



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2012 HCV01806

**CORAM: THE HON. Mr. JUSTICE L. HIBBERT
THE HON. MS. JUSTICE J. STRAW
THE HON. MS. JUSTICE N. SIMMONS**

BETWEEN	ANDREW COKE	CLAIMANT
AND	THE COMMISSIONER OF POLICE	1ST DEFENDANT
AND	THE CHIEF OF STAFF OF THE JAMAICA DEFENCE FORCE	2ND DEFENDANT
AND	THE MINISTRY OF SECURITY	3RD DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	4TH DEFENDANT

Mrs. Carolyn Reid-Cameron, Chuckwuemeka Cameron instructed by Carolyn C. Reid and Company for the Claimant.

Miss Althea Jarrett and Miss Celia Middleton instructed by the Director of State Proceedings for the Defendant.

HEARD: 27TH, 28TH, 29TH, 30TH, 31ST, JANUARY, 2014; 2ND APRIL, 2014 & 25TH March, 2015

[1] The Claimant Andrew Leighton Coke, on 27 March 2012 filed in this court a Fixed Date Claim seeking declarations and awards of damages for alleged breaches of his rights which are guaranteed under the Constitution. At that time he was

an inmate at the Horizon Adult Remand Centre (HARC), in a section designated Security Post II (SPII).

[2] At the commencement of the hearing Mr. Cameron on behalf of the Claimant, indicated that only some of the orders originally sought would be pursued. Those are set out at paragraph 38 in the judgment of Straw, J. Those pursued may be categorized under the following heads:

- i. That the use of personnel from the Jamaica Defence Force (JDF) at the HARC was unlawful.
- ii. That the claimant's right to life, liberty and security of his person was contravened.
- iii. That the claimant was subjected to torture, inhuman and degrading treatment.
- iv. That the claimant was denied his right to legal representation
- v. That vindictory damages and compensation should be awarded.

The JDF at HARC

[3] The evidence concerning the presence of members of the JDF at HARC is set out in paragraphs 45 - 53 in the judgment of Straw, J. Members of the JDF were first deployed to the HARC in 2002. According to Lieutenant Colonel Prendergast who was then a Major in the JDF and who was a part of this deployment, their function was to assume operational control of the facility. This control was relinquished in 2004 but the JDF retained control of special detainees who were housed in SP 11. As evidenced by a letter written by the then Commissioner of Corrections, Major Richard Reese, in 2008 all commissioned, non-commissioned and other officers of the JDF who were assigned duties at the HARC were designated as "authorized persons." This was repeated by Lt. Col. Prendergast in 2012 while he was the Commissioner of Corrections. The presence of members of the JDF at the HARC ended in 2013.

[4] The issues raised require an examination of sections 5 and 9 of the Defence Act as well as provisions in the Corrections Act. Section 5 of the Defence Act states:

"5. The Jamaica Defence Force shall be charged with the defence of and maintenance of order in Jamaica and with such other duties as may from time to time be defined by the Defence Board."

Section 9 of the Act states in part –

" 9. (1) There shall be a Jamaica Defence Board with shall, subject to the provisions of subsection (2), be responsible under the general authority of the Minister for the command, discipline and administration of, and all other matters relating to, the Jamaica Defence Force.

(2) The responsibility of the Defence Board shall not extend to the operational use of the Jamaica Defence Force, for which use responsibility shall be vested in the Chief of Staff subject to the overall direction of the Cabinet:

Provided that the Prime Minister may give go the Chief of Staff such directions with respect to the operational use of the Jamaica Defence Force in Jamaica for the purpose of maintaining and securing public safety and public order, notwithstanding that the directions of the Cabinet have not been obtained, and the Chief of Staff shall comply with those directions or cause them to be complied with."

[5] On behalf of the Claimant it was submitted that:

- i. "Neither the Chief of Staff nor the Minister of National Security have the power to deploy members of the Jamaica Defence Force to take full control of the Horizon Adult Remand Centre without the direction of the Defence Board on the Prime Minister*
- ii. Manning a section of the Horizon Adult Remand Centre on a full time basis does not fall within the ambit of their prescribed duties as set out in the Defence Act and without the Jamaica Defence Board or Prime Minister instructing them to man the Horizon Adult Remand Centre their presence in the Remand Centre was unlawful and illegal.*
- iii. The Commissioner of Corrections had no power to designate members of the Jamaica Defence Force as*

“authorized persons” under the Corrections Act as they could only be deployed outside the confines of the Defence Act by virtue of the Prime Minister triggering section 9 of the Defence Act.”

[6] Miss Jarrett on behalf of the defendants submitted that the deployment of members of the JDF to take up operational control of the HARC was a responsibility which was vested in the Chief of Staff by virtue of Section 9 (2) of the Defence Act and in no way breached section 5 of the Act.

[7] Miss Jarrett further submitted that sections 2(1) and 15(7) of the Corrections Act confer upon the Commissioner of Corrections the authority to designate any person as an “authorized person” and as such they would be acting under the control of the Commissioner of Corrections.

[8] In Section 2 (1) of the Act “authorized person” is defined as follows:

“Authorized person”-

a) In relation to sections 15 and 55, means any person authorized for the purposes of those sections, respectively, by the Commissioner or by an officer of police not below the rank of sergeant.

[9] Section 15 (7)states:

(7) Every constable or authorized person who is for the time being serving in the capacity of an escort or of a guard in or around any adult correctional centre, lock up or remand centre in order to ensure the safe custody of any inmate or person detained in a lock up or remand centre shall for the purposes of his duties in relation to such inmate or person be deemed to have all the powers and privileges granted to correctional officers under this section.

[10] I fully agree with Miss Jarrett’s submission that the deployment of members of the JDF by the Chief of Staff was lawfully done in the exercise of his authority under section 9 (2) of the Defence Act which removes from the Defence Board the operational use of the JDF. I also agree with her that by virtue of the provisions of the Correction

Act which were cited by her, the Commissioner of Corrections had the authority to designate any person as an “authorized person.”

[11] Miss Jarrett further submitted that the declaration which is sought by the Claimant and listed as xii should not be countenanced by the court as to do so would entail the court embarking on an academic exercise. In support of her submissions she cited the decisions in **Tindall v Wright [1922] 38 Times Law Report 521, Ainsbury v Millington [1987] 1 All ER 929** and **Gouriet v Union of Post Office Workers and others [1977] 3 All ER 70.**

[12] It is to be noted that the claimant remained a detainee at the HARC between June 2010 and May 2012. Nowhere is it being claimed that the deployment of members of the JDF in 2002 impacted upon the Claimant in anyway. Further, since 2013 the presence of members of the JDF has ceased. I therefore agree that to consider the legality of the deployment of members of the JDF to the HARC in 2002 could not be with a view to deciding existing issues between the claimant and the defendants, but to embark on an academic exercise. In doing so I adopt the extracts relied on by Straw J in paragraphs 68 to 71 in her judgment. The court could therefore have refrained from considering the declarations sought.

Right to Life

[13] The original Chapter III of the constitution of Jamaica was headed “Fundamentals Rights and Freedoms” and in Section 14(1) stated:

“14- (1) No person shall intentionally be deprived of his life save in execution of a sentence of a court in respect of a criminal offence of which he has been convicted.

Section 15 (1) stated:

15 (1) No person shall be deprived of his personal liberty save as may in any of the following cases be authorized by law-

[14] By Act No. 12 of 2011 the Constitution was amended by repealing Chapter III and replacing it with the *Charter of Fundamentals Rights and Freedoms* as the new Chapter III. Section 13 states:

"13 (2) - *Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society –*

a. this Chapter guarantees the rights and freedoms set out in subsections 3 and (6) of this section and in sections 14, 15, 16 and 17; and

b. Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.

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

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

[15] Harrison JA, as he then was, in ***Fuller v Attorney General (1998) 56 WIR 337***, in referring to Section 14 (1) of the Constitution at page 419 said:

"The right is a new right as given by the Constitution. It is a right which arises because of death; it did not exist before because of the rule in Baker v Bolton (1808) 1 Camp 493. However, for the right to be contravened, the unlawful deprivation by the State, must be done 'intentionally.'

[16] Miss Jarrett submitted that the right to life, liberty and the security of person encompassed in Section 13(3)(a) in the Charter of Rights is substantively the same right which was protected under different sections of the former Chapter III. Further, she submitted, relying on the passage quoted from the judgment of Harrison, JA in ***Fuller v***

Attorney General, that since there was no death there was no deprivation of the right under Section 13((3)(a) of the Constitution.

[17] Mr. Cameron further submitted that the right to life involves a substantive obligation not to take life and another substantive obligation to safeguard and protect life as well as a procedural obligation for independent, adequate and effective investigation of the taking of life. This submission is based on the interpretation by the European Court of Human Rights of Article 2 of the European Convention on Human Rights [ECHR]. It states:

“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court, following his conviction of a crime for which this penalty is provided by law.”

[18] **Renolde v France (2009)48 EHRR 42** was decided by the European Court of Human Rights on 16th October, 2008. Joselito Renolde who had a history of psychiatric illness was detained in custody for injuring his former partner and their daughter and also for criminal damage and theft on 12 April, 2000. On 2 July, 2000 he assaulted a trainee warden. Consequently, he was on 5 July, 2000, given a penalty of 45 days in a punishment cell which he compared to a tomb. On 12 July 2000 Mr. Renolde’s lawyer and family requested a review of his punishment on the basis of his psychological illness. On 20 July, 2000 while this request was being processed Mr. Renolde hanged himself.

