[2021] JMFC Full 05

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. SU2019 CV 03267

CORAM: THE HONOURABLE MR. JUSTICE CHESTER STAMP
THE HONOURABLE MRS. JUSTICE SONYA WINT-BLAIR
THE HONOURABLE MRS. JUSTICE ANDREA PETTIGREW-COLLINS

IN THE MATTER OF the Constitution of Jamaica

A N D

IN THE MATTER OF the Charter of Fundamental Rights and Freedom (Constitutional Amendment Act 2011)

BETWEEN	**LINTON BERRY**	**CLAIMANT**
AND	**ATTORNEY GENERAL**	**DEFENDANT**

IN OPEN COURT

Miss Zara Lewis instructed by Zara Lewis and Co. for the claimant

Miss Kamau Ruddock and Mrs. K. Fletcher instructed by the Director of State Proceedings for the defendant

Dates Heard: September 22 & 23, 2021 and December 16, 2021

Constitutional Law – whether breach of constitutional rights – right to equitable and humane treatment by public authority – right to enjoy healthy and productive environment – right to protection from torture, or inhuman or degrading

punishment – whether claimant provided with access to life-saving food and medication, meals and medication in a timely manner and adequate access to medical and dental care.

STAMP J

[1] I have had the benefit of reading a draft copy of the judgment of Justice Pettigrew-Collins and I concur with her findings and conclusions and there is nothing useful that I can add.

WINT-BLAIR J

[2] I have read the draft judgment of my sister and I am in agreement with her reasoning and conclusions.

PETTIGREW-COLLINS J

THE CLAIM

[3] The claimant filed a Fixed Date Claim Form with supporting affidavit on the 14th of August 2019. In that claim, he sought the following relief:

> A declaration that the claimant's Fundamental Human and Constitutional Rights contained in Chapter III of the Jamaica Constitution titled the Charter of Fundamental Rights and Freedoms section 13 (3) (h), (l) and (o) have been contravened by the actions of the Correction Officers who are servants and/or agents of the Government of Jamaica (hereinafter referred to as "The Government Authorities") attached to the Tower Street Adult Correctional Centre who refuse to allow the claimant access to necessary lifesaving food and medical assistance;

i. A declaration that the claimant be allowed access and permission to receive items on a weekly basis according to the diet sheet received from the Diabetic Association;

ii. An order that the Defendants do pay compensation to the claimant for the infringement of his rights and for the inconvenience and distress suffered;

iii. An order that the claimant's sentence be reduced on account of the ill treatment by the Correctional Officers meted out to the claimant;

iv. An order that the claimant be awarded damages to be assessed as compensation for the breach of his Constitutional rights under section 14 (3) of the Constitution of Jamaica;

v. Special damages of $246,690.97;

vi. Exemplary Damages;

vii. Aggravated Damages;

viii. Vindicatory Damages; and

ix. Such Orders and Directions as the Honourable Court may deem appropriate in this case.

THE BACKGROUND

[4] The background to the claim is taken from the claimant's affidavits. His evidence will be more fully examined during the course of the judgment. The claimant is an inmate at the Tower Street Adult Correctional Centre. He was convicted for the offence of murder. He is serving a life sentence and will become eligible for parole after serving 25 years. He had been sentenced to death after his first trial

but after an appeal and subsequent retrial, he was again convicted of murder in February of 1997. As at the date of his first affidavit, (10th of August 2019), he had served 22 years and 5 months of that sentence.

[5] The claimant avers that the Correctional Services has negligently and continually refused and/or failed to provide him with any or any adequate access to life saving food or medication, access to medical and dental care, meals and medication in a timely manner, and not at all with certain medications. He says the meals, care, and medication that he has been deprived of, were recommended by the medical officer of the Department of Corrections and the Department of Corrections knew or ought to have known that he was diagnosed with type 2 diabetes as he had been in the care of their doctors over the years. He contends that he has been deprived of the minimum dietary requirements and medical care having regard to his diabetic and hypertensive status.

[6] He also avers that over the years he has had to elicit the help of Attorneys-at-law to write to various Correctional Officers and other persons in authority to assist him to secure proper medical and dental care. He exhibited various letters written by him to Attorneys-at-law and to the Correctional Services, as well as letters written to the Correctional Services and in particular to the Commissioner by Attorneys-at-Law on his behalf.

[7] He says that in May of 2008 he was placed on a strict diet in accordance with the Jamaica Diabetic Association's dietary recommendation. He avers that he was granted permission by the Superintendent of the Tower Street Adult Correctional Centre where he has been housed to receive food consistent with his dietary requirements. He exhibited various memoranda to that effect.

[8] The claimant asserts that his inability to access the correct diet and medication has resulted in his developing type 1 diabetes, type 2 diabetes, damage to his retina resulting in serious blurred vision which is likely to lead to him going blind

in the eye, constant leg and muscle pain, dry itchy skin, headaches and difficulty concentrating as well as high glucose levels.

[9] He claims that his symptoms are as a result of foods that he has been served which do not conform with and according to him are “in direct contradiction of” the foods recommended by the Diabetic Association and Medical personnel at the correctional centre.

[10] The claimant requests as part of the remedy for the breach of his constitutional rights that time spent on remand and on death row between January 1987 and 1992 be deducted from his sentence based on an order of the Court of Appeal of Jamaica that the period he should serve before becoming eligible for parole should commence 3 months after the date of conviction. He seeks in the alternative a reduction in sentence on account of the time spent on death row and the ill treatment he has been subjected to at the hands of Correctional Officers.

THE DEFENDANT’S EVIDENCE

[11] An affidavit in response to the claimant’s first affidavit was sworn to by Lieutenant Colonel (Retired) Gary Rowe, the Commissioner of Corrections, on the 30th of October 2019. This court is cognizant of the fact that Lieutenant Rowe was not the Commissioner of Corrections during the period in relation to which the complaints have been made and that as he stated in response to a question put by the court, his knowledge of the matters deponed to was derived from records kept at the institution. He averred that the claimant has been provided a balanced diet in accordance with the Standard Operating Procedure Dietary regime and he is given the necessary medical treatment from internal medical officers as well as from sources external to the system.

[12] He also averred that inmates with special dietary requirements are facilitated and that as long as a special dietary regime has been approved by the staff Medical Officer, the inmate is permitted to be served same. He admitted as the claimant stated, that the claimant's special dietary requirements were approved by a staff Medical Officer. He said that the Master Cook would in such instances be required to serve the approved diet and, in this instance, approval was given for the claimant to be served the diet in accordance with the list of food items and meal plan prepared by Dr Joy Callender. He stated that it was arranged that the claimant would take his meals in the kitchen and would sign a logbook when he received his meals. This he said was done because the Standard Operating Procedure ("SOP") prevented special diets from being served in the dining rooms. He said that the claimant on several occasions failed and or refused to collect his meals as arranged.

[13] His evidence was that the claimant's request that he be permitted to prepare his own meals was not approved as that practice was not in keeping with the Correctional Institution (Adult Correctional Centre) Rules 1991 ("the 1991 Rules"). He also stated that the rules do not permit inmates having access to raw foods brought into the institution by outside persons. He averred that when it was discovered that the claimant was receiving quantities of raw food, a meeting was held with Superintendent Brown and a decision taken for the Department of Correctional Services (DCS) to purchase the raw foods and have the meals prepared by the Master Cook for the claimant. The affiant directed the court's attention to a letter dated January 30, 2018, from Ms Ina Hunter, the then Commissioner of Corrections which was exhibited to his affidavit, as evidencing the fact that permission was granted for the claimant to receive items on a weekly basis in accordance with the diet sheet from the Diabetic Association. He states further that there has been no failure to implement the arrangement. He also stated that the claimant was granted permission to receive fruits and nuts on Wednesdays which is the Food Day. (Understood in the context of the evidence to mean the day when inmates are allowed to receive into the institution, food

from external sources, generally from family members and or friends who are permitted to visit).

[14] Lieutenant Colonel Rowe also stated that the Master Cook was provided with details of the schedule for the claimant's special diet and has been preparing the meals accordingly. He proffered that the claimant has refused to collect his meals and sign for same on occasions because he wants to prepare his meals himself. The affiant said that the claimant constantly demanded special treatment and pointed to the claimant's history of lodging complaints.

[15] He said that it is the Correctional Services' policy that inmates with chronic diseases are seen by their physicians every 3 to 6 months but that the claimant failed to attend several medical appointments and dental appointments for the reason that he was not given prior notice of the appointment. He observed that for security reasons, this could not be done. Other aspects of his evidence will be referenced as necessary throughout the course of the judgment.

