

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

(1) DOMINIC PITILAL
(2) EARL ELIE
(3) ASHMEED MOHAMMED

Appellants

and

ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent

APPELLANTS' WRITTEN CASE

Introduction

1. Prior to the declaration by the government of a public emergency on 21 August 2011, a state of emergency had been a comparatively rare event in Trinidad and Tobago. Previously, emergencies had been declared in 1970 and 1971, during a period of intense civil strife and mass mobilization sometimes known as the Black Power Revolution, and in 1990, when a group called the Jamaat al-Muslimeen attempted a coup against the government.
2. The state of emergency of 2011 marked a new justification for the use of emergency powers. An upsurge of violent crime and a perceived risk of reprisal attacks against the police by criminal gangs were said to warrant the adoption of “*more decisive and stronger action*” to ensure the safety of the public. After the emergency ended (in December 2011), the question whether the government ought to resort again to emergency powers, in response to subsequent outbreaks of increased criminal

violence, became a feature of public debate in Trinidad and Tobago¹. And in the last eighteen months, three emergencies have been declared in quick succession.

3. On 30 December 2024, the government (under the previous PNM administration) declared a public emergency in response to an outbreak of gang-related violence, described as an unacceptably high level of violent crime involving the increased use of dangerous firearms. The state of emergency lasted until April 2025. Within months, a new UNC-led government on 18 July 2025 declared a public emergency in order to combat what was said to be a co-ordinated criminal network operating out of prisons in Trinidad and Tobago. That state of emergency lasted until January 2026. Soon after, on 3 March 2026, the government declared a new public emergency in response to a fresh outbreak of violence between organised criminal gangs. At the time of writing, the state of emergency continues.
4. Seen in this light, the government’s declaration of a public emergency on 21 August 2011 is not only of historical interest. The question whether the government and Court of Appeal correctly defined a public emergency, for the purposes of s.8(2)(c) of the Constitution [EB1731], is a question of continuing public importance in Trinidad and Tobago.
5. Further, the threshold definition of a public emergency under s.8(2)(c) [EB1731] appears in a number of other Caribbean Commonwealth constitutions and has been the subject of controversy (referred to below) in particular in Jamaica, in light of the repeated use of declarations of public emergency as a response to criminal violence. Authoritative guidance as to the threshold may be said to be of public importance across the Caribbean Commonwealth.
6. For the appellants personally, the other issues of highest importance concern the lawfulness of the regulations by which they were deprived of their liberty, the Emergency Powers Regulations 2011 (“the Regulations”) [EB2079]. The appellants were detained by police under enhanced powers of arrest and detention, and then detained for a further period under provisions which empowered the Minister of

¹ For example, when shots were fired at a police station in 2014, the head of the Police Welfare Association called on the government to declare a public emergency so that the police could “... enjoy and utilise powers that are not accessible under the Constitution”: *Trinidad Express*, 25 September 2014.

National Security to order their indefinite detention without charge and without judicial oversight. The appellants contend that these provisions lacked effect (because they were not reasonably justifiable), and so their detention was unlawful.

Summary of the appeal and the errors of the Court of Appeal

7. The judge and the Court of Appeal both found that the declaration of a public emergency on 21 August 2011 accorded with the Constitution, because the state of affairs described by the government answered to the definition of a public emergency at s.8(2)(c) of the Constitution [EB1731]. Further, they found that the Regulations were lawful, because the government had made them with due regard to the situation that was said to exist, and the appellants had failed to show that they were not reasonably justified by the situation.
8. The claims of two of the appellants succeeded in other, minor respects. The Court of Appeal found that the initial arrests of Sergeant Elie and Mr Pitilal had been unlawful, because the arresting officer had not held the requisite suspicion, and awarded them damages for the initial period of their detention.
9. However, it overturned the judge's award of damages to the two men in respect of her finding that they had been denied access to a lawyer at the time of their interrogation by police, because it found that they had suffered no adverse result and so there was nothing to compensate them for.
10. The appellants submit that the Court of Appeal erred in law, for the following reasons in summary.
11. First, the Court of Appeal erred in its approach to the definition of a public emergency under s.8(2)(c) of the Constitution [EB1731]. It held that the meaning of s.8(2)(c) was clear, but it failed to state a clear or appropriate threshold for the assumption of emergency powers inconsistent with fundamental rights.
12. Although the defining words of s.8(2)(c) [EB1731] are broad, such that they might permit widely different readings of the said threshold, the Court of Appeal declined to construe the provision in accordance with the treaty obligations of Trinidad and Tobago under the International Covenant on Civil and Political Rights ("ICCPR")

[EB2092] or in light of other persuasive expressions of widely adopted norms. Without explaining why, it held, wrongly, that s.8(2)(c) [EB1731] was not capable of being read consistently with the state's obligations under the ICCPR.

13. Second, the Court of Appeal erred in answering the question whether the situation described in August 2011 was capable of meeting the definition of a public emergency. It misstated the requirements of s.8(2)(c) [EB1731], as above.
14. In addition, it failed to ask whether the government had properly assessed that emergency powers were necessary (because the ordinary powers of the police and criminal justice system were inadequate to deal with the situation) as opposed to expedient and desirable.
15. Third, the Court of Appeal erred in finding that the Regulations had been made with due regard to the situation that was said to exist, because it failed to appreciate that the Constitution required emergency measures to be carefully tailored to the requirements of the present emergency. That could not be said of the Regulations, which were an exact copy of those made during the Muslimeen coup in 1990.
16. Fourth, the Court of Appeal erred in finding that the Regulations were reasonably justifiable for dealing with the situation that was said to exist. In particular:
 - 1) It failed properly to appreciate that there was no evidence of any assessment by the government that the particular measures adopted were necessary and encroached upon fundamental rights no more than was necessary.
 - 2) In effect, it held that because the government had described a situation that required emergency powers, and because enhanced powers of arrest and detention were to be expected in an emergency under s.8(2)(c) [EB1731], then the adoption of such powers in the present case was reasonably justifiable.
 - 3) It did not subject the power of executive detention to any scrutiny. It held that because executive detention was envisaged by s.11 of the Constitution [EB1733] (that is to say, it would be permitted in certain cases) it was therefore permitted by the Constitution in this case. That reasoning is wrong in logic and in law.

- 4) It relied upon the supposed availability of judicial review to find that detainees would be protected from arbitrary detention; it was wrong to do so, because judicial review could provide no substantial protection.
17. Fifth, the Court of Appeal erred in overturning the judge's award of damages to Mr Pitilal and Sergeant Elie in respect of the refusal of access to a lawyer, on the basis that there was no evidence that they had been adversely affected and therefore no reason to compensate them. It failed to consider the evidence of the appellants' anxiety and distress, or the question of whether an award should be made to vindicate the constitutional rights infringed.

