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

JCPC 2025/0024

BETWEEN

WAYNE ALLEYNE
LENNARD SYLVESTER
WINSTON SOLOMON
JUNIOR COLLINS
SIMON HABIB

Appellants

and

THE ATTORNEY GENERAL

Respondent

RESPONDENT'S CASE

Introduction

1. All the Appellants were detained for indefinite periods after criminal proceedings in which they were either the subject of a special verdict of "guilty but insane" or (in the case of the 3rd Appellant) convicted of manslaughter on the ground of diminished responsibility.

2. The Appellants found "guilty but insane" were detained in safe custody "until the President's pleasure is known" pursuant to s.67 of the Criminal Procedure Act (CPA) **[AB 3/EB1004]** and dealt with according to the laws governing the care and treatment of mentally ill persons, pursuant to s.68 of the CPA **[AB 3/EB1004]**. The 3rd Appellant was detained in safe custody "until the President's pleasure is known" pursuant to s.4A(6) of the Offences Against the Person Act (OAPA) **[AB 5/EB1032]**, as that subsection then read.

3. Decisions of the courts of Trinidad and Tobago in these and related cases have established that the said provisions for detention should be both be read as providing for detention "until the Court's pleasure is known", not the President's, so as to preserve the constitutional separation of powers (and s.4A(6) of the OAPA was so amended in 2017).

4. That question is not in issue in this appeal. The issues in this appeal concern the periods and manner of the Appellants' detention.

5. Further, the unconstitutionality of orders detaining the Appellants "at the President's pleasure" is not said to be the basis for compensation or declarations in these appeals. The Appellants do not contend that their detention was for those reasons unlawful ab initio, or that they should be compensated for the whole period of their detention.

6. Rather (as the Respondent understands it) the Appellants' position, for the purposes of the compensation and declarations they seek, is that the lawfulness of their detention depended upon an appropriate system of regular psychiatric review. They say that there was no effective review of their detention (paras 7 and 40 of their Case) and that their detention became arbitrary and unlawful after one year, the date when the first review should have taken place (paras 53 and 63 of their Case).

7. In summary, the Appellants contend that:
    1) The courts below should have awarded them greater damages because:
        i. The periods of unlawful detention for which damages should have been assessed began earlier than the periods identified by the Court of Appeal;
        ii. The awards of the courts below in any event were too low because they followed precedents which wrongly compensated only for mental anguish and not loss of liberty;
        iii. The courts below failed to consider all the material factors relevant to damages, because they failed to consider the different factors applying at different stages of the Appellants' detention; and
        iv. The courts below erred in failing to make a separate award of vindicatory damages, instead including such damages within one compendious award, which had the effect of further understating the level of damages.
    2) The courts below wrongly declined to make declarations that the Appellants' rights under s.5(2)(a) of the Constitution (protection against

arbitrary detention) **[AB 2/EB998]** and 5(2)(b) (protection against cruel and unusual punishment) **[AB 2/EB998]** had been violated.

3) The Court of Appeal erred in adjusting the judge's award of interest when this had not been the subject of appeal.

8. The Respondent respectfully submits that the courts below did not err, and in particular that:
    1) The Court of Appeal correctly identified the periods of unlawful detention for which the Appellants should be compensated;
    2) The awards of the judge, affirmed by the Court of Appeal, were well within the range of awards open to him and were not afflicted by any errors of principle;
    3) The Court of Appeal did not err in declining to grant the formal declarations sought; and
    4) Having correctly identified an error of principle in the judge's award of interest and having brought that to the attention of the parties, the Court of Appeal was entitled to put it right.

Structure of submissions

9. The Respondent's submissions will not follow precisely the same ordering of the issues as in the Appellants' Case.

10. The Appellants' written submissions have proceeded as follows:
    1) At paragraph 27 they summarise the four grounds of appeal;
    2) At paragraphs 29 to 47 they set out their submissions on the requirements of a lawful detention in their cases, and what amounted to a proper review;
    3) At paragraph 48 onwards, Ground 1, they make submissions as to why formal declarations of constitutional breach should have been made;
    4) At paragraphs 58 to 63, they contend that their unlawful detention was arbitrary and thus amounted to a breach of s.5(2)(a);
    5) At paragraphs 64 to 69, they contend that the lack of review and delay in their release amounted to cruel and unusual punishment and thus a breach of s.5(2)(6);

6) At paragraphs 70 to 73, Ground 2, they argue that the Court of Appeal was wrong to adjust the judge's award of interest;

7) At paragraphs 76 to 83 (pp.22 to 25) they make certain criticisms of the Court of Appeal's approach to damages – that it assessed over the wrong period and wrongly followed the decision in Mukesh Maharaj – and contend that the award in Mukesh Maharaj should be understood as an award compensating the detainee for mental anguish only and not for loss of liberty.

