



**tribunal – Claimant subsequently detained after being released – Claimant further detained whilst proceedings are on-going before the court – Whether the Claimant is entitled to declarations and damages**

**Whether claims for each period of detention and the condition of the detention should be specifically pleaded**

**Damages - Whether the Claimant is entitled to an award of compensatory damages – Whether the Claimant is entitled to an award of aggravated damages – Whether the Claimant is entitled to an award of vindictory damages – Whether the Claimant should be awarded special damages**

**C. STAMP J, A. NEMBARD J AND T. CARR, J**

[1] During the years 2015-2017, the number of shootings and murders in the parish of Saint James drastically escalated, so that, by 2017, the murder rate for the parish was the highest ever recorded for a police division in Jamaica for a single calendar year. It was three (3) times the national average. The security forces sought new and enhanced strategies to contain and suppress this escalating criminal activity and gang violence. On 18 January 2018, His Excellency, the Governor General of Jamaica, issued a proclamation under section 20(2) of the Constitution of Jamaica by virtue of which he declared that a state of public emergency existed in Saint James and enacted the Emergency Powers Regulations 2018.

[2] The establishment of a period of public emergency has far reaching implications for the rights and freedoms of persons living in, working in or entering the designated areas. Numerous persons including the claimant, Mr Roshaine Clarke, have been detained in these areas by the security forces in the exercise of powers conferred under the state of public emergency. Mr Clarke was detained over several months during which he was never charged for any offence. He asserts that his detention and treatment by the security forces were in contravention of his fundamental rights guaranteed by the Constitution of Jamaica. He further contends

that the Regulations under which he was detained are, in several instances, in violation of the Constitution.

- [3] This case raises issues of paramount national importance where the fundamental rights and freedoms of individuals in Jamaica intersect with the measures adopted by the State to protect the society in general.

### **INTRODUCTION**

- [4] By way of a Fixed Date Claim Form filed on 14 January 2019, Mr Clarke seeks the following relief: -

1. Declarations that the following provisions of the Emergency Powers Regulations 2018 abrogates, abridges or infringes guaranteed constitutional right(s) –
  - a. Section 30 of the Regulations breach –
    - i. the right to liberty, acknowledged by section 13(3)(a) and guaranteed by section 13(2) of the Constitution;
    - ii. the right at the time of his arrest or detention or as soon as is reasonably practicable, to be informed, in a language which he understands, of the reasons for his arrest or detention, acknowledged by section 14(3)(b) and guaranteed by section 13(2) of the Constitution;
    - iii. the right to be brought forthwith or as soon as is reasonably practicable before an officer authorized by law or a court acknowledged by section 14(3)(a)(1) and guaranteed by section 13(2) of the Constitution;
    - iv. the right to equitable and humane treatment by any public authority in the exercise of any function, acknowledged

by section 13(3)(h) and guaranteed by section 13(2) of the Constitution;

b. Sections 30(5) and 38 respectively breach section 19(1) of the Constitution;

c. Sections 22 and 32 of the Regulations breach –

i. the right to liberty, acknowledged by section 13(3)(a) and guaranteed by section 13(2) of the Constitution;

ii. the right to be treated humanely and with respect for the inherent dignity of the person acknowledged by section 14(5) of the Constitution and guaranteed by section 13(2) of the Constitution;

2. A Declaration that neither the manner nor the extent of the abrogation, abridgement or infringement of the aforementioned constitutional rights is demonstrably or alternatively, reasonably justified where the claimant was detained on 14 February 2018 and not given a hearing until 11 June 2018 and with no charges being proffered against him and no meritorious reason(s) given for his continued detention and he was thereafter released on 27 September 2018;

3. A Declaration that section 33 of the Emergency Powers Regulation grants the Minister of National Security extraordinary powers insofar as the Minister can without any restrictions determine the place, conditions and duration of the claimant's detention. That such extraordinary powers constitute a breach of –

i. the right to liberty, acknowledged by section 13(3)(a) and guaranteed by section 13(2) of the Constitution;

4. A Declaration that neither the manner nor the extent of the abrogation, abridgement nor infringement of the aforementioned constitutional rights is demonstrably or alternatively, reasonably justified where the Government sought and obtained extensions for the State of Public Emergency in the parish of Saint James for respective periods ending 2 May 2018, 2 August 2018, 1 November 2018 and 31 January 2019;
5. Damages for False Imprisonment and breaches of the claimant's constitutional rights, to include aggravated damages, exemplary damages and constitutional/vindictory damages;

### **THE GENESIS OF THE CLAIM**

- [5] On 18 January 2018, His Excellency, the Governor General of Jamaica issued a proclamation pursuant to section 20 of the Constitution that a state of public emergency existed in the parish of Saint James. Parliament subsequently by resolution extended the State of Emergency on several occasions by the maximum three (3) months permitted by Law.
- [6] His Excellency also issued Emergency Powers Regulations, 2018, pursuant to section 3 of the Emergency Powers Act ("the Regulations"). On each occasion that Parliament extended the State of Emergency in Saint James, it also extended the Regulations.
- [7] On 14 February 2018, the claimant, Mr Roshaine Clarke, was detained pursuant to the St. James State of Emergency. He was not given any reasons for his detention until sometime in May of that year, when he was given a copy of a Detention Order made on 20 April 2018, by the Minister of National Security ("the Minister"), pursuant to Regulations 33 and 38 of the Regulations.
- [8] Mr Clarke submitted an objection to his detention and the matter of his detention was heard by a Review Tribunal which, on 30 August 2018, directed that he be released. He was not released until 27 September 2018.

- [9]** On 14 January 2019, Mr Clarke initiated these proceedings. The Attorney General is named as the defendant as the representative of the Crown by virtue of the Crown Proceedings Act.
- [10]** On 15 July 2019, Mr Clarke was again detained by the police and released on 18 July 2019.
- [11]** On 30 November 2019, Mr Clarke was detained by the police for a third time and released on 3 December 2019.
- [12]** On 13 January 2020, Mr Clarke was detained for a fourth time by the police and was released on 15 February 2020.
- [13]** Mr Clarke avers that at all times he was detained in contravention of his Charter rights to liberty of the person. He also claims that the police did not give him any reason(s) for his detention for three (3) months after his initial detention and that this prevented him from being able to file an objection and put his case before a review tribunal. This, it is contended, is in breach of his rights under section 14(2) of the Charter to be informed as soon as is reasonably practicable of the reasons for his detention.
- [14]** It was further claimed that Mr Clarke was detained by the police for more than two (2) months before the Minister made the Detention Order, and that there is no evidence of compliance by the detaining authorities with Regulations 30(1), (2) or (3) of the Regulations. This, he asserts, is in breach of sections 13(3)(f), 13(3)(h) and 14 of the Charter.
- [15]** Mr Clarke also complained that he was not placed before a review tribunal for four (4) months after his initial detention and two weeks after he filed his objection. This, he claims, is a further breach of section 14(3) of the Charter which guarantees the right to an early hearing.

- [16] In addition, even after the Review Tribunal directed that he should be released, he remained in detention and was not released in accordance with those directions for almost one (1) month.
- [17] Mr Clarke further stated that on the second, third and fourth occasions when he was detained by the police he was never charged for any offence and on none of these occasions did the authorities comply with Regulations 30(1)(2) or (3) or 33.
- [18] Mr. Clarke also stated that he was kept in appalling conditions at the detention facility which adversely affected his health and claims that this constitutes a breach of his rights under sections 13(3)(h) and 13(3)(o) of the Charter to equitable and humane treatment by a public authority in the exercise of any function and to protection from inhumane or degrading treatment, respectively.

#### **CLAIMANT'S SUBMISSIONS**

- [19] The gist of the challenge to the constitutionality of the impugned Regulations was that they gave to government authorities powers under the state of emergency that were so broad or unfettered that they contravened or were likely to contravene the claimant's fundamental rights under the constitution and, further, the defendant on whom the burden of proof lay had provided no evidence that these breaches were proportional or reasonably justifiable for the purpose of dealing with the situation that existed. The Court was referred to the authority of ***Julian J Robinson v The Attorney General of Jamaica***<sup>1</sup> for guidance in relation to the test of constitutionality, the test of proportionality, and the burden of proof.
- [20] Mr Michael Hylton QC on behalf of Mr Clarke submitted that Regulation 22 breaches Mr Clarke's right to freedom of movement guaranteed by section 13(3)(f) of the Constitution. The Regulations allows the competent authority to make an order prohibiting someone from residing in or entering any area for as long as the

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<sup>1</sup> [2019] JMFC Full 04

competent authority chooses and the competent authority can do so once it is satisfied that it is desirable to do so on the basis of certain suspicions. The Regulation places no restrictions on the competent authority's powers and the extent and duration of a person's detention are entirely within the discretion of the competent authority. It was further submitted that the State has not led any evidence to establish that this breach was reasonably justifiable either at the time of the original declaration or at the times of the various extensions of the period of the State of Emergency.

- [21]** It was submitted that Regulation 30 breached Mr Clarke's constitutional rights in several respects. Regulation 30(1) allows any member of the Jamaica Defence Force, any constable, any member of any fire brigade or any person duly authorized to detain someone if there is reasonable ground for suspecting that that person has acted or is acting in a manner that is prejudicial to public safety. It was argued that this power, as conveyed by the Regulation, is unfettered and, as such, infringes the protected right of freedom and liberty under the Charter.
- [22]** It was submitted that Regulation 30(3) of the Regulations allows the police to detain a person for as long as a state of public emergency lasts. This, it is argued, breaches sections 13(3)(f) of the Charter, which provides for freedom of movement and section 14 of the Charter, which provides for liberty of the person.
- [23]** Regulation 30(4) of the Regulations permits the police to take a person's photograph and fingerprints and to preserve them after that person has been released from custody. This, it was contended, breaches section 13(3)(j) of the Charter, which provides for protection from search and privacy and in any case are contrary to sections 4A(1), 4B(1) and 4B(4) of the Finger Prints Act which provides that in all cases where a person's fingerprints or photograph have been taken, then, in the absence of a conviction, both must be destroyed unless there is an order of the court to the contrary.