[19] The applicant who was a sister of Joselito Renolde alleged that the French authorities had not taken the necessary measures to protect Joselito Renolde’s right to life. She, as stated in paragraph 66 of the decision, relied in substance on the first sentence of Article 2 of the Convention, which provides,

“Everyone’s right to life shall be protected by law.”

The Court held that there had been a violation of Article 2 of the Convention in that the authorities breached their positive obligation to protect Joselito Renolde's right to life.

[20] The court in its assessment recapitulated the applicable principles and at paragraphs 80 to 83 stated:

"80. The Court reiterates that the first sentence of Article 2 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. The Court's task is therefore to determine whether, given the circumstances of the case, the State did all that could have been required of it to prevent the applicant's brother's life from being avoidably put at risk (see, for example, *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, Reports 1998-III).

81. The Court further reiterates that Article 2 may imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual from another individual or, in particular circumstances, from himself (see *Tanribilir*, cited above, § 70; *Keenan*, cited above, § 89; and, *mutatis mutandis*, *Ataman v. Turkey*, no. 46252/99, § 54, 27 April 2006).

82. However, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising (see *Tanribilir*, cited above, §§ 70-71; *Keenan*, cited above, § 90; and *Taïs v. France*, no. 39922/03, § 97, 1 June 2006).

83. The Court has had previous occasion to emphasise that persons in custody are in a vulnerable position and that the authorities are under a duty to protect them (see *Keenan*, cited above, § 91; *Younger v. the United Kingdom* (dec.), no. 57420/00, ECHR 2003-I; and *Trubnikov v. Russia*, no. 49790/99, § 68, 5 July 2005). The prison

authorities, similarly, must discharge their duties in a manner compatible with the rights and freedoms of the individual concerned. There are general measures and precautions which will be available to diminish the opportunities for self-harm, without infringing personal autonomy. Whether any more stringent measures are necessary in respect of a prisoner and whether it is reasonable to apply them will depend on the circumstances of the case (see Keenan, cited above, § 92; Younger, cited above; and Trubnikov, cited above, § 70)."

[21] Similarly, **Keenan v the United Kingdom** (application No. 27229/95) in which a judgment was delivered on 3 April, 2001 involved a case in which a mentally ill person committed suicide while in custody. In its assessment the court stated at para. 89:

"89. The Court recalls that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see L.C.B. v. the United Kingdom, judgment of 9 June 1998, Reports of judgments and decisions 1998-III, p. 1403, § 36). This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual (see Osman v. the United Kingdom, judgment of 28 October 1998, Reports 1998-VIII, p. 3159, § 115).

At paragraph 91 it was stated:

In the context of prisoners, the Court has already emphasised in previous cases that persons in custody are in a vulnerable position and that the authorities are under a duty to protect them. It is incumbent on the State to account for any injuries suffered in custody, which obligation is particularly stringent where that individual dies

[22] The applicability of Article 2 to the use of non lethal force is as discussed in *Ilhan v. Turkey* (application No. 22271/93 in a judgment delivered on 27 June 2000. During the course of apprehending the applicants brother Abdüllatif İlhan, Abdüllatif was beaten by soldiers and consequently suffered brain damage and 60% loss of function on the left side. The Court in its assessment stated at paragraphs 75 to 77:

"75. The Court recalls that in the present case the force used against Abdüllatif İlhan was not in the event lethal. This does not exclude an examination of the applicant's complaints under Article 2. It may be observed that in three previous cases the Court has examined complaints under this provision where the alleged victim had not died as a result of the impugned conduct.

In *Osman v. the United Kingdom* (judgment of 28 October 1998, Reports 1998-VIII, pp. 3159-63, §§ 115-22), the applicant, Ahmet Osman, had been shot and seriously injured when a man fired a shotgun at close range at him and his father. His father had died. The Court concluded on the facts of that case that the United Kingdom authorities had not failed in any positive obligation under Article 2 to provide protection of their right to life within the meaning of the first sentence of Article 2. In the *Yaşa* case (judgment cited above, pp. 2436-41, §§ 92-108), the applicant was shot in the street by an unknown gunman, receiving eight bullet wounds but surviving. The Court, finding that the authorities had not failed to protect the applicant's life, held nonetheless that they had failed to comply with the procedural obligation under Article 2 to conduct an effective investigation into the attack. In *L.C.B. v. the United Kingdom* (judgment of 9 June 1998, Reports 1998-III, pp. 1403-04, §§ 36-41), where the applicant, who suffered from leukaemia, was the daughter of a soldier who had been on Christmas Island during the United Kingdom's nuclear tests, the Court noted that it was not suggested that the State had intentionally sought to deprive her of her life but examined under Article 2 whether the State had done all that could have been required of it to prevent the applicant's life from being avoidably put at risk. It found that the State had not failed in this regard.

76. **The Court observes that these three cases concerned the positive obligation on the State to protect the life of the individual from third parties or from the risk of illness under the first sentence of Article 2 § 1. It considers, however, that it is only in exceptional circumstances that physical ill-treatment by State officials which does not result in death may disclose a breach of Article 2 of the Convention. It is correct that the criminal responsibility of those concerned in the use of force is not in issue in the proceedings under the Convention (see the *McCann and Others* judgment cited above, p. 51, § 173). Nonetheless, the degree and type of force used and the unequivocal intention or aim behind the use of force may, among other factors, be relevant in assessing whether in a particular case the State agents' actions in inflicting injury short of death must be regarded as incompatible with the object and purpose of Article 2 of the Convention. In almost all cases where a person is assaulted or ill-treated by the police or soldiers, their complaints will fall to be examined rather under Article 3 of the Convention.**

77. **The Court recalls that Abdüllatif İlhan suffered brain damage following at least one blow to the head with a rifle butt inflicted by gendarmes who had been ordered to apprehend him during an operation and who kicked and beat him when they found him hiding in some bushes. Two contemporaneous medical reports identified the head injury as being of a life-threatening character. This has left him with a long-term loss of function. The seriousness of his injury is therefore not in doubt.**

However, the Court is not persuaded in the circumstances of this case that the use of force applied by the gendarmes when they apprehended Abdüllatif İlhan was of such a nature or degree as to breach Article 2 of the Convention. Nor does any separate issue arise in this context concerning the alleged lack of prompt medical treatment for his injuries. It will, however, examine these aspects further under Article 3 of the Convention below.

78. **It follows that there has been no violation of Article 2 of the Convention concerning the infliction of injuries on Abdüllatif İlhan.**

[23] It was also submitted that the applicant's right to life was infringed by a failure to adequately investigate threats against his life and beating administered by soldiers on 21st February, 2012 in seeking to carry out of those threats. The summary of the evidence and the analysis thereof, with which I agree are to be found in paragraphs 146 to 146 in the judgment of Straw, J. It is to be noted that this submission is also based on the applicability of the terms of Article 2 of the ECHR to Section 13(13) (a) of the Jamaica Constitution.

[24] Based on my assessment of the evidence, the credibility and reliability of the witnesses, I cannot accept that the incident on 21st February 2012 was an attempt to take the life of the applicant. Unfortunately the court was not provided with a progress report from the Independent Commission of Investigations which was mandated to carry out the investigations into the complaints made by the Claimant. Consequently I am unable to hold that there was a lack of adequate investigation.

[25] Miss Jarrett submitted that the provisions of Article 2 of the ECHR in particular the first sentence is inapplicable to the provisions of Section 13(3)(a) of the Jamaica Constitution. She instead invited the court to examine similar provisions in the Canadian Constitution. Section 7 of the Canadian Constitution Act states:

"Everyone has the right to life, liberty, security of the person and the right not to be deprived thereof except in accordance with the principle of fundamental justice."

In ***Louise Gosselin v the Attorney General of Quebec [2002] SCJ No 85*** the Supreme Court of Canada in an appeal from the Court of Appeal for Quebec considered the effect of Section 7 of the Act. At paragraph 81 of the judgment the Court stated:

Section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each

person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these.

This position was supported by Ken Cooper-Stephenson, LLB, LLM, LL.D., Professor of Law, Thompson Rivers University, British Columbia, Canada in his book entitled *Constitutional Damages Worldwide* where at page 58 in reference to Section 7 of the Canadian Charter he said:

"... it is often qualified in such a manner as to lead to the interpretation that it gives only a 'negative right' rather than imposing a positive obligation on the state to guarantee those protected interests."

[26] I find that Section 13(3) (a) of the Constitution gives only a negative right and does not impose a positive obligation. Consequently, as was stated by Harrison JA in ***Fuller v Attorney General***, a breach of the right to life can only arise after the death of a person.

[27] Even if I was of the opinion that Section 13(3)(a) imposed a positive obligation on the state, having rejected the evidence of the Claimant that there was an unwarranted attack upon him with a view to taking his life, the declaration sought would still be refused.

Torture/Inhuman or Degrading Treatment

[28] Section 13(6) of the Constitution provides:

"(6) No person shall be subjected to torture or inhuman or degrading punishment or other treatment."

In paragraph iv of the declaration applied for the following was sought:

"A declaration that the right of the Claimant not to be subjected to torture or to inhumane and degrading treatment under Section 13(3)(0) of the Constitution was contravened by the actions of the 1st and 2nd Respondents servants and or agents in administering of the beating/punishment on the Claimant on the 21st day of February, 2012."

