

IN THE JUDICIAL COMMITTEE
ON APPEAL FROM THE COURT OF APPEAL
OF THE REPUBLIC OF TRINIDAD AND TOBAGO

Between

WAYNE ALLEYNE
LENNARD SYLVESTER
WINSTON SOLOMON
JUNIOR COLLINS
SIMON HABIB

Appellants

and

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent

CASE FOR THE APPELLANT

Background to the appeal and related litigation:

- 1) The High Court proceedings herein were commenced separately but heard together. The appeals were separately filed and heard together. The matters were consolidated by the Court of Appeal upon the grant of conditional leave to appeal. There are 5 Appellants in this appeal.
- 2) The second named Appellant (Sylvester) was charged with attempted murder while the others were charged with murder. The third Appellant (Solomon) was found guilty of manslaughter on the basis of diminished responsibility and ordered to be detained under section 4(A) of the Offences Against the Person Act which reads as follows:

(6) *Where on a trial for murder—*

- (a) *evidence is given that the accused was at the time of the alleged offence suffering from such abnormality of mind as is specified in subsection (1); and*
- (b) *the accused is convicted of manslaughter,*

the Court shall require the jury to declare whether the accused was so convicted by them on the ground of such abnormality of mind and, if the jury declare that the conviction was on that ground, the Court may, instead of passing a sentence as is provided by law for that offence, direct the finding of the jury to be recorded, and thereupon the Court may order such person to be detained in safe custody, in such place and manner as the Court thinks fit until the President's pleasure is known.

(7) The Court shall as soon as practicable, report the finding of the jury and the detention of the person to the President who shall order the person to be dealt with as a mentally ill person in accordance with the laws governing the care and treatment of such persons or in any other manner he may think necessary.

Following the case of Gilbert Evelyn v The Attorney General¹ the section was amended in 2017 to read “Court’s Pleasure” and there was an extensive amendment which implemented a new and comprehensive review procedures and other substantive provisions².

- 3) All other Appellants were found guilty of the act with which charged but insane so as not to be responsible according to law for their actions (guilty but insane) and were ordered to be detained until the President’s Pleasure is known under section 67 of the Criminal Procedure Act Chapter 12:02 of which sections 66 to 68 read as follows:

“66. Where, in an indictment, any act is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible according to law for his actions at the time when the act was done, then, if it appears to the jury before whom such person is tried that he did the act charged, but was insane as mentioned above at the time when he did the same, the jury

¹ Cv 2017- 04514 Gilbert Evelyn v The Attorney General of Trinidad and Tobago as noted in the explanatory note to the [**AB 23/EB1478**]

² The revised amended version of the Offences Against the Person Act Chapter 11:08. [**AB 5/EB1028**]

shall return a special verdict to the effect that the accused person was guilty of the act charged against him, but was insane as mentioned above at the time when he did the act.

67. Where a person is found to be insane under section 64 or section 65, or has a special verdict found against him under section 66, the Court shall direct the finding of the jury to be recorded, and thereupon the Court may order such person to be detained in safe custody, in such place and manner as the Court thinks fit until the President's pleasure is known.

68. The Court shall as soon as practicable, report the finding of the jury and the detention of the person to the President who shall order the person to be dealt with as a mentally ill person in accordance with the laws governing the care and treatment of such persons or in any other manner he may think necessary.”

There has been no amendment to this statute to date and there remains no legislative procedures to date, unlike in the cases of diminished responsibility.

- 4) The commonality of these cases is the order for indefinite detention at the President's Pleasure on the basis of either criminal insanity or abnormality of the mind in the case of diminished responsibility but which both require periodic reviews of detention. In law a finding of guilty but insane is not a conviction, unlike the cases of diminished responsibility. Nothing turns on this distinction for the purposes of this appeal.
- 5) The claims were all instituted on the 22nd April, 2004 supported by the affidavit evidence of the Claimants, the State's consultant forensic psychiatrist and that of their instructing Attorney at Law³. The other claims of Roger Sobers and an earlier claim of Felix James⁴ were heard and determined together in one

³ Separate affidavits were filed in each proceeding as shown in the Record of Appeal herein.

⁴ HCA # 2659 of 2003 Felix James v The Attorney General of Trinidad and Tobago

judgment of Rampersad J⁵ including the Appellants now before Your Lordships. The appeal of Roger Sobers was stayed by operation of law following his passing. The appeal in Felix James has been stayed by the Court of Appeal pending the determination of this appeal to the Judicial Committee.

- 6) The claims for constitutional relief were divided into two parts: i) relief relative to the modification of the order for detention/sentence in the case of the 3rd named Appellant and, ii) those which related to claims of breaches of the fundamental rights in the manner of the execution of the detention: it is the latter in issue in this appeal.
- 7) The core complaint of the Appellants is that there the order for detention had not been executed in accordance with the underlying purpose of the detention which required continuous periodic review of the continuing detention. The Appellants' claim is that there was no effective review of their detention until Cabinet made the decision to release them on the 5th January, 2006⁶ and they were kept in the dark as to their continued detention⁷. Each of the Appellants were subject to favourable reviews of the Psychiatric Hospital Tribunal recommending their release. The Appellants claimed declaratory relief that their detention was in breach of due process and the protection of law under section 4(a) and (b) and, further, under section 5(2)(a), (b) and (h)⁸. The Appellants also claimed damages for the unconstitutional detention and the breaches of their fundamental rights.
- 8) On that same date other claims of Ventour and Francois were also filed. These two cases were heard together with the earlier claim of Dillon producing a single written judgment. Rampersad J determined the claims of Dillon, Ventour and Francois in one judgment hereinafter referred to as Dillon and others⁹. These

⁵ The High Court judgment herein in Habib and others v The Attorney General of Trinidad and Tobago hereinafter referred to as the High Court judgment herein of Rampersad J. [EB102]

⁶ Recorded in the important Cabinet Minute see ROA at page [EB699]

⁷ As noted at paragraph 89 of the High Court judgment herein

⁸ There were other breaches claimed but these are the operative breaches alleged for the purpose of this appeal

⁹ HCA # 3498 of 2003 - Dillon, HCA # 1094 of 2004 Ventour and HCA # 1090 of 2004 Francois hereinafter Dillon and others. [AB 14\ EB1331]

cases were chosen as test cases while the remaining claims (including those of the Appellants) were adjourned pending the determination of the test cases.

- 9) Prior to the filing of these proceedings, in 2003 several similar circumstanced detainees in the form of Funrose, Noregia¹⁰ and James¹¹ and Dillon (above) filed similar claims. Separately and later in 2009 other similar claims were filed in relation to detainee Mukesh Maharaj and Kedar Maharaj. Kedar Maharaj died before his appeal was heard and the appeal is presently stayed. In the case of Mukesh Maharaj the detainee successfully appealed the assessment to the Court of Appeal. In the case of Dillon, the Attorney General appealed to the Court of Appeal which reduced the vindictory additional award.
- 10) The claims now on appeal are the last claims to be determined by the High Court and the first time that such claims are before the Judicial Committee.
- 11) Mention is also made of the cases of juveniles as being closely allied in law on the issue of periodic review. A number of juveniles convicted of murder and sentenced to be detained at the State's Pleasure, as the statute then stood, also filed claims of a similar nature complaining of the lack of a review process and modification of the sentence to read "Court's Pleasure"¹².

The High Court determination:

14. As alluded to above, the same High Court (per Rampersad J) determined three related and similarly circumstanced cases of Dillon, Ventour and Francois in Dillon and others delivered in 2012. The damages awarded were assessed at a much higher level than the awards made by the High Court herein and affirmed by the Court of Appeal.
15. In Dillon a declaration as to section 4(a) had already been made by Ibrahim J leaving only the assessment of damages to be determined. In Ventour and

¹⁰ HCA # 1816 of 2003 Funrose and Noreiga v The Attorney General of Trinidad and Tobago [AB 20\ EB 1424]

¹¹ HCA # 2659 of 2003 Felix James v The Attorney General of Trinidad and Tobago.

¹² Commencing with HCA # 2175 of 2003 Chuck Attin v The Attorney General of Trinidad and Tobago [AB 13\ EB1312]

Francois the High Court proceeded to make declarations as to section 4(a), (b) and 5(2)(h).

16. The High Court determined the assessments herein in 2016, at the time when Mukesh Maharaj was the latest authority from the Court of Appeal. That appellate decision in 2015 had a fundamental effect on the determination of these proceedings.

