Michaelmas Term
[2023] UKPC 41
Privy Council Appeal No 0067 of 2022

JUDGMENT

Anthony Henry and another (Appellant) v Attorney General of St Lucia (Respondent) (Saint Lucia)

From the Court of Appeal of the Eastern Caribbean Supreme Court (St Lucia)

before

Lord Reed
Lord Lloyd-Jones
Lord Sales
Lord Hamblen
Lord Leggatt

JUDGMENT GIVEN ON
27 November 2023

Heard on 12 June 2023

Appellants
Anand Ramlogan SC
Robert Strang
Katharine Bailey
Lydia Faisal
(Instructed by Jared Jagroo of Freedom Law Chambers (Trinidad))

Respondent
Katherine Deal KC
(Instructed by Charles Russell Speechlys LLP (London))

LORD SALES:

1. Introduction

1. This case is concerned with the rights of persons charged with serious criminal offences but found unfit to plead at trial and detained in prison until the Governor General's pleasure should be known.

2. There are two appeals before the Board. In each appeal the appellant was detained on this basis for a very lengthy period. The first appellant, Mr Henry, was detained for 24 years before being released. The second appellant, Mr Noel, was detained for 32 years.

3. The appellants' complaint is that they were detained in prison rather than in a mental hospital, as they should have been. They also say there was no proper review of whether continued detention remained appropriate throughout these periods. They maintain that if there had been they would have been released much earlier, possibly after trial on the charges against them once they were fit to plead. They claim damages for breach of their rights to personal liberty and to protection from inhuman and degrading treatment set out in the Constitution of St Lucia at section 3(1) and section 5, respectively.

2. Mr Henry's case

4. Mr Henry was arrested on 26 September 1995 and charged with two counts of murder. He was detained on remand until his arraignment on 7 February 2000, when he was found unfit to plead. The judge ordered that he be detained in prison "until the Governor General's pleasure shall be known".

5. At first Mr Henry was detained in the prison at Castries but later he was transferred to the prison at Bordelais. He remained there until he was unconditionally discharged by the High Court sitting in its criminal jurisdiction on 30 May 2019. This discharge was the result of proceedings commenced on his behalf by his current solicitor, who had learned of his situation.

6. According to Mr Henry's medical notes compiled in the medical unit at the Bordelais Correctional Facility ("Bordelais"), he was seen by visiting consultant psychiatrists at the unit on a number of occasions each year from 2003 (when the unit opened) until his release in 2019, totalling 103 occasions. There is no evidence in the

form of medical notes regarding what (if any) psychiatric attention was received by him prior to 2003.

7. Mr Henry has been mentally ill for most of his life. His medical notes show that he was examined by the psychiatrists at the medical unit and diagnosed variously with psychosis, schizophrenia, bipolar affective disorder and anti-social personality disorder. He was given medication for these conditions throughout the period of his detention covered by the medical notes.

8. Mr Henry remained in prison and was not admitted to any mental health facility. He was not subjected to periodic reviews to decide whether his mental health had improved such that he might be fit to stand trial.

3. Mr Noel's case

9. Mr Noel was arrested and charged on 13 December 1987 with causing grievous harm. He was detained on remand at the Royal Gaol. At trial on 21 November 1991 the jury found that he was not fit to plead. On the basis of that finding, on 20 July 1992 the judge ordered that he be detained in prison "until the Governor General's pleasure shall be known."

10. Mr Noel's detention continued at the Royal Gaol until he was transferred to Bordelais when it opened in February 2003. He remained there until trial on 24 October 2019 in the present civil proceedings, which were commenced by his current solicitor after he learned of Mr Noel's plight.

11. Medical notes for Mr Noel compiled at the medical unit at Bordelais show that he was seen by visiting consultant psychiatrists at the unit on a number of occasions each year between 2003 and his release, totalling 89 occasions in all. As with Mr Henry, there is no evidence in the form of medical notes regarding what (if any) psychiatric attention was received by him prior to 2003.

12. Mr Noel has also suffered from mental illness for most of his life. His medical notes from Bordelais show that he was diagnosed as being delusional, schizophrenic and occasionally psychotic. He was given medication for these conditions in the period covered by the notes.

13. Like Mr Henry, Mr Noel remained in prison and was not admitted to any mental health facility. He was not subjected to periodic reviews to decide whether his mental health had improved such that he might be fit to stand trial.

4. The Constitution of St Lucia

14. The Constitution includes the following provisions:

> "**Section 3: Protection of Right to Personal Liberty**
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> (1) A person shall not be deprived of his or her personal liberty save as may be authorised by law in any of the following cases, that is to say-
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> (a) in consequence of his or her unfitness to plead to a criminal charge or in execution of the sentence or order of a court … in respect of a criminal offence of which he or she has been convicted;
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> …
>
> (h) in the case of a person who is, or is reasonably suspected to be, of unsound mind … for the purpose of his or her care or treatment or the protection of the community; …
>
> (3) Any person who is arrested or detained-
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> …
>
> (b) upon reasonable suspicion of his or her having committed, or being about to commit, a criminal offence under any law
>
> and who is not released, shall be brought before a court without undue delay and in any case not later than 72 hours after such arrest or detention.
>
> …

(5) If any person arrested or detained as mentioned in subsection (3)(b) is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him or her, he or she shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he or she appears at a later date for trial or for proceedings preliminary to trial, and such conditions may include bail so long as it is not excessive.

(6) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that other person or from any other person or authority on whose behalf that other person was acting:

Provided that a judge, a magistrate or a justice of the peace or an officer of the court or a police officer shall not be under any personal liability to pay compensation under this subsection in consequence of any act performed by him or her in good faith in the discharge of the functions of his or her office and any liability to pay any such compensation in consequence of any such act shall be a liability of the Crown.

