

Michaelmas Term
[2026] UKPC 41
Privy Council Appeal No 0072, 0073 and 0074 of 2025

JUDGMENT

Dominic Pitilal (Appellant) *v* The Attorney General of Trinidad and Tobago (Respondent) (Trinidad and Tobago); Earl Elie (Appellant) *v* The Attorney General of Trinidad and Tobago (Respondent) (Trinidad and Tobago); Ashmeed Mohammed (Appellant) *v* The Attorney General of Trinidad and Tobago (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Reed
Lord Hamblen
Lord Leggatt
Lady Rose
Lord Doherty

JUDGMENT GIVEN ON
17 November 2026

Heard on 14 July 2026

Appellants
Ramesh L Maharaj SC
Robert Strang
(Instructed by Broadfield Law UK LLP)

Respondent
Peter Knox KC
(Instructed by Charles Russell Speechlys LLP)

LADY ROSE AND LORD DOHERTY:

1. Introduction

1. The opening words of the Constitution of Trinidad and Tobago record that the people of the Republic affirm that their nation is founded on principles which include faith in fundamental human rights and freedoms, the dignity of the human person and the equal and inalienable rights with which all members of the human family are endowed. The rights that are set out in the following sections of the Constitution enshrine those principles and make provision for ensuring the protection of fundamental human rights. These rights include the right to liberty under section 4 and the right to be protected from arbitrary detention under section 5.

2. The Constitution, however, also recognises that there may be circumstances in which exceptions may be necessary to the exercise of these rights, in particular when there is a period of public emergency. Part III of the Constitution sets out in some detail when those circumstances arise and what action can lawfully be taken even if it may be inconsistent with sections 4 and 5. Sections 7 to 12 therefore describe when a public emergency can be said to have arisen, the procedure that must be followed by the President to declare that a public emergency exists and what kinds of powers, orders and instructions can be issued for the purpose of dealing with the situation. Those provisions limit the extent to which measures adopted to deal with a public emergency can lawfully derogate from the rights protected by sections 4 and 5. Section 7 provides that emergency powers are lawful even if they are inconsistent with sections 4 and 5 unless they may be shown not to be reasonably justifiable for the purpose of dealing with the emergency that has been declared.

3. These appeals arise from the state of emergency that was declared to exist in Trinidad and Tobago between 21 August and 5 December 2011. The appellants were all arrested and detained under powers enacted pursuant to Part III of the Constitution. They challenge the lawfulness of their arrest and detention because, they say, no public emergency in fact existed at the time and if it did, the regulations under which they were detained did not pass the tests for lawfulness set by the Constitution.

2. The 1976 Constitution

4. Section 4 of the Constitution of Trinidad and Tobago enshrines certain fundamental human rights and freedoms including the right to life, liberty and security of the person and the right not to be deprived thereof except by due process of law; and the right to the protection of the law. Section 5 makes provision for the protection of those rights. Section 5(2)(a) provides, subject to certain exceptions, that Parliament may not authorise or effect the arbitrary detention of any person. Section 5(2)(c) provides, again

subject to certain exceptions, that Parliament may not deprive a person who has been arrested or detained of the right to retain and instruct without delay a legal adviser of his own choice and to hold communication with him.

5. Part III of the Constitution provides for the President to declare a state of emergency and to make regulations to deal with such emergency, as follows:

> "7. (1) Without prejudice to the power of Parliament to make provision in the premise, but subject to this section, where any period of public emergency exists, 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 and issue orders and instructions for the purpose of the exercise of any powers conferred on him or any other person by any Act referred to in subsection (3) or instrument made under this section or any such Act.
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> (2) Without prejudice to the generality of subsection (1), Regulations made under that subsection may, subject to section 11, make provision for the detention of persons.
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> (3) An Act that is passed during a period of public emergency and is expressly declared to have effect only during that period or 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.
>
> 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.
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> (2) A Proclamation made by the President under subsection (1) shall not be effective unless it contains a declaration that the President is satisfied—
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> > (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 immediately 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 or any substantial portion of the community of supplies or services essential to life.

9. (1) Within three days of the making of the Proclamation, the President shall 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, and a date shall be fixed for a debate on this statement as soon as practicable but in any event not later than fifteen days from the date of the Proclamation.

(2) A Proclamation made by the President for the purposes of and in accordance with section 8 shall, unless previously revoked, remain in force for fifteen days.

10. (1) Before its expiration the Proclamation may be extended from time to time by resolution supported by a simple majority vote of the House of Representatives, so, however, that no extension exceeds three months and the extensions do not in the aggregate exceed six months.

(2) The Proclamation may be further extended from time to time for not more than three months at any one time, by a resolution passed by both Houses of Parliament and supported by the votes of not less than three-fifths of all the members of each House.

(3) The Proclamation may be revoked at any time by a resolution supported by a simple majority vote of the House of Representatives.

(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; or

(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.

11. (1) Where any person who is lawfully detained by virtue only of such an Act or Regulations as is referred to in section 7 so requests at any time during the period of that detention and thereafter not earlier than six months after he last made such a request during that period, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person appointed by the Chief Justice from among the persons entitled to practise in Trinidad and Tobago as Attorneys-at-law.

(2) On any review by a tribunal in pursuance of subsection (1) of the case of any detained person, the tribunal may make recommendations concerning the necessity or expediency of continuing his detention to the authority by whom it was ordered but, unless otherwise provided by law, that authority shall not be obliged to act in accordance with such recommendations."

6. Under section 22 of the Constitution, the President is the head of state and commander in chief of the armed forces. He is elected by an "Electoral College" of senators in the Senate and the House of Representatives (section 28). Under section 80 "In the exercise of his functions under this Constitution or any other law, the President shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet …".

7. While it is not an issue in these appeals, it is convenient at this stage to note that section 13 of the Constitution makes provision that an Act passed by a supermajority of

both Houses of Parliament may expressly declare that it shall have effect even though inconsistent with sections 4 and 5, and that any such Act will have effect unless it is shown not to be reasonably justifiable in a society that has proper respect for the rights and freedoms of the individual. Both section 7 and section 13 were examined by the Board in *Suraj v Attorney-General for Trinidad and Tobago* [2022] UKPC 26, [2023] AC 337, ("*Suraj*") a case which is discussed further below.

3. The Proclamation of 21 August 2011

8. On Sunday 21 August 2011, the Prime Minister of Trinidad and Tobago made a public statement announcing that, after deliberation with the National Security Council, the Cabinet had decided to impose a "limited state of emergency", for reasons which she summarised. She said that she would have a meeting with the President of Trinidad and Tobago to give him the Cabinet's advice.

9. Later that day the President, acting on the Cabinet's advice, declared a state of emergency in Trinidad and Tobago by Proclamation No.8 of 2011 ("the Proclamation"). By the Proclamation he declared himself satisfied, in accordance with section 8(2) of the Constitution, that "action has been taken, or is immediately threatened, by persons or bodies of persons, of such a nature and on so extensive a scale, as to be likely to endanger the public safety".

10. On Tuesday 23 August 2011, in accordance with section 9(1) of the Constitution, the President delivered to the Speaker of 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 ("the President's statement"). At the same time, pursuant to section 7(1) of the Constitution, the President made the Emergency Powers Regulations 2011 ("the Regulations").

11. On Friday 2 September 2011 the Minister of National Security (Brigadier Sandy) introduced to the House a motion on the Government's decision to declare a state of emergency and read to it the President's statement. That statement was as follows:

> "The country has been witnessing within recent times the tragedy of multiple murders and an upsurge in gang-related violence. During the period 19-21 August, 2011, there were 11 murders. As of August 21, 2011, there are two hundred sixty murders for this year. Our criminal intelligence gathered by national security agencies shows that the escalation in violent criminal activity is linked to recent success of the police in certain drug trafficking and interdiction exercises, which led to the seizure of large quantities of drugs with a street value of

> several million dollars. Drugs of a street value in excess of twenty million dollars were seized in just one raid on August 16, 2011. There is the real risk of reprisal and retaliation by gangs that will compromise and will continue to compromise and endanger public safety, law and order. Innocent citizens going about their daily business have lost their lives as a result of the actions of these gangs merely being at the wrong place at the wrong time.
>
> The present unprecedented escalation of murders and other serious acts of violence and lawlessness warrant the adoption of more decisive and stronger action to ensure the safety of the public. There is urgent need to address this threat to public safety and the upsurge in violent crime in the shortest possible time.
>
> The majority of these murders are occurring in specified geographical areas across Trinidad and Tobago, often committed by members of criminal gangs or persons involved in the drug and arms trades. The statistics from the police service reveal that the murders are disproportionately occurring in certain geographical areas where these gangs are based.
>
> As a consequence of these events and facts, I am satisfied that the nature and extent of these events endanger public life and safety to an extent that warrants the declaration of a state of public emergency."

12. The Minister went on to tell the House that, in addition to these developments, he had received information and assimilation of intelligence from the country's national security agencies around midday on 21 August 2011 that prompted him, as Minister for National Security, to ask the Prime Minister to convene a meeting of the National Security Council to pass on the information to her that day. After extensive debate and discussion both at that meeting and then in an emergency Cabinet meeting later in the day, the options were examined in further detail, before deciding to seek the President's concurrence to having a state of emergency declared. There was no way, he told the House, that he would have recommended such a bold option "had I not given it tremendous thought and consideration myself", taking into account his own experience in the military.

4. The Emergency Powers Regulations 2011

13. Regulation 16 of the Regulations made provision for police officers to have the following powers of arrest and detention:

> "16. (1) Notwithstanding any rule of law to the contrary, a police officer may arrest without warrant any person who he suspects has acted or is acting or is about to act in a manner prejudicial to public safety or to public order or to have committed or is committing or is about to commit an offence against these Regulations; and such police officer may take such steps and use such force as may appear to him to be necessary for affecting the arrest or preventing the escape of such person.
>
> (2) Subject to these Regulations a person arrested by a police officer under subregulation (1) may be detained in custody for the purposes of inquiries.
>
> (3) No person shall be detained under the powers conferred by this regulation for a period exceeding twenty-four hours except with the authority of a magistrate or of a police officer not below the rank of Assistant Superintendent, on either of whose direction such person may be detained for such further period, not exceeding seven days as in the opinion of such magistrate or police officer, as the case may be, is required for the completion of the necessary inquiries, except that no such directions shall be given unless such magistrate or police officer, as the case may be, is satisfied that such inquiries cannot be completed within a period of twenty-four hours."