17. Rampersad J found that the Court was bound by Mukesh Maharaj and applied that decision to the assessments herein. The effect of Mukesh Maharaj as applied affected the assessment in the following manner:

- i) limited the period of assessment to that between the date of recommendation and the date of release;
- ii) substantially reducing the range of damages applicable to the present cases by making the award at less than half that ordered in Dillon and others);
- iii) established that the award of \$450,000 was sufficient to fully vindicate the appellant's rights in that case thereby requiring no additional award to fully vindicate the appellant's rights; and,
- iv) laid down dicta to the effect that an additional vindictory award was not required as there was no evidence of the deliberate targeting or malicious conduct meted out to the appellant.

18. Of further note, the High Court expressed the award of damages as including an uplift for vindictory damages on the authority of Mukesh Maharaj.

19. Rampersad J made reference to the declarations made in Dillon and others and clearly intended to make the same formal declarations as had been made in the cases of Ventour and Francois. No formal declarations were made. Rampersad J also applied and clearly assessed damages in line with that awarded in Mukesh Maharaj.

Before the Court of Appeal

20. The Appellants appealed to the Court of Appeal. There was no cross appeal by the Attorney General. Before the Court of Appeal the Appellants challenged:

- i) the failure to grant formal declaratory relief and, in the event, that the same declarations were applied as made in Dillon, the Appellants challenged the failure to make the further declarations required by the evidence as to breaches of section 5(2)(a) - arbitrary detention and section 5(2)(b) -cruel and unusual treatment,
- ii) the approach to the assessment of compensatory damages and the treatment of vindictory damages by the High Court.

21. As to the approach to the assessment of damages at ii) above it was submitted that the High Court had adopted the wrong approach to the assessment by, inter alia, i) failing to make the necessary declarations required by the evidence, ii) had not correctly identified the period under assessment and iii) had not paid sufficient regard to the changing circumstances of the appellants during detention and the effect of same on them when assessing damages over the operative period.

22. It was further submitted that the award was inordinately low in the circumstances, that Mukesh Maharaj did not apply to the assessments herein and was not binding authority. If it did apply as to quantum, it could not stand as it was inordinately low and under compensated the Appellants.

23. The Appellants pointed to the dicta of Maharaj No.2 and showed that those cases which applied that dicta were unreliable as part of a trend of compensation which was based on an erroneous reading of that dicta resulting in under compensation in cases involving loss of liberty. Further, the Appellants submitted that the courts below were wrong to not have regard to common law awards especially in relation to the last period of detention following the recommendations. There was also the submission that previous awards had

proceeded on the basis of tapering damages¹³ which was not properly part of the local law.

Determination by the Court of Appeal:

24. The Court of Appeal held as follows:

- i) In light of the High Court making reference to the declarations made in Dillon and others further declarations were unnecessary and would not have added anything to the assessment which the Court was to undertake. In this way the Court of Appeal limited the issue of declaratory relief to that as affecting the assessment only.
- ii) Limited the assessment on the basis of reasonable expectation of release which arose only upon the recommendations being made and therefore tied the compensation to only that period following the recommendations.
- iii) That without evidence of fitness for release by way of psychiatric evaluation there was no arbitrary detention¹⁴ and that no basis for further declarations as to arbitrary detention on the basis that the detention was pursuant to an order of the High Court¹⁵.
- iv) There was no basis for relief as to cruel and unusual treatment as there was no evidence that the appellants' conditions were being ignored or that the issue of their release had been forgotten¹⁶.
- v) That Mukesh Maharaj was binding on the Court of Appeal and the High Court.

¹³ see Thompson v The Commissioner of Police [1997] 2 ALL ER 762 [AB 58\EB 2256] and Cv App No.14 of 2000 Millette v McNichols in the Court of Appeal of Trinidad and Tobago. [AB 32\EB1658]

¹⁴ Paragraph 48 of the judgment of the Court of Appeal

¹⁵ See paragraph 44 ibid

¹⁶ Paragraph 50 ibid

- vi) That the period of assessment was from the date of the recommendations to the date of release.
- vii) That there was no basis for assessing damages from an earlier date – before the recommendations were made.
- viii) That the Appellants had sought to artificially disaggregate different periods during the total period of detention and claimed damages thereby. There was no basis to consider the periods to be subjectively qualitatively different as to as entitle the appellants to any additional compensation¹⁷.
- ix) That the award of damages which included an uplift of vindictory damages was not such that the Court of Appeal would interfere with that exercise of discretion and required it to be demonstrated to be an wholly erroneous estimate of the loss or damage suffered¹⁸.
- x) That the award was consistent with precedent, which included Mukesh Maharaj¹⁹.
- xi) That there was no suggestion of the High Court having applied the “tapering off” to the award of damages²⁰.

25. The appeal was dismissed. In so doing, the Court of Appeal varied the order as to interest rates and the periods attracting 6% was reduced by the Court on the basis that the full amount of damages should not accrue from 2004 (the date of filing of the claim) in respect of periods of detention that had not yet occurred²¹. The Court of Appeal indicated that the issue was accepted by both parties. The Appellants do not agree with that this was the case.

¹⁷ Paragraph 54 ibid

¹⁸ Paragraph 78 ibid

¹⁹ Paragraph 92 ibid

²⁰ See paragraph 95 g ibid

²¹ Paragraph 11 and 96. ibid

26. Of important note, is that the Court of Appeal did not deal with the Appellants' case on the issue of under compensation²² but did agree with the Appellants' contention that nothing in Maharaj No.2²³ limited compensation to mental distress and inconvenience. The difficulty with this is that the Court of Appeal failed to consider how this may affect such authorities being relied upon as applicable precedent including Mukesh Maharaj and those that came before it. The issue of under compensation in constitutional law was therefore not dealt with by the Court of Appeal which assumed the correctness and applicability of Mukesh Maharaj without properly dealing with the submissions on the point.

The Appeal to the Judicial Committee:

27. The Appellants rely on 4 substantive grounds of appeal²⁴ challenging the failure to grant certain declaratory, the variation of the interest rate, the award of damages as being inordinately low and a wholly erroneous estimate of damage suffered and challenged the approach taken to the assessment as being plainly wrong. Ground numbered 4 relates to the approach taken to the assessment and is sub-divided into 6 further particulars. The grounds advanced before the Judicial Committee (save for the point on interest which did not arise) were all advanced by the Appellants in the Court of Appeal.

Preliminaries:

28. This appeal relates to the breaches of fundamental rights arising from the failure to conduct the required periodic reviews of detention and the assessment of damages against the backdrop of the following:

- i) recommendations for release made by the Psychiatric Hospital Tribunal (hereinafter the Tribunal) existed,
- ii) inaction on those recommendations until years after when Cabinet took the decision to effect the release of the detainees,

²² Although this was one of the bases upon which conditional leave was granted by the Court of Appeal.

²³ Maharaj v The Attorney General [1977] AC 385 at page 400 per Lord Diplock [**AB42/EB1878**]

²⁴ ROA 674

- iii) those very detainees who were the subject of the favourable decision of Cabinet were not released pursuant to Cabinet's decision, and
- iv) it was only by way of interim order of the High Court in constitutional proceedings that the Appellants secured their actual release.

Essential elements of the orders for detention.

29. Detention until the President's Pleasure is known has been the subject of decisions at all levels of the Supreme Court. It is accepted jurisprudence that such an order for detention breaches the separation of powers such that the relevant statutes are to be read with modifications to read Court's Pleasure.

30. Such detention is indefinite and continues until there is a positive decision taken to release the detainee. The nature and character of the detention is therapeutic and preventative (risk based) in nature²⁵ with no punitive element²⁶.

31. The issues of mental condition, welfare and risk to the public are likely to be subject to change with the passage of time. It is therefore an intrinsic element of the execution of detention that there be continuous reviews of the continued need to detain by a decision maker with the power to order/effect the release of the detainee. It has been held that this is implied by the common law²⁷ and is part of the statutory duty to detain and treat the detainee²⁸.

32. The continued detention must be objectively justified on the basis of the need to continue detention for therapeutic reasons together with the risk that the detainee may pose to the public. In this manner, it is the review process which provides that objective justification for the continued detention and that which, when properly administered, ensures that the detention is not arbitrary and remains rationally connected to the objectives of the detention.

²⁵ See Cv 2009 of 00479 Kedar Maharaj v The Attorney General of Trinidad and Tobago [EB1574]

²⁶ Unlike in the cases of juveniles sentenced for murder. In the case of the 3rd Appellant- Solomon- until the 2017 amendment to the Offences Against the Person Act Chapter 11:08 – there was no element of minimum period of detention and, arguably, there was no punitive element unless so declared by the sentencing judge.