[29] In addition to his evidence pertaining to the events of 21 February, 2012 the Claimant also gave evidence of incidents which allegedly took place in January 2012 and of the treatment generally meted out to him and other inmates. His evidence was supplemented by video footage of occurrences on the cell block of SP11. The evidence tendered on behalf of the claimant as well as the evidence tendered on behalf of the defendants is summarized in paragraphs 167 to 189 in the judgment of Straw, J.

[30] I have already rejected the evidence of the Claimant concerning the events of 21st February, 2012. In considering the other allegations I find the evidence of the witnesses for the defendants more credible. The video footage which was viewed by the court certainly belied the accounts given by the claimant and instead showed misbehavior on the part of the inmates. I accept and adopt the analysis of the evidence as stated in paragraphs 208 to 221 in the judgment of Straw, J I too have found that there was no credible evidence to ground the allegations of torture or inhuman or degrading punishment or treatment.

Right to Legal Representation

[31] The claimant avers that his right to legal representation to which he is entitled to by virtue of Section 16(6)(c) of the Constitution has been contravened. The relevant section states:

16 –(6) (c) – Every person charged with a criminal offence shall –

(a) ...

(b) ...

(c) be entitled to defend himself in person or through legal representation of his own choosing or, if he has not sufficient means to pay for legal representation, to be given such assistance as is required in the interests of justice”

[32] The complaint is based on two situations. The first was the denial of visits by his attorney-at-law Mrs. Neita-Robertson at certain times and the second was the refusal of the prison authorities to allow his then attorney Mr. Cameron from taking the claimant's bloodied underpants from the facility without prior approval. The evidence surrounding these incidents is set out in the judgment of Straw, J at paragraphs 74 to 82. The evidence adduced clearly indicates that at all times including during his trial the claimant had legal representation. Consequently, even if the authorities erred, which I do not accept, in refusing some visits by Mrs. Neita-Robertson and the removal of the underpants by Mr. Cameron these in my view could not amount to a contravention of the rights given under Section 16(6)(c).

[33] We have considered all of the applications including those relating to the declarations not actively pursued. We have concluded that based on our assessment of the evidence presented we must refuse to grant the declarations sought. Consequently, the applications for the award of compensation and vindictory damages are also refused.

[34] In light of the nature of the proceedings we make no order as to costs.

Straw J.

[35] The claimant, Andrew Coke, was a former inmate of the Horizon Adult Remand Centre [HARC] between June 2010 and May 2012. At the commencement of this hearing in court in January 2014, he had already been released from custody. He is seeking constitutional redress for breaches of his constitutional rights against the defendants, the Commissioner of Corrections, a public officer by virtue of section 3 of the Corrections Act, and the person responsible for the control and management of HARC, the Chief of Staff of the Jamaica Defence Force (JDF), who at the relevant time was responsible for the operational control of the said institution, the Minister of National Security, who has ministerial responsibility for the above defendants and the Attorney General of Jamaica, who by virtue of the Crown Proceedings Act is the representative of the Government of Jamaica.

The Breaches of the Constitution

[36] Mr. Coke alleges that his right to life and the right not to be subjected to torture or to inhuman and degrading treatment or punishment were contravened by the actions of the defendants. These breaches were further committed by a failure to take preventative measures to protect his life and the failure to investigate the wrongful actions of the officers of the 1st and 2nd defendants.

He also alleges that his right to legal representation was breached by the actions of the defendants.

[37] As a result of the above breaches, Mr. Coke is requesting certain declarations and an award of vindictory damages to reflect the outrage felt as well as compensatory damages for the distress, pain and suffering endured over the period of his incarceration following from the torture and inhuman treatment.

Orders Sought

[38] Although Mr. Coke filed an Amended Fixed Date Claim Form on the 24th January 2014 requesting several declarations and orders, at the commencement of the hearing before this court, his attorney, Mr Cameron stated that they were seeking the orders in relation to the following as numbered below:

- iii *A Declaration that the right of the claimant not to be deprived of his right to life guaranteed by section 13(3)(a) of the Constitution was contravened by the actions of the 1st and 2nd respondents servants and or agents in the administering of the beating on the claimant on the 21st day of February 2012.*
- iv *A Declaration that the right of the claimant not to be subjected to torture or to inhuman and degrading treatment and punishment under section 13(3)(o) of the Constitution was contravened by the actions of the 1st and 2nd respondents servants and or agents in administering of the beating/punishment on the claimant on the 21st day of February 2012.*
- vii *A Declaration that the right of the claimant not to be deprived of his right to life guaranteed by section*

13(3)(a) of the Constitution was and continues to be contravened by respondents, when the respondents being aware that the claimant's life was at risk and knowing that there was a real and immediate threat to the claimant, failed to take preventative measures to protect the claimant's life and his person.

- xii *A Declaration that on a true and proper interpretation of sections 5 and 9 of the Defence Act, the 2nd respondent does not have the power to deploy members of the JDF to aid in the manning of HARC without the written direction of the Defence Board or the Prime Minister.*
- xiii *A Declaration that the Chief of Staff of the JDF in assigning members of the JDF to man a section or sections of HARC in or around 2008 without the direction of the Defence Board or Prime Minister acted ultra vires.*
- xvii *A Declaration that the actions of the 1st and 2nd respondents in forcing the claimant's attorney under pain of punishment to return to the claimant his blood drenched underpants which was to be used in the preparation of his case presently before court prejudiced an essential public right and interest of citizens of Jamaica namely the right to Legal Professional Privilege and contravened and continues to contravene the right to legal representation guaranteed in section 16(6) (c) of the Charter of Rights.*
- xviii *An award of Vindictory Damages be made to reflect the sense of public outrage, to emphasize the importance of the right to life and the right not to be subjected to torture or to inhuman and degrading treatment and punishment and to deter further breaches.*
- xix *An award of Compensation for the distress, pain and suffering, suffered by the claimant over the period of his incarceration flowing from the torture and inhuman treatment meted out to the claimant by the respondents, such damages should also contemplate the means for full rehabilitation or as much as is possible."*

[39] In essence, Mr. Coke is asking this court to determine the liability in public law of the State itself for breaches of his constitutional rights. It is to be noted that the declarations sought at paragraphs xii and xiii in relation to the Defence Act are not constitutional issues but can be determined by the court also.

Relevant Provisions of the Constitution

[40] The Charter of Fundamental Rights and Freedoms is enshrined in chapter 3 of the Constitution of Jamaica. The relevant sections of this Charter are set out in sections 13 [3] [a], [o] and 13 [6], as well as sections 14 and 16. These are set out below:

Section 13 [3]

- [a] *"The right to life, liberty and security of the person and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted.*
- [o] *The right to protection from torture, or inhuman or degrading punishment or other treatment as provided in subsections (6) and [7];*

Section 13 [6]

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

[41] [Section 14 [2] [d] grants the right to every person arrested or detained to communicate with and retain an attorney-at-law. Section 16 [6] [c] provides that any person charged with a criminal offence should be entitled to defend himself in person or through legal representation of his own choosing.

[42] Section 19 [1] and [4] enables any person who alleges a breach or likely breach of any of the protective provisions including those mentioned above to apply to the Supreme Court for redress provided that the court is satisfied that adequate means of redress for the alleged contravention is not available under any other law. There is no issue taken in this case that adequate alternative redress is available to Mr. Coke.

[43] Section 19 [3] speaks to the empowerment of the Supreme Court to make orders, issue writs or give directions as it may consider appropriate to enforce or secure the enforcement of any of the provisions contained in this Chapter to the protection of which the person is entitled.

Breach of the Defence Act Ultra Vires Activity

[44] Counsel for Mr Coke, Mr Cameron, has submitted that the assignment by the Chief of Staff of members of the JDF to man a section or sections of HARC in or around 2008 without the direction of the Defence Board or Prime Minister was *ultra vires*. He has submitted further that the presence and operations of servants/agents of the JDF in HARC is illegal and that all interactions with the inmates are unlawful. The court has been asked to examine relevant sections of the Defence Act in order to determine this issue. Before doing so, it is prudent to set out the background and context of the JDF's presence at HARC.

Evidence in Relation to JDF Presence at HARC

[45] The evidence concerning the above is contained in the affidavit of Garfield Sean Prendergast, a Lieutenant Colonel in the JDF and former Commissioner of Corrections between March 2010 and June 2013. He told the court that the JDF was first deployed to HARC in 2002 and that deployment ended in June 2013. He was first assigned duties there in 2002 as a Major. In that year, he was told to take over operational command of the facility by the Chief of Staff of the JDF and the Minister of National Security.

[46] He stated that his job description was to conduct a survey into its operations and prepare a report for the Chief of Staff and the Minister. This was against a background of violent riots by inmates and remandees and an escape from the said institution. Lieutenant Colonel Prendergast stated that he would not agree that the JDF was in total control of the facility in 2002 but described it as taking over operational control as the JDF were still under the Corrections Act and under the guidance of the Commissioner of

Corrections. He took instructions from the Commissioner and operational control remained in the hands of the Superintendent of the facility.