8) At paragraphs 84 to 87, Ground 3, they contend that it follows that the awards in their cases, which followed Mukesh Maharaj, necessarily undercompensated them.

9) At paragraphs 88 to 92, Ground 4(i), they contend that the Court of Appeal erred in finding that the unlawful period of detention began at the date of the Tribunal's recommendation for their release because, for reasons adverted to already, their detentions became arbitrary earlier than that;

10) At paragraphs 93 to 108, Ground 4(vi), they submit that the Court of Appeal misunderstood their criticism of the judge's failure to consider their detention in different periods – they contend that there were different factors applying in each period which the courts below failed adequately to consider;

11) Under this heading they add a submission that there is an unjustified disparity between constitutional awards for loss of liberty and common law awards for false imprisonment, and that the courts below wrongly failed to use comparable common law awards as guidance.

12) At paragraphs 109 to 119, Ground 4(ii), they contend that there is a wrongful trend of authorities in constitutional cases undercompensating claimants for loss of liberty when compared to common law awards for false imprisonment.

13) At paragraphs 120 to 149, Grounds 4(iii) and 4(iv), they contend that the courts below erred by not making a separate award for vindicatory damages and in so doing undercompensated them.

11. This case will address the issues in the following order:

1) First (paras 12 to 34 below), the Respondent will set out the correct analysis as to the period of unlawful detention and the basis for compensation.
2) Second (paras 35 to 42), he will address whether the breaches found in this case call for the formal declarations of breach sought by the Appellants.
3) Third (paras 43 to 57), he addresses the question of damages, and whether the awards in the present case were erroneously low for any of the reasons advanced by the Appellants.
4) And fourth (para 58 to 62), he will address the Court of Appeal's decision on interest.

Periods of unlawful detention and compensation

12. The Appellants' case on appeal is that their detention became unlawful after the State's failure, within an appropriate time, to review their detention (para 53 of their Case). They say that there were no statutory provisions or rules applicable to their cases (para 62) but submit, following the decision of the High Court in <u>Funrose and Noriega</u> HCA 2474 of 2003 **[AB 20/EB1424]**, that review should have taken place within a year of their detention, but did not, with the result that their detention became arbitrary and unlawful after the first year (para 63).

13. This submission is based upon the Appellants' proposition that review can only be said to have taken place when the decision-maker with the authority to release has given consideration to the question of release (para 44 of their Case). Accordingly, say the Appellants, review did not take place, or was not completed, until the decision of Cabinet on 5 January 2006 to release them [**703**].

14. The Respondent disputes this analysis. He accepts, in cases of detention under s.67 of the CPA **[AB 3/EB1004]** and s.4A(6) of the OAPA **[AB 5/EB1032]**, that it is a condition of lawful detention that the detention of each detainee be kept under review.

15. Such review is likely to involve continuous or regular assessment of: the detainee's mental condition, therapeutic needs and response to treatment; the potential risks posed by the detainee; and, depending on all of the foregoing, the detainee's fitness for release.

16. But this process of review does not require the continuous or regular involvement of the final decision-maker. If the review procedure is working properly, the decision-maker need only be called upon to make a decision when the reviews and assessments described above support a case to be made for the detainee's release (most often where there has been significant improvement in the detainee's mental condition and the concomitant potential risks).

17. In short, a lawful system of review for present purposes is one of continuous or regular expert review of each case, with occasional decisions by the ultimate decision-maker (as to whether release is appropriate) as the case requires.