²⁷ Seepersad and Panchoo v The Attorney General [2012] UKPC 4 [AB 52/EB2157]

²⁸ CV App P 245 of 2012 The Attorney General of Trinidad and Tobago v Selwyn Dillon [AB 53 \EB2178]

33. Throughout the detention of the Appellants and even after the commencement of the claims the State continued to detain on the basis that it was the Executive to determine the review under the formula of “until the President’s Pleasure is known”. There was therefore no attempt to have the Appellants reviewed by the High Court or to have any such review conducted in accordance with the fundamentals of natural justice including the right to be heard and informed.
34. Until 2004 and the decision in Funrose and Noreiga²⁹ there was no decision of the local courts dealing with the issue of a failure to review detention of those found guilty but insane or those guilty of manslaughter on the basis of diminished responsibility. It was this decision led to the Attorney General³⁰ approaching Cabinet to establish a procedure to deal with the plight of those found guilty but insane which also applied to diminished responsibility detainees. The procedure adopted by Cabinet was on the continued basis of detention at the pleasure of the President.
35. The procedure which was applied to the Appellants is detailed in the important evidence of the consultant psychiatrist at the St. Ann’s Mental Hospital – Dr. Ghany³¹. These Appellants were detained at the Forensic Science Ward of the said mental hospital which house the “criminally insane”.
36. The essence of the procedure is that persons so detained are assessed and treated for any mental condition found. They are then referred to the Psychiatric Hospital Tribunal established under the Mental Health Act Chapter 28:02 for further assessment and consideration of whether a recommendation for release should be made. This tribunal has no power to order the release.³²
37. The tribunal considers the case presented by the doctor in charge of the treatment which includes medical opinion together with other evidence from social workers. Once satisfied of their being no further need to detain the

²⁹ HCA # 1816 of 2003 Funrose v The Attorney General of Trinidad and Tobago [AB 20 \EB1424]

³⁰ By way of Cabinet Note AG Note to Cabinet 2005

³¹ See ROA page 699

³² See further HCA # 2107 of 2005 Funrose and Noreiga v Dr. Doon and the members of the Psychiatric Hospital Tribunal [AB 22\EB1466]

tribunal makes a recommendation which is forwarded to the relevant line Minister(s) of Government. This recommendation is then considered by either the Minister or Cabinet³³ and a decision is made whether the detainee is to be released with the President informed of this advice. Dr. Ghany made it clear that upon the making of the recommendations the issue of release is thereafter “out of the hands” of the Tribunal. It was also evidenced that the detainee are not informed of the results of the Tribunal’s assessment but that Dr. Ghany had informally informed some of the patients.

38. In the case of each Appellant, on diverse days the Tribunal made favourable recommendations for their release after conducting the assessment. Years later on the 5th January, 2006 Cabinet considered the aforesaid note of the Attorney General and decided that the Appellants were to be released. Notwithstanding, the Appellants continued to be detained until the High Court ordered their release by way of interim relief on the 21st May, 2007. This release did not arise on a review of detention by the Court but in constitutional proceedings.

39. It is accepted that for the purposes of these proceedings and constitutional relief that the order for detention should have been read as Court’s Pleasure from the date of the making of same and that the review process ought to have been in the Court’s hands with the final determination within the province of the Court which thereby had the power to release.

40. The Appellants’ case on this appeal does not hang on the failure of the Court to review but it was the failure of the review process as a whole which was denied to the Appellants resulting in loss of liberty and mental distress and inconvenience. It is important to note that in Mukesh Maharaj the Court of Appeal held that the date of recommendations was treated as the date of an entitlement for release, their being no contrary evidence to suggest that further detention was required³⁴.

³³ As occurred in this case

³⁴ See Archie CJ in Mukesh Maharaj above at paragraph 20 and per Berezuk JA at paragraph 36.

Ground 4(v) – the courts below erred in equating a clinical assessment by the Psychiatric Hospital Tribunal as the review of detention process required by the detention:

41. It is convenient to here deal with this ground as it informs the issue of appropriate relief. It is the Appellants case that there had been no completed review of detention before the Cabinet decision of the 5th January, 2006 – after the commencement of the proceedings.
42. The Appellants' case that there is a distinction on the one hand between a clinical assessment by the staff at the mental hospital and the further assessment by the Tribunal leading to recommendations and, on the other hand, the review of detention. The former is merely the preliminary clinical steps in the review process and not the review required by the indefinite order for detention.
43. The error of the courts below was to equate the clinic assessment and recommendation of the tribunal with the completed review process. The courts below did not deal with this distinction and erred thereby.
44. It is the Appellants' case that the review process is only properly completed in law when there has been consideration of the release of the detainee by the decision maker with authority to order release. On the facts the State considered that it was the Executive with such authority.
45. In this case the first and only review of detention was therefore only conducted³⁵ in January, 2006 such that that there was a callous disregard for the Appellants welfare and liberty throughout which continued even after the positive decision was taken to effect the release.
46. What occurred in the cases on appeal was merely the first steps in the review process without the process being brought to completion and as was recognized in the present case at first instance this was the essence of the

³⁵ Also important because the Court of Appeal held that it was material to the determination of the issue of cruel and inhumane treatment and found that the issue of release had not been forgotten.

complaints made in these cases and those related. The final step in the process was the decision of Cabinet.

47. Therefore, the Appellants' case is that there was no periodic review until January, 2006 such that the Appellants were denied the review process for varying durations. It is submitted that the Court of Appeal was wrong to find that the Tribunal's recommendation marked the first review of detention. This affects the approach to the assessment as shown hereunder.

Ground 1: Failure to grant declaratory relief.

48. By the Appellants' Notices of Appeal³⁶ the Appellants sought the specific order of the grant of declarations as to sections 4(a),(b) and 5(2)(a), (b), (e) and (h). The Court of Appeal treated the case as though declarations had been made as to section 4(a), (b) and 5(2)(h) and held that there was no basis for declarations as to section 5(2)(a) or (b). The Appellants before the Board seek declaratory relief as to sections 5(2)(a) and (b) on the basis that the High Court intended to make the declarations as to section 4(a), (b) and 5(2)(h) but did not do so formally.

49. Rampersad J cited his previous decision in Dillon and others and clearly intended to make the same formal declarations as to breach of sections 4(a), (b) and 5(2)(h) of the Constitution. Before the Court of Appeal, the Appellants submitted that the first error was the failure to make the relevant declarations on the bases as found by Rampersad J in applying his earlier decision in Dillon and others.

50. The Court of Appeal treated the appeal as being only on the issue of increasing damages but the Appellants had sought and still seek that specific declaratory relief on appeal. The Court of Appeal also confined the issue as to being relevant to assessment and framed the appeal as being a claim to "separate

³⁶ See item tab 19 ROA page 163, 27 ROA item 27 ROA page 252, item 35 ROA page 342, item 43 ROA 431 and item 51 ROA page 514 – all filed on the 28th September, 2022

declarations” being sought when in the issue raised on appeal was that the High Court had failed to give any declaratory relief at all.

51. The Court of Appeal relied on the fact that in Mukesh Maharaj there had been no criticism of the failure to make separate declarations. But this is not only not binding on the Court of Appeal but also neglects to consider that in Mukesh Maharaj there was no appeal against the failure to make declarations and the appeal was only as to quantum such that the point never arose for determination.
52. In constitutional proceedings the issue is as to what rights have been breached. It is important for the court to articulate the rights found to have been breached. The Court of Appeal’s finding is to the effect that no declaration need be made once the assessment proceeds on the correct basis but this only applies to its effect on the assessment. Prima facie and applicant for constitutional relief is entitled to declaratory relief as found appropriate.
53. On this point the Appellant submits that the assessment did not proceed on a correct basis and, in particular, failed to consider that the detention was arbitrary from the time when the first review of detention should have been conducted. This contributed to the limitation of the assessment to the period after the making of the recommendations.
54. The crux of the Appellants’ submission is that further declarations were required on the evidence and, in the case of arbitrary detention there were a number of first instance decisions declaring that the detention was arbitrary. Even in Mukesh Maharaj where there was no specific declarations other than under section 4(a), (b) and 5 (2) both the High Court and Court of Appeal made findings that the detention was the antithesis of arbitrariness.
55. Irrespective of whether the declaration made by the High Court was sufficient in terms of declaratory relief the Appellants were still entitled to the relevant findings being made for the purposes of the assessment.

56. Moreover, it is settled law that the nature of the rights breaches, the importance of those rights in the context of the facts, and the gravity of those rights are all matters having a direct impact on the assessment of compensatory or purely vindicatory damages. For this reason the Appellants do not agree that further declarations would have added nothing to the assessment.
57. The Court of Appeal cited Subiah v the Attorney General as authority for the proposition that there is no need to make separate declarations. With respect, that decision does not support that position because i) there was a consent order ii) which consent order granted a declaration as to breach of section 4(a) and iii) the terms of the declaration made it clear as to the breach of the right and when same had occurred³⁷. Therefore in Subiah there was never any consideration of the need to make formal declarations or to spell out the basis of the relief granted.