- [24]** Regulation 30(5) of the Regulations allows the police to detain a person for up to three (3) months without charge and without taking him before a court. This, it is urged, is a breach of section 13(3)(f) of the Charter, which provides for freedom of movement and section 14(3) which provides that a person who is arrested or detained shall be entitled to be tried within a reasonable time and brought, as soon as is reasonably practicable, before an officer authorized by law or a court. It was argued that the Defendant has also failed to lead any evidence to establish that this breach is demonstrably justified in a free and democratic society or that it is even reasonably justifiable.
- [25]** Counsel for Mr Clarke also challenged Regulation 32 by virtue of which the Minister is empowered to make an order requiring a person to remain in his house. He asserts that this Regulation places no restrictions on the Minister's powers and that the duration of the restriction is entirely within the Minister's discretion. This, he argues, is a breach of sections 13(3)(f) and 14 of the Charter and that the State has not led any evidence at all to justify the breach.
- [26]** It was submitted that Regulation 33 of the Regulations allows the Minister to order the detention of anyone. The Regulation also permits the Minister, in his complete discretion, to impose restrictions on a person's right to associate or communicate with another. The Regulation places no restrictions on the Minister's powers so to do and that the place, conditions and duration of a person's detention or other restrictions are entirely within the Minister's discretion.
- [27]** The Claimant submits that Regulation 33 of the Regulations excludes the need for reasonableness, as contemplated by section 14(1) of the Charter and widens the bases for detention, beyond the commission of an offence. As with the other impugned Regulations, it was submitted that the State had not led any evidence to establish that this breach was reasonably justifiable.
- [28]** It was submitted that Regulation 38(9) allows the Minister to ignore the findings of the Review Tribunal when a person has been detained. This it is contended, is a

breach of section 13(11) of the Charter, which provides that a review tribunal established under the Charter may give directions to the authority which ordered the detention and that the authority 'shall act in accordance with those directions'. As with the other Regulations that are challenged it was submitted that the State had failed to lead any evidence to establish that this breach is reasonably justified.

### **DEFENDANT'S SUBMISSIONS**

- [29]** Ms Althea Jarrett QC (as she then was) drew the Court's attention to the affidavit evidence of Deputy Commissioner of Police (DCP) Clifford Blake which described the circumstances that obtained in Saint James that impelled the authorities to declare a state of public emergency in the area. The annual increases in both murders and shootings in the parish were so rapid that in 2017 the murder rate in Saint James was the highest ever aggregated murder rate recorded for any single police division in Jamaica's history.<sup>2</sup>
- [30]** Most of these crimes were committed by members of gangs with ongoing feuds with rival gangs over turf dominance and proceeds from lottery scamming activities. Approximately Thirty-Three (33) gangs operated in Montego Bay alone and these gangs are equipped with high powered rifles.<sup>3</sup> Intelligence obtained by the security forces suggests that there was a huge influx of illegal arms and ammunition within the parish.
- [31]** This situation was made particularly worse as it was increasingly difficult for the security forces to suppress or contain the gangs and their acts of criminality. This was attributed to limited human resources to properly investigate the rising incidents of crime and the lack of cooperation from eyewitnesses, as gang members had developed a reputation for murdering anyone who dared to present

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<sup>2</sup> See – Paragraphs 3-6 of the Affidavit of Clifford Blake in Answer to Affidavit in Support of Fixed Date Claim Form, which was filed on 27 May 2019

<sup>3</sup> See – Paragraphs 8-10 of the Affidavit of Clifford Blake in Answer to Affidavit in Support of Fixed Date Claim Form, which was filed on 27 May 2019

themselves as potential witnesses in any case against them.<sup>4</sup> This tumultuous and dire situation formed the background against which the proclamation was made declaring a state of public emergency in Saint James in January 2018.

[32] Ms Jarrett QC submitted that the Constitution of Jamaica recognizes that emergency conditions will necessitate extraordinary measures and that His Excellency is empowered by the Emergency Powers Act to make the Regulations that are the subject matter of the Claim.

[33] Ms Jarrett QC accepted that the test of constitutionality was as set out in the authority of *Julian J Robinson*.<sup>5</sup>

[34] It was submitted that sections 13(2) and 13(9) of the Charter provide circumstances in which an interference with Charter rights will not be regarded as breaches of the Charter. Section 13(9) of the Charter provides that the rights of freedom of movement and liberty may be interfered with, to the extent that the interference is reasonably justifiable, for the purpose of dealing with the exigencies of public emergencies or public disasters.

[35] It was argued that a true interpretation of the right to liberty created by section 13(3)(a) and section 14 of the Charter, is a deprivation of liberty and not merely a restriction on liberty. She submitted that the right to liberty created in both section 13(3)(a) and section 14 of the Charter should be interpreted as being coterminous and therefore the exceptions that apply to section 14 should equally apply to section 13(3)(a). To this end, she relies on the authority of *Guzzardi v Italy*,<sup>6</sup> where the European Court of Human Rights applied a similar interpretation to the right to liberty created by paragraph 1 of Article 5 of the European Convention on Human Rights. She further contended that the court found that the right contemplated the

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<sup>4</sup> See – Paragraph 12 of the Affidavit of Clifford Blake in Answer to Affidavit in Support of Fixed Date Claim Form, which was filed on 27 May 2019

<sup>5</sup> *supra*

<sup>6</sup> Application no 7367/76 [1980] ECHR 7367/76

physical liberty of the person and is concerned with the deprivation of liberty and not a mere restriction on liberty.

[36] Ms Jarrett QC asserted further that Regulation 30 of the Regulations does not contravene the right to liberty under sections 13(3)(a) and 14(1) of the Charter. She contends that the issue of whether the Regulation contravenes the right to liberty must be considered in the context of section 13(9) of the Charter, having regard to the proclamation of a state of emergency. The objectives of the state of emergency were to reduce lawlessness, to disrupt criminal activities, and the criminal's means and opportunities, to increase weapon recovery and to leverage information and intelligence from other agencies, task forces and departments.<sup>7</sup> This, she contended is indisputably a legitimate aim. To buttress this assertion she referred the Court to the authority of ***Nadine Rodriguez v (1) Minister of Housing of the Government (2) The Housing Allocation Committee***<sup>8</sup>

[37] It was further submitted on behalf of the Defendant that Regulation 30 of the Regulations is not disproportionate in the context of the existing circumstances. The enactors of the Regulations were satisfied that, based on the extensive scale of criminal activity that endangered public safety in the parish, the detention of persons up to the end of the period of the public emergency was reasonable. This allowed the police to make the necessary enquiries and to conduct the depth of investigations required.

[38] It was submitted that Regulation 32 of the Regulations allows for the restriction of a person's freedom of movement and does not involve the deprivation of a person's liberty. This it was argued does not contravene or interfere with the right to liberty.

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<sup>7</sup> See – Paragraph 14 of the Affidavit of Clifford Blake in Answer to Affidavit in Support of Fixed Date Claim Form, which was filed on 27 May 2019

<sup>8</sup> [2009] UKPC 52

- [39] Regarding Regulation 30 Ms Jarrett QC submitted that it does not stipulate or imply that a detainee should be treated in an uncivilised, humiliating, debasing or otherwise inhumane way during the period of detention. Nor do Regulations 22 and 32 breach the right to be treated humanely and with respect. The Court was referred to ***Sean W. Harvey v Board of Management of Moneague College, Ministry of Education, Youth and Information and Attorney General of Jamaica***,<sup>9</sup> where Sykes J (as he then was) indicated that the claimant had to demonstrate that he has been treated differently from some other similarly circumstanced person, in order to establish that the treatment was inequitable and inhumane.<sup>10</sup>
- [40] It was further submitted that the courts have recognized that, where the difference in treatment is created by statutory provisions themselves, then the right that is engaged is that to protection of the law and not that to equitable and humane treatment.<sup>11</sup>
- [41] It was argued that it is not in every case of the detention of an individual that he must be given the reasons for his arrest or detention at the time of that arrest or detention. The Charter allows for the reasons for the arrest or detention to be given as soon as is reasonably practicable. What is reasonably practicable will depend on the circumstances of each case.
- [42] The Regulation neither implicitly nor expressly precludes a detainee from being informed in a timely manner, nor is the right at section 14(2) of the Charter placed in abeyance. Nor does the Regulation prevent a detainee from being brought before an authorized officer as soon as is reasonably practicable. Regulation 30(2) of the Regulations provides that a person should not to be detained for a period

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<sup>9</sup> [2018] JMSC Full 3

<sup>10</sup> See – **Mohanlal Bhagwadeen v The Attorney General of Trinidad and Tobago** [2004] 64 WIR 402

<sup>11</sup> See – **The Public Service Appeal Board v Omar Maraj** [2010] UKPC 29

exceeding seven (7) days, except with the authority of an officer not below the rank of Deputy Superintendent of Police (DSP).

- [43]** In the instant case, in circumstances where the threat to public safety was so extensive so as to satisfy His Excellency of the need to declare a state of public emergency, the seven (7) day period stipulated by the Regulation would be considered 'reasonably practicable'.
- [44]** It was submitted that the requirement for a person to be brought before an officer authorized by law (section 14(3)(a)(i) of the Charter) is an alternative recourse to the person being brought before the court. Although the Charter does not define the term an 'officer authorized by law', counsel contended that that officer is separate and distinct from a court or a judicial officer. Had the framers of the Charter intended that the phrase be interpreted as meaning a judicial officer, then that would have been expressly stated. It was urged that the phrase 'officer authorized by law' must also be interpreted in a manner that is consistent with the provisions of the Constabulary Force Act.
- [45]** Ms Jarrett QC submitted that Mr Clarke's right to seek redress through the court under section 19(1) of the Constitution of Jamaica has not been contravened by virtue of Regulation 30(5) of the Regulations. She asserts that section 19(1) of the Constitution is concerned with an action for breach of a constitutional right and that the two jurisdictions are separate and independent of each other. It is submitted that the fact that Mr Clarke filed the instant claim in the Supreme Court relying on, inter alia, section 19 of the Constitution, is evidence that section 19(1) has not been breached. It is further submitted that Regulation 38 of the Regulations has not breached section 19(1) of the Constitution. Ms Jarrett QC maintained that the Review Tribunal is a creature of the Charter, under section 13(10) of the Charter and that the framers intended to review all the detentions made under a state of public emergency.

