cases "snaking" their way through the Courts. Further, the Respondent submitted that the State also failed to explain what, if anything, was being done to ameliorate the said backlog. Thus, the State had failed to proffer any defence or justification for its conduct, which was a critical obligation imposed on it given the significance of the breach and the harm being caused to the Respondent.

45. On the question of prejudice, the Respondent signalled that she relied on expert evidence to support her claim that not only was she experiencing prejudice, but she was also likely to continue to suffer serious psychological harm by the acts and omissions of the State.

46. On the final question as to an effective legal remedy, the Respondent's contention was that she had no remedy available to her to bring the serious harm being caused by the excessive delay to an end.

47. Finally, on the question of the State's international obligations, the Respondent explained that the State was violating its obligation to afford special protections for women and children. The Respondent also submitted that the State was in violation of its international duty to treat with these cases expeditiously.

48. For all of these reasons, the Respondent argued that the judge was plainly wrong in finding that the State had put mechanisms in place and allocated sufficient resources to ensure that her matter was concluded expeditiously. Thus, she contended that she was entitled to relief for the breach of her right to protection of the law.

49. The Respondent's fourth plank of argument was that she was entitled to compensation for the serious psychological harm that she suffered as a result of the repeated adjournments and delay generally.

50. The Respondent subsequently dealt with the issue of the judge's orders. In this regard, the Respondent submitted that she sought certain general declarations which would confirm the status of victims of crime under the Constitution.

51. Further, the Respondent submitted that the requirement in law for an expeditious hearing was grounded in **Sookermany** where de la Bastide CJ (as he then was) noted that the policy of the law is that criminal proceedings should be dealt with expeditiously.

52. The Respondent also contended, on the authority of **R v A**,[35] that fair trial rights extend to victims of crime and required that their interests be taken into account.

53. Finally, the Respondent submitted that the criminal justice system is in a state of crisis and Executive inaction was causing significant harm to individuals. Thus, the Court was mandated to send a clear message by granting the general declarations sought in this claim.

54. The Respondent challenged each of the individual grounds of appeal as contained in the Appellant's Notice of Appeal. However, for the purposes of this appeal, a rehashing of those arguments is unnecessary for a resolution of this matter.

The Appellant's Reply Submissions

55. In the Appellant's Reply Submissions, Mr. Dass first submitted that the Respondent did not plead in her Fixed Date Claim Form any breach of either her right to freedom from cruel and unusual

[35] [2001] 3 All ER 1

treatment under **section 5 (2) (b) of the Constitution** or a breach of her right to a fair trial under **section 5 (2) (e) of the Constitution**.

56. As to the issue of constitutional relief, the Appellant clarified that it took no issue with a Court being able to make mandatory orders against the State. Rather, the Appellant's case was that it was improper for the judge to make orders the effect of which was to trespass upon the lawful province of independent arms of the State which are protected by the doctrine of the separation of powers. The Appellant submitted in reply that none of the Respondent's authorities refuted that cardinal constitutional principle.

57. As to the issue of the due process right, the Appellant submitted that the Respondent misunderstood the scope and protection afforded by the due process clause. According to the Appellant, the due process clause protected the right to a fair trial. The Appellant explained that the Respondent acknowledged that a fair trial was still possible. Thus, according to the Appellant, there could be no breach of the due process right.

58. As to the protection of the law, the Appellant submitted that the **Rules** related to child offenders only. The Appellant rejected the Respondent's contention that those **Rules** demonstrate that the speedy trial of matters involving children was a norm recognized by the State. In any event, the Appellant argued in its reply submissions that the right to the protection of the law protects the rights established under the relevant legislation, but not the purported norms which those statutes are said to facilitate or embody.

59. For similar reasons, the Appellant also rejected the Respondent's reliance on the **Domestic Violence Act** since the offence in question was not committed under that **Act** and there were no provisions therein that gave rise to a speedy trial for victims either in the narrow context of that statute and more generally under the criminal law.

60. As to the submissions on damages, the Appellant contended that on the authority of **Romauld James v The Attorney General of Trinidad and Tobago**,[36] the Respondent had no automatic entitlement to damages.

61. Finally, the Appellant submitted that the Respondent's reliance on **The Attorney General of Trinidad and Tobago v JM** ("**JM**")[37] for a *per diem* award of damages was inapt since the cases were factually different.

The Respondent's Reply Submissions

62. In the Respondent's Reply, she first submitted that this case was not only about delay, but was also about the repeated adjournments (thirty (30) in total). Second, on the issue of constitutional interpretation, the Respondent sought to distinguish **Ferguson** and argued that the approach to interpreting the Constitution varied not only according to the provision in question but also within the human rights provisions themselves. Thus, certain provisions (such as the right to the protection of the law) had to be interpreted more generously than others. Third, the Respondent submitted in her reply to the issue of a speedy trial, that cases dealing with the right to a speedy trial of an accused were entirely irrelevant to these proceedings. Fourth, the Respondent challenged the Appellant's assertion that the fair trial rights in the Constitution apply only to the accused and not the putative victim. Fifth, the Respondent contended that on the authority of **JM** the Court of Appeal accepted that **section 4(a)** imposed positive obligations on the State to ensure that an individual's right to the security of the person was not infringed. In the result, the Respondent prayed that she be granted the remedies sought in the Counter-Notice of Appeal.

Issues

63. As this Court has elucidated above, the principal issues which arise on the appeal are:
    (i) Whether there exists a right to a speedy trial or a right to a trial within a reasonable time in the **Constitution of Trinidad and Tobago**;

[36] [2010] UKPC 23
[37] CA S302/2019

(ii) Whether the Respondent's right not to be deprived of her security of the person except by due process of law pursuant to **section 4(a)** was infringed;

(iii) Whether the Respondent's right to the protection of the law under **section 4(b)** has been violated; and

(iv) Whether the judge erred in making the orders enumerated at paragraph 110 (II) and (III) of her decision.

64. Before proceeding to consider the above-mentioned issues, since this Court has considered the substantive issues raised in this appeal, it is not necessary to address the technical points of civil procedure raised by Counsel for both parties.

Issue 1: Whether there exists a right to a speedy trial or a right to a trial within a reasonable time in the 1976 Constitution of Trinidad and Tobago.

65. The first issue which falls for resolution is whether there exists a right to a speedy trial or to a trial within a reasonable time in the **Constitution of Trinidad and Tobago**.

Judge's findings

66. This issue was fleshed out on appeal for the first time. An examination of the judge's decision illustrates that she made no findings or conclusions on this issue.

Submissions

67. In brief, Counsel for the Appellant submitted that an examination of the **Constitution** revealed that no such right inured to the benefit of citizens.[38] Contrastingly, Counsel for the Respondent articulated the position that such a right exists within the Constitution. Thus, a citizen enjoys the protections afforded by it.[39]

[38] See para 26 of the Appellant's submissions *et seq*
[39] See para 75 of the Respondent's submissions

Discussion

68. A salutary starting point in the resolution of this issue is a recital of the relevant constitutional provisions. **Section 4 of the Constitution** provides, so far as material, as follows:

> "**CHAPTER 1**
>
> **THE RECOGNITION AND PROTECTION OF FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS**
>
> **PART I**
>
> **RIGHTS ENSHRINED**
>
> 4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:
>
> (a) **the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law**;
>
> (b) **the right of the individual to** equality before the law and **the protection of the law**;
>
> . . .
>
> 5. . . .
>
> (2) Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not—
>
> . . .
>
> (e) deprive a person of **the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations**;
>
> . . .
>
> (ii) **to a fair and public hearing by an independent and impartial tribunal** . . ." (emphases added)

Construing the Constitution

69. In the recent decision of **Seepersad**,[40] the Judicial Committee explained that the most comprehensive guidance on the approach to constitutional interpretation is found in the judgment of Lord Bingham in **Reyes (Patrick) v R**.[41] At paragraphs 21 and 22 of **Seepersad**, the Judicial Committee explained what Lord Bingham said in **Reyes (Patrick) v R** concerning constitutional interpretation:

> *"21. The two live issues require the Board to construe the two provisions of the Constitution of Trinidad and Tobago noted above.* ***The most comprehensive guidance on how this exercise is to be conducted is found in the judgment of Lord Bingham in Reyes v The Queen [2002] 2 AC 235*** *in a passage which bears repetition in full, at para 26:*
>
> > *'When (as here) an enacted law is said to be incompatible with a right protected by a Constitution, the court's duty remains one of interpretation. If there is an issue (as here there is not) about the meaning of the enacted law, the court must first resolve that issue. Having done so it must interpret the Constitution to decide whether the enacted law is incompatible or not. Decided cases around the world have given valuable guidance on the proper approach of the courts to the task of constitutional interpretation: see, among many other cases, Weems v United States (1909) 217 US 349, 373; Trop v Dulles (1958) 356 US 86, 100-101; Minister of Home Affairs v Fisher [1980] AC 319, 328; Union of Campement Site Owners and Lessees v Government of Mauritius [1984] MR 100, 107; Attorney General of The Gambia v Momodou Jobe [1984] AC 689, 700701; R v Big M Drug Mart Ltd [1985] 1 SCR 295, 331; State v Zuma 1995 (2) SA 642; State v Makwanyane 1995 (3) SA 391 and Matadeen v Pointu [1999] 1 AC 98, 108. It is unnecessary to cite these authorities at length because the principles are clear.* ***As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution.*** *But it does not treat the language of the Constitution as if it were found in a will or a deed or a charterparty.* ***A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society****: see Trop v Dulles 356 US 86, 101.* ***In carrying out its task of constitutional interpretation the court is not concerned to evaluate and give effect to public opinion.'***

[40] [2021] UKPC 13
[41] Ibid, para 21

Lord Bingham added, at para 28 that ***it is appropriate to take into account international instruments incorporating relevant norms to which the state in question has subscribed****. The Board will elaborate on this in considering the section 4(b) ground of appeal.*

22. One of the main reasons for the generous and purposive approach advocated by Lord Bingham is readily ascertainable. ***The terms in which individual rights and guarantees are formulated in constitutional instruments are typically broad and open textured, unaccompanied by definition or particularity. Thus while the exercise of construing a statute has certain similarities, a court engaged in the construction of constitutional provisions must adopt a somewhat broader perspective****. The analogy with construing a legal instrument such as a contract or a will is, as Lord Bingham makes clear, inappropriate.* ***Furthermore, the Board considers that the court engaged in the interpretation exercise must be alert to the historical context of the constitutional instrument in question. It is trite to add that the constitutional provision under scrutiny must be construed by reference to the whole of the instrument in which it is contained****."* (emphases added)

70. In **Matadeen v Pointu**,[42] Lord Hoffmann, speaking for the Judicial Committee, explained at page 108 that:

"7. Constitutional interpretation

Their Lordships consider that this fundamental question is whether section 3, properly construed in the light of the principle of democracy stated in section 1 and all other material considerations, expresses a general justiciable principle of equality. ***It is perhaps worth emphasising that the question is one of construction of the language of the section****.* ***It has often been said, in passages in previous opinions of the Board too familiar to need citation, that constitutions are not construed like commercial documents. This is because every utterance must be construed in its proper context, taking into account the historical background and the purpose for which the utterance was made.*** *The context and purpose of a commercial contract is very different from that of a constitution.* ***The background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account. Furthermore, the concepts used in a constitution are often very different from those used in commercial documents. They may expressly state moral and political principles to which the judges are required to give effect in accordance with their own conscientiously held views of what such principles entail. It is however a mistake to suppose that these considerations release judges from the task of interpreting the statutory language and enable them to give free rein to whatever they consider should have been the moral and political views***

[42] [1999] 1 AC 98

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

A right to a speedy trial or a right to a trial within a reasonable time?

71. **Seepersad**, **Reyes**, and **Matadeen** speak with one voice in saying that in interpreting the Constitution, one must carefully examine the language used in the Constitution itself. To determine whether a right to a speedy trial or a right to a trial within a reasonable time exists, the language of **sections 4 and 5 of the Constitution** will be considered.

72. As a starting point, and bearing in mind that a court must eschew the "*austerity of tabulated legalism*",[43] this Court nonetheless notes that in **section 4 of the Constitution**, certain rights and freedoms are recognised and declared to exist in Trinidad and Tobago. A careful examination of the words used in **section 4** and its **sub-sections (a) – (k)** reveals that there is no language used by the constitutional framers to evidence that an explicit or independent right to a speedy trial or a right to a trial within a reasonable time exists. **Section 5 of the Constitution** has been described as being a further and greater particularisation of the rights enumerated in **section 4**. When the language used in **section 5** is carefully analysed, it can be seen that **section 5 sub-section 2 (e)** provides citizens with a right that ensures that "*Parliament may not deprive a person of a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations*". Further, **section 5 sub-section 2 (f) (ii)** provides citizens with a right to ensure that Parliament may not "*deprive a person charged with a criminal offence of the right to a fair and public hearing by an independent and impartial tribunal*". The language used in these sub-sections references "*fair hearing*" and "*fair and public hearing*". That language does not lend itself to an interpretation which would support the existence of a right to a speedy trial or the right to a trial within a reasonable time. An examination of the explicit language of **section 5 of the**

[43] Minister of Home Affairs v Fisher [1979] 3 All ER 21, page 25 per Lord Wilberforce

Constitution as a whole demonstrates that that section does not endow citizens with either a right to a speedy trial or a right to a trial within a reasonable time.

73. At inception, on construing the Constitution and carefully examining the explicit language used therein, neither a right to a speedy trial nor a right to a trial within a reasonable time is identifiable.

74. This conclusion is bolstered by the decision in **Tokai**[44] where the Judicial Committee explained at page 862 that:

> *"**It is noticeable that this Constitution, unlike some of those in other Caribbean countries and elsewhere, particularly the United States of America and Canada, does not include in the catalogue of fundamental rights and freedoms the right to a speedy trial or trial within a reasonable time** . . ."* (emphasis added)

75. Further support for this conclusion is derived from the Court of Appeal's decision in **Sookermany** where the learned Chief Justice (as he then was) stated at page 296 that:

> *"**There are many countries whose Constitution or Bill of Rights expressly provides a right to be tried within a reasonable time. Trinidad and Tobago is not among them**."* (emphasis added)

76. On the plain language of the Constitution, there is neither a right to a speedy trial nor a right to a trial within a reasonable time.

77. Notwithstanding the above conclusion, this Court is cognisant of the principle that it must avoid the "*austerity of tabulated legalism*" and that it must give the provisions of the Bill of Rights a broad and generous interpretation. Thus, I proceed to consider whether, in the context of this case, **section 4(a) and (b)** can be given such a broad and generous construction.

[44] [1996] AC 856

International instruments & a generous interpretation

78. In **Ann Marie Boodram v The State**,[45] Lord Steyn, speaking for the Judicial Committee, expressed the view that:

> *"Except for one point it is unnecessary to mention the other grounds of appeal which were placed before the Privy Council. There was, however, an interesting argument about the correctness of the decision of the Privy Council in Director of Public Prosecutions v Tokai (1996) 3 W.L.R. 149,* ***where it was held that the provisions of the Constitution of Trinidad and Tobago do not confer on individuals the right to a trial within a reasonable time****. In Tokai the Privy Council made its decision without reference to Trinidad and Tobago's international obligations to secure to its citizens the right to a trial within a reasonable time. See* ***Articles 9 (3) and 14 (3) (c) of the International Covenant on Civil and Political Rights and Articles 7 (5) and 8 (1) of the American Convention on Human Rights****. The Privy Council did not consider whether by necessary implication there is a right to a trial within a reasonable time under the Constitution. It is unnecessary to decide this point and, in any event, undesirable to do so in a case where the Privy Council has not had the benefit of the views of the Court of Appeal on this important point. The point will be decided when it is necessary to do so."* (emphasis added)

79. Based on the factual matrix of this matter, and the arguments proffered by Counsel on both sides, it is now necessary to definitively decide whether a right to a trial within a reasonable time can be expressly or impliedly located in the **Constitution**. To properly decide this point, consideration must be given to some of the international instruments to which Trinidad and Tobago is a party to see how, if at all, they assist in interpreting the **Constitution**.

80. On 28th May 1991, the Government of Trinidad and Tobago ratified the **American Convention on Human Rights 1969** ("**the Convention**"). The Convention established two institutions, the Commission and its judicial organ, the Inter-American Court of Human Rights ("the IACHR"), to which the Commission could refer disputes. By ratifying the Convention, the Government of Trinidad and Tobago recognised the Commission's competence to entertain petitions from individuals complaining of violations of the Convention and to make reports and recommendations in respect thereof. It also recognised the compulsory jurisdiction of the IACHR to give binding rulings on the interpretation and application of the Convention. This was subject

[45] [2001] UKPC 20

to a reservation which was primarily designed to preserve the legitimacy of the death penalty but which, in other respects, is not material to this appeal.[46]

81. **Article 7 of the Convention**, so far as material, provides as follows:

> *"**Article 7. Right to Personal Liberty***
>
> *. . .*
>
> *5. **Any person detained shall be brought promptly before a judge** or other officer authorized by law to exercise judicial power and **shall be entitled to trial within a reasonable time** or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial."*
> (emphases added)

82. **Article 8 of the Convention** states, so far as material, as follows:

> *"**Article 8. Right to a Fair Trial***
>
> ***(i) Every person has the right to a hearing, with due guarantees and within a reasonable time**, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature. . ."*
> (emphasis added)

83. Trinidad and Tobago is also a party to the **International Covenant on Civil and Political Rights** ("the **ICCPR**").[47] The Government of Trinidad and Tobago ratified the **ICCPR** in 1978. It acceded to the **Optional Protocol to the ICCPR** in 1980. The **ICCPR**, which was adopted by the General Assembly of the United Nations in 1966 and came into force in 1976, constitutes a commitment by the States which are parties to the **ICCPR** to observe certain fundamental norms of conduct to be supervised by international institutions. The United Nations Human Rights Committee ("the UNHRC") is the institution charged with supervising the conduct of the State parties to the **ICCPR**. The Optional Protocol gave individuals a right of access to the UNHRC.[48]

[46] Thomas v Baptiste [1999] 2 LRC 733 at page 740
[47] Matthew (Charles) v The State (2004) 64 WIR 412 at para 12
[48] Thomas v Baptiste [1999] 2 LRC 733 at pages 740 and 741

84. **Article 9 of the ICCPR**, so far as material, states:

> *"Article 9*
>
> *. . .*
>
> *3. **Anyone arrested or detained** on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and **shall be entitled to trial within a reasonable time** or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement."* (emphases added)

85. **Article 14 of the ICCPR** is also instructive. That **Article** states, so far as material, that:

> *"**Article 14***
>
> *1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, every one shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.*
>
> *. . .*
>
> *3. **In the determination of any criminal charge against him, every one shall be entitled to the following minimum guarantees, in full equality**:*
>
> *. . .*
>
> *(c) **to be tried without undue delay**. . .*" (emphases added)

86. From my consideration of two of the international instruments which Trinidad and Tobago has ratified, it is pellucid that a right to a speedy trial or a right to a trial within a reasonable time is a key protection afforded by those international instruments.