Appellants' submissions

18. To elaborate and make good these grounds, the appellants' submissions will take the following structure.
 - 1) First, they will briefly address the allegations against the appellants which were said to have justified their arrest and detention.
 - 2) Second, they will address the justiciability of the government's decision to declare a public emergency, and the supervisory role of the court.
 - 3) Third, they will articulate the meaning of a public emergency under s.8(2)(c) of the Constitution [EB1731] and address the Court of Appeal's errors of law in this regard.
 - 4) Fourth, they will address the question whether the situation described by the government in August 2011 answered to the true definition of a public emergency and explain how the Court of Appeal erred.
 - 5) Fifth, assuming, contrary to the above, that there was a public emergency, they will explain why the Regulations were not made in accordance with s.7(1) of the Constitution [EB1730] because they were not made with due regard to the situation that was said to exist.
 - 6) Sixth, and further, they will demonstrate that the specific measures by which they were deprived of their liberty were not reasonably justifiable for the purpose of dealing with the situation and therefore, pursuant to s.7(3) [EB1731], lacked effect; and they will refer to the Court of Appeal's errors of law in respect of each one.
 - 7) Finally, seventh, they will make submissions on the question of damages.

The alleged assassination plot

19. The appellants were all arrested on 24 November 2011. They were alleged, along with thirteen others, to be conspirators in a plot to assassinate the Prime Minister and other ministers. The source of these allegations is said to have been an informer or informers known to Corporal Dave Williams [EB134].
20. The appellants' arrests were accompanied by media briefings from senior officers and statements made by government ministers, including the Prime Minister herself, who described the supposed plot as an "*evil, devious act of treason*" [EB1271-3]. The Minister of National Security and senior officers assured the public that the threat was real [EB1270][EB1274].
21. There was no substance in the allegations against the appellants. None of the alleged co-conspirators was charged with any offence. All were released when the Minister's power to detain them expired at the end of the state of emergency on 5 December 2011. The transcripts of the appellants' interrogations by police reveal that the police were in possession of no specific evidence against them, nor had any understanding of how they were said to be linked to an assassination plot [EB1151][EB1254][EB1540].
22. After the state of emergency ended, it was reported that the information of the alleged assassination plot had, as early as 23 November 2011, been assessed as unreliable and speculative [EB1286].

Declaration of a public emergency - justiciability

23. The provisions of Part III of Chapter 1 of the Constitution [EB1730-33] are set out in the statement of facts and issues, and the appellants will not repeat them here. They readily accept that the decision whether a public emergency exists is primarily a decision for the executive, with the approval of parliament, in respect of which the courts will accord due weight to the judgment of the executive and the legislature: see e.g. *A v Home Secretary* [2005] 2 AC 68 [EB2183] at [29] [EB2217].

24. That said, the role of the courts is to ensure that constitutional powers are exercised within their proper bounds: see e.g. Bobb v Manning [2006] UKPC 22 [EB2370] at [12] and [13] [EB2377-8]; R (Miller) v Prime Minister [2019] UKSC 41 [EB2755] at [39] [EB2786].
25. In particular, the meaning of the provisions of the Constitution is a matter for the court. It is for the court to consider whether the President (acting on the advice of Cabinet), when making his Proclamation on 21 August 2011, properly understood the meaning of a “*public emergency*” as that phrase is used in Part III of Chapter I of the Constitution [EB1730-33], and properly understood the matters of which he had to be satisfied under s.8(2)(c) of the Constitution [EB1731].
26. In other words, the executive must correctly understand what is meant by a “*public emergency*” in order to determine that a public emergency exists. If the President’s description of the situation does not answer to the definition of a public emergency, or if it is apparent from the justifications advanced that he did not understand the true meaning of the term, then the court is bound to rule that the proclamation of a state of emergency was invalid: see the minority judgment of Lord Hoffmann in A v Home Secretary at [95]-[97] [EB2246-7]. This is an assessment properly within the scope of the court’s role in public law: Secretary of State for Education v Tameside Metropolitan Borough Council [1977] AC 1014 [EB3196] at 1065B [EB3247].
27. For the reasons which follow, the appellants submit that the emergency described by the government on 21 August 2011 did not answer to the definition of a public emergency under s.8(2)(c) [EB1731]. It follows that the President and Cabinet cannot be said to have understood the question they had to ask themselves; and could not have been satisfied, on the material upon which they relied, that there existed a public emergency within the meaning of s.8(2)(c) [EB1731].

The meaning of a public emergency under s.8(2)(c)

28. The President declared that he was satisfied, under s.8(2)(c) [EB1731], “*that action has been taken, or is immediately threatened, by any person, of such a nature and on so extensive a scale, as to be likely to endanger the public safety...*”.

29. The broad phrase “*likely to endanger the public safety*” is open to different meanings. The question, what amounts to a danger to the public safety, could be answered in more than one way, including: a danger to members of the public; a danger to the public generally; a danger to the public realm or the functioning of public institutions.

Context and purpose

30. The courts will therefore look to the context and purpose of the provision and consider other aids to its interpretation.
31. The context includes the other circumstances in which a public emergency is said to arise under Part III. They include: war (s.8(2)(a) [EB1731]; s.10(4)(a)) [EB1732]; subversion of the domestic institutions of the country (s.10(4)(c)) [EB1731]; large-scale disasters and calamities (s.8(2)(b)) [EB1731]; and circumstances of large-scale disruption to services or supplies essential to life (s.8(2)(c)) [EB1731]. In short, they describe circumstances in which the institutions of the state are under direct attack, or situations where those institutions are prevented from doing their job of protecting the public, or there is a grave and imminent risk of this.
32. The purpose of declaring a public emergency is to enable the executive to make emergency laws and assume exceptional powers under s.7 of the Constitution [EB1730-31]. That would tend to indicate that the emergency must be exceptional in the further sense that the normal powers available to the state are inadequate to deal with the situation.
33. Further, the emergency enables the executive to suspend the rights guaranteed by ss. 4 and 5 of the Constitution [EB1727-9]. It is always the duty of the state to protect the public safety and therefore to take steps to address dangers to the safety of the public. But this does not ordinarily justify “*a Sisyphean quest for absolute public safety at the expense of human rights*”² because at the same time, and always, the state is also the guarantor of those rights. These considerations argue in favour of a reading that would permit the executive to suspend the guarantees of those rights only where its very ability to protect both the safety and liberty of its citizens would otherwise be imperilled.

² “Human Rights, Emergencies, and the Rule of Law” *Human Rights Quarterly* 34 (2012) 39–87 at 62.

34. Such a reading also accords with the well-established principle that provisions which encroach upon fundamental rights should be interpreted restrictively.