14. Regulation 17 gave effect to the Second Schedule of the Regulations, providing for detention by order of the Minister of National Security. Paragraph 2 of the Second Schedule provided:

> "2. (1) Subject to the provision of paragraph 4, the Minister may, if satisfied with respect to any person that, with a view to preventing him acting in any manner prejudicial to public safety or public order or the defence of Trinidad and Tobago, it is necessary to provide for his preventative detention, make an order—

(a) directing that he be detained; and

(b) stating concisely the grounds for such detention, so however, that no defect of any kind on such statement shall invalidate the order.

(2) Every order under subparagraph (1) shall come into force upon making thereof, notice of which shall be published in the Gazette within seven days after its coming into force."

15. Paragraph 4 of the Second Schedule made provision for review of a detained person's case by an independent and impartial tribunal established by law. This must be presided over by an Attorney-at-Law appointed by the Chief Justice (all as required by section 11(1) of the Constitution). According to paragraph 9, if the tribunal were to find that there was insufficient cause for a person's detention, it remained a matter for the Minister's discretion whether to release the person or continue to detain them (in accordance with section 11(2) of the Constitution).

16. Regulation 19 made provision for the suspension of bail and habeas corpus for persons detained under the Second Schedule or regulation 16.

17. The Regulations were an exact copy of the Emergency Powers Regulations of 1990, which had themselves been a copy of the Emergency Powers Act No. 13 of 1970. It was common ground that some of the Regulations (eg those restricting public assembly) were not apt for the emergency proclaimed in 2011.

5. The facts, the proceedings below and the issues in the appeals

(a) The arrest and detention of the three claimants

18. The following account is drawn from the judgments of the High Court and the affidavit evidence included in the record before the Board.

19. Earl Elie was a Sergeant in the Police Service and was on duty on 23 November 2011 when he was arrested at St Clair Police Station. He was told by the arresting officer that he was being detained under the Regulations, but no further reason for his detention was given to him. He was taken to his home and his house was searched. The evidence of the officer who conducted the search confirms that nothing of evidential value was found and nothing was seized. He was placed in a cell at a different police station.

20. Also on 23 November, Deputy Commissioner of Police Mervyn Richardson authorised Sergeant Elie's further detention under regulation 16(3) for seven days until 30 November 2011. DCP Richardson declared himself satisfied that the continued detention of Sergeant Elie was required for the completion of necessary enquiries as to whether he was likely to act in a manner prejudicial to public safety or public order.

21. The next day, 24 November 2011, Sergeant Elie was told by police officers that he was being detained because he had made threats to public safety and was involved in a plot to assassinate the Prime Minister and other ministers. That afternoon he was interviewed by a team of investigators led by Superintendent Don Lezama in the presence of two police officers. Sergeant Elie's evidence is that before the interview, Superintendent Lezama told him that, because of the sensitive nature of the investigations, he would not be permitted to consult a legal representative or have one present at the interview. His evidence was that he was not at any stage of the interview given the particulars of the allegations against him and was not questioned on any specific allegation.

22. Superintendent Lezama's evidence is that after cautioning Sergeant Elie, he informed him of his constitutional right to legal representation. But, he says:

> "I told him that I was denying him the right to have a legal representative present because of the serious nature of the threat and the sensitive nature of the investigations and that the security of the State takes precedence over the right of the individual and to assassinate the Prime Minister and the Attorney General is to bring down the government. I was of the view that given the nature of the threat and that the security of the State was involved and based on the information that I had to pursue my investigations urgently and also could not risk the confidentiality of the information."

23. Sergeant Elie was detained in the police cell until 29 November. On that date, Brigadier Sandy signed a detention order pursuant to para 2 of the Second Schedule. He stated that he was satisfied that detention was necessary for preventing Sergeant Elie from acting in a manner prejudicial to public safety or public order or the defence of Trinidad and Tobago. The order said that the ground upon which it was made was that Sergeant Elie had been named as a person involved in a conspiracy to assassinate the Prime Minister, Attorney General and two other government ministers on 24 November 2011. This order was served on Sergeant Elie. Sergeant Elie's evidence was that he had not been questioned with regard to any such allegations in the interview on 24 November and he was not interviewed again.

24. After the detention order was served on him, Sergeant Elie was handcuffed and taken to a different prison and then to a maximum-security prison. He was detained there until the afternoon of 5 December 2011 which was the last day of the public emergency. He was then released without charge. He was detained for a total of thirteen days and since his release no further evidence has been forthcoming in respect of the allegations which it is said led to his arrest. He vehemently denies any part in any assassination plot or in the importation of firearms for that plot.

25. Sergeant Elie says in his affidavit that the publication of the detention order made against him resulted in his name and personal circumstances being widely reported in the press and other media. After his release, he stayed away from his home for two months and avoided going out in public because of the shame and stigma of his arrest and the allegations made against him. The effects of his detention have continued in the longer term to affect his relationships with his family and his colleagues at work. His detention has also had practical effects, one of which was that when he arrived in The Bahamas for his honeymoon, he was refused entry and immediately deported.

26. Turning to Mr Pitilal, the main evidence in support of his claim was given in an affidavit from his wife, Mrs Mohammed. On 24 November 2011, about eight officers entered their apartment and conducted a search. They seized various books, Mr Pitilal's licence to own a firearm, a family laptop, two cell phones and Mr Pitilal's passport. The police officer who conducted the search confirmed that nothing illegal was found. According to Mrs Mohammed, Mr Pitilal was asked several times by different officers if he knew why he was detained but when he said he did not, no information was provided to him.

27. On or about 26 November 2011, he was interviewed by Superintendent Lezama, amongst others. Superintendent Lezama says in his witness statement that after cautioning Mr Pitilal, he told him that he was denying him the right to have a representative present because of the serious nature of the threat and the sensitive nature of the investigations. His evidence is that he told Mr Pitilal the same things he told Sergeant Elie about the security of the State taking precedence over the right of the individual. He adds in relation to Mr Pitilal that he was told that he could consult with an attorney, friend or relative and that he could make a phone call but he did not do so.

28. On or about 30 November 2011, Mr Pitilal was shown a detention order signed by the Minister of National Security pursuant to para 2 of the Second Schedule that stated that he was detained to prevent him from acting in any manner prejudicial to public safety or public order or the defence of Trinidad and Tobago. It stated that the order had been made on the ground that he had been "identified as one of the persons behind a plot to destabilize Trinidad and Tobago and cause major panic". He had also been shown an order authorising his detention from 24 November to 1 December for the completion of

necessary enquiries as to whether he was likely to act in a manner prejudicial to public safety or public order.

29. On 2 December 2011 Mr Pitilal was transported to prison in handcuffs escorted by heavily armed officers. Mrs Mohammed describes in detail the appalling conditions in which Mr Pitilal says he was detained, though this evidence is disputed by Patrick King who is the Acting Superintendent of the Eastern Correctional Rehabilitation Centre. Mr Pitilal was released from detention on 5 December when the public emergency came to an end. No charges were brought against him.

30. Mrs Mohammed retained a lawyer to assist in getting her husband released. She intended to make an application to the special tribunal to have his case reviewed but he was released a few days later in any event. She also notes that reports of his detention were widespread in the media and still come up when the internet is searched using his name. She records the psychological harm he has suffered as well as the financial difficulties he has encountered through the loss of customers for his motor repair business. His bank accounts were closed because the bank did not want to be associated with him.

31. Finally, Ashmeed Mohammed's evidence is that he was arrested on 24 November 2011 when 15 uniformed police armed with machine guns surrounded his vehicle. There is a dispute between him and Officer Terrance Nobbee as to whether Mr Mohammed was arrested at this point but there is no doubt that he was told that he was suspected of being in possession of firearms and ammunition which would endanger the safety and security of Trinidad and Tobago. His vehicle was searched but nothing illegal was found.

32. Mr Mohammed was taken to a police station. He was then taken to his home which was searched. Money and other items such as computers and cell phones were taken and his former address was also searched. Again, nothing illegal was found. He was detained in a cell at that police station and was interviewed on 28 November 2011. Also on 28 November he was shown an authorisation notice pursuant to regulation 16(3) and told that he would be detained for a period of at least seven days starting from 25 November in order to complete outstanding inquiries.

33. Mr Mohammed says that during the interview on 28 November 2011 he asked to see his lawyer but was told that he could not do so. This is denied by two police officers who were present at the interview. Sergeant Jerry Hossein says in his affidavit that he informed Mr Mohammed of his right to retain and instruct an attorney of his choice and to communicate with him or her without delay. Sergeant Hossein says that Mr Mohammed declined, saying he was not part of any conspiracy to kill the Prime Minister or others. On or about 30 November 2011 he was taken by six officers to a detention centre where he stayed until he was released on 5 December.

34. Mr Mohammed states in his affidavit that at no time during his arrest, detention or during any of the interrogations conducted by the police was he given any particulars of the reasons for his arrest and detention. He was shown a detention order dated 30 November which stated that it was necessary to detain him in order to prevent him from acting in a manner prejudicial to public safety and that he had been identified as one of the persons behind a plot to destabilize Trinidad and Tobago and cause major panic. He says he was not questioned about any such allegations. He also complains that his detention was given widespread publicity. No charges have been brought against him and he is not aware of any evidence linking him to any such conspiracy.