87. However, be that as it may, it is critical to recall the exhortation of Lord Bingham in **Reyes** that:

> *"The court was required to "consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society" (para 26). **At the same time, this***

> ***'does not mean that in interpreting the Constitution … effect need be given to treaties not incorporated into the domestic law of Belize or non-binding recommendations or opinions made or given by foreign courts or human rights bodies. It is open to the people of any country to lay down the rules by which they wish their state to be governed and they are not bound to give effect in their Constitution to norms and standards accepted elsewhere, perhaps in very different societies. But the courts will not be astute to find that a Constitution fails to conform with international standards of humanity and individual right, unless it is clear, on a proper interpretation of the Constitution, that it does**.'"*
> (emphasis added)

88. In similar vein, in **Lendore v The Attorney General of Trinidad and Tobago**,[49] Lord Hughes, speaking for the Judicial Committee, observed at paragraphs 60 and 61 that:

> *"60.* ***It is inherent in this concept of fundamental rights that different jurisdictions may develop the law in ways that reflect their own constitutional traditions, legal procedures and collective values****. The European Court of Human Rights has been the most prolific single international source of judicial decisions on human rights which in one form or another are protected under many instruments in many countries. But in considering the persuasiveness of its decisions in Trinidad and Tobago, some significant features of its jurisprudence must be born in mind. First, the Convention is a regional human rights instrument and, as the Strasbourg court's observations in Tyrer show, the values which it seeks to apply are those of the member states of the Council of Europe so far as it is possible to generalise about them.* ***Criminal law and procedure, and penal policy in general, are areas in which accepted practices are particularly liable to diverge as between different jurisdictions and different parts of the world, where patterns of criminality, social attitudes to crime and the practical implications of penal policy may not be the same****. Secondly, the Strasbourg court has not been content to lay down* ***general principles to be applied by national courts in accordance with divergent national practice****. Its practice has been to define the incidents of human rights prescriptively and in considerable detail.* ***This means that the scope for inconsistency between the decisions of the court as an international court and the values and practices of individual jurisdictions is necessarily increased****. Thirdly, perhaps because of the enormous volume of its decisions and the differing composition of its chambers, as well as because it is evolutionary, the jurisprudence of the Strasbourg court may sometimes not be entirely consistent internally, which can require analysis by States which are parties to the ECHR.* ***It is not the duty of the courts of independent non-party States to follow every turn in its case law as it occurs****.*

[49] [2017] UKPC 25

> *61. Compliance with the decisions of the European Court of Human Rights is not an international obligation of Trinidad and Tobago as it is of the United Kingdom.* ***Instead, the international obligations of Trinidad and Tobago in relation to human rights arise under the instruments to which it is party****, some of which have their own decision-making bodies and their own corpus of decisions. The decisions of the European Court of Human Rights are not a source of law which the courts of Trinidad and Tobago are bound to take into account, as the domestic courts of the United Kingdom are by virtue of section 2(1) of the Human Rights Act 1998, let alone are they a source of binding authority.* ***They may bear valuable persuasive authority on the general principles underlying the protection of particular rights. But they are likely to be less valuable when prescribing the detailed content of those rights or the mode of giving effect to them procedurally****.* ***As far as the Board is concerned, particular importance will generally be attached to the views of the courts below before recognising any development of the law which is not warranted by the express terms of the Constitution or necessarily implicit in them****."* (emphases added)

89. Based on the authorities of **Reyes** and **Lendore**, while on the international plane, a citizen may possess a right to a speedy trial or a right to a trial in a reasonable time, the fact remains that the State has not incorporated those rights into the domestic law. The Judicial Committee's observations in **Lendore** on this issue are particularly instructive.

90. According to the Judicial Committee, the international obligations of this State in relation to human rights would arise under the instruments to which it is a party, for example, the **Convention** and the **ICCPR**. It is well-established that those instruments can provide useful guidance on the general principles which belie human rights protections. However, the Judicial Committee's caveat in **Lendore** was that international instruments will be much less valuable in prescribing the detailed content of fundamental rights or the mode of giving effect to them procedurally, especially when recognising any development of the law, which is not warranted by the express terms of the Constitution or which are necessarily implicit in them. I will return to this issue subsequently. Suffice it to say for now, however, while the State's international obligations can assist in giving meaning to the rights in **section 4 and 5** when they are being generously construed, there are limits to that assistance.

91. My position on this matter is bolstered by the decision in **Hadeed**.[50] In that decision, Bereaux J.A. explained that:

> *"(52) . . .* ***Domestic courts have no jurisdiction to construe or apply the provisions of a treaty****. . .*
>
> *. . .*
>
> *(57) The judge also found that section 15(1A) of the LPA goes against the grain of providing minimum Caribbean standards for the practice of law and therefore had no rational relation to the aims and objectives of the legislation. At paragraphs 157 to 168, he criticized Parliament for acting inconsistently with Trinidad and Tobago's treaty obligations. He erred.* ***Once the Agreement was enacted into Trinidad and Tobago domestic law, it was subject to review and amendment by Parliament as with any other statute. The question of legal education standards, minimum or otherwise, is a matter of policy for Parliament. Moreover, it is the duty of Court to construe domestic law. It has no jurisdiction to interpret or apply the Agreement*** *. See Lord Hoffman's comment in R v. Lyons [2003] 1 AC 976 at paragraph 27:*
>
> > *'. . .* ***the Convention is an international treaty and the ECHR is an international court with jurisdiction under international law to interpret and apply it. But the question of whether the appellants' convictions were unsafe is a matter of English law. And it is firmly established that international treaties do not form part of English law and that English courts have no jurisdiction to interpret or apply them: JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418. Parliament may pass a law which mirrors the terms of the treaty and in that sense incorporates the treaty into English law. But even then, the metaphor of incorporation may be misleading. It is not the treaty but the statute which forms part of English law. And English courts will not (unless the statute expressly so provides) be bound to give effect to interpretations of the treaty by an international court, even though the United Kingdom is bound by international law to do so. Of course there is a strong presumption in favour of interpreting English law (whether common law or statute) in a way which does not place the United Kingdom in breach of an international obligation****.'"* (emphases added)

92. As Bereaux J.A. explained, a domestic court has no power or jurisdiction to interpret and apply international instruments unless they have been incorporated into domestic law. Thus, while the right to a speedy trial or to a trial within a reasonable time exists on the international plane, the

[50] Civ. App. No. P310 of 2019

same cannot be said on the domestic plane. It would be inapt to use the abovementioned international instruments to read into the unambiguous language of **sections 4 and 5 of the Constitution**, a right to a speedy trial or a right to a trial within a reasonable time. I therefore decline to do so. If there is to be a constitutional right to a speedy trial or to a trial within a reasonable time, then it must originate from the Constitution itself through a constitutional amendment. It cannot originate by ordinary law to supersede the express terms of **sections 4 and 5** no matter how generously those sections are interpreted.

93. This Court is fortified in its opinion by the decision of the Court of Appeal (Weekes, Soo Hon & Bereaux JJA) in **Dularie Peters v The State** ("**Dularie Peters**").[51] In **Dularie Peters**, the Court of Appeal had to consider the issue of abuse of process in the criminal context. In deciding that issue, a sub-issue concerning delay, the Republican Constitution and Human Rights Conventions arose for discussion. In discussing this sub-issue, Weekes J.A. (as she then was) explained:

> *"21.* ***This court finds that there is a clear difference between construing the meaning of legislation and importing meaning into an enactment****. It is clear that the combined effect of the decision in Tokai and the constitutional principle recognised in Thomas v Baptiste is that the inclusion of the reasonable time requirement in section 5(2)(e) of the Republican Constitution is untenable. It is interesting therefore that the court in Robert Mohammed (supra) did not seek to include the requirement of a reasonable time within the construct of the fair trial, instead opting to aver that it was part of the notion of due process.* ***This inclusion in the face of the express provision of the right to a fair trial, in the Constitution is perhaps a misguided attempt to import meaning into the Constitution. It is a usurpation of Parliament's function and amounts to judicial constitutional amendment. This court is clear that even in the face of judicial pronouncements that the Constitution of Trinidad and Tobago should be interpreted so as to conform to the international obligations of Trinidad and Tobago, including Lord Hoffmann's statement that domestic law should be interpreted so far as possible consistently with international obligations under the International Convention on Civil and Political Rights (ICCPR) and the Inter-American Convention on Human Rights (IACHR), that the reasonable time requirement cannot be recognised until it is incorporated by the passage of relevant domestic legislation****. The very*

[51] Cr. App. No. 34 of 2008

outcome of that case bears testimony to the fact that construction can be taken only so far." (emphases added)

94. This Court entirely agrees with Weekes J.A.'s comments in **Dularie Peters**.

95. The Appellant submitted that **Dularie Peters** is a careful and correct ruling on this aspect of the law while the Respondent has sought to limit the precedential value of that decision by arguing that (i) it was a criminal appeal, and (ii) by contending that it was concerned with whether, under the Constitution, an accused person is afforded a right to have his trial take place within a reasonable time.

96. The Respondent's submissions are unsustainable and are rejected. While **Dularie Peters** was a criminal appeal, Weekes J.A.'s comments were directly relevant to how the **Republican Constitution** can and should be interpreted using human rights conventions. Further, those comments are very much aligned with Bereaux J.A.'s dicta in **Hadeed**. Thus, it is inconsequential that the dicta cited from **Dularie Peters** were made in the context of a criminal appeal. As it relates to the submission that the comments were in relation to whether an accused has a right to a trial within a reasonable time, it is erroneous for the Respondent to seek to artificially classify the rights enumerated in the Bill of Rights as belonging to "accused persons" and "victims". The rights contained in the Bill of Rights inure to the benefit of **everyone** in Trinidad and Tobago, including accused persons and victims. If it has been determined that there is no right at all to a speedy trial in the **Constitution of Trinidad and Tobago**, then that applies for both accused persons and putative victims.

An independent, free-standing right

97. It is necessary to interrogate the issue of whether the right to a speedy trial or to a trial within a reasonable time exists independently of other rights contained in **sections 4 and 5 of the Constitution**. Such a right is modelled on the **ECHR**. **Article 6 of the ECHR** provides, so far as relevant, as follows:

"Article 6

Right to a fair trial

1. *In the determination of his civil rights and obligations or of any criminal charges against him,* ***everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law****. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juvenile or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."* (emphasis added)

98. In **Darmalingum v The State**,[52] the Appellant was arrested in 1985 on provisional charges of forgery. After being interviewed in custody at that time, the Appellant heard nothing further about the matter until he was charged in 1992 and then convicted at a trial held in 1993. He appealed to the Supreme Court, which did not reach a final decision, rejecting his appeal until July 1998. The Judicial Committee held that the overall delay, much of which was unexplained, was a flagrant breach of **section 10(1) of the Mauritian Constitution** (which is in much the same terms as the boldened sentence contained in the quote above at paragraph 91) and that the only disposal which would properly vindicate the constitutional rights of the Appellant would be the quashing of the convictions. Lord Steyn, giving the judgment of the Judicial Committee, described the content of **section 10(1)** as being three separate guarantees:

> *"It will be observed that section 10(1) contains three separate guarantees, namely (1) a right to a fair hearing; (2) within a reasonable time; (3) by an independent and impartial court established by law. Hence, if a defendant is convicted after a fair hearing by a proper court, this is no answer to a complaint that there was a breach of the guarantee of a disposal within a reasonable time. And, even if his guilt is manifest, this factor cannot justify or excuse a breach of the guarantee of a disposal within a reasonable time.* ***Moreover, the independence of the "reasonable time" guarantee is relevant to its reach****. It may, of course, be applicable where by reason of inordinate delay a defendant is prejudiced in the deployment of his defence.* ***But its reach is wider****. It may be applicable in any case where the delay has been inordinate and oppressive.* ***Furthermore, the position must be distinguished from cases where there is no such constitutional guarantee*** *but the question arises whether under the ordinary law a prosecution should be stayed on the grounds of inordinate delay.* ***It is a matter of fundamental importance that the rights contained in section 10(1) were considered important enough by the people of Mauritius, through their representatives, to be enshrined in their Constitution.***

[52] [2000] 1 WLR 2303

The stamp of constitutionality is an indication of the higher normative force which is attached to the relevant rights*: see Mohammed v. The State [1999] 2 A.C. 111, 123 h."* (emphases added)

99. After **Darmalingum** was decided, the Judicial Committee considered **section 20 (1) of the Constitution of Jamaica** which was also modelled on **Article 6 of the ECHR** and was to the same effect, in its decision in **Flowers v The Queen** ("**Flowers**").[53] In **Flowers**, the Judicial Committee approached the interpretation of **section 20 (1)** differently, departing from its reasoning in **Darmalingum**. The result of this was that uncertainty arose between the conflicting dicta in **Darmalingum** and **Flowers**.

100. The Judicial Committee revisited the content of **Article 6** in **Mills v HM Advocate**[54] where Lord Steyn provided the majority opinion. In that case, Lord Steyn observed:

> *"7 In deciding not to follow Darmalingum on the question whether article 6(1) incorporates three separate guarantees Lord Hutton, who gave the judgment, observed, at pp 2414–2415:*
>
> > *"The judgment of the Board does not refer to the passage in the judgment of the Board in Bell v Director of Public Prosecutions [1985] AC 937which recognises that the right given by section 20 of the Constitution of Jamaica must be balanced against the public interest in the attainment of justice or to the passage which states that the right to a trial within a reasonable time is not a separate guarantee but, rather, that the three elements of section 20(1) form part of one embracing form of protection afforded to the individual." (Emphasis added.)*
>
> ***Relying on Bell the Privy Council in Flowers rejected the idea that there are three separate guarantees.*** *This ruling enabled the Privy Council in Flowers to consider the question of breach (as opposed to remedy) by weighing against a lengthy period of delay, countervailing matters which were plainly considered to be justifying, excusing or balancing factors. Those factors were the gravity of the crime, its prevalence in Jamaica and the guilt of the appellant: p 2415 b. If this approach is correct the interpretation of article 6 in Darmalingum was wrong.*
>
> *8* ***The question whether there are three separate guarantees or not is important****.* ***The point was examined by the House of Lords in Porter v Magill [2002] 2 AC 357****.* ***In a speech***

[53] [2000] 1 WLR 2396
[54] [2002] 3 WLR 1597

delivered by Lord Hope of Craighead with the agreement of all the Law Lords *he said, at p 489, para 87, that article 6(1)*

> *"**creates a number of rights which, although closely related, can and should be considered separately**. The rights to a fair hearing, to a public hearing and **to a hearing within a reasonable time are separate and distinct rights from the right to a hearing before an independent and impartial tribunal established by law**. This means that a complaint that one of these rights was breached cannot be answered by showing that the other rights were not breached. Although the overriding question is whether there was a fair trial, it is no answer to a complaint that the tribunal was not independent or was not impartial to show that it conducted a fair hearing within a reasonable time and that the hearing took place in public: see Millar v Dickson [2002] 1 WLR 1615, 1624, para 16, per Lord Bingham of Cornhill and my own observations in that case, at pp 1640–1641, paras 65–66."*

Later in his speech he continued, at pp 496–497:

> *"108. **I would also hold that the right in article 6(1) to a determination within a reasonable time is an independent right, and that it is to be distinguished from the article 6(1) right to a fair trial. As I have already indicated, that seems to me to follow from the wording of the first sentence of the article which creates a number of rights which, although closely related, can and should be considered separately**. This means that it is no answer to a complaint that one of these rights was breached that the other rights were not. To take a simple example, the fact that the hearing took place in public does not deprive the applicant of his right to a hearing before an independent and impartial tribunal established by law. [2002] 3 WLR 1597 at 1602*

> *"109. **I would respectfully follow Lord Steyn's observation in Darmalingum v The State [2000] 1 WLR 2303** about the effect of section 10(1) of the Constitution of Mauritius when he said that the reasonable time requirement is a separate guarantee. It is not to be seen simply as part of the overriding right to a fair trial, nor does it require the person concerned to show that he has been prejudiced by the delay. In Flowers v The Queen [2000] 1 WLR 2396 a differently constituted Board, following Bell v Director of Public Prosecutions [1985] AC 937, held that prejudice was one of four factors to be taken into account in considering the right to a fair hearing within a reasonable time in section 20(1) of the Constitution of Jamaica. In the context of article 6(1) of the Convention **however the way this right was construed in Darmalingum v The State seems to me to be preferable**. In Crummock (Scotland) Ltd v HM Advocate 2000 SLT 677, 679 a– b, Lord Weir, delivering the opinion of the High Court of Justiciary, said that under article 6(1) it was not necessary for an accused to show that prejudice has been, or is likely to be, caused, as a result of delay. The article 6(1) guarantee of a hearing within a*

reasonable time is not subject to any words of limitation, nor is this a case where other rights than those expressly stated are being read into the article as implied rights which are capable of modification on grounds of proportionality: see Brown v Stott [2001] 2 WLR 817, 851 b– e; R (Pretty) v Director of Public Prosecutions [2002] 1 AC 800, 843–844, para 90. The only question is whether, having regard to all the circumstances of the case, the time taken to determine the person's rights and obligations was unreasonable."

The agreement of the Law Lords, who sat in the case, are recorded as follows: Lord Bingham of Cornhill, at p 480, para 57; my speech, at p 481, para 59; Lord Hobhouse of Woodborough, at pp 502–503, para 131; and Lord Scott of Foscote, at p 511, paras 161 and 163*.*

9 My Lords, I have cited lengthy passages from Lord Hope's speech because ***they explain the structure of article 6(1) more fully than I had done in Darmalingum****.* ***The decision of the House of Lords in Porter v Magill is not binding on the Privy Council. But I would wish to adopt Lord Hope's analysis****. Subsequently* ***in Dyer v Watson [2002] 3 WLR 1488 the Privy Council considered the point again. Four of the Law Lords sitting stated in express terms or by concurrence with others the view that Darmalingum more closely reflects European jurisprudence than Flowers****: see Lord Bingham of Cornhill, at p 1500, para 29; Lord Hope of Craighead, at pp 1518–1519, para 94; Lord Millett, at p 1526, para 123; and Lord Rodger of Earlsferry, at p 1528, para 134. Lord Hutton gave a short separate judgment on the issue of remedies to which I will return. The language of article 6(1), the human rights context, and European jurisprudence, suggest that the best interpretation is that, although the three elements of article 6(1) are closely related,* ***they are nevertheless in law distinct and independent guarantees****."* (emphases added)

101. Based on the authorities cited above, the right to a speedy trial and the right to a trial within a reasonable time (as expressed in **Article 6 of the ECHR**) are distinct and independent fundamental rights from the right to a fair trial. Thus, they cannot be properly implied into the catalogue of rights provided in **sections 4 and 5 of the Constitution**.