Arbitrary Detention– sections 5(2)(a)

58. On the issue of the further declarations at title the Court of Appeal did not state that the declarations were not appropriate for relief but that there was no basis in the evidence for such relief. The Appellant submits that this is wrong.
59. The Court of Appeal approached the issue of arbitrary detention on the basis that there could be no arbitrary detention because the Appellants had been detained pursuant to an order of a court on certain grounds.
60. This is an error which confuses the common law issue of justification for imprisonment with the prohibition against arbitrary detention under the Constitution. For the purposes of constitutional relief the existence of a Court order or warrant providing for detention does preclude a breach of any of the fundamental rights³⁸ and the Court of Appeal was wrong to rely on there being an order of a court as preventing arbitrary detention.

³⁷ See paragraph 4 of the judgment of Kangaloo JA. The judges differed on the quantum of the additional vindicatory award.

³⁸ Funrose and Noreiga where the warrant did not prevent there being unconstitutional detention as being arbitrary. The same was also held in Kedar Maharaj v The Attorney General of Trinidad and Tobago. In both cases declarations were granted under section 5(2)(a) prohibition against arbitrary detention.

61. This is because it is settled that in these cases of indefinite detention, subject to a periodic review process, the order for detention made by a court merely authorizes the initial detention with the continuation of the detention to be ordered through the review process. Where, as in these cases, that review process is absent there will be an obvious failure to objectively justify the continued detention and thereby lies the basis for finding arbitrary detention. In Kedar Maharaj it was stated that *“in the absence of such periodic reviews it is difficult, if not impossible to justify the Claimant’s continued detention as being lawful.”*³⁹
62. As to when the detention became arbitrary there is little to guide in the way of when the first review ought to have been conducted. Even after Stollmeyer J indicated that the issue raised is “a matter of urgent and preferred consideration and implementation by the executive and the legislature of this country” in Funrose and Noreiga in 2004 there remains no statutory provisions or rules of Court which govern the review process applicable to persons found guilty but insane⁴⁰.
63. The nearest in terms of guidelines which obtained during the course of the Appellant’s detention comes from the decision in Funrose and Noreiga which was heavily influenced by the provisions of the Mental Health Act Chapter 28:02⁴¹. Those guidelines speak of reviews taking place at not more than 1 yearly intervals save for compelling reason. The Appellants commend this as a measure of when the review ought to have taken place and submits that there being no review to justify the continued detention the detention became arbitrary after the first year⁴². The Appellants were therefore entitled to this finding and declaratory relief accordingly. The Court of Appeal did not deal with these submissions in its judgment nor did it make mention on the first instance decisions cited herein and before the Court of Appeal. It is noted here that

³⁹ Paragraph 34 of Kedar Maharaj per Ventour J. **[AB 28\EB1574]**

⁴⁰ In 2017 the law on diminished responsibility was amended as indicated hereinabove.

⁴¹ Adopted by the Cabinet Minute of the 5th January, 2006.

⁴² See Funrose and Noreiga – See Mukesh MaharaJ High Court where findings were made as to arbitrary detention and breaches of section (5)(2)(e) and (f) at paragraph 66 last bullet point per Kokaram J.

Funrose and Noreiga was not overruled on this issue by the Court of Appeal in the subsequent appeal in Seepersad and Panchoo v The Attorney General⁴³.

Cruel and unusual treatment – section 5(2) (b).

64. The Appellants case under section 5(2)(b) was based on the fact of prolonged arbitrary detention even after the recommendations of the Tribunal and the delay in conducting a review process were made constituted cruel and unusual treatment⁴⁴. In this regard it is paramount consideration that the purpose of the detention was to treat the Appellant's mental conditions and that Dr. Ghany's unchallenged medical opinion was that further continued detention would be deleterious to the mental health of the Appellants⁴⁵. It is the effect upon the Appellants which must be considered here.

65. It is further important that the Appellants stand to be considered as among the most vulnerable in society and the Constitution is particularly intended to safeguard the rights of the most vulnerable in society. It is for these reasons the Appellant submits that the circumstances of the detention of the Appellants fall well below the irreducible minimum standard of treatment expected to be afforded to those such as the Appellants without regard to their dignity and personhood⁴⁶. The threshold of irreducible standard is met by virtue of the period of detention in excess of when the Appellants ought to have been released; i.e., when the Tribunal made the recommendations in each case.

66. The Court of Appeal held that there being no issue that the Appellants' conditions were ignored or that the issue of release had been forgotten there

⁴³ Attorney General v Seepersad and Panchoo. See further Kedar Maharaj paragraph 39

⁴⁴ See Weekes v UK (1987) 10 EHRR 293 para 47 **[AB 60\EB2294]** punishment which is arbitrary and disproportionate can be regarded as inhuman. The same applies with greater force in the case of non-punitive detention as in the present appeal. See also R v Lichniak [2002] UKHL 47 at paragraph 25 of Lord Hutton's judgment. **[AB 41\EB1861]**

⁴⁵ See Dr. Ghany's affidavit at ROA and which is substantially and materially the same in the case of all Appellants.

⁴⁶ Reyes v R 2001 UKPC **[AB 45\EB1952]**

was no basis for a finding of cruel and unusual treatment. But this is wrong as a matter of finding of fact and adopts an unduly narrow scope of that right.

67. Firstly, there was clear evidence to the effect that the issue of release had been forgotten by the State: this is only basis which explains the failure to review over the years and the continuation of the detention by the Executive in failing to act on the recommendations in a timely manner and to act thereafter once the decision had been made to release. The State has offered no explanation for this unconstitutional state of affairs. Secondly, the issue of cruel and inhumane treatment is not limited as suggested by the Court of Appeal. It is accepted that the mental states of the Appellants, prior to the making of the favourable recommendations, were not ignored to the extent that there were clinical assessments but the point is made above that those clinical assessments were only preliminary steps in the review process such that this is only part of the equation which clearly neglects consideration of the review process as a whole. In law the Respondent cannot rely on the clinical assessment to justify detention.

68. The claim to a finding under section 5(2)(b) is grounded on the continuing failure to review following those recommendations which is alleged to have fallen below the irreducible minimum standard of treatment⁴⁷ on the further ground that there was no rationale nexus between their continued detention and the initial order for detention.

69. For these reasons the Appellants submit that the Court of Appeal was wrong to find no basis for the further declaratory relief under section 5(2)(a) and (b) and the Appellants pursue that relief on this appeal.

Ground 2 - Variation of the Interest Rate.

⁴⁷ The Court of Appeal in Selwyn Dillon made reference to what standards of treatment were to be expected.

70. Before the High Court the Respondent Attorney General's submission was not as to the period for the running of interest but that interest should be allowed, if at all, at a reduced rate. This was summarized in the High Court's judgment which gave reasons for rejecting that submission.

71. There was no appeal by the Respondent before the Court of Appeal and the Court of Appeal expressly recognized that there the Court could not reduce the awards made. During the course of argument before the Court of Appeal, the Court raised an issue concerning the calculation of interest at 6%. Before the Court of appeal neither party made submissions on the point and even though so raised there was no agreement by the parties that this issue was open for determination on the appeal as filed.

72. It is submitted that the award of interest is part of the appropriate relief granted to the Appellants in the exercise of the Court's wide discretion to make the necessary orders under section 14(2) of the Constitution. It is further part of the overall award of damages which was not the subject of any appeal to that Court. The Court recognized that any reduction in damages was not available on that appeal still proceeded to vary the interest rate⁴⁸ notwithstanding there being no notice of appeal providing jurisdiction to vary the relief in this way.

73. It being a matter of discretion there are obvious difficulties in challenging the relief granted but the point was never in issue. The Court of Appeal was therefore wrong to vary the order for interest and that variation should therefore be set aside by the Judicial Committee.

Appeal as to Damages:

74. The Appellants appeal the awards made on the assessment of damages and raises separate issues with respect to the compensatory aspect and that of the vindicatory additional award. These are reflected in grounds of appeal numbered 3 and 4. Ground 4 contains several particulars of which 4 (vi) has

⁴⁸ See paragraphs 9 and 96 of Court of Appeal decision

been dealt with above. Grounds 4 iii) and iv) relate to the issue of vindictory damages whereas the others relate generally to the compensatory element of the award.

75. The Appellants accept that in reviewing an award such as this the Court is entitled to look at the global award to see if the total award comes within the bounds of the discretion being exercised as shown in Subiah v The Attorney General⁴⁹. The Appellants submit that even the most generous measure of the bounds of discretion cannot save the present awards from successful challenge.

