



[2025] JMSC Civ 116

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2024CV00204

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| BETWEEN | GARREN BRAHAM | CLAIMANT |
| AND | THE MINISTER OF NATIONAL SECURITY | FIRST DEFENDANT |
| AND | THE COMMISSIONER OF THE POLICE | SECOND DEFENDANT |
| AND | HIS EXCELLENCY, THE GOVERNOR GENERAL | THIRD DEFENDANT |
| AND | THE ATTORNEY GENERAL OF JAMAICA | FOURTH DEFENDANT |

IN OPEN COURT

Mr John Clarke for the Claimant

Ms Kristina Whyte and Ms Karessiann Gray instructed by the Director of State Proceedings for the Defendants

HEARD: December 9, 10, 2024 & September 25, 2025

CONSTITUTIONAL LAW – State of Public Emergency – Whether the written advice of the Commissioner of Police to the Minister of National Security constitutes a procedural safeguard against the Minister’s power to detain under Regulation 33 of 2019 - Whether Regulation 30 of the Emergency Powers Regulations 2019 breached the right to liberty, protection from search, privacy – Whether the breaches alleged are demonstrably justified – Whether the claimant is entitled to

vindictory, aggravated and exemplary damages – Whether entitlement to damages to false imprisonment

The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, sections 13(3)(a), (b), (h), 13(3)(a), 13 (3) (f), (j) & (o), 13(9), 13 (6), 14(1), 14(5), 16(2), 16 (3), 20(5)

WINT-BLAIR J

BACKGROUND

- [1]** By Proclamation dated April 30, 2019, the Governor-General declared a state of public emergency ('SOE') within the parishes of Saint James, Hanover, and Westmoreland ('Proclamation 1').
- [2]** The Governor-General declared the Proclamations pursuant to section 20 of the Constitution of Jamaica, which empowers him to make Proclamations declaring a period in which a public disaster or public emergency exists. During these periods, the fundamental rights and freedoms of persons in Jamaica may be curtailed, suspended, or, indeed, infringed by the state, subject to the requisite constitutional justification.
- [3]** In keeping with the dictates of section 20(2)(b) of the Constitution, the preamble of the three Proclamations made in 2019 and 2020 purportedly conveyed the Governor-General's satisfaction that, among other things, *"action [had] been taken or [was] immediately threatened by persons or bodies of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety of the community..."*.
- [4]** Pursuant to section 3 of the Emergency Powers Act ('EPA'), the Governor-General, by order, promulgated the Emergency Powers (No 2) Regulations, 2019 ('EPR'), by which the declared SOPEs were regulated. Regulation 30(1) of the EPR gave an "authorised officer" the power to: "arrest, without a warrant, and

detain, pending enquiries, any person whose behaviour is of such a nature as to give reasonable grounds for suspecting that he has –

(a) acted or is acting in a manner prejudicial to the public safety;

(b) or (b) has committed, is committing, or is about to commit an offence against [the EPR].”

- [5]** In accordance with the foregoing regulation, the police (being authorised officers) arrested and detained the claimant without charge. Under a detention order, made pursuant to Regulation 33 of the EPR, the Minister of National Security ordered that the claimant be detained until the end of the period of public emergency (‘the detention order’). Those SOPE would not come to an end until 17 August 2020.
- [6]** Prior to his release, the claimant lodged a notice of objection to his detention with the Emergency Powers Review Tribunal (“the tribunal”), established in accordance with section 13(10) of the Constitution, to request a review of his detention. However, following the review of the tribunal, which ordered his release, he was not released.
- [7]** The claimant contends that his detention for 154 days was not a reasonably justifiable measure under a declared state of public emergency (“SOPE”), thereby breaching his constitutional rights. He was detained for that excessive period despite section 3(5) of the Emergency Powers Act and a finding by the Emergency Powers Review Tribunal that his detention was unwarranted. The crown has not responded to sections 13(9) or 20(5) of the Charter.
- [8]** The defendant’s case is that there has been no breach of the claimant’s constitutional rights, relying on the validity of the declaration of the SOPE and the fact that the claimant was accused of participating in criminal activity, which justified his detention under the SOPE.
- [9]** The claimant is self-employed as a security guard, shop owner, fisherman, and taxi driver. Around 11:00 a.m. on June 14, 2019, Sgt. Jermaine Jenkins and

officers took him into custody at his shop and then transported him to his house. The police searched the house but found nothing of interest. He was then taken to the Lucea police station and detained. When he asked why he had been arrested, he was told it was under the SOPE. He was arrested without a warrant, processed at the Criminal Investigation Bureau, fingerprinted, photographed, and forced to sign a document. He was not informed of how his arrest was justified under the SOPE.

[10] Aggrieved by 154 days of detention under the SOPE, the claimant asserts that his rights under the Charter were contravened. He has filed an Amended Fixed Date Claim, alleging that the Emergency Powers Regulations, 2019, breached his right to liberty and were neither fair nor lawful. When arrested, he was not promptly, or at all, informed of the reasons for his detention or of his right to legal counsel; he was denied fair access to the tribunal to review his detention; his rights to communicate with and be visited by his family and spouse were restricted; the conditions of the cells infringed upon his rights to liberty, humane treatment, and respect for his inherent dignity; he was deprived of his cell phone without recompense, this cell phone has not been returned. His detention without trial, under the conditions in the cells, amounted to torture and inhuman punishment.

[11] The claimant seeks:

- a. declarations,
- b. an order that the Commissioner of Police file an affidavit indicating that there has been the destruction of private data, photographs, fingerprints and personal information collected under the state of public emergency under which the claimant was detained.
- c. Damages for false imprisonment and breaches of his constitutional rights
- d. Aggravated, exemplary and vindictory damages
- e. Costs

EVIDENCE

The claimant's case

- [12] The claimant deposed that he was arrested and held for processing under a SOPE at the Hanover Police Station headquarters in Lucea. He was told he would be detained for ninety days; however, he was held for 154 days. He received no copies of any documents, the particulars he signed, nor official notification of the private data taken from him. He did not consent to the collection of this data or his private information. Therefore, he requests that all his private information and relevant data be deleted from the Government database.
- [13] He was never advised of his right to petition the tribunal. He desired to exercise his constitutional right to have his detention reviewed from the outset. This right was denied by the police, who provided a written document but advised that he could not obtain a review as the tribunal had not been established in accordance with the Constitution. On the advice of his lawyer, he applied for his release to the tribunal and was subsequently released after 154 days in custody by the officer.
- [14] He was deprived of his liberty and was neither treated humanely nor with respect for the inherent dignity of his person. He was subjected to inhumane and degrading treatment and punishment by being placed in the police lock-up during a state of public emergency.
- [15] There were about seventeen other prisoners in his cell (cell #1). He needed permission to go to the bathroom; he was on lockdown from the time he was detained until his release. The cell had no running water or bathroom facilities, and any exit required permission. The prison was on lockdown. Many times, he had to use a bottle. After ninety days, he was moved to the back cell, which housed more than eight inmates. He was treated inhumanely and degradingly. He has suffered anguish, pain, and embarrassment among his family, members of the community, and the public, and has incurred expenses securing his release from detention. He lost the income and money he would have earned during that period. He has also

sustained loss and damage as a result. He has not been compensated for the loss of time or any expenses he incurred.

- [16] The police officers detained him without any proper investigation and had insufficient evidence to bring any charges against him. He was held for 154 days while the police attempted to gather enough information to charge him with a criminal offence. His constitutional right to liberty was violated by the police, who did not follow the fair procedure required by law. He was detained by the police for a third time under the SOPE for criminal offences, despite the statute's clear wording and the court's interpretation of it.
- [17] He was denied his constitutional right to a fair hearing by an independent and impartial court or authority established by law when deciding whether he should be detained. The police officers made a decision adverse to his liberty without affording him a hearing.
- [18] There was a tribunal hearing regarding his case. He does not have copies of the documents which were presented to the tribunal. The tribunal was deprived of information to properly carry out its duties, including the 'emergency' that existed in Hanover and how his detention was reasonably justified under the SOPE.

The defendants' case

- [19] Jermaine Jenkins, Detective Sergeant of police stationed at the Hanover Police Station, assigned to the Proactive Investigations Unit, stated that his functions involved investigations into gang activities, crime-for-profit criminal activities, fugitive apprehension, and offences under the Law Reform (Fraudulent Transactions) (Special Provisions) Act 2013. He is certified in Cybercrime Investigations and Systematic Search Procedures at the Caribbean Regional Drug Law Enforcement Training Centre and the Caribbean Search Centre, respectively.
- [20] On April 30, 2019, the Prime Minister of Jamaica declared a state of public emergency in the parish of Hanover. In light of this, the Hanover police

management team met to discuss the imminent threat posed to the division by active gangs, including criminal suspects inclined to threaten public peace. One of these suspects was the claimant.

- [21]** One of the gangs being monitored for its influence is the 'Hundred Rounds' gang, also referred to as 'Crucs,' situated in the Green Island police jurisdiction of Hanover. In response to the escalation of violence in Green Island and intelligence indicating the gang as the primary source of such activities, enhanced surveillance measures have been implemented.
- [22]** The affiant deposed that since 2013, during his investigations into the Hundred Rounds gang, he had conducted interviews to determine whether the Hundred Rounds group constituted a gang. Information gathered from all sources, including law enforcement and civilians, indicated that Hundred Rounds was a criminal organisation composed of lottery scammers and their enforcers engaged in illegal firearms trading and extortion.
- [23]** He deposed that he had coordinated and participated in operations targeting gang suspects and interviewed over 90% of the known gang population. The estimated number of individuals suspected of being part of this gang was approximately thirty-five (35) before intra-gang conflict, which led to members leaving and establishing the rival "Ants Nest" gang. The Hundred Rounds/Crucs gang is responsible for numerous firearm-related injuries and a minimum of twenty-one (21) homicides within the Hanover Division. These criminal activities originate from both a gang conflict with the opposing Ants Nest gang and disagreements with other individuals.
- [24]** In or around late 2018, he was tasked with conducting investigations into reports that the incarcerated leader of the Hundred Rounds gang used enforcers to extort lottery scam syndicates in the Green Island police area. Intelligence reports have disclosed that this extortion was coordinated by the lottery scamming faction of the Hundred Rounds gang, known as the 'Cash in Hand Family'. Information regarding

the members of the Cash in Hand Family suggests that they constitute the leading lottery scamming syndicate in western Hanover, with the claimant identified as the leader.