102. This conclusion is fortified by the recent decision of the Judicial Committee in **Ferguson**. In that case, the Judicial Committee had to consider whether same-sex marriage falls within the ambit of **section 8(1) of the Bermudian Constitution** which deals with an individual's right to

freedom of conscience.[55] In jointly delivering the majority decision, Lord Hodge and Lady Arden observed:

> *"46.* ***So to hold is not to depart from the principles, which the Board has repeatedly stated, (i) that constitutions are living instruments and constitutional provisions are to be given a generous interpretation to allow them to develop through usage and convention, rather than a narrow and technical construction****: Edwards v Attorney General for Canada [1939] AC 124, 136; Matadeen v Pointu (above) 108, and* ***(ii) that individuals are to be given the full measure of the fundamental rights and freedoms which a constitution confers****: Minister of Home Affairs (Bermuda) v Fisher (above), 328. Thus, the protections given to the fundamental rights stated in section 1 of the Constitution, such as those contained in section 8, must not be given a narrow legalistic construction.* ***But the generous interpretation to give full effect to the fundamental rights and freedoms contained in a constitution, which the Board and courts adopt, must be derived from the language used in the Constitution****. In Matadeen v Pointu (above), 108 the Board stated:*
>
> > *'the court is concerned with the meaning of the language which has been used. As Kentridge AJ said in giving the judgment of the South African Constitutional Court in State v Zuma 1995 (4) BCLR 401, 412: 'If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination.'*
>
> *See also Boyce v R [2004] UKPC 32; [2005] 1 AC 400, para 59 per Lord Hoffmann.* ***In respectful disagreement with the Court of Appeal, the Board cannot find any basis in the language used in the Constitution for a general principle which would nullify legislation enacted for a religious purpose****."* (emphases added)

103. Lord Hodge's and Lady Arden's analysis is entirely apposite here. In interpreting the Constitution, it is to be assumed that the constitutional framers included the terms which they wanted to include, and on which they were able to agree, omitting other terms which they did not wish to include or on which they were not able to agree. Thus, special regard must be had and reliance placed on the express terms of the **Constitution** even when it is recognized as being *sui generis* and calling for a broad and generous interpretation. To be clear, the contention is not that nothing can be implied into the **Constitution**. The case law demonstrates otherwise. Rather, the contention is that the exercise of implication must be cautiously undertaken so that a Court does not, by judicial interpretation, bind the State and its citizens to obligations which the

[55] See paragraph 99 of Lord Sales' dissenting judgment where His Lordship expresses the issue in clear terms.

constitutional framers did not expressly accept and might not have been willing to accept.[56] The law is clear that our **Constitution** is "*a living tree capable of growth and* ***expansion within its natural limits***".[57] However, a Court must strictly monitor and adhere to those 'natural limits'. The natural limits of our **Constitution** are (i) the express language of the **Constitution**, and (ii) the clear implications which logically arise from the clear language. There is nothing in **sections 4 and 5** which would allow a right to a speedy trial or to a trial within a reasonable time to be engrafted onto our **Constitution**. In the words of Lord Hoffmann, "*if this conclusion provokes accusations of literalism, originalism, and similar heresies, we must bear them as best we can*": **see Boyce v The Queen**.[58]

Respecting the framers' decisions

104. In the final limb of analysis on this issue, the need for respecting the decisions of the framers of the Constitution will be addressed.

105. In **Reyes**, as quoted in **Seepersad**, Lord Bingham noted that while a Court must be astute to generously interpret fundamental rights provisions, such interpretation does not give the constitutional court licence to read its own predilections and moral values into the Constitution.[59] Further, in **Matadeen**, Lord Hoffmann explained that constitutions may often expressly state moral and political principles to which the judges are required to give effect in accordance with their own conscientiously held views of what such principles entail. However, His Lordship posited that it would be fallacious to think that those considerations release judges from the task of interpreting the constitutional language thus enabling them to give free rein to whatever they consider should have been the moral and political views of the framers of the constitution.[60] Lord Hoffmann concluded by drawing on Kentridge A.J.'s well-known dictum in **State v Zuma**[61] that if the language used by the lawgiver is ignored in favour of a general resort to "values", the result is not interpretation, but rather, divination.

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[56] See Lord Bingham's analysis to this effect in Brown v Stott (Procurator Fiscal, Dunfermline) [2001] 2 All ER 97 at page 114
[57] Edwards v AG for Canada [1930] AC 124
[58] [2004] 3 WLR 786 at 59
[59] supra
[60] supra
[61] 1995 (4) BCLR 401, 412

106. A court has to be alert to the possibility that it does not read into the **Constitution** rights which do not exist simply because of the Court's own moral persuasions. A constitutional court must always be on guard to ensure that it does not let its own personal opinions and beliefs about what the **Constitution** should protect seep into how it interprets what is actually said in this foundational document. The danger of such an occurrence taking place is self-evident: it leads to the Court engaging in divination rather than interpretation. The Respondent is asking us to do precisely that: to engage in divination and not interpretation. The Respondent has asked this Court to look beyond the language of the **Constitution**, and to consider values which may have been on the constitutional framers' mind in drafting this document. In essence, she is asking that we give effect to the belief that citizens should have, according to her, a right to a speedy trial or to a trial within a reasonable time.

107. As a conception, a speedy trial or a trial within a reasonable time could be thought of as an important right which may be protected in any democratic society. Indeed, such a conception may be a general axiom of many criminal justice systems. However, as Lord Hoffmann has said of the principle of equality in the **Mauritian Constitution** in **Matadeen**:

> ***"the very banality of the principle must suggest a doubt as to whether merely to state it can provide an answer to the kind of problem which arises in this case. Of course persons should be uniformly treated, unless there is some valid reason to treat them differently. But what counts as a valid reason for treating them differently? And, perhaps more important, who is to decide whether the reason is valid or not? Must it always be the courts? The reasons for not treating people uniformly often involve, as they do in this case, questions of social policy on which views may differ. These are questions which the elected representatives of the people have some claim to decide for themselves. The fact that equality of treatment is a general principle of rational behaviour does not entail that it should necessarily be a justiciable principle - that it should always be the judges who have the last word on whether the principle has been observed. In this, as in other areas of constitutional law, sonorous judicial statements of uncontroversial principle often conceal the real problem, which is to mark out the boundary between the powers of the judiciary, the legislature and the executive in deciding how that principle is to be applied."*** (emphasis added)

108. In oral arguments, Counsel for the Appellant explained, and relied on, **Matadeen**. He submitted that on the authority of **Matadeen**, the Court's task was to determine whether the

right to a speedy trial or to a trial within a reasonable time was included in the corpus of rights similar to Lord Hoffmann's task in ascertaining whether there was a right to equality in that case. We accept Counsel's submission that Lord Hoffmann's analysis in **Matadeen** can be aptly applied in this matter. Following from Lord Hoffmann's analysis in the quote referred to above, the following issues arise:

(i) If persons should be tried within a speedy or reasonable time, what then counts as a reasonable time?

(ii) Additionally, there is no objective way to determine what the adjective "speedy" means in the multifaceted context of a trial and within the broader context of the criminal justice system as a whole.

(iii) Further, one would need to consider whether the right is so expansive to include both criminal and civil trials.

109. Questions as to how much resources should be allocated to each trial to make it speedy or to be disposed of within a reasonable time are principally questions of socio-economic policy which are optimally reserved to elected members of the Legislature and Executive. The fact that a speedy trial or a trial within a reasonable time might sound like an enticing principle to embody within a constitution, does not entail that it should necessarily be a justiciable principle, or that it should be for judges to decide whether such a principle is in fact justiciable. This position is concretized by a consideration of the fact that while the terms "speedy" and "within a reasonable time" are convenient labels and descriptors, determining whether a trial is "speedy" or occurs "within a reasonable time" involves a polycentric, multifaceted evaluation based on various factors, not least of which include a consideration of the particular type of case and the needs of that particular type of case which may or may not be transplantable to other types of cases. In essence, there may not be a "one size fits all" answer to the problem a right to a speedy trial or to a trial within a reasonable time, seeks to combat. This is especially so in a developing State where there is stiff competition for already limited resources.

110. Crucially, the comments of de la Bastide CJ's comments in **Sookermany** must be borne in mind:

> ***"This provision (a right to a trial within a reasonable time) must have been on the menu of standard provisions which was on offer at the time when the framers of our 1962***

Independence Constitution made their selection. It would appear to me to be strange if the presumably deliberate omission from our Constitution of any reference to a right to be tried within a reasonable time should have had no effect whatever when our position is compared with that of other countries which chose to incorporate such a right in their Constitutions. I do not think that at the relevant time, ie in 1962, the state of the authorities in England or elsewhere in the Commonwealth would have justified anyone coming confidently to the conclusion that the insertion of such an express right was otiose because there already existed a common law right of equal scope. Admittedly, the fact that the framers of the Constitution may have been unaware of the existence of the same right at common law does not preclude it from being now recognised. Its omission from the expressly recognised rights, however, suggests that they, the Constitution makers, did not wish either to create any such right if it did not exist, or to confirm and indorse it, if possibly it did. At any rate, the fact that the right has not been expressly given constitutional status ought at least to entitle a court to exercise a greater degree of flexibility when weighing a person's claim that the right has been breached in relation to him, especially when (as in this case) the alleged breach is purely as a result of that type of delay which has been categorised as 'systemic' or 'institutional'. . .*"* (emphasis added)

111. Based on the legal principles enunciated above, it is plain that the constitutional framers of the **1976 Constitution** had the option of including a right to a speedy trial or at least a right to a trial within a reasonable time into the catalogue of rights guaranteed by **sections 4 and 5**. No doubt, as de la Bastide CJ (as he then was) would have noted in **Sookermany**, the framers would have known that such a right was commonplace throughout the Commonwealth. Notwithstanding the banality of such a right, the formulation of a right to a speedy trial or to a trial within a reasonable time was not used. The ineluctable conclusion is that the omission of a right to a speedy trial or to a trial within a reasonable time must have been a deliberate decision on the part of the constitutional framers.

112. Therefore, I am constrained to conclude that there is neither a right to a speedy trial or to a trial within a reasonable time in the **Constitution**.

Issue 2: Whether the Respondent's right to not be deprived of her security of the person except by due process of law was violated.

113. The second issue concerns whether the Respondent's right not to be deprived of her security of the person except by due process of law was violated.

Judge's Findings

114. In addressing whether the Respondent's right to security of the person was violated, the judge traversed the legal principles governing this right at paragraphs 29 – 42 of her decision. At those paragraphs, the judge cited a myriad of decisions emanating from the Supreme Court of Canada. However, the decisions cited at those paragraphs are quite distinguishable from the case at bar. **Blencoe** and **New Brunswick (Minister of Health and Community Services) v G. (J.)** ("**New Brunswick**") [62] are significantly more analogous. In any event, these two cases were cited, and applied with approval, by this Court of Appeal in **Attorney General v Rajesh Mathura** ("**Rajesh Mathura**")[63] and their treatment was binding on the judge.

115. Turning to the judge's analysis, she discussed at length the evidence contained in the Confidential Psychological Report of Ms. Ghent-Garcia. In that Report, Ms. Ghent-Garcia recounted, among other things, what she perceived to be the Respondent's psychological state and what she considered to be the effect of the continued court proceedings on the Respondent. The judge made the finding of fact that, based on the evidence, there was no doubt that the psychological prejudice experienced by the Respondent was serious.[64] The judge noted that the Respondent was diagnosed with PTSD, Major Depression and a Generalised Anxiety Disorder *directly consequent to the rape*.[65]

[62] [1999] 3 SCR 46
[63] Civ. App. No. 32 of 2006
[64] Paragraph 48 of the judgment
[65] Paragraph 48 of the judgment

116. Further, the judge concluded, as findings of fact, that (i) the "*inexcusable delays, prolonging the criminal proceedings has caused the claimant to experience trauma from being chastised and humiliated by the defence attorney and from having to repeatedly face her rapist resulting in the claimant's psychological damage*" and (ii) that in "*the claimant's attempt to seek justice, she has been subjected to victimization and re-traumatization by the lack of care and promptness in the proceedings*".[66] The judge then concluded that although the damage to the Respondent's psychological integrity stemmed from her alleged attack, it was reasonable to conclude that such damage had been accentuated by the trauma from the ongoing court proceedings.[67] As such, the Respondent suffered an infringement of her right to security of the person.[68]

117. For the reasons which appear below, our conclusion is that the judge did not properly analyse the two criteria which must be established to found a breach of the right to security of the person. It therefore falls to this Court to properly conduct that analysis.

Submissions

118. In summary form, the Appellant submitted that to ground a violation of the right to security of the person, the Respondent must satisfy the two limb test established in **Blencoe**. The Appellant argued that (a) **Blencoe** provided that State-imposed delay *simpliciter* was insufficient to constitute an affront to the right of security of the person, (b) however, that even if such delay could amount to an affront to the right, the delay in this case must be examined in the context of local conditions, including that there was no right to a speedy trial and that (c) for delay to amount to a breach of a right, delay which caused real concern was needed. The Appellant also considered (d) the question of whether the State interfered with the Respondent's psychological integrity. The Appellant argued that a direct causal connection between the State's action and the alleged psychological harm must be established to ground this limb. According to the Appellant, a consideration of the "proximate cause" was essential. The Appellant then addressed the

[66] Paragraph 51 of judgment
[67] Paragraph 52 of judgment
[68] Paragraph 64 of judgment

Confidential Psychological Report of Ms. Ghent and how that Report failed to satisfy this limb of the **Blencoe** test.

119. In her main submissions, the Respondent did not address the Court on the issue of the violation of the right to security of the person in any meaningful way except to say that the Respondent's right to security of the person would continue to be violated in the future if relief is not granted. However, in her reply, the Respondent contended that the judge was entitled to rely on the Canadian authorities she cited to establish the ingredients necessary to amount to an infringement of this right. The Respondent did accept, however, that the judge's reliance on the quotation from **Mills v The Queen** ("**Mills**")[69] was irrelevant to these proceedings. In addressing **Blencoe**, the Respondent submitted that paragraphs 83, 84 and 85 of that case were relevant. Those paragraphs articulated that it was only in exceptional cases where the State interfered in profoundly intimate and personal choices of an individual, that State-caused delay in human rights proceedings could trigger the **section 7** security of the person interest. According to the Respondent, this was the same reason the right was being invoked in this case. Finally, on the issue of causation, the Respondent attempted to distinguish **Ahmed**. She argued that that case dealt with causation in a common law action between private individuals for personal injuries. The Respondent submitted that the correct test for causation emanated from **Kazemi Estate v. Islamic Republic of Iran**[70] which was relied on by the judge. The Respondent also contended that the Appellant failed to address the Canadian authorities relied on by the judge on this point concerning causation.

120. **Section 4 (a) of the Constitution** provides:

> *"4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:*
>
> ***the right of the individual to** life, liberty, **security of the person** and enjoyment of property and **the right not to be deprived thereof except by due process of law**;"*
> (emphases added)

[69] [1986] 1 S.C.R. 863
[70] [2014] SCC 62

121. To determine whether the Respondent's right to security of the person has been violated, the law governing this right will be set out and examined.

122. In **Attorney General v Rajesh Mathura**[71] ("**Rajesh Mathura**"), the Respondent was arrested and placed in a holding cell with twenty-five (25) other prisoners while awaiting bail. Whilst in the cell, one of the Respondent's cellmates set fire to some items near the cell. This caused smoke to engulf the cell. Some of the Respondent's other cellmates then used that opportunity to strike the Respondent on his head with a piece of iron chain, rub his back with a razor until it bled, and took away his clothes leaving him in his underwear only. Eventually, the Respondent was taken out of the cell to be conveyed to the State prison. However, after some vigorous protestation from some of the prisoners, the officials took the Respondent for medical attention. After being released on bail, the Respondent filed a constitutional motion seeking, among other things, a declaration that his right to life and security of the person under **section 4(a)** was infringed by the acts and/or omissions of the State. At the trial, the judge found that the Respondent's right to security of the person had been infringed and ordered damages. The State appealed. The Court of Appeal was asked to consider, among other things, whether the judge was correct in determining that the Respondent's right to security of the person was violated.

123. In delivering its decision, the Court of Appeal accepted with approval the learning concerning the right to security of the person enunciated by the Supreme Court of Canada in **Blencoe**.

124. In **Blencoe**, sexual harassment complaints were lodged against the Appellant in 1995 with British Columbia's Council of Human Rights. After two years of investigation, the Council informed Blencoe that it was referring the complaints to the British Columbia Human Rights Tribunal which subsequently set a date for a hearing in March 1998, more than thirty (30) months after the initial filing of the complaints. Blencoe petitioned the British Columbia Supreme Court for judicial review of the Commission's decision to refer the complaints to the Human Rights Tribunal. He argued that the entire process was carried out with undue delay. This in turn, Blencoe alleged,

[71] Civ. App. No. 32 of 2006

had prejudiced his ability to make a full defence. Blencoe also relied on the negative impact that the complaints and the process had on his personal life and family. He invoked both **section 7 of the Charter** and the common law principles of procedural fairness and abuse of process.

125. A majority of the Supreme Court of Canada held in that decision that State action that has a serious and profound effect on a person's psychological integrity, i.e. where the State interferes in profoundly intimate and personal choices, could engage that person's security of the person interest. According to the Supreme Court, this would not "easily include" the stress, anxiety and stigma resulting from administrative or civil proceedings. The majority recognized that Blencoe's life had been terribly affected by the allegations of sexual harassment. However, the Court was not convinced that this prejudice was caused or even exacerbated by administrative delay. Even assuming that the stress and anxiety experienced by Blencoe were caused by the delayed proceedings, they did not meet the threshold required to engage Blencoe's right to security of the person.

126. Bastarache J explained:

> *"55.* ***In the criminal context, this Court has held that state interference with bodily integrity and serious state-imposed psychological stress constitute a breach of an individual's security of the person. In this context, security of the person has been held to protect both the physical and psychological integrity of the individual*** *(Morgentaler, supra, at p. 56, per Dickson C.J., and at p. 173, per Wilson J.; Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519, at p. 587, per Sopinka J.; Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123, at p. 1177, per Lamer J.).* ***These decisions relate to situations where the state has taken steps to interfere, through criminal legislation, with personal autonomy and a person's ability to control his or her own physical or psychological integrity*** *such as prohibiting assisted suicide and regulating abortion.*
>
> *56.* ***The principle that the right to security of the person encompasses serious state-imposed psychological stress has recently been reiterated by this Court in G. (J.),*** *supra. . .*
>
> *. . .*
>
> *57.* ***Not all state interference with an individual's psychological integrity will engage s. 7. Where the psychological integrity of a person is at issue, security of the person is***

restricted to "serious state-imposed psychological stress" *(Dickson C.J. in Morgentaler, supra, at p. 56). I think Lamer C.J. was correct in his assertion that Dickson C.J.* ***was seeking to convey something qualitative about the type of state interference that would rise to the level of infringing s. 7*** *(G. (J.), at para. 59).* ***The words "serious state-imposed psychological stress" delineate two requirements that must be met in order for security of the person to be triggered. First, the psychological harm must be state imposed, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be serious. Not all forms of psychological prejudice caused by government will lead to automatic s. 7 violations****."* (emphases added)

127. In **New Brunswick**, the Supreme Court of Canada had earlier considered the right to security of the person. In considering that right, Lamer C.J. (as he then was) noted:

> *"****58. This Court has held on a number of occasions that the right to security of the person protects "both the physical and psychological integrity of the individual":*** *see R. v. Morgentaler, [1988] 1 S.C.R. 30, at p. 173 (per Wilson J.); Reference re ss. 193 and 195.1(1)(c) of the Criminal Code, [1990] 1 S.C.R. 1123, at p. 1177; Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519, at pp. 587-88. Although these cases considered the right to security of the person in a criminal law context, I believe that the protection accorded by this right extends beyond the criminal law and can be engaged in child protection proceedings.* ***Before addressing this issue, I will first make some general comments about the nature of the protection of "psychological integrity" included in the right to security of the person.***
>
> ***59. Delineating the boundaries protecting the individual's psychological integrity from state interference is an inexact science. Dickson C.J. in Morgentaler, supra, at p. 56, suggested that security of the person would be restricted through "<u>serious</u> state-imposed psychological stress" (emphasis added). Dickson C.J. was trying to convey something qualitative about the type of state interference that would rise to the level of an infringement of this right. It is clear that the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interpreted with such broad sweep, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected. Nor will every violation of a fundamental freedom guaranteed in s. 2 of the Charter amount to a restriction of security of the person.*** *I do not believe it can be seriously argued that a law prohibiting certain kinds of commercial expression in violation of s. 2(b), for example, will necessarily result in a violation of the*

psychological integrity of the person. This is not to say, though, that there will never be cases where a violation of s. 2 will also deprive an individual of security of the person.