…

Section 5: Protection from Inhuman Treatment

No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

…

Section 8: Provisions to Secure Protection of Law

(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

…"

5. Relevant legislation

15. Title 67 of the Criminal Code is entitled "Trial of Issue of Insanity". Section 1019(1) provides that "[i]f any accused person appears before or upon arraignment to be insane", a jury may be impanelled to determine whether such person "is or is not insane and unfit to stand trial." Subsection (3) provides that such a verdict "shall not affect the trial of any person so found to be insane for the offence for which he was indicted, in case he subsequently becomes of sound mind."

16. Section 1021 provides in relevant part as follows:

> "(1) Where any person is found to be insane under the provisions of section 1019 … the Court shall direct the finding of the jury to be recorded and thereupon the Court may order such person to be detained in safe custody, in such place and manner as the Court thinks fit, until the Governor-General's pleasure shall be known.
>
> (2) The Judge shall immediately report the finding of the jury and the detention of such person to the Governor-General, who shall order such person to be dealt with as a person of unsound mind under the laws of this State for the time being in force for the care and custody of persons of unsound mind, or otherwise as he may think proper."

17. This group of sections re-enacted sections 207 to 209 of the Criminal Code for St Lucia of 1888 with minor and irrelevant differences (such as to replace reference to "the laws of this Colony" with "the laws of this State"), which had also been re-enacted in the Criminal Code of 1895 and a number of times thereafter. The current version of the Criminal Code post-dates the Mental Hospitals Act, but the Codes of 1888 and 1895 and other re-enactments pre-dated that Act.

18. The Mental Hospitals Act ("the MHA") makes provision for persons suffering with mental illness, including prisoners. So far as relevant, it includes the following:

> "**Section 30: Appointment of Mental Hospital for Prisoners**

(1) The Governor General may appoint the whole or any part of any building, prison, hospital, house or other place with any out-houses, yards, gardens, grounds or premises thereto belonging, to be a mental hospital for prisoners.

…

Section 31: Insanity Before Verdict

(1) If any person, upon arraignment before the High Court in its criminal jurisdiction or during his or her trial for any offence, is found by the jury to be insane, the Court shall order that the trial of such person be postponed until he or she becomes of sound mind and that in the meantime he or she be detained in custody in such mental hospital as the Court appoints until Her Majesty's pleasure is known, and thereupon the Governor General on behalf of Her Majesty may give such order for the safe custody of such person until he or she becomes of sound mind as the Governor General thinks fit.

… [references to Her Majesty's pleasure are now taken to be to the Governor General's pleasure]

Section 33: Prisoners of Unsound Mind

(1) Where the Governor General is satisfied that any person imprisoned for any cause in any prison is insane he or she may by warrant under his or her hand direct that such person be removed to such mental hospital for prisoners or other mental hospital as the Governor General thinks proper, and that the person so removed be detained in such hospital until discharged as in this section is mentioned.

…"

19. Section 24(1) and (2) of the Correctional Services Act (No 24 of 2003) ("the CSA") provides as follows:

> "(1) Where a person detained in a correctional facility, lock-up or legalised police cell appears to the Director or person in charge of a lock-up or legalised police cell to be mentally ill, the Director or person in charge may order [a] Consultant Psychiatrist to examine the person detained.
>
> (2) Where the Consultant Psychiatrist certifies that such person detained is, in the opinion of the Consultant Psychiatrist, mentally ill, the Director or person in charge of a lock-up or legalised police cell shall seek a Court order to have the person detained committed to a mental hospital, there to be kept and treated as if he or she had been ordered to be detained in the mental hospital under the [MHA] until a consultant psychiatrist of such mental hospital certifies that the person has ceased to require treatment in that institution."

At that point, a court may order that the detainee be returned to the correctional facility.

20. The CSA post-dates the current version of the Criminal Code, but section 24 in substance re-enacted section 28 of Prisons Ordinance (No 17 of 1963), which pre-dated the current version of the Code. In the Ordinance, the administrator of a prison was given a discretion to transfer a prisoner suffering from mental illness to a mental hospital, after obtaining a certificate from a doctor that they were of unsound mind. This discretion was converted into an obligation in section 24 of the CSA. The difference is more apparent than real, because the circumstances in which an administrator could properly or rationally have chosen not to effect a transfer to a mental hospital where such a certificate had been obtained would have been rare.

6. The judgments below

21. Mr Henry and Mr Noel commenced proceedings seeking damages for breach of their constitutional rights. Mr Noel also sought an order that he be released to a mental health facility. Smith J heard the claims together.

22. Smith J held that there had been a breach of section 3 of the Constitution in the case of both Mr Henry and Mr Noel in that they had been deprived of their personal liberty in a manner not authorised by law. Reading the Criminal Code and the MHA together, the law required that an individual found unfit to plead should be detained in a mental hospital, not a prison, until he becomes of sound mind. That is the default position when a court makes a provisional order in such a case pending a decision by the Governor General and it is implicit in the provisions of the MHA that the Governor

General must give directions that a mentally ill person be committed to a mental hospital for care until he becomes of sound mind. The CSA was to the same effect. There was no evidence that the Governor General had designated Bordelais as a mental hospital. It was a further breach of section 3 of the Constitution that the appellants had been detained without any periodic assessments being carried out to determine whether they had sufficiently recovered to be fit to stand trial. The detention of the appellants in prison, rather than a mental hospital, without periodic reviews of their fitness to stand trial also amounted to inhuman and degrading treatment, in breach of their rights under section 5 of the Constitution. Smith J was not persuaded that it was appropriate to award damages for any breach of the appellants' right to a fair trial within a reasonable time. Relying on the approach in cases from St Christopher and Nevis he assessed damages at the rate of $500 per day for the infringement of the right to personal liberty.