THE ISSUES

[16] On the claimant's behalf, Miss Lewis formulated the main issue as being whether the claimant's rights have been breached by the failure to provide him with necessary lifesaving food and timely medical assistance. The first sub-issue as formulated by her is essentially the same as the main issue. The fourth issue concerns the remedy for breaches. For her, the other two sub issues are:

i. Whether the doctrine of proportionality as outlined in the case of ***Julian J Robinson v. The Attorney General of Jamaica*** [2019] JMFC Full 4 places the burden on the defendant to provide justification for their breach of the claimant's constitutional rights; and

ii. Whether the strict adherence to the Standard Operating Procedure can provide the justification for the breach of the claimant's constitutional rights;

[17] Miss Lewis' formulation of the issues could be interpreted as embodying the assumption that it has been established, on the evidence that there was a failure to provide lifesaving food and timely medical assistance to the claimant, hence the defendant was required to provide justification for this failure. It would then be for the court to assess the explanation provided by the defendant in order to determine if that explanation amounted to justification. Further, her stance that the defendant's position is that it has strictly adhered to the SOP is an inaccurate reflection of what the evidence led by the defendant in this claim discloses.

[18] The main issue arising in this claim may be better formulated as whether the claimant's constitutional rights as guaranteed by section 13 (3) (h), (l) and (o) of the Charter of Fundamental Rights and Freedoms have been or are being breached by virtue of the acts and/or omissions of servants and or agents of the Government of Jamaica.

[19] In order to answer that question, this court must decide whether there has been a failure on the part of the Correctional Services to provide the claimant with, or access to necessary lifesaving food and medication, and timely meals, medical optical and dental care.

[20] The question also arises as to whether the court can properly make the declaration that the claimant be allowed access to and permission to receive on a weekly basis, items in accordance with the dietary stipulations of the Diabetic Association.

[21] The subsidiary issue of his entitlement to remedies can only arise if the court determines that there has been a breach of his constitutional rights or his fundamental human rights.

[22] The specific complaints are that the government agents who are officers attached to the Tower Street Adult Correctional Centre failed to provide the claimant:

i. with any or adequate access to life-saving food or medication as recommended by medical officers when the Department of Corrections knew or ought to have known that the claimant was diagnosed with type 2 diabetes;

ii. with meals in a timely manner as recommended by the medical officer;

iii. with access to medical and dental care as recommended by the medical officer;

iv. with medication in a timely manner or at all as recommended by the medical officer.

THE LAW

[23] Chapter III of the Constitution of Jamaica encapsulates the Charter of Fundamental Rights and Freedoms. Section 13(1) provides that whereas-

(a) the state has an obligation to promote universal respect for, and observance of, human rights and freedoms;

(b) all persons in Jamaica are entitled to preserve for themselves and future generations the fundamental rights and freedoms to which they are entitled by virtue of their inherent dignity as persons and as citizens of a free and democratic society; and

(c) all persons are under a responsibility to respect and uphold the rights of others recognized in this Chapter, the following provisions of this chapter shall have effect for the purpose of affording protection to the

rights and freedoms as set out in those provisions, to the extent that those rights and freedoms do not prejudice the rights and freedoms of others.

[24] Among the rights and freedoms guaranteed under section 13(3) are the following;

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

(l) the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage;

(o) the right to protection from torture, or inhuman or degrading punishment or other treatment as provided in subsection (6) and (7);

[25] As provided in section 13(2), there may be derogation from the rights enshrined in the constitution to the extent that such derogation is demonstrably justified in a free and democratic society.

[26] Section 19 of the constitution provides an avenue to a citizen for vindication if any of the rights has been, is being, or is likely to be infringed. Section 19(1) of the constitution states as follows:

i. "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 the same matter, which is lawfully available, that person may apply to the Supreme Court for redress."

Section 13(3)(h)

[27] The question of breach of the right guaranteed under section 13(3)(h) was considered in the case of ***Sean W. Harvey v Board of Management of Moneague College et al***. [2018] JMSC Full 3. The claimant who is visually

impaired claims that he was not employed by the Moneague College because of his visual impairment and disability and asserted that the failure to employ him amounted to a breach of his constitutional rights guaranteed under section 13(3)(h) of the Charter of Fundamental Rights and Freedoms. One of the issues raised was whether it was established by the claimant that the failure to employ him amounted to treatment that was other than equitable and humane. The learned Chief Justice Sykes relied on the principle from ***Bhagwandeen v Attorney General of Trinidad and Tobago*** (2004) 64 WIR 402 that a claimant who alleges inequality of treatment must establish that he has been or would be treated differently from some other similarly circumstanced person(s). He concluded at paragraph 64 of his judgment that there was no evidence that the claimant failed to secure the job because he was not treated equal. He pointed to the evidence that three persons including the claimant were shortlisted for the interview and none of them was selected and that from the second round of interviews, the person selected for the post fulfilled all the requirements for the position; having both a first and second degree and teaching experience and certification. The claimant did not have three of the stated requirements.

[28] Palmer-Hamilton(Ag) as she then was, agreed that there was insufficient evidence before the court to make a fair assessment as to whether there had been inequitable and inhumane treatment meted out to the claimant. At paragraph 119 in relation to equitable and humane treatment she said:

> *"The interpretation of equitable and humane treatment was given minimal treatment in the case of Rural Transit Association Limited v Jamaica Urban Transit Company Ltd., The Commissioner of Police and the Attorney General [2015] JMFC Full 4, in which C. McDonald, J stated that the words equitable and humane should be read conjunctively. I agree wholeheartedly with McDonald, J's interpretation that equitable does not mean equal, nor are they synonymous with each other. McDonald, J gives a clear definition of equitable to mean fair and just, however neither McDonald, J nor F. Williams J (as he then was), proffered an interpretation or definition of humane. Nonetheless I will adopt the definitions utilised by Counsel Mrs. Dixon-Frith and Ms. Tamara Dickens. Simply put, humane means showing kindness towards other people and is*

often used in the context of the treatment of categories of persons such as the disabled."

Section 13(3)(l)

[29] In relation to the rights conferred under section 13(3)(l), I have not been able to unearth any local cases. However, the case of ***the Indigenous Communities of the Lhaka Honhat Association Our Land v Argentina*** decided by the Inter-American Court of Human Rights on February 6, 2020, is instructive. The court declared that the state of Argentina had violated among other rights of the inhabitants of 132 indigenous communities, the right to a healthy environment and the right to adequate food as well as the right to water, owing to ineffectiveness of state measures to stop activities which harmed those rights.

[30] It was acknowledged that those are distinctive rights guaranteed by Article 1(1) of the Inter-American Convention on Human Rights. In assessing the case, the court examined the rights to a healthy environment, to adequate food, to water and to take part in cultural activities, as well as the interdependent nature of these rights. The right to a healthy environment was considered as one of the rights protected by Article 26 of the convention. This by virtue of the obligation of the state to ensure "integral development for the peoples" as revealed by Articles 30, 31, 33 and 34 of the Charter. (See paragraph 202 of the judgment). This right was acknowledged by the court to be an autonomous right which protects the components of the environment such as forests, rivers and seas as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. The court went on to observe that nature must be protected, because of its benefits to humanity and its importance for other living organisms. (See paragraph 203 of the judgment). The court further opined that the observance of any one of the rights may overlap with the realization of the others to the extent that environmental factors affect the quality, accessibility, and

availability of food and water. For example, environmental degradation will adversely affect the quality of food and water.

[31] The Court recognized that certain activities carried out by the Criollo population within the territory such as logging, raising livestock and installing fences, affected environmental rights in that those activities impacted the traditional ways in which the indigenous inhabitants obtained food and accessed water. The case was also decided against the background that the right to a healthy environment is also enshrined in the Argentinian Constitution.

[32] In **Advisory Opinion OC – 23/17 of November 15, 2017 Requested by the Republic of Colombia**, also a decision of the Inter American Court of Human Rights, the court reiterated the interdependence and indivisible nature of various guaranteed human rights and that numerous other rights may be affected by a failure to address environmental concerns. The court observed that under the inter-American human rights system, the right to a healthy environment is established expressly in Article 11 of the Protocol of San Salvador, and states as follows:

> 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
>
> 2. The States Parties shall promote the protection, preservation, and improvement of the environment.

[33] The court emphasized the distinct likelihood of environmental degradation affecting the well-being of individuals and the violation of other rights such as the right to life. The court observed at paragraph 59 the individual dimension of the right “in so far as its violation may have a direct and an indirect impact on the individual owing to its connectivity to other rights such as the right to health, personal integrity, and life”. The court also acknowledged that environmental degradation may cause irreparable harm to human beings; hence the reason the right to a healthy environment is a fundamental right.