60. ***For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety****."* (emphases added)

128. **New Brunswick** was cited with approval and applied in a concurring decision of Weekes J.A. in **Rajesh Mathura**. In **Rajesh Mathura**, Weekes J.A. remarked of **New Brunswick**:

"16. ***I am in agreement with the approach of Lamer, C.J. in New Brunswick (Minister of Health and Community Services) v. G.(J.) 1999 Can LII 653 (S.C.C.)****. This was a case where an indigent parent had been denied legal aid to challenge a custody application. On appeal to the Supreme Court of Canada it was held that the litigant's constitutional right to security of the person had been breached - the New Brunswick Government was under a constitutional obligation to provide the appellant with state funded - counsel in the particular circumstances of the case (When the court came to consider the case the issues were moot, but because of their importance the constitutional questions were reformulated and adjudicated upon****). Notwithstanding the finding, Lamer, C.J. however warned at paragraph 59****:*

> *'****It is clear that the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interpreted in such broad sweep countless government initiatives could be challenged on the ground that they infringed the right to security of the person, massively expanding the scope of judicial review and in the process trivializing what it means for the right to be constitutionally protected****.'"* (emphases added)

129. Finally, in **Rajesh Mathura**, Weekes J.A. elucidated at paragraph 16 of her concurring judgment, the nature of the State action which would lead to an infringement of the right to security of the person:

> *"****The action or inaction must therefore have a serious and far-reaching effect on the claimant's physical or psychological integrity. Each case must therefore be assessed on its particular facts****."* (emphasis added)

130. From canvassing the legal principles cited above, it can be seen that two criteria must be established for a court to conclude *prima facie* that an individual's right to not be deprived of his security of the person has been violated by actions, omissions or inactivity on the part of the State where it is alleged that any of these have been responsible for physical or psychological harm. These criteria are that:

(i) The alleged physical or psychological harm/prejudice must be State-imposed; and

(ii) The alleged physical or psychological harm/prejudice must be serious.[72]

Discussion

(i) Was the harm to the Respondent the result of State-Imposed delay in the trial process?

131. Earlier in this judgment, the principles governing the two-limb test in **Blencoe** were set out. The law governing the first limb of the test is clear. In order for the right to security of the person to be violated, the Respondent must demonstrate that the State caused actual psychological harm, and that there have been serious injuries or prejudice resulting from the State's action or inaction. The State action or inaction must have had a serious and profound effect on the person's psychological integrity. The effects of the State interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility.[73] Each case must be assessed on its own facts.[74]

132. In this case, the Respondent's argument is that the State's alleged delay in concluding the criminal case against the accused and the repeated adjournments in relation to hearing the matter is violative of her right to security of the person.[75] According to her evidence, because the court proceedings in this matter have taken more than five (5) years to be completed, the Respondent is continually being re-traumatized and re-victimized which, in turn, is violating her right to security of the person.[76] Counsel for the Respondent alleged that at the time the Fixed Date Claim Form was filed, the Preliminary Inquiry had been ongoing for some four (4) years and

[72] Blencoe at [57]
[73] New Brunswick at [59]
[74] Rajesh Mathura at [16]
[75] Respondent's Submissions in Reply paragraph 11
[76] Record of Appeal Volume 1 page 284 Affidavit of Isolde Ali Ghent-Garcia, IAG 3

there had been twenty-three (23) hearings of the matter at the Rio Claro Magistrates Court.[77] According to the Respondent, she was forced to attend court on most of those occasions, even though the matter was not listed for hearing, because the police officers informed her that if she did not show up the matter would be thrown out.[78] The crux of the Respondent's case in this regard is therefore that because of the State's alleged delay in trying the case against the accused, her right to security of the person has been and is continuing to be violated.

133. In the decision in **New Brunswick**, the subject matter of that appeal concerned a child custody application. The State applied to have the children of an indigent mother taken into the custody and care of the State. The then Chief Justice of Canada opined that there was direct State interference with the psychological integrity of the parent in that case because a child custody application was "*an example of State action which directly engages the justice system and its administration*". In **New Brunswick**, the Chief Justice emphasised, however, that not every State action which interfered with the parent-child relationship would have triggered **section 7 of the Charter**.

134. Since the issue of delay is at the forefront of this matter, and since the judge made findings on it,[79] that issue will be addressed frontally. As established above, there is no constitutional right to a speedy trial or to a trial within a reasonable time.[80] This means that neither the accused nor the Respondent is guaranteed by law to a trial within a specific period of time such that if they do not receive that trial in what they consider to be a speedy or reasonable time, one (or various) of their constitutional rights would be violated.

135. Further, the Supreme Court of Canada's dictum at paragraph 59 of **Blencoe** is instructive:

> *"59.* ***Stress, anxiety and stigma may arise from any criminal trial****, human rights allegation,* ***or even a civil action, regardless of whether the trial or process occurs within a reasonable time****. We are therefore* ***not concerned in this case with all such prejudice*** *but* ***only that impairment which can be said to flow from the delay*** *in the human rights process****. It would be inappropriate to hold***

[77] Appellant's Submissions, paragraph 4, page 3
[78] Appellant's Submissions, paragraph 4, page 3
[79] Paragraph 51 of judgment
[80] See paragraph 112, supra

government accountable for harms that are brought about by third parties who are not in any sense acting as agents of the State*."* (emphases added)

136. The Supreme Court's dictum above is apposite. In any given criminal or civil trial, stress and anxiety can emerge. It cannot be gainsaid that this would occur regardless of the speed at which the criminal or civil litigation progresses.

137. The Respondent's position is that she has suffered serious psychological prejudice in connection with the alleged sexual assault which was exacerbated by alleged State-caused delay. However, there must be a sufficient causal connection between the alleged State-caused delay and the Respondent's psychological prejudice.

138. One aspect of the Respondent's case was that the State's alleged delays were caused by consistent requests for adjournments. The Appellant countered this by articulating that there was no concrete evidence to demonstrate that the Respondent's alleged psychological prejudice was exacerbated by the State's alleged delays.

139. Some of the facts in this matter taken from the documentary evidence are:

(a) In the Pre-Action Protocol Letter dated 14th October, 2022 sent from Counsel for the Respondent to the State, Mr. Merry indicated at paragraph 2 that, "*subsequent to the attack, our client became depressed, could not eat, and stopped school*".[81]

(b) In the same letter, Mr. Merry articulated to the State that, "*our client was urged by her mother not to terminate her pregnancy, so she kept the baby. She subsequently attempted to commit suicide on several occasions.*"[82]

(c) In a letter from Mr. Merry to Ms. Isolde Ali Ghent-Garcia, Counsel for the Respondent explained, "*Our instructions are that the Claimant has been diagnosed with PTSD and chronic depression which were caused by the trauma associated with the criminal act perpetrated against her*."[83]

[81] Record of Appeal, Volume I, page 110, Pre-Action Protocol Letter, paragraph 2
[82] Record of Appeal, Volume I, page 110, Pre-Action Protocol Letter, paragraph 3
[83] Record of Appeal Volume 1 page 212 Affidavit of Isolde Ali Ghent-Garcia, IAG 2

(d) In Ms. Ghent-Garcia's Confidential Psychological Report, in the section that deals with "*Reasons for referral*", Ms. Ghent-Garcia noted, "*her (the Respondent's) daughter is currently three years of age; however, because her daughter is a reminder of the horrific rape, Ms. FR (sic) struggles with establishing a relationship with her*."[84]

(e) Later in the Report, Ms. Ghent-Garcia recorded that, "*despite her (the Respondent's) wishes, her mother convinced her to carry the pregnancy to full term. To date, her daughter is a reminder of her assault and the day in which her life would change forever*".[85]

(f) Further under the above-mentioned heading ("*Reasons for Referral*"), Ms. Ghent-Garcia also noted of the Respondent that, "*there has been no true joy or true happiness since the day she was assaulted at sixteen (16) years of age*."[86]

(g) Ms. Ghent-Garcia also recorded in her Report that, "*Ms. FR (sic) has been unable to seek consistent mental health support due to lack of funds; as such, she continues to suffer from extreme sadness, fear, hypervigilance, and despair on a daily basis. Ms. FR (sic) feels as though she has been slandered and accused of being an opportunist or wanting to extort money by her attacker although she was the victim of a brutal rape at the age of sixteen. She has been publicly shamed for being "from a broken home" and for being "poor""*.[87]

(h) Finally, in the section of the Report entitled "*Conclusions: Summary of Diagnosis*", Ms. Ghent-Garcia articulated that "*Ms. FR (sic) is suffering from a DSM-V/ICD-10 diagnosis of Posttraumatic Stress Disorder, Major Depression, and a Generalized Anxiety Disorder* ***directly consequent to the rape at age sixteen and its aftermath****. Furthermore,* ***the ongoing court proceedings has added to her existing Posttraumatic Stress Disorder symptoms by re-traumatizing her in court by eliciting unwanted images, by attacking her character causing feelings of hopelessness, helplessness, and acute fear****. Symptoms of trauma have consistently persisted at a clinical level*."[88] (emphases added)

[84] Record of Appeal Volume 1 page 283 Affidavit of Isolde Ali Ghent-Garcia, IAG 3
[85] Record of Appeal Volume 1 page 286 Affidavit of Isolde Ali Ghent-Garcia, IAG 3
[86] Record of Appeal Volume 1 page 284 Affidavit of Isolde Ali Ghent-Garcia, IAG 3
[87] Record of Appeal Volume 1 page 286 Affidavit of Isolde Ali Ghent-Garcia, IAG 3
[88] Record of Appeal Volume 1 page 291 Affidavit of Isolde Ali Ghent-Garcia, IAG 3

140. Based on the above facts, the delays and adjournments in the Court proceedings for the accused were clearly not the fount of psychological prejudice or harm incurred by the Respondent. The judge explained at paragraph 43 of her decision that "*the Claimant gave evidence that before the attack she had never suffered from any mental health issues. However, following the rape she could not sleep or eat and kept having flashbacks*".[89] The Respondent made the assertion that the delays and adjournments exacerbated the psychological prejudice caused by the alleged sexual assault. Thus, the original source of the psychological prejudice was the alleged sexual assault.

141. The stigma which the Respondent alleged to have been attached to her where she had been slandered and accused of being an opportunist or wanting to extort money by her attacker and where she had been allegedly publicly shamed for being "*from a broken home*" and for being "*poor*" were not brought about by alleged delays and adjournments in the Preliminary Inquiry.

142. In this case, the core of the Respondent's argument is that the alleged delays in the Preliminary Inquiry exacerbated the psychological prejudice she incurred and that led to an infringement of her **section 4(a)** right. Mr. Blencoe ran an analogous line of argument before the Canadian Courts which was rejected. The Supreme Court of Canada dealt with that line of argument in this way:

> *"69.* ***First, with respect to this "contributing cause" argument, I find it very difficult to equate the situations in Rodriguez and Morgentaler with that in the case at bar****. In Rodriguez, the Crown had erroneously characterized Mrs. Rodriguez's deprivation of security of the person as caused not by government but by her physical disabilities. In rejecting that argument,* ***Sopinka J. held that the Criminal Code prohibition at s. 241(b) would contribute to Mrs. Rodriguez's distress if she was prevented from managing her death*** *(at p. 584).* ***A Criminal Code prohibition therefore directly deprived Mrs. Rodriguez of the ability to terminate her life****.* ***The Court in Rodriguez surely did not eliminate the need to establish a relationship between the harm complained of and the state action****. In Rodriguez, all of the members of the Court agreed that* ***government actions deprived Mrs. Rodriguez of the right to terminate her life at the time of her choosing. In the absence of government involvement, Mrs. Rodriguez would***

[89] See paragraph 43 of the judgment

> ***not have suffered a deprivation of her s. 7 rights***. *The same cannot be said of the facts in the case at bar.*
>
> *70. In the same vein, the* ***Morgentaler case dealt with direct state interference with a woman's bodily integrity in that the delays in obtaining therapeutic abortions were caused by the mandatory procedures in s. 251 of the Criminal Code and resulted in a higher probability of complications and greater health risks to women***. *In that case,* ***it could not have been argued that the cause of the deprivation is a woman's pregnancy rather than the Criminal Code prohibition***. *The decisions in Morgentaler and Rodriguez do not, in my opinion, obviate the need to establish a significant connection between the harm and the impugned state action to invoke the Charter.*
>
> *71. Moreover, even accepting this exacerbation argument,* ***it is difficult to see how the respondent's prejudice was seriously exacerbated by the delays***. ***In the absence of delays in the proceedings, the respondent would nevertheless have faced unproven allegations of sexual harassment and discrimination and suffered stigma as a result. It is thus clear that the respondent's reputation was harmed prior to the filing of the Complaints with the Commission. The delays in the proceedings could only have extended the time that rumours were circulating***. *As previously mentioned, the continuation of the concurrent complaint and civil action must also be considered. As professed by L'Heureux-Dubé J. in R. v. O'Connor, [1995] 4 S.C.R. 411, at para. 119, with respect to privacy, "****once invaded, it can seldom be regained****". Much the same is true of reputation; it is quickly ruined and difficult to re-establish.* ***It is thus difficult to see how procedural delay could have seriously increased the damage to the respondent's reputation that had already been done***. *The true prejudice to the respondent in this case may only be the lost opportunity to clear his name rapidly."* (emphases added)

143. The judge in this case erred in attributing the entire period of delay, cancellations, and postponements to the State. While the State and its agents should, in fact, take responsibility for some of the alleged delay, it was erroneous that the trial judge attributed the entirety of the alleged delay to the State. The evidence in this matter demonstrated that much of the alleged delay and many of the adjournments were also caused by third parties or by factors not attributable to the State. For example, while the proceedings in the Magistrates' Court were being conducted, the COVID-19 pandemic was still an on-going public health emergency which necessitated virtual hearings. The matter before the Magistrate was also adjourned because of

the absence of prosecution witnesses.[90] The accused had to be out of the jurisdiction for work for two months.[91] The accused's attorney-at-law was absent on some occasions.[92]

144. At paragraph 59 of **Blencoe** (*supra*), the Supreme Court of Canada stated that it would be inappropriate to attribute blame for consequences caused by third parties who are not in some sense agents of the State. In a similar vein, it would be inappropriate to directly attribute blame to the State for actions or consequences namely, alleged delay and adjournments caused at least in part by third parties. The evidence is unwavering that many of the instances of the alleged delay and adjournments cannot be attributed to the State. Thus, the judge erred in her assessment that the multiple postponements and cancellations caused the Respondent to feel abandoned and discarded and that the postponements were "*unfair*".

145. Further, it is particularly important to note that in **Blencoe**, the Supreme Court of Canada recognised that even in the absence of delays in the proceedings, the Respondent in that case would nevertheless still have to face unproven allegations of sexual harassment and potential discrimination and stigmatization as a consequence. Analogously, even if the Respondent in this case did not have to experience any alleged delay or postponements of the hearings, her existing trauma would still very probably have been exacerbated because of the intrinsic nature of criminal litigation.

146. A critical facet of the Respondent's case on the violation of her right to security of the person was her challenge to the accused's Counsel's cross-examination and the general approach of his conduct at the Preliminary Inquiry. The Respondent submitted that Counsel for the accused's treatment of her, further exacerbated a violation of her right to security of the person. That submission is insupportable.

147. In **Director of Public Prosecutions v Chris Durham**[93] ("**Chris Durham**"), the Judicial Committee, speaking through Lady Carr, observed that:

[90] Record of Appeal, Volume 1, Affidavit of Her Worship Taramatie Ramdass, TR 1, page 131
[91] Record of Appeal, Volume 1, Affidavit of Her Worship Taramatie Ramdass, TR 1, page 136
[92] Record of Appeal, Volume 1, Affidavit of Her Worship Taramatie Ramdass, TR 1, page 144
[93] [2024] UKPC 21

*"39. **The criminal trial process involves a number of different participants, playing different roles and with different duties and responsibilities**. **It is adversarial in character, a format directed to ensuring a fair opportunity for the prosecution to establish guilt and a fair opportunity for the defendants to advance their defence**. **The overriding requirement is to ensure that the defendant is tried fairly**."* (emphasis added)

148. Further, Lady Carr explained:

*"45. **The central task of the defence is to test the evidence presented on behalf of the prosecution**. **By challenging the strength, reliability and admissibility of evidence, defence counsel ensure that the process remains truly adversarial, essential for a fair trial; they are the critical counterforce in the courtroom, ensuring that the evidence withstands the highest scrutiny for the protection of their client's rights**."* (emphasis added)

149. The Judicial Committee's dicta referred to above comprehensively answer the Respondent's submission in this regard. The apex Court recognised that the accused's Counsel's task is to "*challenge the strength, reliability and admissibility of evidence*". That may include vigorously cross-examining the Prosecution's witnesses, including the Respondent. This is because the criminal trial process, and the Preliminary Inquiry process also, are adversarial in nature and both are geared towards ensuring that the accused is accorded the full panoply of his rights. Once it is within the confines of the law, vigorous cross-examination by Counsel for the accused does not violate the Respondent's right to security of the person.

150. Returning to **Blencoe**, Bastarache J further said:

""2. State Interference with Psychological Integrity

*81. In order for security of the person to be triggered in this case, **the impugned state action must have had a serious and profound effect on the respondent's psychological integrity** (G. (J.), supra, at para. 60). There must be state interference with an individual interest of fundamental importance (at para. 61). Lamer C.J. stated in G. (J.), at para. 59:*

> *'It is clear that the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interpreted with such broad sweep, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, massively expanding*

the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected.'

He went on to state (at paras. 63-64):

> *'Not every state action which interferes with the parent-child relationship will restrict a parent's right to security of the person. For example, a parent's security of the person is not restricted when, without more, his or her child is sentenced to jail or conscripted into the army. Nor is it restricted when the child is negligently shot and killed by a police officer: see Augustus v. Gosset, [1996] 3 S.C.R. 268.*
>
> *While the parent may suffer significant stress and anxiety as a result of the interference with the relationship occasioned by these actions, the quality of the "injury" to the parent is distinguishable from that in the present case. In the aforementioned examples, the state is making no pronouncement as to the parent's fitness or parental status, nor is it usurping the parental role or prying into the intimacies of the relationship. In short, the state is not directly interfering with the psychological integrity of the parent qua parent. The different effect on the psychological integrity of the parent in the above examples leads me to the conclusion that no constitutional rights of the parent are engaged.' [Emphasis added.]*

82. ***The quality of the injury must therefore be assessed****. In my opinion, all of the cases which have come within the broad interpretation of "security of the person" outside of the penal context differ markedly from the interests that are at issue in this case.* ***Violations of security of the person in this context include*** *only serious psychological incursions* ***resulting from state interference with an individual interest of fundamental importance****.*

83. It is ***only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the s. 7 security of the person interest****. While* ***these fundamental personal choices would include the right to make decisions concerning one's body free from state interference or the prospect of losing guardianship of one's children, they would not easily include the type of stress, anxiety and stigma that result from administrative or civil proceedings****."* (emphases added)

151. The dicta quoted from the Supreme Court of Canada above are pivotal. That dicta recognise and confine breaches of the right to security of the person even further than by simply requiring the need for a direct causal connection between State action and psychological prejudice. There is another element which is required. The Supreme Court established that it is only in exceptional or rare cases where the State trespasses into "*profoundly intimate and*

personal choices of an individual" that State-caused delay could trigger the **section 7** security of the person interest. That dicta from **Blencoe** is accepted with approval. It is only in exceptional cases where the State intrudes into an individual's private sphere would State interference causing psychological harm infringe **section 4(a)**.

