

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

BETWEEN:

(1) EARL ELIE
(2) ASHMEAD MOHAMMED
DOMINIC PITILAL

Appellants

- and -

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent

RESPONDENT'S CASE

This Case uses the same abbreviations as the SFI

Summary

1. On the main issues in this appeal, the Respondent's case can be summarised as follows.
2. First, on the lawfulness of the declaration of a public emergency:
 - (1) The Court of Appeal correctly concluded that under s.8(2)(c) of the Constitution [AB 3/EB1731], it was not necessary for there to be a "*threat to the life of the nation*" (or a state of affairs amounting to such) when the President on 21 August 2011, using the words of s.8(2)(c), declared himself satisfied that "*action has been taken or is imminently threatened of such a nature and on so extensive a scale as to be likely to endanger the public safety*". Nothing in the ICCPR or the Siracusa principles limited or could limit the width of his powers to declare a public emergency on this basis.
 - (2) There was likewise no error of law in the Court of Appeal's decision that the Minister of National Security's evidence at trial should be taken into account in assessing the justifiability of declaring the state of emergency, even though it added matters which were not mentioned to the House of Representatives on 2 September 2011 when the Government introduced the motion to extend the period of

emergency, after which the House voted on 4 September 2011 to extend it for three months.

- (3) There is accordingly no basis for interfering with the evaluations by both courts below that, on the evidence (which was unchallenged), the President was entitled to make the proclamation and Parliament was entitled to extend it.
3. Second, on the lawfulness of the regulations made by the President on 21 August 2011, there was no error of law in the assessments by the courts below that they have “*not been shown not to be reasonably justifiable for the purpose of dealing with the situation*” that would arise during the period of public emergency.
4. This is because the basis of the declaration of emergency was the danger to public safety from very serious criminal action, including against national agencies, and so it was not unjustifiable to impose limitations on the rights of those who were genuinely suspected of having acted or being about to act in a way contrary to public safety. In particular, it has not been shown that these limitations were not reasonably justifiable, given (a) the “strong weight” (as correctly held by the Court of Appeal) to be attached to the President’s judgment in making the regulations, and (b) the safeguards they contained, and the court’s continuing ability, whether by judicial review or constitutional motion, to supervise the conduct of the police and the executive under them.
5. Third, and because the relevant regulations were justified, there is no basis for increasing the awards for Sergeant Elie and Mr Pitilal to give them compensation for their further detentions from 30 November 2011 to 5 December 2011, and no basis for making any award to Mr Mohammed, because no part of his arrest and detention was unlawful.
6. Fourth, there was no error of law in the Court of Appeal’s decision to overturn the judge’s awards of TT \$50,000 each to Sergeant Elie and Mr Pitilal for breach of their rights under s.5(2)(c)(ii) of the Constitution [**AB 3/EB1728**], because, as the Court of Appeal held, that breach caused no loss to either of them over and above that caused by the wrongful detention for which they were awarded compensation. Further, there was no reason to make an award of vindictory damages instead, because the judge had declined to make any such award, and there was no finding of bad faith or the like.

The first issue: were the proclamation and the continuation of the period of emergency lawful?

Did there have to be a threat to “the life of the nation”?

7. The material parts of the Constitution are set out in paragraph 2 of the SFI, but for convenience the most important provisions are summarised or repeated here.
8. Section 7(1) of the Constitution [AB 3/EB1730] provides that “*where any period of public emergency exists*”, the President may make regulations to deal with the situation, which regulations, by s.7(2) [AB 3/EB1731], may provide for “*the detention of persons*”. Such regulations are to have effect during the period of emergency even though inconsistent with the fundamental rights and freedoms set out in s.4 and 5 [AB 3/EB1727 and EB1728] of the Constitution “*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*”.
9. Section 8 [AB 3/EB1731] provides:
 - “8 (1) Subject to this section, for the purposes of this Chapter, the President may from time to time make a Proclamation declaring that a state of public emergency exists.
 - (2) A Proclamation made by the President under subsection (1) shall not be effective unless it contains a declaration that the President is satisfied –
 - (a) that a public emergency has arisen as a result of the imminence of a state of war between Trinidad and Tobago and a foreign State;
 - (b) that a public emergency has arisen as a result of the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence or of infectious disease, or other calamity whether similar to the foregoing or not; or
 - (c) that action has been taken, or is imminently threatened, by any person of such a nature and on so extensive a scale, as to be likely to endanger the public safety or to deprive the community of any substantial portion of the community of supplies or services essential to life.”
10. Section 9 [AB 3/EB1732] provides for the President, within three days of making the Proclamation, to deliver to the Speaker for presentation to the House of Representatives “*a statement setting out the specific grounds on which the decision to declare the existence of*

a state of public emergency was based". There must then be "*a debate on this statement*" in the House within fifteen days of the date of the Proclamation, which is the period for which the Proclamation can remain in force.

11. By s.10(1) and (2) [AB 3/EB1732], the Proclamation can be extended by simple majority vote of the House of Representatives, as long as no single extension exceeds three months and the aggregate does not exceed six months. It can be extended yet further for no more than three months at a time by a three fifths vote of all members in each House of Parliament.
12. Section 10(3) [AB 3/EB1732] provides that such Proclamation may at any time be revoked by a simple majority of the House of Representatives, and s.10(4) [AB 3/EB1732] goes to provide:
 - "10(4) In this Chapter "period of public emergency" means any period during which –
 - (a) Trinidad and Tobago is engaged in any war; or
 - (b) there is in force a Proclamation by the President declaring that a state of public emergency exists;
 - (c) there is in force a resolution of both Houses of Parliament supported by the votes of not less than two-thirds of all the members of each House declaring that democratic institutions in Trinidad and Tobago are threatened by subversion."

Response to the Appellants' contentions on the meaning of s.8(2)(c)

Are the powers in s.8(2)(c) limited by the ICCPR or the Siracusa principles?

13. The Appellants contend on this appeal, as they did below (see [EB/699/23]), that the President's power under s.8(2)(c) [AB 3/EB1731] must be read in the light of article 4 of the ICCPR [AB 9/EB2094], which requires there to be a "*threat to the life of the nation*" to justify a declaration of a state of emergency, and also in the light of the Siracusa principles which define the circumstances which constitute such a threat. Therefore, the Appellants say at paragraph 63 of their written case 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 or 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”.