[47] Lieutenant Colonel Prendergast explained further, that in taking over operational command, he would deploy military personnel to secure the needs of the facility which included access, control, monitoring and controlling remandees to prevent further escapes or riots. In his role, he would not only be representing the Chief of Staff but also the Commissioner of Corrections. The Superintendent for the facility would remain and the JDF would have at its disposal the cooperation of a number of correctional officers. As a result, he shared the same office as the said Superintendent. Lieutenant Colonel Prendergast explained the rationale by stating that 'we were reacting to a crisis and to make sure there was calm at the facility.' He also stated that the Commissioner was the critical link and he had to first discuss matters with him while the JDF remained at the facility. He further explained that based on his assessment in 2002, it was necessary for the JDF to take over operational control as the facility was not adequately staffed and there was a need to review security issues.

[48] Lieutenant Colonel Prendergast stated further that he was not aware of any order in writing from the Minister of National Security in respect of the said deployment. It is important to note that counsel for the defendants, Ms. Althea Jarrett, informed the court that it was accepted that there were no orders in writing by the Minister in 2002 or a subsequent deployment in 2004 of the JDF to HARC.

[49] In relation to the issue of 'authorized persons,' Lieutenant Colonel Prendergast stated that he could not confirm if the JDF was designated 'authorized persons' for the purposes described by section 2[1] of the Corrections Act before 2008 and that when he became Commissioner, the earliest document he found relating to such a designation was by way of a letter dated 11th March 2008 sent to the Chief of Staff by the then Commissioner of Corrections, Major Reece. In that letter, Major Reece, by virtue of the powers granted to him under section 2 [1] [a] of the Corrections Act, designated all commissioned and non-commissioned officers and other members of the JDF who were assigned duties at HARC as 'authorized persons.'

[50] He stated that he issued a similar directive in 2012 as the new Commissioner. He explained, however, that the JDF would have known that they were authorized as far back as 2008 as each soldier would have been briefed and received training on his power, authority and operational procedures to be followed while employed at the facility [HARC].

[51] It is to be noted that there are two letters dated the 9th April 2002 and 24th April 2002 respectively and signed by Gilbert Scott, Permanent Secretary in the Ministry of National Security, to the then Chief of Staff conveying the Minister's request for the deployment of the JDF to assist the Correctional Services at HARC against the background described above.

Operational Control of SP11

[52] In relation to the specific control of Security Post 11[SP11] Lieutenant Colonel Prendergast, stated that in March 2004, the JDF handed over the control of HARC to the Department of Corrections and [as indicated in a letter of the 4th April 2004 signed on behalf of the Chief of Staff], the JDF reverted to being in assistance but retained as expressed in the letter, "full control of special detainees..... and will continue to do so until further notice."

[53] These special detainees were housed at SP11 which is where Mr. Coke was located during the currency of his incarceration. Lieutenant Colonel Prendergast stated that SP11 was the designated location for high risk prisoners and Mr. Coke was assessed as such by the Commissioner of Police, Chief of Staff and the Permanent Secretary and/or National Security Minister. Lieutenant Colonel Prendergast explained that this control, although referred to as 'full control' related only to operational control and stated that by so doing the JDF was acting in assistance to the Department of Corrections. He stated that the understanding was that the JDF would continue to be in operational control of this special unit, not full control.

[54] The relevant sections of The Defence Act are now set out below:

Section 5

"The Jamaica Defence Force shall be charged with the defence of and maintenance of order in Jamaica and with such other duties as may from time to time be defined by the Defence Board."

Section 9

[1] *"There shall be a Jamaica Defence Board which shall, subject to the provisions of subsection (2), be responsible under the general authority of the Minister for the command, discipline and administration of, and all other matters relating to, the Jamaica Defence Force.*

[2] *The responsibility of the Defence Board shall not extend to the operational use of the Jamaica Defence Force, for which use responsibility shall be vested in the Chief of Staff subject to the overall direction of the Cabinet.*

Provided that the Prime Minister may give to the Chief of Staff such directions with respect to the operational use of the Jamaica Defence Force in Jamaica for the purpose of maintaining and securing public safety and public order, notwithstanding that the directions of the Cabinet have not been obtained, and the Chief of Staff shall comply with those directions or cause them to be complied with."

[55] An examination of these sections reveals that the duties of the JDF consist of the defence and maintenance of order as well as other duties that may be defined by the Defence Board [section 5]. The Defence Board is responsible under the general authority of the Minister for the command, discipline, administration and all other matters relating to the JDF [Section 9 [1]].

[56] However, the operational deployment of the JDF is vested in the Chief of Staff subject to the overall direction of the Cabinet [Section 9 [2]]. The *proviso* allows the Prime Minister to give directions to the Chief of Staff [even in the absence of directions by Cabinet] in relation to the operational deployment for the purpose of maintaining and securing public safety and public order.

[57] It is apparent therefore that JDF personnel could be deployed to HARC by the Chief of Staff subject to the overall direction of the Cabinet. The Prime Minister, however, has discretion to give directions to the Chief of Staff to deploy the JDF for the purpose of securing and maintaining public safety and public order notwithstanding the absence of directions by the Cabinet.

[58] Counsel for the defendants, Ms. Jarrett, has submitted that the deployment of the JDF to HARC constituted the operational use of the Force within the meaning of the Defence Act and was within the authority of the Chief of Staff and that the reasons given for the deployment fall within the statutory responsibilities of the JDF. She has submitted that these reasons are clearly delineated in the evidence of Lieutenant Colonel Prendergast and the three letters referred to above.

[59] What is clear from these documents is that the Minister of National Security, who is a member of the Cabinet, in April 2002, [through the Permanent Secretary] requested that the Chief of Staff deploy JDF personnel to assist the Correctional Services at HARC. There is no evidence and it is not suggested that this request was suspended or ordered terminated at any time before their departure in 2013. I am of the view that their continued operation at HARC after 2004 in relation to the special detainees would still be covered by the initial direction/request of the Minister bearing in mind Lieutenant Colonel Prendergast's evidence concerning the object to secure the security needs of the facility.

[60] It is my opinion that once the JDF had been deployed to HARC, then the Commissioner would be empowered by virtue of Section 5 of the Corrections Act to

issue standing orders designating each JDF personnel as an 'authorized person.' This was done by the then Commissioner in 2012. Section 5 of the said Act has been set out in paragraph 375 of the judgment of Simmons J. Section 5 has to be read in conjunction with Sections 2(1) and 15(7) of the said Act. These sections have been set out in paragraphs 8 and 9 of the judgment of Hibbert J.

[61] The issue is whether such a request by the Minister would be sufficient to satisfy the requirements of the Defence Act. Mr. Cameron has submitted that any such directions ought to be in writing and originate from the Defence Board or the Prime Minister. However, section 9 [2] of the Defence Act clearly grants responsibility for the operational use of the JDF to the Chief of Staff subject to the overall direction of the Cabinet.

[62] Counsel has posed the following questions for the court's determination:

- Who has the power to deploy the JDF to HARC?
- Was the deployment to HARC directed by the lawful authority, namely the Prime Minister, the Defence Board, or the Cabinet?
- Did the Minister of National Security have the power to assign the JDF?

[63] I would agree with counsel's submission that there must be some legal authorization for the Chief of Staff to deploy troops to a correctional institution. The Act makes it abundantly clear that this is grounded by the directions of Cabinet or the Prime Minister [if the reason relates to public safety or order]. However, I do not agree that the authorization of the Defence Board is required.

[64] There is nothing in the Defence Act that mandates that the Chief of Staff should be given directions from either the Defence Board or the Prime Minister [and in a prescribed manner] in order to deploy the troops. The Prime Minister certainly does have that discretion as stated previously as well as the Cabinet.

[65] The Act has clearly made a distinction as to the functional responsibility of the Chief of Staff and the Defence Board. The Defence Board is given the responsibility under the general authority of the Minister for the command, discipline and administration of the JDF. However, the operational use of the JDF is the responsibility of the Chief of Staff subject to Cabinet's overall direction.

[66] It seems to me that it would be important to have some evidential trail [documentary or otherwise] of the intentions of the Cabinet or the Prime Minister in order to satisfy the legal basis for such a deployment. But whether or not there is such evidence need not detain this court for the reasons hereafter expressed.

Is this a Live Issue for Consideration?

[67] Ms. Jarrett has submitted in the alternative that, given the fact that the JDF is no longer deployed to HARC and Mr. Coke is no longer remanded there, the issues raised are now academic. She referred the Court to the cases of **Tindall v Wright** [1922] Times Law Report 521, **Ainsbury v Millington** [1987] 1 All ER 929 and **Gouriet v Union of Post Office Workers and others**, [1977] 3 All ER 70.

[68] In both **Tindall** and **Ainsbury**, the courts reaffirmed the principle that they would not decide on points of law which were really academic. In **Ainsbury**, which was a decision of the House of Lords, the court considered the principle stated by Viscount Simon LC in **Sun Life Assurance Co. of Canada v Jervis** [1994] 1 All ER 469 at 470-471, where he said:

"I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the house undertook to do so, it would not be deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without in any way affecting the position between the parties... I

think it is an essential quality of an appeal fit to be disposed of..... that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue."

[69] In **Ainsbury**, Lord Bridge of Harwich, who delivered the judgment of the court, considered the argument of counsel for the appellant to confine Viscount Simon's principle to cases where the point of law at issue is peculiar to the facts of the case or arises on the construction of certain documents and ought not to restrict the House from resolving a question of law of general importance.

[70] Lord Bridge of Harwich rejected this argument and stated as follows [page 931]:

"It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them they do not pronounce on abstract questions of law when there is no dispute to be resolved.

Different considerations may arise in relation to what are called 'friendly actions' and conceivable in relation to proceedings instituted specifically as a test case. The instant case does not fall within either of these categories."