International obligations

35. In construing s.8(2)(c) [EB1731], the courts will, so far as possible, apply a meaning which accords with the obligations to which Trinidad and Tobago has committed itself in international law: see Matadeen v Pointu [1999] 1 AC 98 [EB2690] at 114G-H [EB2706]; Lewis v Attorney General of Jamaica [2001] 2 AC 50 [EB2649] at 78F [EB2677]; Reyes v The Queen [2002] 2 AC 235 [EB3004] at [27] and [28] [EB3016]; Boyce v The Queen [2005] 1 AC 400 [EB2381] at [25] and [26] [EB2397]; Matthew v Trinidad and Tobago [2005] 1 AC 433 [EB2711] at [12] [EB2727] and [55] [EB2741].
36. Trinidad and Tobago acceded to the ICCPR [EB2092] on 21 December 1978. Article 4 of the ICCPR [EB2094] describes the circumstances in which a public emergency allows a state to derogate from its obligations to guarantee its citizens' rights:
- “1. In time of public emergency which threatens the life of the nation ... the States Parties may take measures derogating from their obligations under the ... Covenant to the extent strictly required by the exigencies of the situation, ...”.*
37. Thus, the ICCPR [EB2092] defines a public emergency for these purposes as one which *“threatens the life of the nation”*.
38. In 1985 the International Commission of Jurists met and produced *The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR* (1985) 7 Human Rights Quarterly 3 (“the Siracusa Principles”) [EB4705] in order to assist in a common interpretation of the emergency provisions in the ICCPR [EB2092]. The Siracusa Principles have been promulgated by the UN and stand as a persuasive elucidation of the principles applying to public emergencies generally and in particular under the ICCPR. They define a public emergency at paragraphs 39 and 40 [EB4711] as:
- “39. ... a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that:*

- (a) *affects the whole of the population and either the whole or part of the territory of the State, and*
 - (b) *threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.*
40. *Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4.”*

Other international standards

39. The approach taken by the European Court of Human Rights (ECtHR) to public emergencies under Article 15 of the European Convention on Human Rights (“ECHR”) [EB2035] is closely aligned with the above approach. Article 15.1 of the ECHR, like Article 4.1 of the ICCPR [EB2094], refers to “... a public emergency threatening the life of the nation”.
40. The ECtHR has considered the meaning of that phrase in a number of cases, including: Lawless v Ireland (No 3) (1961) I EHRR 15 [EB2622]; and The Greek Case (1969) 12 YB 1 [EB3435]. Its definition of a public emergency for these purposes is (see the Greek Case at [153] [EB3439]):
- 1) an actual or imminent crisis;
 - 2) whose effects must involve the whole population;
 - 3) which threatens the continuance of the organised life of the community;
 - 4) and which is exceptional in that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate.
41. The American Convention on Human Rights (“ACHR”) [EB1671] (which Trinidad and Tobago joined in 1991 and denounced in 1998) provides for public emergencies at Article 27.1 [EB1680], as follows:
- “In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and the period of time strictly required by the exigencies of the situation, ...”.*

42. In the case law of the ACHR [EB1671], the threshold for a public emergency under Article 27.1 [EB1680] is understood to be similar to that under Article 4.1 of the ICCPR [EB2094] and Article 15.1 of the ECHR³ [EB2035].

43. Finally, in Paris in 1984 the 61st Conference of the International Law Association approved a set of minimum standards governing the declaration and administration of states of emergency, by reference to the ICCPR, ECHR and ACHR, known as the Paris Minimum Standards [EB4697]. At Article 1(b) [EB4697], the Paris Minimum Standards define a public emergency as follows:

“(b) The expression “public emergency” means an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed.”

Interpretations of the same provision in other jurisdictions

44. The same phrase – “action has been taken, or is immediately threatened, by any person, of such a nature and on so extensive a scale, as to be likely to endanger the public safety” – appears in the emergency provisions of a number of other commonwealth constitutions⁴. The phrase has been considered and defined by the courts in two of those jurisdictions, Jamaica and Papua New Guinea.

45. In Everton Douglas v Minister of National Security [2020] JMSC Civ 267 [EB2483] the Supreme Court of Jamaica (Morrison J) considered the meaning of a public emergency under s.20(2)(b) of the Constitution of Jamaica, which provides an identical test to that of s.8(2)(c) [EB1731] (see paragraph 28 [EB2494] of Everton Douglas [EB2483] for the Jamaican provision).

46. The Court derived principles from the common law and the principles of martial (i.e. emergency) law expounded in Dicey’s “Introduction to the Study of the Law of the

³ See the Kyoto 2020 report of the International Law Association Committee on Human Rights in Times of Emergency, paras 89 and 94.

⁴ Including those of Jamaica, St. Lucia, Belize, Antigua and Barbuda, St Christopher and Nevis, Barbados, Turks and Caicos and Papua New Guinea.

Constitution” [EB3483] to conclude (at paragraph 138 [EB2539]) that the defining features of a public emergency under the Jamaican Constitution were the same as those expounded by the ECtHR (above).

47. An appeal against the decision in Everton Douglas [EB2483] was dismissed by the Jamaican Court of Appeal in Minister of National Security v Everton Douglas [2023] JMCA Civ 39 [EB2952]. The appeal was dismissed on the ground that no appeal lay against a writ of habeas corpus, and the Court of Appeal did not consider Morrison J’s definition of a public emergency.
48. In Dayton Campbell v Attorney General [2025] JMFC Full 2 [EB2440] a Full Court of the Supreme Court of Jamaica (Morrison J, Pettigrew-Collins J and Wolfe-Reece J) ruled that certain proclamations by the Governor-General declaring states of emergency in parts of Jamaica were invalid. The Full Court, adopting the approach taken in Everton Douglas [EB2483], agreed that the court was empowered and bound to enquire into whether an emergency existed as defined by the Constitution (at paragraph 60 [EB2460]).
49. However, in the context of that case, the Full Court did not expressly adopt the ECtHR definition. It found that the recent proclamations concerned an ongoing state of affairs which the police had had difficulty managing over a long period; and that this could not properly be described as an emergency (paragraph 44 [EB2456]). It found that the state of emergency had been used as a method of policing over an extended period of time, in a scenario where the police had been unable to use standard law enforcement to cauterize an intolerably high level of crime (paragraph 59 [EB2460]). This did not correspond to the definition of a public emergency under s.20 of the Jamaican Constitution, which the court held to be “*a sudden, unexpected action or event that negatively impacts an entire community*” (paragraph 57 [EB2459]).
50. In the case of Southern Highlands Provincial Government v Somare [2008] 2 LRC 372 [EB3337] the Supreme Court of Papua New Guinea was required to consider the meaning of a similar phrase at s.226(c) of the Constitution of Papua New Guinea [EB1695]. In that case, the head of state had declared an emergency in the Southern Highlands province and had taken control from the provincial government, on the ground that corruption and maladministration had led to a breakdown in law and

order. Those circumstances were said to meet the definition of a public emergency, because the situation was said to be “...likely to endanger the public safety or to deprive the community or any substantial portion of the community of supplies or services essential to life.”