23. The judge made declarations that the appellants' constitutional right to personal liberty had been breached by reason of their detention in prison, rather than in a mental health facility, and by reason of the absence of periodic reviews to determine whether they had recovered their mental health so as to be fit to stand trial. He also made a declaration that the appellants' rights under section 5 of the Constitution had been breached. He ordered that Mr Noel be transferred to a mental health facility. He awarded Mr Henry damages of $3,526,000 for his detention in prison for 7,052 days and Mr Noel damages of $5,031,500 for his detention in prison for 10,063 days.

24. The Attorney General appealed. The Court of Appeal (Pereira CJ and Webster and Cottle acting JJA) allowed the appeal in part. It ruled that:

> (i) Detention in prison of a person found unfit to plead rather than in a mental hospital does not of itself result in a breach of their right to protection from inhuman and degrading treatment under section 5 of the Constitution; nor does the fact that there is no periodic review of their condition. There was no evidence that the conditions in which Mr Henry and Mr Noel were detained involved such treatment. In order for an absence of periodic reviews to constitute a breach of section 5 it would have to be shown that such review would have resulted in them standing trial or otherwise being released from detention; but the uncontroverted evidence was that both Mr Henry and Mr Noel continued to suffer from serious mental illness throughout the relevant period. Therefore, the appeal against the finding of a breach of section 5 was allowed.
>
> (ii) A breach of the right to personal liberty in section 3 of the Constitution may be found where a person is detained in a place other than that which is specified by law. Section 31 of the MHA required a person found unfit to plead to be detained in a mental hospital, but section 1021(1) of the Criminal Code confers a discretion on a judge as to where such a person should be detained, and this includes a power to direct that they be detained in prison. The Criminal Code

is later legislation and impliedly repealed the conflicting provision of the MHA. Accordingly, there was no breach of section 3 on the basis of detention in the wrong institution.

(iii) There was no breach of section 3 by reason of the absence of periodic reviews because the evidence showed that both Mr Henry and Mr Noel continued to suffer from serious mental illness throughout the relevant period so that even with periodic reviews they would not have been released from detention, whether on bail or otherwise.

(iv) Derogation from the constitutional right to personal liberty is only lawful when it seeks to achieve the purpose for which it is authorised by the Constitution. In the case of section 3(1)(a) of the Constitution and under section 1021 of the Criminal Code, the authorised purpose of detention is to permit a defendant to recover so that he is fit to plead and to stand trial. In Mr Noel's case, it could not reasonably be said that detention for more than 32 years was in legitimate pursuit of that purpose when that period was in excess of the maximum lawful custodial sentence which could have been imposed had he stood trial on charges of causing grievous harm and been convicted. His detention became arbitrary, and accordingly was in breach of his rights under section 3, following 10 years.

(v) The detention of Mr Henry and Mr Noel for the periods in question was contrary to their right under section 8(1) of the Constitution to a fair trial within a reasonable time, and the length of their detention eliminated the possibility of a fair trial. On this basis, their detention had become arbitrary and in breach of their rights under section 3 because the purpose of their detention had been effectively overtaken by the fact that the period exceeded (in Mr Noel's case) the lawful custodial sentence which could have been imposed following a conviction and because a fair trial could no longer take place due to the passage of time. Accordingly, there had at that point been a breach of their rights under section 3 of the Constitution.

(vi) There was no proper basis on which the judge could have awarded damages for breach of Mr Henry's and Mr Noel's constitutional rights for the entirety of the periods of their detention, as he had done. Also, it was not appropriate to use a simple daily rate to assess the quantum of damages. The Court of Appeal therefore made its own fresh assessment of damages in the sum of $250,000 for Mr Henry and $500,000 for Mr Noel for breaches of their rights under section 3 of the Constitution.

(vii) The circumstances of the two cases were exceptional. Given the length of time that had elapsed since charges were brought and the impossibility of a fair trial, the indictments against Mr Henry and Mr Noel were permanently stayed.

25. Mr Henry and Mr Noel appeal to the Board.

7. The issues in the appeal

26. The issues in the appeal as identified by the parties are as follows:

(1) Was the detention in prison of the appellants unlawful ab initio, as they contend, or did it become unlawful only at a later date when detention could no longer serve the purpose for which it was authorised and a fair trial was no longer possible?

(2) Did section 1021(1) of the Criminal Code, when read with section 31 of the MHA, permit a judge, upon a finding of unfitness to plead, to order the detention of the appellants in prison?

(3) Did section 1021(1) of the Criminal Code impliedly repeal the requirement in section 31 of the MHA that a judge in such circumstances should only order the detention of a defendant in a mental hospital?

(4) Did section 1021(2) of the Criminal Code permit the Governor General to order the detention of the appellants in prison?

(5) Did the failure periodically to review the appellants' fitness to plead, while detaining them in prison, in any event render their detention unlawful?

(6) Did the treatment of the appellants amount to inhuman and degrading treatment in breach of section 5 of the Constitution?

(7) Did the Court of Appeal err in its award of damages and, if so, what order should be made as to damages?

Issues (1) to (5) concern the effect of section 3(1) of the Constitution and it is convenient to consider them together under that heading.

8. Protection of the right to personal liberty: section 3(1) of the Constitution

27. Section 3(1) of the Constitution sets out a basic and important right that a person shall not be deprived of his or her personal liberty "save as may be authorised by law" in one of the cases set out in the subparagraphs of that provision. In order for detention to comply with the constitutional right in section 3(1) both the condition that the detention is "authorised by law" and the condition that it falls within one of the specified cases must be satisfied. The difficulty for the Attorney General relates to the requirement that the appellants' detention should be "authorised by law".

28. When it was determined by the jury in the case of each of the appellants that he was unfit to stand trial, under section 1021(1) of the Criminal Code the judge was empowered to order that he be detained in safe custody until the Governor General's pleasure should be known. Under section 1021(2), the judge was required immediately to report the finding of the jury and the detention of the appellant to the Governor General so that he could make a decision in exercise of his functions under that provision.

29. Section 1021(2) requires the Governor General to order that such a person "be dealt with as a person of unsound mind under the laws of [the] State for the time being in force for the care and custody of persons of unsound mind". This is subject to a discretion conferred on the Governor General to deal with him in some other way "as he may think proper".