[34] The African Commission on Human and Peoples' Rights case of ***The Social and Economic Rights Action Center and The Center for Economic and Social Rights v. Nigeria*** Communication No. 155/96 decided 13-27 October 2001 is another example. In this case, violation of various rights guaranteed by a number of articles of the African Charter were alleged. It was the complaint that the oil consortium had exploited oil reserves in a particular region of Nigeria Ogoniland, without regard inter alia, for the health or environment of the local community by disposing of toxic waste in the local environment and local waterways thereby resulting in contamination of water, soil and air. Such conduct it was said, impacted in the short and long term, the health of the inhabitants resulting in conditions such as skin infections, respiratory ailments, neurological and reproductive problems and increased risk of cancer.

[35] It was therefore the complaint that the Nigerian government violated the right to enjoy the best attainable state of physical and mental health and the right to a clean environment as recognized under Articles 16 and 24 of the African Charter. The African Commission found that those rights among others had been violated as there was a failure to fulfil the minimum duties required by those rights.

[36] Those cases in my assessment, though the rights involved are differently worded, demonstrate that the right as envisaged by section 13(3)(l) is referable to matters affecting the physical environment, that is the quality of the physical environment and involves the constituent elements such as water, soil and air and matters affecting their quality and how human lives are thereby impacted.

[37] There are various cases which examine the contravention of other rights in the context of how those rights may be affected as a result of damage to the environment in circumstances where there is no guarantee of the right to a healthy environment. The cases of ***Di Sarno and Others v. Italy*** (Application No. 30765/08) decided 10 January 2012 concerned a claim of poor management of waste collection and disposal by the Italian authorities which allegedly resulted in environmental damage and thereby endangering life and health. In ***Hatton and***

Others v. The United Kingdom (Application No. 36022/97) decided 8 July 2003, eight United Kingdom nationals brought a claim alleging that the level of disturbance from aircraft noise at nights amounted to breach of the individual's right to respect for his private and family life. ***Guerra and Others v. Italy*** (116/1996/735/932) decided 19 February 1998 concerned a claim by forty Italian Nationals that the government had failed to put in place measures to reduce pollution levels and major accident hazards at a factory where there was the potential for the release of gases which could possibly result in explosive chemical reaction and also that there was a failure to advise the public about the hazards and procedure to follow in the event of a major accident. Those breaches they claimed, infringed their right to freedom of information.

Section 13(3)(o)

[38] The right guaranteed under section 13(3)(o) of the Constitution was clarified in the case of ***Patrick Whitely v Attorney General*** [2016] JMFC Full 6. At paragraph 46 of the judgment, the court had the following to say:

> *[46] Assistance in deciding whether or not the claimant could be said to have endured torture or inhuman or degrading punishment or other treatment is to be found in the decision of the Court of Appeal of Jamaica in* **Fuller v. Attorney General** *(1998) 56 WIR 337. At page 412 Harrison J.A. stated:*
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> *"Torture is not defined in the Constitution. However, because of the history of the origin of the Constitution and the fact that it was influenced by the conventions which were adopted primarily to deal with the atrocities of the Second World War, the decisions of international tribunals and bodies can provide assistance in interpretation, despite the sui generis nature of the Constitution. The European Court of Human rights in* ***Republic of Ireland v. United Kingdom*** *(1978) 2 EHRR 25 by a majority made a distinction between "torture" on the one hand and "inhuman and degrading treatment" on the other. Torture that court found, involved…. deliberate inhuman treatment causing very serious and cruel suffering……. of a particularly high level of intensity."*

[39] The matter was further considered with specific reference made to the cases from the European Court of Human Rights. The following was said at paragraphs 47, 48 and 49.

> *[47] In **Gafgen v. Germany** (2010) 28 BHRC 463, the court after considering the decisions in **Ireland v. U.K**., **Aksoy v. Turkey** (1996) 1BHRC 625 and **Selmouni v. France** (1999) 7 BHRC 1 at paragraph 90 of the judgment stated: "In addition to the severity of the treatment, there is a purposive element to torture, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which in art. 1 defines torture in terms of the intentional infliction of severe pain or suffering with the aim, inter alia of obtaining information, inflicting punishment or intimidating (see **Akkoc v. Turkey** [2000] ECHR 22947/93 at para 115)."*
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> *[48] The court in **Gafgen v. Germany** also considered what would constitute inhuman or degrading treatment at para. 88 the court stated: "In order for ill treatment to fall within the scope of art 3 it must attain a minimum level of severity… Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it…"*
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> *[49] At para. 89 the following was said: "The court has considered treatment to be "inhuman" because, inter alia it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering (see **Lobita v. Italy** [2000] ECHR 26772/95 at para. 120 and Ramirez **Sanchez v. France** [2006] ECHR 59450/00 at para. 118). Treatment has been held to be "degrading" when it was such as to arouse in its victims feeling of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance, or when it was such as to drive the victim to act against his will or conscience…"*

[40] Section 13(3)(o) of the Constitution mirrors part of Article 7 of the International Covenant on Civil and Political Rights. Cases such as **Levy v Jamaica** Communication No 719/1996 decided in the context of Articles 7 and 10 are relevant to the present claim. Although there is no specific clause in any of the three provisions that the claimant says have been breached which deal distinctively with the rights of an individual who is incarcerated. Article 10 of that Convention provides that "*all persons deprived of their liberty shall be treated with humanity of the human person and with respect for the inherent dignity."*

[41] In **Levy v Jamaica** the complaint of Conroy Levy, an inmate on death row was that his rights under Articles 7 and 10 of the Covenant among others had been breached. Part of the complaint in relation to the breach of Articles 7 and 10 was that gunshot injuries he had received prior to being arrested had not healed and he had been denied proper treatment. He claimed that the prison authorities failed to meet his appointment so that he could have an operation to his throat and jaw despite the fact that he constantly complained of swelling in his throat. He also complained that the prison where he was being held was in a state of total disrepair, the food provided was not palatable and did not meet his nutritional needs. It was also a part of his complaint that he was kept in a cell without a mattress, other bedding or furniture, sanitation or natural light or adequate ventilation 23 hours per day. Concerning Mr Levy's complaint that his detention on death row since 1992 constituted cruel inhuman and degrading treatment, the Human Rights Committee observed that while detention on death row for any specific period of time does not constitute a violation of Articles 7 and 10 in the absence of further compelling circumstances, the committee has in its jurisprudence held that deplorable conditions of detention may on their own constitute a violation.

[42] Specifically relating to violation of Articles 7 and 10 on the ground of the conditions of detention relating to the matters set out above, the Committee observed that the state had not refuted those specific allegations and did not

forward the results of investigations it had announced would be carried out and therefore determined that there had been a violation of the articles.

[43] The factors which are relevant to a consideration of whether there was a breach of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedom (the main ground of complaint in **Testa v Croatia** Application no. 20877/04) are evidently important in deciding whether there is a breach of our constitutional provisions, particularly section 13(3)(o). Just as with a breach of Article 3 of this Convention and Article 7 of the International Covenant on Civil and Political Rights, for there to be a breach of our constitutional provisions, the ill treatment complained of must attain a minimum level of severity.

[44] In **Testa v Croatia**, the applicant Mrs Ksenija Testa while serving a three-year prison sentence in the Pozega penitentiary, made an application to the European Court of Human Rights against the Republic of Croatia for breaches of her rights under Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Article 3 reads “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

[45] In support of her application, the applicant outlined that she had been suffering from Hepatitis C with high levels of viruses in the blood since 1996. She further outlined that she underwent unsuccessful interferon treatment and due to the effects of the disease her liver was damaged, and she was in general bad health. The applicant also highlighted that she contracted hepatitis A and suffered from endometriosis.

[46] The applicant disclosed to the court that at the Pozega Penitentiary she was held in the high security unit in a 12 square metre cell along with five inmates, that the penitentiary was in a bad state of repair, that the walls were damp, windows were broken, and the heating facilities were old and insufficient and as a result it was cold in the cells and in other prison areas. She stated that the roof of the room

leaked when it rained, and the sewage and water system often broke down for days, depriving the inmates of running water. She also said that the beds were old and broken down, there were two toilets for 30 inmates, and they were not allowed to use the toilets at night. Additionally, the court learnt that an inmate in the applicant's room who took heavy sedatives soiled her bed every night and this created an unbearable smell in the cell. According to the applicant, the penitentiary lacked sufficient sanitary facilities, so inmates were occasionally sent to shower in the basement where there were rodents, cockroaches and cats running around. The court was also told that the inmates had to wash their clothes by hand and dry them in a very small room which created an unbearable smell.

[47] Further, the applicant stated that the inmates had to line up in the courtyard regardless of weather conditions and often for prolonged periods of time while they awaited access to the canteen and that doing so was unbearable for the applicant due to her illness. The applicant stated additionally that she was allowed one hour's rest in her bed each day and if she needed more rest, she had to seek the doctor's permission. According to the applicant, the short period of rest was almost unbearable for her since she suffered from tiredness associated with hepatitis C.