152. In this case, the alleged right to be free from delays in criminal proceedings in the face of the absence of a right to a speedy trial or to a trial within a reasonable time is not one of those profoundly intimate and personal choices. The State has not interfered with the Respondent's right to make profoundly intimate and personal choices about her life.

153. Therefore, applying the first limb of the test laid out in **Blencoe**, the psychological prejudice incurred by the Respondent was not as a result of State-imposed alleged delay in the Preliminary Inquiry.

154. In **Blencoe**, Bastarache J opined that there must be a sufficient causal connection between the State-caused delay and the prejudice suffered by the Respondent in order for **section 7 of the Canadian Charter** to be triggered.[94] That principle applies with equal force to **section 4(a)**. The central concern which a Court treating with an alleged **section 4 (a)** security of the person violation must grapple with, is whether there has been a direct impingement by the State upon the right to security of the person.

155. The issue of proximate cause and causation in general was recently addressed by the United Kingdom Supreme Court in **Ahmed**.[95] The key issue raised in **Ahmed** is whether tortious liability can and should be extended to include cases where a claimant's injury is caused by witnessing the death or injury of a close relative, not in an accident, but from a medical condition which the defendant has negligently failed to diagnose and treat.[96] In delivering the decision of the Judicial Committee, Lord Leggatt opined that:

> *"129. As Lord Oliver emphasised, reasonable foreseeability of harm, although necessary, is not by itself enough to give rise to a duty of care. There must also exist the necessary*

[94] Blencoe, paragraph 60
[95] [2024] UKSC 1
[96] [2024] UKSC 1, paragraph 5

"proximity" in the relationship between the parties to make it just to impose such a duty.
. .

. . .

130. The need to show not only reasonable foreseeability of harm but proximity sufficient to give rise to a duty of care applies whatever the nature of the harm suffered by the claimant - whether it be financial loss, damage to property or personal injury: see eg Marc Rich & Co AG v Bishop Rock Marine Co Ltd [1996] AC 211, 235-236."

156. Applying the principle in **Ahmed**, the Respondent must not only show that the State has directly interfered with her psychological well-being, but she must also show that the State's action was the proximate cause of the harm which she alleges was inflicted upon her. The Appellant, in a nutshell, has submitted that the difficulty with Ms. Ghent's Confidential Psychological Report is that it does not disaggregate the alleged rape, the trauma of the Respondent bearing a child, and the alleged delay in the criminal proceedings. There is very considerable force in the Appellant's submission in this regard.

157. It is simply impossible to ascertain whether the alleged delay in the criminal proceedings and the adjournments were the proximate cause of the Respondent's psychological prejudice. The fact that the Confidential Psychological Report does not disaggregate the trauma caused by the alleged sexual assault, the trauma of bearing a child, the alleged delay, and the course of criminal proceedings is a significant shortcoming in this aspect of the Respondent's case. As noted above, there are inherent difficulties which participating in a criminal trial entail. Some of those difficulties cannot simply and selectively be excised. The Respondent incurred significant psychological damage because of the alleged sexual assault itself. Any harm the Respondent incurred cannot be directly attributed to the State.

158. In both the judge's decision[97] and the Respondent's submissions,[98] the decision of the Supreme Court of Canada in **Kazemi Estate v Islamic Republic of Iran** ("**Kazemi Estate**")[99] was discussed and applied. Both the judge, and the Respondent, relied on **Kazemi Estate** for the proposition that "*a sufficient causal connection did not require the impugned government action*

[97] At paragraphs 39 - 42
[98] At paragraph 59 of her Reply Submissions
[99] [2014] SCC 62

or law to be the only or dominant cause of the prejudice suffered".[100] On close analysis, **Kazemi Estate** cannot support the proposition that the judge and the Respondent both cite the case for. The facts of that case are entirely distinguishable from the factual matrix of the present matter. It will be sufficient to take the facts from the headnote of the case:

> *"K, a Canadian citizen, visited Iran in 2003 as a freelance photographer and journalist.* ***She was arrested, detained and interrogated by Iranian authorities. During her detention, she was beaten, sexually assaulted and tortured. She later died as the result of a brain injury sustained while in the custody of Iranian officials. Despite requests made by K's son, H, that her remains be sent to Canada for burial, she was buried in Iran. Although a report commissioned by the Iranian government linked members of the judiciary and the Office of the Prosecutor to K's torture, only one individual was tried. That person was acquitted following a trial marked by a lack of transparency. In short, it was impossible for K and her family to obtain justice in Iran****.*
>
> *In 2006, H instituted civil proceedings in Quebec seeking damages on behalf of himself and his mother's estate against the Islamic Republic of Iran, its head of state, the Chief Public Prosecutor of Tehran and the former Deputy Chief of Intelligence of the prison where K was detained and tortured. H sought damages on behalf of K's estate for her physical, psychological, and emotional pain and suffering as well as damages for the psychological and emotional prejudice that he sustained as the result of the loss of his mother. Both H and the estate also sought punitive damages. The Iranian defendants brought a motion in Quebec Superior Court to dismiss the action on the basis of state immunity. In response, H and K's estate raised certain exceptions provided in the State Immunity Act ("SIA"), and challenged the constitutionality of certain provisions of that Act."* (emphasis added)

159. From the headnote, it is patent that the facts of **Kazemi Estate** were exceptional ones and are not remotely analogous to the situation in this case. **Kazemi Estate** involved physical abuse, sexual abuse, torture, medical complications arising from that abuse and issues of alleged corruption. The judge introduced this case at paragraph 39 of her judgment. However, she did not condescend to the facts of the case. This shortcoming in her judgment facilitated her wholesale adoption and application of legal principles from an entirely distinguishable case to the present matter. In doing so, the judge erred. **Kazemi Estate** must be confined to its extreme and particular facts.

[100] See paragraph 42 of the judgment

160. Further, that case predominantly revolved around issues of international law and State responsibility which are entirely different from the issue in the present matter. LeBel J, giving the judgment of the Court, explained:

> *"[32] The answers to those questions can be found in the interpretation of the SIA.* ***Essentially, the Court is being asked to determine the scope of the SIA, the impact that the evolution of international law since the SIA's adoption might have on its interpretation, and whether the Act is constitutional.*** *An* ***overarching question, which permeates almost all aspects of this case, is whether international law has created a mandatory universal civil jurisdiction in respect of claims of torture which would require states to open their national courts to the claims of victims of acts of torture that were committed outside their national boundaries****."* (emphasis added)

161. From the quote referred to above, **Kazemi Estate** primarily concerned issues of international law. It is accepted that in that case, the Supreme Court of Canada did consider a sub-issue relating to the right of the security of the person. However, a discussion of the type of connection required between State interference and psychological prejudice was not a part of the *ratio* in **Kazemi Estate**. Thus, the proposition relied upon by the judge must be taken in its context as *obiter dicta* and is not binding on this Court.

162. Finally, and very importantly, the Respondent has conveniently omitted to mention in her submissions that in **Kazemi Estate**, the specific backdrop was that the Appellant had alleged that a statutory provision – **section 3 (1) (a) of the State Immunity Act** – enacted by the State, constituted the "State interference" which caused his psychological prejudice. When LeBel J was considering whether the Appellant's right to the security of the person had been infringed, he said:

> *"[134]* ***Based on the above analysis, it is arguable that s. 3(1) of the SIA might cause such serious psychological prejudice that the security of the person is engaged and violated****. But, in any event,* ***I do not find it necessary to decide whether s. 3(1) of the SIA engages the security of the person interest*** *under s. 7 of the Charter, given my conclusion (discussed below) that the operation of s. 3(1) does not violate any principles of fundamental justice."* (emphases added)

163. The factual matrix of this case is very far removed from that of **Kazemi Estate**. In this matter, as concluded above, there has been no direct State interference in the life of the Respondent. This is yet another vital point of distinction between **Kazemi Estate** and the present matter which neither the judge nor the Respondent discussed. To the extent that the judge failed to appreciate this, she erred and was thus plainly wrong in applying **Kazemi Estate**.

164. For these reasons, there has not been a direct causal link shown between the actions of the State and the Respondent's psychological prejudice. This limb of the test fails.

(ii) Whether the alleged psychological prejudice faced by the Respondent was serious?

165. It cannot be seriously doubted that the psychological prejudice faced by the Respondent was serious. It was/is serious prejudice.

166. However, for the reasons stated above, the prejudice suffered was not as a result of the actions or omissions of the State. As such, it follows that the State has not infringed the right of the Respondent to her security of the person.

Due Process of the Law

Judge's Findings

167. On this issue of a breach of due process, the judge applied the learning she extrapolated from the decision of Bereaux J.A. in **Desmond Renne**. At paragraph 58 of the judge's decision, she stated that in determining an answer to this issue, the question turned on whether there was any avenue available to the Respondent to seek redress for the wrongs committed against her.[101] The judge then examined the meaning of the expression "legal system" and found that there was no evidence that any appeal was made to the Director of Public Prosecutions, who is part of the legal system, to manage the prosecution of the case or take any action within his constitutional authority.[102] The judge also found that the Respondent could have also appealed to the Chief

[101] Paragraph 58 of judgment
[102] Paragraph 60 of judgment

Magistrate and the Chief Justice regarding the pace of the Preliminary Inquiry, but that there was no evidence of this.[103] Finally, the judge held that there were the High Court proceedings in which the Respondent could receive orders compelling the State to put mechanisms in place and to allocate sufficient resources to ensure that the committal and trial proceedings were completed expeditiously. When the judge examined all of these facts, she determined that the legal system, as a whole, was fair to the Respondent. She thus concluded that since the right to due process was not breached, there could be no breach of the Respondent's right to security of the person except by due process of law.[104]

Submissions

168. The Appellant submitted that there was no breach of the right to due process. According to the Appellant, it is constitutionally permissible to derogate from the right to security of the person if due process was observed. To bolster this submission, the Appellant relied on the decision in **R v Morgantaler** where the Supreme Court of Canada declared that Canada can breach an individual's right to security of the person if the principles of fundamental justice are observed. The Appellant then defined what "*due process of law*" meant and stated that there was no entitlement to an "i*nfallible system of law*", but to one that was fair and that afforded access to the courts. According to the Appellant, the purpose of the due process provision was primarily to protect the rights of the accused who is innocent unless and until convicted of a charge. Once a fair trial was still possible, there could be no breach of due process. The Appellant submitted that the relief sought by the Respondent related to having a trial and so, by that fact, the Appellant contended that the Respondent impliedly accepted that a fair trial was still possible. Thus, there was no breach of the right to due process.

169. The Respondent cross-appealed this aspect of the judge's decision. According to her, the trial judge was plainly wrong in finding that the legal system, as a whole, was fair to her since she had various avenues of redress available. In respect of the judge's reliance on **Desmond Renne** and the word "appeals" used in that case, the Respondent submitted that the word "appeals"

[103] Paragraph 61 of judgment
[104] Paragraph 64 of judgment

meant a legal right of appeal against an erroneous order. According to the Respondent, there was no law which stated that a person may request that the Director of Public Prosecutions manage a particular case, or may request from the Judiciary that his case be expedited. The Respondent contended that the remedies which should be available to her are legal remedies. She also articulated that even if she had requested the Chief Justice and the Chief Magistrate to expedite the proceedings, there was no enforceable obligation on their part to address such a request. In her submissions, the Respondent argued that a more apposite way to determine whether the legal system was fair was to ascertain whether her rights had been vindicated already. According to the Respondent, it was clear that she had no right to appeal or bring any other judicial proceedings in respect of the failings of the State. The only means of obtaining an effective remedy was by virtue of these proceedings. For these reasons, she said that there was a violation of the right to due process.

Discussion

170. **Section 4(a)** comprises two rights: the right to security of the person and the right not to be deprived thereof except by due process. A court will only find that the right to security of the person is violated if there was a breach of the alleged victim's right to due process.

171. The legal principles relating to the concept of due process were recently explained by Sir Bernard McCloskey in **Seepersad**:

> *"30. The Board has taken note of the leading cases in which section 4(a) has been the subject of previous judicial consideration. It considers that these cases have an unmistakable central theme and orientation.* ***In short, "due process" has generally been considered to protect rights of a procedural nature, fair trial rights, in particular (though not exclusively) the right to procedural fairness. This is a right which is engaged in all kinds of contexts, both judicial and administrative*** *. . .*
>
> *. . .*
>
> *32. Section 1(a) has been considered in a number of reported cases. In* ***Lasalle v Attorney-General*** *(1971) 18 WIR 379, which concerned a court martial, one of the complaints about the legal process was that it infringed the appellant's rights under section 1(a). Phillips JA stated at 389G:*

"This is the first occasion on which the due process clause of the Constitution has been the subject matter of interpretation by this court. Little authority is to be found with reference to the interpretation of its counterpart in the Canadian Bill of Rights. The expression 'due process of law', although having its roots in Magna Carta (1215), which has come to be regarded as the palladium of the basic liberties of the British citizen, has not found a firm footing in British legal terminology …

. . .

Phillips JA then traced the use of this phrase in subsequent English legislative enactments, the Fifth Amendment of the Constitution of the USA and the Canadian Bill of Rights. He also noted the analysis of Professor Holdsworth in History of English Law (Vol 1, p 63 and Vol 2, pp 215-216), passages in which one finds emphasis on the protection of the citizen against arbitrary government conduct, including arbitrary deprivation of personal liberty. Phillips JA continued, at 319G:

'The concept of 'due process of law' is the antithesis of arbitrary infringement of the individual's right to personal liberty; it asserts his 'right to a free trial, to a pure and unbought measure of justice'. While it is not desirable and, indeed, may not be possible to formulate an exhaustive definition of the expression, it seems to me that, as applied to the criminal law … it connotes adherence, inter alia, to the following fundamental principles:

(i) reasonableness and certainty in the definition of criminal offences;
(ii) trial by an independent and impartial tribunal;
(iii) ***observance of the rules of natural justice****.'"* (emphases added)

172. Sir Bernard McCloskey continued at paragraph 35:

"35. The "due process of law" clause in section 4(a) of the Constitution has been considered by the Board in several cases. There are four of particular note. The first is ***Thomas v Baptiste*** *[2000] 2 AC 1. Lord Millett, giving the judgment of the Board, traced the history of the clause in essentially the same terms as Phillips JA in Lasalle and continued (at 21H-22E):*

*"****Transplanted to the Constitution of Trinidad and Tobago, the due process clause excludes legislative as well as executive interference with the judicial process****.*

But the clause plainly does more than this. It deliberately employs different language from that found in the corresponding provisions of the Universal Declaration of Human Rights and the European Convention on Human Rights.

> *They speak merely of 'the sentence of a court of competent jurisdiction'.* ***The due process clause requires the process to be judicial; but it also requires it to be 'due'. In their Lordships' view 'due process of law' is a compendious expression in which the word 'law' does not refer to any particular law and is not a synonym for common law or statute. Rather it invokes the concept of the rule of law itself and the universally accepted standards of justice observed by civilised nations which observe the rule of law*** *…*
>
> ***The clause thus gives constitutional protection to the concept of procedural fairness****".* (emphases added)

173. Finally, Sir Bernard McCloskey explained that:

> *"37.* ***In Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago [2005] 1 AC 190, para 88 the Board, echoing what Lord Diplock had stated in Maharaj v Attorney-General of Trinidad and Tobago (No 2) [1979] AC 385, emphasised that in determining whether a person has been deprived of their liberty by due process of law it is necessary to consider the legal system as a whole. In both cases this entailed taking into account the availability of judicial remedies****."* (emphasis added)

174. In **Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No 1)**,[105] Mr Maharaj was a barrister who was committed to prison for seven days for an alleged contempt in the face of the court. At that date, there was no right of appeal to the Court of Appeal against such an order. An appeal, however, lay directly to Her Majesty in Council by special leave of the Board. Mr Maharaj brought such an appeal and succeeded upon it. The Judicial Committee quashed the committal order on the grounds that there had been a fundamental failure of natural justice. This was because before making the order, the judge had not told the Appellant what he had done so as to enable him to explain or excuse his conduct. At the same time, Mr Maharaj had been pursuing a constitutional motion for redress, including monetary compensation, on the ground that he had been deprived of his liberty without due process of law. In this, too, he was to succeed on appeal to the Privy Council. The Judicial Committee explained:

> ***"The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting***

[105] (1976) 29 318

> ***infringements of the rights protected by s 1(a) [of the 1962 Constitution, now s 4(a) of the 1976 Constitution], and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their lordships do not believe that this can be anything but a very rare event. … even a failure by a judge to observe one of the fundamental rules of natural justice does not bring the case within s 6 [now s 14] unless it has resulted, is resulting or is likely to result, in a person being deprived of life, liberty, security of the person or enjoyment of property.*** *. . . "* (emphasis added)

175. Finally, in **Desmond Renne**[106] the Appellant was convicted of arson and two counts of causing grievous bodily harm. He was sentenced to six years imprisonment. He appealed and remained in custody pending the appeal. The Court of Appeal allowed his appeal in relation to the two counts of causing grievous bodily harm but affirmed his conviction in relation to the arson. The Court of Appeal, in imposing the six year term of imprisonment, directed that the term begin from the date of the disposition of the appeal i.e. May 11th 2004. The Court of Appeal gave no reason for so directing. The Appellant was released on May 7th 2008. He had spent fifteen months awaiting his appeal and had that time been taken into account, he would have been released on or about February 6th 2007.

176. Bereaux J.A. giving the decision of the Court of Appeal explained that the question in that appeal was "*whether the failure of the Court of Appeal to direct, upon the dismissal of the Appellant's appeal against conviction, that his sentence should run from the date of conviction, was an error which resulted in the appellant being deprived of his right to liberty without due process contrary to* ***section 4(a) of the Constitution***".[107] In answering this question, Bereaux J.A. explained:

> *"[12] At the heart of the appeal is whether there has been a failure of "due process" in this case. The decision of the Privy Council in Independent Publishing Company Limited v. The Attorney General of Trinidad and Tobago [2005] 1 LRC 222 provides the complete answer to that question and to the appellant's case. My understanding of the holding in that case is as follows:*

[106] Civ. App. 57/2013
[107] Ibid, paragraph 1

> ***(i) In deciding whether someone's section 4(a) right not to be deprived of their liberty except by due process of law, has been violated, it is the legal system as a whole which had to be examined and not merely one part of it.***
>
> ***(ii)] Where there is no avenue open to the person aggrieved for redress then the legal system can be characterised as unfair. Where however there are avenues within the legal system by which an aggrieved person can pursue redress for the wrong committed against him then the legal system may be characterised as fair."*** (emphasis added)

177. The Respondent's right to security of the person in **section 4(a)** is expressly limited by due process. An individual can suffer an infringement of his right to security of the person, but if that infringement was incurred in circumstances where due process obtained, there will be no breach of the **section 4(a)** right.