35. Mr Mohammed had operated a business importing plastic furniture. His evidence is that after his detention, his customers and suppliers no longer wanted to do business with him. His containers at the port were always emptied and searched causing damage to his goods and resulting in the theft of some of his goods. His family and friends have distanced themselves from him and he moved to a different part of Trinidad and became a farmer. His travel to and from Canada (where he is a dual national) is disrupted by special security screening as permission has to be obtained for him to fly over USA airspace.

(b) The judgments of the High Court

36. All three claims were heard and determined by Dean-Armorer J in judgments delivered orally in summary on 1 December 2017 and then in fully written form on 19 December 2017. Evidence before Judge Dean-Armorer was given by affidavit only. She concluded in each case that the state of emergency and the 2011 Regulations were valid and could not be set aside on the grounds that they were unconstitutional. The main reasoning for that conclusion was set out in her judgment in the case of Sergeant Elie.

37. In the *Elie* judgment, Dean-Armorer J set out the terms of the Proclamation and the statement to the media of the then Prime Minister the Hon Kamla Persad-Bissessar. She also referred to the affidavit filed for the purpose of the proceedings of Brigadier Sandy setting out, the judge said, the rationale which motivated the declaration of the State of Emergency and she summarised its contents.

38. Turning to the law, Dean-Armorer J referred to the decisions of the United Kingdom House of Lords in *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 ("*A v SSHD*") and *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153 as indicating that although the executive is accountable to the court for decisions relating to national security, the court must give due weight to the judgement of the executive. She also relied on other authorities as to the meaning of the term "public emergency" and to the Siracusa Principles which the Board discusses below.

39. At para 80 of the *Elie* judgment, Dean-Armorer J said that it was clear from the evidence before her that in August 2011, Trinidad and Tobago was portrayed as being in a state which "constituted a threat to the life of the nation in a very literal way". Citizens were being deprived of their lives in a spate of murders; "meaning a flood, deluge or torrent of murders". Accordingly, she held that the President had been empowered by the Constitution to declare a period of public emergency where the President was satisfied that one of the circumstances identified in section 8(2) of the Constitution existed. She found that the evidence before her patently supported the view that there were actions and threats of such a nature and so extensive a scale as to endanger public safety: para 87. There were no grounds for declaring the Proclamation that a state of public emergency existed to be invalid.

40. Turning to the question whether the Regulations were reasonably justifiable for dealing with the emergency, she applied the test in *Suratt v Attorney General of Trinidad & Tobago* [2007] UKPC 55, [2008] 1 AC 655 ("*Suratt*"). She held that it was clear that the summary detention of suspects and enhanced powers of search and seizure were rationally connected to the purpose of stemming the spate of murders (para 113) and that they were no more than necessary to achieve that purpose (para 114). She recognised that the requirement that the suspicion of offending must be reasonable before an arrest could be lawful had been replaced with a requirement only that there be an honest belief. She said: (para 115)

> "The power of arrest was not, however, an open door. The arresting officer was still required to hold a suspicion that the person detained was acting or was about to act in a manner prejudicial to public safety or public order, which in my view, were infractions greater than a mere arrestable offence."

41. Finally she held that the measures struck a fair balance. The executive had been confronted with a crisis that was claiming the lives of many citizens: "Every murder clearly had a domino effect on the peace and stability of families, which comprise the units of the nation." Further, the strong measures were tempered by checks and balances to ensure there would be no arbitrary and unnecessary detention. Even with the authority of the Magistrate or Senior Police Officer, detention could not be authorised beyond seven days unless that person was satisfied that enquiries could not be completed within 24 hours. Her view was that it was clear that the question whether or not the officer is satisfied could be subject to judicial review: para 117.

42. She concluded that the appellants had failed to discharge the burden of proving that the Regulations were not reasonably justifiable for the purpose of dealing with the emergency: para 119.

43. Turning to the facts of the particular appellants, when considering Sergeant Elie's case, she concluded that the arresting officer had fallen short of providing any evidence of an honestly held suspicion that the Sergeant had committed an offence. The arresting officer had said only that the arrest he had been instructed to effect was to be made pursuant to the Regulations. The arresting officer lacked the requisite suspicion and was not protected by regulation 16. It was also wrong of the arresting officer and the interviewing officer to deny Sergeant Elie an opportunity to consult his legal adviser. Sergeant Elie had therefore suffered a contravention of his right to liberty pursuant to section 4(a) and of his right to legal counsel pursuant to section 5(2)(c)(ii) of the Constitution.

44. The judge divided Sergeant Elie's detention into two parts, the seven days before the making of the detention order of the Minister and his detention between 30 November and 5 December following that order. In her view, the illegality of his arrest was cured by the detention order of the Minister so that he was entitled to be compensated only for the first seven days: para 138. She awarded him $100,000 for that detention. She awarded a further $50,000 for denying access to a legal adviser.

45. In her judgment on Mr Pitilal's claim, Justice Dean-Armorer reiterated her conclusion that the Proclamation of the public emergency and the 2011 Regulations were valid. As to the legality of Mr Pitilal's detention she held:

> a. That the evidence of the arresting officer was that he held an honest suspicion that Mr Pitilal was holding arms and ammunition contrary to law. There had therefore been adequate justification for the arrest and there was no breach of Mr Pitilal's right to liberty contrary to section 4(a) of the Constitution: para 19.
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> b. Mr Pitilal had been denied his right to consult an attorney. That was a contravention of his right under section 5(2)(c)(i) and (ii) of the Constitution.

46. She awarded Mr Pitilal compensation of $50,000.

47. In her judgment in Mr Mohammed's proceedings, Dean-Armorer J said that for the reasons she had given in the *Elie* judgment the Proclamation and the Regulations were lawful and constitutional: para 23. As to the legality of Mr Mohammed's arrest, the arresting officer's uncontroverted evidence was that he had received information that Mr Mohammed was suspected of being in possession of firearms. The Attorney General had therefore succeeded in establishing that the arresting officer held a suspicion sufficient for regulation 16. As to whether Mr Mohammed had also been denied access to a lawyer, she said that there was a direct conflict of evidence since Superintendent Lezama said that Mr Mohammed was advised of his right. It had been incumbent on the claimant to cross-

examine the Superintendent if he wished to challenge that evidence and in failing to do so, he had failed to discharge the burden of proof. The claim was therefore dismissed.

(c) The Court of Appeal judgment

48. The three claimants appealed to the Court of Appeal and the appeals were consolidated before that court. The Attorney General filed cross appeals in relation to the findings in respect of Sergeant Elie and Mr Pitilal and as to the quantum of compensation awarded. Judgment was delivered on 11 January 2024. Mendonça JA gave the only reasoned judgment with which Moosai and Aboud JJA agreed.

49. The first issue before the court was whether there had been a public emergency within the meaning of section 8(2)(c) of the Constitution. Mendonça JA first rejected the submission that in assessing this, the trial judge should have considered only the statement of the President to the House of Representatives. He held that she had been entitled also to consider the media statements of the Prime Minister and the affidavit evidence of Brigadier Sandy. Section 9(1) of the Constitution did not require the President to provide the Speaker of the House with the evidence and detailed argument in support of the grounds on which he had decided to make the declaration: para 37. Mendonça JA also rejected criticisms of the President's statement. In particular he rejected the criticism that the President had said that violence was occurring mostly in specified geographic areas and was not a threat to the whole population. The President had said that the "majority" of murders were taking place in particular areas. But no area of the country was immune: "it was a case of not knowing where, if anywhere, one could be safe" (para 42).

50. He therefore agreed with Dean-Armorer J that on the evidence before the Court, a state of public emergency within section 8(2)(c) had arisen at the time the Proclamation was made. The Proclamation was valid and effective.

51. Turning to the validity of the 2011 Regulations, Mendonça JA said that this concerned first whether the Regulations were made with "due regard" being had to the existing or likely circumstances within section 7(1) and secondly whether they were reasonably justifiable within the meaning of section 7(3): para 49. As to the first point, the appellants argued that the Regulations were a direct copy of the Emergency Powers Regulations 1990 and the Emergency Powers Act of 1970. But those powers were adopted to deal with entirely different situations compared to the situation that existed in 2011. It was plain to see, the appellants contended, that the measures in the 2011 Regulations were not designed to deal with and nor could they be justified by the surge in criminal activity committed by drug trafficking gangs: para 57.

52. The Court of Appeal rejected this submission saying that since the Proclamations in 1990 and 1970 were also made as a consequence of a danger to public safety, "the similarity to the 1970 Act and the 1990 regulations is understandable": para 62.

53. In any event, Mendonça JA said that even if he were to assume that those regulations were not made with due regard, that took the appellants' case no further. The regulations regarding arrest and detention were ones which one would expect to find in regulations addressing the circumstances described in the President's statement. If other regulations were not made with due regard, they could be severed; none of the appellants was affected by those regulations and none had sought specific relief in respect of them: para 63.

54. As to whether the powers were reasonably justifiable in accordance with section 7(3), both parties before the court agreed that the test to be applied was the proportionality test set out in *Suraj* and *Suratt*. Applying that staged test, Mendonça JA held that the aims of the measures were to provide 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 the public safety. Those aims were sufficiently important to justify the limitation of fundamental rights: para 77. The powers conferred were rationally connected to that objective: paras 78 and 79. They did not go further than was necessary because "public emergencies are extraordinary situations that require extraordinary measures": para 83. Finally, he considered whether the Regulations struck the right balance between the rights of the individual and the interest of the community.

55. He focused on regulations 16, 19 and the Second Schedule: see para 84 onwards. He recognised that the Regulations went further than ordinary non-emergency powers both by removing the need for the arresting officer's suspicion to be reasonable and by allowing detention that was not limited, as under ordinary law, to what was necessary to dispel or confirm the reasonable suspicion that led to the person's arrest or to seek further evidence with his assistance: para 89. But the power to detain was not unlimited or open-ended. Mendonça JA, like the trial judge, stressed that there were safeguards to ensure that there were no arbitrary or unnecessary detentions. He also stated, as Dean-Armorer J had done, that the person detained could pursue a remedy in judicial review to challenge the making of the detention order: paras 91 to 102.