30. Contrary to the view of the Court of Appeal, the Board does not consider that there is any irreconcilable conflict between section 1021 of the Criminal Code and section 31 of the MHA which could justify treating the latter provision as having been impliedly repealed in any material respect.

31. When first enacted in 1888, the Criminal Code referred to laws "for the time being in force for the care and custody" of persons of unsound mind ("of lunatics", to use the language in the 1888 version of the text), which plainly envisaged that the applicable laws dealing with that topic might change from time to time. The obvious meaning - both in the original version of the Code and in its current version - is that when laws are enacted to cater for the care and custody of such persons, it is that legal regime which should be applied. The MHA falls within that category, as do section 24 of the CSA and section 28 of Prisons Ordinance No 17, which it replaced. Therefore, so far as concerns the obligation on the Governor General in the first limb of section 1021(2), the terms of the MHA and the CSA govern.

32. As regards the discretion conferred by the second limb of that provision, that can be read in such a way as to be consistent with the regime set out in the MHA. It allows

the Governor General the possibility of a short time for reflection when notified of the finding of a jury that a person is unfit to stand trial about how to deal with them, after consideration of the seriousness of the offence with which they are charged, the nature of their mental illness and the extent of any threat to the public. Depending on the circumstances, in a small jurisdiction like St Lucia with limited resources, there might be justification for continuing their detention in prison for a short time while suitable arrangements are made for their care and custody.

33. The discretion is limited in nature. It allows the Governor General to make arrangements to give the MHA regime proper effect in relation to the detainee, not to circumvent that regime altogether. The Governor General could not lawfully think that such circumvention would be "proper", within the meaning of that term in section 1021(2). This is underlined by the wide power that the Governor General has under section 30(1) of the MHA to appoint any place to be a mental hospital for a prisoner. This enables him to bring into account any limitation on the resources available and to reconcile that with the requirement that a person who is suffering from a serious illness should be provided with care. So, for example, the Governor General could appoint a prison to be a mental hospital (if this was justified by the need to contain a risk to the public posed by the detainee) or even, in an appropriate case (for instance, if the detainee was suffering from dementia and assessed to be harmless), the detainee's own house. It is implicit that if a place which is not already a mental hospital is to be designated to be such a hospital, it should be a place where suitable arrangements have been put in place for the treatment of the detainee's mental illness. Otherwise, it could not be described as a "mental hospital" within the meaning of the statute at all.

34. This interpretation of the Criminal Code is reinforced by section 24 of the CSA (and section 28 of Prisons Ordinance No 17, which preceded it). Under section 24, if the Governor General directs that a person who is unfit to stand trial should be detained in a correctional facility (that is, a prison) and it appears to the director of the facility – as it will do – that the person is mentally ill, the director is obliged to seek a court order to have the person committed to a mental hospital to be treated. It is therefore clear that the Governor General is not permitted to circumvent placement of a person who is unfit to stand trial in a mental hospital by directing that they be detained in a prison, since the director of the prison would be obliged to re-direct them to a mental hospital. The way for the Governor General to secure that such a person is held in prison (if public safety justifies such a step) is to designate the prison or some part of it to be a mental hospital pursuant to section 30(1) of the MHA. As explained above, that would require suitable arrangements to be made for the detainee to have access to treatment for their illness.

35. Section 33(1) of the MHA also supports the interpretation of the Criminal Code set out above. It provides that where a person is imprisoned "for any cause" (that is, including if they are held in prison on remand awaiting trial) and the Governor General is satisfied that they are "insane", the Governor General "may" direct that they be removed to a mental hospital. This is a context in which the word "may" imports an

obligation, since other than perhaps in exceptional circumstances it is difficult to see that there could be any other course which the Governor General could properly or rationally take in such a situation, especially having regard to the general object of the MHA to make suitable provision for the care and treatment of people who are mentally unwell. It would be incoherent to interpret the Governor General's discretion under section 1021(2) of the Criminal Code as a wide power to place a person who is mentally unwell anywhere other than in a mental hospital, if the Governor General is also required at the same time to place them in a mental hospital.

36. The final part of section 31(1) of the MHA also confers a discretion on the Governor General. This operates in the same way and subject to the same limitations as the discretion contained in section 1021(2) of the Criminal Code.

37. So far as section 1021(1) of the Criminal Code is concerned, it is appropriate to interpret the power of the court to order that a person "be detained in safe custody, in such place and manner as the court thinks fit" as a power to direct detention in such a place as section 31(1) of the MHA requires the court to designate, namely in a mental hospital which the court chooses. In the Board's view, section 1021(1) cannot be taken to have impliedly repealed section 31(1):

> (1) As the Court of Appeal correctly observed, there is a presumption against implied repeal of legislation: *Ferdinand James v Planviron (Caribbean Practice) Ltd* SLUHCVAP2017/0050 (St Lucia); *Snelling v Burstow Parish Council* [2013] EWCA Civ 1411; [2014] 1 WLR 2388; *O'Byrne v Secretary of State for the Environment, Transport and the Regions* [2001] EWCA Civ 499; [2002] HLR 30; see *Halsbury's Laws of England, Statutes and Legislative Process,* vol 96 (2018), para 301. A court must attempt to construe the later statute so as to allow effect to be given to the earlier statute. It should only conclude that the earlier provision is repealed if the later statute cannot rationally be interpreted in a way that avoids contradicting the earlier statute, so that it has to be inferred that the intention of the legislature as expressed in the later statute is that the earlier statute should be repealed to the extent of the contradiction. In the Board's view, it is rationally possible to read the Criminal Code in conjunction with the MHA as set out above, so the presumption against implied repeal is not rebutted. This conclusion is reinforced by the fact that it is clear that the court is not intended to have a power under the Criminal Code to circumvent the operation of the MHA in any general way, because it is subject to an obligation under section 1021(2) to refer the case to the Governor General "immediately", and as explained above the Governor General is obliged to comply with the MHA and ensure that a prisoner who is mentally unwell receives suitable treatment;
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> (2) It is particularly difficult to rebut the presumption where the earlier statute is in particular terms directed to dealing with a specific issue and the later statute

is in more general terms: *Halsbury's Laws*, op cit, para 302. In such circumstances, the maxim generalia specialibus non derogant (general things do not derogate from specific things) applies. In the present case the MHA is the specific law governing how the general power in the Criminal Code should be exercised, and as such is not inconsistent with that power but instead is a statutory direction how it should be operated;