18. The evidence established that there was such a system of expert review in place for each appellant.

19. The evidence of Dr Ghany, the head of the Forensic Unit at St Ann's psychiatric hospital, was that patients' progress and response to treatment were constantly monitored. Each patient was seen by him or another mental health officer on at least a fortnightly basis; and on most occasions, they were seen by a panel of staff which often included mental health officers, nurses, social workers, doctors and student doctors. Those patients who responded favourably to treatment, to the extent that their mental illness was under control and they did not pose a risk to themselves or those around them, were referred to the Psychiatric Hospital Tribunal ("the Tribunal") for adjudication (para 5 [**695**]).

20. The Tribunal meets when necessary to determine whether patients should be recommended for release. A medical health officer puts the case of the detainee to the Tribunal which then decides whether to recommend the detainee for release. The Tribunal takes into account the medical and behavioural history of the detainee, medical and social welfare reports and number of other considerations which include: whether the detainee has recovered from his mental condition and to what extent; whether the patient is in need of further treatment and to what extent; whether this further treatment requires the further detention of the patient and whether that treatment can be effectively administered if the patient is discharged; the patient's behaviour and disciplinary record while detained; his family ties and whether he has somewhere stable to go if released (Ghany para 6 [**695**]).

21. The evidence of each Appellant was that his case was subject to this system of review.

22. So far, so good. The Respondent submits that this system, up to the point of recommendation for release by the Tribunal, satisfied the requirements of the law[1]. Where the system failed, in the case of each Appellant, was that no action was taken upon the Tribunal's recommendation that he be released until the decision of Cabinet on 5 January 2006. Even after that decision, the Appellants were not released until the orders of Ibrahim J in the present proceedings on 21 May 2007 [**39-47**].

23. The Respondent submits, accordingly, that the Court of Appeal was correct to follow the approach taken in the previous decision of Mukesh Maharaj v Attorney General Civ App 118 of 2010 **[AB 34/EB1704]** and in each case treat the period from the date of the Tribunal's recommendation (plus 3 months for Cabinet to consider the Tribunal's recommendation and 10 days for the authorities to act upon a decision to release) until the date of the Appellant's actual release as the period of unlawful detention for which the Appellant should be compensated[2]. (See Court of Appeal's judgment at paras 15 [**609**], 20 [**611**] and 44 [**624**]).

Section 18 of the Mental Health Act

24. The Respondent's submission thus proposes that a lawful system of review did not require each Appellant's detention to be considered by the Tribunal until the Forensic Unit at the hospital assessed that a case could be made for release. The law did not require periodic review by the Tribunal in any event.

25. A question arises as to whether this proposition is inconsistent with s.18(1)(b) of the Mental Health Act 28:02 **[AB 4/EB1024]**, which provides for certain functions of the Tribunal as follows:

    18. (1) The Tribunal shall –

[1] And was endorsed as lawful by the Court of Appeal in Mukesh Maharaj v Attorney General Civ App 118 of 2010 **[AB 34/EB1704]**.

[2] There was no suggestion that Cabinet ought not have followed the Tribunal's recommendation in each case: in 2006 Cabinet accepted the recommendations; and there was no suggestion of any reason why it should not have done so earlier.

(a) review not less than once a year the case of each medically recommended patient who has been hospitalised for more than one year;

(b) review every six months the case of a patient who has been hospitalised for more than six months pursuant to an order of the Court or an order of the Minister with responsibility for prisons; and

(c) inspect at least once annually each psychiatric hospital, psychiatric ward or approved home.

[Underlining added].

26. In this appeal, the Appellants do not contend that s.18(1)(b) applied so as to require that the Tribunal reviewed their cases every 6 months, so the issue does not arise; but for the sake of completeness the Respondent will state his position on s.18(1)(b). He submits that the provision is best understood as referring to orders of the Court under s.13 of the Mental Health Act **[AB 4/EB1020]** and orders of the Minister under s.14 of the Act **[AB 4/EB1021]**, and not to orders of the Court under s.67 of the CPA **[AB 3/EB1004]** or s.4A(6) of the OAPA **[AB 5/EB1032]**.

27. This also appears to have been the understanding of the Attorney General's Office at the time of the Cabinet's decision on 5 January 2026. The Attorney General advised the Cabinet that there was no law in force governing the care and treatment of persons detained "at the President's pleasure" [**704**] and, acting upon the Attorney General's advice, the Cabinet adopted a new procedure for the periodic review of persons detained under s.67 of the CPA (Appendix 2 [**709**]).