51. The Supreme Court disagreed and held that there was no public emergency. Injia DCJ (with whom the majority agreed) considered the definitions of a public emergency in the Constitution [EB1731] and the ICCPR [EB2094] and Siracusa Principles [EB4711] and held:

- 1) At paragraph 64 [EB3361] – that s.226(c) was intended to cover “...situations of very serious civil unrest or disorder which threaten the lives of citizens or threaten the government as an institution or its function of itself as providing public safety and services essential to life of its people or facilitating the provision of such services by other people”.
- 2) And at paragraph 65 [EB3361] – that s.226(c) related to actions which “... are so serious and extensive that they strike at the very foundation of government and threaten its existence. The kind of action taken by persons under the situation described in (c) relates to harmful, illegal or criminal activities carried out by criminals bent on destroying human life, property and government. An organised attack by criminals of wide-scale proportion on citizens or government institutions, services and officers, if it reaches a level which causes civil disorder or cripples civil government, may come within (c). I do not think (c) is intended to include ordinary criminal activities by isolated individuals or groups of persons arising from general breakdown of civil order due to social problems or poor economic conditions. These types of actions can be dealt with under the ordinary criminal law” [Underlining added].

Respondent’s new point

52. The respondent has notified the appellants that he intends to take the point, not taken below, that the ICCPR are no use as an aid to construction of the Constitution of Trinidad and Tobago, because Trinidad and Tobago acceded to the ICCPR in December 1978, after it adopted the Constitution.

53. The appellants submit that there is no force in this point, for the following reasons.

54. First, there are a number of decisions of the Board to the contrary: the Board has repeatedly adopted the position, in a number of jurisdictions, that constitutions should if possible be construed so as to conform to the state's international obligations, even where those obligations were undertaken *after* the date of the constitution. In particular:
- 1) The Board's statement in Matadeen v Pointu at 114G-H [EB2706] was made notwithstanding the fact that Mauritius had acceded to the ICCPR in 1973, five years after it adopted its 1968 Constitution;
 - 2) To like effect, the Board's statement in Lewis v Attorney General of Jamaica at 78F [EB2677] was made in the context of the accession by Jamaica to the ICCPR in 1978, sixteen years after its 1962 Constitution;
 - 3) And the Board's statements in Reyes v The Queen at [27] and [28] [EB3016] applied to Belize, which adopted its Constitution in 1981 and acceded to the ICCPR in 1996.
55. In the Trinidadian context, the principle was discussed in Matthew v Trinidad and Tobago. The minority, at [55] [EB2741], expressly said that the proposition – that a court will so far as possible adopt that interpretation which will accord the state's international obligations – applies even if the international obligations were undertaken after the date of Constitution, citing Matadeen [EB2690], Lewis [EB2650], Reyes and Thomas v Baptiste [2000] 2 AC 1 [EB3444]. The majority, at [12] [EB2727], accepted that the principle applied in that case.
56. In the case of Boyce v The Queen [EB2381], decided at the same time as Matthew [EB2711], the majority again accepted that the principle applied in that case to the Constitution of Barbados, adopted in 1966, before the accession of Barbados to the ICCPR (in 1973) and its ratification of the ACHR (in 1982). Giving the judgment of the majority, Lord Hoffman noted that the application of the principle to laws which existed before the treaty was more difficult to justify as an exercise in construction, but nevertheless proceeded on the basis that it applied in that case (at [26] [EB2397]), having described the principle as well-established (at [25] [EB2396]).

57. Second, given the line of authority above, in this case it is material that the point was not taken below. The respondent (at paragraph 39 [EB634], citing Matthew [EB2711]) accepted that the court ought to have regard to the contents of international treaties; and the Court of Appeal (at paragraph 27 [EB701], citing Reyes [EB3004]) accepted that so far as is possible the relevant provisions should be interpreted consistently with international obligations. These positions necessarily implied acceptance that the principle applies also to international obligations undertaken after the date of the Constitution. If the Board is to be asked to reverse that approach in Trinidad and Tobago, the appellants submit that it would be better to do so in a case with the assistance of the considered views of the Court of Appeal, after hearing argument.
58. Third, even accepting the principle that international obligations and domestic law operate in two spheres, and that treaties generally give rise to no legal rights or obligations in domestic law, the emergency provisions of a constitution such as that of Trinidad and Tobago occupy a unique and exceptional position.
59. They set the threshold conditions under which the executive arm of the state may arrogate unto itself exceptional powers and take drastic measures inconsistent with the fundamental rights of its citizens.
60. By acceding to the ICCPR the executive, on behalf of the state, agreed that it will only assume such powers if certain conditions are met. More importantly, for present purposes, it agreed to a specific understanding of the threshold conditions for emergency powers. That agreement and the legitimate expectations engendered thereby in its citizens, can properly have interpretative force when the court is asked to resolve any ambiguity in the meaning of the threshold conditions.
61. This proposition is to be distinguished from that rejected by the Board in Fisher v Minister of Public Safety and Immigration (No. 2) [2000] AC 434 [EB2544] and Thomas v Baptiste [EB3444]. The appellants do not seek to derive from a legitimate expectation a right which is not provided by the Constitution. Rather, they submit that where a provision of the Constitution governing the powers of the executive over its citizens admits of two interpretations, an agreement by the executive to follow one interpretation should have effect.

62. Fourth, the starting point in any event is that the meaning of the threshold condition under section 8(2)(c) [EB1731] is capable of admitting a number of meanings, potentially permitting the threshold to be set at different levels. The courts will therefore look to persuasive expressions of the applicable principles. The Siracusa Principles [EB4705] and the Paris Minimum Standards [EB4697] express an international consensus as to the conditions under which it is permissible for governments to assume emergency powers. They reflect, among other things: near unanimity in the international conventions; and the consistent adoption of similar standards in the courts of jurisdictions which, in other contexts, take a similar approach towards fundamental rights to that taken by the courts of Trinidad and Tobago.

Conclusions on meaning

63. The appellants submit, summarizing the guidance above, that for a crisis to amount to a public emergency in the sense that it “*endangers the public safety*”, it is not enough that there is a heightened risk of violence capable of endangering members of the public. To amount to a public emergency the crisis must involve disorder or violence which is so extensive and so serious as to threaten the existence of guardians of public safety (namely civil government, public institutions and police) or substantially hinder their ability to keep the public safe, and in respect of which their ordinary powers are inadequate.

Court of Appeal’s errors

64. The Court of Appeal erred in two ways, as follows.
65. First, it accepted as a matter of principle that so far as is possible s.8(2)(c) [EB1731] should be interpreted consistently with international obligations (paragraph 27 [EB701]). But it held that it was not possible to construe s.8(2)(c) consistently with paragraphs 39 and 40 of the Siracusa Principles [EB4711] (paragraph 27), because those explain the meaning of the phrase “a public emergency which threatens the life of the nation” and that phrase could not supplant the words in s.8(2)(c) (paragraph 28).