14. However, it is respectfully submitted that the courts below were correct to hold that the words of s.8(2)(c) are clear and readily understandable, and so for this reason alone it is wrong in principle to seek to reinterpret them and to limit their ambit in the light of the ICCPR and the Siracusa principles (see **EB/278/72**] in the judge’s main judgment at first instance, and **[EB/705/35]** in the Court of Appeal). The question is not whether there was an emergency as seen through the lens of the ICCPR or the Siracusa principles, but whether, on a natural interpretation of the words of s.8(2)(c) **[AB 3/EB1731]** and their purpose in the context of the Constitution, there was an actual or imminently threatened action “*of such a nature and on so extensive a scale, as to be likely to endanger the public safety*”. No doubt, the presence or absence of the factors mentioned in the Appellants’ argument or in the Siracusa principles could be relevant to this question, but there is no basis for saying that they are the only relevant factors, and that anything that falls short is insufficient.
15. It is therefore immaterial that “the highest of the meanings” which one can attribute to a public emergency is capable of being understood consistently with the idea of an emergency which threatens the life of the nation, as the Appellants’ Case contends in paragraph 66. That is to read a limitation into the words which does not exist on their natural meaning.
16. Further, even if (contrary to the above) it would be appropriate to have resort to the ICCPR, it does not follow that it would also be appropriate to treat the Siracusa principles as determinative of the issues in this case, because, although they were drawn up (in 1985) by distinguished international law jurists, they have no binding force as they are no more than a recommendation as to how the ICCPR should be interpreted, and the State of Trinidad and Tobago has never signed up to these principles. And if all that is left is the ICCPR itself, but not the Siracusa principles, it would be within the margin of appreciation for the State of Trinidad of Tobago to apply its own wider definition of what constitutes a state of emergency.

17. For similar reasons, the other conventions relied upon by the Appellants (the American Convention on Human Rights and the Paris Minimum Standards), cannot operate to limit the meaning of s.8(2)(c), because there is no ambiguity in s.8(2)(c), and the Republic of Trinidad and Tobago is not even a party to them.
18. Accordingly, it is respectfully submitted that Mendonca J.A., speaking for the Court of Appeal, was right to hold at **[EB/705/35]**:

“There is really no difficulty in my view as to the understanding of section 8(2)(c). As is clear from its wording, it refers to the action taken, or immediately threatened, by any person, of such a nature and on so extensive a scale, as to be likely to endanger the public safety. This must refer 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.”
19. The Appellants criticise this approach in paragraph 67(2) of their Case on the basis that it does not identify where on a rising scale of seriousness the threshold is to be found, and because the level of threat to the Government’s ability to provide for the safety is not defined. But the Court in this passage was not attempting to give a precise definition of when a situation does or does not fall within the words of s.8(2)(c). It was simply saying, correctly, that for the public safety to be endangered within s.8(2)(c), there had to be danger generally and not just to a few citizens; after which it provided a couple of examples of what this could be (hence “*That can occur in a number of ways including*”).
20. The Appellants also suggest that this approach is inconsistent with authorities concerning the same phrase found in the constitutions of Jamaica and Papua New Guinea.
21. However, it is respectfully submitted that this is not so.
22. Thus, in the Jamaican cases:
 - (1) The High Court’s summary at paragraph 138 of *Everton Douglas and others v. Minister of National Security and others* [2020] JMSC Civ 267 (Morrison J) **[AB 17/EB2539]**

as to what constitutes a public emergency in Jamaica was *obiter*, and it was derived not from the ICCPR or the ECHR, but from Dicey’s Introduction to the Study of the Law of the Constitution, and it is prefaced by the words “*Primarily, such a public emergency may then be seen to have, in particular, the following characteristics*”. These characteristics are then listed (that is, the emergency must be actual or imminent, its effects must involve the whole nation, the organised life of the community must be threatened, and the crisis must be exceptional, such that normal restrictions permitted for maintenance of public safety). No doubt, this is often the case, but this does not purport to be an exhaustive definition, and further, it is not so different from the way the Court of Appeal put it in the passage recited above at [EB/705/35], namely that the situation must be such that “*the lives or safety of citizens, not just a few but more generally, are endangered*”.

- (2) In *Dayton Campbell v. Attorney General* [2025] JMFC Full 2 [AB 16/EB2440], the Court of Appeal of Jamaica, having referred at paragraph 44 [EB2456] (relied on by the Appellants) to the evidence of crime statistics and a prolonged criminal activity, simply concluded “*There is logic and good sense in the assertion that a state of affairs which persist over a period of years cannot properly be described as an emergency*”. But nothing in that helps in this case. Nor does what is said at paragraph 57 [EB2459], which, having noted that the initial declaration of emergency can be for only 14 days (similar to the 15 days in Trinidad and Tobago), says: “*Accordingly, we conclude that for the purposes of section 20 of the Constitution, a public emergency is a sudden unexpected action or event that negatively impacts an entire community*”. The reference to “entire community” is *obiter*, and anyway not all that different to what the Court of Appeal in this case held was necessary (“*safety of the citizens generally*”), which, as submitted above, is sufficient to justify a declaration as long as the other requirements of s.8(2)(c) [AB 3/EB1731] are met [EB/705/35].

23. Further, nothing in the Supreme Court of Papua New Guinea’s decision in *Southern Highlands Provincial Government v. Somare* [2008] 2 LRC 372 [AB 35/EB3337] assists the Appellants’ case.
24. In this case, the State led no evidence to justify the declaration of emergency which had been based on an apparent breakdown of civil government in part of Papua New Guinea,

or to explain why the normal law could not deal with the situation said to have justified it. Accordingly, the Supreme Court held that it was invalid (see the headnote at paragraph (3) [EB3344]). The judges went on, *obiter*, to discuss the Constitution, which had been drawn up in the light of the Papua New Guinea Constitutional Planning Committee Report (1974) [AB 44/EB4163] (referred to in the judgments as the “CPC Report”), but which contained in s.226 [AB 2/EB1695] very similar wording for the exercise of emergency powers as in s.8(2) of the Trinidad and Tobago Constitution [AB 3/EB1731], and the same wording in s.226(c) [AB 2/EB1695] as s.8(2)(c) [AB 3/EB1731] (see paragraph 18) [AB EB3346].