- [46]** Ms Jarrett QC submitted that Mr Clarke's right to seek legal redress, pursuant to section 19(1) of the Constitution of Jamaica, has not been contravened by Regulation 30(5) of the Regulations. The reason for this, she further submitted, is that Regulation 30(5) of the Regulations is concerned solely with the issue of the release of a person who has been detained for a period of three (3) months, without being charged. On the other hand, section 19(1) of the Constitution is concerned with an action for breach of a constitutional right.
- [47]** Ms Jarrett QC asserted that the two jurisdictions are separate and independent of each other and that, the very fact that Mr Clarke filed the instant claim in the Supreme Court, relying on, inter alia, section 19 of the Constitution, is evidence that section 19(1) of the Constitution has not been breached.
- [48]** Ms Jarrett QC repeated these submissions in relation to the complaint that is made in respect of Regulation 38 of the Regulations. She submitted further, that, the review tribunal is a creature of section 13(10) of the Charter and that the framers of the Charter intended that there be a review of all the detentions that are made under a state of public emergency.
- [49]** Counsel for the defendant maintained that the evidence of DCP Blake is sufficiently cogent to justify the extensions to the states of public emergency in Saint James. This evidence, she submitted, clearly establishes the factual basis on which His Excellency declared a state of public emergency. The subsequent extensions to the states of emergency were necessary, as the initial periods did not provide sufficient time for the objectives to be achieved.
- [50]** On the matter of the pleadings, Ms Jarrett QC contended that Mr Clarke's complaint about his fingerprints and photographs being taken in breach of his right to protection from search and to privacy were not pleaded in the fixed date claim form and no decision should be rendered on it as it was not properly before the court. Similarly, the Court ought properly to disregard the several allegations made in relation to the alleged encounters with the police after the state of emergency as

they fall outside of the period of the state of emergency covered by the claim and were not included in the fixed date claim form.

## **ISSUES**

**[51]** The central issues that arise for the Court's determination may be distilled in the following way: -

- (i) Whether Regulations 22, 30, 32, 33 and 38 of the Emergency Powers Regulations violate Sections 14 (2), 13 (3) (h) (j) (o), and 14 (3) of the Constitution;
- (ii) Whether the breaches are demonstrably justified in a free and democratic society, or, alternatively, reasonably justified;
- (iii) Whether any of Mr Clarke's Charter rights have been abrogated, abridged or infringed; and
- (iv) Whether Mr Clarke is entitled to declarations and damages as a result of any or all of those purported breaches.

## **THE LAW**

**[52]** Section 2 of the Jamaican Constitution ("The Constitution") provides as follows: -

*"Subject to the provisions of sections 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."*

**[53]** Section 49 of The Constitution confers the power to Parliament to alter provisions of The Constitution. In short, any legislation that is passed which contravenes any aspect of The Constitution is void and of no effect.

**[54]** The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 is to be read and construed as one with The Constitution of Jamaica.



The Charter repealed Chapter III of the Constitution and heralded a new dawn. It guaranteed certain fundamental rights and freedoms to citizens as follows: -

*“Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society (a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17;*

*and*

*(b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.”<sup>12</sup>*

**[55]** An individual who feels aggrieved by any provision in law which appears to breach any of the rights conferred by The Charter may seek redress by making an application to the Supreme Court.

**[56]** Section 19 of The Charter reads, in part, as follows: -

*“(1) If any person, alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to same matter which is lawfully available, that person may apply to the Supreme Court for redress.*

*(3) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.”*

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<sup>12</sup> See – Section 13 (2) (a) and (b)

[57] The recent decision of ***Julian J Robinson v The Attorney General***,<sup>13</sup> discussed the test to be applied when considering an application for redress under the Charter. Batts J opined: -

*“The test of constitutionality of legislation now involves two stages, namely;*

*A determination as to whether the law abrogates, abridges or infringes a guaranteed right; and*

*Secondly, if it does, is the abrogation, abridgment or infringement demonstrably justified in a free and democratic society.”*

### **THE BURDEN AND STANDARD OF PROOF**

[58] In determining the burden and standard of proof, the Court of Appeal judgment of ***The Jamaican Bar Association v The Attorney General and The General Legal Council***<sup>14</sup> is instructive. At paragraph 122, McDonald Bishop JA had the following to say: -

*“[122] The starting point...the Charter guarantees the rights and freedoms, which it seeks to protect and...they should not be abrogated, abridged or infringed, unless it can be demonstrated (not merely asserted) that such abrogation, abridgment, or infringement is justified in a free and democratic society. The state, therefore, has the burden to bring justification, upon proof by the appellant of abrogation, abridgment or infringement of a Charter right. This is a positive duty cast on the state to prove constitutionality.”*

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<sup>13</sup> [2019] JMFC Full 04, at paragraph 268

<sup>14</sup> [2020] JMCA Civ 37

**[59]** At paragraph 124, it was stated:

*“[124] ... That translates into both an evidential and legal burden cast on the state to establish constitutionality....”*

**[60]** The salient principles to be distilled from these cases, are applied to this case as follows:

a) Mr Clarke must establish on a balance of probabilities that his charter rights have been abrogated, abridged or infringed.

b) The State has the legal and evidential burden of proving that the infringement of Mr Clarke’s charter rights is demonstrably justified in a free and democratic society or reasonably justified.

**[61]** Where His Excellency has declared a state of emergency the Constitution provides for the restriction of certain rights by operation of law. A period of public emergency is defined as follows: -

*“... any period during which –*

- a) Jamaica is engaged in war;*
- b) There is in force a Proclamation by the Governor-General declaring that a state of public emergency exists; or*
- c) There is in force a resolution of each House of Parliament supported by the votes of a two thirds majority of all the members of each House declaring that democratic institutions in Jamaica are threatened by subversion.”<sup>15</sup>*

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<sup>15</sup> Section 20 Jamaica (Constitution) Order in Council, 1962

[62] Section 13 subsection 9 of the Charter states: -

*“Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (3) (f) of this section and sections 14 and 16(3), to the extent that the law authorizes the taking, in relation to persons detained or whose freedom of movement has been restricted by virtue of that law, of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during a period of public emergency or public disaster.”*

[63] In recognition of the fact that a restriction of those rights are an extreme measure, provision was made for the court to enquire into the reasons for, as well as, any actions taken in pursuance of a state of emergency. Section 20(5) reads:

*“The Court shall be competent to enquire into and determine whether a proclamation or resolution purporting to have been made or passed for any purpose specified in this section or whether any measures taken pursuant thereto are reasonably justified for the purpose.”*

[64] With respect to those specific rights Section 20(5) alters the test from demonstrably justified to reasonably justified in cases where there is a declaration of a state of public emergency.

[65] The term “demonstrably justified” connotes something more than a mere statement. McDonald Bishop JA made reference to paragraph 129 of the Canadian case of **RJR-MacDonald Inc. v Canada (Attorney General)**,<sup>16</sup> in addressing the standard to be applied in constitutional claims in which the State was called upon to prove that the action taken in breach of a Charter right was demonstrably justified:

*“The bottom line is this: while remaining sensitive to social and political context of the impugned law and allowing for difficulties of proof inherent in*

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<sup>16</sup> [1995] 3 SCR 199 at paragraphs 126-136

*that context, the courts must, nevertheless, insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line if the rights conferred by the Constitution are to have force and meaning.”*

[66] It is therefore incumbent on the State to provide evidence in support of its averment that the law or action was reasonably justified if that law or action produces any infringement of the charter rights of an individual.

[67] The term “reasonably justified” has been interpreted by the courts as being a measure that pursues a legitimate aim and is proportionate or rationally connected to that aim. In the England and Wales Court of Appeal decision of **Secretary of State for the Home Department v JJ and Others**<sup>17</sup>, Lord Hoffman, in his judgment described reasonably justified as “necessary and proportionate for the protection of the public”.<sup>18</sup>

## **ANALYSIS AND DISCUSSION**

**Whether regulations 22, 30, 32, 33 and 38 of the Emergency Powers Regulations violates Sections 14 (2), 13 (3) (h) (j) (o), and 14 (3) of the Constitution and whether the breaches are demonstrably justified in a free and democratic society or alternatively, reasonably justified.**

### **Regulation 22**

*“Where a person is suspected of acting, or of having acted, or of being about to act, in a manner prejudicial to the public safety, the supply or distribution of any necessity of life or the preservation of the peace, and a competent authority is satisfied that it is desirable that that person should*

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<sup>17</sup> [2008] 1 All ER 613

<sup>18</sup> Supra

*be prohibited from residing in or entering any particular area, the competent authority may, by order, prohibit him from residing or entering any such area or areas as may be specified in the order; and upon the making of such order the person to whom the order relates shall, if he resides in any area so specified, leave that area within such time as may be specified in the order, and shall not subsequently reside in or enter any area so specified during such time as may be specified in the order.”*

**[68]** Section 13(3)(f) of The Constitution provides as follows: -

*“the right to freedom of movement, that is to say, the right (i) of every citizen of Jamaica to enter Jamaica; and (ii) of every person lawfully in Jamaica, to move around freely throughout Jamaica, to reside in any part of Jamaica and to leave Jamaica”.*

**[69]** Regulation 22 restricts the right of all Jamaicans to move freely around their country. In the circumstances of a state of emergency the state needs only to establish that the restriction is reasonably justified.

**Was there a legitimate aim?**

**[70]** Counsel for the defendant in her submissions commenced by relying on the affidavit of Deputy Commissioner of Police (DCP) Clifford Blake. DCP Blake outlined the crime statistics for the parish of Saint James for the three (3) year period of 2015-2017. The parish was inundated with an increase in murders and shootings which saw a record number of 341 of these types of crimes in 2017. He averred that the murders and shootings took place in areas characterized as crime hot spots. The violence in these areas resulted in the murder of or injury to innocent citizens who were caught in the fray. Feuding gangs were the main perpetrators of these acts and were under the watchful eyes of the security forces. It was in these circumstances that a state of emergency was called. DCP Blake in the final paragraph of his affidavit summarized it in this way:

*“The extensions of the State of Emergency were necessary to assist the security forces in eradicating the threat to democratic governance posed by organized crime; systematically dislodging the gangs from the communities; methodically conducting searches for arms and ammunitions; creating the condition for community policing; re-establishing legitimate community structure; creating the environment for social intervention; facilitating access to the communities by relevant agencies such as utility companies; and restoring peace and stability in areas plagued by high levels of crimes; restoring the confidence of citizens, visitors and investors so that Jamaica could experience economic growth and prosperity.”*

[71] The aim of the state of emergency and by extension, the regulations was to prevent and curtail the increased crime rate in the parish of St. James. There was and still is no greater concern of the Jamaican public than that of the escalating crime rate. This burgeoning problem was also the basis for the introduction of several pieces of legislation in other countries in their own efforts to control terrorism, the rise of mafias, gangs, and other unscrupulous groups intent on wreaking havoc in various parts of the world. To that extent Jamaica is no different. It is the conclusion of this Court that the aim as set out in the Affidavit of DCP Blake was in fact a legitimate one.