- [25]** The affiant deposed that he conducted interviews with individuals suspected of engaging in lottery scams within the police jurisdictions of Lucea, Kingsvale, and Green Island. He observed a correlation in reports suggesting that the leader of the Hundred Rounds gang was involved in extorting lottery scammers. Consequently, surveillance operations were undertaken targeting the Cash in Hand Family, specifically the claimant, also known by the aliases 'Mark Shields', 'Curbis', and 'Speng Shell', aged 28 (date of birth 11.10.90), unemployed, residing at Hogshit Lane, Green Island, Hanover.
- [26]** The witness said that he has known the claimant for over ten (10) years and has interacted with him on multiple occasions during those years. He was informed that the claimant was involved in lottery scamming and was the son of a serving member of the Jamaica Constabulary Force (JCF). He was regularly seen in the presence of men associated with lottery scams, said to be members of the Hundred Rounds crew.
- [27]** Based on the information gathered about the claimant, his role and membership within the gang were those of a mid-level financier. His residence was subject to multiple raids before 2013 due to allegations of lottery scamming. During one such raid, a black plastic bag containing a substantial amount of lead sheets was found concealed in bushes near his residence. Since that incident, no further evidence has been obtained, and the claimant has not been formally charged with lottery scamming. Nonetheless, he continued to be under surveillance and subject to police operations. Moreover, since 2014, he has been monitored on social media platforms, such as Facebook, and has been consistently observed associating with members of the Hundred Rounds gang.

- [28]** In or around 2017, the gang evolved into a second-generation gang. A second-generation gang is one which expands its reach and power beyond its area of origin for commercial profit and is more structured and organised. The new name of the gang was Cruce, and it consisted primarily of Hundred Rounds members, operating under the former name to remain anonymous. The claimant heavily supported the war between the Hundred Rounds and Ants Nest Gang, which began in late 2014 and led to several murders. The claimant devised a method to carry out transactions by sending thousands of dollars' worth of Digicel credit to another gang member to acquire sophisticated firearms.
- [29]** When interviews were conducted, statements were requested. Still, sources expressed great fear for themselves and their families, except one gang member who voluntarily gave a statement that the gang was the biggest gang in Hanover and existed far from the boundaries of Hanover and was operating throughout Area 1 into St. Ann, Westmoreland and was linked to several murders as far as the Corporate Area.
- [30]** Mr Jenkins said that he knows of the gang's activities outside of Hanover through intelligence gathered by the National Intelligence Bureau ("NIB") and confidential sources. This intelligence was confirmed during a police raid in Alexandria, St. Ann, when a known gang member was fatally wounded and the police team was repelled by heavy gunfire and grenades.
- [31]** From the statements received, it was revealed that the claimant moved to strengthen and secure the gang and called a conference where he suggested that 'every man should come together, make some money and lock some gun.' This meant that they should buy more weapons and secure them for protection.
- [32]** Based on all the information that he collected on the claimant, Mr Jenkins formed a reasonable and probable suspicion that the claimant was a member of the Hundred Rounds gang and the leader of the Cash in Hand Family arm of the gang, which was involved in lottery scamming and extortion.

- [33]** On June 14, 2019, at approximately 12:35 p.m., a raid was conducted at Cash in Hand Enterprises where the claimant was arrested under Regulation 30 of the Emergency Powers Regulations, 2019, for investigations into crimes committed in the Hanover Division and his suspected membership in a criminal organisation.
- [34]** The claimant was informed of the suspected crimes and cautioned; he replied, "Mi nuh know nothing about wa yu a talk 'bout." He was taken to his residence, where a search was conducted in his presence and view, and nothing illegal was found. A blue Samsung Galaxy 9+ cellular phone, identified as his, was seized. The claimant was then transported to the Hanover Police Headquarters. He was allowed a phone call and handed over to the cell station guard in what appeared to be good health.
- [35]** The claimant was served with a Notice of Detention pursuant to Regulation 38(10) of the Emergency Powers Regulations, 2019, which stated the reason for his detention and informed him of his right to request a review of his case and to object to his detention before the Emergency Powers Review Tribunal. The claimant signed the said Notice of Detention he was served with on September 9, 2019.¹
- [36]** A Detention Order was issued by the first defendant dated September 11, 2019, pursuant to Regulations 33 and 38 of the Emergency Powers Regulations, 2019, which ordered that the claimant was to be detained from September 10, 2019, until the end of the period of the public emergency which commenced with the Proclamation of the Governor-General published in the Jamaica Gazette Supplement Proclamation, Rules and Regulations on April 30, 2019.²

¹ Exhibit JJ1

² Exhibit JJ2

- [37]** The claimant subsequently submitted a Notice of Objection Form through his attorney on September 17, 2019, challenging his continued detention as he has never been involved in any criminal activities or organisations.³
- [38]** On October 9, 2019, a tribunal hearing took place. At the hearing, Sgt Jenkins testified on behalf of the first defendant, relying on his statement dated July 23, 2019, which suggested the claimant was involved in a criminal organisation. The claimant did not testify but called one witness, Miss Joyce Nelson.
- [39]** After considering the matter, the tribunal ruled that the evidence presented on behalf of the first defendant was insufficient to prove, on a balance of probabilities, that the claimant was involved in acts detrimental to public safety or public order. As a result, under Section 13(11) of the Constitution and Regulation 38(12) of the Emergency Powers Regulations 2019, the tribunal directed that the claimant's detention be revoked and discontinued.
- [40]** On October 16, 2019, the tribunal issued its written findings and direction, which was sent to the first defendant in a letter dated October 17, 2019. The claimant was released from custody after the tribunal's decision was communicated to Hanover Police headquarters.
- [41]** In amplification, Sgt Jenkins clarified that the Notice of Detention was partially written up by him and signed by DSP Alva Douglas. It was the same as Exhibit JJ1 in that it bore the name of the claimant and the statute under which he was being investigated. That document was labelled Exhibit JJ5.
- [42]** In cross-examination, he agreed that the claimant was arrested pursuant to Regulation 30 and that the decision made on June 14, 2019, to do so was made collectively based on investigations being conducted in the division regarding the Hundred Rounds gang. He was involved in the decision to arrest under Regulation

³ Exhibit JJ3 signed by Yanica Gabbidon, Attorney-at-Law

30, but could not say whether the decision was subsequently reduced to writing in accordance with that Regulation. However, it was discussed that the claimant was being sought, and they apprehended him on sight.

[43] He was not involved in certain decisions, nor was he aware of what was written or not; he only received instructions to pick up the individual. The Divisional Commander made the decision, and the final instruction was given by the Crime Officer, including the commanding officer. He received instructions after management meetings, but before June 14, 2019. He agreed that none of the instructions he received regarding Mr Braham were in writing. He stated that he had written a statement about his investigation of the claimant, but not about Mr Braham's detention. He confirmed that he was the officer who detained Mr Braham.

[44] He wrote a statement for the tribunal about Mr Braham's detention, but could not recall when. He disagreed that the statement was prepared around the time he found out that Mr Braham was going to the tribunal. When asked by counsel who reviewed his decision to detain the claimant, the witness stated that the decision was based on the state of crime in the area and information received about the claimant's involvement. He clarified that it was a decision made after meetings above his office and his unit.

[45] He confirmed that there is a standard operating procedure for individuals detained under the SOPE, as outlined in Regulation 30, which governs the process for detaining people under the SOPE. Under Regulation 30(3), a police officer of at least Superintendent rank may review the detention of someone held under the SOPE. They stated that the decision was initially reviewed by a Deputy Superintendent and then by a Senior Superintendent. The SOPE also designates an officer as the Detention Officer, who would be responsible for justifying a person's detention at the initial stage. The Detention Officer had to be satisfied that the legal requirements were met, or the person would not be detained.

- [46] At the time of Mr Braham's arrest, DSP Alva Douglas was the Detention Officer, but not part of the collective who made the decision to detain him. When asked if he gave DSP Douglas a written statement explaining why Mr Braham should be detained, Mr Jenkins said he provided recordings of the claimant threatening people, witness statements, and social media photos of the claimant with gang members or suspected gang members. However, when pressed about whether he gave a written statement justifying the claimant's detention on June 14, 2019, he said no.
- [47] The witness was asked about Regulation 30, which required him to charge or present the detainee before the Parish Judge within 90 days. He did not recall the exact days but said he followed protocol. He confirmed that the claimant received a detention notice on September 9, 2019, in the correct form, which included space for a narrative. He stated that he only provided the notice and did not provide any additional documents. The notice was given the same day as detention, and the claimant was instructed to keep it safe. He disagreed that it was standard to keep a copy, but said a copy was at headquarters and had been given to the tribunal. He could not remember if it was signed or dated June 14, 2019. He personally handed a copy to Mr Braham and informed his lawyers and family about this. His affidavit did not include this detail due to oversight, but he believed he was truthful. He reiterated that the claimant received the notice on September 9, 2019, as the DSP would not accept it if it had not been served. The notice contained the claimant's name and alleged involvement in a criminal organisation, which is an offence.
- [48] He said that under the current procedure in criminal cases, he could not have held Mr Braham in custody for more than 24 hours without an order from the court or a Justice of the Peace. He agreed that section 3(5) of the Emergency Powers Act did not permit him to detain Mr Braham for more than five days without charging him or bringing the claimant before a judge. He further agreed that Regulation 30(5) changed the existing procedure as it allowed him to detain the claimant for up to three months without charge or court proceedings. He also agreed that,

having detained Mr Braham on June 14, 2019, the three-month period expired on September 14, 2019.