General Damages:

76. The Appellants' case is that the courts below approached the assessment on a plainly wrong basis by limiting the period of assessment to the period from the date of the recommendations to the date of release rather than the entire period of unconstitutional detention. Tied to this issue is that of the issues as to arbitrary detention and cruel and inhumane treatment which impact both the period for assessment and the quantum and the issue of declaratory relief or findings. There are further wider issues addressed as to the submission that constitutional awards have proceeded on an erroneous basis of limiting recovery to mental distress and inconvenience which appears in various decisions following and applying the dicta of Lord Diplock in Maharaj No.2 v The Attorney General⁵⁰.

77. It is clear that Rampersad J applied Mukesh Maharaj to limit the period of the assessment⁵¹ and in arriving at the quantum of the award. In so doing, Rampersad J departed from the approach and the awards made in his previous decision of Dillon and others.

⁴⁹ Subiah v The Attorney General [2008] UKPC 47 [AB 55\EB2217]

⁵⁰ Maharaj v The Attorney General of Trinidad and Tobago No.2 [1979] AC 385 at page 400.

[EB1878]

⁵¹ The Learned Trial Judge stated that "*using the rationale set out in Mukesh Maharaj, this court will award*" and again "*in keeping with the decision in Mukesh Maharaj, this court awards.*"

78. The Court of Appeal upheld this approach to the assessment and the award made on the basis that it was an application of Mukesh Maharaj and binding on both the High Court and the Court of Appeal⁵². It was further held that :

- i) in both Dillon and Mukesh Maharaj the “assessment was similarly based upon those constitutional breaches, and a similar exercise was conducted by the trial judge⁵³.”
- ii) the present cases bore greater similarity of circumstances to Mukesh Maharaj than Dillon.
- iii) the awards of the High Court were consistent with precedent which the Court indicated showed compensation being awarded at approximately \$100,000 per annum⁵⁴ and relied on Mukesh Maharaj and Kedar Maharaj⁵⁵.

79. The Appellant submits that the Court of Appeal erred on all fronts with the primary error being in failing to view Mukesh Maharaj in terms of the declaration made and the assessment which resulted therefrom. As a result of the central importance placed upon Mukesh Maharaj that case requires a closer examination than that conducted in the courts below.

Mukesh Maharaj's case- a closer examination:

80. Mukesh Maharaj was a successful appeal by the detainee against the quantum of the award. The declarations made were not in issue and the appeal proceeded on the basis of those declarations having been correctly made.

81. Before the High Court Kokaram J stated that the issue was *whether the detention of the Claimant and failure of the Defendant to act upon the*

⁵² See paragraph 57 of Court of Appeal judgment

⁵³ See paragraph 68 *ibid*

⁵⁴ Notwithstanding the Court making it clear that the law as stood was that the assessment should not be a matter of mathematical calculation - see paragraph 93. But the Appellants never contended for any sort of mathematical calculation as the proper approach to the assessment.

⁵⁵ Cited above

recommendation of the Tribunal constituted a breach of sections 4(a) and (b) and 5(2) and (sic) (h) of the Constitution⁵⁶ and later held “that the claim is restricted to one of the mental anguish of uncertainty. His uncertainty began at least in 2004 but heightened in 2008⁵⁷.”

90)The Appellant submits that these two excerpts from the judgment show conclusively that the assessment in Mukesh Maharaj was for compensation for the attendant mental anguish only and not the loss of liberty itself. This is the clear effect of the declaration and therefore the only basis upon which the assessment could have proceeded.

91)There being no issue of compensation for the loss of liberty on the declaration so made, the award is only reliable as part of the trend in relation to compensation of mental anguish without recovery for injury to liberty. This was expressly recognized in Mukesh Maharaj at paragraph 30 thereof⁵⁸ which cited the Maharaj No.2 dicta⁵⁹.

92)The period of detention was a relevant factor in the assessment as to the duration of mental anguish and the failure to give sufficient weight to the duration of that mental anguish was the basis for the Court of Appeal increasing the award of damages. It is on this basis that the statement that the Court made as to finding common law authorities as unhelpful is explicable on the basis that the common law will compensate for the injury to liberty together with the injury to feelings: hence, the gravity and nature of the breaches involved were not apposite to the assessment for mental anguish.

93)That there is a clear and obvious distinction between the compensation for loss of liberty (being the physical element of damage) and that of mental anguish, distress and inconvenience as the mental element of loss suffered. It is also clear that loss of liberty will be compensated at a higher level than the injury to

⁵⁶ Paragraph 17 of Mukesh Maharaj in the High Court

⁵⁷ at paragraph 66 *ibid*

⁵⁸ See paragraph 30 at page 12 of Mukesh Maharaj

⁵⁹ See paragraph 41 page 16 *ibid* – compensatory award... as recompense for the inconvenience and distress suffered during the illegal detention.

feelings such as anguish. This point alone is sufficient to distinguish Mukesh Maharaj from those cases in the present appeal.

94)As to the similarity of circumstances, it is accepted that the facts in the present case appeal bear greater similarity to those in Mukesh Maharaj than those of Dillon. The reasons are that Dillon was never the subject of medical treatment, remained detained at prison and was never afforded any stage of a review process until he issued the proceedings in 2003 and the overall detention was for a longer period than in the cases of the Appellants. The failure to treat Dillon becomes relevant if he required treatment in the first place but there was no evidence noted to that effect in that case.

95)The true distinction lying with the declaration and limitation of compensation to mental anguish. So that, while the periods of detention may bear greater affinity with that in Mukesh Maharaj the similarity ends there.

96)Mukesh Maharaj in the Court of Appeal is authority for the sole proposition that a compensatory award for mental anguish for a period of 4 ½ years following the recommendation for release was sufficient redress to vindicate the rights without an additional vindictory award in circumstances amounting to administrative inefficiency or inertia. This is submitted as the ratio of the case and it is binding to that extent only.

82. Mukesh Maharaj is precedent as to an award for mental anguish arising from the uncertainty as to his liberty in the sum of \$450,000 for a period of 4 ½ years on those facts. In this regard, in this award there were no aggravating factors and no evidence as to his subjective feelings⁶⁰ just that he was uncertain as to his liberty.

83. Two matters arise on the issue of precedent value: i) the award in Mukesh Maharaj was arrived at without reference to any other awards made for mental anguish and ii) the evidence in this case is markedly different in this appeal. At first instance in Mukesh Maharaj Kokaram J made it clear that there was a

⁶⁰ See paragraph 66 per Kokaram J as to the assessment in the High Court in Mukesh Maharaj.

paucity of evidence as to distress and that the evidence related to mental anguish relative to the uncertainty as to liberty⁶¹.

Ground 3: award inordinately low and a wholly erroneous estimate of loss

84. The first point is that an award for mental anguish only is not applicable as part of the range of appropriate awards in circumstances which call for an award for both injury to liberty and injury to feelings: to do so would necessarily involve under compensation in the latter case.

85. For those Appellants with periods of post recommendation detention similar to that of Mukesh Maharaj the award of the High Court was identical to that made in Mukesh Maharaj⁶²: these are Wayne Alleyne with a period 4 years and 7 months and 14 days and one Roger Sobers⁶³ (not an Appellant in this appeal) both awarded precisely the same sum as that awarded in Mukesh Maharaj for detention of 4 years and 6 months. It is also easy to see that the other awards were similarly based on some extrapolation of the award in Mukesh Maharaj where there were greater periods of detention following the recommendations herein.

86. In the High Court, Rampersad J found that an additional award was appropriate by the terms of his judgment making an award “*inclusive of an uplift*”. If, as is clear, the award made by Rampersad J was intended to include an uplift for the additional award of vindictory damages it means that the compensatory element of the award for injury to both liberty and feelings would therefore be less than that awarded in Mukesh Maharaj for mental anguish/feelings only where there was little evidence of distress and no aggravating facts. This would

⁶¹ Also recognized in the Court of Appeal at paragraph 29 which endorsed the

⁶² Appellant numbered 1 Wayne Alleyne – 4 years and 7 months and 14 days
Roger Sobers who is not before the Board having died before the Court of Appeal hearing was detained

also result in obvious under compensation, the extent of which is not known for the reason that the vindictory award was not identified.

87. For this reason, the award made cannot stand as it has been shown to be a wholly erroneous estimate of the loss suffered and inordinately low.

Ground 4i) – the wrong approach to the assessment – limiting the period of assessment.

88. The Court of Appeal misconstrued the case as one being limited to unlawful detention following the recommendations for release. As explained above, with regards to arbitrary detention, the issue is one of unconstitutional detention and the detention was without due process and the protection of law from much earlier on.

89. On the authority of Mukesh Maharaj the courts below limited the assessment period on the basis of that which was applied in Mukesh Maharaj and limited by the declaration granted there. It has been shown hereinabove that this limitation is unfounded in the present cases. What is the loss suffered and that to be properly the subject of an award of damages is a different issue.