**Is the measure proportionate or rationally connected to the aim?**

[72] In her submissions learned Queen’s Counsel for the defendant argued that there was a distinction between a restriction on a person’s freedom of movement as opposed to the deprivation of a person’s liberty. She relied on the case of **Guzzardi v Italy**<sup>19</sup> which dealt with Article 5 of the European Convention on Human Rights. A synopsis of the facts of **Guzzardi**<sup>20</sup> is useful at this stage. The applicant, in that

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<sup>19</sup> Application No. 7367/76 [1980] ECHR 7367/76

<sup>20</sup> supra

case, was being held on remand having been charged with several serious offences. Further, he had previous convictions which rendered him a high risk prisoner. His detention was with a view to prevent his communication with persons in the mafia.

**[73]** The basis of his detention was a 1956 Act which made provisions for various measures to be taken against persons who presented a danger “for security and public morality.” Section 1 of the Act specified the persons for which the legislation was applicable. The Chief of Police was to send a warning to these persons at first, and there was a restriction as to the length of time for which the order could be in place. Subsequent to the warning, an order could be made for prohibition on residence however this could only be obtained by an application to the Court following a reasoned application by the Chief of Police.

**[74]** The applicant claimed that his detention was a breach of Article 5 of the Convention. It is to be noted that Article 5 of the Convention speaks to the right to liberty as such the judgment focused on the question of his detention and whether or not that was a breach of that right. The decision of the court in making a distinction between a deprivation of liberty and the restriction of movement or access must be considered from this perspective.

**[75]** The Constitution of Jamaica specifically addresses the right to freedom of movement as distinct from liberty which is Section 14(1). It is the view of this Court that the intention of parliament was to protect the right to freedom of movement, in the same vein that it sought to protect the right to liberty.

**[76]** We therefore cannot agree with Queen’s Counsel Ms. Jarrett that this right has not been contravened on the basis that it does not deprive an individual of his liberty, since that was not the intention as set out in The Constitution. The right has therefore been shown to be likely to be violated by the provisions of the regulation.

**[77]** The starting point of any examination as to proportionality and rationality must be a determination as to who the regulation is directed to? The drafters commenced



with a direction as to the person or persons who ought to be subject to this prohibition. That person is defined as one who is suspected of acting, or of having acted, or of being about to act, in a manner prejudicial to the public safety, the supply of distribution of any necessity of life or the preservation of the peace.

**[78]** What is public safety, if not the protection of the general public? Breaches of public safety are wide and varied. Examples include misdemeanours, traffic offences, disturbing the peace, breaches of the Disaster Risk Management Act, petty session offences as well as more serious offences such as possession of drugs or illegal firearms. This wide and varied category of persons breaches the rule of proportionality. It cannot be said that in furtherance of the legitimate aim of protecting the country from the scourge of criminality that persons who disturb the peace and are guilty of a minor misdemeanour ought to be treated in the same manner as persons who are accused of being in possession of firearms. There has been no reasonable justification put forward by the state for the curtailment of this right on so broad a scale. The infringement cannot be said to be proportionate in these circumstances.

**[79]** The term “the supply of distribution of any necessity of life or the preservation of the peace” is also quite arbitrary and not specific enough to be considered rationally connected to the aim. We test this proposition by asking the question, if the aim of the State is to disrupt gangs, shouldn't the target of the regulations be persons with gang affiliations and ties. In other words, persons who are suspected of or are involved in that type of criminal activity. As it stands, this regulation infringes on the rights of ordinary citizens who wish to demonstrate in the area of the court or parliament, for example, as they could be described as disturbing the peace. The State has failed to provide reasonable justification for the infringement of this right in respect of the category of persons alluded to in the regulation.

- [80] In contrast the Act of 1956 in the **Guzzardi**<sup>21</sup> case was specific as to the persons who could be subject to its application. Given the nature of a state of emergency as set out in The Constitution, the Governor General acted under Section 20 (2) (b) and must have been satisfied that action has been taken by a person or body of persons of such nature and on so extensive a scale as to be likely to endanger the public safety or to deprive a community or any substantial portion of the community of supplies or services essential to life. When you contemplate the words as set out under that section it speaks to extreme circumstances. The power to be exercised is an extraordinary one and ought not to be arbitrarily pursued and utilized. Having regard to the evidence of DCP Blake in relation to the need to curtail gang activity, the regulation as set out is disproportionate to that aim.
- [81] The restriction of movement as set out in the regulation is also indeterminate. Although the regulation provides that a time should be stipulated in the order, there is no specific time limit prescribed by the regulation itself. In comparison, The 1956 Act referenced in **Guzzardi**<sup>22</sup> makes provisions for a determinate period of time within which this restriction ought to take place. The absence of a specific time limit has the potential for abuse and is irrational.
- [82] In summary; a) the restriction of movement as set out in regulation 22 is distinct from the right to liberty as the Charter has clearly distinguished between the two, b) the category of persons to which the regulation applies is too wide and is not proportionate to the aim as set out by the State, and c) the failure to stipulate a specific time period within which the restriction may take place lends itself to abuse by the authorities.
- [83] The regulation is disproportionate and not rationally connected to the aim as set out by the State.

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<sup>21</sup> supra

<sup>22</sup> supra

### **Regulation 30**

*“(1) An authorized person may arrest, without a warrant, and detain, pending enquiries, any person whose behaviour is of such a nature as to give reasonable grounds for suspecting that he has -*

*Acted or is acting in a manner prejudicial to the public safety; or*

*Has committed, is committing, or is about to commit an offence against these Regulations.*

*(2) Subject to paragraph (3), a person shall not be detained under paragraph (1) for a period exceeding 7 days, except with the authority of a police officer not below the rank of Deputy Superintendent on whose directions such person may be detained for a further period of not exceeding seven days.*

*(3) Where a police officer not below the Rank of Senior Superintendent is satisfied that any necessary enquiries, pursuant to these Regulations, cannot be completed within the further period of seven days mentioned in paragraph (2) he may direct that person be detained for a further period not exceeding the period of public emergency.*

*(4) Any person detained under paragraph (1), shall be deemed to be in lawful custody and may be detained in any prison or any lockup or in any other place authorized generally or specially by the Minister (whether within or outside of the community); and an authorized person may, during such detention take photographs, descriptions, measurements and fingerprints of any person so detained and any information so obtained may, after the release of such person, be preserved.*

*(5) Where a person is detained under this regulation for a period of three months without a charge being proffered against that person, the person shall be released or shall be brought before a Judge of the Parish Courts to be entered into a recognizance and find sureties to keep the peace, or to be of good behaviour.”*

- [84]** An authorized person is defined in the Emergency Powers Regulations as any competent authority, any member of the Jamaica Defence Force, any constable, any member of any fire brigade or any person authorized by any competent authority to do the act in relation to which the expression is used. A competent authority means the Governor General, the Minister responsible for national security, the Chief of Defence Staff, the Commissioner of Police, each Deputy Commissioner of Police or the Senior Officer of Police in each parish, or any such person who the Governor General may appoint as the competent authority for the purposes of such regulation.
- [85]** Queen's Counsel for the Defendant submitted that Regulation 30 did not breach the right to liberty as it is to be assessed in the context of Section 13 (9) of the Charter having regard to the imposition of a state of emergency by the Governor General. Counsel argued that it pursued a legitimate aim and that it was proportionate and rationally connected to the aim. It was submitted that the period was reasonable as it would give the security forces sufficient time to make the necessary enquiries and conduct the depth of investigation required in circumstances where persons are engaged in activities that lead to an enhanced threat to public security.
- [86]** The right to liberty is a basic fundamental right. In an oft quoted passage from Patrick Smith, "Give me liberty or give me death." The right to liberty is the most important right of every human being. The deprivation of liberty is characterised by the incarceration of persons in a cell or something equivalent thereto. It is however a qualified right, and has been recognized as such in The Constitution. A person can be deprived of his/her liberty in certain circumstances such as where he/she is serving a sentence for crimes committed or he/she is on remand having been charged for an offence and in this case where he/she is held under a state of emergency.
- [87]** Section 20 (5) of The Constitution provides the basis for a court to enquire into whether or not this deprivation of liberty is reasonably justified for the purpose in

which it was made. In essence, although the state of emergency provides for a qualification of the right to liberty it affords a check on those in authority to ensure that such an infringement is reasonably justified.

**[88]** The right to liberty was infringed in this case. Mr Clarke was detained under the state of emergency. The legitimate aim is accepted as stated previously. Is the regulation proportionate and rationally connected to the aim?

**[89]** The scope of this regulation is extremely wide for two reasons. Firstly, it gives the power of arrest to Constables, persons employed to the fire brigade or any person authorized by a competent authority. That delegable authority means that it can be extended to just about anyone. Secondly, it speaks to those persons having reasonable grounds for suspecting. Counsel for Mr Clarke argued that Regulation 30 (5) permitted the detention of a person for up to three months without taking them before a court. The regulation, it was argued gives the right to an authorized person to detain a citizen without charge. This is evident in regulation 30 (2) which gives the initial period of seven days before a senior officer may seek an extension. Subsequently, further extensions can be made by a senior officer once he is satisfied that further enquiries need to be made. This extension can continue up to a maximum of three (3) months.

**[90]** There is no recourse in law for the detainee to be brought before a court prior to the expiry of three months. The State has provided no justification for the detention of a citizen without charge for such an extensive period without his having due recourse to law. In contrast, the accused man who is charged for an offence is placed before the court so that a determination can be made as to any application for bail. In this case, the person who has not been charged and for whom there is no statement or potential evidence is given fewer rights than the person for whom a charge has been laid.