25. Talking of s.226, the Chief Justice, Kapic J, put the matter generally in this way at paragraph 22 [EB3347]:

“It is apparent from the definition of ‘emergency’ that it is not confined to these three categories of case. The word ‘emergency’ is to be given a much wider meaning. This is apparent from the definition of ‘emergency’. It is not appropriate to give an exhaustive definition of circumstances that would result in an emergency. There may be other circumstances which may be regarded as creating an emergency. However, the circumstances which may be regarded as creating an ‘emergency’ should be of such a scale and have the characteristics ultimately of threatening public safety, security, health and welfare of human lives and the environment.

He added, at paragraph 24 [EB3347]:

“Such circumstances must be of such a nature and to such an extent that would result in an emergency. What must be born in mind in dealing with breakdown of civil government is that there are ordinary laws in existence to deal with such matters. They should be dealt with under those laws and governance. The circumstances must be of such a nature and to such extent so as to require corrective or preventive action outside the normal laws or governance to contain the situation.”

26. Indjiac J, referring to the CPC Report, and the ICCPR (to which Papua New Guinea was not a signatory), said:

“63. While international covenants and the common law refer to internal conflict and civil unrest or civil disorder which threatens the life of the nation or collapse of civil government, s.226(c) refers to a situation of civil disorder which threatens public safety or ‘supplies or services essential to life’. Section 226(c) does not specify if ‘life’ refers to human life or the life of the government or the nation,

but I would interpret it broadly to include lives of the people, the life of the nation or prince of the life of the government, be it national, provincial or local-level government.

64. The CPC had in mind a situation of civil disorder such as internal conflict or unrest which threatened the life of the government as a guardian of public safety and either itself a provider of social and economic services essential to human life or as facilitating a secure environment which is conducive to provision of such services by other persons. *In my view, s.226(c) should be read broadly to include situations of very serious civil unrest or disorder which threaten the lives of citizens or threatens the government as an institution to function of itself as providing public safety and services essential to life of its people or facilitating the provision of such service by other people.*” [Emphasis in italics added] [EB3360-EB3361]

27. Los J agreed with the reasons and conclusions in these judgments (see paragraph 79) [EB3364], as did Salika J (paragraph 83) [EB3364]. Sakora J, having likewise noted the CPC report, agreed with academic commentary that the phrase “*likely to endanger the public safety*” in s.226(c) [AB 2/EB1695] was not susceptible to the *eiusdem generis* rule of construction so as to require that it be construed narrowly so as to cover only situations of the seriousness mentioned in s.226(a) and (b) [AB 2/EB1695] (see paragraphs 126 and 127) [EB3375]. He then noted that some emergencies can be so extreme as to justify giving extraordinary powers to the police and the army to run the country, and others are less dangerous, so as to justify giving special powers to the government or to a minister of state. He then referred to what had been said in two Privy Council cases:

“132. Lord Dunedin observed when delivery the ‘advice’ of the Privy Council in *Bhagat Singh v. King Emperor* AIR 1931 PC 111, that ‘A state of emergency is something that does not permit of any exact definition: it connotes a state of matters calling for drastic action’

133. And Lord MacDermott, delivering the advice of the Privy Council in *Ningkan v. Government of Malaya* [1970] AC 379 at 390, observed that the natural meaning of the word itself is capable of covering a very wide range of situations and occurrences, including such diverse events as wars, famines, earthquakes, floods and collapse of civil government.” [EB3376]

28. It is respectfully submitted that all the judgments support the broader, more general, test adopted by the Court of Appeal. The short point is that the words are general, and are intended to cover any situation where, on a proper view, “the public safety” is likely to be endangered by action taken or imminently threatened of the required scale and nature.

Further points in answer to the Appellants’ approach

29. There are three further objections to the Appellants’ suggested approach.
30. First, it imposes unexpressed conditions on what is obviously meant to be a simple test in everyday English which can be understood and applied quickly both by the President (or rather, the Cabinet advising the President, on whose advice he must act under s.80 of the Constitution) [AB 3/EB1781]) and by the House of Representatives on the debate provided for s.10(1) and (2) [AB 3/EB1732].
31. Second, it is contradicted by the background to the Constitution.
32. This shows that the framers both of this Constitution which was passed in 1976, and of its predecessor Constitution which was passed in 1962, deliberately chose this wider formulation for emergency powers in preference to the narrower formulation for emergency powers in article 15 of the ECHR [AB 5/EB2035], to which the UK had signed up in 1953, which, like the later ICCPR (which was passed in 1976), allowed for derogations to fundamental rights when there was an emergency that threatened “*the life of the nation*”. (The same applies to Jamaica, St Lucia, Belize, Antigua and Barbuda, St Christopher and Nevis, Barbados, Turks and Caicos and Papua New Guinea, all of which, as the Appellants’ Case notes, use the wider concept of “*likely to endanger the public safety*” as one of the circumstances in which a state of emergency can be declared.)
33. Thus article 15 of the ECHR [AB 5/EB2035] provided:

“Derogation in time of emergency

1. In time of war or other public emergency *threatening the life of the nation* any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the

- situation, provided that such measures are not inconsistent with its other obligations under international law. [Emphasis in italics added.]
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
 3. [Contracting states to notify the Council of Europe of measures taken and when they cease.]”
34. Likewise, article 4 of the ICCPR **[AB 9/EB2094]** (passed in 1976) provides, in substantially the same terms:
- “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 present Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
 2. No derogation from articles 6 [right to life], 7 [protection from torture], 8 paragraphs 1 and 2) [no slavery or servitude], 11 [no imprisonment for breach of contract], 15 [no retrospective criminal offences], 16 [right to recognition as a person] and 18 [freedom of thought] may be made under this provision.
 3. [State parties to the Secretary General of the United Nations of derogations and reasons for them.]
35. However, when Trinidad and Tobago was granted independence in the 1962 Constitution by the Trinidad and Tobago (Constitution) Order in Council 1962 **[AB 10/EB2118]**, it provided for emergency powers of the same width and in exactly same words as one finds in the later 1976 Constitution (save that the relevant powers were to be exercised by the Governor General instead of the President, because under this earlier constitution the Crown was still the head of state). Further, even though the United Kingdom was still responsible for Trinidad and Tobago at the time under international law up to the passing of the 1962 Constitution, there was, so far as material, no breach of these obligations in passing the Order in Council with these wider emergency powers for Trinidad and Tobago, because (from the United Kingdom’s point of view) it was entitled to a margin of

appreciation in deciding how to frame emergency laws (compare, for instance, *Matadeen v. Pointu* [1999] 1 AC 98 at 116A-D) [AB 23/EB2708], and (from Trinidad and Tobago’s point of view) it was now to be an independent country subject only to the Crown being the head of state.