[48] In addition, the applicant revealed that although she had been prescribed a low-fat diet for her liver disease, she was served food cooked with pig fat. Further, that generally the food served to inmates was of a poor quality. The applicant disclosed that she saw a doctor once and the medical documentation showed that she tested positive for hepatitis C and had high levels of viruses in her blood. She said she had not been sent for other medical check-ups neither had she been seen by a hepatologist.

[49] The court considered Article 23 of the Croatian Constitution which provides that no one shall be subjected to any form of ill treatment and certain sections of the

Croatian Enforcement of Prison Sentences Act which made provisions for prisoner entitlements and the standard of treatment that is to be given to them.

[50] At paragraph 42, the Court reiterated that Article 3 of the Convention enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see **Labita v. Italy**, judgment of 6 April 2000, Reports of Judgments and Decisions 2000- IV, § 119).

[51] The court at paragraph 43-46 said:

> "43. *According to the Court's case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities,* ***Ireland v. the United Kingdom****, judgment of 18 January 1978, Series A no. 25, p. 65, § 162). Although the purpose of such treatment is a factor to be taken into account, in particular the question of whether it was intended to humiliate or debase the victim, the absence of any such purpose does not inevitably lead to a finding that there has been no violation of Article 3 (****Peers v. Greece****, no. 28524/95, § 74, ECHR 2001-III, and* ***Valašinas v. Lithuania****, no. 44558/98, § 101, ECHR 2001-VIII).*
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> *44. The Court has consistently stressed that the suffering and humiliation involved must in any event exceed the inevitable element of suffering or humiliation connected with a legitimate deprivation of liberty. Nevertheless, in the light of Article 3 of the Convention, the State must ensure that a person is detained under conditions which are compatible with respect for human dignity, that the manner and method*

of the execution of the measure do not subject the individual to distress or hardship exceeding the unavoidable level of suffering inherent in detention, and that, given the practical demands of imprisonment, the person's health and well-being are adequately secured (see Kudła v. Poland [GC], no. 30210/96, §§ 92-94, ECHR 2000-XI), with the provision of the requisite medical assistance and treatment (see, mutatis mutandis, ***Aerts v. Belgium****, judgment of 30 July 1998, Reports 1998-V, p. 1966, §§ 64 et seq.). When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as the specific allegations made by the applicant (see* ***Dougoz v. Greece****, no. 40907/98, § 46, ECHR 2001-II).*

45. In exceptional cases, where the state of a detainee's health is absolutely incompatible with the detention, Article 3 may require the release of such person under certain conditions (see ***Papon v. France*** *(no. 1) (dec.), no. 64666/01, CEDH 2001-VI, and* ***Priebke v. Italy*** *(dec.), no. 48799/99, 5 April 2001) There are three particular elements to be considered in relation to the compatibility of the applicant's health with her stay in detention: (a) the medical condition of the prisoner, (b) the adequacy of the medical assistance and care provided in detention and (c) the advisability of maintaining the detention measure in view of the state of health of the applicant (see* ***Mouisel v. France****, no. 67263/01, §§ 40-42, ECHR 2002-IX).*

46. However, Article 3 cannot be construed as laying down a general obligation to release detainees on health grounds. It rather imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty. The Court accepts that the medical assistance available in prison hospitals may not always be at the same level as in the best medical institutions for the general public. Nevertheless, the State must ensure that the health and well-being of detainees are adequately secured by, among other things, providing them with the

requisite medical assistance (see Kudła, cited above, § 94, ECHR 2000-XI; see also ***Hurtado v. Switzerland****, judgment of 28 January 1994, Series A no. 280-A, opinion of the Commission, pp. 15-16, § 79, and* ***Kalashnikov v. Russia****, no. 47095/99, §§ 95 and 100, ECHR 2002-VI). Furthermore, if the authorities decide to place and maintain a seriously ill person in detention, they shall demonstrate special care in guaranteeing such conditions of detention that correspond to his special needs resulting from his disability (see* ***Farbtuhs v. Latvia****, no. 4672/02, § 56, 2 December 2004)"*

[52] The court considered whether the conditions of the applicant's detention were compatible with Article 3 of the convention and whether the applicant was provided with the necessary medical treatment and assistance. It was consequently held that the applicant was not provided with proper medical assistance as it was essential for the applicant to undergo adequate assessment of the state of her health in order to be provided with adequate treatment. Also, that the applicant was not provided with appropriate diagnostic treatment and was left without relevant information in respect of her illness, thus keeping her in the dark about her health condition and depriving her of any control over it which must have caused her perpetual anguish and fear. It was further held that the applicant was detained in an unsanitary and unsafe environment. These conditions the court said diminished the applicant's human dignity and aroused in her feelings of anguish and inferiority capable of humiliating and debasing her and possibly breaking her physical or moral resistance. Accordingly, the nature, duration and severity of the ill-treatment to which the applicant was subjected and the cumulative negative effects on her health can qualify the treatment to which she was subjected as inhuman and degrading. Article 3 of the Convention in the circumstances of the present case was therefore violated. The applicant was awarded non-pecuniary damages and costs.

[53] In ***Latvia v Moisejevs*** (No. 640846 delivered June 152006), the applicant, a permanent resident of Lativa, while imprisoned brought a motion against the

republic of Latvia in the European Court for Human Rights. He alleged among other things that he has been the victim of treatment prohibited by Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

[54] The applicant was arrested on 4 December 1996 as a suspect in relation to an armed robbery and placed in pre - trial detention following preliminary investigations by the police. He was subsequently charged with armed robbery with aggravating circumstances and later with banditry. The applicant's detention was extended on three separate occasions in total until 20 July 1997.

[55] On 20 June 1997, the public prosecutor's office closed the preliminary investigation and transmitted the files to the defence. From that moment the period of detention of the applicant was suspended. Under paragraph 2 of Article 77 of the Code of Criminal Procedure the maximum period of detention permitted at the preliminary stage of the investigation was one year and six months. This period expired on June 4, 1998. However, as the applicant's release had been suspended, he remained in detention.

[56] The applicant was committed to stand trial on 4 September 1998 and the examination of the case lasted until 16 August 2001. During this time, he made a number of unsuccessful applications for release. The applicant alleged that during this period when he was transported to the regional court, no practical arrangements were made for feeding him while on the court premises. He stated that he was deprived of lunch during the days of the hearing or given bread, an onion, and a piece of grilled fish and this was insufficient food to meet his needs. He also stated that he was sometimes brought back to the prison after the usual dinner and had to settle for a simple loaf of bread. He further alleged that he was deprived of family visits.

[57] The applicant was convicted of banditry and sentenced to 13 years' imprisonment on appeal his sentence was reduced to 12 years.

[58] The court at paragraph 78 considered that "*the obligation of the national authorities to ensure the health and general well-being of a prisoner implies, inter alia, the obligation to provide him with adequate nutrition (see,* ***mutatis mutandis, Llaşcu and Others v. Moldova and Russia*** *[GC], nor 48787/99, § 451, CEDH 2004-VII)."*

[59] The court took into consideration the absence of the government's denial of the applicant's allegations that he did not receive a normal lunch and on occasion full dinner. The court reasoned that the meal provided to the applicant while at the court was clearly insufficient to meet his body's functional needs especially since the applicant's participation at the hearings created increased psychological tension in him. The court concluded that at least before the end of 2000 the applicant suffered hunger during the days of the hearing and that in all the relevant circumstances of the case, the applicant's suffering was sufficiently severe to reach the minimum degree of seriousness required by Article 3 of the Convention and to constitute degrading treatment within the meaning of that provision.

[60] In ***Slyusarev v Russia*** Application no. 60333/00, the applicant was arrested in July 1998 for armed robbery. After his arrest, his glasses which he wore for his short-sightedness were damaged and confiscated. While in pre-trial detention, the applicant's request for new glasses was refused. In September 1998, the applicant requested to have his eyes examined because his eyesight was deteriorating, the investigator in charge of his case ordered that he see an oculist. In the meantime, the applicant filed an application for release at the court in which he indicated inter alia, that he was short sighted, that his glasses were confiscated during arrest and that his eyesight was deteriorating. Also, the applicant's wife filed a complaint with the district prosecutor in which she requested that the applicant's glasses be returned to him. In due course, the applicant was medically examined at an eye hospital. The doctor found that there was a reduction in the applicant's left eye's mobility due to a contusion, that his eyesight had deteriorated, and he needed glasses with stronger lens. He also,

found that the applicant was able to move around indoors and attend to himself. In December 1998, the applicant's lawyer lodged a formal request with the investigator to have the applicant's glasses returned to him, a day later, the applicant was provided with his old glasses and eventually with new ones. In June 1999, the applicant was convicted of armed robbery, illegal possession of firearm and fraud. He was sentenced to nine years' imprisonment.