178. Having found that there has been no breach of the Respondent's right to security of the person, it is strictly speaking unnecessary for this Court to consider this question. However, out of deference to the industry of Counsel on both sides, I proceed on the assumption that there was, in fact, a breach of the right in order to ascertain whether the said breach occurred without due process.

179. As Bereaux J.A. opined in **Desmond Renne**, this Court too, finds that the complete answer to this question is found in the decision of **Independent Publishing Company Limited v Attorney General of Trinidad and Tobago** (**Independent Publishing Co Ltd**).[108] In **Independent Publishing Co Ltd**, two journalists breached a prohibition on publication of aspects of a criminal trial and were convicted by the judge for contempt of court. One (Mr Ali) was sentenced to 14 days' imprisonment and the other was fined. They appealed against their convictions and sentences, and Mr Ali was granted bail the day after his appeal was lodged, after he had spent four days in prison. Together with newspaper publishers affected by orders made by the judge, they also brought proceedings under **section 14 of the Constitution** relying on their rights under **section 4(a)**, among other provisions. The constitutional motions were dismissed and the publishers and journalists appealed. The Court of Appeal heard the various appeals together and, so far as is

[108] [2005] 1 AC 190

relevant for present purposes, allowed Mr Ali's appeal against his conviction (and quashed his sentence) and also allowed his constitutional appeal based on **section 4(a)** and made an order for damages to be assessed for the time he had spent in prison before being released on bail. The Attorney General successfully appealed in respect of the constitutional relief awarded to Mr Ali.

180. The Judicial Committee explained the holding in **Independent Publishing Co Ltd** in its recent decision in **Duncan and Jokhan v The Attorney General of Trinidad and Tobago**.[109] In this latter case, Lord Sales clarified:

> *"25. The judgment of the Board was delivered by Lord Brown of Eaton-under Heywood. Lord Brown clarified the effect of the judgment in Maharaj (No. 2), explaining (para 87) that a critical feature in that case was that the appellant had no right of appeal to the Court of Appeal against his committal and therefore had no right to apply for bail pending such appeal and (para 88) that, where there was no avenue of redress (save only an appeal by special leave direct to the Board), then it was appropriate to characterise the legal system as unfair, and to identify a breach of the fundamental human right identified by Lord Diplock to "a legal system … that is fair"; by contrast, Mr Ali had had a right of appeal and had been able to secure his release on bail promptly using the ordinary local avenue of redress available to him, which meant that the legal system as a whole was fair. Lord Brown pointed out (para 89) that Mr Ali was in a position no different from that of a person convicted of any other offence, who has a right of appeal and who, even if successful on such appeal, cannot seek constitutional relief in respect of time spent in prison."*

181. In **Independent Publishing Company Limited**, the Judicial Committee cited its earlier decision in **Maharaj No. 2**. Lord Diplock, in **Maharaj No. 2**, explained that the fundamental human right is not to a legal system that is infallible but to one that is fair. Lord Diplock stated that it was only errors in procedure that are capable of constituting infringements of the rights protected by **section 4(a)**, and that no mere irregularity in procedure is enough, even though it goes to jurisdiction. The error must amount to a failure to observe one of the fundamental rules of natural justice. In **Maharaj No. 2**, Lord Diplock explained further that the Judicial Committee did not believe that such errors can be anything but a very rare event and that even a failure by a judge to observe one of the fundamental rules of natural justice would not bring a case within the

[109] [2021] UKPC 17

redress clause (**section 14 of the Constitution**) unless it has resulted, is resulting or is likely to result, in a person being deprived of life, liberty, security of the person or the enjoyment of property.

182. The core of the argument on this matter has revolved on the issue of whether the legal system as a whole is fair. The legal system of a State will be considered to be fair where it has implemented various avenues for redress for persons who complain of issues which they are confronted with. One such example is no doubt the Respondent's wish to have her matter heard expeditiously.

183. As in **Renne**, the Respondent's submission here was that she was denied due process and this was occasioned by the fact that she could not have her matter heard expeditiously. Where that is the claim, it is the legal system as a whole that must be examined to ascertain whether it could be characterized as fair or one that was unfair. Where the legal system when looked at as a whole can be characterized as fair, the Respondent would have had the benefit of due process. Where the legal system provides an effectual avenue to correct any shortcomings occasioned by error, then the system is one that could be characterised as fair.

184. The legal system, when examined as a whole, must be characterised as fair. The Respondent had at the very least two potent avenues of redress to cure any potential delays which she considered to have occurred. She could have requested the Director of Public Prosecutions to manage the prosecution of the case in a manner that would take due account of her particular vulnerabilities which included most notably her psychological state. The Director has the ability to direct his State Prosecutors to make requests of the presiding Magistrate (and the High Court eventually, during the process of case management) to expedite the matter, with substantiating reasons for doing so. Further, as the judge correctly pointed out, the Respondent could have also advanced specific requests to the Chief Magistrate and/or the Chief Justice. Indubitably, the DPP, the Chief Magistrate, and of course, the Chief Justice are all major players in the legal system. Thus, the Respondent had avenues for redress available to her which made the legal system fair.

185. Another way in which the legal system as a whole can be seen to be fair, in a general sense, to putative victims such as the Respondent is by the fact that the law allows such persons to make Victim Impact Statements ("VIS") after the conclusion of a criminal trial. A VIS is a statement by a victim of a crime detailing the impact of the incident on their personal, professional and family life.[110] In **Brandon Lutchman & Aaron Lallan v PC Adesh Gokool Reg. No. 133341**, this Court explained that in this jurisdiction, both statute and common law were silent on how a VIS should be treated by a court and the degree of weight that should be attached to them in the sentencing process.[111] As such, this Court canvassed the law on VIS from across the Commonwealth. In that case, this Court explained that VIS may play an important role in helping the sentencer, when determining an appropriate sentence, to evaluate the full and true extent of the aggravating factors in a case. This Court also noted that they help in assessing the immediate and potential long-term effects of the offence on the victim and any physical or psychological harm caused.[112]

186. In exploring the law on VIS, this Court cited the decision in **S v Matyityi**[113] which stated:

> *"'**An enlightened and just penal policy requires consideration of a broad range of sentencing options, from which an appropriate option can be selected that best fits the unique circumstances of the case before court. To that should be added, it also needs to be victim centred**. Internationally the concerns of victims have been recognised and sought to be addressed through a number of declarations, the most important of which is the UN Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power. The declaration is based on the philosophy that adequate recognition should be given to victims, and that they should be treated with respect in the criminal justice system. In South Africa victim empowerment is based on restorative justice. Restorative justice seeks to emphasise that a crime is more than the breaking of the law or offending against the State - it is an injury or wrong done to another person. The Service Charter for Victims of Crime in South Africa seeks to accommodate victims more effectively in the criminal justice system. **As in any true participatory democracy its underlying philosophy is to give meaningful content to the rights of all citizens, particularly victims of sexual abuse, by reaffirming one of our founding***

[110] Mag. App. No. S025/2018 Brandon Lutchman & Aaron Lallan v PC Adesh Gokool Reg. No. 13341 at [21]
[111] Ibid, paragraph 23
[112] Ibid, paragraph 21
[113] 2011 (1) SACR 40 (SCA)

democratic values, namely human dignity. It enables us, as well, to vindicate our collective sense of humanity and humanness*. The charter seeks to give to victims the right to participate in and proffer information during the sentencing phase.* ***The victim is thus afforded a more prominent role in the sentencing process by providing the court with a description of the physical and psychological harm suffered, as also the social and economic effect that the crime had and, in future, is likely to have. By giving the victim a voice the court will have an opportunity to truly recognise the wrong done to the individual victim****."* (emphases added)

187. The decision of **Brandon Lutchman & Aaron Lallan v PC Adesh Gokool Reg. No. 133341** which cited **S v Matyityi** both demonstrate that a victim to a criminal offence can potentially play an important part in the criminal justice system which exists in a State. By the inclusion of victims in the sentencing process, it can be seen that this is one aspect in which the legal system attempts to be fair to victims.

188. As indicated above, it is indubitable that the Office of the DPP plays a central role in the legal system of Trinidad and Tobago. The Office of the DPP is staffed by State Prosecutors whose main function is to represent the interests of the State and those of the victim, in proceedings against accused persons. Further, the Judicial Committee observed **Chris Durham** that:

> *"42. The DPP is responsible for the provision of a* ***Code for Prosecutors in Trinidad and Tobago (March 2012 version) ("the Code")****.* ***The Code is not an instruction manual, nor does it purport to lay down any rule of law****. But* ***it is the expectation that all prosecutions in Trinidad and Tobago will be conducted in accordance with the guidelines outlined in the Code****."* (emphases added)

189. State Prosecutors are guided by that Code which contains overarching principles which State Prosecutors ought to adhere to in the discharge of their functions. The following provisions of that Code demonstrate the manner in which State Prosecutors should treat with victims and witnesses:

> *"17****. Victims and Witnesses***
>
> *17.1* ***Victims and witnesses of crime in the criminal justice system are to be:***
>
> ***Treated with courtesy and compassion; and with***
>
> ***Respect for their dignity and privacy****.*

> *17.2.* ***The key means of observing these principles is through the provision of information to ensure that victims and witnesses understand the process and know what is happening at each stage****. So far as is possible, the victim and witness should have explained to the court's processes and procedures, and victims should be kept informed of what is happening during the course of the proceedings.*
>
> *. . .*
>
> *17.5.* ***Prosecutors should seek to the victim's interests as best as they can whilst fulfilling their duty to the Court and in the conduct of the prosecution on behalf of the State****."* (emphases added)

190. It is accepted that the Prosecutor's Code is not a binding legal instrument. However, the Code represents a codification of policy within the Office of the DPP on how State Prosecutors should, among other things, treat with victims. A focal point of the Code is the duty imposed on State Prosecutors to respect and treat victims and witnesses with courtesy, compassion, and respect for their dignity and privacy. As such, it too is an example of another way in which the legal system, looked at in the round, is fair to putative victims such as the Respondent.

191. Furthermore, when one examines the provisions of the **Criminal Procedure Rules 2016**, it is clear that those Rules ensure that the criminal justice system is as fair as possible in relation to victims. For example, the overriding objective of the **Criminal Procedure Rules** is to deal with criminal cases justly.[114] This overriding objective was recently reiterated by the Judicial Committee where the Court explained that, "*the* ***Criminal Procedure Rules 2016*** *(sic) also oblige the prosecutor to deal with the case "justly" (see* ***rule 3.1****)*": **see paragraph 44 of Chris Durham**. In dealing with cases justly, a Court must consider the interests of the accused, witnesses, and victims.[115] Further, **Rule 16 of the Criminal Procedure Rules** concerns Trial Management. Pursuant to **Rule 16.1 (c)**, a court may require a party to identify either orally or in writing (iv) what arrangements or special measures are desirable to facilitate the giving of evidence by a witness and (v) what arrangements are desirable to facilitate the participation of the accused and any other person.[116] These Rules dealing with special measures are also illustrative of yet another

[114] Criminal Procedure Rules, 2016, Rule 3.1
[115] Ibid, Rule 3.3 (c)
[116] Ibid, Rule 16.1 (c) (iv) & (v)

attempt by the Legislature to ensure that the legal system as a whole is as fair to victims as possible.

192. Another way in which the legal system as a whole is fair to the Respondent is that in trials for sexual offences, there are provisions contained in Acts such as the **Sexual Offences Act**[117] and the **Children Act** which empower judges and other judicial officers to take measures which would protect the interests of persons such as the Respondent and/or other victims. **Section 29 of the Sexual Offences Act** provides that in trials for rape, sexual assault and offences concerning children, they must take place in camera unless the Court directs otherwise.

193. It is patent that the raison d'être for these types of measures is to protect vulnerable witnesses, and victims from being exposed to the accused and other persons involved in the trial. This is yet another example of a way in which one aspect of the legal system is fair to the Respondent.

194. An important protective mechanism which is inherent in the criminal trial process and which amply demonstrates how the legal system as a whole is fair to the Respondent is the necessary function of the judge to give instructions and directions to juries (and to himself in Judge Alone Trials) at different points in the trial including, most importantly, during the Summing-Up or in the provision of the Reasons for the Verdict(s). Trial judges are able to utilise cautionary directions in criminal trials to instruct the jury (or themselves) on issues such as delay and its potentially prejudicial impact on the reliability of recollection. The judge can also utilise Directions to provide juries (and themselves, of course in Judge Alone Trials) with guidance on the dangers of stereotyping. See for example, **Chapter 21 of the Criminal Bench Book 2015** which deals with "**The Trial of Sexual Offences**" and in particular, the decision of the Court of Appeal in **Feroze Khan v The State.**[118] In that decision, the Court of Appeal approved the use of anti-stereotyping directions by judges. The benefit of such directions are that the jury or the judge would not seek to evaluate the Respondent by a misguided perceived standard, but rather, by a standard commensurate with the individual's specific, contextual circumstances.

[117] Chap 11:28
[118] Crim. App. No. P015/2013

195. For these reasons, the legal system, when examined as a whole, must be characterised as fair. Thus, the right to due process has not been breached.

196. In sum, the Respondent's right to not be deprived her security of the person without due process of the law has not been violated.

(iii) Whether the Respondent's right to the protection of the law under section 4(b) of the Constitution has been violated.

197. The third issue in this matter concerns whether the Respondent's right to the protection of the law under **section 4(b) of the Constitution** was violated.

Judge's findings

198. On the issue of whether the Respondent's right to the protection of the law under **section 4(b)** was violated, the judge relied on well-known decisions such as **The Maya Leaders Alliance v Attorney General of Belize** ("**Maya Leaders Alliance**"),[119] **Sam Maharaj v Prime Minister** ("**Sam Maharaj**"),[120] **Attorney General v Joseph and Boyce**[121] and **Boyce v R** ("**Boyce**").[122] The judge cited these decisions for various propositions including that (i) the right to the protection of the law is very broad in scope, (ii) that international law and international human rights treaties can have a significant influence on the interpretation of the Constitution and that (iii) the right to the protection of the law can be interpreted having regard to the State's international obligations. The judge then set out and discussed various provisions of the **United Nations Convention on the Rights of the Child**. The judge thereafter explained that to adhere to its international obligations, the State enacted a suite of legislation to incorporate those obligations into domestic law.

[119] [2015] CCJ 15
[120] [2016] UKPC 37
[121] CCJ Appeal No CV 2 of 2005
[122] [2004] UKPC 32

199. According to the judge, that suite of legislation included (i) **The Children Act**, (ii) **The Children's Authority Act**;[123] and (iii) **the FCDA**. The judge then examined various provisions in those statutes. She concluded that it was clear according to law that once a Magistrate became aware that a matter in which the virtual complainant was a child, that matter was a children matter as defined in the **FCDA**. The judge found that under the statutes she cited, a Magistrate was obligated to forthwith refer all children matters to the Children Court.

200. Applying the provisions of those statutes which she cited, the judge also concluded that the Magistrate should have known that the Respondent's case was a children matter which had to be referred to the Children Court. The judge, in her reasons, referred to the case of **Maria Da Penha Maia Fernandes**[124] decided by the Inter-American Commission on Human Rights. However, she distinguished that decision by explaining that the human rights situation in this State was not as dire as that of the impugned State in that decision.

201. In light of all of the above, the Court considered that while the Respondent had been afforded access to the court, the protection guaranteed by such access was not effective as the Respondent's case was not treated as a children matter and forthwith referred to the Children Court. Notwithstanding the above, the Court concluded that the State did not fail to put mechanisms in place nor did it fail to allocate sufficient resources to ensure that criminal matters can be concluded expeditiously in general. However, the Court noted that having regard to law as obtained with regard to children matters specifically, it was satisfied that the Respondent was not afforded the protection of the law.

Submissions

202. The Appellant's submissions on this issue began with an assertion that the Respondent did not identify a particular "law" which it claimed that she was being deprived the protection of. According to the Appellant, this was an integral facet of analysing whether there had been a violation of the right to the protection of the law. The Appellant submitted that the cases cited by both the judge and the Respondent, namely, **Sam Maharaj** and **Maria da Penha**, were

[123] Chap 46:10

[124] Report No. 54/01 Case 12.051 dated 16 April 2001; Claimant's Authorities filed on the 16 January 2023 at page 1187.

distinguishable from the instant matter in many material regards. The Appellant contended that since the judge arrogated unto herself a consideration of the suite of legislation adverted to above to determine whether there was a breach of the provisions of those statutes, it would have had to make submissions on those provisions for the first time on appeal.

203. The Appellant then submitted that upon a close scrutiny of various material provisions in the **Children Act** and the **FCDA**, it is plain that the judge erred in finding that the Respondent's right to the protection of the law was breached because the criminal proceedings were not transferred to the Children Court.

204. As to the Respondent's submissions on this issue, she began her submissions by setting out the principles enunciated in the decision of the Caribbean Court of Justice in **Maya Leaders Alliance**. According to the Respondent, the State enacted a suite of legislation to comply with its obligations under the **UNCRC** including the **Children Act** and the **FCDA**. The Respondent cited the **Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belém do Pará"** ratified on 4th January, 1996 and **Maria de Penha** also in support of her submissions. The Respondent then discussed the **Domestic Violence Act** and its history and how that **Act** provided for the speedy disposition of trials. According to the Respondent, all of these treaties and statutes demonstrate that there is a norm in Trinidad and Tobago for children matters to be dealt with speedily.

205. The Respondent, relying on **Akili Charles**, submitted that the Appellant misconstrued the law in relation to **section 4(b)**. She explained that she did not need to identify any "law" which the State was in breach of. The Respondent criticised the judge's reasoning on this issue. She stated that there was an irrational and unreasonable course of action/inaction adopted by the State in not ensuring that she obtained a speedy trial and that because of that unreasonable course of action/inaction, she suffered real and substantial prejudice through psychological damage and that there was neither a prompt nor effective remedy nor a rationale for the said course of action/inaction. Thus, the Respondent argued that her right to the protection of the law was violated.

Discussion

206. The legal principles governing the right to protection of the law under **section 4(b)** are uncontroversial. In **Seepersad**, the Judicial Committee explained:

> "*52. The section 4(b) jurisprudence was developed in a further decision of the Caribbean Court of Justice,* ***The Maya Leader's Alliance v Attorney General of Belize [2015] CCJ 15****. The Board would offer the following summary of this lengthy judgment:*
>
> *i) The right asserted by the appellants, namely a right to protection of Maya customary land tenure, was protected by the relevant provisions of the Belize Constitution.*
>
> *ii) By section 3(a) of the Constitution of Belize every person in Belize enjoyed, amongst other "fundamental rights and freedoms of the individual … the protection of the law".*
>
> *iii) While this right has "traditionally" been considered to guarantee access to courts and tribunals which are independent and impartial, the court considered this an unduly "narrow interpretation": see paras 39-41.*
>
> *iv) The right to protection of the law encompasses "access to and the enjoyment of the fundamental rules of natural justice": see para 42.*
>
> *v) This right "… goes well beyond the issue of access to judicial or quasi-judicial proceedings": para 44.*
>
> *vi) It is a "broad spectrum right": para 45.*
>
> *vii) This right also "… encompasses the international obligations of the state to recognise and protect the rights of indigenous people … to honour its international commitments" see para 52.*
>
> *53. The judgment of the court, which was unanimous, contains the following passage of particular note, at para 47:*
>
> > *'**The law is evidently in a state of evolution but we make the following observations. The right to protection of the law is a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property. It encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand***

***effective relief to remedy any breaches of their constitutional rights. However the concept goes beyond such questions of access and includes the right of the citizen to be afforded 'adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power' [Attorney General v Joseph and Boyce at para 20]. The right to protection of the law may, in appropriate cases, require the relevant organs of the state to take positive action in order to secure and ensure the enjoyment of basic constitutional rights. In appropriate cases, the action or failure of the state may result in a breach of the right to protection of the law. Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the citizen's rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy**.'*

The court concluded that the Government of Belize had contravened the constitutional right of the appellants to the protection of the law on account of its failure to take appropriate positive measures to provide practical and effective protection for the substantive constitutional right in play, specifically - in the language of para 59 - "the obligation to put in place special measures to give recognition and effect to these rights so that the protection of the law can be enjoyed". The court decided that the remedy of non-pecuniary damages was appropriate.