90. The Appellant submits that the courts below did not consider that while mental distress attendant upon the continued failure to act on the decision to release or on the favourable recommendations would no doubt have occurred the evidence spoke to the entirety of the respective periods of detention which is up to the date of filing of the 22nd April, 2004. It was therefore impossible for many of the Appellants to have even known of the recommendations being made and the decision to release would only occur 2 years later.

91. By applying the court's earlier judgment in Dillon and others to the present claims the period for the assessment was thereby fixed by the intended

declaratory relief⁶⁴. The assessment had to proceed on that basis and use the period of assessment as from the initial incarceration. Nothing said in Mukesh Maharaj or the Court of Appeal in the present case could have changed that, it was not even open on the appeal as there was no cross appeal by the State.

92. It is for these reasons it is submitted that the court adopted the wrong approach to the assessment and erred in limiting the period under assessment. This resulted in unfair determination of the assessment which must be set aside on this appeal.

Ground 4 vi) Erred in misconstruing the Appellant's case as disaggregating periods of detention as opposed to one of identifying the changing and varying circumstances of the Appellant's detention and thereby failed to adequately consider all relevant circumstances during the course of the Appellant's detention.

93. To the extent that the Court of Appeal confined the assessment to the period following the recommendations there could be no consideration to the effects upon the Appellants which occurred before that date. As indicated herein, the evidence as to mental element of damages related to the period up to the filing of the claim in April, 2004 which it was reasonable to infer that same must have continued after the filing of the claim and this would have been materially affected upon the Appellants learning of the formal recommendations and the decision to release made thereafter.

94. There was therefore no compensation considered for the period before the recommendations and thus none could be awarded. This was an error in approach to the assessment. Accordingly, there was no consideration of the serious effects upon the Appellants given in evidence which was sufficient to ground an award of damages in this respect. Moreover, in other cases where

⁶⁴ See paragraph 73 in Dillon and others [AB 53\EB2178]

there has been no evidence to show that persons were likely to have been released the local courts have assessed damages on the basis of a loss of chance deprived as a result of the failure to review detention⁶⁵. There was therefore a proper case and evidence grounding an award of damages before the recommendations were made to compensate for mental distress and loss of chance caused by the continuing failure to review.

95. The reasoning of the Court of Appeal, repeated in various parts of the judgment, is that the Court found that there could be no compensation without a reasonable expectation of release which could only arise upon the favourable recommendation for release. This is incorrect and does not pay due regard to the loss suffered whether it be solely related to mental distress which was unchallenged or by the loss of chance due to the Appellants.

96. The basis for tying the availability of compensation to that of an entitlement of release (which is understood to be taken as at the date of recommendations in the face of no countervailing evidence to the contrary) was that the Court of Appeal considered that it an award could only be made where there was a direct loss of liberty proven on the evidence. This also neglects the consideration that causation in constitutional law is relaxed and even where the direct loss is not proven the assessing court can take this into consideration in the making of the additional vindictory award. This was the effect of the decision of Boodoosingh J (as he then was) in Central Broadcasting v The Attorney General⁶⁶ where an additional award was made in the sum of \$500,000 in though that loss was not strictly proven and which was upheld on appeal⁶⁷. That authority shows that the discretion of the award is wide indeed and had the Court taken into account these matters it would have been alive to the fact that compensation ought to have been awarded for the period before the recommendations.

97. The Appellants case is on two points: i) once it is kept in mind that the principles which apply to the compensatory element is to be assessed under the usual

⁶⁵ See Cv 2009-00439 Felix James v The Attorney General [AB 18\EB1400] and on appeal Cv App No. 194 of 2011 Felix James v The Attorney General [AB 19\EB1412]

⁶⁶ H.C.A #1352/2002 Central Broadcasting an ors v Attorney General of Trinidad and Tobago.[AB 10/EB1206]

⁶⁷ Cv App 216 of 2009 Attorney General of Trinidad and Tobago v Central Broadcasting an ors [AB 9/EB1185] 29

common law principles obtaining in the local jurisdiction the changing circumstances over the period of detention, the nearer to or further from the State providing some basis for the detention that these circumstances must be considered in the assessment. As put in Dumbell v Roberts⁶⁸: *“The more high-handed and less reasonable the detention is, the larger may be the damages; and conversely, the more nearly reasonable the defendant may have acted and the nearer he may have got to justification on reasonable grounds ... the smaller will be the proper assessment”* per Scott LJ.

98. The second is that where the facts and circumstances are akin to false imprisonment by there being no possible justification for the continued detention this must necessarily require a higher level of award along the lines contemplated by the awards at common law. It is on this basis that the Appellants submit that the awards at common law do provide a guide and, in many cases, a more appropriate guide to the compensatory element such that the courts below were wrong not to consider them. This approach is common in the jurisdiction and many decisions in constitutional law apply only constitutional awards such as to deprive themselves of appropriate guidance on an assessment. It is submitted that to confine applicable authorities to those under the constitution which are at a much lower level than at common law which lower recovery cannot be supported to the extent that explains the large disparity between the awards made under the different causes of action.

99. That common law awards were not found to be helpful in Mukesh Maharaj has been explained but, irrespective, this in no way diminishes the application of common law awards to the present appeals following the recommendations. The Court of Appeal did not deal with that period as a loss of chance but that there was an entitlement to release- in the same way that at common law there is an entitlement to release and liberty.

100. That this affects the assessment is clear when one examines the disparity in the awards between the two causes of action. An example is

⁶⁸ Dumbell v Roberts [1944] ALLER Vol 1 page 326 at page 330 letter A [AB 15/EB1365]

Sheldon La Fortune⁶⁹, a case of false imprisonment arising following detention in excess of the warrant of commitment without mal-intent with the award assessed on the pleadings without any evidence. That period of detention was 141 days and for the loss of liberty simpliciter – without any aggravating facts or evidence of mental distress – the award was \$300,000.

101. Taking the Appellant with the least detention post recommendation of approximately 4 ½ years the award was \$450,000 on evidence with aggravating facts and evidence of mental distress and the like. A number of other authorities were cited to the Court of Appeal which showed the disparity in the awards at common law and that under the constitution. The Court of Appeal did not address this submission.

102. This disparity in awards cannot stand and is unprincipled. The assessment at common law and that under the Constitution assesses the same heads of damage as that available at common law. The local Courts have not dealt with this issue sufficiently and there is some divergence of opinion as to the use of common law awards⁷⁰. The Court of Appeal and local courts have addressed this disparity by reference to the dicta in Maharaj No.2 that damages are not at large⁷¹ or that damages for deprivation of liberty does not involve the same loss of liberty as in false imprisonment. As to whether damages should be considered as being at large, on the high authority of Rookes v Barnard⁷² and Cassell v Broome⁷³ that that part of the dicta is unsupported and should not be considered as part of the law.

103. The Court of Appeal in Merrick⁷⁴ stressed that the awards cannot be equated as the juridical basis is different but there is no such suggestion made by the Appellants herein. In any event, these attempts to explain the disparity

⁶⁹ Cv 2017- 00891 Sheldon La Fortune v Sterling Stewart and the Attorney General decision of Master Pierre – unreported. Only transcript of decision available. [AB 62/EB2337]

⁷⁰ See Cv App 86 of 2007 Nadike v The Attorney General and also Kowlessar v The Attorney General of Trinidad and Tobago. See also Dillon and others where common law awards were addressed. [AB 48/EB1976]

⁷¹ See Boodoosingh J in Quincy George v The Attorney General of Trinidad and Tobago at paragraph 41. [AB 40/EB1841]

⁷² Rookes v Barnard [1964] 1 All ER 367 [AB 51/EB2106]

⁷³ Cassell v Broome [1972] 1 All ER 801 [AB 8/EB1107]

⁷⁴ Cv App 146 of 2009 Ulric Merrick v The Attorney General of Trinidad and Tobago. [AB 59/EB2273]

in the awards do not go far enough to sufficiently explain why, in an appropriate case, the common law should not be directly applicable to an assessment under the Constitution.

104. In an effort to assist the Court of Appeal with identifying the circumstances of the Appellants' detention⁷⁵, the periods of detention were explained by reference to three periods: i) the first was from the initial detention to the first clinical assessment by the Tribunal, ii) the period between the making of the recommendations and the decision of Cabinet and the iii) was the period following the decision of Cabinet until the release of the Appellants was ordered by the High Court.

105. The Court of Appeal stated these periods to be based on artificial distinctions but those distinctions were not artificial and were supported by the evidence of the Appellants. The Court of Appeal wrongly construed the submissions as though the Appellants were seeking different awards for these periods.