[61] The applicant petitioned the European Court of Human Rights where he alleged inter alia that the taking of his glasses by the police after his arrest amounted to inhuman and degrading treatment in breach of Article 3 of the ECHR. The government accepted that the applicant had been deprived of his glasses without legal basis and this hindered his ability to participate in the proceedings for a time, however they argued that this did not result in the impairment of his vision.

[62] The Court held that the applicant's situation, due to its degree and duration resulted in a breach of Article 3 of the Convention. In coming to this conclusion, the court reasoned that the applicant was without glasses for several months and although the domestic expert concluded that the impairment was due to natural causes, the Court considered that without the glasses, the applicant must have suffered; he could not read nor write normally, and he must have been distressed in his everyday life and felt insecure and helpless.

[63] The Court further considered whether the applicant's delay in informing the authorities about the confiscation of his glasses rendered the authorities responsible for the treatment the applicant complained of. The Court found that the investigator was aware of the applicant's problems a few months after his arrest. Although they took steps to help the applicant, it took the authorities five months to give him new glasses without explanation from the government why the old glasses were not returned to him sooner when this could have alleviated the applicant's difficulties. At paragraph 43, the court said "*under Article 3 of the convention, States must ensure that a person is detained in conditions which are compatible with respect for his human dignity and that, given the practical*

demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance." It was held that taking the applicant's glasses could not be explained in terms of the practical demands of imprisonment and even more so, was unlawful in domestic terms.

[64] I make reference to the human rights cases where claims were brought in respect of the breach of certain international conventions for guidance only, and not in an attempt to determine whether there was a violation of the particular Covenant or provision in this instance, but rather, to examine factual scenarios which have been found to be violations of provisions which bear some similarity to our constitutional provisions.

ANALYSIS

[65] I will address the matters enumerated in paragraph 18 above which the claimant alleges constitute the breach of his constitutional rights. These are to summarize, failing to provide him with any or adequate access to lifesaving food or medication, with meals in a timely manner, with access to medical and dental care and with.

Failure to provide the claimant with lifesaving food

[66] The claimant in his first affidavit stated that in 2015, he began experiencing difficulties accessing the items on the approved diet sheet. He deponed to, and exhibited letters written by him to the prison authorities and to his various Attorneys at Law, as well as letters by his Attorneys at Law to the prison authorities complaining of lack of access to required food, medical and dental care and medication. He stated that the Superintendent issued a memorandum to the Officer in charge of the main gate authorizing him to receive certain food items on a weekly basis which were the items recommended by the Medical

Officer but said that even though permission was granted for him to receive the items, attempts by person/persons to deliver the items to him were prevented by personnel at the gate.

[67] In his second affidavit, the claimant stated that he had never been served any meal that is consistent with the approved diet. Further, that no effort has ever been made by the institution to accommodate his dietary requirements. He also stated that the diet he is fed consists mainly of foods cooked in oil, lard, starchy foods such as white rice, white flour dumplings and yam with a small amount of vegetables. He also said that despite being given permission by the Commissioner of Corrections in January 2018 to receive items in accordance with the diet recommended by the Diabetic Association, up to the time of giving his affidavit, he had not received any such items.

[68] It is the claimant's affidavit evidence that as at the 28th of August 2018 he stopped receiving raw food from the kitchen which he had been permitted to receive in order to prepare his own meals.

[69] The assumption is that he is speaking about the state of affairs since 2015 when he said that no effort was ever made by the institution to accommodate his dietary needs, as he had said that his problems began in 2015 and in cross examination, that up to 2015, he was allowed to receive from outside the institution, the items recommended by doctors and the nutritionist, twice weekly.

[70] In a letter dated June 14, 2016, written by the claimant (only part of which was included in the bundle at page 47) he indicated that he had received his last bag of grocery on the 29th of April 2016. It stands to reason that he was admitting that he was able to access foods consistent with the recommended diet at that time, albeit not provided by the Correctional Services. In another letter bearing date March 2018, by the claimant to his Attorney at Law Miss Zara Lewis, the claimant made reference to reminding one Superintendent Michael Anderson that most of his meat was oven-baked and that the kitchen did not want to light the gas just to

cook his meals. I am mindful that this statement is capable of a dual interpretation and may not be a statement to the effect that he was in fact receiving oven baked meat, but rather that he was supposed to be getting same.

[71] It is a part of the claimant's case that he was told by Superintendent Brown on the 16th of May 2016 that he would be allowed to have someone bring into the institution fruits, nuts, vegetables and a cooked meal on a Wednesday. The claimant's evidence in this regard in cross examination is quite instructive. He stated that this permission was given in 2015. When asked in cross examination whether he was allowed to receive fruits, nuts and vegetables on a Wednesday, the claimant said that he was permitted to bring in the items but after a Superintendent Brown withdrew the permission, he had problems receiving the items and therefore he ceased attempting to get the items in.

[72] He explained the precise nature of the problem as follows at paragraph 19 of his second affidavit:

> "*… I attempted to receive fruit and nuts (almonds, about one pound) which would last me for a week, some raisins, apple, tomato and lettuce but the almonds were rejected by the officer who stated it was too much; the raisins were also rejected and the officer wanted the bearer to cut up the apples and tomatoes and tear the lettuce apart leaf by leaf. After that incident, I have made no further attempts to receive anything else. I was further deterred by the manner in which relatives and friends are treated when they bring food for inmates on food day, some being turned away after traveling for miles, and expletives being used to them. This treatment of my friends and relatives is the main reason I have brought this claim."*

[73] I am mindful of the hearsay nature of this aspect of the evidence regarding the problems at the gate since the claimant would not have been privy to what transpired at the gate. The narrative of the claimant is not entirely consistent but, in any event, his account regarding searches at the gate renders it patently clear

that there were obvious security concerns of contraband to include weapons, entering the facility.

[74] Regarding preparations of meals by the Master Cook, the claimant said that after the raw food was stopped, (understood to mean after permission was withdrawn for him to receive raw foods), the Superintendent asked the Master Cook to prepare his meals. The claimant accepted in cross examination that he would receive specially prepared meals from the kitchen, but he insisted that those meals were not in conformity with the recommended diet. This evidence must be contrasted with paragraph 19 of his second affidavit in which he stated that "In further response to paragraph 14 of the affidavit I say that there are no specially prepared meals provided by the Master Cook and never have been up to present." This raises the question as to why there was a special effort being made to prepare have meals prepared for the claimant in the kitchen, yet he was still being given an entirely inappropriate diet.

[75] This court is well aware that the diet may not have been at all times perfectly in sync with the recommended diet. I find however, that the meals must have represented an improvement over what was served to the other inmates not on a special diet. He stated in his second affidavit that he was instructed by the superintendent to sign a logbook for meals received but stopped signing for the meals after he found out that what he was being given was not in accordance with the approved diet plan. Further, he said that he noted in the logbook his reason for not signing. He stated that the delivery book from the kitchen shows what foods he received (paragraph 9). He stated that there is no facility for baking because the oven has not been in working condition since 2016 or 2017 and since January 2019, there has been no gas. He reiterated that his diet requires broiled, grilled or baked meats.

[76] In cross examination he said he was the one who requested that he be provided with the logbook for the purpose of keeping a record of what he was getting. In answer to questions put by the court, the claimant stated that he signed the

logbook for over a year. He stated that someone would write in the logbook what he was being served. Asked whether the purpose of signing the logbook was to indicate if he was getting the proper diet, his response was yes. He further accepted that the logbook was requested because of the dispute as to whether he was being served the correct diet. He said the purpose was for him to sign for what he was receiving.

[77] In all the circumstances, the inference drawn by me is that the logbook was signed by the claimant indicating his satisfaction with what was served and that when he became dissatisfied with what was served, he made the notations he mentioned and ceased to sign. The very purpose of the logbook was to allow the claimant to be able to prove or disprove his assertions regarding the diet. His Attorney at Law has complained that the logbook has not been produced in evidence. The onus was on her to request its production. This court rejects the claimant's assertions that no effort has ever been made by the institution to accommodate his dietary requirements or that he has never been served a meal which conforms to the diet plan provided by Dr Callender and approved by the Staff Medical Officer.

[78] In relation to the claimant's complaint about not receiving his meals on time, or a sufficient number of meals and snacks per day, he said that a diabetic is supposed to have 6 meals per day, 3 full meals, breakfast, lunch and supper and 3 snacks in between meals. He said that there were days when he was given an inadequate breakfast (he described it as sketchy breakfast) way past 6 am which is the time he should receive breakfast and nothing else for the day. I reject this evidence about being provided with only breakfast on any given day.

[79] He said some days there was no supper and he would be told that lunch must serve for supper. He said he had never been provided with snacks. He also said that when he is served with soup it is either too cold or too salty and cannot be consumed. He said that since he cannot eat most of the meals, his food intake is

inadequate and not in accordance with his diet. (See paragraph 24 of his second affidavit).