66. The Court of Appeal thus erred because, as submitted above, the phrase “*of such a nature and on so extensive a scale, as to be likely to endanger the public safety*” is open to different meanings, including: a danger to members of the public; a danger to the public generally; a danger to the public realm or the functioning of public institutions. The highest of those meanings is capable of being understood consistently with the idea of a “*a public emergency which threatens the life of the nation*”, as that is explained by the Siracusa Principles [EB4705].
67. Second, the Court of Appeal held (at paragraph 35 [EB705]) that s.8(2)(c) [EB1731] refers to “*... a situation where the lives or safety of citizens, not just a few but more generally, are endangered. That can occur in a number of ways including criminal activity of such a nature and on so extensive a scale that it endangers the lives of the citizens or threatens the ability of the government to provide for the safety of its citizens*”. There are two reasons why that is wrong in law:
- 1) In applying the test, the Court of Appeal chose a lower threshold than under the proper test set out above by the appellants.
 - 2) The Court of Appeal’s definition is not clear; it does not identify where, on a rising scale of seriousness, the threshold is to be found. Something which endangers the lives of citizens could meet any of the three meanings identified by the appellants in the paragraph above. The level of threat to the government’s ability is not stated.

The situation described in 2011 was not a public emergency

68. Applying the appellants’ definition, the situation described by the government in August 2011, even taking it at its highest, was not a public emergency within the meaning of s.8(2)(c) of the Constitution [EB1731]. The appellants say so for the following reasons.
69. First, the President’s statement, by which the government put forward its justification, described a rise in violent crime and in particular a rise in murders carried out by the members of gangs involved in drug trafficking and other criminal activities. It did not describe a threat to the organised life of the community or its public institutions. At its highest, in respect of the threat to public institutions, it described a risk of reprisals (i.e. presumably reprisals against the police because of recent successes in drug

seizures, as well as violence between different gangs) that could endanger public safety, law and order. But that was not said to amount to a risk to the continuing functioning and effectiveness of the police or any other institution of the state, and no other such risk was identified. It did not describe, therefore, a threat to the basic functioning of the institutions which protect the public (cf, for example, Siracusa Principle 39(b) [EB4711]).

70. Second, the President's statement said that the violence was disproportionately occurring in certain geographical areas where criminal gangs (involved in the drugs and arms trades) were based. The government was thus describing violence, for the most part, between criminal gangs, which could be expected to present an elevated danger to citizens, particularly in the said areas (described as "hotspots" by the Prime Minister); but in no sense could it be said to have been describing a grave and imminent threat to the life of the nation (cf Siracusa Principle 40 [EB4711]).
71. Third, the government did not say why the ordinary powers of the criminal justice system and police in particular, properly applied, were inadequate for dealing with the criminal activity described; it was not plain from the situation described that those powers were inadequate; and the government did not refer, in that statement or otherwise, to any assessment by which it determined that the ordinary powers of the state were inadequate. The President's situation simply said that the situation warranted "*...the adoption of more decisive and stronger action to ensure the safety of the public*".

Court of Appeal's errors

72. The Court of Appeal erred in finding to the contrary that the government had correctly identified a public emergency within the meaning of s.8(2)(c) [EB1731], for the following reasons.
73. First, for the reasons above, it applied the wrong construction of s.8(2)(c) [EB1731], and so its determinations at paragraphs 39 [EB706] and 46 [EB708] were made without due attention to what the true threshold conditions are for a public emergency.
74. Second, it wrongly rejected (at paragraph 40 [EB706]) the appellants' criticism that the President's statement did not say why the powers of the criminal justice system

and the police were inadequate for dealing with the situation, holding that the President was under no obligation to do so under s.9(1) of the Constitution [EB1732]. That does not answer the appellants' point, which is that the government must properly assess that its ordinary powers are inadequate for the situation, so that emergency powers are *necessary*. If the government, when assuming emergency powers, does not say that it has made such an assessment, then the basis for the assumption of emergency power is called into question.

75. Third, it erred in finding (at paragraph 41 [EB707]) that a reasonable inference from the President's statement was that the police in the exercise of their ordinary powers were unable to provide for the safety of the public. The statement did not say that. Given the potential for drastic incursions upon civil rights where a government assumes emergency power, it is essential that the distinction is properly maintained between what the government finds to be *necessary* and what the government finds to be *useful and expedient*. For that reason it is wrong to assume that the government has been astute to maintain the distinction if it has not said so.
76. Fourth, it erred in dismissing the appellants' criticism that the Prime Minister announced a limited state of the emergency, limited to hotspots across the country (i.e. presumably those areas described by the President where the majority of the gang violence was taking place) but the President proclaimed a state of emergency across the whole country. The Court of Appeal found, because the Minister of National Security had given evidence that Cabinet had weighed up the pros and cons, there must have been a change of position by the government after considering all the pros and cons and a decision to advise the President to declare a state of emergency for the entire country; the President was not acting on a frolic of his own (at paragraph 43 [EB707-8]).
77. There are two errors in this reasoning:
 - 1) The appellants were not alleging that the President had acted on a frolic of his own; rather that the government had put forward a justification for one, more limited state of emergency but had then declared another, broader measure.
 - 2) There was no evidential basis for the Court of Appeal's finding of fact. The evidence of the Minister was that there was one Cabinet meeting which concluded with decision to ask the President to declare a state of emergency

(paragraph 9 [EB1179]); and the Prime Minister's statement was made after the Cabinet's discussions [EB1063].

78. Fifth, it erred in its approach to the affidavit evidence of the Minister. The Minister gave much evidence in his affidavit [EB1177], as to the seriousness of the situation, which had not formed part of the proclamation of the public emergency and the President's statement to the House of Representatives.
79. The Court of Appeal found that the judge had been right to take the Minister's statement into account, because s.9(1) of the Constitution [EB1732] did not require the President to set out the evidence or detailed argument in support of the proclamation; but when the court was asked to review the decision, it then became a matter of evidence on which the court will decide whether circumstances justified the proclamation (paragraph 37 [705]).
80. That was an over-simplification which has the potential to undermine the constitutional scheme. The Constitution provides that the matter is one for Parliament as well as the executive (and the court in its supervisory role). Section 9(1) [EB1732] requires the President to set out for the House of Representatives, in a statement, "*the specific grounds*" on which his decision was based, and requires the House to debate that statement.
81. As the Board said in Suraj v Attorney General [2023] AC 337 [EB3383] at paragraph [96] [EB3421], the President "*... is ultimately accountable to the electorate for his actions and, further, sections 9 and 10 give Parliament a close supervisory role regarding any Proclamation.*"
82. Matters said to be within the knowledge or expertise of the Minister but not set out in the President's statement will not be subject to the same close supervision by Parliament. They are not "*specific grounds*" under s.9(1) [EB1732] identified by the President as the bases for his decision in accordance with the Constitution and are not reasons approved by Parliament.