56. Mendonça JA described the independent tribunal set up under para 5 of the Second Schedule to review detentions. The detainee had the benefit of knowing the grounds for his detention and had the right to retain and instruct a legal adviser. Any decision by the Minister not to act on the recommendation of the tribunal would also be subject to judicial review: para 102. The Regulations were therefore reasonably justifiable within the meaning of section 7(3).

57. Turning to the particulars of the arrest of Mr Pitilal, the question was whether the arresting officer held an honest suspicion that Mr Pitilal was in breach of any aspect of regulation 16(1): para 114. Having analysed the evidence of the arresting officer in detail, Mendonça JA concluded that the evidence could not be construed as showing that he had held an honest opinion that Mr Pitilal was holding arms and ammunition: para 117. What he had purported to do was to arrest Mr Pitilal for the purpose of inquiries. But that was not what was permitted under regulation 16. The judge had erred in holding that Mr Pitilal's arrest had been lawful. Mr Pitilal was therefore entitled to damages for false imprisonment from 24 to 30 November and the Court awarded him $100,000: para 121.

58. However, the Court of Appeal disagreed with the judge's conclusion as to denial of access to a lawyer in the cases of Sergeant Elie and Mr Pitilal. The court held that even if the right had been breached, the trial judge should not have awarded compensation. Referring to two earlier cases, Mendonça JA held that a breach of the right does not automatically result in relief being granted: "The claimant is usually required to show that the infringement of the right has affected him adversely in some way that would attract relief": para 128. There was no evidence that Sergeant Elie and Mr Pitilal had been adversely affected by the absence of an attorney for the interview and they were already being compensated for the full period of their detention. The court set aside the award of $50,000 made to Elie and Pitilal.

59. The result was that the awards to Elie and Pitilal were both of $100,000 to compensate them for the period of detention from the date of their unlawful arrest until the date of the detention order made by the Minister under the Second Schedule.

(d) The issues in the appeal before the Board

60. The issues before the Board can be summarised as follows.

61. First, whether, on the proper construction of section 8(2)(c) and having regard to the evidence properly available to the court, the High Court and the Court of Appeal were right to conclude that a public emergency existed and that the President's Proclamation was valid.

62. The appellants say that the Court of Appeal construed the section too broadly and applied the wrong test, setting the threshold too low before the power to make the necessary Proclamation arose. The appellants say further that, applying the correct test, the evidence did not provide a basis on which the courts below could have arrived at their conclusion that the test had been satisfied. The courts erred therefore in upholding the validity of the Proclamation. It is accepted by the Attorney General that both stages of this challenge to the validity of the Proclamation raise questions of law for the courts below, and now the Board, to determine.

63. It is accepted by the Attorney General that the Regulations are inconsistent with sections 4 and 5 of the Constitution. The second issue is therefore, if the Board upholds the validity of the Proclamation, are the Regulations valid? This raises the following subsidiary issues:

a. whether the Regulations were made by the President with "due regard … to the circumstances of any situation likely to arise or exist" during the period of public emergency for the purposes of section 7(1) of the Constitution; and

b. have they been shown not to be reasonably justifiable for the purpose of dealing with the situation that existed during that period for the purposes of section 7(3).

64. Thirdly, there are issues as to the remedies which should be granted to the appellants. The parties before the Board were agreed that if the Board concludes that compensation should be paid to any of the appellants over and above what has so far been quantified by the courts below, their cases should be remitted to the High Court for assessment. The appellants do raise the issue of whether, if the Board holds that the Proclamation was unlawful, vindicatory damages should be awarded to each of the appellants.

65. Mr Pitilal and Mr Elie also argue that the Court of Appeal was wrong to set aside the awards of compensation made by the trial judge for the violation of their right to have the benefit of an attorney's advice during their time in detention.

66. At a number of places in their judgment, the Court of Appeal referred to the fact that the period of emergency and the currency of the Regulations had long since ended: see eg paras 63 and 107. However, the Board's consideration of the issues in these appeals takes place against the backdrop of the fact, as the appellants explained in their written case before the Board, that on 30 December 2024 the Government of Trinidad and Tobago declared a public emergency which lasted until April 2025. Another public emergency was declared on 18 July 2025 lasting until January 2026 and on 3 March 2026, a public emergency was declared which was lifted on 15 September 2026. The Board's decision in the present appeal may well therefore have important implications for the more recent states of emergency declared by the Government.

6. The proper construction of section 8(2)(c)

(a) Principles of construction and case law on the wording adopted in section 8(2)(c)

67. The principles of construction to be applied by courts interpreting constitutional documents are not in dispute. Particularly relevant in the present context is the well-established principle that provisions creating exceptions to the rights conferred on citizens should be given a narrow rather than a wide interpretation: see for example Lord Rodger in *R v Hughes* [2002] UKPC 12, [2002] 2 AC 259 at para 35 and the authorities cited there.

68. To ascertain the meaning of section 8(2)(c), one must look at the natural meaning of the words and consider the context in which they are used and the purpose for which they are included in the Constitution. In the present case, the foundation for the Proclamation was primarily the risk to public safety, rather than a threat to supplies or services. The President must therefore have been satisfied that action had been taken or was immediately threatened by any person, being action that was or would be of such a nature or on so extensive a scale as to endanger the public safety.

69. Inherent in the wording, in the Board's judgment, is that the nature and scale of the threat must be extremely serious. This is clear not only from the wording of paragraph (c) itself, but from the preceding paragraphs which provide different bases for a Proclamation, namely war with a foreign state or earthquake, fire, disease or other calamitous disaster.

70. These words have rightly been interpreted by the courts of other jurisdictions with similarly worded exceptions as setting a high threshold. The parties referred the Board to *Southern Highlands Provincial Government v Somare* [2008] 2 LRC 372 ("*Somare*"), a decision of the Supreme Court of Papua New Guinea. The court there was considering preliminary issues raised by a challenge by the Government of the Southern Highlands Province to the declaration by the National Executive Council ("NEC") that a state of public emergency existed in the Province. "Emergency" was defined in section 226 of the Papua New Guinea Constitution (set out at para 18 of the judgment) in terms similar to section 8 of the Constitution of Trinidad and Tobago and the NEC had relied on section 226(c) which was in similar terms to section 8(2)(c). The Papua New Guinea Supreme Court stated at para 22 that it was not appropriate to give an exhaustive definition of circumstances that would result in an emergency. However, the circumstances 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. The Supreme Court held that the NEC had failed to provide the court with evidence to establish this. The declaration of public emergency was therefore invalid.

71. Chief Justice Kapi, with whose judgment Injia DCJ, Los, Salika and Sakora JJ concurred, said that even accepting that there was some evidence of a breakdown of law and order, maladministration, corruption and the like, that was not of itself enough to prove that a state of emergency existed: "What is required is some evidence of steps taken

under the existing laws and [that] the situation is so out of control or is so ineffective to declare a state of emergency.": para 33. Injia DCJ said at para 64 that section 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 or its function of itself as providing public safety and services essential to life of its people or facilitating the provision of such services by other people."

72. Two cases from Jamaica were also helpfully cited to the Board in the present appeals. *Douglas v The Minister of National Security* [2020] JMSC Civ 267 ("*Douglas*") is a judgment of Morrison J in proceedings on a writ of habeas corpus brought by four men in the Supreme Court of Jamaica. Section 20(2)(b) of the Jamaican Constitution was in similar terms to section 8(2)(c). A state of emergency had been declared in some but not all the parishes of Jamaica and the petitioners were detained for periods ranging from 177 to 431 days without being charged with any offence. Morrison J said at para 111 that for an emergency to exist the impugned conduct must "cause the ordinary course of the law to be diverted from" and that the life of the nation must be threatened. He held that the respondent had not made out an adequate case and ruled that the detention of the petitioners was unlawful.

73. The Full Court of the Supreme Court of Jamaica revisited the issue in *Campbell v Attorney General of Jamaica* [2025] JMFC Full 2 ("*Campbell*"). The Full Court (Morrison J, Pettigrew-Collins J and Wolfe-Reece J) considered a challenge to a series of proclamations by the Governor-General of Jamaica declaring that a state of public emergency ("SOPE") existed in specified communities in various parishes. The SOPEs lasted from January 2018 to February 2023.

74. At para 54 of *Campbell*, the Full Court asked the question: "what is an emergency?" As the proclamation inevitably involved significant restrictions on the rights and freedoms conferred by the Charter of Fundamental Rights, the Full Court said it should prefer a strict, narrow definition of the phrase:

> "55. It is observed that the Constitution does not define 'emergency'. The Concise Oxford English Law Dictionary defines 'emergency' as:
>
> > *'A serious, unexpected, and potentially dangerous situation requiring immediate action'.*

> As the definition indicates, in its ordinary and usual meaning, an emergency is something unexpected or unforeseen. It is also usually sudden and requires an immediate response. The use of the word 'emergency' in the Constitution also supports that interpretation.
>
> 56. A declaration of an emergency would also be justified if a state of war is imminent, if there has been an earthquake or hurricane, or if Jamaica's democratic institutions are threatened by subversion. The Constitution routinely uses the word in conjunction with the preceding qualifier 'public', which clearly indicates how widespread the unexpected or unforeseen event is required to be."

75. It was also significant, the Full Court held, that the Constitution limited the period for which the state of emergency could remain in force without Parliament's intervention to 14 days. This indicates that "a public emergency is a sudden, unexpected action or event that negatively impacts an entire community". Hence the Full Court found that the Governor-General must be satisfied that a sudden, unexpected action of such a nature and on so extensive a scale as to be likely to endanger the public safety of the community has been taken or is immediately threatened by any person or body of persons.