**[91]** The requirement for the Senior Officer to be satisfied that further enquiries need to be made is considered spurious. The Senior Officer is the person charged with

making the decision each time the period is to be extended. The word satisfied does give the impression that there must be something put forward to cause such a decision to be made. However, as it is the said officer who makes the decision it raises the question of the value of that restriction. In the case of the **Attorney General v Reynolds**<sup>23</sup> a similar point was discussed and the court found that:

*“The word satisfied must be read as limiting the exercise of an arbitrary power. But if the question whether the condition has been satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in effect nothing.”<sup>24</sup>*

**[92]** The power vested in the officer is therefore insufficient to offer protection to a person who is detained under the state of emergency.

**[93]** There is also no option available to a person who has been detained on what is later discovered to be unsubstantiated allegations, or even malice. The regulation provides that for the purpose of the state of emergency, the detainee is deemed to be in lawful custody. A regulation that purports to deprive a citizen of his right to liberty must be reasonable. The Court does not find that this provision is reasonably justified. Further, as with the prior regulation discussed, the persons targeted are wide and varied and can include citizens who are suspected of committing misdemeanours, we reiterate that this is not rationally connected to the aim of the state of emergency and is not considered reasonably justified.

### **Regulation 32**

*“The Minister, if satisfied that it is necessary so to do in order to prevent any person from acting in a manner prejudicial to public safety or public order, may make an order requiring that person, subject to such conditions as may be specified in the order, to stay in the house or place where that person resides or resides principally*

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<sup>23</sup> Attorney General v. Reynolds [1979] 43 WIR 108

<sup>24</sup> Supra page 121

*or, where the person has no fixed place of abode, at a place specified by the Minister.”*

- [94]** This regulation breaches the right to freedom of movement. It is the Minister who is empowered to make this order. He must be satisfied that it is necessary. The definition of satisfied is completely certain or sure about something, convinced. It suggests a high degree of certainty but gives no indication as to the basis for such a view. Further, the purpose is to secure public safety and public order. There are similar provisions in the Bail Act dealing with persons who have been charged for an offence. On the face of it, there may seem to be nothing objectionable about this regulation as it provides for a high standard on the part of the Minister. Additionally, this regulation is subject to review by the tribunal. It therefore means that the power wielded by the Minister may be checked and verified by the review panel.
- [95]** The regulation does not limit the time within which such an order may reasonably be enforced, and there is no specification as to the place the Minister may assign as accommodation for the citizen.
- [96]** The actions of the citizen go beyond a breach of public safety and go into the general discourse as to public order. The state of public order is considered as the normality and security that is needed in society. It is based on shared norms and culture and may not necessarily be based on legislation. In view of the extreme measures of the state of emergency and what the Governor General has to be satisfied of before making such a declaration, it cannot be said that a breach of public order is inimical to the public interest, so as to deprive a citizen of his right to reside in a location of his choosing, thereby depriving him of his freedom to move about in Jamaica, when he has not been the subject of any criminal investigation or charge before a criminal court. The regulation is not reasonably fair and cannot be justified as rationally connected to the aim for which the state of emergency was intended.

### Regulation 33 and 38(9)

*“The Minister, if satisfied that any person has been concerned in acts prejudicial to public safety or public order or in the preparation or instigation of such acts and that for any reason thereof it is necessary to exercise control over that person, may make an order (hereinafter referred to as a “detention order”) against that person directing that he be detained.”*

**[97]** This regulation infringes on the right to liberty. The Minister’s discretion under this regulation is somewhat specific to persons who may be involved in illicit activities. It is also strengthened by the additional factor which must be considered, that is whether it is necessary to exercise control over that person. The challenge however, is that the scope of these prejudicial acts and breaches of public order have not been outlined. This broad brush approach lends itself to potential abuse by the authorities.

**[98]** Although there is provision in the regulations at 38 (6) for the detainee to object to his detention by making representation to the review tribunal. Regulation 38 (9) leaves it open to the Minister to disregard the decision of the tribunal.

*“The Minister **may** (our emphasis), having regard to the findings of the Tribunal and the public interest in preserving public safety and public order-*

- a) In the case of an order under regulation 22 direct the competent authority to review its decision;*
- b) In the case of an order under regulation 32 or 33 -
  - i) Direct that the order remains in force;*
  - ii) Vary the order (including imposing conditions thereunder); or revoke this order.”**

**[99]** This regulation provides that a Minister may veto the recommendations of a review tribunal and, there is no requirement for him to give any reasons for doing so. This is absolute power in the hands of an individual to deprive a person of his liberty in circumstances where there is no reasonable justification for doing so. The power



of a Minister, to in effect, disregard an order of a tribunal that was created by legislation for the purpose of enquiring into the detention of persons is an absolute one in circumstances where the class of persons who may be detained is as wide as previously described. This measure is neither rationally connected to the aim nor is it proportionate. It lends itself to abuse by an individual who may have nefarious motives without offering protection to the detainee. It is draconian and reminiscent of a culture that is uncharacteristic of democracy.

**[100]** In summary, it is the view of this Court that the State has failed to discharge its burden of proving that regulations 22, 30, 32, 33 and 38 of the Emergency Powers Regulations are reasonably justified for the purpose of the Saint James state of emergency which was declared on 18 January 2018.

**Whether any of Mr Clarke’s Charter rights have been abrogated, abridged or infringed**

**[101]** Mr Clarke complains that his detention and the circumstances of his detention infringed the following rights guaranteed by The Constitution –

- a. the right to liberty under section 13(3)(a),
- b. his right to be informed of the reason for his detention as soon as reasonably practicable under section 14(3)(b),
- c. his right to humane treatment under section 13(3)(h) and 14(5),
- d. his right to brought forthwith or as soon as is reasonably practicable before an officer authorized by law, or a court under section 14(3)(a)(i).

**[102]** The abovementioned provisions so far as relevant are as follows:

“13. ----(1)....

- (2)....

(3) *The rights and freedoms referred to in subsection (2) are as follows—*

*(a) the right to life, liberty and security of the person and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted;*

*(h) the right to equitable and humane treatment by any public authority in the exercise of any function;*

14.--- (1) ....

(2)....

*(3) Any person who is arrested or detained shall be entitled to be tried within a reasonable time and --*

*(a) shall be --*

*(i) brought forthwith or as soon as is reasonably practicable before an officer authorized by law, or a court; and*

*(b) if he is not released as mentioned in paragraph (a)(ii), shall be promptly brought before a court which may thereupon release him as provided in that paragraph.*

(4).....

*(5) Any person deprived of his liberty shall be treated humanely and with respect for the inherent dignity of the person."*

**[103]** Both the claimant and the defendant filed affidavits in this matter which stood as the evidence. Most of the facts of this case in so far as they relate to the detention of Mr Clarke are not in dispute. The Court has examined the evidence to determine if it is sufficient to establish on a balance of probabilities that any of his Charter rights have been infringed.

**[104]** Mr Clarke avers that his constitutional rights were infringed by the State when he was detained under the state of emergency on 14 February 2018. He remained in custody until 27 September 2018 notwithstanding the order of the review tribunal made on 30 August 2018 that he be released from detention. The reasons given

in the detention order for his detention were unacceptable. They included allegations in criminal cases where he was acquitted. During this period of detention, he was never charged for any criminal offence and had not been charged up to the filing of his claim. It is clear that his detention from 14 February 2018 to 27 September 2018 was in breach of his fundamental right to freedom and liberty acknowledged by section 13(3)(a) of The Constitution.

**[105]** It was his evidence that he was never told the basis for his detention. He was never given any reason for his arrest and he was never charged for any offence. It was only when he was served with a detention order that the particulars of his detention were made known to him. There is a dispute as to this fact. The State has, through the evidence of Deputy Superintendent of Police (DSP) Ainsley McCarthy challenged this evidence.

**[106]** At paragraph 8 of his Affidavit filed on 25 May 2019, he stated, *“I told the Claimant of the reason for his detention and he was given the option to contact family and an attorney-at-law and he was also advised of the availability of legal aid representation”*.

**[107]** The Court accepts Mr Clarke’s evidence in this regard. It is the finding of this Court that Mr Clarke was never told of the reason for his detention until he was served with the Order from the Minister. The affidavit of DSP McCarthy does not specify exactly what was conveyed to Mr Clarke as to the “reason” for his detention. The Detention Order was served on him some three (3) months after his initial detention. In that document, it referred to the fact that Mr Clarke *“has been concerned in acts prejudicial to public safety and public order...”*. In his affidavit DSP McCarthy referred to his reason for detaining Mr Clarke as being based on his alleged involvement in two murders, as well as his participation in lottery scamming activities. All of this was set out in detail when he made reference to the decision of the review tribunal and yet it was conspicuously absent from his earlier paragraph outlining what he told Mr Clarke. The Court rejects the evidence of DSP McCarthy on this issue. The Court accepts that Mr Clarke was never told of the

reason for his detention prior to his receipt of the detention order. The delay of three (3) months cannot be considered as being “as soon as reasonably practicable”. It is the finding of this Court that the lengthy delay was a breach of Mr Clarke’s constitutional right under section 14(3)(b) of The Constitution to be informed of the reason for his arrest and detention as soon as is reasonably practicable.