83. If the executive were to be permitted to justify a state of emergency by matters within the knowledge and expertise of the Minister but not set out for the House in the statement under s.9(1) [EB1732], that would allow greater discretion to the executive (and the Minister in particular) than is afforded by the Constitution.
84. Parliamentary scrutiny is rendered ineffective, if the executive is permitted to justify its decisions (to itself, or afterwards to the court) on grounds different to those it puts to Parliament. Conversely, the “democratic credentials” (cf Suraj at [96] [EB3421]) of a proclamation justified by matters not put to Parliament are to that extent reduced.

“Due regard”

85. Section 7(1) of the Constitution [EB1730] permits the President, where any period of public emergency exists, “... *due regard being had to the circumstances of any situation likely to arise or exist during such period...*” to make regulations for the purpose of dealing with that situation.
86. Section 7(3) [EB1731] provides that any such regulation may have effect even though inconsistent with ss. 4 and 5 of the Constitution [EB1727-9] “... *except in so far as its provisions may be shown not to be reasonably justifiable for the purpose of dealing with the situation that exists during that period.*” This entails the application of a proportionality test. See the Court of Appeal’s judgment at paragraphs 65 to 75 [EB725-9] and the Board’s judgment in Suraj [EB3383].
87. The requirement under s.7(1) [EB1730] that measures be made with due regard to the situation is to be read in the light of s.7(3) [EB1731]. The application of the proportionality test requires that the measures introduced by the executive are “*carefully tailored*” to deal with the situation: see the judgment of Lord Walker in A v Home Secretary at paragraph [214] [EB2283], citing RJR-Macdonald v AG of Canada [1995] 3 SCR 199, 342, [EB3028] paragraph 160 [EB3171] (McLachlin J).
88. The requirement of due regard under s.7(1) [EB1730] therefore requires the executive to make a careful assessment of the requirements of the situation and tailor the measures introduced accordingly.

89. Further guidance is given by the Siracusa Principles, numbers 51 to 57 [EB4711-2], which elaborate upon the proportionality test entailed by the requirement that any measures be strictly required by the exigencies of the situation:

“51. The severity, duration, and geographic scope of any derogation measure shall be such only as are strictly necessary to deal with the threat to the life of the nation and are proportionate to its nature and extent.

52. The competent national authorities shall be under a duty to assess individually the necessity of any derogation measure taken or proposed to deal with the specific dangers posed by the emergency.

53. A measure is not strictly required by the exigencies of the situation where ordinary measures permissible under the specific limitations clauses of the Covenant would be adequate to deal with the threat to the life of the nation.

54. The principle of strict necessity shall be applied in an objective manner. Each measure shall be directed to an actual, clear, present, or imminent danger and may not be imposed merely because of an apprehension of potential danger.

55. The national constitution and laws governing states of emergency shall provide for prompt and periodic independent review by the legislature of the necessity for derogation measures.

56. Effective remedies shall be available to persons claiming that derogation measures affecting them are not strictly required by the exigencies of the situation.

57. In determining whether derogation measures are strictly required by the exigencies of the situation the judgment of the national authorities cannot be accepted as conclusive.”

90. Principle 52 [EB4711] reinforces the point. The executive must assess individually the necessity of any derogation measure taken or proposed to deal with the specific dangers posed by the emergency. This requirement is entirely in accordance with the principles of proportionality.

91. The appellants submit that it could not be said that the government made the Regulations having due regard to the situation that existed in 2011, for the simple reason that the Regulations were an exact copy of the Emergency Powers Regulations

of 1990 [EB2078], which were themselves in turn a copy of the Emergency Powers Act of 1970 [EB2062].

92. The government thus granted to itself in 2011 exactly the same powers as had been taken by previous governments in the emergencies of 1990 and 1970. But the requirements of those previous emergencies could not have been the same as those of the situation in 2011.
93. Further, the government (whether in its evidence in these proceedings or in the President's statement) set out no explanation or justification for the specific measures taken in the Regulations; nor did it give an account of any assessment or decision-making process in respect of the choice of these particular measures, or a decision that each of these measures was necessary.
94. Accordingly, the appellants submit that the President cannot be said to have had due regard to the requirements of the situation for the purposes of s.7(1) of the Constitution [EB1730]: he simply took and enacted, without amendment, regulations designed to deal with a different emergency; there is no evidence that the government assessed individually the necessity of each measure derogating from fundamental rights; it should be inferred, from the fact that the Regulations were an exact copy, that it did not.
95. For that reason alone, the Regulations were not lawfully made; it follows that the particular emergency powers by which the appellants were arrested and detained were not lawful.

Court of Appeal's errors

96. The Court of Appeal's reasons for dismissing this ground of challenge were inadequate and erroneous.
97. First, with respect to the fact that the Regulations were a copy of the regulations of 1990 and 1970, the Court of Appeal said that the similarity was understandable, because the proclamations made in 1970 and 1990 were also as a consequence of a danger to public safety (paragraph 62 [EB723-4]). But that could not justify exactly

the same measures in 2011. Assuming that there was a danger to public safety, it was a different danger to that existing in 1990 or 1970. The Court thus failed properly to apply the requirement of due regard.

98. Second, as to the particular measures in dispute (regulations 16, 17 and 19 [EB2086-7] and the Second Schedule [EB2089] making provision for enhanced powers of arrest and detention), the Court of Appeal held that it would be difficult to dispute that these were made with due regard to the circumstances, because one would expect to find such powers in regulations designed to address the danger to public safety in the circumstances described in the President's statement (paragraph 63 [EB724]).
99. The appellants respectfully submit that this is no answer to the challenge. Simply to say that one would expect to see enhanced powers of arrest and detention in measures to address a threat to public safety posed by criminal gangs does not establish that the specific powers taken were tailored to the situation. It does not allow for the possibility that, although one might well expect to see them in another case, enhanced powers might not in fact be required in this particular case. Nor does it allow for the fact that powers of arrest and detention, and the powers of the security apparatus generally, can be enhanced in many ways and can intrude upon fundamental rights in different aspects and degrees.
100. To take the particular example of the executive power of detention provided by regulation 17 [EB2087] and the Second Schedule [EB2089], in order to introduce this in a manner having due regard to the situation, the executive ought to have an assessment of, among other things: what aspects of the present danger would be addressed by assuming a power of detention without charge; why it should be given to the Minister; and why judicial oversight and habeas corpus should be suspended. The executive would have to conclude that all these aspects were necessary: i.e. that it would not be possible to deal with the emergency without them.

Not reasonably justifiable

101. The appellants submit that the specific powers of arrest and detention under challenge in these proceedings, addressed in turn as follows, were not reasonably justifiable for the purpose of dealing with the emergency situation that was said to exist, as it was described by the government.