Other possible dates with respect to the Tribunal

28. The Appellants did not each give materially the same evidence about how their cases were decided by the Tribunal. Mr Alleyne (para 18 [**689**]), Mr Sylvester (para 18 [**718**]) and Mr Solomon (para 19 [**759**]) said that after the Forensic Unit referred them to the Tribunal their cases were not heard until after one or more missed opportunities, because a social worker's report was missing or because the Tribunal was not quorate.

29. Mr Collins (para 18 [**835**]) and Mr Habib (para 18 [**863**]) both said that the Tribunal had recommended their release on a number of occasions prior to the date of last recommendation for their release.

30. Does this evidence make a case for a different start date for the periods of unlawful detention? In the first three cases, it might be said that the Appellants lost the opportunity of an earlier recommendation for their release; in the latter two, the Appellants alleged that there actually were earlier recommendations. The short answer is that this was not how the cases were put, and in consequence no findings were made.

31. In the case of the first three, the judge was not asked to make findings as to the reasons for the alleged aborted Tribunal hearings, and the culpability of the State for any resulting delays. In the case of the latter two, their evidence appeared to contradict that of Dr Ghany, who said that the Tribunal is not asked to reconsider the case of a detainee once it has made a recommendation for the release of that detainee (para 11 [**697**]). In the case of each detainee at first instance, the relevant date was said to be that recorded by the Cabinet Minute of 5 January 2006 as the date the Tribunal recommended their release (see their submissions at subparagraph (47) [**74-75**]).

The judge's findings

32. The judge expressed his findings of breaches of the Appellants' rights very briefly, at paragraph 89 [**134**]: the Appellants *" ... all complained that the Tribunals did not conduct appropriate reviews and that they were ultimately left in the dark about whether or not their cases were referred to the Minister of National Security or the President for review. The Court finds that this, as in the Dillon case, amounts to a breach of sections 4(a) and (b) and 5(2)(h) of the Constitution."*

33. The uncertainty adverted to, over whether the Appellants' cases were referred to the Minister and President review, refers to the period after the Tribunal's recommendations; but the suggestion that the Tribunal did not conduct appropriate reviews would appear to refer to the period before. The reference to the Dillon case[3]

[3] Dillon, Ventour and Francis v Attorney General HCA Nos. 3498, 1094 and 1090 of 2004 **[AB 14/EB1331]**

is confusing: in that case, no reviews had been carried out at all, as the judge himself said at paragraph 88. Taken on its own, this paragraph is unclear as to what periods of detention the judge was finding to be unlawful, and on what basis. However, the judge then went on to follow the decision in Mukesh Maharaj, where the Court of Appeal found that detention became unlawful upon the failure of the State to respond to the Tribunal's recommendation for release (paras 107 and 108 [**145-146**]). The Court of Appeal in the present case took the same approach (as set out above).

Declarations as to the character of the breach

34. The judge made a finding of breaches of ss. 4(a) and (b) and 5(2)(h) of the Constitution **[AB 2/EB997 and EB999]**, and the Court of Appeal found that he had not erred by failing to make formal declarations of such breaches (para 12 [**608**]); it found further that there was no basis for separate declarations of a breach of s.5(2)(a) **[AB 2/EB998]**, which protects against arbitrary detention, and s.5(2)(b) **[AB 2/EB998]**, which prohibits the imposition of cruel and unusual treatment or punishment (para 29(iv) [**616**]).

35. The Appellants have contended that the Court of Appeal erred in refusing to make the latter two declarations. The Respondent respectfully submits that the Court of Appeal made no error.

Section 5(2)(a)

36. The context for any discussion of the rights set out under s.5 **[AB 2/EB998-EB999]** is that they are directed to elaborating in greater detail what is meant by "due process of law" under s.4(a) **[AB 2/EB997]** and "the protection of the law" under s.4(b) **[AB 2/EB997]**: see (with regard to the predecessor provisions at ss.1 and 2 of the 1962 Constitution **[AB 1/EB977-EB978]**) de Freitas v Benny [1976] AC 239 at 245 **[AB 16/EB1378]**; and Thornhill v Attorney General [1981] AC 61 at 70 **[AB 57/EB2251]**.