106. But this was not the case for the Appellants- there was no attempt to disaggregate the periods of detention for the purpose of claiming separate awards and the Court of Appeal was wrong to construe the Appellants' case in this way. The Appellants merely indicated that these were the changing relevant circumstances of the detention by reference to material events that occurred during same. The Appellants sought one award of damages but made it clear that this award was to consider the various periods on the basis that this was required for the proper assessment of damages.

107. The approach taken by the Court of Appeal negated any submission as to the common law awards being used as guides to the award under consideration where the circumstances admitted same. This was important in relation to the described second and third period. What is important is not the

⁷⁵ At paragraph 39 of the Court of Appeal's decision herein details a breakdown of the different periods under consideration. This was provided by the Appellants on the direction of the Court of Appeal at the hearing.

disaggregation of the awards, which was not sought, but that the relevant facts were taken into consideration and given due weight in the assessment.

108. It is on the basis that this was not undertaken by the Court of Appeal which denied the applicability of the approach contended for by the Appellant that the Appellants submit that the Court of Appeal failed to properly consider all relevant circumstances and adopted the wrong approach to the assessment.

Ground 4 ii) the erroneous line of authorities in Constitutional law which under-compensate.

109. This issue is closely related to the above submissions as to the appropriateness of common law damages as guides on the assessments in this appeal.

110. Extensive submissions were made as to the applicability of common law awards and the fact that the application of constitutional awards tends to under compensate. This was based on submissions related to the interpretation of dicta in Maharaj No.2. The Appellants submitted that there are a number of constitutional awards which under compensate for the loss of liberty on the basis of the dicta in Maharaj No.2 which is often cited.

111. One interpretation put upon Maharaj No.2 is that it represents a clear and bright dividing line between the cause of action under false imprisonment and that under the constitution for deprivation of liberty. In a number of cases the award is expressed as for mental distress and inconvenience on the basis of the Maharaj No.2 dicta. This was addressed in Quincy George where Boodoosingh J indicated that the size of the awards were such that they must be taken as including compensation for the loss of liberty as a head of damage as was done in Quincy George.

112. The Court of Appeal agreed with the submission of the Appellants that there was nothing in Maharaj No.2 which limited the damages to mental distress

and inconvenience. However, the Court of Appeal did not address the further issue of what effect this had on the assessment of damages in this case.

113. It is therefore submitted that in identifying applicable authorities an assessing court must bear the distinction between those cases which make no reference to compensation for loss of liberty and those that do make clear the extent to which the loss of liberty is being compensated rather than any simply citing the dicta in Maharaj No.2 and limiting damages to mental distress and inconvenience. In principle there ought to be no difference in the awards at common law and under the constitution as explained above.

114. It is also important to bear in mind that Maharaj No.2 was in 1977 and that the erroneous interpretation of Maharaj No.2 as to compensation for loss of liberty has continued to run through the authorities which continue to thereby limit recovery to the mental element of damage.

115. Likewise, the same has occurred with the concept of tapering down of damages which was not expressly adopted into local law and which ought not to be adopted as a rule as the basis for same in Thompson v Commissioner of Police⁷⁶ with hourly rates for computation of damages does not apply in this jurisdiction. The Appellants submit that the tapering of an award is a matter of discretion rather than a rule such that the authorities must be carefully examined as to whether they have proceeded on the basis of tapering down either by that award or consideration of those awards which have proceeded on that basis.

116. In examining the authorities, the disparity between them is palpable and has been touched upon above. It is therefore submitted that those authorities which do not make sufficient reference to compensation for loss of liberty are in apt to the assessment herein and, in these circumstances, the common law will provide a more appropriate guide to the award for the simple reason that the awards in constitutional law when viewed against similar natured awards

⁷⁶ Citation at note 13 above

under false imprisonment are substantially lower without proper explanation or principle.

117. The Appellants submit that this ground can be taken with the other grounds challenging the approach to the assessment and that once the Appellant succeeds on the other grounds it may not be necessary for the Board to determine this ground of appeal.

118. However, leave to appeal was granted on this ground which was specifically referenced by the Court of Appeal and which is therefore addressed.

119. The Appellants submit that this issue and that of the tapering of damages should be clarified by the Board as a matter of guidance in the event that the assessment is remitted to the local courts. The Appellants therefore ask the Board to deal with the issue of the applicability of the common law awards to the periods of detention following the recommendations for release.

Grounds 4 iii) and iv) the Vindictory Award.

120. The principles which apply to the making of an additional award are well settled in a line of authority from the Privy Council⁷⁷ and are not in issue. The issues arise from the Appellants' complaint as to the application of those principles. The Appellants accept the principle that for the appellate court to interfere with an award it must be shown to have been inordinately low or a plainly wrong exercise of discretion such that differences in the possible award may not entitle appellate interference. It is submitted that this does not save the assessment now before the Board.

121. The Appellants specifically asked for vindictory damages on the basis that any compensatory award would not suffice as adequate redress in the circumstances which required the making of an additional award as set out in

⁷⁷ Starting with *Attorney General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328 to *Akili Charles v The Attorney General No.1* [2023] 1 WLR 177

the line of authority from the Judicial Committee⁷⁸. Rampersad J agreed and expressed the award as arrived at by “*using the rationale as set out in Mukesh Mahara”*⁷⁹ and as “*in keeping with the decision in Mukesh Mahara”*⁸⁰.

122. The Learned Trial thereby departed from his earlier decisions in Dillon and others which had made substantial additional vindictory awards of between \$500,000 and \$250,000 which decisions were cited in the courts below but not considered as part of the applicable range of damages.

123. On appeal by the Attorney General Respondent in the Dillon case the Court of Appeal, after considering that the Learned Trial Judge had failed to justify the quantum of the additional award and in the absence of reason or proper reasons the award was reviewable on appeal reduced the additional award from \$500,000 to \$200,000 *on the basis that the “sum of TT\$500,000.00 is in our opinion altogether too high in light of the actual compensatory award and bearing in mind the factors already considered in making that compensatory award. In our opinion an additional sum of TT\$200,000.00 is an appropriate award as ‘vindictory’ damages to achieve the aims identified above and at the same time avoid double compensation.”*

124. The Appellants rely to their earlier submissions explaining the distinctions in Mukesh Maharaj showing that it was not binding and that, having regard to the distinctions in terms of the declarations, assessment and the findings made on the compensatory award.

125. The Court of Appeal reasoned that the making of the composite award was within the discretion of the High Court which cannot be reversed on appeal unless demonstrated to be a wholly erroneous estimate of damage and relied upon Subiah as support.

126. In so doing the Court of Appeal erred in placing undue emphasis on the exercise of discretion when the entire award was being challenged together

⁷⁸ The Ramanoop line of cases referred in the High Court of Rampersad J herein.

⁷⁹ Paragraph 111 of High Court decision herein.

⁸⁰ Paragraph 113 *ibid*

with its constituent parts recognizing that all awards are the product of the exercise of that discretion. It is therefore not an answer to treat separately vindicatory damages as entirely discretion and demarcate same on this basis as being subject to some higher threshold of appellate deference.

127. The Court of Appeal thereby took an unduly restrictive approach to its jurisdiction when the appeal was based on several competent grounds challenging the exercise of discretion on the usual basis including that it was a wholly erroneous estimate of loss suffered.

128. The Court of Appeal misconstrued the Appellants case at paragraph 78. The Appellant was not challenging that the determination of the making of an additional award. The case is i) that the award was not actually made even though expressed and ii) that if the award is found to have included an uplift for vindicatory damages it is clear that the compensatory award was inordinately low.

129. At paragraph 79 the Court of Appeal adopted the principle in Subiah as part of its reasoning: the difference in award did not warrant interference by an appellate court. It is submitted that Subiah was a very different case and did not answer the Appellants' case.

130. In Subiah, pursuant to a consent order damages were assessed in total at \$80,000 without expressing any vindicatory or exemplary additional award. element – the decision in Ramanooop was not available. Both sides appealed and on appeal the majority reduced the award to \$70,000. The unanimous decision was that there should be compensation in the sum of \$45, 000 but the court differed as to the vindicatory award with the minority assessing it at \$50, 000 and the majority. The minority award was \$15, 000 more than that of the Master and the majority award was \$10000 less than that awarded by the Master. In these circumstances, where there was a clear expression of the additional vindicatory award by the Courts below the Board held that the difference between the Master's award and the Court of Appeal was such that the Court of Appeal was wrong to interfere with the Master's award.