[49] In re-examination, he clarified that he had notified the common-law wife of the claimant immediately, and the claimant's attorney was informed later that evening when he called.

[50] ISSUES

1. Whether the SOPE declared by the third defendant under the Emergency Powers (No. 2) Regulations 2019, enacted under section 3 of the Emergency Powers Act 1938, and gazetted on April 30, 2019, was valid.
2. Whether the Declarations of States of Emergency made between January 18, 2018 & February 15, 2023, were demonstrably justifiable in a free and democratic society.
3. Whether the pleaded Regulations breached the claimant's constitutional rights under Sections 14(1), 16 (2), 20, 13(3)(a), (b), (h), 13(3)(a)(1), 13 (3) (f), (j), and (o), 13(9), 13 (6), 14(5), 20 (5), 14 and 16 (3) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 ("the Charter").
4. Whether the imposition of the state of public emergency and the measures taken under it are reasonably justifiable.
5. Whether the breaches, if found, are demonstrably justified in a free and democratic society or are reasonably justified.
6. Whether the claimant is entitled to damages for false imprisonment and breaches of his constitutional rights, aggravated damages, exemplary damages and vindictory damages.

Discussion

Whether any of the claimant's Charter rights have been abrogated, abridged or infringed

[51] The claimant claims that his detention and the manner of his detention infringed the right to liberty under section 13(3)(a), his right to be informed of the reason for his detention as soon as reasonably practicable under section 14(3)(b), his right to humane treatment under section 13(3)(h) and 14(5), his right to brought forthwith or as soon as is reasonably practicable before an officer authorized by law, or a court under section 14(3)(a)(i).

The pleadings

[52] Mr Whyte argued that the claimant wants the court to make a finding as to the unconstitutionality of the regulations, where the rights raised were not pleaded, and relies on **Kurt Mitchell v Attorney General**⁴ and **Roshaine Clarke v The Attorney General**.⁵ Mr Clarke conceded that he is bound by his pleadings.

[53] Argued but not pleaded are the right to equality under the law, section 13(3)(g) and the right to a fair hearing within a reasonable time by an independent and impartial court or authority established by law, section 16 (2) of the Charter.

[54] The Judicature (Supreme Court) Act. Section 48 of the Act provides for the concurrent administration of law and equity. Section 48(g) provides:

*“The Supreme Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it shall grant either absolutely or on such reasonable terms and conditions as to it seems just, all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim **properly brought forward** by them respectively in such cause or matter; so that as far as possible, all matters so in controversy*

⁴ [2023] JMSC Civ. 110

⁵ [2022] JMFC Full 3

between the said parties respectively may be completely and finally determined, and multiplicity of proceedings avoided.” (Emphasis added)

- [55] This section means that for the court to grant relief not expressly sought, the claim must be **properly brought forward** by the relevant party seeking relief in that cause or matter. If section 48(g) is not satisfied, the Civil Procedure Rules (“CPR”) cannot fill the lacunae because the rules do not create jurisdiction; rather, they only make provision for how the court’s jurisdiction should be exercised. The claimant did not bring himself within section 48(g) of the Judicature (Supreme Court) Act for constitutional relief to be granted, particularly where damages are being claimed, because he has failed to comply with the procedural requirements prescribed by the CPR for the bringing of such a claim.
- [56] Before identifying any contravention of the Constitution, the court is required to analyse it within the framework of section 13(2) of the Charter of Rights and Freedoms. Consequently, the defendants against whom this claim is initiated must be afforded the opportunity to demonstrate that the alleged breach is justifiable within a free and democratic society. The mere engagement or likely infringement of rights under the Charter is not the conclusion of the matter. A section 13(2) analysis must be performed as a matter of law before it can be established that a violation of the Charter has occurred (see **The Attorney General and another v Jamaica Bar Association**).⁶
- [57] In the absence of a fixed date claim setting out the underlying facts and supporting affidavit, concerning an alleged breach of the constitutional rights raised only in submissions, the Attorney-General would not have had the opportunity to defend the claim and to advance the possible justifications as required by section 13(2) of the Constitution. This is not just a matter of law but also of fairness.

⁶ [2023] UKPC 6

- [58] The provisions of the CPR for the commencement of claims for constitutional relief must be followed for the court to grant any relief. Rules 56.9 and 56.10(2) require the claimant in a claim for judicial review or relief under the Constitution to include a claim for the other relief or remedy being sought in the claim form and to set out in his affidavit or statement of case the provisions of the Constitution which have allegedly been breached, justifying the grant of such relief.
- [59] The CPR, therefore, cannot expand the jurisdiction conferred by section 48(g) of the Supreme Court Act, nor does it eliminate the requirement for the claim to be properly brought before the court. The way facts are presented—whether in the claim form, statement of case, or affidavit—is intended to meet the requirements for the pleadings in civil cases. The rules do not override the substantive legal principle that a claimant must plead and prove his case. (See **McPhilemy v Times Newspapers Ltd**⁷ ('McPhilemy') and **Conticorp SA & Ors v The Central Bank of Ecuador and Ors**⁸ ('Conticorp') where a party's statement of case must be sufficiently pleaded to put the other side on notice of the case they are required to meet.)
- [60] Without a claim for this relief, there is no basis for awarding damages for constitutional redress or any other remedy under the Constitution, as no claim for damages or any other remedy for breach of the Constitution has been made in respect of sections 13(3)(g) and 16(2) of the Charter.
- [61] The affidavit evidence relied on by each side has already been set out. There is no dispute that the claimant was in custody for the period alleged. The claimant does not dispute the assertions made by Sgt. Jenkins regarding investigations or information received. The claimant disputes receiving a detention order. No complaint was made to the Tribunal regarding this non-receipt of the detention

⁷ [1999] 3 All ER 775

⁸ [2007] UKPC 40

order, which was specifically reviewed by that body. I reject the claimant's evidence on this aspect and find that the claimant received a detention order. I accept Sgt Jenkins' evidence that the claimant was duly served.

[62] The Privy Council has guided the court in **The Attorney General (Appellant) v The Jamaican Bar Association**, stating that:

*“...the burden of establishing that legislation derogates from a constitutionally guaranteed right lies on the claimant for redress, whereas the burden of establishing demonstrable justification lies on the State. The Board agrees with the Full Court that the differences in language between the Canadian and Jamaican Charters do not detract from the applicability of the **Oakes** analysis of the court’s task.”⁹*

[63] Therefore, in this claim, if the claimant has established that the regulations derogate from his constitutionally guaranteed rights, then it is the State's responsibility to provide evidence supporting the need for the imposition of the SOPE and his detention under it.

[64] The court will assess the impugned state action, which is, in this case, the imposition of the SOPE, according to the principle of proportionality, as the measure imposed should impair the right as little as possible. Regarding the issue of justification, the Board affirmed the dictum of McDonald-Bishop when describing the **Oakes** test and set out its own formulation of the balancing exercise involved in addressing proportionality at paragraph 77 of the judgment:

“77 This test is similar to that which the Board recently described as “the modern conventional approach to issues of proportionality” in Suraj v

⁹ [2023] UKPC 6 at [26]

Attorney General of Trinidad and Tobago [2022] UKPC 26, [2022] 3 WLR 309, at para 51. This involves asking in relation to the relevant measure:

*“(i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. See *Huang v Secretary of State for Home Department* [2007] 2 AC 167, para 19 (Lord Bingham of Cornhill) and *Bank Mellat v HM Treasury (No2)* [2013] UKSC 39, [2014] AC 700, paras 20 (Lord Sumption) and 73-74 (Lord Reed).”*

- [65] The claimant alleges that his right to liberty was violated. It is undisputed that the right to liberty was infringed by his detention for 154 days. The defendants concede that the right to liberty was indeed violated and that the first declaration sought in this regard could be granted to the claimant.

The right to be informed of the reasons for any arrest or detention

- [66] The claimant asserts that there was a breach of his right under section 14(2)(b). The claimant alleges that his arrest under Regulation 30 violated his right to liberty and his right, at the time of his arrest or detention, or as soon as reasonably practicable, to be informed in a language he understands of the reasons for his arrest or detention. When arrested, he was not promptly, or at all, informed of the reasons for his detention.
- [67] Mr Clarke relied on **Roshaine Clarke** and **Kurt Mitchell** to submit that all the claimant has to prove is that he has been deprived of his liberty to trigger a possible breach of this right. This is demonstrated by the facts of this case. The claimant, in the Crown's case, was detained for at least 154 days despite section 3(5) of the Emergency Powers Act.

- [68] There is no evidence to suggest that the claimant's detention was reasonably justified in response to any situation arising during a state of public emergency. What is being protected under the right to liberty is the right to personal liberty and the right not to be detained without trial. This right was violated daily, and there is no valid reason not to provide compensation on a daily basis, as this case is not comparable to false imprisonment cases. An award based solely on false imprisonment is inadequate and unreasonable, given the evidence.
- [69] Ms Whyte submits that, in this case, it is not disputed that the claimant was detained under the state of emergency declared in the parish of Hanover. The right to liberty has therefore been engaged in this case. The question that arises is whether the breach was demonstrably justified.
- [70] Ms Whyte submits that the assertion that the right is violated by Regulation 30 has not been substantiated. Regulation 30 in no way, neither implicitly nor expressly, precludes a detainee from being informed as soon as reasonably practicable of the reasons for his arrest or detention in a language that he understands. There is nothing in the evidence in this case which discloses any allegations to support any finding that the right was infringed. At paragraph 4 of his Affidavit filed on January 23, 2024, the claimant stated: "*I enquired about the reason(s) for my detention at Hanover HQ, and I was advised that I was detained under 'SOE'.*"
- [71] In the Affidavit of Jermaine Jenkins filed June 11, 2024, the deponent stated at paragraph 22 that: "*...the Claimant was accosted and arrested pursuant to Regulation 30 of the Emergency Powers Regulations, 2019, for investigations into crimes committed in the Hanover Division and his suspected membership in a criminal organization*". He continued at paragraph 23 as follows: "*The Claimant was informed of his suspected crimes and cautioned and he replied 'Mi nuh know nothing about wa yu a talk about.'*"
- [72] At paragraph 24, the deponent states that the claimant was then transported to Hanover Police Headquarters and handed over into custody. He further states in

paragraph 25 that the claimant was served with a Notice of Detention informing him of the reason for his detention, which the claimant signed in acknowledgement of receipt on September 9, 2019. Based on the evidence, it cannot be argued that the claimant was not informed of the reason for his arrest and detention within a reasonably practicable time. Accordingly, the right under section 14(2)(b) of the Charter has not been engaged or breached in this case.