37. Thus, arbitrary detention in breach of s.5(2)(a) **[AB 2/EB998]** is also a breach of s.4(a), which protects the right not to be deprived of one's liberty without due process of law.

38. In the present case, the Respondent accepts that each Appellant's continued detention after the Tribunal's recommendation for his release could be said to have been arbitrary. The Tribunal's recommendation called for a decision; none was taken; when a decision was at last taken, it was to release; the continued detention of each Appellant was not by reason of any lawful decision but by reason of the failure to take a decision and could therefore be said to be arbitrary. That was the finding of the High Court (Ventour J) in a similar case in Kedar Maharaj v Attorney General CV 2009-00479 at para [36] **[AB 28/EB1586]**: such detention was *"arbitrary and without due process"*.

39. However, it does not follow that a finding and declaration of breach of s.5(2)(a) in particular were required, in the circumstances of the present case, or that such finding would have a distinct and separate effect. The finding of a breach of s.4(a) and the award of compensation for that breach, arising as they do from the fact that the Appellants continued to be detained after the Tribunal's recommendations, surely give effect to the protection against arbitrary detention. To fail to make a separate declaration of a breach of s.5(2)(a) could not be said to have been an error of law.

Section 5(2)(b)

40. The case under s.5(2)(b) **[AB 2/EB998]** may be somewhat different, in that if it were found that the Appellants' detention was not only arbitrary and unlawful, but also amounted to cruel and unusual treatment, then that might amount to a reason to award greater compensation or to increase any vindicatory element; and so that might amount to a reason to make an express finding or formal declaration of a breach of s.5(2)(b).

41. However, the Respondent respectfully submits that the detention of each Appellant in this case did not amount to cruel and unusual punishment. He submits that "prolonged, arbitrary detention", as the Appellants put it, does not amount to cruel and unusual treatment for the purposes of s.5(2)(b), and there is no authority for such a proposition. He refers the Board to its discussion in similar, if not directly comparable, circumstances in Henry v Attorney General of St Lucia [2023] UKPC 41 at [64] **[AB 25/EB1531]**.

The approach to damages

Undercompensation generally

42. The Appellants have submitted that the judge and Court of Appeal under-compensated them by following a trend of constitutional cases which have awarded lower damages for deprivation of liberty than comparable common law awards for false imprisonment. They contend that this disparity arises from a mistaken understanding, expressed in some constitutional cases, that the court's task is to compensate for injury to feelings, but not for the loss of liberty itself.

43. The Respondent submits that the relevant authorities do not bear this out. In the present case the judge followed the guidance of the Court of Appeal in Mukesh Maharaj. In that case, the Court of Appeal found that the judge's award of $200,000 was inordinately low. Increasing the award to $450,000, Bereaux JA expressly made clear that he was compensating Mr Maharaj for the loss of his liberty: he found that the judge's award had been insufficient to compensate the appellant *"for the unlawful deprivation of his liberty"* (para 50) **[EB1725]**.

44. The Appellants are therefore wrong to submit that the Court of Appeal's award in Mukesh Maharaj was compensation for mental anguish only and not loss of liberty itself (pp. 24 and 25 of their Case; page numbers are used because the paragraph numbering goes awry in this section of the Case).

45. The Respondent is prepared to accept that awards for deprivation of liberty in constitutional and common law cases ought to be broadly comparable in most cases. This is also the position of the Court of Appeal, as set out in guidance given in the case of Uric Merrick v Attorney General Civ App 146 of 2009 at para [60] **[AB 59/EB2291]**. Given that guidance, the Respondent does not accept that the trend of awards in Trinidad and Tobago has been set upon an erroneous course.

Different factors relevant to compensation in different periods

46. The Appellants have submitted that the failure of the judge to consider the distinctions between different periods of detention led to a failure to appreciate factors relevant to compensation.

47. However, in their Case (paras 93 to 108), the complaints appear to boil down to two: the Courts below failed to compensate for periods before the dates of the Tribunals' recommendations; and once the Appellants had an entitlement to release, arising from those recommendations, they should have been compensated at the higher levels suggested by common law awards. The Respondent has already addressed these complaints above.