102. By regulation 16(1) **[EB2086]** a wide discretionary power, inconsistent with the fundamental right to liberty, was given to police officers. The power of arrest was exercisable on suspicion only. Reasonable grounds for the suspicion were not required. And the matters of which a person could be suspected were put extremely broadly.
103. It is not in dispute that the fundamental standards of the law, which inform the rights liberty and security of the person guaranteed by ss.4 and 5 of the Constitution **[EB1727-9]**, ordinarily require a police officer making an arrest without a warrant to have reasonable grounds for suspecting that a crime has taken place or is about to take place⁵.
104. The government offered no justification for the removal of these protections. The President's statement described a rise in violent crime and the risk of further crimes. It referred to criminal activity known to the police and security services, or about which they had information and intelligence. There was nothing in the statement, or in the other statements made on behalf of the government or in its evidence, to suggest that maintaining the fundamental protections (and in particular, requiring a police officer to have reasonable grounds for his suspicion) would dangerously inhibit the necessary response to the emergency or undermine the ability of the police to guard the public safety.
105. Further, there was nothing in the government's descriptions of the emergency which would warrant giving police the power of arrest without warrant on the extremely broad ground of suspicion that a person might act in a manner prejudicial to public safety or public order. What was described was a rise in crime and an increased likelihood of further serious, criminal acts of violence. No reason was given to suggest that this threatened criminal violence would not itself be a ground of arrest, so that the grounds of arrest had to be broadened to include matters which would not necessarily form the basis of a criminal charge.

⁵ S.3(4) of the Criminal Law Act Chap. 10.04 and the summary of the law in Ramsingh v Attorney General [2012] UKPC 15 were cited to the judge and the Court of Appeal.

106. The same applies to regulation 16(3) [EB2087]. Instead of requiring the police continually to justify and revisit the detention of the subject, as would be required by the ordinary protections of the law⁶, regulation 16(3) permitted a senior police officer at the outset to fix the period (up to seven days) he believed would be necessary to complete inquiries. There was no obligation to revisit that decision. Habeas corpus is suspended: regulations 19(1)(b) and (2) [EB2087].
107. There was no reference to this power in the government's statements, nor any justification set out for the removal of the law's normal protections of the right to liberty. Nothing in the circumstances described suggests that the police's purposes would be dangerously inhibited by the retention of the normal protections; no emergency purpose was described which could be said to require their removal; nothing in the description of the emergency that was said to exist suggests that it was necessary or proportionate to remove them.
108. The same arguments apply a fortiori to the provisions of the Second Schedule [EB2089], which provided for the power of indefinite detention, without habeas corpus and without charge, at the discretion of the Minister of National Security.
109. By paragraph 3 [EB2089], if the Minister is satisfied that it is necessary to do so for the purpose of preventing a person from acting in any manner prejudicial to public order or public safety, he may order the preventive detention of that person. A Tribunal is established to hear the representations of the detainee: paragraph 4 [EB2090]. But if the Tribunal recommends that there is insufficient cause for detention, it remains a matter for the sole discretion of the Minister whether to release the detainee or to continue the detention: paragraph 9 [EB2091]. Habeas corpus is suspended: regulations 19(1)(a) and (2) [EB2087].
110. Authority is scarcely required to show that such powers could only in the rarest of emergencies be justified in a society which protects the individual's right to liberty. But see e.g. the judgments in A v Home Secretary of Lord Nicholls at paragraph [74] [EB2242]; Lord Hope at [100] [EB2247]; Lady Hale at [222] [EB2285].

⁶ As summarized in Ramsingh v Attorney General [2012] UKPC 15

111. There was no attempt in the government's statements or evidence to justify this power, and no justification can possibly be discerned from the circumstances described. The appellants submit that no justification existed for believing that it was necessary to supplement, or rather usurp, the ordinary powers of the criminal justice system by granting the power of indefinite detention to the executive.
112. The same arguments apply to the suspension of the writ of habeas corpus. The right to have reasons for one's detention assessed by a court; and to ask the court to bring a wrongful detention to an end, are essential components of the right to liberty. The writ of habeas corpus is a necessary protection against arbitrary and unlawful arrest (including of course mistaken arrest) and is of "*incalculable value*" (per Lord Wright in Greene v Home Secretary [1942] AC 284 at 302 [EB2584]).
113. Further, in the absence of habeas corpus, a detainee's remaining rights may be rendered illusory. See for example the advisory opinion of the Inter-American Court of Human Rights, OC-8/87 [EB4121], which held that the provisions of the ACHR [EB1671] which identify some rights as non-derogable (for example the right not to be tortured) necessarily required that writ of habeas corpus may not be suspended; without it, the other rights could not be enforced.
114. No justification for suspending these rights was given by the government in its statements or evidence; no possible justification can be discerned in the description of the emergency that was said to exist. The appellants submit that no justification existed for believing that it was necessary to remove the right to judicial protection afforded by the writ of habeas corpus.

Court of Appeal's errors

115. The Court of Appeal found that all of the above measures were reasonably justified. However, its reasoning is afflicted with a number of errors.
116. First, the Court of appeal rejected the general criticism that the President's statement did not seek to justify the powers contained in the Regulations, by holding that the President had no obligation under s.9(1) of the Constitution [EB1732] to do so (paragraph 81 [EB732]). That was to miss the point of the criticism, which was that

there was no statement by the government justifying the powers and the specific intrusions upon fundamental rights, saying why this specific intrusion was deemed to be necessary and no more than was necessary; nor was there any evidence that the government had carried out such an assessment.

117. In the absence of such a statement or evidence, there was no reason to give “*especially strong weight*” to the judgment of the state in making the Regulations, as the Court of Appeal did (paragraph 74 [EB729]; paragraph 106 [EB739]). Nor was there a reason to infer that the state had carried out the careful tailoring necessary to ensure proportionality; or that it had limited itself to the measures strictly required by the situation, when the nature of the measures taken suggested very clearly that it had not.
118. Second, at paragraph 82 [EB732], the Court of Appeal found that the President’s statement had described a situation with which the police were not able to cope; and that the emergency described required measures which vested wide powers in the police and the executive and which placed limitations on judicial inquiry (paragraph 82 and 83).
119. The appellants take issue with those findings for these reasons:
 - 1) The President’s statement did not describe a situation with which the police were not able to cope;
 - 2) To say that the emergency required measures of the type described by the Court of Appeal was not to answer the question it had posed itself, whether less intrusive measures than those chosen could have been used (paragraph 80 [EB731]).
 - 3) The Court of Appeal gave no reason for saying that the emergency required an executive power of indefinite detention, for example, or the suspension of habeas corpus. For the reasons given above, none is apparent in the circumstances described.
120. Third, turning to each measure under challenge and considering whether a fair balance had been struck, the Court of Appeal justified the power under regulation 16(1) [EB2086] (to arrest upon suspicion without the requirement for reasonable grounds for the suspicion) by holding that it was reasonable in dealing with a state of emergency that there should be a power to arrest a person where he is acting or is

about to act in manner prejudicial to public safety or has committed or is about to commit a breach of the Regulations (paragraph 87 [EB733]).