[73] I find that the claimant was not given the same reasons for his arrest in the notice of detention as those set out in the detention order from the Minister. The affidavit of Sgt Jenkins states that: “*the claimant was accosted and arrested pursuant to Regulation 30 of the Emergency Powers Regulations, 2019, for investigations into crimes committed in the Hanover Division and his suspected membership in a criminal organisation.*” What was conveyed to Mr Braham as to the “reasons” for his detention was stated thus: “*The claimant was informed of the suspected crimes and cautioned...*”

[74] The Detention Order before this court speaks to the claimant being concerned in acts prejudicial to public safety and public order, more specifically, *illegal possession of firearm, illegal possession of ammunition, illegal dealing of firearm [sic] and ammunition, [and] extortion.*”

[75] I accept that it was the claimant who asked on June 14, 2010, why he was being arrested and that he received the response that he was being detained under the SOPE. This means that the claimant was informed that the SOPE was the basis for the arrest as soon as was practicable, that is, on the day of the arrest when he asked.

[76] I also accept that the claimant was served with a Notice of Detention on the day of his arrest, though this was omitted from the text of the officer’s affidavit; it was attached as an exhibit. Further, in cross-examination, the officer said this failure to mention the Notice in the affidavit was an oversight as he had provided copies of the Notice to the court and to the tribunal.

[77] The notice set out the grounds for his detention, namely, being a part of a criminal organisation. At the time of the arrest, the reasons were reduced to writing. Does this mean the right is engaged? In this claim, I find that there were two separate periods of detention. The first, as outlined by Sgt Jenkins, under Regulation 30, and the second, by the Minister under Regulation 33, directing that the claimant be detained until the end of the SOPE.

[78] The claimant was informed of the reasons for his detention under Regulation 30 as well as under Regulation 33. He was given two separate documents stating the reasons for his detention at two separate points. The first period of detention was from June 12, 2019, to September 11, 2019, covered by the Notice of Detention. The second was September 11, 2019, to the date of the hearing before the tribunal. The tribunal considered the detention order but did not review the notice of detention, as it is not mentioned in their report to the Minister. There is no engagement of this right in terms of how regulations 30 and 33 were applied to the claimant.

The right to be brought forthwith or as soon as reasonably practicable before an officer authorised by law or a court

[79] Mr Clarke argued that Regulation 30(5) permits detention for up to three months without charge or court appearance. This is a breach of section 14(3) of the Charter, which guarantees the right to a trial within a reasonable time and to be brought before a lawful authority or court as soon as practicable. It was further argued that the defendant has not provided any evidence to show that this detention period is justifiable within a free and democratic society, or that such a breach can be construed as reasonably justified.

[80] Ms Whyte submits that the claimant claims that this right, though acknowledged by section 13(3)(a), is in fact found in section 14(3)(a)(i). Regulation 30 does not preclude a detainee from being brought before an authorised officer as soon as reasonably practicable. In any event, the question of what is a "reasonably

practicable" period of time within the meaning of section 14(3)(a)(i) must be considered in view of the factual circumstances.

- [81] The undisputed evidence is that the claimant submitted a Notice of Objection dated September 17, 2019, and the hearing before the tribunal was held on October 9, 2019. In the circumstances, the claimant's right to be brought forthwith before the duly constituted tribunal was exercised. In addition, the notice of detention also informed the claimant of his right to appear before the tribunal to be heard. The claimant said that the police did not so advise him; this is false. He signed the notice on the date he was arrested. This right was not engaged.

The right to be treated humanely and with respect for the inherent dignity of the person

- [82] Mr Clarke submits that the right to inherent dignity is protected by section 14(5) of the charter. The SOPE infringed on the claimant's right to inherent dignity. Counsel relied on **Gary Simpson v Governor of Mountjoy Prison**.¹⁰
- [83] The claimant averred that police lock-up conditions were inhumane without access to a bathroom, with the prison on lockdown, until he was released. The area was without the necessary sterilant, and the cell had no running water. The conditions of the lock-up were described as inhumane and degrading. This evidence was enough for the claimant to prove that his right to inherent dignity has been breached by the conditions and arrangements under which he was held in executive detention. The claimant has demonstrated that he was treated in a manner which violates his inherent dignity and rights as a human being.
- [84] The state has not shown that these breaches of the claimant's inherent dignity were a measure that was 'reasonably justifiable for the purpose of dealing with the situation that existed during the period of public emergency'. This court is asked to

¹⁰ [2017] IEHC 561 [135], [162], [400]

find that the claimant's right, as guaranteed and recognised by the Constitution, was unjustifiably breached.

[85] Ms Whyte relied on section 14(5) of the Charter to submit that the evidence fails to establish that the claimant received different treatment from other detainees to assert a breach of this right. Support for this position is found in **Roshaine Clarke**, where, at paragraph 112 of the judgment, the Court found that the claimant was treated no differently than any other detainee in custody, and the detention conditions did not infringe upon his constitutional right to be treated humanely.

[86] The right to be treated humanely and with respect for the inherent dignity of the person is acknowledged by section 14(5) of the Charter and guaranteed by section 13(2). I adopt the holding of the Full Court in **Roshaine Clarke** at paragraph 112 in that the claimant has failed to establish that the conditions under which he was held during his detention were different from what would be expected in a lock-up or holding cell. The evidence as to how the claimant was treated while in custody has not been refuted. However, the claimant has not adduced any evidence to show that he was treated differently from any other detainee while in custody. As a result, I find that this right has not been engaged.

The Regulations

[87] Challenge to the regulations was based on the fact that, under the SOPE, authorities were given broad and extensive powers. This allowed them to act without constraints, thereby violating the claimant's fundamental rights under the Charter. The defendant has failed to provide evidence that these violations were proportionate or reasonably justified in addressing the situation. (see **Julian Robinson v The Attorney General of Jamaica**.)¹¹ The claimant claims that Regulations 22, 29, 30, and 33 are unconstitutional in their text.

¹¹ [2019] JMFC Full 5

Regulation 22

[88] The claimant submits that Regulation 22 breaches the right to liberty acknowledged by section 13(3)(a). Ms Whyte submits that in the instant case, it is not in dispute that the claimant was detained under the state of emergency declared in the parish of Hanover. The question which therefore arises is whether the breach was demonstrably justified.

[89] There is no evidence before the Court indicating that the claimant's right to liberty was infringed through the application of Regulation 22, as no order was issued to restrict his access to any area pursuant to that Regulation. I agree with the submissions of Ms Whyte. In the absence of such evidence, the right to liberty has not been engaged in this case.

Regulation 29

[90] The instant claimant contends that Regulation 29 is also at issue. The defendants contend that this provision merely provides a right of questioning, and in no way purports to infringe upon a person's right to liberty. I find that there is no evidence that Regulation 29 was ever applied to the claimant, as there is no evidence that he was questioned in the manner contemplated by the regulation. The right has therefore not been engaged.

Regulation 30

[91] The claimant alleges on the evidence that his rights were breached under this regulation, and it is undisputed that the right to liberty was violated by his detention for 154 days.

[92] Regulation 30 of the Emergency Powers Regulations, 2018 ("the Regulations") has been found to be unconstitutional by the Full Court in **Roshaine Clarke**. The defendants accept that Regulation 30, in this case, mirrors Regulation 30 of 2018, which was struck down. They therefore accept that the current legal position is that Regulation 30 of 2019 breaches section 13(3)(a) of the Charter and breaches

the freedom of movement. However, they argue that it is reasonably justified to have detained the claimant for 154 days based on the allegations against him.

[93] Regulation 30(1) of the EPR gave an “authorised officer” the power to: *“arrest, without a warrant, and detain, pending enquiries, any person whose behaviour is of such a nature as to give reasonable grounds for suspecting that he has –*

(a) acted or is acting in a manner prejudicial to the public safety;

(b) or (b) has committed, is committing, or is about to commit an offence against [the EPR].”

[94] It was argued that Regulation 30 authorises any member of the security forces to detain an individual if there are reasonable grounds to suspect that their conduct endangers public safety. This authority is unrestrained and, therefore, infringes upon the constitutionally protected right to freedom and liberty under the Charter.

[95] Regulation 30(3) additionally authorises detention for the entire period of a declared state of public emergency. This constitutes an infringement upon section 13(3)(f) of the Charter, which confers the right to freedom of movement, as well as Section 14(1) of the Charter, which secures personal liberty.

[96] Regulation 30(5) permits detention for up to three months without charge or court appearance. This is a breach of section 14(3) of the Charter, which guarantees the right to a trial within a reasonable time and to be brought before a lawful authority or court as soon as practicable. It was further argued that the defendant has not provided any evidence to show that this detention period is justifiable within a free and democratic society, or that such a breach can be construed as reasonably justified.

[97] Regulation 30(4) of the regulations authorises the collection and retention of a person’s photograph and fingerprints following their release from custody. It was argued that this provision violates section 13(3)(j) of the Charter, which safeguards individuals from searches and invasions of privacy. Furthermore, it is alleged that

such practices are inconsistent with sections 4A(1), 4B(1), and 4B(4) of the Fingerprints Act, which stipulate that, in the absence of a conviction, both photographs and fingerprints must be destroyed unless a court orders otherwise.