**[108]** Mr Clarke asserted that he was subjected to inhumane treatment while he was in custody. In his affidavit filed on 14 January 2019, he stated at page 9 paragraph (iv):

*“The experience was traumatizing, and I felt like I was in a “pig pen” with men in underpants walking up and down and defecating in buckets with bottles to urinate in and no beds were provided, I had to sleep on cold concrete for the entire time. I was subjected to the administering of medication by myself to my anus in the presence of other men in the cell and had to do this twice daily. The area was without the necessary sterilants and there was no running water in my cell. I was only permitted to use the bathroom once daily.”*

**[109]** In response DSP McCarthy averred that Mr Clarke was detained along with all other detainees at the Saint James Divisional Headquarters cells. He described the cells as having been recently reopened in January 2018. The facility was able to accommodate seven persons to a cell. He went further to say:

*“Each cell is equipped with bunks made of concrete for sleeping purposes. Therefore, it is not true as the Claimant has stated that no beds were provided. Each cell is equipped with a toilet separated by a small wall for privacy, therefore if the claimant administered medication or had medication administered to him in the presence of others, it was his choice to do so. It is not true that during the State of Emergency detainees were allowed to use buckets to defecate. At no time was this allowed as all the toilets were functioning properly. All detainees were allowed one bath per day as the shower is not located in the cell area. Hence the detainees were allowed to go outside and were monitored by the cell staff.”*

- [110]** Additionally, he denied that Mr Clarke was kept in overcrowded cells or inhumane conditions. The Claimant, he said, was provided with medical attention and each visit was logged in the Prisoner's medical journal.
- [111]** The medical journal formed a part of the evidence as it was admitted as an exhibit in the case. Mr. Hylton Q.C. argued that although the document was admitted it ought not to be relied on as it constitutes hearsay. In so far as the court cannot use the document for the purpose of establishing a medical diagnosis the court accepts that submission. However, it is evidence to speak to the fact that Mr Clarke was seen by a doctor and that a record was made in the medical journal.
- [112]** The Court finds that Mr Clarke was afforded the opportunity to see a doctor; he was not refused treatment. It is also the finding of this Court that the conditions of the cell during the detention of Mr Clarke was no less than what would be expected of a Jamaican holding area for detainees and others. The affidavit evidence of DSP McCarthy was never rebutted in the further affidavit of the claimant. It is the view of this Court that Mr Clarke was treated no differently than any other detainee in custody, and that his detention in the conditions described by DSP McCarthy did not infringe upon his constitutional right to be treated humanely.
- [113]** The evidence which is accepted is that Mr Clarke was detained from 14 February 2018 without having an opportunity to be heard until he appeared before the review tribunal on 11 June 2018. There is no acceptable explanation for the long delay of almost four months. In those circumstances, there can be no denial that his right to be brought forthwith or as soon as is reasonably practicable before an officer authorized by law, or a court under section 14(3)(a)(i) of The Constitution was infringed.
- [114]** It is the finding of this Court that Mr Clarke's rights as set out in Sections 13 (3) (a), 14 (3) (a) (1), 14 (3) (b) were infringed upon and as such he is entitled to redress under the Constitution.

## **MATTERS NOT PLEADED**

[115] Before addressing the matter of any redress that Mr Clarke may be entitled to, the Court must first summarise its findings of the constitutional breaches for which the defendant is liable. As indicated above, the factual issues were decided solely on the affidavits and there was no cross-examination. One of the issues which must be addressed in order to make these findings is whether Mr Clarke can rely on violations of his rights that were alleged in a second affidavit filed on his behalf, after the defendant had filed its response to the claim. These later allegations are not included in the fixed date claim form. The defendant contends that this affidavit is not properly a part of the pleadings and should not be considered by the Court in making its findings. In describing the issue, it is perhaps useful to start by setting out the procedural history in respect to the fixed date claim form and the affidavit evidence.

[116] The fixed date claim form and affidavit in support were filed on 14 January 2019 wherein Mr Clarke set out alleged breaches of his constitutional rights during the period of his detention from 14 February 2018 to 27 September 2019 and claims for redress. The defendant's affidavits in response were filed out of time on the 27<sup>th</sup> and 28<sup>th</sup> of May 2019. They were permitted to stand by order of the court at the pretrial review on 28 January 2020. At the same pretrial review, the court further ordered:

*"2. The claimant is permitted to file and serve affidavits in response to the defendant's affidavits if necessary, on or before February 14 2020."*

[117] No permission was given for the defendant to further respond. Mr. Clarke's second affidavit was filed on 13<sup>th</sup> February 2020. In this affidavit, he makes several new allegations, not included in the affidavit in support, of further conduct by members of the security forces that, if accepted, would constitute additional breaches of his constitutional rights. They included allegations that during his initial detention, his photographs and fingerprints were taken by members of the security forces without his consent; that the security forces subsequently targeted him and his family,

purportedly in reliance on the continuing state of emergency whereby he was arrested and detained without being charged on three further occasions, 15 July 2019 until 18 July 2019; on 30 November 2019 when apparently he was released on 3 December 2019 after the intervention of his attorney; and on 13 January 2020 and apparently was released sometime after 21 January 2020. On one occasion, he was arrested at his home and was handcuffed in the presence of his children, spouse, friends and members of the community then placed in an open police vehicle to be taken to the police station. He felt embarrassed and humiliated.

**[118]** It was submitted on his behalf that the additional period of detention, the photographing and fingerprinting, the humiliation and continued harassment are part of the claim before the court and should be reckoned in any assessment of damages. There was no application to amend the fixed date claim form to include the fresh allegations and claims and the defendant did not file any affidavit response to them. There was no permission for the defendant to file further affidavits and the defendant did not apply for permission to do so. It would appear that the order number 2 quoted above was intended to bring closure to the filing of affidavit evidence in the matter.

**[119]** Counsel for Mr. Clarke accepted that the evidence of the subsequent actions of the security forces and the photographing and fingerprinting were not pleaded but submitted that these violations should not be ignored. These matters had been in the knowledge of the defendant for two years before the hearing, the defendant had sufficient notice of them and could anticipate that it was intended to be part of the claim. The latter breaches occurred while the matter was already before the court and if Mr. Clarke was required to include them in the fixed date claim form he may be obliged to file several fixed date claim forms. This should not be necessary as the subsequent detentions relate to the same right and alleged the same breaches as before. This is not entirely correct as the affidavit in support of the fixed date claim form did not refer to or make any claims in respect to the fingerprints and the photographs. Mr. Clarke's counsel also argued further that, in the second affidavit he expressly incorporates his first affidavit and they should be

read together. He asked the Court to note that paragraph 6 of the fixed date claim form includes the standard catch-all phrase “*Such further and other relief as the Honourable Court deems fit ...*” which would also put the defendants on notice that the evidence was being relied on as part of the claim.

**[120]** The defendant maintained that part 56.9 of the Civil Procedure Rules sets out the mechanism available to a person to invoke section 19 of The Constitution to enforce his or her constitutional rights. The rules were clear that the application should be by fixed date claim form and therefore the claimant should be limited to the remedies that he seeks in the fixed date claim form. The rule is set out in full.

*“56.9 (1) An application for an administrative order must be made by a fixed date claim in form 2 identifying whether the application is for -*

*(a) judicial review;*

*(b) relief under the Constitution;*

*(c) a declaration; or*

*(d) some other administrative order (naming it),*

*and must identify the nature of any relief sought.*

*(2) The claimant must file with the claim form evidence on affidavit.*

*(3) The affidavit must state -*

*(a) the name, address and description of the claimant and  
the defendant;*

*(b) the nature of the relief sought identifying -*

*(i) any interim relief sought; and*

*(ii) whether the claimant seeks damages, restitution,*



*recovery of any sum due or alleged to be due or  
an order for the return of property, setting out the  
facts on which such claim is based and, where  
practicable, specifying the amount of any money claimed;  
(c) in the case of a claim under the Constitution, setting out  
the provision of the Constitution which the claimant alleges  
has been, is being or is likely to be breached;  
(d) the grounds on which such relief is sought;  
(e) the facts on which the claim is based;  
(f) the claimant's address for service; and  
(g) giving the names and addresses of all defendants to the claim."*

[121] Both parties referred to the ***Julian J Robinson case***. There, Chief Justice Sykes summarily dealt with the claim for breach of the right to vote in the following manner at paragraph 247 C:

*"The learned Attorney General, indicated, and I agree, that this alleged violation was not pleaded in the fixed date claim form. It only arose in the affidavit of Mr Robinson and in oral submissions. The fixed date claim form was not amended to include this violation. This means that no decision can be rendered on this because it was not properly raised by Mr Robinson."*

[122] However, Batts J at paragraph 371 expressed a different view on this issue. He said:

*"[371] .... I am in general agreement with the judgment of my lord the Chief Justice of Jamaica. We part company on the issue whether, in matters of constitutional breach, a failure to plead is fatal. It is, and has always been,*

*my view that where a constitutional breach is brought to the attention of the court it ought not to be ignored. The Defendant, if caught by surprise, may request time to respond. However, the door to constitutional relief is not to be shut on technical rules of procedure or pleading or because of the absence of rules, see **Jaundoo v Attorney General of Guyana** (1971) 16 WIR 141.”*

[123] Palmer-Hamilton J also cited with approval the dicta of Lord Diplock in **Jaundoo**<sup>25</sup> at page 146 of that judgment:

*“They are not confined to the procedure appropriate to an ordinary civil action...The clear intention of the Constitution that a person who alleges that his fundamental rights are threatened should have unhindered access to the High Court is not to be defeated by any failure of Parliament or the rule-making authority to make specific provision as to how that access is to be gained.”*

[124] She added:

*“[403] In my view, once the Defendant has been put on notice as to the substance of the claim for constitutional redress, the finding of unconstitutionality of a provision, though not pleaded, must be anticipated. Of note, is the distinction made between a civil action filed and the justiciability of a constitutional right being violated. Constitutional redress ought not to be denied merely on a defect in form and not substance. I agree wholeheartedly with my learned brother, Batts, J on this point.”*

[125] Naturally, counsel for Mr. Clarke submitted that this Court should follow the majority while counsel for the defendant submitted that the decision of Sykes J should be preferred. This is a Court of coordinate jurisdiction with the court in Julian Robinson and so we are not bound by the majority decision. Although the majority

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<sup>25</sup> (1971) 16 WIR 141

gave a reasoned decision on the matter, it must be observed that they relied on *Jaundoo*<sup>26</sup>, a case decided at a time where no procedural rules for constitutional actions were in existence. Presently, in Jamaica the Civil Procedure Rules have been promulgated. This Court takes the view that these rules now govern the procedure for applications for redress under the constitution and must be followed. The new allegations for violations are outside the claim before the Court.