131. Without the Court of Appeal making a finding as to the appropriate vindictory award it is not possible to rely on Subiah as an answer to the Appellants' case on this point.
132. The Appellants submit that the Learned Trial Judge failed to articulate the vindictory award intended and this was upheld by the Court of Appeal. It has been submitted above that if the award is taken to have included vindictory damages, this clearly points to under-compensation in the compensatory award which would thereby be less than that awarded in Mukesh Maharaj for mental anguish alone – far less damage than that of the Appellants. The first point, therefore, is that the awards in these appeals with the uplift for vindictory damages provides for under-compensation having regard to the award made in Mukesh Maharaj which was applied by both courts below.
133. The Appellants submit that Rampersad J failed to properly consider the additional award on the basis of the mis-application of Mukesh Maharaj which included no additional award. That Rampersad J saw the tension between following his earlier decision in Dillon and others on the basis of reasoning and that of applying the Court of Appeal's decision in Mukesh Maharaj on the basis of binding precedent is evident in the judgment.
134. This uneasy tension is what must have led to the award being made in line with Mukesh Maharaj which was seen as including a vindictory award. This was the wrong approach which led to the Court failing to make the additional award or identify such an award.
135. It is however clear that Mukesh Maharaj is not supportive of the making of a composite award and it is difficult to follow the reasoning of the High Court. The Court of Appeals disposal of the point on the basis of discretion does not assist with the issue raised.
136. There being no reasons or insufficient reasons for the making of this additional award as a composite award with no indication of the range of the additional award entitled the court to look at the issue afresh. It did not do so and it falls to the Board on this appeal to examine the point raised.

Whether there should be a separate identification of the additional award.

137. The Appellants submit that it is the practice in the jurisdiction to identify separately the additional vindictory award which is expressed separately as in the case of exemplary damages. This differs from the practice of awarding a single compensatory award inclusive of an uplift for aggravated damages. There is no warrant to apply this approach to vindictory damages or to depart from this local practice. The Court of Appeal did not provide any reasons for the composite approach which it upheld and failed thereby to deal with a number of the submissions relative thereto⁸¹.

138. The reasons for the separate identification of vindictory damages are similar to those relating to exemplary damages but with greater force to vindictory damages. In the context of the Constitution the practice of making a composite award with no identification of the additional would tend to stultify the development of this area of law which is relatively new. Further, the intended force behind the additional award as explained in the Ramanoop line of cases is likely to be lost without the court making that additional award clear and the reasons for same. The identification of the additional award is also important for the purpose of appeals and the decision to appeal. Moreover, it is difficult to see in any given case how a court can consider an additional award when this is heavily influenced by the quantum of the compensatory award. A composite award does not accord with the test in law as to whether an additional award is necessary. The latter was especially significant in the appeal in Dillon.

139. It is submitted that the issue is not limited as suggested by the Court of Appeal but properly concerns the correct approach to the additional award. For the above reasons, the Appellants submit that the Court of Appeal adopted the

⁸¹ Only cases in which the vindictory award was not identified but included in the total award was in Funrose and Noreiga v The Attorney General where in the award was made of \$545,000 for compensation for breach and distress and inconvenience for detention of 737 days where there was a failure to continue the review process after it was so ordered in separate constitutional proceedings.

wrong approach to the making of the additional award such that it materially affected negatively the assessment of damages. The Appellants further submit that the Board should make it clear that there should be identification of the additional award for the court to discharge its function of providing full vindication of the rights.

140. Before the Court of Appeal the Appellants made substantial submissions of the circumstances requiring an additional award and the factors to be considered in the making of that award. These are relied on herein. The Court of Appeal addressed the issue of deterrence only which it saw as a matter of quantum.

141. The Appellants submit that the issue of quantum was not in point on the appeal because there was no indication of what the intended quantum, if any at all, was intended by the Learned Trial Judge. More importantly, the Appellants submit the Court of Appeal adopted a vary narrow view of deterrence on the basis that the Appellants had recognized that the situation was unlikely to be repeated.

142. The fact is that this situation of a lack of review was ongoing for decades without respite until claims were filed starting in 2004. Even after those were filed the situation continued as to a lack of review. In 2009 the further claims filed that the situation was continuing with respect to those indefinitely detained on the basis of mental affliction.

143. Moreover, there have been several instances of even where reviews of detention were ordered, there were no reviews thereafter⁸² all of which resulted in further claims being issued. Incredibly even where the orders for detention were modified to read Court's Pleasure no reviews were listed by the court in some instances and other claims were filed for the failure to produce reports

⁸² Cv 2009 v 00439 Felix James No.3. v The Attorney General;[AB 18/EB1400] Funrose v The Attorney General and HCA# 1688A of 2005 Noreiga v The Attorney General [AB 37/EB1793]

required for the review process⁸³. The need for deterrence has been understated by the Court of Appeal.

144. Additionally, there was no basis for the Court finding that the lacunae in the law has been resolved as this could only apply to the Offences Against the Person Act orders. It has been drawn to attention above that there remains nothing in terms of procedure or guidance to follow in the case of those found guilty but insane. The Appellants further submit that the issues before the Court of Appeal affect all persons indefinitely detained, which detention requires a review process to prevent arbitrary detention and that a review process is only sufficient as to due process and the protection of law to the extent that it is followed. This applies to anyone ordered to be detained at Court's Pleasure whether by statute in the case of juveniles, guilty but insane or the diminished responsibility detainees or by way of discretion at common law which was explored in the case of Naresh Boodram v The Attorney General⁸⁴ per Archie CJ. As the authorities above show there is still a need for deterrence.

Approach to the vindictory award- dicta in Mukesh Maharaj No.2

145. The weighty dicta⁸⁵ in Mukesh Maharaj on the additional award is not binding and cannot be supported by reference to authority. It is unduly restrictive an approach to be allowed to stand.

146. The observations as to the award of an additional vindictory sum and whether such an additional award was required in the absence of targeted or deliberate malicious conduct on the part of the agents of the State was without reference to a series of authorities in which such an award was made notwithstanding no evidence of mal-intent. Such a case is Quincy George⁸⁶

⁸³ See C.V. 2009-03462 Gilbert Evelyn v Registrar of the Supreme Court, Cv 2011-03889 Ramesh Seunarine v The Attorney General of Trinidad and Tobago. [AB 43/EB1904]

⁸⁴ Cv App 177 of 2010 upheld by the Judicial Committee in the important decision of The Attorney v Naresh Boodram [2022] UKPC 22 [AB 35/EB1732] [AB 56/EB2224]

⁸⁵ From the then Chief Justice with whom the rest of the panel composed of very senior appellate judges agreed.

⁸⁶ Quincy George v The Attorney General of Trinidad and Tobago [AB 40/EB1841]

where it was held to be appropriate even in the absence of mal-intent but was rather a product of administrative inefficiency. It is difficult to see how the award could be made on the facts in Quincy George but not made in the present cases in circumstances where the loss was greater and the fact much more egregious.

147. More importantly, such an approach cannot be applied without reference to the facts of each case and it is therefore prima facie wrong to apply this dicta across the board. The dicta in Mukesh Maharaj is to be confined to the facts of that case and such general observations cannot limit the discretion of the first instance court to make the award that it saw fit.

148. To adopt such a narrow interpretation of when it may or may not be appropriate to make an additional award is effectively a fetter on the discretion under section 14(2): it cannot be supported and is not supported by the authorities from the Judicial Committee. It may be the Court of Appeal was influenced by the reprehensible personal conduct of officers of the state in Subiah and Ramanoop but this ignores the loss being compensated and the effect on the detainee in what is a rights based approach to constitutional law. The fact is that the effect upon the Appellants herein was far more deleterious than cases such as Subiah and Ramanoop.

149. For these reasons, the Appellants submit that the Court of Appeal was wrong to apply the dicta in Mukesh Maharaj which negatively affected the assessment by inappropriately denying the Appellants an identified substantial award to vindicate the rights.

Disposal of the Appeal:

150. The Appellants submit that they have made good on the grounds of appeal dealt with hereinabove such that the assessment must be set aside. There were a number of issues which the Court at 1st instance did not address on the basis that they were effectively rendered moot by the decision of the Court of Appeal in Mukesh Maharaj. As these submissions show the issues are far wider than that which have been considered by the Court of Appeal.

151. The Appellants submit that the appropriate order on this appeal is to set aside the assessment and remit same for re-hearing before the local Courts in accordance with the advice of the Board on this appeal together with such guidance directed to the local courts as the Board sees fit. The Appellants ask for their costs before the Board and the Court of Appeal.

And so submitted for your consideration

Dated the 20th August, 2026

Mark Seepersad
Of Counsel

Postscript

Following the writing of these submissions a further recent authority has come to the attention of the Appellants. This is Cv 2019 – 04011 Leslie Tewarie v The Attorney General and Cv 2019-04016 Robert Noreiga v The Attorney General which is a decision of 1st instance where the complaint was of failure to review in the context of the Prison Rules where substantial damages have been awarded.

It has not been possible to address this case in these submissions. The Appellants indicate that it intends to rely on this authority for the hearing and will address same with leave of the Board at the appropriate time.

Mark Seepersad
Of Counsel