[98] Further, Regulation 30 of 2019 under review in this claim, as conceded by Ms. Whyte, mirrors Regulation 30 of 2018, which the Full Court in **Roshaine Clark** has determined was not reasonably justified as it breached section 13(3)(a) of the Charter. The Full Court held that the State had failed to prove that regulations 22, 30, 32, 33 and 38 of the Emergency Powers Regulations were reasonably justified for the SOPE declared in Saint James on January 18, 2018.

[99] The Full Court found that regulation 22 infringed the right to liberty and freedom of movement. Regulation 30 was not rationally connected to the aim of the SOPE and was not reasonably justified, thereby breaching the right to liberty. Regulation 32 was not reasonably fair and could not be justified as rationally connected to the purpose for which the SOPE was intended. The regulation breached the freedom of movement. Regulation 33 infringed the right to liberty.

[100] Ms Whyte submits that the case law establishes that Regulation 30 breaches the right to liberty of a person detained under this regulation. The matter for consideration is whether the claimant is entitled to an award of vindictory damages for breach of his constitutional rights. However, such an award is discretionary in nature and in making any such award, the relevant considerations are the particular circumstances of the case. Counsel relied on **Attorney-General v Siewchand Ramanoop**¹² for this position, which was also reiterated in the **Roshaine Clarke** authority. In the circumstances, an appropriate sum for vindictory damages should be within the range of \$1,500,000.00 to \$2,000,000.00.

¹² (2005) 66 WIR 334

[101] To my mind, even if the regulation contained text held to be valid, the manner in which it was applied to the claimant would have rendered it invalid. The claimant was served with a Notice of Detention under Regulation 38(10) of the Emergency Powers Regulations 2019. He is alleged to have signed the Notice of Detention served on him on 9 September 2019. The claimant was arrested on 14 June 2019 and remained in custody without being told the reasons for his detention between June 14 and September 9, 2019, other than that he was arrested under the SOPE.

[102] Additionally, a Detention Order was issued by the first defendant on September 11, 2019, under Regulations 33 and 38 of the Emergency Powers Regulations 2019. This order required the claimant to be detained from September 10, 2019, until the end of the SOPE. 19.¹³ The detention ordered by the Minister was to take effect on the day before the order was issued, which is a material irregularity. There is a clear breach of the right to liberty, as has correctly been conceded.

Regulation 33

[103] Mr Clarke argued, relying on sections 13(2)(b) and 13(9) of the Charter, that the State must demonstrate that the detention of the claimant is both (a) reasonably justifiable to address the situation during a public emergency (section 13(9)) and (b) demonstrably justified in a free and democratic society (section 13(2)). Sections 14 and 16(2) of the Charter remain in force during emergencies, without suspension. A defendant's rights should not outweigh those of a detainee, and the necessity for and duration of detention are subject to review under section 14(3). The State must demonstrate that the claimant's deprivation of liberty was based on three criteria: (a) reasonable grounds; (b) conducted via fair procedures established by law; and (c) reasonably necessary to prevent the claimant from

¹³ Exhibit JJ2

committing a crime. The Court will interpret the claimant's rights under the Charter with generosity.

[104] Regulation 33 of 2019 provides for the written advice of the Commissioner of the Police in relation to a person/s concerned in acts prejudicial to public safety/ order; a person/s concerned in the preparation or instigation of such acts, and the necessity to detain a person or person/s to exercise control over him or/ them.

[105] Under the regulations, the Minister has the authority to issue seven different orders; the decision to carry out the most invasive intrusion on the claimant's fundamental human rights must be reasonably justified under Regulation 33(1) of the regulations and section 13(3)(9) of the Constitution.

[106] The seven orders available to the minister under the EPR include the following:

1. Confinement orders (regulation 32).
2. Association orders (regulation 33 (3) (a)).
3. Curfew orders (regulation 33 (3) (b)).
4. Prohibition orders (regulation 33 (3) (c)).
5. Notification of movement orders (regulation 33 (3) (d)).
6. Restriction of movement orders (regulations 33 (3) (e)).
7. Restriction of access orders (regulation 22).

[107] The EPR provides the Minister with several options; therefore, choosing the most intrusive measure requires the defendants to justify that decision. The defendants assert they have not infringed the claimant's constitutional rights. Additionally, they contend that there is sufficient evidence to support the claimant's detention. The core issue in this case hinges on whether the state has justified (1) the existence of a state of public emergency; (2) the detention of the claimant as a reasonably justifiable measure to address the emergency; and (3) the constitutionality of the impugned regulations. The Charter is founded on the principle that the state has a duty to respect human rights and freedoms. Provisions relating to periods of public

emergency must be interpreted within this framework, and any emergency-related language must align with these fundamental objectives, as outlined in the preamble of the Charter.

[108] The guaranteed rights which the claimant wishes the Court to bear in mind, while fulfilling its constitutional role under section 20 (5), are the following:

- (1) The right to liberty and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence for which he has been convicted - as guaranteed and acknowledged by Section 13 (3)(a)
- (2) The right to equitable and humane treatment by a public authority in the exercise of any function, as guaranteed and acknowledged by Section 13 (3)(b)
- (3) The right to protection from torture, or inhuman or degrading punishment - as guaranteed and acknowledged by section 13(3)(o)
- (4) Fair hearing in civil proceedings - section 16(2)
- (5) Presumption of innocence - section 16(5)
- (6) Due process in criminal proceedings - section 16(6)

[109] A declaration of emergency under section 20(2) of the Constitution suspends certain rights, including the right to movement, freedom of the person, and public court hearings, if necessary during a public emergency or disaster. Section 13(3)(a), guaranteeing liberty and protection from deprivation except by court sentence, remains applicable. All emergency actions must be reasonably justified. The claimant's detention must comply with section 14(1).

[110] The proper assessment of the constitutionality of State actions is addressed in **Julian Robinson**. To be constitutionally valid, detention must be preventative and reasonably justified, showing a legitimate aim, rational connection, and proportionality. Actions impacting rights must go no further than necessary; detention must be reasonably necessary to prevent offences.

- [111] The reasons in the Detention Order do not meet these standards, as they relate to future conduct, and the claimant has not been charged or convicted, making the detention akin to pre-trial punishment. The authority must justify the detention with credible evidence. The EPR should prevent administrative detention from being a shortcut to criminal trial, especially since such detention is prohibited without sufficient evidence. The detention appears punitive and retroactive, and goes beyond the scope of the regulations, which aim to secure community needs without derogating from constitutional rights. The state violated section 13(3)(1)(a) and has presented no evidence to support the necessity, proportionality, or appropriateness of the claimant's detention.
- [112] Further, the court cannot rely on evidence from unnamed sources that were not presented to the court. This amounts to an impermissible attempt to depend on hearsay evidence without full compliance with sections 31C, 31D & 31E of the Evidence Act.(See **R v Davis**¹⁴ and **Myers, Brangman and Cox v The Queen**¹⁵). Relying on hearsay evidence to deprive the claimant of his liberty is contrary to the fundamental principles of the Constitution and the doctrine of the separation of powers.
- [113] Unsubstantiated or untested statements from 'credible' police sources cannot support the detention order. Counsel cited **Harry Daley v R**,¹⁶ arguing that assertions from unnamed sources are unsubstantiated, unproven and prejudicial sources. The respondents relied on hearsay statements from police sources, which lacked context or any record of the information, rendering them unreliable. Without evidence of the sources' identities or credibility, these statements should carry no weight, and the officer's belief in their credibility is irrelevant.

¹⁴ [2008] UKHL 36

¹⁵ [2015] UKPC 40, [66] & [67]

¹⁶ [2013] JMCA Crim 14

- [114] Mr Clarke states that once the claimant shows a breach or likely breach of his rights, the burden shifts to the defendants to prove their measures were 'reasonably justifiable' during a public emergency and 'demonstrably justified' in a free society. The **Oakes** test therefore applies.
- [115] Mr. Clarke contended that based on section 13(9) of the Charter all SOPE measures are unconstitutional, as the government has not shown they were justifiable under the emergency. To meet this standard, the government must prove the emergency and show how the measures were a reasonable response.
- [116] The Governor-General, Police Commissioner, and Minister of National Security are parties and must provide information on the emergency and justify the measures under section 13(9) of the Constitution. Their failure to provide relevant materials prevents a fair determination of the issues raised by sections 13(9) and 20(5), which entitle the claimant to relief.
- [117] Alternatively, Mr. Clarke argues that even if measures are justifiable during a state of emergency, section 13(2) requires proof that such measures are demonstrably justified in a free, democratic society of which there is none.
- [118] The defendants accept that Regulation 33 infringes the right to liberty. However, the power accorded to the Minister is proportionate to the requirement to seek the advice of the Commissioner of Police, which serves as a safeguard against potential abuse, a concern raised by the Court in **Roshaine Clarke** with respect to this regulation.
- [119] Ms Whyte submits that, to the extent the process under the regulations was followed in relation to the detention of the claimant during the state of emergency, there was lawful justification for his detention. Having regard to the evidence of Sgt Jenkins, which demonstrates that there was reasonable and probable cause to suspect the claimant's involvement in lottery scamming and extortion, as well as his membership of a criminal organisation, the conclusion is that there was a lawful basis to detain the claimant.

The text of Regulation 33

'33.-(1) The Minister, on the written advice of the Commissioner of Police, if satisfied that any person has been concerned in acts prejudicial to public safety or public order or in the preparation or instigation of such acts and that for any reason thereof it is necessary to exercise control over that person, may make an order (hereinafter referred to as a "detention order") against that person directing that he be detained.¹⁷'

[120] It was also contended by the claimant that neither the manner nor the extent of the infringement on the claimant's constitutional rights by this regulation was reasonably justifiable, as he was not afforded a hearing within a reasonable period to present his objections.