[71] In **Gouriet**, which was also a decision of the House of Lords, Lord Diplock examined the issue of declaratory relief specifically in relation to the power of the courts [page 100]. He acknowledged that the power to grant such relief is discretionary and that it is useful. He also stated that it has been more extensively used as an alternative to the procedure by way of *certiorari* in cases where it is claimed that a decision of an administrative authority which purports to affect rights available to the plaintiff in private law is *ultra vires* and void. He then stated that there were limits to the jurisdiction inherent in a declaration of rights:

"The only kind of rights with which courts of justice are concerned are legal rights; and a court of civil jurisdiction is concerned with legal rights only when the aid of the court is invoked by one party claiming a right against another party to protect or enforce the right or to provide a remedy against that other party

for infringement of it, or is invoked by either party to settle a dispute between them as to the existence or nature of the right claimed. So for the court to have jurisdiction to declare any legal right it must be one which is claimed by one of the parties as enforceable against an adverse party to the litigation, either as a subsisting right or as one which may come into existence in the future conditionally on the happening of an event.

---It is when an infringement of the plaintiff's rights in the future is threatened or when, unaccompanied by threats, there is a dispute between parties as to what their respective rights will be if something happens in the future that the jurisdiction to make declarations of right can be most usefully invoked. But the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else."

[72] I consider the submissions of counsel, Ms. Jarrett, on this point to be of great merit. Mr. Coke is seeking declarations in relation to the Defence Act for the purpose of a general declaration of the law. There is no contested legal rights subsisting or future on the points raised. It is certainly not a living issue and a consideration as to whether the claimant's constitutional rights have been breached is independent of the declarations sought.

[73] Secondly, it is my opinion that there is no basis on which I could grant the declarations as sought by the claimant in any event as it would not be necessary for either the [written] direction of the Defence Board or the Prime Minister to authorize such a deployment of the JDF. In that event also, there is no basis for any declaration that the Chief of Staff acted *ultra vires* in assigning members of the JDF to a section of HARC in 2008 without the aforementioned direction.

Constitutional Breaches

Evidence in Relation to the Breach of Right to Legal Representation The Claimant's Case

[74] Mr. Coke states that during his period of detention at HARC for the offences of shooting with intent and illegal possession of a firearm, his attorney, Mrs. Valerie Neita Robertson, was prevented from seeing him on more than one occasion. As a result, she wrote to the President of the Advocates Association of Jamaica and sent a copy letter to the Public Defender. A copy of this letter dated 26th April 2011 forms part of the agreed bundle. A review of the letter reveals complaints as to limitations on counsel's ability to see clients during the week and weekends in terms of time of day, length of time available, restriction on Sundays and interruptions for lunch. Mrs. Neita Robertson also complained of being denied visits because she had no authorization badge from the General Legal Council.

[75] At a later stage, Mr. Coke was also represented by present counsel Mr. and Mrs. Cameron. He states that on the 6th day of March 2012, he had an interview with Mr. Cameron in the interview room at HARC. He handed over to his attorney a pair of white underpants packaged in a transparent zip lock bag. This underpants was drenched with his blood.

[76] He stated that the underpants was physical evidence and formed part of his instructions to his attorney. This was apparently in relation to an incident that took place on the 21st February when Mr. Coke received some injuries and forms part of his claim before this court. However, when Mr. Cameron attempted to leave the interview room, he was prevented by two soldiers who blocked the doorway and stated he would not be allowed to leave with the garment. His attorney eventually indicated that he wished to speak to the Superintendent and left the interview room without the said underpants. Mr. Coke referred the court to a letter dated 7th March 2012 written by Mr. Cameron to the Commissioner of Corrections in relation to the incident. This letter also forms part of the agreed bundle of exhibits.

[77] It is to be noted that in that said letter, Mr. Cameron stated that he spoke to the Superintendent in charge who told him that the Commissioner had instructed her that the request should be put in writing. The letter further states as follows:

"At that time our Mr. Cameron declared that was unacceptable and made it clear that she was depriving our client of his lawyer client privilege and prevent him from being able to adequately prepare his case for court....."

[78] These allegations are the substratum of Mr. Coke's argument for breach of his constitutional rights in relation to legal representation. It is to be noted also that Mr. Coke stated that both sets of attorneys visited him while he was at HARC.

The Evidence of the Defendants

[79] Lieutenant Colonel Prendergast stated that remandees at HARC are allowed visits by families, friends and attorneys-at-law but that these visits are circumscribed by rules, including the search of all persons entering and leaving the institution. He also stated that he recalled receiving the letter from Mrs. Neita Robertson, but explained that the previous Commissioner had worked out protocols with groups such as the Advocates Association in relation to dates and hours. These were to fit into the high security measures enforced at HARC, for example, the facility lock down at 3:30 p.m. He stated that all inmates should be in cells at that time as staffing levels are significantly reduced and it would be unsafe to have inmates out and about after that period.

[80] He stated also that visits with attorneys are allowed on Mondays to Fridays within set times and also on Saturdays during periods when inmates would be unlocked. However, visits were not allowed on Sundays in accordance with the Corrections Act [section 163.7]. He indicated that Standing Orders in respect of these visits were developed in July 2004. The Standing Orders are attached to his affidavit and speak to the procedure involved.

[81] Lieutenant Colonel Prendergast stated that Mrs. Neita Robertson's complaints were that she could not see her client at times and dates outside that previously agreed with the President of the Advocates Association. He told the court that she also had an issue with the requirement for an identification showing she was an attorney. It was

further explained that in the protocols sent to Mr. Soutar, it was understood that if attorneys are refused entry, for example, if identification was forgotten or no proper identification was available, the attorney should contact the operations room where the matter would be referred to the Commissioner or Deputy Commissioner.

[82] In relation to the complaints of Mr. Cameron, Lieutenant Colonel Prendergast stated that Mr. Coke was never subject to any oppressive treatment by members of the JDF but explained that Mr. Coke attempted to give his attorney an article of clothing to take from HARC without proper authorization. When the attorney was informed by authorized persons on duty that he could not leave with the items without authorization, he insisted on doing so.

Submissions

[83] Counsel for Mr. Coke made reference to the above 'Standing Orders' and asked the court to note that attorneys are not allowed to bring 'prohibited items' into the remand centre. These are described as 'firearm, cell phone, cameras, illicit drugs, food or any other contraband.'

[84] Counsel also pointed the court to section 2 of the Corrections Act where 'prohibited article' is defined as follows:

[a] *"any intoxicating liquor, drug, tobacco, money, clothing, provisions, letter, tool, or any article likely to be prejudicial to the life or safety of any person, or to facilitate any escape from a correctional institution, or to be used for purposes prejudicial to the discipline of such institution;*

[b] *any article, the introduction or removal of which into, or out of, a correctional institution or any part thereof is prohibited by the Correctional Institution Rules, including any article declared to be prohibited by such Rules;*

“standing order” means orders issued by the Commissioner under section 5.

[85] Section 129 of the Correctional Institution [Adult Correctional Centre] Rules, 1991 also forbids an inmate to have in his possession any prohibited article without the authorization of the Commissioner of Corrections.

[86] Counsel for Mr. Coke contends that the underpants could not be considered as contraband or as any of the items listed in the Standing Order, therefore the Commissioner had no legal basis to limit the constitutional right of Mr. Coke to retain and instruct counsel in the preparation of his case. Counsel submitted further that the attorney should not have to seek permission to receive those instructions as it is clear from the evidence in the affidavits of both Lieutenant Colonel Prendergast and JDF soldier, Shane Patterson, that they knew it was an article of clothing and not contraband. It is counsel's contention that the section of the Act that speaks to prohibited article is set within the context that the said article is:

- Likely to be prejudicial to the life or safety of any person, or
- To facilitate any escape from a correctional institution, or
- To be used for purposes prejudicial to the discipline of such institution.

[87] However, with due respect to counsel, section 2 of the Act [that provides the above definition] cannot be construed so narrowly. There is a list of prohibited articles including 'clothing' as well as a reference to any other article that could be deemed to fit into the three classes of description referred to above. Section 15 [1] of the Rules also authorizes the Superintendent to search any visitor before admission and before departure if he suspects any visitor of trying to convey prohibited articles into or out of the institution.

[88] It is my considered opinion therefore that the Superintendent would have the responsibility to determine whether the article leaving the institution could be considered contraband as defined. There must of necessity be checks and balances in order to maintain the integrity of the remand system. The refusal of the JDF soldier to allow Mr. Cameron to leave with the article without the clearance of the Superintendent is reasonable within the context of the rules and does not constitute a breach of Mr. Coke's right to retain and instruct counsel as there had been no final determination that he would not be permitted to remove the said article.

[89] In relation to the other issues referred to in the complaints of Mrs. Neita Robertson, it is clear from the documents exhibited, that Mrs. Neita Robertson objected to restrictions of time, days and hours and whether she needed to present any identification as Lieutenant Colonel Prendergast has testified. Protocols had been established and the issues would have had to be dealt with by the relevant associations in conjunction with the Commissioner. I am of the view that these issues do not reveal any act that would constitute an attempt to prevent Mr. Coke from communicating with or retaining counsel in light of the fact he would be subject to the rules and regulations of a correctional institution. I am therefore in agreement with the submissions of counsel, Ms. Jarrett, that there is no credible evidence of any breach of Mr. Coke's constitutional right to legal representation. The declaration as sought is therefore refused.