(3) Further, the MHA is specific legislation which was enacted after the general power was first set out in section 209(1) of the 1888 version of the Criminal Code, and in this legislative context it is not plausible to infer that the legislature intended that it should be overridden or removed when it re-enacted what had been in the previous law in materially identical terms in section 1021(1). Rather, the legal position regarding the interaction of the Criminal Code and the MHA was already settled at the time the Criminal Code was re-enacted in its current form without change and the inference from such re-enactment is that it was intended that this legal position should continue. The need for a special regime to be in place to deal with persons who are suffering from serious mental illness has not changed in any way since the enactment of the MHA, nor has the operation of the criminal legal process changed at all, and the legislature has given no indication that its view regarding the appropriate interaction between that regime and that legal process has changed.

38. If a court directed that a prisoner who is mentally unwell and who represented a significant risk to the public should be detained in an ordinary mental hospital, special security arrangements might have to be put in place for a short time until the Governor General was able to make longer term secure arrangements as explained above. The fact that such practical arrangements might be called for in certain cases does not affect the proper interpretation of the legal power which the court has.

39. Consideration of the interaction of the Criminal Code, the MHA and the CSA is relevant both to the question whether there was a breach of section 3 of the Constitution and to the issue of damages. The issue of damages is addressed in section 10 of this judgment below.

40. As regards the appellants' claim that their rights in section 3(1) of the Constitution have been breached, what is significant is that the legal procedure for treatment of Mr Henry and Mr Noel as persons who were unfit to stand trial was not brought properly into operation at all. The court failed to exercise its power of detention in section 1021(1) of the Criminal Code read with section 31(1) of the MHA as it was required to do. Moreover, in neither case is there any evidence that the courts dealing with their cases reported the finding of the jury and the appellant's detention to the Governor General immediately or at all. The Governor General was therefore never in a position to order that they be treated in accordance with the MHA and never considered

whether to exercise such discretion as he had under the second limb of section 1021(2). The Governor General did not designate any of the prisons where the appellants were held as a "mental hospital".

41. Instead, it seems that Mr Henry and Mr Noel were simply detained indefinitely on the basis of the warrant issued by the court in each case that they be held in prison. Even if the existence of such a warrant might be an answer to a claim at common law for false imprisonment (as to which the Board expresses no view), where the warrant was issued and allowed to continue in effect in circumstances of a total failure to operate the correct legal procedure as described above the detention of the appellants cannot be said to have been "authorised by law" within the meaning of section 3(1) of the Constitution. The appellants were unlawfully detained in prison from the outset, rather than in a mental hospital as they should have been.

42. This is not simply a matter of detention in the wrong physical location. It also involved a failure to ensure that a regime directed specifically to providing correct care and treatment of the appellants' mental ill-health was put in place and meant that there was an absence of focus on any assessment of their position overall and the basis for their detention.

43. For these reasons, the Board considers that the appellants' appeal in relation to breach of their rights under section 3(1) of the Constitution should be allowed.

44. The Board does not find it necessary to determine whether the failure on the part of the authorities to carry out periodic reviews of the fitness of Mr Henry and Mr Noel to stand trial constituted a separate breach of section 3(1). The Attorney General accepts that in principle a failure to conduct periodic reviews of the position of the appellants may contribute to a breach of section 3(1) and also that the requirement for periodic review is implied into any order for detention under section 1021: see the ruling of the Court of Appeal of Trinidad and Tobago on equivalent legislation in *Bissessar v Attorney General of Trinidad and Tobago* Civil Appeal No P136 of 2010 at paras 34-36 per Bereaux JA, citing *Seepersad v Attorney General of Trinidad and Tobago* [2012] UKPC 4; [2013] 1 AC 659 (see in particular paras 28-29 in the judgment of the Board delivered by Lord Hope of Craighead). In the present case the Court of Appeal also agreed with the reasoning in *Bissessar*, and the Board sees no reason to question this; but for procedural reasons the court did not think it appropriate to grant a separate declaration based on this aspect of the case. In the Board's view, the absence of such reviews was an aspect of the situation brought about by the failure to operate the correct legal procedure in the first place. The legal significance of this is considered further in section 9 (inhuman and degrading treatment) and section 10 (damages) below.

9. Did the treatment of the appellants amount to inhuman and degrading treatment in breach of section 5 of the Constitution?

45. The Court of Appeal found on the evidence, and the appellants do not dispute, that the conditions and regime under which they were held in prison did not meet the requisite high threshold of inhuman and degrading treatment.

46. However, the appellants submit that the judge was right to find a breach of their rights under section 5 of the Constitution because their detention in prison rather than in a mental hospital amounted to criminalisation of the mentally ill, without respect for their human dignity; and, in the absence of periodic reviews of their fitness to stand trial, this amounted to inhuman and degrading treatment. They rely on the judgment of the European Court of Human Rights in *Vinter v United Kingdom* (2016) 63 EHRR 1, concerning the imposition of life sentences, at para 102, in which it was held that a grossly disproportionate prison sentence would violate the protection against inhuman and degrading treatment contained in the equivalent provision of the European Convention on Human Rights (article 3). They contend that without periodic reviews they could have no prospect of being found to be fit to stand trial and hence no prospect of trial or release. By way of analogy, they rely upon para 119 in the *Vinter* judgment, where it was said:

> "… the Court considers that, in the context of a life sentence, Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds."