36. Therefore, as Trinidad and Tobago can be seen to have expressly chosen both in 1962 and in 1976 a wider emergency power than the “threat to the life of the nation” test in the ECHR, it cannot be taken now to have accepted the test it then rejected merely by entering into the ICCPR in 1978, that is to say, two years after the passing of the 1976 Constitution.
37. Third, and relatedly, it is respectfully submitted that it is not settled law that that the executive, by entering into a treaty after the passing of a constitution, can thereby alter the interpretation which should be placed of the words of the Constitution.
38. It is of course accepted that, as with statutes passed pursuant to a treaty obligation, resort can be had to an antecedent treaty in order to resolve a genuine ambiguity in the text of the Constitution. (For the position on statutes, see Dicey & Morris, *Conflict of Laws*, 16th edition, paras 7-20 to 7-27 [AB 40/EB4067-EB4069], esp. at 7-23. [EB4068]) A well known example is *Minister of Home Affairs v. Fisher* [1980] AC 319 [AB 28/EB2939], in which the Privy Council, had to decide whether the word “*child*” in s.11 of the Constitution [AB 3/EB1733] included an illegitimate child, so as to have the rights of residence afforded to legitimate children. In doing so, they took into account, amongst other things, that the Constitution had been passed against the background of (a) the European Convention on Human Rights, which had been applied by the UK to Bermuda in 1953, article 8 [AB 5/EB2034] of which provided for respect for family life, (b) the United Nations’ Declaration of the Rights of the Child made in 1959, and (c) Article 24 of the International Covenant on Civil and Political Rights 1966 [AB 9/EB2104], which guaranteed protection to every child without discrimination as to birth. (See p330B-E. [EB2950])
39. To similar effect, in *Attorney General for Bermuda v. Roderick Ferguson and others* [2022] UKPC 5 [AB 12/EB2291], and *Chantelle Day and another v. Governor of the Cayman Islands and another* [2022] UKPC 6 [AB 15/EB2414], the Privy Council took into account the UK’s pre-existing ECHR obligations in holding that, given their respective wordings, neither Constitution required same sex marriages to be recognised as a matter of law if

Parliament decided otherwise. See in particular paragraphs 11 and 34 for the adoption of the general principle **[EB 2297 and EB2304]**.

40. In *Matadeen v. Pointu and Minister of Science* [1999] 1 AC 98 **[AB 23/EB2690]**, which is the authority generally relied on for the proposition that treaty obligations are to be taken into account in construing a Constitution, Lord Hoffmann put the matter generally, without expressing any requirement that the treaty in question should precede the passing of the Constitution in question. Indeed, in that case, he considered the relevant provisions of the 1968 Mauritian Constitution, which concerned the right to equality, against the rights conferred by the International Covenant on Civil and Political Rights (the “ICCPR”), to which Mauritius had been a signatory only since 1973. (See 114G to 116D) **[EB2706-EB2708]**. However, the defendants in that case (who were the appellants on the appeal) do not appear to have taken the chronological point (see 101B-102G) **[EB2693-EB2694]**. In *Lewis v. A-G of Jamaica* [2001] 2 AC 50 at 78F **[AB 22/EB2677]**, and *Reyes v. The Queen* [2002] 2 AC 235 at paragraphs 27 and 28 **[AB 31/EB3016]**, the Privy Council adopted what Lord Hoffmann had said on this point, but without subjecting it to analysis. (See p78E to G) **[EB2677]**.
41. More importantly, in *Boyce v. The Queen* [2005] 1 AC 400 **[AB 14/EB2381]**, the appellants argued that the savings clause in the 1966 Barbados Constitution was ambiguous and should be interpreted in the light of the ICCPR (to which Barbados had acceded in 1973) and of the American Convention on Human Rights (the “ACHR”) which it had ratified in 1982. At paragraph 26 **[EB2397]**, Lord Hoffman qualified what he had said in *Matadeen v. Pointu* (*supra*):
- “This principle is obviously at its strongest when it appears that the domestic law was passed to give effect to an international obligation or may otherwise be assumed to have been drafted with the treaty in mind. Its application to laws which existed before the treaty is more difficult to justify as an exercise in construction but their Lordships are willing to proceed on the hypothesis that the principle requires one to construe the Constitution and other contemporary legislation in the light of treaties which the government afterwards concluded.”
42. It is respectfully submitted that (contrary to paragraph 55 of the Appellants’ Case) Lord Hoffmann was not affirming in this passage that the principle applied even in the case of treaties entered into after the passing of a constitution, but rather expressing doubt and leaving the point open, because on the facts of *Boyce* the later treaties in question could not

make any difference to the clear words of the Barbados Constitution (hence he said “*willing to proceed on the hypothesis*”).

43. Further, it is respectfully submitted that it is indeed difficult to see how the width of the words in a Constitution, or even an ambiguity, can properly be resolved by reference to a later treaty obligation, any more than in the case of a statute (for which there is no authority in Dicey & Morris). That would run counter to the “dualist theory”, as explained by the majority in *Miller v. Secretary of State for Exiting the European Union* [2018] AC 61 [AB 27/EB2795], at paragraphs 55 to 57 [EB2875-2876].

“55. This principle rests on the so-called dualist theory, which is based on the proposition that international law and domestic law operate in independent spheres. The prerogative power to make treaties depends on two related propositions. The first is that treaties between sovereign states have effect in international law and are not governed by the domestic law of any state ... The second proposition is that, although they are binding on the United Kingdom in international law, treaties are not part of UK law and give rise to no legal rights or obligations in domestic law.

56. It is only on the basis of these two propositions that the exercise of the prerogative power to make and unmake treaties is consistent with the rule that ministers cannot alter UK domestic law. Thus, in *Higgs v. Minister of National Security* [2000] 2 AC 228, 241, Lord Hoffmann pointed out that the fact that treaties are not part of domestic law was the “corollary” of the Crown’s Treaty-making power. [Reference is then made to *JH Rayner (Mincing Lane) Ltd v. Department of Trade and Industry* [1990] 2AC 418)]

57. It can thus fairly be said that the dualist system is a necessary corollary of Parliamentary sovereignty, or, to put the point another way, it exists to protect Parliament not ministers. Professor Campbell McLachlan in *Foreign Relations Law* (2014) para 5.20 neatly summarises the position in the following way:

“If treaties can have no effect within domestic law, Parliament’s legislative supremacy within its own polity is secure. If the executive must always seek the sanction of Parliament in the event that a proposed action on the international plane will require domestic implementation, parliament’s sovereignty is reinforced at the very point at which legislative power is engaged.”