76. The Crown in *Campbell* relied on the emergence of new types of criminal activity which had led to an increase in the murder rate in most parishes. It had become difficult for the security forces to contain or suppress crime using normal policing methods because of a lack of human resources. The Full Court held that this evidence was insufficient to establish the existence of a state of public emergency; it did not purport to identify "the persons or bodies of persons" whose action merited the imposition of the measures but simply described in very general terms the high rate of crime in various areas. It was true, the Full Court noted, that the evidence showed a sharp decrease in murders and shootings during the period in which the state of emergency was in force. But this was "an attempt at ex post facto justification, or to put it another way, an assertion that 'the end justifies the means'": para 42. They held that the SOPEs declared by the Governor-General between January 2018 and February 2023 were inconsistent with the Constitution and void.

77. Following the hearing in the instant appeals, the parties drew the Board's attention to the decision of the Court of Appeal of Belize handed down on 3 September 2026, *Attorney General of Belize v John Grinage* Civil Appeal No 18 of 2025 ("*Grinage*"). That concerned a challenge to a state of emergency declared in part of Belize City in 2020 pursuant to section 18(3) of the Belize constitution which is in very similar terms to section 8(2)(c). The cause appears to have been an outbreak of violent lawlessness in that part of the City. The Court of Appeal considered the requirements of section 18, referring

both to *Somare* and to the judgment in the *Elie* case on appeal before the Board here. The Belize Court of Appeal stated that section 18 prescribes that the disruption to law and order triggering the state of emergency be founded on an act committed or threatened that is of such nature that it is not capable of being dealt with under the ordinary criminal law, and is of such scale as is likely to result in civil unrest or disorder threatening the lives of a sufficiently large number of persons in the area subject to the declaration. The Court held that there was no evidence before the Courts in any of the cases consolidated in the *Grinage* appeal that could satisfy that requirement: paras 183 and 184. It therefore held that the arrest and detention of each of the claimants was unconstitutional.

(b) The relevance of international instruments and the earlier Constitutions

78. There was a dispute between the parties as to the relevance of international instruments which describe the situation in which emergency powers curtailing fundamental rights can be adopted. The formulation they use casts the situation justifying the exercise of such powers as comprising a "threat to the life of the nation".

79. The International Covenant on Civil and Political Rights ("ICCPR") was adopted by the United Nations General Assembly in December 1966 and came into force on 23 March 1976 following the 35th instrument of ratification or accession. Article 4 provides:

> "Article 4
>
> 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant 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."

80. The second paragraph of article 4 lists certain rights from which there can be no derogation, such as the prohibition on slavery and servitude or freedom of thought, conscience or religion.

81. In 1985 the United Nations Economic and Social Council adopted the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4 ("the Siracusa Principles"). These

elaborated on the meaning of different terms used in the ICCPR including phrases in article 4. They said:

> "39. A state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 (hereinafter called "derogation measures") only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that:
>
> (a) affects the whole of the population and either the whole or part of the territory of the state; and
>
> (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the state or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.
>
> 40. Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4.
>
> 41. Economic difficulties *per se* cannot justify derogation measures."

82. As regards the phrase "strictly required by the exigencies of the situation" the Siracusa Principles state in paras 51 to 57 that the competent authority is under a duty to assess individually the necessity of any derogations. The principle of strict necessity must be applied in an objective manner and "the judgment of the national authorities cannot be accepted as conclusive."

83. The ICCPR wording is similar to that used in article 15 of the European Convention on Human Rights ("ECHR"). Article 15 states that in time of war "or other public emergency threatening the life of the nation", the states party may take measures derogating from their obligations.

84. The appellants argue that the wording of article 4 ICCPR informs the meaning of section 8(2)(a) to (c) of the Constitution for two reasons. First, the concept of a "threat to the life of the nation" was an overall indication of the gravity of the situation that must arise before fundamental rights can lawfully be curtailed. That applied also to the Trinidad

and Tobago Constitution; the sub-paras of section 8 are simply an expanded set of illustrations describing more precisely when a threat to the life of the nation arises.

85. Secondly, in so far as the terms in section 8(2)(c) may have been more expansive when the Constitution was first adopted in 1976, the wording must now be read more narrowly given that Trinidad and Tobago acceded to the ICCPR in 1978. The appellants refer to well-known statements that domestic legislation, including the nation's constitution, should if possible be construed so as to conform to international instruments of which the state is a signatory. In *Matthew v Trinidad and Tobago* [2004] UKPC 33, [2005] 1 AC 433, Lord Hoffmann stated that an obligation binding on a state in international law but not forming part of its domestic law cannot override or even influence the construction and application of a clear and unambiguous provision of domestic law. But if a provision of a state's domestic law is ambiguous and permits of two interpretations, one of which will accord with the state's international obligations and the other of which will involve a violation of those obligations, a court will, so far as possible, adopt that interpretation which will accord with the state's international obligations. Further, those propositions apply to the interpretation of constitutions as to other domestic law, and apply even if the international obligations were undertaken after the date of the constitution: see para 55 and the authorities cited there.

86. Mr Knox KC on behalf of the respondent argued that a deliberate choice was made by the drafters of the Constitution not to adopt the "threat to the life of the nation" formulation. The test adopted in section 8(2)(c) deliberately set, he said, a lower threshold for when a public emergency can properly be said to have arisen. He also referred the Board to the earlier version of the Constitution adopted in 1962 which contained section 8(2)(b) in similar terms to the current section 8(2)(c). This again showed, he argued, that Parliament had decided to carry forward the original test from 1962 instead of adopting the wording of the ICCPR or ECHR.

87. The Board does not regard the test set in article 4 of the ICCPR or article 15 of the ECHR as significantly different from the test set in section 8(2)(c) of the Trinidad and Tobago Constitution and the corresponding provisions in similar constitutions considered in the case law discussed above. The Board notes that Dean-Armorer J in the *Elie* judgment stated her conclusion that the evidence showed that there had been "a threat to the life of the nation in a very literal way" (para 80), and in *Douglas* Morrison J had also interpreted the similarly worded test in the Jamaican constitution as requiring "the life of the nation to be threatened": para 111.

88. Further, the authorities to which the Board was taken on article 15 ECHR do not indicate that it sets a materially higher threshold than that set by the wording with which this appeal is concerned. In *Lawless v Ireland (No 3)* (1961) 1 EHRR 15 ("*Lawless*") the European Court of Human Rights upheld the validity of legislation introduced in the Republic of Ireland in response to attacks by the Irish Republican Army mainly against

police targets. The factors relied on by the court were different from those involved in the present case, in particular the IRA's use of the Republic as a base from which to attack targets north of the border, thereby jeopardising Ireland's relations with its neighbour. The article 15 test, as explained in *Lawless* was also applied in *The Greek Case* (1969) 12 YB 1 where the Human Rights Commission concluded that the Government of Greece had not satisfied the test following the military coup on 21 April 1967. At para 153 of its opinion, the Commission stated that a public emergency may be seen to have, in particular, the following characteristics: (a) it must be actual or imminent; (b) its effects must involve the whole nation; (c) it must imperil "the continuance of the organised life of the community" and (d) the crisis or danger must be exceptional in that the normal measures or restrictions permitted by the Convention "are plainly inadequate".

89. Lord Hope in *A v SSHD* explained the significance of the commission's use of the word "imminent" in *The Greek Case*. That word was used in the French text of the court's judgment in *Lawless*, recognising that "derogation is permitted in the face of an emergency which has not yet happened but is imminent". *A v SSHD* arose from the emergency measures adopted in the United Kingdom following the terrorist attacks in the United States on 11 September 2001. Lord Hope said this at para 115 about the meaning of "emergency":

> "The primary meaning of the word is an occurrence that is sudden or unexpected. It has an extended meaning – a situation of pressing need. A patch of fog on the motorway or a storm which brings down power lines may create a situation of emergency without the life of the nation being under threat. It is a question of degree. The range of situations which may demonstrate such a threat will extend from the consequences of natural disasters of all kinds to the consequences of acts of terrorism."

90. Each of article 4 of ICCPR, article 15 of ECHR and section 8(2)(c) of the Constitution requires a situation that is extreme, sudden and out of the ordinary and all recognise that the measures taken in response to the public emergency are partly to address the situation that has already arisen and partly to prevent further escalation of violence and lawlessness which is feared to be imminent if strong measures are not taken. The Board respectfully agrees with the Supreme Court in *Campbell* that the concept of an emergency suggests something sudden, immediate and likely to be short-lived. In the present appeals the public emergency lasted about three and a half months rather than more than five years as described in that case. That interpretation also accords with what one would expect in light of the context and purpose of the words used. The test must be a strict one because if it is met, the state is permitted to confer powers on the police, military and security forces that derogate from the basic rights and freedoms that the Constitution regards as a fundamental tenet of the society which the Constitution establishes. The purpose also therefore points to the need for a strict test.

91. The Board also endorses the emphasis placed in the case law on the importance of the courts balancing the need to respect the expertise and responsibilities of the Government in taking the decision to declare a public emergency with the vital role of the courts in protecting the Constitutional rights and liberties of those citizens who find themselves the target of the extreme measures adopted. The appellants rightly accept in their written case that the decision whether a public emergency exists is primarily a decision for the executive, with the approval of Parliament, in respect of which the courts will accord due weight to the judgment of the executive and the legislature. But as Lord Hope said in *A v SSHD*: para 99

> "Two cardinal principles lie at the heart of the argument. It is the first responsibility of government in a democratic society to protect and safeguard the lives of its citizens. That is where the public interest lies. It is essential to the preservation of democracy, and it is the duty of the court to do all it can to respect and uphold that principle. But the court has another duty too. It is to protect and safeguard the rights of the individual. Among these rights is the individual's right to liberty."

92. Lord Hope referred to the dangers that lie in store for democracy itself if the courts were to allow individuals to be deprived of their right to liberty indefinitely and without charge on grounds of public interest by the executive.

93. The decisions of the courts in *Campbell*, *Somare* and other cases where courts have considered the validity of declarations of public emergency show the judiciary fulfilling this vital role with courage and intellectual rigour.