47. The appellants maintain that they should have been detained in a mental health facility for treatment and periodic review, but instead they were kept in prison without review; they were thus given treatment which amounted to punishment, even though not convicted of any crime; because they were mentally ill, they could not stand trial, but because there was no periodic review they were effectively incarcerated indefinitely; they in effect received a sentence of indefinite imprisonment, although not convicted of any crime, because they were mentally ill; in other words, the presumption of innocence was denied them because they were mentally ill; and this amounted to criminalisation of the mentally ill.

48. In the Board's view, the circumstances in which Mr Henry and Mr Noel were held in detention did not constitute inhuman or degrading treatment. They overstate

their case. They were initially imprisoned on remand because they were accused of committing acts of violence and it was reasonably considered that they should stand trial on serious criminal charges in respect of those acts. They were then detained pursuant to sections 1019 and 1021 of the Criminal Code, on grounds of mental illness. They were provided with medical treatment for their mental ill-health during the period of their detention for which records are available. They were also subject to assessments of their mental health by psychiatrists.

49. It is true that there were no formalised periodic reviews of whether the appellants were fit to stand trial, but it is an agreed fact that both of them have been mentally ill for most of their lives. The evidence of their treatment by psychiatrists at Bordelais from 2003 indicates that their mental illness continued throughout their time in prison. It was not suggested to the Board that their mental condition had been significantly different during the earlier period of their detention after they were found unfit to stand trial by reason of their mental ill-health. Although the Board does not have evidence of what medical reviews took place and what treatment was made available for the appellants before their time at Bordelais, it is clear that at Bordelais they were seen and treated by psychiatrists.

50. If the psychiatrists who examined them found that either Mr Henry or Mr Noel had been restored to mental health, they would clearly have stated their opinion to that effect and, if this had happened, the criminal process against the appellants would have been re-commenced. It is therefore not sustainable for the appellants to contend that, without formal periodic reviews, there was no prospect of a finding that they had been restored to sound mind. It cannot be said that it did not matter to the State whether they might recover or not. Nor can it be said that they were denied the presumption of innocence: they were not convicted of any offence. They were not punished or criminalised because they were mentally ill.

51. Unlike in *Vinter*, the context in the appellants' cases was not imposition of a life sentence, but the operation for an excessively extended period of a pre-trial procedure involving detention on remand which commenced in legitimate circumstances but which was not converted (as it should have been) into detention in a mental hospital. Since the mental health of Mr Henry and Mr Noel was in fact reviewed by appropriate doctors and they in fact received appropriate medical treatment, it is not possible to say that the mere fact that the place of their detention was a prison rather than a mental hospital turned their detention into inhuman or degrading treatment. As noted above, it would have been possible in law for the Governor General to designate the prisons where they were detained as mental hospitals provided that they received appropriate medical examinations and treatment.

52. The more significant aspect of the appellants' cases from the perspective of section 5 of the Constitution is the absence of periodic reviews not simply of their

mental health (as the Board has observed, in practice psychiatrists were periodically reviewing this), but reviews conducted by the executive with the benefit of legal as well as medical advice to take stock of the position as the years went by, in order to determine whether the appellants' detention pursuant to sections 1019 and 1021 of the Criminal Code could continue to be justified.

53. In the Board's view, a critical point so far as this is concerned is whether it would have remained possible for the appellants to have a fair trial on the charges against them. While a fair trial remained a possibility, the detention of the appellants in appropriate conditions would in principle have been capable of being justified under section 1021, even for a lengthy period, on the basis of their mental ill-health and the consequent risk they posed to themselves and to public safety.

54. Detention pursuant to sections 1019 and 1021 of the Criminal Code did not constitute punishment. Nor was it detention on remand, that is, detention justified by the need to hold someone in custody in anticipation of the possibility that they might be found guilty at trial and become liable to a sentence of imprisonment. Sections 1019 and 1021 apply in all cases of trial on indictment, including when the defendant is not detained in custody on remand. Section 1019(3) of the Criminal Code and section 31(1) of the MHA indicate that when a defendant is found to be "insane" (severely mentally unwell), the criminal process is postponed for the period when he is mentally unwell. Such mental ill-health is treated as a supervening impediment to being tried in the usual way, and if and when it is removed the usual process of justice can resume. Detention pursuant to those provisions is a form of preventive detention directed to serving the legitimate aim of providing appropriate treatment for a person suffering with severe mental illness. During the period of such detention, the person concerned is removed from the criminal process and made subject to the regime for treatment of severe mental ill-health.

55. A finding of insanity by a jury serves as the gateway into the system for treatment of persons suffering from mental ill-health (including by detaining them for that purpose) in much the same way as certification by a medical practitioner of such ill-health outside the criminal process would do pursuant to section 3(1)(h) of the Constitution and the relevant mental health legislation: sections 4, 6 and 7 of the MHA. So far as the Constitution is concerned, preventive detention pursuant to such a finding by a jury is covered by both section 3(1)(a) and section 3(1)(h), which have overlapping effect.