[126] Also in this particular case it seems clear that when order number 2 was made at the pre-trial review, it was anticipated that any subsequent affidavit filed for the claimant, “if necessary”, would respond to and address the evidence in defence presented in the affidavits filed on behalf of the defendant. If it was envisaged that Mr Clarke would include new evidence of fresh allegations of constitutional infringements encompassing new grounds and claims for redress, then certainly the defendant would have been given time to file affidavits in response. There has to be a cut-off point in the filing of affidavits otherwise there could be no end to the addition of new claims and defences. In the circumstances, we agree with counsel for the State that if Mr Clarke intended to augment or change the substratum of his claim then he ought to have applied to amend the fixed date claim form in which case the defendant likely would have sought permission to file further affidavits in answer.

[127] As the fixed date claim form was not amended to include the violations alleged in Mr Clarke’s second affidavit, this material will not form a part of this decision.

[128] Having regard to the foregoing the Court finds that the Mr. Clarke’s constitutional rights were breached in the following particulars: -

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<sup>26</sup> supra

- a) Mr. Clarke was deprived of his liberty from 14 February 2018 until 27 September 2018, a total of 225 days without there being any evidence that his detention was reasonably justifiable.
- b) Mr. Clarke was detained without being informed of the reason for his detention “as soon as reasonably practicable”. He was informed after a delay of three (3) months when the Minister’s detention order was served on him.
- c) His right to due process was infringed when after his detention he was not brought forth or as soon as reasonably practical practicable before an officer authorized by law or a court. He was taken before the review tribunal on 11 June 2018.
- d) Even after the Review Tribunal recommended his release he was held in custody for a further period of 26 days until his subsequent release on 27 September 2018.

## **DAMAGES**

**[129]** Section 19 of the Charter gives an aggrieved person the right to apply to the court for redress and grants the court jurisdiction to make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter. This includes an award of damages to enforce the abrogated fundamental rights and freedoms. In a leading case, *Attorney-General v Siewchand Ramanoop*<sup>27</sup>, the Privy Council, in considering section 14 of the Trinidad and Tobago Constitution (which is in similar terms to section 19 of the Jamaican Constitution) stated:

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<sup>27</sup> (2005) 66 WIR 334

*“[17] Their lordships view the matter as follows. Section 14 recognises and affirms the court’s power to award remedies for contravention of Chapter 1 rights and freedoms. This jurisdiction is an integral part of the protection which Chapter 1 of the Constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against misuse of State power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the State’s violation of a constitutional right. This jurisdiction is separate from and additional to (‘without prejudice to’) all other remedial jurisdiction of the court.*

*[18] When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common-law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide, because the award of compensation under s 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.”*

**[130]** We hold that Mr. Clarke is entitled to compensatory damages for the breaches of his constitutional rights by the actions of the security forces and other organs of government purportedly under the state of emergency. His claim for damages was posited under three (3) heads:

- (a) Compensatory damages for the period of detention;
- (b) Constitutional/vindictory damages;
- (c) Aggravated damages; and
- (d) Special damages.

## COMPENSATORY DAMAGES FOR THE PERIOD OF DETENTION

[131] In *Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No 2)*<sup>28</sup>, Lord Diplock considered the effect of provisions in the former Trinidad and Tobago constitution on the issue of redress for deprivation of liberty. The provisions are substantially the same as section 19 of the Jamaica constitution. He observed (at page 320):

*“What then was the nature of the ‘redress’ to which the appellant was entitled? Not being a term of legal art it must be understood as bearing its ordinary meaning, which in the Shorter Oxford Dictionary is given as: ‘Reparation of, satisfaction or compensation for, a wrong sustained or the loss resulting from this’. At the time of the original notice of motion the appellant was still in prison. His right not to be deprived of his liberty except by due process of law was still being contravened; but by the time the case reached the Court of Appeal he had long ago served his seven days and had been released. The contravention was in the past; the only practicable form of redress was monetary compensation. ...”*

[132] And at pages (321-322):

*“Finally, their Lordships would say something about the measure of monetary compensation recoverable under s 6 where the contravention of the claimant’s constitutional rights consists of deprivation of liberty otherwise than by due process of law. The claim is not a claim in private law for damages for the tort of false imprisonment (under which the damages recoverable are at large and would include damages for loss of reputation). It is a claim in public law for compensation for the deprivation of liberty alone. Such compensation would include any loss of earnings*

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<sup>28</sup> (1978) 30 WIR 310

*consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration.”*

[133] It is not disputed that Mr. Clarke was, in the first instance, detained in police custody from 14 February 2018 until his release on 27 September 2018 a total of Two Hundred and Twenty- Five (225) days. Ms Jarrett for the defendant submitted that liability for the loss of liberty should be limited to a period of Twenty- Six (26) days, that is, the period between the date when the review tribunal recommended that his detention order be revoked (30 August 2018) and his delayed release from custody on 27 September 2018. However, the Court has already held that his detention over the entire period was unconstitutional. He is therefore entitled to damages for the whole period. The claimant submitted that the Court should follow the practice of calculating damages by awarding a sum for each day of detention. Mr Clarke’s attorney relied on ***Patrick Whitely v The Attorney General***<sup>29</sup> where the court awarded Seventy- Five Thousand Dollars (\$75,000.00) per day and proposed the rate of Ninety Thousand Dollars (\$90,000.00) per day as appropriate in the circumstances of this case. This daily rate was not challenged by the defendant. However, it is to be observed that that daily rate is at the high end of the scale. In ***Patrick Whitely***<sup>30</sup> it appears that the daily rate was arrived at by reference solely to private law cases for false imprisonment where damages were at large. In ***Denese Keane-Madden v The Attorney General of Jamaica and Corporal T. Webster***<sup>31</sup>, the court after reviewing several authorities assessed damages for false imprisonment at One Hundred and Eighty Thousand Dollars (\$180,000.00) for six days, ie, Thirty Thousand Dollars (\$30,000.00) per day which amounts to Forty- Five Thousand Dollars (\$45,000.00) today when adjusted for inflation. Although this was also an assessment of damages for false imprisonment, in arriving at the figure, the court held (at paragraph 29) that the

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<sup>29</sup> [2016] JMFC Full 6

<sup>30</sup> supra

<sup>31</sup> [2014] JMFC Civ. 23

elements of injury to reputation, pride and self-esteem were absent in that case. Thus this award bears closer resemblance to an award for compensation in public law for deprivation of liberty alone.

[134] Even if the agreed sum of Ninety Thousand Dollars (\$90,000.00) per day is used as a starting point, the court holds that applying this as a daily rate for the entire period of detention would not be the correct approach. This is a case where the period of unlawful detention was very lengthy and it is reasonable to accept that the claimant would as time passed have made necessary adjustments for his circumstances. Also in this case an additional award is made for the aggravating features of his detention. It is right therefore that the daily rate is applied on a progressively reducing scale and a global figure will be awarded for the entire period of detention.

[135] In ***R v Governor of Brockhill Prison, ex p. Evans***<sup>32</sup>, the English Court of Appeal approved the trial judge's refusal to award an amount for each day but rather to make a global award as compensation for the whole period of detention. Lord Woolf MR said:

*"We accept that an award of £2,000 is well below the appropriate figure for 59 extra days of imprisonment. We increase the award to £5,000. This is a global figure. We recognise that it is possible to work out a daily, weekly, or monthly figure from this amount for the approximately two months extra imprisonment of this case but we discourage such an exercise. No two cases are the same. The shorter the period the larger can be the pro rata rate. The longer the period the lower the pro rata rate."*

[136] The Privy Council in ***Takitota v. The Attorney General & Ors (Bahamas)***<sup>33</sup>, reaffirmed that *"is quite correct that it is usual and proper to reduce the level of*

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<sup>32</sup> [1999] QB 1043 page 1060 paragraphs F-G

<sup>33</sup> [2009] UKPC 11 paragraph 9



*damages by tapering them when dealing with an extended period of unlawful imprisonment...*

[137] In the circumstances of the instant case, the Court considers it appropriate to award an overall sum of Twelve Million Dollars (\$12,000,000.00) as compensatory damages for the entire period of detention.

### **CONSTITUTIONAL/VINDICATORY DAMAGES**

[138] In addition to the monetary award for compensation for the false imprisonment/deprivation of liberty the Court should consider whether an additional award of damages is appropriate to 'vindicate' Mr Clarke's constitutional rights which were infringed. It is important to note that vindicatory damages are largely discretionary and dependant on the particular circumstances of a case. In **Ramnaroop**<sup>34</sup> the Privy Council set out the basis for this award:

*"[19] An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. **An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches.** All these elements have a place in this additional award. 'Redress' in s 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions 'punitive damages' or*

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<sup>34</sup> supra

*‘exemplary damages’ are better avoided as descriptions of this type of additional award.”*

[139] Mr. Clarke submitted that the circumstances of the instant case merited an award of no less than Seven Million and Five Hundred Thousand Dollars (\$7,500,000.00) as vindicatory damages. Counsel for the defendant’s rather pithy answer was that no award for vindicatory damages should be allowed as his constitutional rights were not infringed. The claimant relied on ***Merson v Cartwright and Another***<sup>35</sup>, a Privy Council decision from the Bahamas where the claimant had successfully obtained damages for assault and battery, false imprisonment, malicious prosecution and contravention of her constitutional rights. The Privy Council held that an additional substantial award to vindicate the claimant’s rights was clearly justified in the circumstances of that case and gave the following guidance on the principles to be applied (at para. 18):

*“... The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases, a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary.”*

[140] The Privy Council upheld an award for vindicatory damages of One Hundred Thousand Bahamian Dollars (BAH\$100,000.00) in 2005. The particular facts that called for such an elevated award included the trial judge’s finding that the claimant had been subjected to outrageous treatment by the police and the prosecuting

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<sup>35</sup> (2005) 67 WIR 17

authority in falsely alleging that she had committed criminal offences, clearly a ruse to justify the arrest:

*“Their lordships, too, would indorse the judge’s reaction and need not add to the Court of Appeal’s coruscating summary cited above, save to note the ‘irresistible inference’ drawn by Sawyer J that –*

*‘... the sole reason for the arrest of [Ms Merson] was to force her father who had been named in the search warrant to return to the Bahamas to check his daughter’s welfare – a Gestapo-type tactic if ever there was one.’*”

[141] After consideration of those circumstances the Privy Council concluded:

*“[20] ...Moreover the wholesale contempt shown by the authorities, in their treatment of Ms Merson, to the rule of law and its requirements of the police and prosecution authorities, makes this, in our opinion, a very proper case for an award of vindicatory damages. There can be no objection, on the facts of this case, to an award to Ms Merson both of damages for the nominate torts and of vindicatory damages for the infringements of her constitutional rights.”*

*[21] ... On the extreme facts of this case we would regard an award of \$100,000 by way of vindicatory damages as high but within the bracket of discretion available to the judge.”*

[142] The particular circumstances in **Merson**<sup>36</sup> were indeed extreme.