44. Accordingly, it is respectfully submitted that for this reason too, the ICCPR cannot be resorted to in order to limit the natural meaning of s.8(2)(c) of the Constitution [AB 3/EB1731], both because the words of s.8(2)(c) are unambiguous, and also because the Constitution was passed before Trinidad and Tobago had signed up to the ICCPR. For the same reason, it is respectfully submitted that, contrary to paragraph 61 of the Appellants’

case, they had no legitimate expectation that the executive would exercise its powers in accordance with the ICCPR or the Siracusa principles. Indeed, this would be to restrain not just the executive's powers to declare a state of emergency, but those of Parliament, which as said, either through of House of Representatives or through both houses, has power to authorise a state of emergency (in s.10(1) and (2)) [AB 3/EB1732].

45. It is accepted that, as the Appellants point out, the Respondent accepted in the courts below that later treaties can be resorted to in order to resolve ambiguities, his argument simply being there was no relevant ambiguity in the first place. But it is respectfully submitted that the point is one of pure law, and it is too important to go by default if in fact anything turns on it.

Were the courts below entitled to take into account the evidence of the Minister of National Security?

46. Both courts below held, it is submitted correctly, that they were entitled to take into account not just the President's statement and what was said to the House of Representatives on 2 September 2011, but also the evidence of the Minister of National Security, Brigadier Sandy, which is summarised at paragraphs 42 to 48 of the SFI.
47. The important part of that evidence, which gave more particulars than he provided to the House of Representatives on 2 September 2011, was:
- (1) In the initial cabinet discussion on Sunday August 2011, there was discussion about *"the real possibility of the national agencies coming under attack before options were recommended by the Council"* [EB/1179/8]
 - (2) At the later cabinet discussion on the same day, *"Cabinet agreed that it would be irresponsible to ignore the intelligence having regard to the extent of damage and the number of lives that could have been lost and had already been lost. We considered that the risk was too high"*. In the past, government had not acted on information about a threat to the nation, which had resulted in serious consequences to citizens' lives and the stability of the government, for instance the attempted coup in 1990. *"Cabinet agreed that the consequences would have been too grave not to act on the intelligence received"*. [EB/1180/10]
 - (3) The state of emergency was seen as the best option, as it meant that the government could declare martial law. *"In my opinion, as then Minister of National Security, the*

support and involvement of the military was absolutely essential to deter any threat". [EB/1180/11] And *"My decision to recommend that a state of emergency be declared was based on an informed response to criminal intelligence and other security developments of which I was aware I was and remain convinced that by declaring the State of Emergency we prevented a crisis of unprecedented proportions"*. It would have been irresponsible to act otherwise. [EB/1180/22]

- (4) The coming into force of the Anti-Gang Act would not have been sufficient to deal with the imminent threat and potential devastation. *"This is because the information received indicated that the possible threat was far beyond the normal gang/turf war occurrences for which the Anti-Gang Act was aimed"*. [EB/1184/21]
- (5) The intelligence and evidence unearthed in the first fifteen days of the emergency was disturbing. *"The nature of items such as automatic weapons that we had not seen in the country before being found on premises, was alarming ... As a result of that information I came to the conclusion that the nature and type of weapons found were beyond the scale of normal gang/turf war occurrences.... All the findings led me to conclude that there were frightening plans being devised by criminals for this country, its institutions of security and its intelligence"*. And he received intelligence that criminal elements were waiting for the initial fifteen day emergency period to end before resuming their criminal activities, so he believed more time was need to investigate the intelligence received; and the plan was *"to place all apparatus of the national security service into investigation, detecting and dismantling any threat posed by these criminal elements"*. [EB/1181/15]

48. This evidence was consistent with, but gave more detail than, the President's statement to the House of Representatives on 2 September 2011 and the Minister's own statement to the House on that occasion, for which see [EB/1067]. But importantly the President's statement said (a) that criminal intelligence obtained by the national security agencies showed that the escalation in violence was linked to the recent success of the police in certain drug trafficking and interdiction exercises, which had led to the seizure of large quantities of drugs with a street value of several million dollars (including drugs worth over \$20 million in just one raid on 16 August 2011); and (b) that there was a real risk of reprisal and retaliation by gangs that would endanger public safety, and innocent people had already lost their lives *"as a result of these gangs merely being at the wrong place at the wrong*

time”. [EB/1066] As the Court of Appeal noted, it was implicit in all this that the reprisals would be against the national agencies who were seeking to enforce the law, not just against members of other gangs. [EB/706/39]

49. Further, this was implicit in the Minister’s statement on that day that *“Together with this development [the eleven murders] was the receipt of information and assimilation of intelligence from our national security agencies around midday on Sunday, August 21, 2011 that prompted me, as Minister of National Security, to request the hon. Prime Minister and head of the National Security Council, that she convene a meeting of the said Council as a matter of urgency so that I might share the information in my possession”*. This led to two emergency meetings later day with Cabinet at which there was extensive debate which considered *“all the pros and cons before the decision to seek the concurrence of His Excellency the President of the Republic to have a state of emergency declared”*. [EB/1067]
50. The Minister’s evidence was not challenged, but the Appellants say that, in so far as it went further than what he reported to the House, it was inadmissible. However, it is respectfully submitted that this is incorrect, because, as held by the Court of Appeal, all that s.9 of the Constitution required the President to do was to provide for debate to the House of Representatives *“a statement setting out the specific grounds on which the decision to declare the existence of a state of public emergency was based”*, and this did not require him (or the Minister) to provide evidence or detailed argument in support of the grounds [EB/705/37].
51. Further, it would make little sense to require the President or the Minister to provide all the evidence, rather than Cabinet’s conclusion on it as adopted by the President, because by definition an emergency has to be declared at considerable speed. Further, in many cases the assessment that there is an emergency will depend upon information from intelligence sources which could not be safely discussed in public without exposing them to danger and without compromising the government’s own intelligence gathering. The House of Representatives, of course, would be entitled on a debate to ask questions to challenge the government’s assessment, which, if not answered satisfactorily, might lead to them refusing to extend the period of emergency. But if they are satisfied with the assessment, then there is no reason for construing the Constitution as requiring not only the specific grounds but

all the evidence relied on in support to be placed before them. Parliamentary scrutiny can still be effective without going this far.