56. The preventive character of detention after a jury has found a person to be unfit to plead is confirmed by consideration of the position in England and Wales under section 2 of the Criminal Lunatics Act 1800 prior to reform of the law in 1964. Section 2 of the 1800 Act provided that if a jury found that a person indicted for an offence was insane, so that they could not be tried, the court should record that finding and order

such person to be kept in custody "until His Majesty's pleasure shall be known." Sections 1019 and 1021 of the Criminal Code were modelled on this regime. In *Felstead v R* [1914] AC 534, at p 541, such an order made under section 2 of the 1800 Act was characterised as being an order of "detention for safe custody during His Majesty's pleasure" (per Lord Reading, with whom the other members of the Appellate Committee agreed). The operation of the regime under the 1800 Act was reviewed in the Criminal Law Revision Committee's Third Report: Criminal Procedure (Insanity) (Cmnd 2149) produced in 1963. It was noted that in practice a person would only be found unfit to plead on the basis of medical evidence (para 16); decisions regarding the choice of hospital and discharge were made by the Home Secretary (para 34); discharges from detention in hospital were not infrequent (para 21(4)); under the relevant mental health legislation the Home Secretary could discharge the person or remove a restriction on discharge if satisfied it was no longer needed "for the protection of the public" (para 30); and the Home Secretary had a power to remit the person to prison to stand trial if he recovered, albeit the power was rarely exercised (para 37). Clearly, if a person was remitted to prison they would from that point be held on remand in the usual way, and time spent in prison on remand would have to be brought into account in relation to any sentence to be imposed.

57. The Board notes that in *Brown v The Queen* [2016] UKPC 6, an appeal from Jamaica which involved the application of a Jamaican law also modelled on section 2 of the 1800 Act, it was said that time spent in hospital at Her Majesty's pleasure should be taken into account when sentencing someone who recovered and then stood trial and was convicted: see paras 47-50. But in this case the lower courts had assumed that time spent in custody in hospital was to be taken into account when passing sentence, so as to reduce the sentence, and the only issue on this aspect of the case which arose on the appeal was what allowance should be made. There was no argument or analysis directed to examination of the nature of the period spent in detention in hospital (as to whether it was punitive or preventive), nor any consideration of the materials referred to above.

58. However, as the Board has noted above, in order to comply with section 3(1) of the Constitution detention also has to be "authorised by law". In the Board's view the authorisation for detention provided by sections 1019 and 1021 of the Criminal Code and section 31(1) of the MHA is predicated upon a fair trial remaining a possibility. If a fair trial on the relevant charges is no longer possible, this particular authorisation for detention falls away. The State would then have to be able to point to another legal basis to justify any continued detention, relying on the general provisions of mental health law, and would have to follow the procedures prescribed by that law, including in particular the requirement of certification of unsoundness of mind by a medical practitioner: sections 4, 6 and 7 of the MHA.

59. In principle, if a fair trial remains viable, it might be possible to resume the criminal process even if the hiatus caused by the supervening impediment of the defendant's mental ill-health lasted longer than the maximum sentence which could

have been imposed upon conviction for the offence with which the detainee was charged. This is because preventive detention for good reason to do with accommodating the defendant's ill-health should not be confused with detention imposed as punishment. Further, as pointed out above, it is not equivalent to detention on remand, which is taken into account as punishment already incurred if the defendant is convicted and falls to be sentenced.

60. Instead, detention pursuant to sections 1019 and 1021 of the Criminal Code and section 31(1) of the MHA is functionally similar to preventive detention on the advice of a medical practitioner of a person suffering from severe mental ill-health. Unlike detention imposed as punishment or detention on remand, if an individual were detained for this reason before he came to be charged with or tried for an offence, that period of detention would not count towards any sentence of imprisonment which might later be imposed. Therefore, the Board does not endorse the approach adopted by the Court of Appeal in Mr Noel's case, according to which it treated the question whether his detention had become arbitrary and in breach of section 3(1) of the Constitution as being determined by whether it lasted for longer than the maximum prison sentence he might have received for the offence with which he was charged. If a fair trial is possible, it is difficult to see why an individual in Mr Noel's position should be allowed to escape justice in the form of a trial on the charge brought against him just because there has been a hiatus in the criminal process due to his mental ill-health. Mental ill-health constitutes a supervening impediment to being tried in the usual way and, if it is removed and a fair trial is possible, the usual process of justice can resume.

61. On the other hand, a point could be reached when a fair trial is no longer a reasonable possibility. One reason for this might be that with the lapse of time evidence had been destroyed or become degraded. Another might be if the medical assessment of the defendant's mental health indicated that he was never going to be well enough to stand trial. If a fair trial was no longer a possibility, detention could no longer be justified on the basis of sections 1019 and 1021 of the Criminal Code and section 31(1) of the MHA: see para 58 above. Detention would then have to be justified, if at all, solely on the basis of authority given by other parts of the MHA directed to the need to protect the individual or the community as set out in section 3(1)(h) of the Constitution, involving certification by a medical practitioner.

62. Psychiatrists examining the appellants were able to address the medical issues arising in relation to whether the appellants were fit to stand trial, but they had no remit and were not qualified to address the wider legal issues bearing on their detention under the regime constituted by sections 1019 and 1021 of the Criminal Code and section 31(1) of the MHA. The absence of formal periodic reviews of the appellants' cases to take account of these wider issues meant that, through inadvertence, the State did not take stock of the position in this way periodically as it should have done. The psychiatrists were not asked to consider the distinct question whether in their opinion

the appellants should be detained for their own safety or the safety of the community under the separate general provisions of the MHA.

63. The Board does not agree with the Court of Appeal that in these circumstances the test for breach of section 5 of the Constitution is whether, if the periodic reviews had taken place, it was likely that the appellants would have been permitted to stand trial or would otherwise have been released from detention. That would be relevant to the question of damages, but in principle it might be possible that a failure to give proper attention to a mentally ill person held in detention could amount to inhuman and degrading treatment even if they were unlikely to be released had their case been reviewed properly.

64. In the present case, however, the appellants' mental health was kept under review by psychiatrists and they were provided with the medical treatment they needed. It was through administrative inadvertence rather than deliberate policy of the State that periodic reviews of the wider legal issues affecting their cases were not carried out. In these circumstances, the Board does not consider that they were treated in an inhuman or degrading way. There was no humiliation or debasement of the person concerned, nor a failure to protect the health of vulnerable persons deprived of their liberty, such as would ordinarily be associated with a violation of section 5 or the equivalent provision in article 3 of the European Convention: cf *Keenan v United Kingdom* (2001) 33 EHRR 913, paras 109-110.