¹⁷ (2) Any person detained under a detention order shall be deemed to be in lawful custody and shall be detained in such place (whether within or outside of the community) as may be authorized by the Minister and in accordance with such instructions as shall be issued by the Minister. by

(3) At any time after a detention order has been made against any person, the Minister may, on the written advice of the Commissioner of Police, a further order, revoke or vary the detention order or may direct that the duration of the detention order be suspended, subject to any of the following conditions, as the Minister thinks fit-

(a) imposing upon such person such restrictions as may be specified in the direction in respect of-

(i) his place of residence: and

(ii) his association or communication with other persons; (b) prohibiting such person from being out of doors between such hours as may be so specified except with the authority of a written permit granted by such authority or person as may be so specified; (c) prohibiting or restricting the possession or use by such person of any articles so specified; (d) requiring such person to notify of his movements in such manner, at such times and to such authority or person as may be so specified; (e) prohibiting such person from proceeding beyond such distance from his place of residence as may be so specified except with the authority of a written permit granted by such authority or person as may be so specified, and the Minister may by order revoke or vary any such direction whenever he thinks fit.

(4) Every person who fails to comply with a condition attached to or restriction imposed by, a direction given by the Minister under paragraph (3), whether or not the direction is revoked in consequences of the failure, commits an offence.

(5) For the avoidance of doubt, the powers exercisable under these Regulations shall be exercisable in respect of a person detained at a place outside of the community, and while being transported to or from any such place, pursuant to paragraph (2), as if the person were located in the community.

(6) In selecting a place of detention for the purposes of paragraph (2), the matters to which the Minister may have regard include- (a) the physical accommodations, for such detention, available in the community; and (b) the likelihood of further prejudice to public safety or public order if the person is detained in the community.

- [121] The hearsay point made by Mr Clarke is without merit as, at the reasonable suspicion stage, on an objective test, suspicion can take into account matters that could not be admitted into evidence. In fact, hearsay may be admissible not for the proof of the truth of its contents but to show the state of mind of the officer. This would be necessary to show that the officer had reasonable and probable cause to make the arrest.
- [122] It is also necessary to review Regulation 38 in respect of the complaint that the claimant was not given a hearing in a reasonable time for his objection to be heard. I can deal summarily with this issue. The claimant had a hearing before the tribunal on October 9, 2019. The Notice of Objection lodged on September 17, 2019, was signed by his attorney, Ms Gabbidon. The Notice of Detention in evidence was served on the claimant on September 9, 2019, and it bears his signature. This Notice advises the claimant that he can have a review of his detention before the Tribunal. There is no evidence from the claimant regarding whether he was visited by an attorney or how the attorney obtained the detention order or instructions to lodge the notice of objection on his behalf. The claimant asserted that the police did not advise him about the tribunal; his attorney did. This would seem to me to mean that the court should be told at what point his attorney entered the fray. There was no evidence in this regard; therefore, there is no basis on which to find that the right was engaged.

Regulation 38

“38.-(1) For the purpose of these Regulations, there shall be established a Tribunal for the review of cases of detention or restriction to be called the Emergency Powers Review Tribunal. (2) The Tribunal shall consist of- (a) one member appointed by the Chief Justice of Jamaica from among persons qualified to be appointed as a Judge of the Supreme Court, who shall be chairman of the Tribunal; and (b) two other persons appointed by the Governor-General...”

...

(11) In respect of the findings of the Tribunal on an objection under paragraph (9), the chairman shall issue such directions as the Tribunal thinks fit to- (a) the competent authority concerned, in the case of an order under regulation 22; (b) the

Minister, in the case of an order under regulation 32 or 33; or (c) in any other case, the competent authority by whom such detention or restriction was authorized, including any recommendations concerning the necessity or expediency of continuing the detention or restriction of freedom of movement (as the case may be).

(12) In keeping with the findings of the Tribunal –

(a) In the case of an order under regulation 22, the competent authority, or in the case of an order under regulation 32 or 33, the Minister, shall –

(i) direct that the order remain in force;

(ii) vary the order (including imposing conditions thereunder); or

(iii) revoke the order; in any other case, the competent authority shall comply with the directions of the Tribunal.

(13) The competent authority shall cause to be issued to a person who is detained, or whose freedom of movement is restricted, by virtue of these Regulations, a notice informing the person of- (a) the grounds therefor; and (b) the person's right to make his objections to the Tribunal aforesaid."

[123] Regulation 38 will become relevant in relation to the discussion regarding the Minister's powers under Regulation 33 below.

[124] The defendants accept that Regulation 33 infringes the right to liberty, but that it can be reasonably justified. Regulation 33(1) formed the basis of the Detention Order issued by the Minister. The defendants argue that the question of any abrogation of the right to liberty under Regulation 33 should be reconsidered, as in **Roshaine Clarke**, the Full Court considered a regulation that was differently worded than Regulation 33 of 2019.

[125] It was submitted that Regulation 33 of 2019 authorises the Minister, among other things, to issue, vary, or revoke a detention order "upon the written advice of the Commissioner of Police." The power granted to the Minister is proportionate, considering there is now a statutory requirement that the Minister seek the advice of the Commissioner of Police, which acts as a safeguard against potential abuse—a concern raised by the Full Court in **Roshaine Clarke**. That court did not

consider this addition to the text of the regulation, therefore, this court is reviewing a differently worded provision.

[126] Therefore, I will first examine its text for constitutional validity. An expansive approach to the construction of the Charter is consistent with the well-established constitutional jurisprudence of the Privy Council, which advocates for a liberal interpretation of constitutional provisions to ensure individuals are afforded the full scope of rights and freedoms conferred by the Constitution: (see **Minister of Home Affairs v Fisher**,¹⁸ **Seepersad v Commissioner of Prisons of Trinidad and Tobago**,¹⁹ **Attorney General for Bermuda v Ferguson**,²⁰ **Day v Governor of the Cayman Islands**²¹).

[127] What is the meaning of the words “reasonably justified”? In the decision by the Court of Appeal of England and Wales in the case of **Secretary of State for the Home Department v JJ and Others**²², Lord Hoffman described “reasonably justified” as “necessary and proportionate for the protection of the public.” In other words, impugned governmental action must be capable of satisfying the **Oakes** test.

[128] In applying the **Oakes** test to the instant case, I bear in mind the guidance from the Privy Council, in **The Attorney General (Appellant) v The Jamaican Bar Association**. The Board said:

“...the burden of establishing that legislation derogates from a constitutionally guaranteed right lies on the claimant for redress, whereas the burden of establishing demonstrable justification lies on the State. The Board agrees with the Full Court that the differences in language between

¹⁸ [1980] AC 319, 328-329 per Lord Wilberforce

¹⁹ [2021] UKPC 13; [2021] 1 WLR 4315, paragraph 26

²⁰ [2022] UKPC 5; [2022] 3 WLUK 176, paragraph 46

²¹ [2022] UKPC 6, paragraphs 36-37

²² [2008] 1 All ER 613

*the Canadian and Jamaican Charters do not detract from the applicability of the **Oakes** analysis of the court's task.²³*

[129] The claimant seeks a declaration that this provision is invalid on the grounds that it grants the Minister extraordinary powers, thereby contravening the Constitution. The court will proceed to assess the impugned state action, which is, in this case, the detention of the claimant under this Regulation based on the imposition of the SOPE.

[130] According to the principle of proportionality, the measure imposed should impair the right as little as possible. Regarding the issue of justification, the Board affirmed the dictum of McDonald-Bishop when describing the **Oakes** test and set out its own formulation of the balancing exercise involved in addressing proportionality at paragraph 77 of the judgment:

“77 This test is similar to that which the Board recently described as “the modern conventional approach to issues of proportionality” in Suraj v Attorney General of Trinidad and Tobago [2022] UKPC 26, [2022] 3 WLR 309, at para 51. This involves asking in relation to the relevant measure: “(i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. See Huang v Secretary of State for Home Department [2007] 2 AC 167, para 19 (Lord Bingham of Cornhill) and Bank Mellat v HM Treasury (No2) [2013] UKSC 39, [2014] AC 700, paras 20 (Lord Sumption) and 73-74 (Lord Reed).”

[131] The right to be informed of the case against oneself, while important, may need to be balanced with the interests of others and the public interest. The most common public interest involved is the effective investigation and prosecution of serious crimes, which may require the use of informers, undercover agents, or scientific and operational techniques (such as surveillance) that cannot be disclosed without

²³ [2023] UKPC 6 at [26]

risking personal injury to individuals or undermining the success of ongoing operations to ferret out criminals. Balancing these considerations is necessary to maintain a realistic understanding as to the practical implications central to the principle of proportionality.

[132] The weight to be assigned to these competing interests will depend on the facts of the case. It is crucial to recognise that standards and perceptions of fairness can evolve over time. While Mr Clarke's focus has been on the rights of the claimant, in this case, the powers of the State and the rights under review should be interpreted within the framework of the administration of the criminal law.

The measures

[133] The emergency situation encompassed gang-related activities, including murders of potential witnesses or intelligence sources, extortion, and lottery scams. The SOPE was established to mitigate a high level of criminality by detaining those responsible. Intelligence linked the claimant to this fluid and ongoing situation, defined as an emergency.

[134] Measures taken by the State must account for the rights of the individual as well as the interests of the community. Therefore, any steps to implement these measures should, in my view, be taken in good faith and must also be proportionate to the situation that necessitated them in the first place.

[135] The evidence of Sgt Jenkins is that the claimant was alleged to be involved in serious criminal offences and suspected of being part of a criminal organisation. He was detained as an alleged criminal offender and gang leader. It is plain to me that removing the leader would likely disrupt the gang's structure, organisation, communication, and coordination, thereby enabling the protection of life and allowing citizens to move freely about. The measures would reduce crime, such as murders and other violent crimes, in the parish. The aim was therefore acceptable as intending to reduce criminality.

Whether the written advice of the Commissioner of Police in Regulation 33(1) acts as a statutory procedural safeguard

[136] Under Regulation 33, the claimant was detained until the end of the SOPE by the Minister. Having acknowledged the existence of a SOPE, there has to be evidence from the defendants to show that the breach of the right to liberty was reasonably justifiable, given the circumstances of what was construed as a public emergency.