54. The most recent judicial learning on this subject is found in Maharaj v Prime Minister (Trinidad and Tobago) [2016] UKPC 37. There the meaning and ambit of section 4(b) were considered in a context where the appellant had established before the Court of Appeal that his non-reappointment to the Industrial Court had been procedurally unfair. The appeal to the Board arose out of the Court of Appeal's determination to grant the appellant declaratory relief only and reject his claim for damages. The appellant made the case that his right to "the protection of the law" under section 4(b) had been violated.

55. Lord Kerr, delivering the unanimous judgment of the Board, quoted with approval the passages in Joseph and Boyce and Maya Leaders noted above. In doing so he noted at para 25 the "expansive approach" which these decisions demonstrated. At paras 37-40 Lord Kerr dilated on the scope of section 4(b). The central theme of these passages and the later passage at para 43 is that, while the right to the individual's protection of the law is capable of being fulfilled by the availability of an efficacious and timeous remedy through judicial proceedings, a breach will arise where the remedy "cannot be or is not provided": para 40. The Board considers these words to be of some importance. The "cannot

be" scenario will typically arise in a case where the affected person has not initiated legal proceedings because no appropriate remedy is available. In contrast, the "is not" scenario will normally arise in a case where the person concerned has indeed pursued legal proceedings in which event the focus will be on an adverse outcome or whether any remedy secured thereby was both prompt and efficacious." (emphases added)

207. The issue is whether the alleged delay and adjournments in the hearing and progression of the Preliminary Inquiry for the Respondent's alleged sexual assault constituted a breach of her right to the protection of the law. The answer is in the negative. The judge was plainly wrong to hold that there was a **section 4(b)** breach.

208. First, to determine whether there has been a breach of the right to the protection of the law, the judge identified "the law" as being a suite of legislation comprising of (i) the **Children Act**, (ii) the **FCDA**, and (iii) the **Children Court Rules**. The question is whether the judge was correct in this respect and whether the provisions contained in that suite of legislation applied to the Respondent.

209. The **FCDA** is "*An Act to make jurisdiction for all family matters and children matters exercisable in a Division of the High Court to be called the Family and Children Division and to make provision for matters connected therewith*".[125] **Section 25 of the FCDA** provides that: "*On the commencement of this Act, the authority and jurisdiction in children matters exercisable by the High Court and Courts of Summary Jurisdiction shall be exercisable by the Children Court*."

210. A "children matter" is defined by **section 3(1) of the FCDA** :

""children matter" includes any—

(a) children charge matter;

(b) children care matter;

(c) children drug matter;

(d) children mental health matter;

[125] See Long Title to the Act

> *(e) matter which is not a family matter within the meaning of this Act, but the primary issue in the matter is the care and protection of a child;*
>
> *(f)* ***matter, in relation to a child, where there is an application for and issuance of a Protection Order and its enforcement under the Domestic Violence Act, and where the child is a victim or an affected bystander****; and*
>
> *(g)* ***matter in which a child is required to appear in Court****;"* (emphases added)

211. The trial judge explained at paragraph 78 of her decision that a "children matter" is defined to include a matter where a child is a victim, an affected bystander, or where a child is required to appear in Court. However, the judge erred in her interpretation of the expression "children matter".

212. In **Garvin Holder v Comptroller of Customs**,[126] Kokaram J.A. explained at paragraph 21 that:

> *"In many cases such an interpretative function ought reasonably to be conducted against a backcloth of history, purpose and text.* ***In resolving differences of interpretation, the clear unambiguous meaning of words should not be easily overtaken by what may be said to be Parliament's intention****. . .*
>
> *. . .*
>
> *22.* ***In determining the purpose and meaning of a statute****, Jamadar J.A. (as he then was) in The Law Association of Trinidad and Tobago v The Honourable Chief Justice of Trinidad and Tobago Mr. Justice Ivor Archie O.R.T.T. CA No. P075 of 20185* ***recommended a textual analysis of the statute****, looking at the actual language used, the statute as a whole or the intratextual approach and canons of interpretation."* (emphases added)

213. Having regard to what was said in **Garvin Holder v Comptroller of Customs**, in determining the meaning of "children matter", as used in **section 3(1) of the FCDA**, a textual analysis of the section must be conducted looking at the meaning of the unambiguous words used. The language used in **section 3 (1) (f)** is clear. That section does not define "children matter"

[126] CA P023 of 2018

as a matter where the child is a victim or an affected bystander as the judge suggested. Rather, **sub-section 3 (1) (f)** provides that in relation to that section, a "children matter" is a matter concerning an application for, and issuance of, a Protection Order under the **Domestic Violence Act**. **Sub-section 3 (1) (f)** further articulates that where such an application relates to a child, and where that child is a victim of domestic violence or an affected bystander in a domestic violence situation, then that is a "children matter" under **sub-section 3 (1) (f)**.

214. When the recommended textual analysis of the **FCDA**, and **sub-section 3 (1) (f)** is therefore conducted, it is clear that the "victim" and "affected by-stander" who is referred to in that sub-section is not a victim or by-stander, at large. On the plain language, it is one who is connected to a particular type of application – applications for Protection Orders under the **Domestic Violence Act**. The judge was therefore plainly wrong in her interpretation of this sub-section at paragraph 78 of her decision.

215. After having defined "children matter", the judge then cited **Part V of the FCDA** which provides for The Children Court. The judge explained that **section 25 (1) of the FCDA** clearly states that children matters are to be heard in the Children Court.[127] **Section 25 of the FCDA** provides the Children Court with its authority and jurisdiction in all children matters:

> *"25. (1) On the commencement of this Act,* ***the authority and jurisdiction in children matters exercisable by the High Court*** *and Courts of Summary Jurisdiction* ***shall be exercisable by the Children Court****.*
>
> *(2) The question whether any cause, matter or proceeding is a children matter within the jurisdiction of the Children Court under this section, shall be decided by the Children Court.*
>
> *(3)* ***Where there is a question of jurisdiction, the Children Court shall be guided by its view as to whether the cause, matter or proceeding is appropriate to be determined by the Children Court by reason of it being a matter in which—***
>
> *(a)* ***a child is charged****;*
>
> *(b)* ***an application is being or has been made that a child is in need of care and protection****;*

[127] Paragraph 81 of judgment

(c) an application is being made for an order under section 61 of the Children Act, 2012;

(d) it is not a family matter within the meaning of this Act, but the primary issue in the matter is the care and protection of the child; or

(e) the Children Court is to hear an application relating to a child at which the attendance of the child is required." (emphases added)

216. Applying a textual interpretation of **section 25**, the Children Court has limited jurisdiction under **section 25(1)**. It can only exercise the jurisdiction in children matters which the High Court formerly possessed. Thus, if the matter is not a children matter within the definition of that term then the Children Court would have no jurisdiction. That makes sense. When **section 25 (3) (a) and (b)** in particular is examined, it is clear that the Children Court's jurisdiction and powers are further circumscribed. First, the Children Court has the power, in determining whether it has jurisdiction over a matter, to consider whether that matter should be heard in the Children Court because a child was charged or because an application was made that a child was in need of care and protection. Thus, the Court can exercise its jurisdiction at its discretion.

217. The facts in this matter are clear. A child was not charged. No application was made on behalf of a child who was in need of care and protection. Indeed, none of the sub-sections in **section 25 (3) (c), (d) or (e)** apply to this case. Thus, in determining whether it would be appropriate for the Children Court to have jurisdiction in this matter, none of the considerations in **section 25 (3)** are applicable. The practical effect of this is that in a situation such as the present one even if the Respondent's matter was transferred to the Children Court, the Children Court would be acting *ultra vires* the **FCDA** in exercising jurisdiction since the considerations set out in **section 25 (3)** would not be applicable.

218. On this interpretation of the provisions of the **FCDA**, and in particular, **section 3(1) (f)** and **section 25**, the judge's statement that "*once a Magistrate becomes aware that a matter, in which a virtual Respondent is a child, the matter is a children matter as defined in the Family and Children Division Act. It is now required that a Magistrate, forthwith, refer all children matters to the division of the High Court with jurisdiction - the Children Court*," [128] is incorrect in law.

[128] Paragraph 83 of the judgment

219. Because the premise of the judge's entire analysis on this **section 4(b)** issue revolved around an incorrect interpretation of the expression "children matter", her entire analysis and conclusions on the issue were plainly wrong. In this regard, the Appellant's submission that there is no requirement for a matter in which the minor is the victim to be transferred to the Children Court is sound in law and is accepted.

220. Both the Appellant and the Respondent cite a myriad of other provisions from the **FCDA** which, according to them, further support or reject the judge's conclusion. Since the law is clear, and the analysis of **section 3 (1) (f)** and **section 25 of the FCDA** conducted above is enough to determinatively answer this aspect of the issue, it is unnecessary to go further in analysing the provisions of the **Children Act** or the **FCDA**.

221. The judge referred to aspects of the **Children Court Rules**, the provisions of the **Convention of Belém do Pará** and the decision of **Maria de Penha** in her judgment. However, none of these authorities add substance to the Respondent's case. In particular, the judge referred to various provisions from the **Children Court Rules**. However, she failed to explain what relevance, if any, those **Rules** bore to her analysis of a breach of **section 4(b)**. They were of no relevance.

222. In consideration of the analysis above, it is indiscernible how the judge's (now disapproved) interpretation of the provisions of the **FCDA** and her ensuing conclusion demonstrate that the Respondent's right to protection of the law has been infringed. As the analysis shows, there was no obligation for this matter to have been transferred to the Children Court. Since that was the hook onto which the judge fastened her finding of a breach of the Respondent's **section 4(b)** right, it follows that that the judge erred in this regard.

223. At paragraph 54 of her submissions, the Respondent relied on the authority of **Akili Charles** for the submission that in considering whether there was a breach of **section 4(b)**, three questions could be considered:

(a) Whether there was an irrational, unreasonable, fundamentally unfair or arbitrary exercise of power;

(b) If so, whether that caused real and substantial prejudice to the Applicant; and

(c) Whether there was a prompt and effective legal remedy.

224. The Respondent further submitted that a relevant consideration was also the international obligations of the State.

225. The Respondent's approach is helpful. However, the Judicial Committee's comment at paragraph 62 of **Seepersad** is important. It offers guidance to lower courts on how to determine whether **section 4(b)** has been breached in any case:

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

226. To analyse whether the Respondent's right under **section 4(b)** has been breached, the material facts and considerations will therefore be identified, and then evaluated, using the questions posed by the Respondent in her submissions and summarised at paragraph 223 above.

227. Before turning to the questions, however, a useful starting point is a summary of the Judicial Committee's respective findings in **Seepersad** and **Akili Charles** given the Respondent's heavy reliance on those two decisions.

228. In **Seepersad**, the Judicial Committee explained that in determining whether the Appellants' **section 4 (b)** right in that case was violated, three aspects of the "law" were relevant. The first aspect of the "law" was substantive in nature and considered various provisions in the **Children Act**. The second aspect of the "law" was procedural in nature and concerned the law which provided the Appellants therein with recourse to the High Court by way of judicial review

and constitutional motion. The third aspect of the "law" was the **Bail Act** since the Appellants in that case had been charged with the offence of murder.

229. After identifying the "law", the Judicial Committee then applied the test it established in paragraph 62 of **Seepersad** (supra) to identify all the material facts and considerations. The Judicial Committee opined that the first aspect of the substantive "law" was ineffectual because the Appellants did not enjoy the benefits of relevant provisions of the **Children Act**. The Judicial Committee then found that because of the Executive's failure to effectuate provisions of the **Children Act**, detention facilities for the Appellants were not established. This failure obstructed the legislative intention of the **Children Act** and impacted on the proper operation of the legislation. The Judicial Committee found that a major consequence of the Executive's failure was that it forced the Chief Magistrate to make successive, unlawful remand orders against the Appellants.

230. After considering all of the above, the Court considered whether the Executive offered any defence of, or justification for, its conduct. The Judicial Committee found that there was none. According to the Judicial Committee, a short affidavit was deposed to by government officials. In that affidavit, the official deposed to *what* was done, but not *why* it was done. The Court then determined that the conduct of the Executive was incompatible with a series of international law provisions and standards. Penultimately, the Court found that it was necessary to consider the impact of the Executive's conduct on the two Appellants concerned and that such a consideration had legal and factual elements. Finally, the Judicial Committee considered whether any legal proceedings brought on the Appellants' behalf were prompt and efficacious redress.

231. At paragraph 75 of its decision in **Seepersad**, the Judicial Committee usefully summarised all of the above:

> *"75. The Board would summarise the relevant acts and omissions of the executive and their consequences in the following way. Fundamentally, the executive brought into operation the material provisions of the Children Act without having first put in place the arrangements necessary to give effect to their mandatory requirements, in a context where the intended beneficiary cohort of these measures, namely children, had been identified by both international law and domestic law as deserving of special protection. This had a series of substantial consequences: the operation of several interrelated provisions of primary*

legislation was rendered impotent during a protracted period; the aforementioned cohort was deprived of the benefits and protections prescribed by the legislature; international norms were violated; the appellants were thereby exposed to conditions, environments and influences which the frustrated legislative provisions were designed to avoid; the Chief Magistrate was compelled to make a series of unlawful remand orders; the Appellants were deprived of their liberty pursuant to such orders; and the legal system of Trinidad and Tobago did not provide them with timeous and efficacious remedies. Finally the executive has failed to offer any explanation of, much less any justification for, its acts and omissions. Taking into account all of the foregoing, the Board considers that the exercise by the executive of its legal powers was arbitrary, as the appellants contend."

232. In **Akili Charles**, the Judicial Committee identified the same three considerations submitted by the Respondent: (i) whether there was an irrational, unreasonable, fundamentally unfair or arbitrary exercise of power; (ii) if so, whether this caused real and substantial prejudice to the Appellant, and (iii) whether there was a prompt and effective legal remedy.

233. On the first question, the Judicial Committee quoted from **Seepersad** and explained that one must consider whether the State has offered any defence of or justification for its conduct. The Court held in that case that there was no evidence from the State to explain its conduct in respect of the Appellant concerned therein. This lack of evidence adduced by the State led the Court to conclude that the State's conduct was irrational, unreasonable, and fundamentally unfair, though it was not arbitrary.

234. On the second question of prejudice, the Judicial Committee highlighted the extreme situation which the Appellant in that case was confronted with: "*He had been held on remand in "inhumane" prison conditions for over six years. His preliminary inquiry had been proceeding before the Chief Magistrate for over five years and was nearing completion. He was financially ruined having used all available financial means to pay counsel for conducting the now abortive preliminary inquiry. He had no means to pay for representation for a new preliminary inquiry, an inquiry that could prospectively last as long as the first had done. As the judge found, he was "suffering from [this] possibility" (para 50(b)). He had become suicidal. His one shred of hope that his preliminary inquiry was almost completed had been dashed. He was now going to have to start*

all over again and to do so without the benefit of his counsel."[129] The Court therefore found that the Appellant therein suffered real and substantial prejudice and that this was caused by the State's conduct.

235. As to the question of a prompt and effective legal remedy, the Judicial Committee determined that the relevant remedy in that case was judicial review of the *de novo* Preliminary Inquiry. However, the Court found that judicial review did not prove to be an effective remedy as the application was dismissed. The Court noted that whilst the Appellant in that case did ultimately obtain redress due to the successful outcome of his second Preliminary Inquiry, if that was a relevant remedy, it was not available promptly. Thus, the Court concluded that there was no prompt or effective legal remedy for the Appellant therein.

236. Before turning to the analytical framework that the Respondent submitted for this Court's consideration, an issue which arose on the divergent submissions of both Counsel must be addressed. That divergence concerns whether it is necessary to identify a "law" which it is said that an individual is being deprived the protection of. The Appellant has submitted that there can be no breach of **section 4(b)** without the identification first of some law, breach of which has been occasioned.[130] Conversely, the Respondent contended that the Appellant's submission is not properly grounded in law.[131]

237. An examination of the two most recent cases from the Judicial Committee interpreting and applying **section 4(b)** (**Seepersad** and **Akili Charles**) does not, on their face, provide a definitive answer to this issue. As can be seen from this Court's summary of the findings in those cases, the Judicial Committee identified three aspects of the "law" which were, in effect, being breached in **Seepersad**. However, in **Akili Charles**, the Judicial Committee did not require the specific identification of a substantive statutory provision or rule.

238. A useful pointer to the correct direction is the Judicial Committee's dictum in **Seepersad** at paragraph 62. That paragraph states that one must identify, and evaluate, **all** material facts and circumstances. Thus, if the identification of specific statutory provisions ("law") would be

[129] Paragraph 64 of Seepersad
[130] Paragraph 118 of Appellant's Submissions
[131] Paragraph 66 of Respondent's Submissions in Reply

indicative, or at least helpful, in determining the question of whether **section 4(b)** has been breached, that "law" needs to be identified by the aggrieved individual.

239. While this case is factually dissimilar to **Seepersad**, the identification of a "law" here is as relevant and material as it was in **Seepersad**. The judge herself recognised this fact when she examined, on her own volition, the suite of children legislation enacted by the State despite neither party in the Court below making submissions on the same. This position was then ratified by the Respondent on appeal when she made submissions on that "law" also.

240. The identification of a "law" in this particular case is thus of paramount significance. The "law" which is material to this appeal are the provisions of the **FCDA**. More particularly, **section 3(1) (f)** and **section 25** because those sections determine whether this matter was supposed to be transferred to the Children Court.

241. Based on the analysis above, it was determined that the judge erred in her determination that all children matters must be referred to the Children Court. Instead, on a proper interpretation of the law, it is only where an application or issuance of a Protection Order under the **Domestic Violence Act** is in relation to a child, and where the child is a victim or an affected bystander in a domestic violence situation, that matter is a "children matter" within **section 3 (1) (f)**. If proceedings are commenced in a court other than the Children Court in relation to a child in that specific instance then arguably, that may be a flagrant violation of the legislative intention of the **FCDA**. Further, applying my interpretation of **section 25**, the Children Court would only have jurisdiction in this case if the matter was a "children matter". I have concluded that it is not. Further, the conclusion was also that none of the sub-sections in **section 25** are applicable here.

242. It is indisputable that the provisions of the **FCDA** seek to achieve the laudable intention of protecting children. However, the Respondent in this case was not the intended beneficiary of that laudable goal. Unlike in **Seepersad**, the statutory provisions of the **FCDA** did not fail the Respondent as they did not apply to her case. The effect of this was that the purpose of that legislation was not frustrated by members of the Judiciary and/or Executive in not transferring the Respondent's matter to the Children Court.