94. The courts in the present case and in those earlier authorities have rightly borne in mind two particular dangers that provisions like sections 7 and 8 of the Constitution raise. At para 65 of *Somare*, Injia DCJ drew a distinction between circumstances falling within section 226(c) of the Papua New Guinea Constitution and ordinary criminal activity. Sakora J in his concurring judgment in that case also sounded an important note of caution about the need for courts to be alert to attempts by governments to address problems arising from inadequate resourcing or lax enforcement of the ordinary criminal law by conferring exorbitant powers on the police and security forces. He said:

> "157 … Matters of administrative inefficiency or ineffectiveness, widespread lawlessness, financial mismanagement and abuse and corrupting of state powers are matters that can properly be dealt with under ordinary laws of the country. In my opinion, all those administrative and financial deficiencies and shortcomings that the NEC appeared

> to have relied on had and have their remedies in the various ordinary laws that were ignored or not enforced effectively and professionally, or indeed at all. And obviously over time these problems, these ills, naturally grew and multiplied.
>
> 158 The state does not need a state of emergency to attend to these administrative, financial and associated deficiencies and shortcomings. The state only needs to enforce existing laws, and effectively administer policies. Thus, the state does not need emergency powers to ensure goods and services are provided to the people that they are duty bound to provide to.
>
> 159 There was, therefore, no valid, legitimate, basis for invoking those extraordinary powers. This, in my opinion, constituted a breach of the Constitution, simply because there was a non-compliance with the requirements, which could properly be characterised as prerequisites for exercise of such powers."

95. Those comments were echoed recently by the Court of Appeal of Belize in *Grinage* where Marshalleck E Andrew J.A (Ag) stated that reliance on proclamations of states of emergency to fight crime "is reliance on bandages rather than cures to address an ailment" because the proclamations do not address the causes of crime: see paras 34 to 38.

96. The Board also endorses the comment of the Supreme Court of Jamaica in *Campbell* at para 94. They said that while they accepted that democratic rights may be limited or restricted in order to ensure public safety, and maintain public order, the restrictions should be temporary so that affected rights are impaired as least as is reasonably possible. They highlighted the dangers that such measures pose particularly to unpopular minority groups:

> "It is unquestionable that the constitutional rights of members of certain marginalized communities will be disproportionately affected as there is increased policing of such communities. There is likely to be an erosion of public trust in government. There will be negative implications for social and economic stability."

(c) Did the Court of Appeal apply the right test?

97. Turning to the test that the Court of Appeal applied in the judgment under appeal before the Board, at para 35, Mendonça JA construed section 8(2)(c) as requiring:

> "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."

98. He recognised at para 88 that outside the public emergency context, the phrase "a threat to public order" might include relatively trivial matters such as littering or traffic offences. But it is clear that the Court of Appeal concluded that that is not what is meant here.

99. The Board considers that that formulation in para 35 must be read as part of the judgment as a whole which referred to the earlier case law. It aptly encapsulated the test as applicable to the present set of facts. The Board therefore rejects the submission that the Court of Appeal applied the wrong test in considering the validity of the Proclamation.

(d) Do the facts before the Board establish that a state of public emergency existed?

100. The Board's conclusion that the Court of Appeal applied the correct test is not, however, the end of the matter. It is for the Board itself to determine whether the circumstances met the test in section 8(2)(c), having regard to the evidence before the courts below. Where the Board is called upon to determine the validity of measures that are alleged to infringe important constitutional rights, the Board has carried out the evaluative assessment of the proportionality of those measures for itself, rather than limiting its appellate role to identifying any error in the approach taken by the courts below: see for example, *Suraj* at paras 98 to 101, *Attorney General v Jamaican Bar Association* [2023] UKPC 6, para 96 and *Commissioner of Prisons v Seepersad* [2021] UKPC 13, [2021] 1 WLR 4315, para 62.

101. The Appellants argued that the courts below erred in relying on the evidence of Brigadier Sandy rather than focusing solely on the contents of the President's Proclamation and the statement delivered to the Speaker setting out the specific grounds on which the decision was based. They argued that the affidavit evidence of the Minister as to the seriousness of the situation had not formed part of the Proclamation of the public emergency or the statement to the House of Representatives.

102. The Board rejects this criticism of the courts below. The task of the courts, and now the Board, is not merely to determine whether the President could reasonably have concluded at the time that a public emergency existed but to determine whether it did in fact exist. The Attorney was right in these proceedings to provide as full a picture as possible of the situation that faced the Government in August 2011.

103. The Board therefore agrees with the Supreme Court in *Somare* which criticised the respondent in that case for failing to put evidence before the Court as to why the respondent had concluded that the state of emergency existed. Injia DCJ noted at para 30 of his judgment that the onus was on the NEC to prove that the situation came within the definition of emergency imposed by the Constitution. There had been no evidence led in those proceedings about the circumstances that were said to constitute the emergency; the respondent relied only on the statement made to Parliament. The Deputy Chief Justice said at para 32:

> "What is required is evidence of the circumstances, not the explanations to the Parliament or conclusions by others of the situation. It is for this court to determine whether those circumstances amount to an 'emergency'. What is explained in the national Parliament is for the purpose of debate and political vote on the floor of the Parliament. Unfortunately, counsel for the respondents decided not to call or introduce any affidavits in this regard. During the directions hearing, counsel discussed at length the nature of the evidence that is required. Every opportunity was given to lead the appropriate evidence. We raised the complete lack of evidence during argument and no steps were taken by counsel for the respondents to introduce any evidence. They sought to rely on the debates in the national Parliament to prove their case."

104. The Board has considered the evidence provided by the following witnesses on behalf of the Attorney General:

a. Brigadier Sandy, who was Minister of National Security of Trinidad and Tobago from 28 May 2010 to June 2012. He swore affidavits in the *Pitilal* proceedings (dated 3 June 2016), the *Elie* proceedings (dated 29 February 2016) and the *Mohammed* proceedings (dated 3 June 2016). As the trial judge and the Court of Appeal set out, his evidence described the senseless and brutal killings that occurred following the drug seizures at Piarco International Airport on 16 August 2011, the discussions that took place within Government and the conclusion of the Cabinet that the consequences of doing nothing were too grave not to act on the intelligence received. He also describes being informed on 11

November 2011 by the then Commissioner of Police about the plot to assassinate the then Prime Minister and various former Ministers.

b. Mervyn Richardson, the Deputy Commissioner of Police in November 2011, swore affidavits in the *Pitilal* proceedings (dated 31 May 2016), in the *Elie* proceedings (dated 29 February 2016) and in the *Mohammed* proceedings (dated 3 June 2016). He deposed to details of the conference he was attending in Port of Spain in early November when he received a report that a group of about 16 men, including the three appellants, were conspiring to assassinate the Prime Minister on 24 November. He describes setting up an investigative team to determine the veracity of the report, the raids that were carried out across the country to arrest the various men and the detention authorisations he signed.

c. Ann Marie Alleyne-Daly, Assistant Commissioner of the Special Branch, the lead law enforcement agency with responsibility for intelligence gathering and the internal security of the State. She swore affidavits in the *Pitilal* proceedings (dated 31 May 2016), the *Elie* proceedings (dated 2 October 2015) and the *Mohammed* proceedings (dated 24 May 2016). She describes receiving a report from two more junior officers (who also gave affidavit evidence in the proceedings) about a conspiracy to assassinate the Prime Minister. She describes her discussions with DCP Richardson and the investigations that followed.

105. The Board has already explained that the clear thrust of the case law is that the courts must give considerable weight to the assessment of the executive and senior members of the security and police services who are tasked with gathering and assessing threats. See for example *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153: per Lord Hoffmann at paras 50 – 58. Lord Hoffmann described the decision at issue there, namely whether the continued presence of Mr Rehman in the UK was not conducive to the public good, as a decision entrusted to the Home Secretary who had the advantage of a wide range of advice from people with day-to-day involvement in security matters which even a specialist court, the Special Immigration Appeals Commission, could not match. Further, the question at issue did not involve a yes or no answer but an evaluation of risk. The need for appellate restraint therefore flowed not from any limit on jurisdiction but "from a common-sense recognition of the nature of the issue and the differences in the decision-making processes and responsibilities of the Home Secretary and the Commission". The same considerations apply to the present appeals. Brigadier Sandy says in his affidavits that before he made the decision to recommend the declaration of the state of emergency, he gave the matter "serious and tremendous thought and consideration". He states further that he was and is convinced that by declaring the state of emergency the Government prevented a crisis of unprecedented proportions.

106. The Board is also keenly aware of the fact that the judges in the courts below who unanimously upheld the validity of the 2011 Proclamation themselves lived through the

days leading up to the Proclamation and experienced the horror and fear that must have affected everyone living in Trinidad & Tobago as described in the evidence. Although the determination of the validity of the Proclamation is ultimately a matter for the Board's assessment, the Board will be slow to arrive at a different view from that of the local court that has applied the correct test and set out so fully its assessment of the evidence.

107. The appellants complained particularly about the mismatch between the statement of the President of 23 August 2011 (read out to the House of Representatives by Brigadier Sandy on 2 September 2011) as to the murders "disproportionately occurring in certain geographic areas where these gangs are based" and the fact that the declaration of the public emergency and the 2011 Regulations applied across the whole country. The Board rejects that criticism for the reasons given by Mendonça JA at para 42 of his judgment. It may be that if the public emergency arises for example from a flood or earthquake followed by widespread looting and lawlessness affecting one part of the country leaving other parts unaffected, it would be appropriate to limit the geographic scope of regulations. But there is no suggestion here that the gangs involved in this violence respected any particular boundary or that there was no possibility of the violence spreading across the country if it were not swiftly checked.

108. The Board therefore upholds the decision of the Court of Appeal that the Proclamation of the public emergency was justified on the facts and therefore constitutional and valid.