Breach of the Right to Life

[90] Mr. Coke alleges that his right to life was contravened by the actions of the 1st and 2nd defendants' servants and/or agents. He contends that this right included the positive duty to protect his life and take measures to protect an attack on his life by the State and to investigate any such attack or threat. He also alleges that his right not to be deprived of his life was contravened when the defendants failed to take preventative measures to protect his life and person although they were aware that his life was at risk and by their failure to investigate threats made against him on the 30th January 2012 and various other dates as outlined in his evidence below.

Evidence of the Claimant

[91] Mr. Coke gave evidence of receiving several death threats from soldiers manning HARC over a period of time as well as being the victim of an attempted murder which took place on the 21st February 2012. In relation to the latter incident, he testified that he was returning to his cell on SP11 after recreation when twelve [12] soldiers accosted him and attempted to kill him by using riot batons to administer blows all over his body including his head.

[92] He stated that they said they were going to kill him and that there were no cameras around in that vicinity. The beating lasted for about fifteen [15] minutes. He played dead so they would stop hitting him. At that point they dragged him down the stairs with the result that he received several bruises and suffered further severe pain to his back. He was then dropped in front of the medical station and left in his own pool of blood.

[93] In relation to other complaints, he spoke to the nights of the 9th, 10th, and 12th of January 2012, when persons dressed in civilian clothing came to his cell and ordered him to come out and to follow them. When he refused, he was verbally abused and spat upon. He stated that he made a report to his present attorneys. As a result, a letter was written to the Commissioner of the Independent Commission of Investigations [INDECOM] and copied to Lieutenant Colonel Patrick Cole in order to have the matter investigated. His attorneys told him they received no response. A copy of the said letter dated 17th January 2012 is exhibited to Mr. Coke's affidavit and forms part of the agreed bundle. It is to be noted also that the letter makes reference to video cameras in the vicinity of the cells and a request made to see the footage.

[94] Mr. Coke also testified concerning an incident on 30th January 2012, when soldiers came to the cell block and without provocation systematically beat all the prisoners 'one after the other approaching his cell.' However, on reaching his cell, he was told he would not be beaten as he was going to court the following day. He also

stated that the Superintendent had no control over the soldiers, and there was no mechanism to complain to anyone. However, a letter was written on behalf of all the inmates to a Judge of the Supreme Court. This letter is dated 30th January 2012 and signed by eight remandees including, Mr. Coke. According to Mr. Coke, a second letter [dated 1st February 2012,] was also written to the Minister of Justice as a result of prisoners being beaten again on the following day. Mr Coke alleges that despite all these complaints, the incident of the 21st February took place and as a result, he received several injuries.

The Medical Reports in Relation to the Injuries

[95] The medical report of Dr Royer-Powe who saw Mr. Coke at the time of the incident of the 21st February, lists the significant findings as follows:

- Head injuries; 4cm laceration on left side of face over frontal bone;
- 6cm laceration over the parietal bone on left side of head;
- 8cm laceration over the parietal and temporal bones of the left side of head.

[96] It is apparent therefore that he received injuries to the left side of his face and head. Mr. Coke was also seen by his private doctor, Dr. Ford, on the 25th of February 2012. The injuries noted are listed below:

- Multiple severe lacerations to the skull.
- Multiple haematoma-swelling to his thorax, posterior chest, abdomen, back and sides.

[97] This report reveals additional injuries described as haematomas [swellings] to other areas of his body. Dr. Ford was not permitted to see Mr. Coke again until 10th April 2012, which was a visit facilitated by an order of the court obtained by his attorneys. At that time an examination revealed the following:

- Extensive scarring at face and over head.
- Open infected wound at top of scalp extended to cranium.
- Retained nylon suture.
- The wound showed signs of recent contact irritation and a slight bleed.
- Ears showed bilateral diminished light reflex but it was noted that there was no facility [at the court] for eudiometry.

[98] It is to be noted that access to his own private physician was an original complaint of Mr Coke. However, these issues were resolved before this hearing commenced and are no longer a live issue for the court's determination.

[99] According to Dr. Ford, Mr. Coke complained of decreased hearing in left ear, tinnitus with spinning in left ear, persistent intermittent headaches, persistent intermittent blurring of his vision, altered sense of smell, swelling of left knee and difficulty in walking involving left knee and pain at top of head with intermittent bleeding. It was Dr Ford's opinion that, due to the severity of the beating and subsequent medical problems, Mr. Coke would require invasive and non-invasive examinations and investigations. It was also his opinion that his patient was receiving less than optimum care and ought to be removed from prison to a safe abode for future treatment.

[100] Mr. Coke gave evidence that he suffered from severe intense headaches stemming from the beating. He also stated that he was diagnosed with severe depression by a psychiatrist, Dr. Bernard, who prescribed medication for him. He also stated that, Dr. Bennett an eye specialist, has determined that there is a problem with the vision in his left eye which may warrant surgery.

[101] It is to be noted that there is no report provided to the court from Dr. Bennett. However, the evidence is that Dr. Bernard is on staff at HARC. Lieutenant Colonel Prendergast stated that he treated Mr. Coke on one occasion. He also stated that he

was aware that a request was made for a medical report from Dr. Bernard but he did not request it and he has no knowledge as to whether one had been provided to Mr. Coke's attorney.

[102] The court also notes that there is a medical report from Dr. Aggrey Irons, a consultant psychiatrist, who saw Mr. Coke on July 24, 2012 and diagnosed him with moderate post traumatic stress disorder which was expected to resolve spontaneously over a long period of time with the help of psychotherapy.

Evidence of the Defendants Incidents of the 9th, 10th and 12th of January 2012

[103] The affidavit of Captain Raymond McLeod addresses this issue but he did not attend the court hearing for cross examination. At any rate, he denied any beating by men dressed in civilian clothes and explained that at the time; a technical team comprised of JDF personnel had visited SP11 to run tests for the detection of outgoing cell phone signals in order to ascertain whether there were any contraband cell phones being used by the remandees.

Analysis of the Evidence

[104] It is to be noted that Mr. Coke admitted that on numerous occasions the inmates were taken out of their cells and he saw people in plain clothes and JDF uniforms in there. He stated that he did not know what they were doing and he was not aware of tests being done for phone signals. It is to be noted also that although the claimant requested to see video footage of those relevant dates, at pre-trial hearings, no request was made for the court to view any such footage. I can therefore draw reasonable inferences from the absence of any such application that the footage did not advance the case for Mr. Coke. Although Mr. Coke stated that he did not know whether these civilians were part of a technical team for security purposes, I do accept that the presence of these persons on the dates identified by Mr. Coke were, on a preponderance of probabilities, for security purposes and not part of a terror campaign against Mr. Coke.

Alleged Systematic Beatings of 30th January

[105] The evidence in relation to this incident was provided by Lieutenant Colonel Prendergast, Platoon Commander Jevon Hudson, Lance Corporal Kevin Smith, and Platoon Sergeant Patrick Robinson. Lieutenant Jevon Hudson was the duty officer at HARC during the period 28th January 2012 to 31st January 2012. He stated that on 30th January, the remandees on SP11 were Oraine Baldie, Michael McLean, Andrew Coke, Tesha Miller, Kevin Tyndale, Joel Andem, and Christopher Linton. He spoke to incidents that took place at 3:45 p.m. on the 30th of January. He has categorically denied that inmates were beaten as stated by Mr. Coke. He also testified of specific instances as follows:

- At 3:45 p.m., he observed from the monitor, inmate Michael McLean climb up on his cell gate and spit water on the south corridor camera. He instructed Duty Sergeant Martin and the Quick Response Force to remove all excess water from the cells on SP11 except for drinking water. He then instructed McLean to exit his cell in order to accommodate this process. During the process, McLean forced his way back in his cell and resisted an order to exit. McLean then pushed a member of the Quick Response Team and was struck with a baton once on his arm. During the process of disruption, the other inmates threw water bottles, faeces, urine, garbage and other items from their cells at the cameras and unto the corridor.
- The team then moved to Christopher Linton's cell who refused to exit but was removed with little resistance. The excess water was also removed from his cell.
- The team then went on to Tesha Miller's cell who also refused to exit and strenuously resisted. He was also removed and had to be restrained to the floor. The excess water was removed. Miller was allowed to stand and suddenly punched the surveillance camera

in front of his cell. He was restrained and returned to his cell

- The team continued to the cells of Kevin Tyndale, Oraine Baldie, and Andrew Coke. There was no resistance and excess water was removed. However, Tyndale did throw faeces and urine from his cell into the corridor.
- Michael McLean was also observed from the monitor climbing on the concrete shelves in his cell and using a bottle to smash the front portion of the camera housing. He then attempted to pull the camera from the mount. Mr. Hudson instructed the Duty NCO to ensure that he desisted.

[106] Platoon Commander Hudson also stated that, to his knowledge, no member of the Quick Response team or any other soldier threatened Mr. Coke or mentioned that he would die like his father. Hudson also stated that he heard no one threaten to poison the food of the inmates on SP11.

Evidence Observed by Court on Video Footage and Analysis

[107] It is to be noted that the footage viewed by the court for the relevant period supported the evidence of Platoon Commander Hudson and contradicted the evidence of Mr. Coke. For example, footage at 3:45 p.m. on the 30th shows Mr. McLean standing on the grill of his cell and spitting outside on the camera. He is then heard saying that he spat on the camera. Soldiers are seen trying to get McLean out of his cell. He pushes a soldier. Soldiers are seen removing bottles. Mr. McLean is acting boisterously.