(a) Whether there was an irrational, unreasonable, fundamentally unfair, or arbitrary exercise of power.

243. I turn now to the Respondent's proposed analytical framework. The first question in that framework is whether the State has offered any defence of, or justification for, its conduct. According to the Respondent, in **Seepersad**, the State explained *what* was done, but not *why* it was done. The Respondent argued that in this case, the State accepted that there was a backlog of cases, but it did not explain the reason for the backlog or what was being done to ameliorate the situation. The Respondent submitted that given the significance of the breach and the harm being caused to her, the State was required to provide a detailed explanation for the current state of affairs in the criminal courts.

244. In respect of this submission, two points can be made. First, in assessing whether the Respondent's right under **section 4(b) of the Constitution** has been breached, the Appellant is not obligated to justify why there has been delay in all of the criminal matters in all the criminal courts in the State. On the Court's reading of the Respondent's submissions, that seems to be the effect of the submission. However, that seems to cast the net impermissibly wide and is unsupported by either **Seepersad** or **Akili Charles**. In **Seepersad** and **Akili Charles**, when the Judicial Committee enquired into whether the State had offered any defence or justification for its conduct, it is axiomatic that such an enquiry was one connected to the facts of the case and not an inquiry of a broader, more abstract nature. Thus, the defence, justification, or explanation need only be in relation to the State's conduct in respect of the Respondent alone. The Court therefore rejects the Respondent's submission that the State was required to provide a detailed explanation for the current state of affairs in the criminal courts as a whole.

245. The second point is that the State proffered explanations, justifications, and defences for the alleged delays and adjournments which hindered the progression of the trial contrary to the Respondent's case. The Record of Appeal amply demonstrates that the State obtained the affidavit evidence of Mrs. Taramatie Ramdass, Ag Senior Magistrate of the Rio Claro District Court and the affidavit evidence of Ms. Shari Deonarinesingh, Magistracy Registrar and Clerk of the Court attached to the Princes Town, Rio Claro, and Mayaro District Courts. Notably, those affidavits were detailed, meticulous, and were based on the personal knowledge of the deponents. For example, in the main affidavit of Mrs. Taramatie Ramdass, Her Worship deposed:

> *"3. I am a Magistrate employed by the Judiciary of Trinidad and Tobago. I have been a Magistrate since August 2008. I have been Ag. Senior Magistrate at Rio Claro District Court since 14th January, 2021. My duties generally include the conduct of Summary Trials and Preliminary Enquiries and the exercise of powers related to the Summary Courts Act.*
>
> *4. In my official capacity, I have virtual access to, all the documents, files and records of the District Court proceedings in this matter. I make this affidavit from the facts within my own knowledge and from a perusal of the files, documents and papers of this matter to which I have access in my official capacity."*

246. Her Worship Mrs. Ramdass' affidavits exhibited true copies of extracts of the Magistrate's Case Book for the Rio Claro District Court for this matter. These extracts provided contemporaneous and authentic documentation from the time the Preliminary Inquiry was taking place. Fundamentally, those documents explained the reasons and rationale for much of the alleged delay and adjournments which occurred in the disposition of this matter. Additionally, Mrs. Ramdass' affidavits also annexed Transcripts from the magisterial proceedings also. Indubitably, these Transcripts of the proceedings would be, and are, invaluable evidence of what transpired in the lower court.

247. Notably, both Mrs. Ramdass and Ms. Deonarinesingh attempted to explain in their affidavits the Preliminary Inquiry process. Thus, in the affidavit of Ms. Deonarinesingh, she deposed that:

> *"5. When a charge is laid indictably, and the Prosecution proceeds as laid, a preliminary enquiry is undertaken. This is done pursuant to the Indictable Offences (Preliminary Enquiry) Act Chap. 12.01. In my experience, I have seen varying time periods for a preliminary enquiry to be completed. This can range from three (3) years and upward. Based on my recollection, there are several factors which affect the completion of these matters. This includes (but are not limited to): the availability of witnesses, the time period for State Attorneys to be appointed, the readiness of the Prosecution, the readiness of the Defence, the ability to obtain witness statements, the ability to have these witness statements sworn to, the filing of these witness statements, the filing of evidential objections, change of Defence Attorneys, change of State Attorneys, summonses not being served by the Trinidad and Tobago Police Service, the ability to locate witnesses, retirement*

of Respondents, the appointment of substitute Respondents, the number of charge cases filed on a particular day and the workload of the Magistrates."[132]

248. Similarly, Mrs. Ramdass deposed that:

> *"7. When charges are laid indictably, such as this, the law requires that a preliminary enquiry is conducted. This is done pursuant to the Indictable Offences (Preliminary Enquiry) Act Chap. 12.01. In my experience when listed, the matters are called, the indictment read, bail is considered and then the matter moves onto the case management stage. At the case management stage issue of disclosure is dealt with (in relation to disclosure by the Prosecution on the Defence), then the issue of whether there are any evidential objections and witnesses required for cross-examination by the Defence as well as any outstanding issues. Included in this case management stage is the issue of whether the victim is interested in their matter. If the victim is not interested, then this assists the court in setting the matter for hearing as soon as is practicable having regard to the reduced length of time such a hearing entails."*[133]

249. Given the state of the evidence in this matter deposed to by both Mrs. Ramdass and Ms. Deonarinesingh, and supported by contemporaneous documents, it is far-fetched for the Respondent to argue that there was a "*lack of a proper explanation by the State*"[134] and that its response is "*indicative of the laissez-faire approach of the State to the plight of victims*".[135] The evidence contradicts these submissions squarely.

250. Thus, this case is distinguishable from both **Seepersad** and **Akili Charles** because in those two cases, no proper explanation or justification was provided by the State.

251. Another aspect of the right to the protection of the law must now be addressed. **Seepersad** endorses **Maya Leaders Alliance** which says that the protection of the law concept includes the right of the citizen to be afforded '*adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power'*. The alleged delay,

[132] Record of Appeal Volume 1 page 166 – 167 Affidavit of Shari Deonarinesingh para 5
[133] Record of Appeal Volume 1 page 122 Affidavit of Taramatie Ramdass para 7
[134] Respondent's Submissions, paragraph 58
[135] Respondent's Submissions, paragraph 57

adjournments, and the fact that the Respondent's matter was not transferred to the Children Court (which has now been shown to be an erroneous requirement) do not demonstrate instances of irrationality or fundamental unfairness. As to whether the alleged delay was unreasonable, the reason for those alleged delays have been previously addressed above. Finally, as to whether the alleged delay and adjournments amount to an arbitrary exercise of power, in **Akili Charles**, the Judicial Committee found that the "colossal misstep" by the State in that case did not amount to an arbitrary exercise of power: **see paragraph 60 of Akili Charles**. Analogously, if a "colossal misstep" which caused the Appellant in that case to remain in prison for a further five years did not amount to an arbitrary exercise of power by the State, any alleged delay on the State's part in this matter could not plausibly be described as arbitrary. As such, there is no breach of **section 4(b)**.

252. Before passing on from this issue, a point of concern for this Court was the conflict of rights which would inevitably ensue if this Court accepted the Respondent's submission that her constitutional rights were violated by alleged delay and adjournments. The core of the Respondent's submission reveals an inherent tension between the rights of the accused, the rights of the victim, and the public interest in the criminal justice system at large. In oral submissions, Counsel for the Appellant was asked whether, on the facts of this case, the Respondent would not end up benefitting from a greater number of rights than the accused. The scenario was posed to Mr. Dass whether the Respondent could institute constitutional proceedings against the State for alleged delay, obtain damages from those proceedings while the criminal matter concerning the accused had not yet been tried before the High Court and the accused has not been convicted. Mr. Dass acknowledged that this was a very important point raised by the Court. In his oral submissions, he drew reference to the extreme, but not unheard of scenario, where a complainant fabricates a story against an accused. Further, Mr. Dass also pointed out the inherent tension between the Court expressly stating that it respected the accused's right to the presumption of innocence, but yet, an award damages could be made to a putative victim for the breach of their constitutional rights in circumstances where a finding of culpability had not yet been arrived at.

253. These are difficult questions which do not yield any easy answers. In **Attorney General's Reference (No 3 of 1999)**,[136] Lord Steyn observed that:

> *"It must be borne in mind that respect for the privacy of defendants is not the only value at stake. The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides.* ***In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public****. In my view the austere interpretation which the Court of Appeal adopted is not only in conflict with the plain words of the statute but also produces results which are contrary to good sense. A consideration of the public interest reinforces the interpretation which I have adopted."*[137] (emphasis added)

254. Lord Steyn's comments are apposite. What a fair disposition of this case requires, at the macro-level, is a carefully calibrated triangulation of the rights and interests of all the stakeholders involved in the criminal justice system. As Lord Steyn noted, this involves considering the rights and interests of the accused, the complainant/putative victim and the wider public's interest in the proper functioning of the criminal justice system of the State as a whole.

255. In **R v Seaboyer; R. v. Gayme**,[138] McLachlin J, giving the judgment of the Supreme Court of Canada, explained in the context of that case:

> *"193. The task before us on this appeal is to devise a test for the production of records held by third parties which preserves the right of an accused to a fair trial while respecting individual and public interest in privacy and the efficient administration of justice.* ***The key to achieving this lies in recognition that the Canadian Charter of Rights and Freedoms guarantees not the fairest of all possible trials, but rather a trial which is fundamentally fair****: R. v. Harrer, [1995] 3 S.C.R. 562.* ***What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like Respondents and the agencies which assist them in dealing with the trauma they may have suffered****. . .*

[136] [2001] 1 All ER 577
[137] Pg 584
[138] [1991] 2 SCR 577

> *194. Perfect justice in the eyes of the accused might suggest that an accused person should be shown every scintilla of information which might possibly be useful to his defence. From the accused's perspective, the catalogue would include not only information touching on the events at issue, but anything that might conceivably be used in cross-examination to discredit or shake a Crown witness. When other perspectives are considered, however, the picture changes.* ***The need for a system of justice which is workable, affordable and expeditious; the danger of diverting the jury from the true issues; and the privacy interests of those who find themselves caught up in the justice system -- all these point to a more realistic standard of disclosure consistent with fundamental fairness. That, and nothing more, is what the law requires."*** (emphases added)

256. In the context of this case, as this Court has indicated above, there is an inherent tension between the rights and interests of the accused, the Respondent, and the public at large. The State's role in the criminal justice system as it relates to these stakeholders, is to ensure that each player receives the maximum of their rights and interests.

257. An accused has the right to be presumed innocent until proven guilty according to the law.[139] In **Woolmington v DPP**,[140] Viscount Sankey LC, giving the judgment of the House of Lords, famously stated at page 481 of the report:

> *"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal.* ***No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."*** (emphasis added)

[139] Section 5(2) (f) (i) of the Constitution
[140] [1935] AC 462

258. In considering whether the Respondent's right to the protection of the law was violated, this Court must consider whether she was treated in a fundamentally unfair manner by the State. As a matter of constitutional principle, this Court must triangulate the interest of the Respondent in being offered the protection of the law with the accused's right to be presumed innocent. By concluding that the Respondent's right to the protection of the law has been violated in the circumstances of this case, this will erode to some degree, albeit indirectly, the fundamental right of the accused to be presumed innocent.

259. In his article, "**Why the constitutionalization of victim rights should not occur**",[141] David M. Paciocco observed that:

> ***"Unless it is done with precision and restraint, constitutionalizing victim rights will damage the presumption of innocence. This is because to speak of victim rights prior to the conviction of the person charged assumes that the complainant is a victim. Although the legal system does not articulate it, when we speak of victim rights, there is an underlying or de facto presumption of victimization that is being taken. It is not possible, of course, to presume both that the complainant is a victim and that the accused is innocent. The presumption of innocence will therefore be contradicted by any constitutionalization of "victim" rights that treats complainants as victims and confers rights on them prior to conviction. Ultimately, it is impossible to entrench pre-conviction rights for victims in the Charter without degrading and doing resolute harm to the presumption of innocence."*** (emphasis added)

This Court is in unequivocal agreement with the views expressed by Mr. Paciocco.

(b) If so, whether this caused real and substantial prejudice to the Applicant.

260. The Appellant has offered well-supported justifications for the alleged delay and adjournments in proceeding with the accused's Preliminary Inquiry. The Court is unable to conclude that the Respondent suffered real and substantial prejudice caused by the State's alleged conduct, alleged actions, or alleged omissions.

[141] David M. Paciocco, "Why the constitutionalization of victim rights should not occur" (2005) 49 Crim LQ 393 at page 397

261. The Respondent also submitted that she relied on the Confidential Psychological Report of Ms. Ghent-Garcia as the basis for her assertion that she has suffered substantial prejudice. However, as discussed more fulsomely in Issue 2, the issue with Ms. Ghent-Garcia's Confidential Report is that there was no disaggregation of her conclusions concerning the trauma and prejudice caused by the accused and the alleged sexual assault, the trauma and prejudice caused by the Respondent's mother forcing her to carry the baby to term, the trauma and prejudice caused by her own suicidal ideations and her guilt over her baby, and the trauma and prejudice, if any, actually caused by the alleged delay and adjournments of the accused's Preliminary Inquiry.

262. As a consequence of this shortcoming in Ms. Ghent-Garcia's Report, our conclusion that there was no real or substantial prejudice to the Respondent caused by the State is augmented.

(c) Whether there was a prompt and effective legal remedy.

263. The Respondent filed a constitutional motion on 29th November, 2021, and her matter was heard and determined by the judge. The judge delivered her written decision on the Respondent's motion on 6th September, 2023. In that decision, she directed that the State put mechanisms in place and allocate sufficient resources to ensure that the accused who was committed to stand trial at the Criminal Assizes in the proceedings in information number 1203/17 be completed expeditiously. Thus, the Respondent ultimately obtained a prompt and effective redress due to the successful outcome of her High Court claim.

264. Considering all of these matters, assessed in the round, the material facts and considerations do not amount on their face to a serious failure to afford to the Respondent the protection of the law to which she was entitled.

265. The judge erred in law in finding that the Respondent's right under **section 4(b)** was violated.

Issue 4: Whether the judge erred in making the orders enumerated at paragraph 110 (II) and (III) of her decision.

266. The final issue is whether the judge erred in making the orders enumerated at paragraph 110 (II) and (III) of her decision.

Judge's findings

267. There are no findings in this issue *per se*. However, the judge made the following orders at paragraph 110:

> *"110. There be judgment for the claimant against the defendant in the following terms:*
>
> *I. The court declares that the failure to ensure that children matters are expeditiously concluded, constitutes a breach of the constitutional rights of child victims of crime to the protection of the law guaranteed by section 4 (b) of the Constitution.*
>
> *II. The court grants* ***an order of mandamus compelling the state to put mechanisms in place and allocate sufficient resources to ensure that, the accused who was committed to stand trial at the Criminal Assizes in the proceedings in information number 1203/17, be completed expeditiously****.*
>
> *III. The court* ***grants an order of mandamus compelling the state to provide the necessary physiological counselling for the claimant while the proceedings in information number 1203/17 are pending. The defendant is to provide half-yearly reports to the Registrar of the Supreme Court on the arrangements made for the claimant's counselling****."* (emphases added)

Submissions

268. There is no need to recapitulate every submission made on this issue. In summary, the Appellant contended that the judge made orders which were inconsistent with her core findings of fact. The Appellant further submitted that by directing the manner in which resources are to be allocated, the judge made orders which contravened the doctrine of the separation of powers. The Appellant finally contended that the judge's orders were vague and impractical.

269. In response, the Respondent has argued that she has sought certain general declarations which would confirm the status of victims of crime under the Constitution. Additionally, she submitted that there was authority for the proposition that mandatory orders such as those made by the judge are capable of being granted by the Court against the State.

Discussion

270. The Court of Appeal has very recently explained the law on the doctrine of the separation of powers in **Ravi Balgobin Maharaj v The Cabinet of Trinidad and Tobago & The Attorney General of Trinidad and Tobago**.[142]

271. The Court's distillation, at paragraph 159, of the cardinal principles which must be borne in mind when determining whether there has been a breach of the doctrine of the separation of powers is worthy of repetition:

> *"(a) The Constitution embodies explicit, and deliberate, political choices made by the constitutional draftspersons;*
>
> *(b)* ***Those deliberate choices relate to, among other things, the structure of the State and how the organs of the State interact with each other****;*
>
> *(c)* ***From these deliberate choices, the doctrine of the separation of powers emerges****;*
>
> *. . .*
>
> *(g)* ***In determining whether the overlap violates the doctrine, one looks at the terms of the Constitution themselves to see where the boundary between the powers has been drawn****;*
>
> *(h)* ***In that light, the doctrine is a tool which can be used to assist in constitutional interpretation****; and . . ."* (emphases added)

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272. The Appellant has submitted that the judge violated the doctrine of the separation of powers by directing the manner in which State resources are to be allocated. The Appellant further buttressed this submission by stating that the Judiciary does not have the constitutional entitlement to direct how limited resources should be deployed in any particular case since such a direction will trespass upon the preserve of both the Executive and the Legislature. This is a forceful and attractive submission grounded in common sense.

273. Having examined the actual provisions of the **Constitution**, it is clear that the High Court, established under **section 99 of the Constitution**, and within which the judge exercises her powers, has no jurisdiction or power to direct the State or its agents on how to allocate its financial resources. When the principles enunciated in **Ravi Balgobin Maharaj** are applied, it is transparent that the constitutional framers did not intend that the Judiciary possess the power to unilaterally direct the expenditure of State finances. **Chapter 8 in the Constitution**, which deals with Finance, expressly states who, and which body, is meant to allocate the State's financial resources: Parliament and the Minister of Finance. Thus, when the provisions of the **Constitution** themselves are examined, it is trite that the **Constitution** separates the Judiciary and its agents (such as judges) from having any oversight and direction over State financial resources.

274. This conclusion is reinforced by the decision of the Court in **The Prime Minister v Comprehensive Nephrology Services Limited**[143] where Aboud J.A. observed:

> ***"[206] Neither the trial judge nor this Court is able to specify, except in general terms, the factors that the Cabinet must consider in its deliberations. We are not well-placed to determine or to direct (even obliquely) the manner in which the State allocates its resources or to direct what matters it deems important in connection with that decision. The court is not the decision maker."*** (emphasis added)

275. The judge could not direct or determine the manner in which the State allocates its limited financial resources. To the extent that she did so in making the impugned orders, she erred and was plainly wrong. Because the orders infringed the doctrine of the separation of powers, they are void.

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Damages

276. None of the Respondent's constitutional rights were violated. She was therefore not entitled to damages.

Conclusion

277. For all of the reasons given above, this Court concludes that:

(i) There is no right to a speedy trial or to a trial within a reasonable time in the **1976 Constitution of Trinidad and Tobago**.

(ii) The Respondent's right to not be deprived of her security of the person except by due process of law under **section 4 (a) of the Constitution** has not been violated.

(iii) The Respondent's right to protection of the law under **section 4 (b) of the Constitution** has not been violated.

(iv) The orders made by the trial judge at paragraph 110 (II) and (III) breached the doctrine of the separation of powers and are therefore void.

(v) The judge's order as it relates to damages is set aside.

(vi) The appeal is allowed. The cross-appeal is dismissed.

278. We will hear the parties on the issue of costs.

Justice of Appeal Mark Mohammed

The Court wishes to express its appreciation to Judicial Research Counsel, Mr. Kevin Lalla, for his assistance and research in the production of this judgment.