[137] I begin with these statements of the law by McDonald-Bishop, JA (as she then was) in **Ministry of National Security et al v Everton Douglas et al**,²⁴ in which the learned judge held, regarding habeas corpus proceedings in the Supreme Court, that the need for those proceedings arose as a result of the executive action of the state:

*“I would hold, at the very least, that the proceedings arose from the executive action of the state to further the criminal law enforcement machinery of the country.”*²⁵

[74] It seems pertinent to note, as a starting point, that in evaluating the detention of an individual within the legal framework of an SOE, one cannot divorce the legality of that detention from its constitutionality. This is, simply, because the detentions were made in the exercise of powers conferred by the Constitution. The Governor-General had purportedly acted under a power conferred on him by the Constitution in declaring the SOEs, which led to the respondents’ detention upon the Minister’s orders. The respondents had approached the court for protection of their constitutional right to liberty, to which they were entitled, but which was abrogated or infringed through the constitutional and concomitant legislative mechanisms deployed by the State.”

[138] It is worth noting that the Court of Appeal did not directly address the several grounds of appeal; rather, it decided the procedural matters raised, holding that

²⁴ [2023] JMCA Civ 39

²⁵ [45]

there is no appeal from the decision of the Supreme Court on an application for habeas corpus.

[139] The first instance decision of Morrison, J in **Everton Douglas, Nicholas Heath, Courtney Hall, Courtney Thompson and Gavin Noble v The Minister of National Security, The Commissioner of Police and The Attorney General of Jamaica**,²⁶ was not cited to this court; however, it has some bearing on this case, as Morrison, J, considered whether the detention of five men under various SOPEs was unlawful. The Petitioners sought writs of habeas corpus, challenging their extended detention without charge under the EPR and the EPA, arguing that the executive's actions infringed their constitutional rights and violated the doctrine of the separation of powers.

[140] The petitioners were detained for periods ranging from 177 to 431 days without charge under SOPEs in various parishes. They argued that their continued detention without criminal charges was unconstitutional and unjustifiable. They applied under Section 20(5) of the Constitution, contending that the tribunals reviewing their cases were inadequate substitutes for the judiciary, lacking access to full evidence and failing to discharge the judicial duties vested in the courts by the Constitution.

[141] Morrison, J examined inter alia, Regulation 33 of 2019, which this court is also reviewing and found that [the regulation 33]:

“gave unfettered discretion to the police/Minister in relation to the committal of persons to penal institutions/jail for offences which are criminal offences.

[70] Regulations 30 and 33 violate the basic structure of the Constitution regarding separation of powers, the rules of law and the protection of fundamental rights.”

²⁶ [2020] JMSC Civ. 267

- [142] Ms Whyte has argued that the 2019 regulation provides a statutory procedural safeguard, specifically the addition of the requirement for the Minister to obtain the advice of the Commissioner of Police under Regulation 33. There were no submissions on the holding of Morrison, J, in **Everton Douglas** to this court. I have considered **Everton Douglas**, and find it persuasive; however, it is distinguishable on the facts and non-binding. My interpretation of the text of Regulation 33(1) differs from that of my learned brother and is set out below.
- [143] Upon a considered review of Regulation 33(1), the authority to detain is vested in the Minister. He is required to seek and consider the written advice of the Commissioner of Police. The provision of the written advice by the Commissioner of Police does not bind the Minister, who retains the discretion to act upon or to abstain from acting on this written advice. However, there exists a statutory requirement for the Minister to obtain the written advice of the Commissioner. This statutory requirement functions as a safeguard on the powers conferred upon the Minister by the regulation, serving as an essential procedural step in the exercise of the authority granted to him over the liberty of the subject. This is why the exercise of this power can only occur under a SOPE, as outside of this, the conferral of any such power upon the Minister would be a misappropriation of the judicial function.
- [144] The Minister may elect not to act upon this written advice; however, he is mandated to seek it. Information concerning the necessity for detention under a SOPE must originate from a credible and reliable source. The provision, as drafted, does not imply that the Minister would serve as the source. The exclusion of the Minister as the source of any information or opinion related to the power to detain is designed to distinguish the information, intelligence, and operational analysis from the policy maker in the application of the provision.
- [145] There is no evidence before this court to suggest there was an improper purpose on the part of the legislature for the inclusion of this provision, nor can the court draw any such inference. For the Minister to elect not to follow the provision would

contravene a constitutional principle that is a fundamental component of the rule of law, namely that decisions and actions of the executive are reviewable by the courts, not vice versa.

[146] When Regulations 33 and 38 are read together, the procedural safeguards are two-tiered, comprising the Commissioner's written advice and the right of review by the constitutionally appointed tribunal, which has the prescribed powers to direct the Minister regarding the detention of anyone who comes before it.

[147] The manner in which the Minister exercises the discretion conferred upon him is subject to review by both the tribunal and the courts. Concerning detention ordered by the Minister under Regulation 33, he must act "in keeping with" or in accordance with the directions of the Tribunal pursuant to Regulation 38(12). The phrase "in keeping with" suggests actions are to be taken by the Minister that are consistent with the directions of the tribunal. The establishment of the tribunal effectively limits the discretion granted to the Minister under Regulation 33 and fulfils the requirements of section 14 of the Charter regarding a fair procedure established by law.

[148] It cannot be denied that during a SOPE, freedom of movement, due process rights, and the right to a fair hearing are suspended or qualified. On justification, the court will ask itself the following questions in balancing the issues of proportionality:

(i) The importance of the aim

[149] The reasoning of the Full Court in **Dayton Campbell v The Attorney General of Jamaica**²⁷ regarding the necessity for the SOPE is adopted. The primary purpose of imposing the SOPE in that case was to reduce criminal activity, specifically gang-related offences. *"Thus, it may reasonably be said that the objective which*

²⁷ [2025] JMFC Full 2

the measure was designed to achieve is of sufficient importance since a key characteristic of a democratic society is its capacity to curb crime and maintain public order. It could not in the remotest way be considered that the need to bring a high level of crime under control is trivial or discordant with the principles underpinning a free and democratic society, but the State must show that the imposition of SOPE is justified.”²⁸

- [150] The evidence of Sgt. Jenkins is unchallenged on this aspect. There was a rise in violence caused by active gangs who posed an imminent threat to the Hanover police division and were inclined to threaten the public peace. Increased surveillance was carried out into the intra-gang conflict between the Hundred Rounds gang, with its lottery scamming arm known as the Cash in Hand Family, and the breakaway Ants Nest gang. One of the suspects was the claimant. The witness stated that he began investigating to determine whether the Hundred Rounds crew was a gang. He had been conducting investigations since 2013.
- [151] The defendant’s evidence indicated that the purpose of detaining the claimant under the SOPE was based on his leadership of a subgroup within the Hundred Rounds gang, known as the Cash in Hand Family. This group was identified as the leading lottery scam syndicate in western Hanover, which also engaged in extortion against other lottery scammers. Reports confirmed the claimant’s involvement in facilitating criminal activities, including the procurement of firearms to widen the reach of the gang. The Hundred Rounds gang was the largest operating in Hanover, with murders as far as the Corporate Area. The gang was implicated in the murders of those who attempted to report its activities. It was also being monitored by the National Intelligence Bureau, with intelligence confirming the gang's participation in a police raid in Alexandria, St Ann, where the police were repelled by heavy gunfire and grenade attacks. The claimant had been instrumental in strengthening the gang by directing the purchase and securing of

²⁸ [86]

firearms. The witness expressed the view that there was reasonable and probable cause to believe that the claimant was a member of the Hundred Rounds gang, led the Cash in Hand Family involved in lottery scamming, and engaged in extortion. The claimant was arrested under the SOPE for investigations into crimes committed in the Hanover division and his suspected membership in a criminal organisation. He was not charged.

(ii) whether the measures are rationally connected to the aim

[152] The SOPE was being used to control gang violence; the aim was that it would curtail the movement of those suspected of being involved in crime within the targeted areas. This, in turn, would lead to a reduction in crime.

[153] In this claim, as I understand Sgt Jenkins' affidavit, he is saying that the measures taken were aimed at curtailing actions which fuelled gang activity. He spoke to intra-gang conflict and to the claimant being an avid supporter of the ongoing conflict. He also averred that the claimant was responsible for financing the purchase of firearms by converting Digicel credit into firearms to arm the gangs. The claimant was arrested for crimes he was alleged to have committed in this regard.

[154] The court acknowledges that preventive custody may well be crucial for protecting life, limb and property from significant damage. The Emergency Powers Regulations should therefore be construed in a manner that does not impede the fundamental responsibilities of law enforcement in preserving public order and safeguarding life and property. This consideration is especially pertinent as long as the security forces operate in accordance with the fundamental tenets of the Charter, which seek to ensure protection against arbitrary detention and unlawful acts by the State.

Whether a less intrusive measure could have been used;

[155] The Board in **The Attorney General (Appellant) v The Jamaican Bar Association** clarified what is meant by a “less intrusive measure” at paragraph 78:

“78. In considering whether “a less intrusive measure could have been used”, the need to allow the legislature a margin of appreciation is of particular importance. As Lord Reed explained in Bank Mellat v HM Treasury (No2) [2013] UKSC 39, [2014] AC 700 at para 75:

“In relation to the third of these criteria, Dickson CJ made clear in R v Edwards Books and Art Ltd [1986] 2 SCR 713, 781- 782 that the limitation of the protected right must be one that ‘it was reasonable for the legislature to impose’, and that the courts were “not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line’. This approach is unavoidable, if there is to be any real prospect of a limitation on rights being justified: as Page 32 Blackmun J once observed, a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation, and thereby enable himself to vote to strike legislation down (Illinois State Board of Elections v Socialist Workers Party (1979) 440 US 173, 188-189); especially, one might add, if he is unaware of the relevant practicalities and indifferent to considerations of cost. To allow the legislature a margin of appreciation is also essential if a federal system such as that of Canada, or a devolved system such as that of the United Kingdom, is to work, since a strict application of a ‘least restrictive means’ test would allow only one legislative response to an objective that involved limiting a protected right.”