[80] In paragraph 38 of his first affidavit, the claimant averred that "on Tuesday August 28, 2018, when I went to the kitchen to collect food, to prepare my meals for the day, I was told that instructions had been handed down by a Superintendent that I should not be given anymore raw food, instead my meals must be prepared at the kitchen. On that day, I didn't get any breakfast at 6:00 am, no snack or fruit at 10:00 am. At 11:00 am, I was called to collect chicken foot soup for lunch at 12:00 pm. I did not get a snack at 3:00 pm but at 3:15pm, I received steamed fish for my 6:00 pm supper with no snack at 6:30 pm."

[81] Two things are evident from the foregoing paragraph; firstly, the claimant is not entirely consistent in his narrative. From this paragraph, it would appear that up to 2018 he was receiving raw food from the institution in order to be able to prepare his meals. Secondly, while this aspect of his narrative also indicates that he was not being served with meals in time, it does demonstrate that some effort was being made to serve him with specially prepared meals.

[82] According to the claimant his problems with securing the proper diet has persisted since 2015. I cannot help but comment that one of the claimant's major problems seem to be his dissatisfaction over the cessation of permission to receive food from sources outside of the institution. The claimant has not refuted the defendant's evidence that he was able to prepare his own meals when he received certain items. Based on memorandum dated June 18, 2009, June 4, 2010, May 12, 2011 and June 14, 2002, from the Superintendent, the claimant was allowed to receive items such as cooking oil, peas, veggie chunks, coconut powder, brown rice, macaroni and other items which required cooking or are ordinarily used in the process of preparing cooked meals. The claimant has referred to a breach of his right to receive those food items which came from sources external to the institution. (See paragraph 17 of his first affidavit).

[83] With regard to the claimant's assertion that his meals were to be delivered to him by an officer and not an inmate, Lieutenant Colonel Rowe explained that the claimant was not hospitalized and therefore rule 68 of the 1991 Rules was not applicable to him. Even if the conduct of having the claimant's meal delivered to him by an inmate amounted to a breach of institutional rules (which it is not) such conduct clearly did not occasion the claimant any harm or injury. His complaint regarding what he perceived to be a breach of the rules is symptomatic of his general attitude of disquiet and his inclination to lodge complaints over very minor matters.

Failure to provide medical care

[84] The claimant also avers that he was not allowed to see an ophthalmologist despite being referred because the appointment had not been made by the prison authorities and when he was finally made to see the ophthalmologist, the prescription he received was not filled. In his second affidavit, he further explained that the referral was received on the 28th of May 2018, and he finally saw the ophthalmologist on the 27th of July. He has not explained the reason for the passage of the two months between the date he received the referral and the date he was seen, even though he has said that the condition required urgent treatment. The time lapse in any event does not represent an unusual delay.

[85] The claimant confirmed what was said by Lieutenant Colonel Rowe that there were instances when he was advised that he was to be taken for medical treatment but refused to go on account of not being advised prior to the day when he was to be taken. He mentioned the 7th and 28th of April 2017 and May 15, 2017, as dates on which he refused to be taken to the doctor and one occasion, (the date of which is not clear, see paragraph 15 of the second affidavit) on which he refused to go to the dentist. It was suggested to Lieutenant Colonel Rowe that the claimant had to pay for his visit to his own podiatrist.

[86] The court takes judicial notice of the functions of such a specialist and notes that the claimant averred in his second affidavit that he was taken to the Kingston Public Hospital in relation to a toe that was hurting and appeared infected. Whilst he went on to say that the doctor looked at the toe and said nothing was wrong with the toe and that he subsequently saw a podiatrist at the Diabetic Association in relation to that toe and others and is now undergoing treatment, the blame for any alleged lack of diagnosis cannot be laid at the feet of the Correctional Services as the department did its part as far as the claimant's needs to see a doctor in relation to his toe was concerned.

[87] The claimant in making reference to his visit to Kingston Public Hospital, did so in explaining Lieutenant Colonel Rowe's evidence that he had refused to attend several medical appointments. He was explaining why he had indicated to an overseer that he would no longer attend at the Kingston Public Hospital. That matter for him was an issue of safety, based on his alleged encounter with someone who recognized him as a former policeman. The court is cognizant that he may have had legitimate reasons for assuming the position that he could not go to various medical appointments but clearly blame cannot be ascribed to the Correctional Services for the claimant not receiving medical treatment on those occasions. There was clearly no failure on the part of the Correctional Services to secure him the necessary dental and medical treatment on those occasions when he declined to go. It was certainly within the right of the prison authorities to refuse to give the claimant prior notice that he would be taken outside of the institution on any given day, because of the security concerns.

[88] Regarding the complaint of deprivation of access to dental care as recommended by the medical officer, the complaint was that he was not allowed access to a **proper** dentist whilst he was suffering from tooth decay and damage. (Emphasis my own). He said he had written to an Attorney-at-Law on the 18th of November 2004 regarding his dental problems because he had been suffering from tooth decay and damage. He said he had sought the assistance of Dr Johnson the prison dentist who gave him several referrals to a dentist, but he was not allowed

to go. He specifically stated in his first affidavit that he had sought the assistance of Dr Johnson the prison dentist because the crown of one of his molars had gotten lost (see paragraph 10 of his first affidavit). It was in his second affidavit that the claimant stated that the prison dentist had referred him in 2004 to an external dentist in order to extract a deteriorating wisdom tooth. It is to be noted that the claimant's complaint is not that he was unable to see a dentist.

[89] The defendant did not specifically address this area of the claimant's complaint. The only response is that arrangements were made at Smile Orange which the claimant did not attend because he was not given prior notice. Based on the claimant's account the missed dental appointment was in 2017 or 2018. It is beyond my comprehension that the dentist employed to the Correctional Services would have been unable to extract a decaying wisdom tooth. The circumstances must admit of the likelihood that it was the claimant's preference to see an external dentist and that such preference was not given effect. Replacing a crown may in my view be regarded as a matter of cosmetic dentistry and not essential dental care. It is my considered view that an institution such as an Adult Correctional Facility should not be burdened with having to facilitate the request of an inmate to ensure that he is taken away from the facility in order to receive a non-essential service.

[90] What seems clear from this evidence is that the claimant who is not a free subject, whether at his own expense or that of the state has been allowed extensive access to medical care. It could not be reasonably expected that the claimant will get or be able to access the same level of medical care whilst institutionalized that the ordinary citizen in society would be able to access. It is abundantly clear that those are his expectations.

Failure to provide medication

[91] It is the further complaint of the claimant that as of late May 2018, he has not had access to much needed medication. He complained specifically that on the 24th of May 2018, he received his prescription, but he only received some of the medication and was without his diabetic medication for some 11 days. He acknowledged that the Overseer to whom he had handed the prescription had made efforts to secure the medication but was unsuccessful.

[92] The claimant named a list of 16 drugs, minerals and vitamins, most of which he says are crucial to his well-being in terms of controlling his diabetes. I understand the crux of his complaint based on paragraph 25 of his second affidavit to be that it is not a case of not getting medication at all but a case of his medication being supplied late in many instances.

[93] In cross examination, the claimant explained that he would get metformin and glycogen but because of problems associated with those items, he was put on janumet and another drug for his hypertension. He spoke of getting another drug, doxium. He said that he has to be buying drug every month and that a certain drug costs between $9,000 and $15,000 monthly and another drug $7000 monthly. According to him, his vitamins cost approximately $80,000 every 3 months but that he is unable to get the quantity he needs locally.

[94] He was asked in cross examination whether the department consistently provided him with medication. His response was “not all”. Asked if once drugs were available what he needed was provided. His response was yes. He went on to name drugs that he would get and to say that some of the other drugs were not readily available. Contrary to this assertion the claimant had said in his affidavit (paragraph 32 of second affidavit) that that the medications he has been prescribed are available and he found it strange that his agent has been able to access the drugs, yet the Department of Corrections cannot.

[95] This court readily accepts the claimant's evidence that there are times that he is given a prescription at the Diabetic Association and he has to source and pay for the medication because sometimes he could not get the medication from the DCS or because it was taking the DCS too long to supply the medication. The claimant himself said that it was his Attorney at law who made these representations (he said fought) for him to be seen at the Diabetic Association and that as far as he is aware the Association does not provide free medication. Neither can it be reasonably expected that the DCS should spend the sums mentioned in order to provide the claimant with costly vitamins. It is apparent that what was recommended by the external doctors and nutritionist is what is ideal as distinct from what is necessary to sustain a reasonable quality of health.