7. The validity of the Regulations

(a) The requirement for the President to have "due regard" to the circumstances

109. In terms of section 7(1), the requirement is for the President to have "due regard ... to the circumstances of any situation likely to arise or exist during" any period of public emergency. On behalf of the appellants, Mr Strang submitted that this requirement would not be satisfied unless regulations were "carefully tailored" to those That was plain because the Regulations were just a copy of the Regulations made at the time of the 1990 emergency, notwithstanding that the circumstances of that emergency were very different - an attempted coup d'etat as described in the judgment of the Board in *Attorney-General of Trinidad and Tobago v Phillips* [1995] 1 AC 396 at pp 406 – 408. The clearest indication of the lack of due regard was, the appellants submitted, the fact that the Regulations included provisions - for example restrictions on the right of assembly - for which there had been no evident need in the different circumstances of the 2011 emergency. There was no evidence that the President or the Government assessed each measure derogating from fundamental rights. It should be inferred from the fact that the Regulations came "off the shelf" that they had not.

110. In the Board's view the requirement for the President to have "due regard" to the circumstances is not an onerous threshold test. It does not require a careful tailoring of the sort suggested. Rather, it directs that in making the Regulations the President should have appropriate or proper regard to the circumstances of any situation likely to arise or exist during the period of the emergency. If those circumstances were such that it could reasonably be concluded that the provisions concerned might be needed, the due regard requirement was met. As discussed in the previous section, it is in the nature of a public emergency that it arises suddenly and often unexpectedly and that measures must be adopted and enforced immediately if they are to be effective in addressing the dire situation that has arisen. This is also clear from the three day deadline set by section 9 for the President to deliver his statement to the Speaker and from section 12 providing for notice of any Proclamation or any regulations made under section 7 to be published by being affixed to public buildings if it is impracticable to publish them in the Gazette before they need to come into force.

111. Had the provisions restricting public assembly been in issue in these appeals the Board might have needed to consider whether the "due regard" requirement was met in relation to them: but even if those provisions could be challenged, that would not have been fatal to the validity of the remainder of the regulations. If necessary, as the Court of Appeal held at para 63, the invalid provisions could have been severed. The Board's focus requires to be on the particular provisions which are in issue. In relation to those provisions, section 7(2) and section 11 of the Constitution expressly anticipate that regulations made under section 7 may empower the lawful detention of people and it is implicit that those powers may extend beyond the powers available to the law enforcement authorities under the general law. The Board is satisfied that in the light of the nature of the public emergency that arose in August 2011 the provisions in the Regulations which authorise arrest and detention were made with due regard to the circumstances of the situation which had arisen or was likely to arise or exist during the period of the emergency.

112. The Board does not overlook the fact that the Regulations made in 2011 were copied from the 1990 Regulations. Like the courts below, the Board does not find it surprising, given the urgency of the emergency, that the Government and the President should look to previous regulations for assistance rather than seek to re-invent the wheel. Of course, consideration ought to have been given to whether all the earlier provisions were apt in the circumstances of the 2011 emergency. However, the Board does not accept that it would be correct to infer from the fact that previous regulations were reproduced without revision that the President failed to have due regard to the circumstance of the emergency when making the provisions which affected the Appellants and which form the basis of their challenge. The Board agrees with what Dean-Armorer J said at para 120 of her judgment in the *Elie* case:

> "120. My view was not changed by the consideration that the 2011 Regulations were substantially the same as those which

> had been published in 1970 and 1990. The evidence before the Court suggests the memory of the 1990 events informed the decision of Cabinet to act cautiously and to declare a state of emergency. While it is clear that the cause of the crisis of 1970 and 1990 were different from that which underlay the state of emergency in 2011, the result of widespread and serious threat to public safety was the same."

113. The Board also agrees with the Court of Appeal's assessment at para 62 of Mendonça JA's judgment that the Regulations were intended to deal not only with the dangers existing at the time of the Proclamation but also any situation likely to arise or exist during the period of public emergency. Again, significant weight must be given to the executive's assessment of that risk.

114. It is noteworthy that the submission about "due regard" has been developed since the hearings at first instance. The declarations which each of the appellants sought focussed on section 7(3) - that regulations 16(1), 16(3), 17 and the Second Schedule, and regulation 19 were not reasonably justifiable. There is no suggestion in the first-instance judgments that any submission based on section 7(1) was made. Such a submission appears to have been made for the first time to the Court of Appeal (para 57 of the judgment). The appellants' criticism that the evidence adduced below did not explain the consideration which was given by the Government and the President to the need for each of the Regulations must be viewed in that context.

115. The Board is not satisfied that the Court of Appeal erred in any material respect on this matter and rejects this ground of appeal.

(b) Were the regulations which are challenged reasonably justifiable?

116. In *Suraj* in 2022 the appellants maintained that regulations made in 2020 under a Public Health Ordinance dating back to 1940 were in breach of their fundamental rights contrary to section 4 of the Constitution of Trinidad and Tobago. The regulations were made to combat the Covid pandemic and imposed restrictions on gatherings of more than five people and on religious gatherings. In response to a submission that regulations abrogating fundamental rights could only be made under section 7 or section 13, the Board considered the relationship between the proportionality test that must be applied in order to determine whether the rights protected by sections 4 and 5 had actually been infringed and the test of reasonable justifiability in section 7(3) and section 13(1) which needed to be satisfied only if the regulations adopted in fact did indeed infringe the rights conferred by sections 4 and 5:

> "86. … It is clear that the test under those provisos must be different from any proportionality test inherent in the rights themselves, since the former only comes into operation if a law passed under section 7 or section 13 is inconsistent with sections 4 and 5 … The tests in the respective provisos to section 7(3) and section 13(1) must be more generous to the government than the proportionality test inherent in the rights themselves, since the object of section 7 and section 13 is to save legislation from invalidity where it is otherwise in breach of the rights."

117. The Board explained in *Suraj* that the test of proportionality appropriate under sections 7(3) and 13(1) involves a lesser intensity of review by the courts and a wider margin of appreciation or discretion for the state than the proportionality test which is inherent in sections 4 and 5; and that the extent of the involvement of the democratic institutions of the state is an important factor. While it is for the court to make the ultimate judgment whether a measure was reasonably justifiable, it ought to give especially great weight to the democratic judgment which has been made as to the importance of the public interest. The supervision by the courts of measures adopted under sections 7(3) and 13(1) through the application of the reasonably justifiable test is in the nature of a long-stop check against the abuse of power. The onus is cast upon the person who contests the compatibility of the measure in question with the Constitution to show that it is not reasonably justifiable. In relation to section 7(3), the Board in *Suraj* concluded:

> "96 … The power under section 7 to legislate by regulation or primary legislation in a manner inconsistent with sections 4 and 5 arises only in a period of public emergency. In a public emergency, the public interest in taking measures to address the emergency will be especially strong, as is clear from the circumstances defined in section 8 in which the President may proclaim that an emergency exists. It is also clear from the fact that section 7(2) permits legislation made pursuant to section 7 to override even the rights which are made absolute under section 5(2)(a), (c) and (h), by providing for the detention of persons, subject to the procedural protection in section 11, if that is reasonably justifiable for the purpose stipulated in section 7(3). 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 Proclamation. Therefore, again, the democratic credentials of any measure taken pursuant to such a Proclamation are strong. The constitutional control under the proviso in section 7(3) is also tighter 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.'"

118. The appellants submit that regulations 16(1), 16(3), regulation 17 and the Second Schedule, and regulation 19 were not reasonably justifiable for the purpose of dealing with the emergency situation because they derogated excessively from the appellants' fundamental rights. They submit that there was no evidence explaining why it was in relation to each of those provisions that the Government or the President had considered that they were necessary. Such safeguards as there were, were inadequate. In light of that, and of the fact that the Regulations were a copy of the 1990 Regulations, the Board ought to infer that the Government and the President had not properly considered whether they were necessary. The power of arrest without warrant in regulation 16(1) required only that the police officer genuinely, as opposed to reasonably, suspect the person arrested of falling within the category of persons described, which category was broad. Regulation 16(3) gave undue power to a senior police officer to fix a period of detention of up to 7 days. The power of the Minister to detain, possibly indefinitely, was an extraordinary derogation. The same went for the suspension of bail and habeas corpus. The availability of review of executive detention by a tribunal was an inadequate safeguard because the Minister was not obliged to accept the tribunal's recommendation. While it was accepted that decisions not to follow a recommendation and decisions made under regulation 16(3) could be judicially reviewed, that process would not be likely to be as speedy as an application for bail or habeas corpus.

119. The Board is not persuaded by these submissions.

120. There was ample evidence as described earlier of the initial state of emergency created by the sudden and extreme outbreak of widespread, brutal violence in August 2011. The Board accepts, as the appellants submit, that it would have been helpful for the evidence adduced by the Respondent to have addressed more directly the President's and the Cabinet's thinking as to why the powers of detention were necessary. But the measures in issue were clearly the sorts of measures which are needed to deal with that kind of emergency.

121. The President, as an elected official, was ultimately accountable to the electorate for his actions. Further, sections 9 and 10 gave Parliament a close supervisory role regarding the Proclamation. The emergency could have been ended at any time by a simple majority vote of the House of Representatives. The democratic credentials of all of the measures taken pursuant to the Proclamation were strong. This is a case where especially great weight should be afforded to the democratic judgment which was made as to the importance of the public interest, and as to where the balance between that interest and the protection of the fundamental rights of individuals should be struck.

122. In addition, a significant factor in the present appeals, which did not arise in *Suraj*, is that the police and security services have access to information and intelligence that is not and sometimes cannot be made public or be included in statements made to the House of Representatives. The "relative institutional competence", to adopt a phrase used by Lord Bingham of Cornhill in *A v SSHD* (para 29), in gathering and assessing that material certainly lies with the Government and the law enforcement agencies rather than with the courts.