79. It appears that a similar approach is taken by the Canadian courts in relation to the “minimal impairment” element of the Oakes test. As is stated in Halsbury’s Laws of Canada, HCHR 22 at p153:

“Reasonability of the degree of infringement. Historically, the original phrasing of the Oakes test referred to testing whether legislators had adopted the ‘least drastic means’ that led to ‘minimal impairment’ of a right. This language is more stringent than the test that is actually applied, which is concerned at this stage of the test with whether a particular infringement falls within a range of reasonable options. It is particularly at this stage that the courts show deference on complex social issues, where legislators are better suited than judges to determine the best way to address these issues. The requirement at this stage is effectively that the legislative measures limit the right ‘as little as is reasonably possible’ to achieve the objectives of the measure.”

[156] The complex social issues involved in determining how to reduce crime are not for this court to decide. The assessment is whether the measures taken under this regulation have abrogated the claimant's rights. The claimant has raised a number of options that the Minister had, with detention being the most severe. The evidence was that the claimant was arrested for crimes he had committed, and a file was being compiled. There was not enough information to charge the claimant, yet there was no explanation as to why he needed to be detained in those circumstances.

(iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

[157] The demands of managing gang-related crime do not permit the extension of the notion of "reasonableness" to a degree that undermines the core protections of liberty and due process guaranteed by the Charter. This serves as a check on the power granted to the security forces, who are not allowed to detain in breach of the Charter, which is the supreme law. The rights outlined by the Charter are interconnected, and the Charter should be read as a whole. The rights of citizens must also be considered; the right to life is paramount, and it was alleged that the claimant was endangering the lives of others. His detention was reviewed, and the Tribunal found that the officer could not provide any reasonable justification for keeping the detention in place; consequently, the claimant's release was directed.

[158] In my view, the way Regulation 33 was applied to the claimant was unconstitutional. The detention of the claimant, without charge for three months, was exacerbated by the Minister's failure to secure the claimant's release, despite the tribunal having ordered that the detention order be revoked.

[159] Privacy is guaranteed by the combination of section 13(3)(j)(ii) and (iii). Freedom from search of property is guaranteed by section 13(3)(j)(i). The evidence to show that these rights have been breached has not been adduced by the claimant.

Whether the claimant is entitled to damages for false imprisonment and breaches of his constitutional rights, including aggravated damages, exemplary damages and vindictory damages.

[160] In this claim, the claimant has established that he was ordered to be released by the tribunal on October 9, 2019, as his detention order had been revoked. He was not released by the Minister as is required by Regulation 38(12)(a)(iii). This constitutes a clear breach of the rights to liberty and freedom of movement. Having established that the regulations derogate from his constitutionally guaranteed rights, it was the State's responsibility to provide evidence to demonstrate it had discharged its burden of proof. The defendants failed to provide an answer.

[161] Mr Clarke relied on **Kurt Mitchell v AG** to argue that the award of damages must uphold the constitutional right to liberty and send a clear message that executive detention in breach of s. 3(5) of the Emergency Powers Act should be discouraged. The purpose of constitutional damages is to provide a sufficient award to remedy the breach of constitutional rights. Any remedy awarded must aim to enforce or secure the enforcement of the provisions of the chapter relating to the protection to which the individual is entitled.

[162] Counsel relied on **Attorney-General of St. Christopher, Nevis and Anguilla v John Joseph Reynolds**,²⁹ **Earl Patrick Stephens v The Attorney-General of Jamaica**,³⁰ **Roshaine Clarke v Attorney General**, **Kurt Mitchell v Attorney General**, and **Keron Campbell v Keroy Watson and the Attorney General of Jamaica**³¹ to submit that the claimant in this case alleges that he was released after spending more than 154 days in custody. It is submitted that the sum of

²⁹ (1977) 24 W.I.R. 552

³⁰ (1988) 25 JLR 26

³¹ CLC 383 of 1998

\$324,532 per day should be used. This amounts to \$50,302,460.00 for loss of liberty.

[163] Accordingly, if the Court finds that liability has been established in respect of the false imprisonment claim, it should be limited to thirty (30) days, that is, the period between the tribunal's decision on October 9, 2019, ordering the release of the claimant and the date of actual release, November 15, 2019. The defendants propose a rate of \$120,000.00 for the first day and \$100,000.00 for each day thereafter. Therefore, a reasonable sum for damages for false imprisonment in this matter is \$3,020,000.00.

[164] Concerning vindictory damages, both sides relied on **Ramanoop and Allie Mohammed v The State**³² to argue that, given the numerous rights breaches in this case, full compensation for daily breaches is suitable and a cautious estimate based on the facts. Counsel asked the court to properly vindicate the rights affected by awarding a sufficient sum of \$15,000,000, considering the circumstances of this case, which reveal a total disregard for the Constitution, the Emergency Powers Act, its regulations and rules of law, and the doctrine of separation of powers.

[165] Ms Whyte submits that the case law establishes that Regulation 30 breaches the right to liberty of a person detained under this regulation. An award of vindictory damages is discretionary in nature and in making any such award, the relevant considerations are the particular circumstances of the case. An appropriate sum for vindictory damages should be within the range of \$1,500,000.00 to \$2,000,000.00.

[166] Regarding aggravated damages, Mr Clarke relied on **Aaron Whyley v The Commissioner of Police and The Attorney General**³³ to submit that the sum of

³² [1998] UKPC 49, 2 AC 111, 123,

³³ BS 2021 SC 8 (delivered 15 January 2021)

\$1,000,000 is reasonable in this case based on the special facts of this case, including that Mr Braham was not released until almost a month after the tribunal ruled that he should be released and the uncontested evidence in relation to the conditions of his imprisonment. The aggravating features of this case includes the fact that the claimant was detained in front of the public and family members, the public humiliation caused by same, his detention, failure to inform him of the reasons for his detention and the conditions of the detention cells and him being held, twice under the state of public emergency, in the same conditions, facilities and rules as a person charged and convicted of criminal offences despite having no criminal conviction are sufficient justification for aggravated damages.

[167] Ms Whyte submitted that there is no evidence of any conduct by the defendant's agents or servants that is sufficiently outrageous to warrant condemnation and punishment. There is no behaviour on the part of the defendants that displays malice, fraud, cruelty, insolence, or similar conduct to justify an award of aggravated or exemplary damages. The claimant would be adequately compensated for damages for false imprisonment during the thirty (30) days of detention, including any aggravating features, and no additional award for aggravated damages should be granted.

[168] Counsel submitted that, should the court be minded to make an award for aggravated damages as in the case of **Maxwell Russell v The Attorney General and Corporal McDonald**³⁴ states the law in Jamaica, that "ordinarily the court will not award exemplary damages if it is satisfied that the award for compensatory damages, inclusive of aggravated damages, sufficiently punishes the wrongdoer for his outrageous conduct".

³⁴ (Claim No 2006 HCV 4024 (delivered 18 January 2008))

- [169] Regarding special damages Mr Clarke relied on **Minister of National Security v Everton Douglas et al**³⁵ to make the point that section 19 lays down no procedural requirements for how the claimant should prove losses to get relief under the said section. The claimant was in custody for at least 154 days. He averred that he incurred expenses related to transportation to obtain items while he was incarcerated. Counsel submitted that the claimant should receive \$850,000.00 for legal fees, \$1,800,000.00 for loss of income and \$80,000 for transportation expenses.
- [170] Ms Whyte submitted that the claimant has not provided any proof to show that he was earning from his jobs. The claimant states that he incurred legal fees to submit his objection to the review tribunal; however, no receipts were exhibited as evidence of payment. Also, the claimant states that he incurred transportation expenses in the sum of \$120,000.00. It is, however, unclear how the claimant incurred transportation expenses whilst in custody and whatever for.
- [171] Notwithstanding, it is trite law that special damages must be specifically pleaded and proved. Counsel relied on **Owen Thomas v Constable Foster and Attorney General**³⁶ to submit that the issue of proof is live in relation to the claim for legal expenses, loss of income, and transportation expenses, as no receipt, no particulars in relation to his earnings, and his travelling were stated or exhibited. In effect, the claimant has merely pleaded these special damages headings without providing any evidence to substantiate them. Mr Clarke submitted that in total, the claimant was to be awarded J\$68,180,000.00 and that the awarding of any lesser sum would not emphasise the importance of the affected rights in light of the new approach demanded by the Charter.

³⁵ [2023] JMCA Civ 39 [83]-[93]

³⁶ (Claim No. CI T 095 of 1999 (delivered January 6, 2006))

[172] The court accepts the defendants' submissions on damages, and the award will be made in accordance with their submissions, with damages limited to 30 days for the tort of false imprisonment and vindictory damages to redress the constitutional breach of the right to liberty. I do find, however, that the Tribunal's directions were honoured in the breach, and this earns the disapproval of the court.

[173] Orders

1. It is declared that Regulation 22 of the Emergency Powers Regulations 2019 breaches Section 13 (3) (f) (ii) of The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011.
2. It is declared that Regulation 30 of the Emergency Powers Regulations 2019 breaches Section 13 (3) (a), Section 14 (2) (b), Section 14 (3) (a) (i) and Section 14 (3) (b) of The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011.
3. It is declared that Regulation 33 of the Emergency Powers Regulations 2019 breaches Section (13) (3) (a) of The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011.
4. It is declared that the claimant's right to liberty was breached as he was not released as ordered by the Emergency Powers Review Tribunal.
5. It is declared that the claimant was wrongfully detained without criminal charges under the State of Public Emergency of April 30, 2019.
6. The claimant is entitled to redress under Section 19(1) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 for the contravention of the rights to liberty and freedom of movement as prescribed by sections 13(3)(a), 13(3)(f), of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act.

7. It is ordered that all private data, photographs, fingerprints and personal information related to the claimant which was collected during his detention under a State of Public Emergency be destroyed.
8. The claimant is awarded damages in the total sum of \$5,000,000.00 as follows:
 - a) compensatory damages in the sum of \$3,000,000.00.
 - b) constitutional/vindictory damages in the sum of \$2,000,000.00
9. Costs to the claimant to be taxed if not agreed.

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Wint-Blair J