[96] The fact that the claimant was not pleased with the medical attention he was receiving clearly does not in and of itself mean that the care is below an acceptable standard. It is readily accepted as observed by Miss Lewis that lack of medical attention and lack of an adequate diet can amount to infringing a person's right to dignity. It is however quite often a question of degree. To the extent that the correctional services was not able to provide the claimant with certain medication and vitamins, the claimant was given permission and was able to access those items from external sources. Even on the claimant's own account, Correctional Services personnel were in my own view very permissive and overindulgent in accommodating the claimant's needs.

The right to equitable and humane treatment by any public authority in the exercise of any function

[97] With specific regard to the alleged breach of the claimant's rights pursuant to section 13(3)(h), Ms Ruddock submitted that the claimant has not demonstrated that he has been treated differently from another in a similar position and circumstance. She cited the case of ***Sean W. Harvey v The Board of Management of Moneague College*** [2018] JMSC Full 3 in which the case of ***Bhagwadeen v Attorney General of Trinidad and Tobago*** was referenced.

She submitted that the claimant must overcome this hurdle before the court is able to say that his right in this regard has been breached.

[98] The claimant's evidence which she pointed to is contained at paragraph 32 of his first affidavit. It is the claimant's assertion in that paragraph that inmates who received permission subsequent to him receiving permission to bring food items into the institution from external sources, are allowed to receive the items they need, and he is not being afforded the same opportunities as others.

[99] In response to the claimant's claim that inmates who received permission subsequent to him are being permitted to carry food into the institution Lieutenant Colonel Rowe stated that the claimant is not classified as an inmate of the first nor second division pursuant to Rule 191 of The Correctional Institution (Adult Correctional Centre) Rules 1991 and is therefore not permitted to provide food for himself at his own expense. Rule 191 allows an inmate of the first or second division, at his own expense, to provide food for himself and not receive the correctional centre diet on the days he so provides for himself. Rule 189 defines first, second and third division inmates. Those inmates include persons who were committed for default of payment of civil debts, persons awaiting trial and persons serving a sentence of simple imprisonment. Without providing further details of the classification, the claimant obviously does not fall into the category of persons who are so privileged.

[100] The claimant had also said at paragraph 44 of his first affidavit and 34 of his second affidavit, that when he was diagnosed with type 1 diabetes, he had requested that his Attorneys at law write to the Commissioner of Corrections and request that he be placed in an aftercare programme so that DCS would no longer have to provide his meals and he would be better able to take care of his health. The claimant proffered that such facility has been granted to other inmates who have been convicted of similar crimes and he has a legitimate expectation that he would be afforded the same opportunities. Lieutenant Colonel Rowe's response is that one of the criteria in determining eligibility for the

programme is the nature of the crime with which the inmate has been charged, (I believe he meant to say convicted). He pointed out that the claimant is serving a life sentence for murder and would not be eligible for the programme solely on the basis that he is diabetic.

[101] The witness evidently did not say that the offence for which an individual has been convicted is the only criterion; he stated that that was one of the criteria. The first observation is that the claimant has made a bare assertion that others convicted of similar crimes have been admitted to the programme. He has not stated who any such persons are and how it is that he is aware of the offence for which those persons have been convicted. Further, he has not stated the circumstances of the offences for which those persons or any of them has been convicted, so that the court can determine if those persons are similarly circumstanced. Even if this court were to assume that there are other persons convicted of murder who are benefitting from the arrangement, that fact by itself is not proof that the claimant is similarly circumstanced as such persons.

[102] Equitable in the context of section 13(3)(l) means fair and just. From a reading of the **Sean Harvey** case, it is clear that the fact that someone else is treated in a different manner and more favourably than the claimant, cannot by itself mean that the treatment was not equitable. This is because there is no requirement that everyone must receive the same treatment. The comparison is with someone who is similarly circumstanced.

[103] In the context of the definition of torture as involving deliberate/intentional inhuman treatment causing serious and cruel suffering of a high level of intensity, this court rules out the contention that the claimant has in any way suffered in such manner. As regards the element of being degrading, there is absolutely nothing in the conduct of the personnel at the Correctional Services that could have, whether objectively viewed or relying on the assertions of the claimant, which arouse or could reasonably have aroused in him any feeling of fear, anguish and inferiority, capable of humiliating and debasing him.

Breach of the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage

[104] The terms of the Jamaican Charter on the right to a healthy and productive environment provides clarity that what is being referred to is the wider physical environment to the extent that factors may occasion damage to it. Such damage of course may affect the quality and availability of food for example, thereby conceivably giving rise to health issues. Even if the immediate physical surroundings were to be considered as a factor envisaged by the provision, the claimant has made no complaint in this regard. Further, he has given absolutely no evidence or in any way raised any concerns as to how adverse environmental factors have infringed upon his access to food and/or medication or medical, optical and dental care. From a perusal of the cases dealing with the right to a healthy environment, while the right has a relationship of interdependence with the right to adequate food and the right to water for example, in the context of this case, the claimant has not demonstrated how the various failures he ascribes to the Correctional Services personnel could amount to a breach of his rights under section 13(3)(l) as interpreted in case law.

The right to protection from torture, or inhuman or degrading punishment or other treatment

[105] In ***Testa v. Croatia*** the court considered a combination of factors in concluding that the applicant's rights had been breached. The condition of the building was in a poor state, the sanitary (toilet) facilities were inadequate; the cell space was much smaller than determined to be acceptable in previous decisions; the facilities for taking showers were unhealthy; the circumstances under which the claimant was able to access the canteen in order to get food was unreasonable and inhumane by any standard. The Court also considered the fact of the claimant's ill health which made her require much more rest than a normal healthy person and the fact that she was not afforded the opportunity to rest as was necessary. Further, the applicant's illness required a diet low in fat and she

was often fed meals consisting of only pig fat. The food was generally insufficient and of very poor quality such as stale bread. All of those factors were combined with a gross lack of adequate medical treatment. The court's acceptance of Mrs Testa's evidence made the conclusion that her human rights were being breached inevitable. The claimant's treatment cannot be compared with Mrs Testa's treatment. The court had found that Mrs Testa's many visits to the doctor was on account of the requirement that she had to obtain special permit from the prison doctor each time to rest when she needed to, and not because she was receiving treatment for her condition.

[106] In making the assessment, the duration of the treatment, the physical and mental effects of the treatment, the state of health of the claimant, are important. If there is some ulterior purpose or motive for the treatment, particularly if the treatment was intended to humiliate or debase the claimant then it is a relevant factor. The absence of such purpose or motive would not by itself mean that there is no violation. The claimant surmised that there has been an orchestrated effort to 'annihilate' him. There is absolutely no basis on which such statement could be accepted. There is a plethora of evidence that much effort has been made to accommodate the claimant's needs. If anything, some members of the Correctional Services have been over-indulgent and over-accommodating. The claimant has been allowed privileges to which he is not entitled. From his own evidence it was garnered that there were occasions on which he had been notified prior to the time that he would be taken from the facility for medical care so that he could prepare himself. From Lieutenant Colonel Rowe's evidence, such prior notification is not permissible for security reasons.

[107] In **Slyusarev v. Russia**, Application No 60333/00, the court in concluding that the applicant's rights had been breached, took into consideration as has been emphasized in many cases the point that the ill treatment must attain a minimum level of severity. The court took into account the length of time that the applicant had been deprived of his glasses, the fact that the taking of the glasses could not be explained in terms of the practical demands of imprisonment, that the

deprivation had been unlawful in the domestic context, and that no explanation had been offered as to why his old glasses had not been given back to him and considered that in the context of that case, there was an element of deliberateness and spiteful behaviour which is absent in the instant case.

[108] The claimant has not demonstrated that any alleged suffering on account of lapses in providing his medication in a timely manner exceed the inevitable element of suffering connected with the fact of being incarcerated. Further, he has wholly failed to show any form of mal intent, deliberateness or spiteful behaviour whatsoever. This court is not at all saying that the claimant is required to establish mal intent on the part of the DCS; what is being said is that poor treatment in circumstances where there is intentional infliction of suffering, even if it does not rise to a high degree of suffering, may carry greater weight in establishing the necessary criteria.

[109] Being mindful of Lieutenant Colonel Rowe's evidence that much of the evidence he has given came from the documents and records kept at the institution, I accept his evidence that the claimant is provided with his medications but there are occasions when the drugs are unavailable. The extent of the deviation from what is ideal is important. It cannot be said that he has been denied access to medication. In fact, the claimant made the point that he has been permitted to purchase his medication. This court considers that there is no significant distinction to be made between the instances when the claimant was provided with medical, dental and optical services and medication and when he purchased or when he procured those items and services at his own expense. He averred and gave viva voce evidence of efforts on occasions of members of the department to secure his medication. I do not find that the deviations from what is ideal or the failures are such that they amount to a breach of the claimant's constitutional rights as alleged. I reject the claimant's assertions that he has consistently received meals that are deleterious to his health.