123. The challenge to regulation 16 is the most straight-forward of the challenges to address. In the Board's view, in the circumstances of the emergency, regulation 16 was well within the margin of appreciation which the Board should afford to the President's judgment as to what was required and as to where the balance should be struck between the public interest and the fundamental rights of individuals. Regulation 16 did not authorise arbitrary arrest or detention. There were safeguards. The arresting officer had to have a genuine suspicion. Detention had to be for the purposes of inquiries. In order to be detained for longer than 24 hours the authority of a magistrate or senior police officer had to be obtained. That authority could not be granted unless the magistrate or senior officer was satisfied that inquiries could not be completed within 24 hours and that the further period was for the completion of inquiries. That further period could not exceed 7 days.

124. Preventative detention and the suspension of bail and habeas corpus are undoubtedly very significant derogations from the enshrined rights. Nevertheless, here too, proper weight must be given to the democratic judgment which was made as to the importance of the public interest and as to where the balance between that interest and the rights of individuals should be struck; and due account must be taken of safeguards.

125. Dealing first with preventative detention, it is clear from the judgments in the authorities cited earlier that the presence of safeguards to prevent the arbitrary use of power is an essential consideration in evaluating whether the abrogation of fundamental rights is reasonably justifiable. In *Douglas* the court described the tribunal that was established under the Jamaican constitution to hear reviews requested by detained persons, and in *Lawless* the European Court of Human Rights clearly placed weight on the fact that detainees could be released on giving an undertaking to abide in future by the anti-terrorist laws. The Board reminds itself at the outset that section 11 of the Constitution stipulates safeguards which must be put in place to prevent detention being arbitrary. It requires that a detained person may request that his case be reviewed by an independent and impartial tribunal but expressly states that, unless otherwise provided by law, the authority that ordered the detention "shall not be obliged to act in accordance with [the tribunal's] recommendations".

126. The requirements of section 11 are fully implemented in the Second Schedule. In terms of paragraph 2 the Minister had to be satisfied that a detention order was necessary

with a view to preventing the person concerned from acting in a manner prejudicial to public safety or public order or the defence of Trinidad and Tobago. An order had to state concisely the grounds for detention, and notice of the order had to be published in the Gazette within 7 days of its coming into force. Paragraph 4 made provision for review of a detained person's case by an independent and impartial tribunal established by law and presided over by an Attorney-at-Law appointed by the Chief Justice (as required by section 11(1)). While, in terms of paragraph 9, whether a person was released or continued to be detained was a matter for the Minister's discretion whatever the findings of the tribunal might be (which provision reflects the terms of section 11(2) of the Constitution), an unreasonable decision by the Minister would be susceptible to challenge by judicial review. The constitutional right of a person who has been arrested or detained to retain and instruct without delay a legal adviser of his own choice and to hold communication with him was a further safeguard against preventative detention being abused.

127. Considerations relevant to the proportionality of the suspension of bail and habeas corpus for persons made the subject of preventative detention include the right to a legal adviser and the availability of judicial review. So far as detention under regulation 16 is concerned, a further factor bearing upon the proportionality of the suspension of bail and habeas corpus is that the period of deprivation of liberty authorised was relatively short.

128. In the case of both preventative detention and the suspension of bail and habeas corpus, the democratic credentials of the measures were strong. Great weight should be afforded to the judgment which was made as to where the public interest lay and where the balance between it and the rights of individuals should be struck. If Parliament had concerns about the measures, it could have raised them at any stage during the emergency (and indeed it could have voted to end the emergency). A detained person had the right to retain and instruct a legal adviser and communicate with him, and he could request a review of his case by an independent and impartial tribunal.

129. In the whole circumstances, the Board concludes that, adopting the words of section 7(3), the appellants have not shown that any of the provisions challenged were not reasonably justifiable for the purpose of dealing with the emergency situation. In the Board's view the Court of Appeal's decision on this aspect of the case was correct.

8. Compensation for the three Appellants

130. The Board has concluded, however, that the Court of Appeal was wrong to overturn the judge's award of $50,000 compensation to each of Sergeant Elie and Mr Pitilal in respect of the breach of their right to appoint and consult a legal adviser under section 5(2)(c)(ii). Mendonça JA referred at para 127 of his judgment to a submission by the Attorney General that there was no right to have an attorney present at the interview with Superintendent Lezama. That submission was wisely not pursued by Mr Knox before

the Board. It appears from the evidence (see paras 22 and 27 above) that Superintendent Lezama's view was that the more serious the allegations were against the two appellants, the less right they had to consult an attorney or have one present to assist and advise them at the interview. That certainly does not represent the law; nor is the confidentiality of the investigation a justification for denying a detained person the right to consult an attorney.

131. The Board has not heard argument on the suggestion by Bereaux JA at para 46(ii) of *Clement v Attorney General of Trinidad and Tobago,* Civil Appeal No 95 of 2010 that it is incumbent on a claimant to show that he has suffered "detriment" by being deprived of legal advice before he is entitled to compensation for the breach of this right (eg by his detention being prolonged or through his making an incriminating statement). However, the Board is mindful that imposing such a requirement might deprive the right of much of its efficacy since, as with almost all process rights, it is often impossible to know what would have happened had the right not been denied. In any case, the Board does not consider that the two cases cited by Mendonça JA in para 127 are relevant to the current appeals. In *Clement* the Court of Appeal was primarily considering whether an award of exemplary damages should be made (in addition to a substantial award of general damages of $160,000). In that case the claimant had been detained in prison conditions that amounted to degrading and inhuman treatment. He was held in a police cell between his arrest on Friday 23 October 2004 and Monday 25 October 2004 when he was taken before a magistrate. He was granted bail but it appears he was unable to fulfil the bail conditions and was held unlawfully for 150 hours before he was released. The failure to advise him of his right to retain and consult a lawyer appears to have been treated as an instance of oppressive, arbitrary and unconstitutional action by the police and hence as indicating that an award of exemplary damages should be made: see para 33 onwards of the judgment of Jamadar JA. On its facts, *Honore v Bernard,* an appeal before the Trinidad and Tobago Court of Appeal, was a very different case. Mr Honore was not advised of his right to consult a lawyer, but he did in fact consult one before he was interviewed.

132. In the passage from *Clement* cited by Mendonça JA in para 128 of his judgment in the instant appeal, Bereaux JA referred to his earlier judgment in *Zaid Mohammed v the Attorney General* Civil Appeal #164 of 2006. That is said to be authority for the proposition that not every breach of the right to consult an attorney will result in relief being granted to an accused. However, in that case, the trial judge had held that there had been no denial of the right to consult; the detainee's legal adviser had been affronted at being asked to wait a short while before seeing his client and had left the police station. In his judgment in *Zaid Mohammed* Bereaux JA stressed that he was "ever mindful of the constitutional importance" of the right to an attorney and the need for vigilance in its application. He upheld the judge's conclusion that in all the circumstances of the case it would not have been appropriate to make an award of compensation even if, contrary to the judge's factual finding, there had been a denial of the right. The Board does not therefore accept that that case supports the proposition that the detainee must prove some specific detriment such as an involuntary confession before an award of compensation can and should be made.

133. The circumstances here are circumstances in which, in line with the Regulations as interpreted by the courts below:

a. a person detained under the Second Schedule does not need to be brought before a magistrate following arrest promptly or at all;

b. there is no prospect of bail being granted or of an application for habeas corpus being made;

c. the person has a right to challenge by way of judicial review the decisions to arrest him or to continue his detention under the Second Schedule and therefore needs advice on whether there are grounds in his case for such a challenge.

It is essential in these circumstances that the detained person is informed as soon as possible of his right to consult a lawyer, that he is able to consult privately with that lawyer and that his lawyer is present, if possible given the exigencies of the situation, at any interview with the detainee.

134. The appellants were never charged with any offence and were only released when the period of public emergency came to an end. They say that they were never provided with any evidence to justify their detention or questioned about the allegations which are said to have provided the justification for their initial arrest and the Minister's detention order. The appellants might well have greatly benefited from the advice and support of an attorney prepared to insist on greater detail being provided to them of the allegations and the basis for their detention and to be able to liaise with their family and friends in the outside world to help establish their innocence.

135. This breach of Sergeant Elie's and Mr Pitilal's constitutional rights was a separate issue from the lawfulness or otherwise of the initial arrest or subsequent detention. The fact that the two appellants had been awarded compensation for the seven days of their initial detention is not, in the Board's judgment, a reason for denying them compensation for this breach. The Court of Appeal should also have considered whether the award of $50,000 was fully justified even if no "adverse effects" had been shown.

136. The Board also agrees with the appellants' submissions in their written case that the Court of Appeal erred in making an order which not only set aside the award of compensation but also set aside Dean-Armorer J's declaration that they had suffered a contravention of their right to retain and instruct without delay a legal adviser of their own choice and to hold communication with him: see para 4 of the Order of the Court of Appeal in the *Pitilal* proceedings and para 3 of the order in the *Elie* proceedings. There

was no basis in the judgment to set aside the declaration that there had been an infringement of the right.

137. The Board therefore sets aside the Court of Appeal's decision to allow the Attorney's appeal in this regard and reinstates the declarations of contravention made by Dean-Armorer J and the awards to Sergeant Elie and Mr Pitilal of $50,000 each for breach of this important constitutional protection.

9. Conclusion

138. The Board therefore concludes that:

a. The Court of Appeal applied the correct test when considering whether a public emergency existed when the President made the Proclamation in August 2011 under section 8(2)(c) of the Constitution and correctly concluded that the test was satisfied. The appeal is therefore dismissed in so far as it challenges the validity of the Proclamation of the state of emergency.

b. The Board dismisses the appeal in so far as it challenges the validity of the Regulations. The Board upholds the decision of the Court of Appeal that:

(a) the President had due regard, when making the provisions under which the appellants were arrested and detained, to the circumstances referred to in section 7(1); and

(b) the appellants have not shown that the provisions under which the appellants were arrested and detained were not reasonably justifiable for the purpose of dealing with the public emergency as required by section 7(3).

c. The appeals are allowed in so far as the Court of Appeal erred in setting aside the award of compensation of $50,000 each to Sergeant Elie and Mr Pitilal in respect of the breaches of their rights to consult an attorney under section 5(2)(c)(ii) of the Constitution.