[108] At 3:55 p.m., Linton is observed resisting soldiers. An officer is trying to calm him. Soldiers are searching his cell. Bottles are removed. Linton is locked back in his cell at 3:59 p.m. At 3:59 p.m., Mr. Miller is seen holding onto the bars of his cell. Soldiers enter and are trying to pull him away. He is removed and bottles also removed from his cell. Noise is then heard. Soldiers are walking past his cell. Linton is seen throwing water and objects outside his cell. He is seen filling containers with liquid and throwing liquid on cameras. At 4:03 p.m. Andem's cell is observed. He is quiet. At 4:09

p.m., soldiers are seen in front of Mr. Coke's cell talking. His door is then relocked. At 4:03 p.m., Baldie is observed with a bucket throwing water outside his cell.

[109] Mr. Coke admitted that, if the soldiers had beaten the inmates, it would have been recorded on the security cameras. He said he heard screaming from each cell, each one calling for help and murder. He also heard sounds of baton. No such sounds were heard by the court. Mr. Coke has been totally discredited about what he said took place on the 30th.

Evidence in Relation to the Incident of the 21st of February 2012

[110] Both Lance Corporal Kevin Smith and Platoon Sergeant Patrick Robinson gave evidence in relation to this matter. Lance Corporal Smith stated that at 2:35 p.m. that day, he was part of the escort team detailed to take Mr. Coke from the recreation area to Security Post 7 [SP7]. He explained that this transfer was necessary in order to facilitate a cleanup of SP11 as the inmates continually threw garbage, faeces, urine, water and other things from their cells and into the corridors. Lance Corporal Smith stated that Mr. Coke was ordered to go to SP7, but he did not remember if he gave the order. However, there is no mention of this 'order' contained in his affidavit.

[111] He stated further that while on the landing of SP7, Mr. Coke insisted that he was not going and became boisterous. He pushed past Lance Corporal Smith, and started to make his way up the next flight of steps towards SP11.

[112] Lance Corporal Smith stated that he tried to grab his legs to prevent him proceeding and a struggle ensued. He stated Mr. Coke punched him on his nose. He and other members of the team, as well as Platoon Sergeant Robinson tried to restrain him. Mr. Coke took away the baton of Private Parkes [three of the team were so armed]. The baton was recovered from Mr. Coke who then punched Platoon Sergeant Robinson in the face. Lance Corporal Smith stated that Mr. Coke was lifted off the ground in an effort to neutralize him and they had to use batons as this was the only means available

to meet the threat that Mr. Coke posed. After regaining control, he noticed Mr. Coke was bleeding and he was taken to the medical post.

[113] Lance Corporal Smith stated that Mr. Coke was cursing and behaving badly and was carried to the medical post with his entire body off the floor. He was placed on a bench but was sitting up. There was blood running down his face from his head.

The evidence of Platoon Sergeant Robinson supports that of Lance Corporal Smith. He stated that on that day, he was briefing the sanitary team when he heard the commotion coming from the landing of SP7. He was not armed with a baton or any weapon. He went to investigate and observed that Mr. Coke was resisting being put into SP7. The escort team consisted of three members including Lance Corporal Smith. Platoon Sergeant Robinson stated that he instructed Mr. Coke to enter SP7 but he refused and became boisterous. Mr. Coke was instructed to comply but he pushed past Lance Corporal Smith and made his way towards SP11. Lance Corporal Smith attempted to restrain him but he punched him in the face and relieved Private Parkes of his baton. Mr. Coke then punched him in his face when he intervened. He stated that efforts were made to restrain Mr. Coke with the use of batons. He recovered the baton from Mr. Coke and also used it to restrain him. This baton was returned to Private Parkes after the incident. When Mr. Coke was relatively subdued, he was observed bleeding and was held and pulled to the medical post as he was still resisting. He explained that they had to lift him and carry him as he refused to walk and was always fighting. Both Platoon Sergeant Robinson and Lance Corporal Smith stated that they also received treatment as a result of Mr. Coke's assault.

Analysis

[114] The evidence of Dr. Royer-Powe as contained in the medical report has not been challenged by the claimant and does assist this court in relation to the determination of certain aspects of the evidence presented by both parties. It is to be noted that there is a discrepancy between Dr. Royer-Powe's report and one aspect of Lance Corporal Smith's testimony. Her report reveals that Mr. Coke was seen lying on the floor outside the post. He was covered in blood. However, she also contradicted Mr. Coke's evidence

as she stated that he was alert and vocal, surrounded by soldiers and that both parties were engaged in a loud vocal battle. Mr. Coke had contended that the soldiers dropped him off at the post and left him for dead. Dr. Royer-Powe stated that she told him that she needed him to be calm and quiet so she could examine him. She further stated that he cooperated after some time and was placed on the bench outside the surgery. The placing on the bench would therefore have been after the doctor spoke to him.

[115] It is to be noted also that Dr. Royer-Powe examined and treated both Platoon Sergeant Robinson and Lance Corporal Smith that day. In relation to Platoon Sergeant Robinson, her report stated that he sustained a soft tissue injury to the face, that the left side of his face was swollen and tender and that this injury was secondary to blunt force trauma. In relation to Lance Corporal Smith, her report reveals that he had a slight swelling over the nasal bone with tenderness. She concluded that he also had a soft tissue injury to face secondary to blunt trauma.

[116] It is agreed that there were no security cameras situated in the vicinity of the landing where this incident took place. However, based on the uncontested evidence provided in the medical reports, there are factual issues that cannot be contradicted by Mr. Coke as he gives no explanation for the injuries suffered by the soldiers. It is clear also that he is a witness prone to much exaggeration. He stated that he lost such levels of blood that his blood count had to be increased. However, there is no medical certificate that speaks to any such issue. Platoon Sergeant Robinson stated that after Mr. Coke was treated by Dr. Royer-Powe, he was taken to the University Hospital of the West Indies for further treatment and returned to HARC that same night. On the basis of Dr. Royer-Powe's observation, it is clear also that although weak and injured, he was still being noncompliant with the soldiers.

Submissions in relation to the breach of the right to life

[117] Counsel for Mr. Coke, Mr. Cameron, is relying on the court's acceptance of Mr. Coke's version of the above incidents to ground the basis for the breach of the right to life. He has submitted that the right to life involves the following:

- [a] A substantive obligation to safeguard and protect life.
- [b] A procedural obligation for independent, adequate and effective investigation of the taking of a life. Such investigations must be accessible to the relatives of the deceased and be open to public scrutiny.

[118] He stated that the defendants have contravened Mr. Coke's right to life in several respects:

1. The administration of several life threatening blows to the head of the claimant on the 21st day of February 2012 with batons.
2. The failure to take preventative measures to protect the claimant's life and his person when the defendants' were aware that his life was at risk and there was a real and immediate threat.
3. The failure to investigate threats made to the claimant on 30th day of January 2012 and various other dates after they had received reports of threats made by the servants or agents of the 1st and 2nd defendants.

Substantive Obligation to Safeguard and Protect Life

[119] Mr. Cameron has submitted that this right to life includes protecting prisoners and that all States must take the necessary steps to protect the life of those detained in prison. The court was referred to **Reynolde v France ECHR**, Application no. 5608/05 [16/01/2009] where it was noted by the European Court of Human Rights that persons in custody are in a vulnerable position and authorities are under a duty to protect them [paragraph 83]. In **Reynolde**, the claimant's brother had hanged himself in his cell. She had brought an application against the French Republic claiming, *inter alia*, that the French authorities had not taken the necessary measures to protect her brother's life under Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms [The European Convention].

[120] Article 2 [1] of the European Convention reads as follows:

“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

[121] In **Reynolde**, the court stated that the issues were twofold:

“.....whether the authorities knew or ought to have known that Joselito posed a real and immediate risk of suicide and if so, whether they did all that could reasonably have been expected of them to prevent that risk [paragraph 85].”

[122] Counsel has submitted that the right to life can also be contravened where the event was not lethal as was the case in **Ilhan v Turkey, ECHR**, Application no. 22277/93. This is another case decided by the European Court. However, Ms. Jarrett has argued that while Mr. Coke is entitled under section 13 [3] [a] of the Charter not to be deprived of his life except under the provisions stated therein, his assertion that this right was breached by the beating he received on the 21st February 2012 is unsustainable. This is so because there can be no liability unless there is first a finding that he has been deprived of his life and secondly that the deprivation was not in accordance with the due process of the law. She referred the court to the Jamaican case of **Fuller v Attorney General**, [1998] 56 WIR 337 at 419 where Harrison JA referred to the right as one that arises because of death.

[123] **Fuller** was decided under the old chapter 3 of the Jamaican Constitution. The wording of the right to life was expressed in section 14 [1] and is basically similar to the section under the [new] Charter which encapsulates what was contained in section 13 [a] and 14 [1] of the old chapter into one section:

13 *“Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place or origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others*

and for the public interest, to each and all of the following, namely –

[a] life, liberty, security of the person, the enjoyment of property and the protection of the law.

14 [1] No person shall intentionally be deprived of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.”

Should the Right to Life be extended to Non-lethal Circumstances?