[110] The claimant indicated when asked in cross examination, that he has never been hospitalized on account of his diabetic condition since his diagnosis. No further questions or suggestions were put to indicate that he had not been hospitalized because he had never become very ill. However, from the circumstances of the case, this court may infer that that the claimant had never been hospitalized because he had never been seriously ill. He has had a history of making numerous complaints, many of which were put in writing of letters to the Commissioner of Corrections and to various Attorneys at Law. Further, he gave two affidavits in this matter and there was no information forthcoming to say that he has been rendered very ill on account of his diabetic or hypertensive condition. That fact of never being seriously ill is suggestive of a reasonable level of care during the extended period over which he has been a diabetic and hypertensive individual.

[111] The claimant claims that his doctor told him that he now had type 1 diabetes because of lack of a proper diet. Even assuming that the claimant now suffers from type 1 diabetes, there is no admissible evidence that it is as a consequence of poor diet or lack of proper medication. Indeed, the claimant's evidence regarding his diabetic status is somewhat conflicting. He ascribes his type 1 as well as his type 2 diabetic status to the improper treatment. (See paragraph 29 of the first affidavit). There is also conflicting evidence as to when he became diabetic. In cross examination the claimant said it has been since about 2009 but in his first affidavit (paragraph 6) he said he developed the condition in or about 1992. This court however accepts that the claimant suffers from type 2 diabetes. The claimant cannot properly ascribe neither his type 2 nor type 1 diabetic status or any of the ailments described in paragraph 9 of his first affidavit to the treatment received in the institution. Needless to say, diabetes and its side effects are pervasive in this country. Assuming that he suffers from the ailments mentioned, there is no medical evidence to show that the claimant would not have developed these conditions or any of them even if he had received the perfect diet and the best medical care.

[112] The claimant through Miss Lewis is asserting that there are clear admissions on the part of the defendant that what is permissible for inmates to receive from the outside namely buns, bullas, biscuits and canned milk would be detrimental to the claimant's health (see paragraph 8 of speaking notes). Reliance is placed on Lieutenant Colonel Rowe's affidavit evidence to the effect that the claimant has been provided a balanced diet in accordance with the Standard Operating Procedure Dietary regime and he is given the necessary medical treatment from internal medical officers as well as from sources external to the system. To come to such a conclusion is to entirely ignore the rest of Lieutenant Colonel Rowe's evidence, and particularly the fact that the very Standard Operating Procedure Dietary regime makes provision for inmates with special dietary needs and all of the evidence including that put forward by the claimant regarding the arrangements put in place for him.

[113] Counsel also severely criticized Lieutenant Colonel Rowe's evidence to the effect that the claimant requested access to raw food in keeping with his special diet from external sources and that the rules do not permit inmates having access to raw foods being brought into the institution by other persons. The claimant has been abundantly clear that his problems accessing food from external sources began in 2015. What is clear is that prior to the restriction imposed the claimant had been allowed many indulgences to which he was never entitled. He had become accustomed to enjoying what was really a privilege and not a right. This evidence by the defendant certainly does not amount to an admission on the part of the defendant that the claimant, in order to save his life has had to request food from external sources. When the institution ceased to indulge him, other workable, albeit imperfect arrangements were put in place. This court considers irrelevant even if true, the claimant's assertion that several of the items stated in the Standard Operating Procedure Dietary Regime for Inmates have never been served.

[114] This court sees no need to address the question of whether the doctrine of proportionality as outlined in the case of ***Julian J Robinson v. The Attorney***

General of Jamaica places the burden on the defendant to provide justification for breach of the claimant's constitutional rights since the finding is that there is no breach of his constitutional rights. In any event his Lordship Sykes CJ provided much elucidation on the matter and has left the clear legal position in no doubt.

Whether the court can make the declaration that the claimant be allowed access to and permission to receive on a weekly basis, items in accordance with the dietary stipulations of the diabetic association.

[115] Even though I am of the view that there has been no breach of the claimant's rights as alleged, it was not entirely clear whether the claimant is seeking this particular order as a remedy for the breach of his constitutional right/s or whether it was a discrete declaration. That is not clear from a reading of the orders and declarations as sought in the Fixed Date Claim Form. However, based on Miss Lewis' submissions, it would appear that the declaration is one of the remedies sought. Because of the uncertainty, and out of an abundance of caution, I will address the matter.

[116] Ms. Ruddock submitted that the defendant has shown that there was a system in place in which the claimant was receiving meals in keeping with the diet stipulated by the Diabetic Association. She opined that once the claimant is cooperative, no new arrangements need to be made. She pointed to the obvious security risk posed by the claimant being permitted to receive raw foods into the institution from sources external to the institution.

[117] This court notes that there are also security risks in permitting food of any kind into the institution and that there are rules in place which permit dry goods to be brought in by relatives and friends of inmates. The framers of the rules in their wisdom and experience have determined that raw foods are not permitted. The process of the thorough search is in my view demonstrative of the awareness of the significant risk to security within the institution that is posed by the ingress of

raw foods. The thoroughness of the search and the damage done to some of the items in the process in part has led the claimant based on his evidence, to decide after two occasions of attempting to get foods inside that it was not worth the effort. It has also been demonstrated that adequate provisions can be made within the institution for the claimant to receive a reasonable diet consistent with that recommended by the Diabetic Association. This court would be very hesitant to make an order, giving effect to that which would necessarily mean the breach of an institutional rule that has not been determined to be demonstrably unreasonable.

[118] Although not necessary to a resolution of this claim, with regard to the claimant's request for an order that his sentence be reduced on account of the ill treatment meted out to him, the claimant's Attorney at law has not put before this court any basis on which such an order could properly have been made.

[119] Counsel is no doubt either relying on pronouncements of the European Court of Human Rights such as that made in **Testa** or on cases which indicate that a breach of an individual's constitutional rights may be vindicated by a reduction in sentence. The pronouncement made in cases such as **Testa** is that in exceptional cases where the state of health of a detainee is absolutely incompatible with detention, the release of that detainee may be required. There are two observations to be made in regard to the first point. Firstly, Jamaica is not a signatory to the Convention for the Protection of Human Rights and Fundamental Freedoms. Counsel has not brought to this court's attention any similar provisions in any law or in any treaty to which Jamaica is a signatory and in relation to which Jamaica, being a dualist state, has passed local law to give effect to such treaty provisions. Secondly, and perhaps more fundamentally, this claim was not brought pursuant to any provision which as far as this court is aware, permits such a remedy.

[120] Relating to the second point, there is case law to suggest that the court could grant a reduction in the length of a sentence being imposed on account of breach

of the accused Constitutional rights. (See the decision of the Judicial Committee of the Privy Council ***Melanie Tapper v DPP*** *[2012] UK PC 26*). Even in circumstances where this remedy is permissible, it is not the inevitable redress for an individual who is incarcerated and whose constitutional rights have been breached, that he be awarded a reduction in sentence. It is unclear whether a different court from the one hearing the matter in respect of which the individual was sentenced, can make such an order. I entertain doubts. The matter was not really argued. In any event, it is not necessary to make any pronouncements on the matter.

[121] If reliance is being placed on the decision in ***Gibson Bunting v Regina*** (Unreported) Claim No. 2008/HCV00657 delivered September 11, 2008, then that case is entirely distinguishable. The applicant Gibson Bunting was being held at the Court's pleasure after he was convicted of murder. He applied for a Notice of Review of his sentence pursuant to Part 75 of the CPR on the grounds that he had been imprisoned for 27 years, that he was a juvenile when he committed the offence and was 46 years old at the time of the application, that he was reformed and has expressed remorse for participation in the crime, that he needed medical attention which the prison was unable to adequately provide and that he was a fit and proper person to be released and he had family and support to rely on if released.

[122] In the instant case there is no basis for this court to consider whether the applicant should be released. That function has been assigned to the Parole Board by virtue of statutory provisions. The Parole Board is best suited to address any consideration for release, of course only after the requisite mandatory term of imprisonment has been served.

CONCLUSION

[123] In all the circumstances, the claimant has failed to satisfy this court to the required standard, that there has been a failure on the part of the Correctional Services, hence the defendant, to provide him with any or adequate access to life-saving food or medication, with meals in a timely manner, with access to medical and dental care or with medication, such that his constitutional rights have been breached. To the extent that there have been shortcomings on the part of the authorities, those shortcomings do not rise to a standard so that the claimant's constitutional rights or any of them has been or are being breached. In the result the claim must be dismissed.

DISPOSITION

STAMP J

[124] It follows from the foregoing that the judgment of the Court is that the declarations and orders sought and the claim for an award of damages made in the Fixed Date Claim Form are refused. There is no order as to costs.

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Stamp J

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Wint-Blair J

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Pettigrew-Collins J