10. Damages

65. The Court of Appeal assessed damages on the wrong basis, so its determination cannot stand. For the reasons explained above, the judge was right to hold that there was a breach of the appellants' rights under section 3(1) of the Constitution from the outset of their detention. However, he erred in applying a daily rate to work out the amount of damages payable.

66. In a case involving false imprisonment or other unlawful deprivation of liberty (as in this case) for a long period, it is wrong in principle to assess damages by applying a fixed daily rate. The amount should be tapered to ensure that the award reflects the injury suffered considered in the round: *Takitota v Attorney General* [2009] UKPC 11, paras 9 and 17; *Ngumi v Attorney General of the Bahamas* [2023] UKPC 12, paras 72-74. As Lord Carswell, giving the judgment of the Board in *Takitota*, said at para 17: "In assessing the proper figure for compensation for such long-term detention [of over eight years], [the court] should take into account that any figure they might regard as appropriate for an initial short period, if extrapolated, should ordinarily be tapered …". Dame Ingrid Simler, giving the judgment of the Board in *Ngumi*, explained that an overall award should be made in the round and "the assessment must be sensitive to the

unique facts of the particular case and the degree of harm suffered by the individual concerned, while at the same time reflecting a reasonable degree of proportionality to assessments made in similar cases and to awards for personal injury given the parallels between these two types of award" (para 72).

67. The judge also erred because he did not consider the specific facts of the appellants' cases, but simply adopted a daily rate drawn from certain previous cases. There are two aspects to this error. First, in making his award the judge did not take into account the circumstances in which the appellants came to be in detention in the first place. They were properly arrested and held on remand to await trial. The period of unlawful detention was an extension of that initial period of justified and lawful detention. Neither Mr Henry nor Mr Noel had any grounds for complaining of any initial shock in being detained.

68. Secondly, the judge failed to consider the counterfactual position of what would have happened if the appellants had not been subjected to unlawful detention in violation of section 3(1) of the Constitution. As Dame Ingrid Simler said in *Ngumi* at para 72, "in assessing compensation for any later period of unlawful detention that follows, any loss of reputation, loss of enjoyment of life or normal experiences foregone, are likely to require consideration alongside the obvious factors of the length of and conditions and treatment in detention." In a claim for damages for false imprisonment, the quantum of any substantive damages is assessed by reference to the counterfactual position had the authorities acted in a lawful manner, since that is the true measure of what the claimant has lost: *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245 (see, in particular, para 95, per Lord Dyson). The same approach is applicable to determine the quantum of damages for breach of constitutional rights.

69. Both Mr Henry and Mr Noel suffered from serious mental illness throughout the relevant period. If they had been detained in a mental hospital, as required by law, that might well have been in conditions of considerable security, in view of the nature of the offences with which they were charged. The practical differences between such (lawful) detention and the unlawful detention they in fact experienced were not established in evidence. There was also no attempt by the judge to assess when the appellants' detention for the purposes of being brought to trial became unjustified, nor whether at that point they might still have had to be detained (lawfully) on section 3(1)(h) grounds for some time because of the risk they posed either to themselves or to the general public, nor whether such detention would have differed in the practical effects experienced by the appellants by comparison with the detention to which they were in fact subjected.

70. The appellants submit that tapering of the rate of damages for detention is not always required (citing *Attorney General of Trinidad and Tobago v JM* [2022] UKPC

54, para 53) and submit that the judge was entitled not to taper the rate in their cases. However, the *JM* case was exceptional, and exceptionally grave, involving as it did a child who was supposed to be cared for by the State who was wholly improperly placed from the outset in a young offenders' institution (despite not having committed or been charged with any criminal offence) and then an adult psychiatric hospital (despite not suffering from any mental illness), and who was subject throughout to appalling physical and sexual abuse. Lord Burrows, delivering the judgment of the Board, expressly said at para 53 that the situation was not analogous to a case of false imprisonment. In *JM* the local courts at both first instance and on appeal held that it was appropriate to assess damages on a per diem basis.

71. In the present proceedings, on the other hand, the judge and the Court of Appeal both correctly regarded the appellants' cases as falling within or analogous to the false imprisonment class of case and relied on authorities within that class; and on this basis the Court of Appeal correctly considered that the approach in *Takitota* should be applied. Indeed, the appellants have continued to rely on false imprisonment authorities in their submissions. In any event, reference to the *JM* case does not provide an answer in relation to the other errors of the judge.

72. The appellants submit that, if their appeal in relation to section 3(1) of the Constitution is allowed but the judge's award of damages is set aside, the proper course is to remit the assessment of damages to the High Court with the parties being permitted to adduce further evidence relevant to that assessment. The Attorney General agrees that the assessment of damages should be referred back to the High Court, but says that questions of what, if any, further evidence should be permitted on such an assessment should be left to the High Court.

73. The Board agrees that the appellants' cases should be remitted to the High Court for damages for breach of their rights under section 3(1) of the Constitution to be assessed on a proper basis. As the Board pointed out in *Ngumi*, at para 70, the local courts are better placed than the Board to assess compensation in a case like this, as they are familiar with local conditions and the society they serve. The legal analysis set out in this judgment is significantly different from that by the judge and by the Court of Appeal and turns on issues not fully explored at trial by the parties in the evidence adduced on each side. Upon remittal, a discrete new assessment of damages will have to be carried out by the High Court. It is in the interests of justice that both sides should have the opportunity of adducing fresh evidence for what will be, in substance, a new trial on the issue of quantum of damages.

11. Conclusion

74. The Board will humbly advise His Majesty that the appellants' appeals in relation to violation of their rights under section 3(1) of the Constitution should be allowed; their appeals in relation to violation of their rights under section 5 of the Constitution should be dismissed; and that the appellants' cases should be remitted to the High Court for a fresh assessment of the quantum of damages for violation of their rights under section 3(1), with permission to the parties to adduce fresh evidence for that assessment.