121. The Court of Appeal thus erred in law. Its justification assumes that the arrestee is guilty of that which he is suspected, and in other words that reasonable grounds for the suspicion exist. That does not answer the question whether the emergency justifies a power to arrest on suspicion *without* reasonable grounds.
122. Fourth, as for the power given to a senior police officer under regulation 16(3) [EB2087] to extend detention for up to seven days for the purposes of enquiries, the Court of Appeal held that there were safeguards against arbitrary detention in that (1) the detention required the authority of a senior police officer or Magistrate and (2) the detainee could pursue a remedy in judicial review (paragraph 92 [EB735]).
123. The Court of Appeal thus erred in law, for the following reasons:
 - 1) Regulation 16(3) [EB2087] only requires the senior officer to be satisfied, with no requirement for reasonable grounds or any statement of what the reasons might be, that inquiries cannot be completed within 24 hours;
 - 2) Assuming judicial review were available, it would be illusory, because the court would not, save in exceptional circumstances, have any reason to impeach the officer's statement that he was so satisfied;
 - 3) And in any event, in the absence of habeas corpus, there would be no assurance that the detainee could gain access to a lawyer, let alone the supervisory jurisdiction of the court. The suspension of the writ of habeas corpus is calculated to remove the possibility of scrutiny by the courts of decisions, by the police and the executive, concerning the fate of individual detainees. (Indeed, in the case of Sergeant Elie and Mr Pitilal, the police took the decision to deny them access to a lawyer while in police detention, in breach of their rights under s.5(2) of the Constitution [EB1728], and there was nothing that they could do about that.)
124. Fifth, turning to the executive power of detention under the Second Schedule [EB2089], the Court of Appeal found that regulations for the detention of persons

were reasonably required to deal with the situation. It observed, at paragraph 99, that the Second Schedule [EB2089] mirrored s.11 of the Constitution [EB1733].

125. It found that s.7(2) of the Constitution [EB1731], when read with s.11 [EB1733], permitted giving a power of detention to persons who are not judicial officers, and that such a power was not uncommon in democratic states in times of emergency. Therefore, the Second Schedule [EB2089] was permitted by the Constitution. Further, because s.11 contemplated review of a person's detention by a tribunal (as opposed to the court) it contemplated that the remedy of habeas corpus may be withheld (paragraph 101 [EB738]). Further, said the Court of Appeal, the decision of the Minister not to act upon the recommendation of the Tribunal would be subject to judicial review (paragraph 102).

126. The Court of Appeal thus made a number of errors of law:

- 1) It did not acknowledge or give any appreciation to the extreme nature of the measures adopted: see the passages from A v Home Office [EB2183] cited above;
- 2) It did not in fact identify any justification, specific to this case, for the executive power of detention;
- 3) The mere fact that the Constitution contemplates the possibility of executive detention in some cases does not establish that it was justified in this case, for obvious reasons (because it is anathema to the rule of law and the antithesis of the right to liberty and security of the person, it would only be justified in the most exceptional of circumstances);
- 4) The suspension of habeas corpus is equally or even more hard to justify, for the reasons already given – because without it the possibility of enforcing any remaining rights can be rendered illusory;
- 5) The notional access to judicial review would provide no substantial protection for similar reasons as stated above (under the Second Schedule [EB2089] the Minister is given sole discretion as to whether to detain or not; and the suspension of habeas corpus means no guarantee of access to a lawyer).

Conclusion on the Regulations

127. For all these reasons, therefore, the appellants submit that the Court of Appeal erred in finding that it had not been established that the impugned provisions of the Regulations, and each of those set out above, were not reasonably justifiable for the purpose of dealing with the situation that was said to exist. It ought to have found that they were not justified, and that the detention of each of the appellants at each stage was therefore unlawful.
128. Further, the Court of Appeal erred in finding that the Regulations had been made with due regard to the situation that was said to exist. They had not and so they were not lawfully made. The detention of each of the appellants at all times was unlawful.

Remedies

129. It follows that the appellants are entitled to compensation, pursuant to s.14 of the Constitution [EB1734] and at common law, for their unlawful arrest and wrongful imprisonment.
130. They respectfully suggest that the question of damages be remitted to the High Court for assessment, and that on the facts, given the importance of the constitutional rights infringed and the gravity of the violation, the question of vindictory damages should be open to the court on assessment. In particular, the adoption of such heavy-handed measures as executive detention and the suspension of habeas corpus, without any apparent care for the need for proportionality, is worthy of an award to mark the court's dismay and the importance of the rights to liberty and security of the person.

Court of Appeal's error

131. The Court of Appeal further erred in setting aside the judge's award of \$50,000 to Sergeant Elie and Mr Pitilal for the denial of their constitutional right of access to a lawyer.
132. The Court of Appeal held that the two men had suffered no adverse effects thereby and so there was no need for compensation (paragraph 131 [EB748]). That was an error of law, for these reasons.

133. First, the Court of Appeal ignored the evidence of both men that they were distressed and afraid and unsure of the reason for their detention. Access to a lawyer might have allayed some of that fear and suffering.
134. Second, the Court of Appeal erred in relying on the supposed fact that after the date of their interviews there was no issue raised that they were denied the right to consult with their attorney. The men were told by the police that because of the sensitive nature of the allegations, they would not be permitted access to an attorney. It is no surprise that they did not ask for an attorney after hearing that.
135. Third, the Court of Appeal ignored the possibility of vindication. If there is no loss to be compensated, an award might nevertheless be made to vindicate the right infringed: see JM v Attorney General [2022] UKPC 54 [EB2593] at [58] [EB2616]. As the judge did not express any compensatory assessment in her reasoning, her award of \$50,000 (c.£6,000) may be better understood as a vindictory award

Conclusions

136. Accordingly, the appellants respectfully ask the Board to allow their appeal and to:
- 1) Set aside the orders of the Court of Appeal and restore the orders of the judge with respect to the awards of \$50,000 to Sergeant Elie and Mr Pitilal for breach of their right under s.5(2)(c)(i) and (ii) of the Constitution [EB1728].
 - 2) Declare that the appellants were all wrongfully arrested and unlawfully detained for the entire period of their detention.
 - 3) In respect of Sergeant Elie and Mr Pitilal, to leave undisturbed the award of damages of \$100,000 for their unlawful arrest and the initial period of their unlawful detention, and remit to the High Court the question of damages for their detention by order of the Minister, and the question of vindictory damages.
 - 4) In respect of Mr Mohammed to remit to the High Court the question of damages for his unlawful arrest and detention for the whole period of his detention, and the question of vindictory damages.

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