52. Accordingly, it is respectfully submitted that the courts below were entitled and indeed bound to take into account the Minister's affidavit evidence, as well as his and the President's statement to the House on 2 September 2011.

Did the Court of Appeal err in upholding the Judge's evaluation?

53. On the basis of the Court of Appeal's said interpretation of s.8(2)(c) at [EB/705/35], and on the basis that the Minister's evidence was admissible, it is respectfully submitted that there is no ground for interfering with the assessments of both courts below that the facts were such as to justify the President declaring a state of emergency, and the House of Representatives resolving to continue it on 2 September 2011. Indeed, it is respectfully submitted that the Minister's evidence also satisfied the higher test proposed by the Appellants at paragraph 65 of their Case, because the violence which was threatened was so extensive and serious as to threaten at least some of the guardians of public safety, or their ability to keep the public safe, in respect of which their ordinary powers were not adequate. Indeed, this was in substance the view of the Judge at first instance (see [EB/279/80]). And even without the Minister's evidence, it is submitted, for the reasons above, that the President's statement and the Minister's statement to the House on 2 September 2011 satisfied the test relied on by the Court of Appeal at [EB/705/35].

54. Further, it is respectfully submitted that there is nothing in the Appellants' particular complaints about the Court of Appeal's assessment of the evidence.

(1) The points made in paragraphs 74 to 76 of the Appellants Case all presuppose that the evidence of the Minister was inadmissible. That evidence made it clear that the adoption of emergency powers was necessary across the country, and not just in "hotspots" of crime. In particular, it made it clear that there were two meetings with Cabinet, not just one, before the President declared the statement of emergency. The Court of Appeal was therefore entitled to conclude (as it did at [EB/707-8/43]) that the initial plan to declare the emergency in certain hotspots, as announced in the Prime Minister's statement at 8 pm on 21 August [1063], was revised before the President declared the state of emergency later that evening.

(2) Further, they overlook that the President's statement and the Minister's statement to the House of Representatives made it plain that the position was extremely urgent (hence two emergency meetings on Sunday 21 August 2011 after receipt of criminal intelligence and eleven murders in just three days); and that they also referred to reprisals against the national agencies of the State (see above). It was obvious from these statements and the circumstances that the Government's assessment was that it was necessary, not just expedient, to declare a state of national emergency.

The second issue: were the relevant Regulations unlawful?

55. The Respondent poses the question in this way, because even if, as noted by the Court of Appeal, those Regulations dealing with public meetings and possession of documents were not made with "*due regard to the circumstances of any situation likely to arise or exist*", that would not affect the regulations regarding arrest and detention (that is to say, those in s.16, 17, 19 and the Second Schedule), which are the regulations relevant to this appeal. See [EB/724/63].

Were the Regulations made with "due regard" to the circumstances likely to arise?

56. The material part of s.7(1) of the Constitution [AB 3/EB1730] provides that "*the President may, due regard being had to the circumstances of any situation likely to arise or exist during such period, make Regulations for the purpose of dealing with that situation*" It is respectfully submitted that there is no basis for interfering with the Court of Appeal's assessment that these regulations were indeed made "*with due regard*" to such circumstances.

57. First, and as a general point, the phrase "*due regard*" does not require that the regulations must be limited to what is "*strictly necessary*", and for the reasons above, it is not permissible to limit the powers granted by the Constitution by reference to the Siracusa principles. The phrase "*due regard*", it is submitted, requires only that the President, in making the regulations, must assess the risks of the situation likely to arise, and must make regulations which are reasonably required in order to deal with those risks, allowing him an appropriate margin of appreciation.

58. Second, as the Court of Appeal held, it was understandable that the Regulations were a copy of those from 1970 and 1990, because the 1970 and 1990 proclamations that led to them were also made as a consequence of danger to public safety. [EB/724/62] It is also understandable, because in an emergency it is necessary to act quickly. Further, as the Court of Appeal held, whatever the position on other regulations, one would expect in this case, given that the danger to public safety came from criminal activity against national agencies, to copy regulations 16, 17, 19 and schedule 2 [EB/724/63]. There is no error of law in this reasoning.

Not reasonably justifiable?

59. The material part of s.7(3) of the Constitution [AB 3/EB1731] provides that any “... *any Regulations made under subsection (1) shall have effect even though inconsistent with sections 4 and 5 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*”.
60. Again, it is respectfully submitted that there is no basis for interfering with the Court of Appeal’s assessment of this part of the test.
61. First, two general points.
- (1) In assessing this question, the threat to public safety was not just a threat of heightened criminal activity, but a very serious threat to the national agencies charged with preventing crime. As the Court of Appeal put it at [EB/729/76-730/77], there was not only evidence of increased criminal activity and gang related violence, but:
- “76. Further, there was a real possibility of retaliation and reprisal which would further increase the murder toll and where national agencies including the police could come under attack, further exacerbating the situation and weakening the ability of the police and government to provide for the public safety.
77. The Regulations were intended to address that situation by providing enhanced powers to law enforcement designed to curb the increased criminal activity, to address the real possibility of national agencies coming under attack by criminals and generally to eliminate or reduce

the danger to public safety. These aims are sufficiently important to justify the limitation of fundamental rights”.

- (2) Second, the Court of Appeal referred to and applied the test set out by the Privy Council in *Suraj v. Attorney General of Trinidad and Tobago* [2023] AC 337 [AB 36/EB3383], which was the proper test to apply. See [725/68-729/75]. Further, it is respectfully submitted, as a general point, that the Appellants have not identified any material respect in which the Court of Appeal misapplied that test.