[143] This Court’s attention was also drawn to the decision in **Patrick Whitely**<sup>37</sup> where the claimant was detained on a sentence which was later found to be unconstitutional. The full court awarded applicant in 2016 the sum of Two Million

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<sup>36</sup> supra

<sup>37</sup> supra

Dollars (\$2,000,000.00) for vindictory damages. In explaining the reasoning which informed that award the court stated:

*“[84] Having determined that the claimant’s constitutional rights have been breached by the absence of periodic reviews and the continued incarceration beyond the release date ordered by Pusey, J., the court now needs to consider the circumstances of this case, as have already been stated, in order to determine the nature of the redress.*

....

*[86] ... the court needs to look at the claimant’s conduct to see whether or not he contributed to his continued incarceration. ...*

*[88] Part 75 of the CPR contemplates that on an application being made for a review a decision would be made within a few months. The claimant’s application which was filed was on 26 January 2010 was not determined until 24 January 2012, due largely to the non-compliance with the provisions of the CPR and orders made by the court. In the circumstances the claimant was detained beyond the period of his likely release. Consequently, I think an award of two million dollars (\$2,000,000.00) would be adequate compensation.*

*It is noted that in the instant case the length of unlawful detention beyond the release date ordered is not as lengthy as in Patrick Whitely however in the instant there is no evidence of any dereliction on the part of this Claimant that contributed to the length of his detention.”*

**[144]** This Court takes into account the following matters in deciding whether an award of vindictory damages ought to be made in respect to the detention of the claimant and, if so, the quantum:

- (i) the failure to inform Mr. Clarke of the reason for his detention as soon as reasonably practicable.

(ii) The failure to bring Mr. Clarke as soon as reasonably practicable before an officer authorized by law or a court.

(iii) The failure to release Mr. Clarke for 26 days even after the Review Tribunal recommended his release

[145] We consider the continued detention of Mr. Clarke after the recommendation for release by the Review Tribunal to be particularly egregious.

[146] Counsel for the claimant argued that the Court should consider the actions of the state in regard to the bases on which the police requested the Minister to grant the detention order in that they effectively misled the Minister by inviting him to make the detention on the basis of charges that the courts had dismissed. Further the actions of the security forces were intended to embarrass and humiliate the claimant before his spouse friends and children. While we do give some consideration to those factors it is to be noted that the bases on which the police requested the detention order were primarily from intelligence sources and their knowledge of the antecedents of the claimant and there is no evidence of deliberate misconduct or that the actions were designed to embarrass and humiliate the defendant.

[147] Having regard to all the circumstances of this case, an award of Four Million Dollars (\$4,000,000.00) is appropriate as vindictory damages.

#### **AGGRAVATED DAMAGES**

[148] Both parties accepted that the principles relevant to the consideration of a grant of aggravated damages are adequately set out in *Denese Keane-Madden v The Attorney General of Jamaica and Corporal T. Webster*<sup>38</sup> Edwards J (as she then was) opined at paragraph 46:

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<sup>38</sup> [2014] JMSC Civ. 23

*“[46] This approach was recognised and adopted by Sykes J in the unreported judgement in **Leeman Anderson v The Attorney General of Jamaica** CLA 017 of 2002, decided July 16th 2004. Aggravated damages are awarded where the defendants conduct is sufficiently outrageous to merit condemnation and punishment. The outrageous behaviour usually carries features of malice, fraud, cruelty, insolence and the like.”*

- [149] The particulars in support of the claim for aggravated damages are detailed in paragraph 14 of Mr Clarke’s first affidavit. They include his continued detention after the Review Tribunals recommendation for his detention order to be revoked; the indignity of having been arrested and placed in an open-back truck where he could be observed by members of his family including his minor children, the public at large including his community members thereby subjecting him to humiliation and disgrace and brought him into ridicule and contempt; the failure to inform him of the reasons for his detention; the inhumane conditions at the place of detention.
- [150] Most of these allegations are subsumed under his claim for the days in detention without reasonable and probable cause, for example, the indignity he suffered when he was arrested in the full view of his family and his community. The allegations of inhumane and degrading treatment during detention are not accepted by the Court. However, there are aggravating features in the failure to inform of the reasons for his detention and the delay in releasing him after the recommendation of the review board.
- [151] In submissions, Counsel also argued that the actions of the police in repeatedly detaining the claimant while these proceedings were pending before the court were aggravating factors. However, these assertions are not properly before the Court.
- [152] Overall, apart from the factors described above there was not anything in the conduct of the state which was proved to be outrageous, arbitrary and callous and which involved malice, fraud, cruelty, insolence and the like. There is also no direct evidence of ill-will in the continued detention of Mr Clarke after the recommendation of the revocation of the detention order.

[153] Mr. Clarke was adequately compensated for his unlawful detention. In addition to that a moderate award of One Million Dollars (\$1,000,000.00) for aggravated damages is reasonable.

### **SPECIAL DAMAGES**

[154] Although the fixed date claim form does not expressly plead special damages, a fair reading of it in conjunction with the affidavit in support confirms that a claim for special damages is included in the overall claim. At paragraph 16 of the affidavit in support Mr Clarke states that he incurred costs as a result of the breaches of his constitutional rights and claimed a sum Five Hundred Thousand (\$500,000.00) for legal expenses for representation at the Review Tribunal. In his third affidavit filed 4 March 2020, he claimed for further legal fees and for loss of income of Fifteen Thousand (\$15,000.00) per week for the period of his incarceration. While the Court will not permit Mr Clarke to put forward new claims in his latter affidavits, the Court accepts that these affidavits may provide evidence of further particulars of a claim, i.e. special damages, that is already properly before the Court for its consideration. There is nothing inconsistent in this approach.

[155] Each item of special damages must be specifically proved and must be reasonable. The special damages claimed amount in total to Two Million One Hundred and Thirty-One Thousand Dollars (\$2,131,000.00). The claim for Five Hundred Thousand Dollars (\$500,000.00) for legal expenses for representation at the review tribunal is unsupported by any documentation. There is a scantiness of proof regarding this item as legal expenses are of a category where it is reasonable to expect a receipt or at least an invoice in evidence. However, there is no question that Mr Clarke was legally represented at the Review Tribunal with hearings over several days. No doubt the defendant is liable for some legal costs and the Court will allow Three Hundred Thousand Dollars (\$300,000.00), for this item.

[156] Mr Clarke asked for further legal expenses of One Million Six Hundred and Thirty-One Thousand Dollars (\$1,631,000.00) and furnished in support an invoice from

his attorney-at-law dated 2 March 2020. This invoice relates to fees for work done in respect to matters which are not a part of the claim before the court. This item is not allowed.

[157] Mr. Clarke also seeks Fifteen Thousand Dollars (\$15,000.00) for loss of earnings for his 37.5 weeks in detention. He said that before his detention he was informally employed as a taxi operator and like so many in the informal sector in Jamaica, it is acceptable that he may not be able to furnish documentary proof. There can be no doubt that he lost some income during the long period of detention and his evidence of Fifteen Thousand Dollars (\$15,000.00) per week is reasonable and will be allowed amounting to a total of Five Hundred and Sixty- Two Thousand Five Hundred Dollars (\$562,500.00).

[158] Special damages is awarded in the sum of Eight Hundred and Sixty-Two Thousand Dollars (\$862,000.00).

### **COSTS**

[159] Mr. Clarke has sought costs on an indemnity basis relying on principles set out in *RBTT Bank Limited v YP Seaton*<sup>39</sup> as well as *Port Kaiser Oil Terminal SA v Rusal Alpart*<sup>40</sup>. Essentially such costs are entirely within the discretion of the Court and may be granted where a party has conducted its case in a manner which is unreasonable to a high degree or where the successful party has been unreasonably and unnecessarily put to expense and the court wishes to express its disapproval of such conduct. These factors and principles do not exist or apply in this case. This was a matter of some novelty involving challenges to the constitutionality of the recently declared state of emergency and even if we consider that some aspects of the defendant's case were not entirely convincing there is nothing unreasonable in the conduct of the defendant's case that was of

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<sup>39</sup> [2014] JMSC Civ. 34

<sup>40</sup> [2016] JMCC COMM CD 10



such a level as to warrant an award of costs on an indemnity basis. However, this successful claimant deserves to recover costs on a standard basis and that order will be made.

## **DISPOSITION**

**[160]** It is hereby ordered as follows: -

1. It is declared that Regulation 22 of the Emergency Powers Regulations 2018 breaches Section 13 (3) (f) (ii) of The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011.
2. It is declared that Regulation 30 of the Emergency Powers Regulations 2018 breaches Section 13 (3) (a), Section 14 (2) (b), Section 14 (3) (a) (i) and Section 14 (3) (b) of The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011.
3. It is declared that Regulation 32 of the Emergency Powers Regulations 2018 breaches Section (13) (3) (f) (ii) of The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011.
4. It is declared that Regulation 33 of the Emergency Powers Regulations 2018 breaches Section (13) (3) (a) of The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011.
5. It is declared that Regulation 38 (9) of the Emergency Powers Regulations 2018 breaches Section 14 (1) of The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011.
6. It is declared that the claimant's rights as set out in Sections 13 (3) (a), 14 (3) (a) (1), 14 (3) (b) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act were infringed upon.

7. The claimant is entitled to redress under Section 19 (1) of The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011.
8. The claimant is awarded damages in the total sum of \$17,862,000.00 as follows:
  - a) compensatory damages in the sum of \$12,000,000.00
  - b) constitutional/vindictory damages in the sum of \$4,000,000.00
  - c) Aggravated damages in the sum of \$1,000,000.00
  - d) Special damages in the sum of \$862,000.00
9. Costs to the claimant to be taxed if not agreed.

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**CHESTER STAMP, J**

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**ANNE-MARIE NEMBHARD, J**

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**TARA CARR, J**