Vindicatory damages

48. The Appellants have submitted that the judge erred by including an award of vindicatory damages within his overall award, rather than making a separate additional award, and that this necessarily had the effect of undercompensating them.

49. On examination, this is presented by the Appellants as another reason for saying that the overall award of damages was inordinately low: if the overall award did include a vindicatory element, then the compensatory element must to that extent have been lower and must, for reasons expressed elsewhere, be inordinately low (para 128 of the Appellants' Case).

50. The Respondent submits that the judge made no error of principle. In JM v Attorney General [2022] UKPC 54 **[AB 26/EB1535]** the Board gave guidance as to the court's task when considering an award of vindicatory damages (para 58 and 70) **[EB1558 and EB1562]**: vindicatory damages should be awarded if, but only if, the judge considers that compensatory damages are inadequate to vindicate the rights infringed. In other words, having assessed compensation, the judge should consider whether the compensatory award is enough to vindicate the rights infringed and, if not, consider what additional award would suffice to do so.

51. In the present case, the judge made awards of compensation which, he said, were inclusive of vindicatory damages (see e.g. para 111 [**147**]. He indicated that he considered himself to be following the decision of the Court of Appeal in Mukesh Maharaj; but in fact in that case the Court had not found it necessary to make an additional award, finding that the compensatory award was sufficient to vindicate the rights infringed (Mukesh Maharaj para 51) **[EB1725]**.

52. The Respondent respectfully submits that the judge's awards in this case can be seen as reflecting his assessment that the award of damages to each Appellant was sufficient *both* to compensate that Appellant *and* to vindicate the rights infringed. That approach is consistent with the Board's guidance in JM.

Not inordinately low

53. With regard to the question whether in all the circumstances, the awards to the Appellants were inordinately low and inadequate to compensate them properly for the damage they suffered, the Respondent submits as follows.

54. As the Board emphasised in Ngumi v Attorney General of the Bahamas [2023] UKPC 12 at para [70] **[AB 36/EB1781]**, the assessment of compensation is primarily a matter for the local courts, familiar with local conditions and the society they serve.

55. In this case, the awards of the judge took as a guide the assessment of the Court of Appeal in Mukesh Maharaj and were endorsed by the Court of Appeal on appeal; the same awards have since been endorsed as good guidelines by the Court of Appeal in the case of Colin Simmons v Attorney General CA P075 of 2021 **[AB12/EB1280]**.

56. For the reasons already given, the Respondent respectfully submits that there is no reason for the Board to find that this guidance is manifestly too low, or that it derives from any error of principle.

Interest

57. It is true to say that the specific error as to interest made by the trial judge was not the subject of appeal. The Respondent made no cross-appeal. However, in each case the judge's award, *including interest*, was the subject of appeal to the Court of Appeal (see para 1.1 [**164**]; all the appeal notices are materially similar).

58. The Court of Appeal recorded that both parties agreed with its ruling on interest (para 11 [**607**]). The Appellants dispute this (para 71 of their Case). The Respondent respectfully submits that a decision on interest was in any event open to the Court

of Appeal, because the question of the award of damages including interest was the subject of the appeals.

59. The Court of Appeal correctly identified that an award of interest at the full interest rate on the entire sum of damages from the date of 22 April 2004 (the date of issue) would award interest on the full amount of damages from a date before all the damage had been suffered. In Ngumi at para [91] **[EB1788]** the Board found, for similar reasons, that the award of interest in that case amounted to over-compensation

60. By awarding the Appellants 3% interest (i.e. half of the judge's rate) from the date of their recommendation for release until the date of release, the Court of Appeal alighted upon a neat solution in accordance with principle (because, on average, interest is thereby awarded at the judge's rate of 6%). There is no reason to set this aside.

61. (Further, it ought to be noted that by doing so the Court of Appeal actually awarded one Appellant, Mr Habib, more by way of interest than the judge did. 6% interest from 22 April 2004 to 21 May 2007 is less than 3% interest from 26 August 1998 to 21 May 2007.)

Conclusion

62. Accordingly, for the reasons given above, the Respondent respectfully asks the Board to dismiss the Appellants' appeals.

ROBERT STRANG
RAQUEL LE BLANC