Response to specific errors alleged by the Court of Appeal on s.7(3) test

62. As to the specific errors alleged by the Appellants, the Respondent replies as follows.
63. First, and contrary to paragraph 116, the President’s statement did not have to seek to justify the specific powers contained in the Regulations. All he had to do, as said above, was to “*set out the specific grounds on which the decision to declare the existence of a state of emergency was based ...*”, which he did. Nor did the Minister have to seek of his motion to justify the specific powers in the Regulations when he presented the motion to continue the period of emergency, although of course he could have been asked to do so by the House, if any representatives wanted to raise questions about them.
64. Further, contrary to paragraph 117, the Court of Appeal was entitled to give “*especially strong weight*” to the executive’s judgment in making the Regulations at [EB/729/74] and [EB/739/106], regardless of the absence of any statement from the President seeking to justify the specific powers granted by the Regulations.
65. This follows from paragraph 96 of *Suraj* [EB3421], which says that the “*same analysis is applicable*” to legislation passed under s.7(3) of the Constitution [AB 3/EB1731] as to legislation passed under s.13 of the Constitution [AB 3/EB1733] with a three-fifths supermajority, which, as set out at paragraph 95 [EB3421], incorporates a proportionality test, but one which involves a lesser intensity of review and a wider margin of appreciation or discretion for the State. As paragraph 96 [EB3421] of *Suraj* continues:
- “The President is an elected official who is ultimately accountable to the electorate for his actions and, further, sections 9 and 10 give Parliament a close supervisory role regarding any Proclamations. Therefore, again, the democratic credentials of any

measure taken pursuant to such a Proclamation. The constitutional control under the proviso in section 7(3) is also together than under the proviso in section 13(1), in that any measure must be “reasonably justifiable for the purpose of dealing with the situation that exists during that period”.”

66. Second, the Court of Appeal was entitled to find that the President’s statement described a situation with which the police were not able to cope, and one that justified vesting wide powers on the police and executive, and limitations on judicial inquiry [EB/732/82-83]. In particular:

(1) As said above, it was implicit that in the President’s statement and the Minister’s statement, and the circumstances in which they were made, that the police could not cope. And in any event, this was clear from the Minister’s evidence.

(2) The Court of Appeal explained at [EB/732/84-738/103], where it deals with the relevant regulations individually, why they struck a “fair balance”, and therefore why less intrusive measures would not have been appropriate. And likewise, in this passage it explains why the emergency required an executive power of detention and the suspension of habeas corpus.

67. Third, the Court of Appeal was entitled to find, at [EB/733/85 - 87], that it was reasonable to provide for a power in regulation 16(1) to arrest a person who had acted or was about to act in a manner prejudicial to public safety, and to do so merely on the basis of suspicion rather than reasonable suspicion. As the premise of the declaration of emergency was that there was a danger to the public safety, it was reasonable to provide for such an offence and power to arrest for such. And although reasonable suspicion was not required (unlike at common law), such an arrest could be made lawfully only if the arresting officer had an honest suspicion, and further the burden would be on that officer to prove this. See *McKee v. Chief Constable for Northern Ireland* [1984] 1 WLR 1358 at 1362B-D [AB 25/EB2754]. Further, neither s.4 nor 5 of the Constitution [AB 3/EB1727 and EB1728] specifically prohibits legislation which removes the requirement for reasonable suspicion to make an arrest: all it relevantly prohibits is arbitrary detention. And in a period of emergency, it is understandable, given the heightened danger to the public and the need for prompt action, that the requirement for an arrest is simply honest suspicion, as was indeed provided for in the Terrorism Act considered in *McKee*.

68. Fourth, the Court of Appeal was right, at [EB/735/92], to hold that there were sufficient safeguards to prevent arbitrary detention under regulation 16(3).
- (1) Under regulation 16(3), the senior officer can authorise a detention (after an initial detention of up to 24 hours) for a further period of up to seven days only (a) if he is of the opinion that “*it is required for the completion of the necessary enquiries*” and (b) if he “*is satisfied*” that such inquiries cannot be completed within the initial period of 24 hours. However, on any footing, he would have to be genuinely satisfied, and he would not be entitled to exercise the power arbitrarily or irrationally, because the phrase “*If [X] is satisfied*” is not generally regarded as conferring an absolute discretion on the decision maker, but requires him to show that the existence of grounds capable of supporting his decision and that he did not misdirect himself in law. (See, for example, *Secretary of State for Education and Science v. Metropolitan Borough of Tameside* [1977] AC 1014 at 1047C-D [AB 33/EB3229], discussed by the Jamaican Court of Appeal in *Dayton* (supra) in the context of emergency legislation at paragraph 37 [EB2454].
 - (2) For this reason, judicial review would not be illusory: the detaining officer would have at least to show a genuine belief in the need for such detention and grounds capable of sustaining it.
 - (3) Even in the absence of habeas corpus, the detained person had the right under the Regulations, just as he would in other cases, to consult a lawyer, because nothing in regulation 16 or elsewhere purported to deprive him of this right; and therefore he could still make an application for judicial review even though he could not issue a writ for habeas corpus. True it is, Sergeant Elie and Mr Pitilal were told that they could not see a lawyer, but as the courts below held, that was unlawful. Of course, unlike a writ of habeas corpus, judicial review does not issue as of right. But if the arrestee made an affidavit to the effect that there were no grounds for his arrest or detention, which was not materially controverted, he would obtain his release from the High Court just as he would by issuing a writ of habeas corpus to which there was no satisfactory return.
69. Finally, there was no error in the Court of Appeal’s conclusion in relation to the executive power of detention in the Second Schedule of the Regulations, to the effect that they had not been shown not to be reasonably justifiable.

70. In this context, it is to be noted that the Appellants' Case (at paragraph 124) says that the Court of Appeal at paragraph 99 of its judgment [EB/737/99] "*found that regulations for the detention of persons were reasonably required to deal with the situation*". However, this is not what the court says there (all it did there was to summarise the effects of s.7(2) and s.11 of the Constitution [AB 3/EB1731 and EB1733] and say that the Second Schedule providing for a Tribunal mirrored the latter provision).
71. Rather, the Court of Appeal's conclusion on the Second Schedule is set out at [EB/7939/106], where it says, applying the proportionality test in *Suraj*, that "*the Regulations struck a fair balance between the rights of the Appellants and the general interest of the public and were a proportionate means of dealing with the situation during the public emergency. Therefore, and in agreement with the conclusion of the Trial Judge, the Appellants have failed to discharge the onus on them of showing that the Regulations were not reasonably justifiable within the meaning of section 7(3)*".
72. As to the Appellant's criticisms of the Court of Appeal's judgment on the Second Schedule and the powers it gave to the Minister, it is respectfully submitted that the court was plainly right to hold (and the Appellants do not appear to contend otherwise) that the combined effect of s.7(2) and s.11 of the Constitution was to permit the passing of regulations that authorised detention by persons who are not judicial officers. This is because s.7(2) authorises detention of persons, subject to s.11, and s.11 then provides for an independent tribunal to consider such persons' detention on request, the necessary implication being that the usual rights of habeas corpus and bail can be withdrawn if appropriate by regulations passed under s.7(1) [AB 3/EB1730].
73. Further, it is respectfully submitted that there was no error in the Court of Appeal's assessment that the Regulations (and therefore the Second Schedule) struck a "fair balance".
- (1) Contrary to paragraph 126(1) of the Appellants' Case, the Court of Appeal did acknowledge that "*the Regulations represent a significant departure from the rights and freedoms an individual enjoys under the ordinary or non-emergency law.*" [EB/739/106]
- (2) The Court of Appeal did identify a justification for the executive power of detention, namely (a) they were made to address a period of public emergency "*when the public*

interest in taking measures to address the emergency would be especially strong”, and (b) the court (consistently with Suraj) “is expected to give especially strong weight to the judgment of the President regarding the importance of the public interest which is sought to be addressed by the Regulations”. [EB/739/106] This was because the President was an elected official, and s.9 and 10 of the Constitution give to Parliament a close supervisory role regarding any Proclamation. This meant that *“the democratic credentials of any measure taken pursuant to any Proclamation are strong” [EB/738/103-104].*

- (3) The Court of Appeal did not hold that the power of detention in the Second Schedule was justified merely because the Constitution contemplates the possibility of executive detention. On the contrary, its decision that a fair balance was struck overall was based not just on this consideration and on the strong weight to attach to the President’s judgment, but also on its analysis of those provisions at [EB/732/84-738/102], and its conclusions that (a) the person detained is entitled to know the grounds for his detention and of his right to retain and instruct a legal adviser; and that (b) if a Minister decided not to act on the recommendation of the Tribunal to release a detainee on request, this would be subject to judicial review. [EB/738/102]
- (4) Because, as said above, the detainee had the right of access to a lawyer, his rights to judicial review were not illusory; and, just as the police officer’s discretion under regulation 16(3), so too the Minister’s discretion under paragraph 2 of the Second Schedule to make a detention order could not be exercised arbitrarily or irrationally, but would require him to show grounds capable of justifying the detention, and would be subject to judicial review. The same would apply to his discretion under paragraph 4 of the Second Schedule to go against the Tribunal’s decision to release a suspect.

The third issue: the nature of any award

74. As there was no error in the Court of Appeal’s judgment, it is submitted that there is no reason to alter any part of its judgment or the awards it made to Mr Pitilal and Sergeant Elie, which the Respondent does not seek to overturn.
75. However, if, contrary to this, the relevant Regulations were invalid, then:
 - (1) It is accepted that, in addition to being unlawfully detained for the periods upheld or found by the Court of Appeal (that is to say from 23 November to 29 November 2011 in Sergeant Elie’s case, and from 24 November to 30 November 2011 in Mr Pitilal’s),

these two Appellants were also unlawfully detained by the Minister's detention orders made against them under paragraph 2 of the Second Schedule for the further periods from then until their releases on 5 December 2011. Therefore, it is accepted that they will be entitled to an award of damages for this further period, but not, it is submitted, to vindictory damages, because there is no basis for holding that there was any bad faith or the like in their continued detention, or in the making of the regulations pursuant to which they were detained in this further period.

- (2) It is accepted, on this premise, that Mr Mohammed was unlawfully detained (a) from 25 November 2011 to 30 November 2011 by the Deputy Commissioner of Police's detention order made against him on 25 November 2011, and (b) from 30 November 2011 to 5 December 2011 by the Minister's detention order made on 30 November 2011, and that he is entitled to damages but not to vindictory damages for this period. It is not accepted that he will be entitled to damages for the original arrest on 24 November 2011, because that was on suspicion of possessing arms and ammunition (see paragraph 31 of the SFI), and not under the Regulations; and it was not suggested that the arresting officer (Police Sergeant Nobbee) did not have a reasonable suspicion of his having committed such an offence.

The fourth issue: damages for denial of access to a lawyer?

76. As to this, it is submitted that there is no basis for interfering with the Court of Appeal's judgment, which held that the denial of access to a lawyer in Sergeant Elie's and Mr Pitilal's cases did not call for an award of damages. As Mendonca J.A. held at [EB/748/131]

"Similarly, in this case, there was no evidence that the Appellants Elie and Pitilal have been adversely affected by the absence of an attorney-at-law for the interview with Lezama. They were not charged with any offence. There was no issue of self-incrimination that was mentioned nor could it be said that their detention was prolonged by the breach of the right. Further and in any event, the fact of the matter is that both Appellants have been compensated for the full period of their detention to the date of the detention order. During the time from the date of the interview [with Mr Lezama] to the date of the detention order and after there was no issue raised that they were denied the right to consult with their attorney."

76. As to the Sergeant Elie's and Mr Pitilal's criticisms of this in their written Case:

- (1) It is speculation that access to a lawyer might have allayed their concerns. There was no evidence to support this.
- (2) Mr Lezama accepted that he told Mr Pitilal at the interview on 26 November 2011 that he told him of his right to a lawyer, but that he was denying him the right to have a lawyer present for the interview itself, because of the serious nature of the threat [EB/1147/13]. But he told him otherwise that could consult with an attorney, friend or relative and could make a phone call if he wished, but he did not do so. [EB/1148/13] As for Sergeant Elie, he told him of his right to a lawyer, but that he could not have one present at the interview [EB/1370/12]. There was no cross-examination of Mr Lezama on this evidence, and so it must be taken as accepted. The Court of Appeal's point that "*there was no issue raised from the date of the detention order*", therefore, is not unfair, because they both knew of their right to a lawyer, and there was no evidence that anything was done to stop them consulting one after the interview.
- (3) There was no basis for an award of vindictory damages. The Judge expressly declined to make one at first instance in the case of Sergeant Elie, because she held that the arresting officer was acting in good faith [EB/298/138]; and she evidently found that the same applied in Mr Pitilal's case, because she made no such award to him either, and awarded to him by way of compensatory damages only the same sum as she had to Sergeant Elie.

77. Accordingly, it is respectfully submitted that the Appellants' appeals should be dismissed, for the following among

REASONS

- (1) The Court of Appeal correctly upheld the Judge's judgment that the President's Proclamation declaring a period of emergency and the House of Representatives' resolution to continue the same were valid.
- (2) The Court of Appeal correctly upheld the Judge's judgment that the Regulations were valid;
- (3) The Court of Appeal correctly held that neither Sergeant Elie nor Mr Pitilal were entitled to a further award of damages (in addition to those which they were awarded for wrongful detention) by reason of Mr Lezama denying them access to a lawyer at their respective interviews.

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