[124] In deciding whether there is a basis for extending the right to life to injuries that fall short of death, it would be prudent to follow the example of my sister, Williams J in the case of **Maurice Tomlinson v Television Jamaica Ltd et al**, Claim no. 2012 HCV 05676, [delivered on November 15, 2013]. She referred to the usefulness of beginning a consideration of rights allegedly infringed by recognition of the intent and purpose of the amendment to the constitution as it existed [paragraph 32]. In paragraph 31 of her judgment, she cites the following reference:

“In the Final Report of the Joint Select Committee of the House of Parliament on Constitutional and Electoral reform dated 31st May 1999 it was expressed as follows inter alia:

‘The New Chapter 111 better reflects modern thinking by adopting the Modern Bill of Rights form in which the rights are positively and simple stated without specific exception. It also ensures much greater protection to the individual against abuse by the State or other persons or organizations and provides easier access to more persons and organizations to the court to facilitate the protection and preservation of the protected rights and freedoms.’”

[125] Bearing in mind the intent to ensure ‘much greater protection’ against abuse by the State, is there any justifiable basis to adopt the approach of the European Court in **Ilhan**. In that case, the applicant alleged that his brother was unlawfully subjected to a life threatening attack by gendarmes and that the authorities failed to carry out an adequate investigation into the attack. He argued that there had been a breach of the

right to life under the European Convention. The force used against the applicant's brother was not lethal. The court stated that this did not exclude an examination of the applicant's complaints under Article 2 [paragraph 75].

[126] The applicant's brother had suffered brain damage following at least one blow to the head with a rifle butt. Two medical reports identified the head injury as being of a life-threatening character. However, the court considered that it was only in exceptional circumstances that physical ill-treatment by State officials which does not result in death may disclose a breach of Article 2. The court stated some of the factors that would be relevant [paragraph 76]:

"Nonetheless, the degree and type of force used and the unequivocal intention or aim behind the use of force may, among other factors, be relevant in assessing whether in a particular case the State agent's actions in inflicting injury short of death must be regarded as incompatible with the object and purpose of Article 2....."

[127] In **Ilhan**, the court stated that it was not persuaded that the circumstances of the case revealed that the use of force applied was of such a nature or degree as to breach Article 2 [paragraph 77]. In **Pretty v The United Kingdom ECHR**, application no. 2346/02, delivered on 29th April 2002, that court described Article 2 as first and foremost a prohibition on the use of lethal force or other conduct which might lead to death [paragraph 2].

[128] Certainly, there may well yet be a compelling set of circumstances arising in the future that could propel a court in this jurisdiction to reach such a conclusion as in **Ilhan** and **Pretty**. However, the circumstances of this case do not measure up to such a standard.

[129] Even if I were persuaded to accept that Mr. Coke received these injuries in the manner he described and that the right to life could be extended to non-lethal circumstances the facts do not reveal that the use of force applied was of such a nature or degree as to amount to a breach of the claimant's right to life. When one applies the

yardstick described in **Ilhan**, it falls pitifully short of the mark. Secondly, it is also my opinion that the claimant has failed to establish that the injuries he received on the 21st of February was a result of an unprovoked or unjustified attack by agents of the State.

Was there a Breach of this Right to Life by Virtue of any Failure to take Preventative Measures to protect his Life and Person?

[130] Mr. Cameron has submitted that there is a positive obligation on the authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of others. In **Reynolde**, the court referred to the fact that Article 2 may imply in certain well defined circumstances a positive obligation on the authorities to take preventative measures to protect an individual from another [paragraph 81]. The court noted, however, that such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources [paragraph 82].

[131] In **Osman v The United Kingdom [GC]** No.87/1997 871/1083, **ECHR** October 1998, the applicants were a mother and son whose husband and father respectively was killed by the son's teacher who had threatened the family previously. They contended before the European Court that the authorities had failed to protect the life of the deceased and the son [who had been shot and injured] from the threat. Although the Court held that there was no violation of Article 2, it did find that the said Article created a positive obligation to take preventative measures to protect an individual whose life is at risk from criminal acts of a third party [paragraph 115].

[132] However, the court stated that not every claimed risk to life can place a requirement on the authorities to prevent that risk from materializing [paragraph 116]. It would be necessary to establish that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and they failed to take measures within the scope

of their powers which, judged reasonably, might have been expected to avoid that risk. The court found that the facts did not reveal that the police knew or ought to have known that there was a real and immediate risk from the teacher. This same reasoning was also adopted by the European Court in **Keenan v the United Kingdom** [Application no. 22277/93, June 2000].

Positive vs Negative Rights

[133] In **Louise Gosselin v the Attorney General of Quebec** [2002] SCC no. 85, the Supreme Court of Canada considered whether there was a breach of section 7 of the Canadian Charter of Rights and Freedoms which is similar in nature to section 13 [3] [a] of the Jamaican Constitution. **Gosselin** involved a challenge to Quebec's social assistance statute which provided less social assistance to persons under the age of 30 years. The court embarked on a discourse as to the scope of section 7 in general and its application to the facts of that case. The Chief Justice, who delivered the majority decision, considered whether the right to life, liberty and security of the person embraced a positive obligation by the State.

[134] She stated that the dominant strand of jurisprudence on section 7 sees its purpose as guarding against certain kinds of deprivation of life, liberty and security of the person which occurs as a result of the individual's interaction with the justice system and its administration [paragraph 77]. She affirmed the current understanding of the right to life as a negative obligation [paragraph 81]:

“...Nothing in the jurisprudence so far suggests that section 7 places a positive obligation on the state to ensure each person enjoys life, liberty or security of the person. Rather section 7 has been interpreted as restricting the state's ability to deprive these rights...”

[135] However, the Chief Justice did leave the door open for a future interpretation to include a positive obligation [paragraph 82]:

*“One day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey’s celebrated phrase in **Edwards v Attorney-General for Canada**, [1930] A.C. 124 [P.C.] at p. 136, the Canadian Charter must be viewed as ‘a living tree capable of growth and expansion within its natural limits’.....It would be mistaken to regard section 7 as frozen....”*

[136] Counsel for the defendants has submitted that the above view as expressed in the majority verdict in **Gosselin** supports her basic premise that section 13 [3] [a] of the Constitution of Jamaica does not create a positive right. She also referred the court to a commentary on Article 2 [European Convention] and section 7 [Canadian Constitution] by the learned author of **Constitutional Damages Worldwide**, Ken Cooper Stephenson. In that article, the author distinguishes Article 2 in the European Convention by the fact that the protection of life is given treatment separately from liberty and security. He also points out that the protection of life is stated as a positive right to be “protected by law” in Article 2 [page 58].

[137] In **Gosselin**, Arbour J, who wrote the dissenting judgment, argued for a positive obligation:

*“A purposive interpretation of the section as a whole requires that all the rights embodied in it be given meaning [page 9].
Reducing section 7 only to the second clause leaves no useful meaning to the right to life. Such an interpretation..... threatens not only the coherence, but also the purpose of the Charter as a whole. In order to avoid this result, it must be recognized that the State can potentially infringe the right to life, liberty and security of the person in ways that go beyond violating the right contained in the second clause of s. 7. Section 7 must be interpreted as protecting something more than negative rights.....”*

[138] It is to be noted that the Chief Justice in **Gosselin** was involved in an analysis of the issue in relation to whether section 7 should be applied to protect rights or interests wholly unconnected to the administration of justice. She stated that, even if it could be

read to encompass economic rights, it spoke only of the right not to be deprived of life, liberty and security [par 80, 81]. It is within that context that she came to the conclusion expressed above. In relation to the circumstances of that case, the Chief Justice formulated the following question and answer [paragraph 83]:

“The question therefore is not whether s.7 has ever been - or will ever be - recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of section 7 on the basis for a positive state obligation to guarantee adequate living standards. I conclude they do not.”

[139] Ms. Jarrett asked that the court consider the significance of the distinction between a positive and a negative right. She referred the court to the *dicta* of Lord Baroness in **L v Birmingham City Council**, [2007] UKHL 27, paragraphs 57- 60]. She stated that positive rights create a positive obligation on the State to protect the rights of the individual against third party infringement. Negative rights are rights which require some active conduct on the part of the State in order for there to be liability.

Assessment of the obligations of the State

[140] The right to life under section 13 [3] [a] is not enshrined as a right protected by public law as in the European Convention or even as the right to protection from torture and/or inhuman treatment in the Jamaican Constitution [Section 13 [3] [o]]. There will clearly be some interpretational distinctions to be applied. However, section 13 [1 [c]] of the Charter does express that all persons are under a responsibility to respect and uphold the rights of others.

[141] Section 13 [4] also states that chapter 3 applies to all law and binds the legislature, the executive and public authorities. Public authorities such as the Department of Corrections would have an obligation and responsibility to take necessary steps to protect the lives of those in its custody as these would be considered to be of vulnerable status. In the case at bar, Mr. Coke is arguing that the

State is obligated to take necessary measures to protect his life against the very agents of the State. It is my opinion that if the right to life were to be applied to non lethal circumstances then such a [positive] obligation would exist. This obligation, however, would be one that is of a higher standard than mere negligence on the part of the State's agents and certainly it would only arise in circumstances where the State was aware of a 'real and immediate risk' [**Keenan**].

[142] Under these circumstances, the court would be looking for factual circumstances to sustain such an obligation. [See **Banton and others v Alcoa Minerals of Jamaica and others** [1971] 17 WIR 207 per Parnell J, p.305]. However, this court has not reached any such determination that the right to life exists apart from death.

[143] Taking Mr. Coke's evidence at its highest level of cogency, the question to be answered is whether it has been established that the defendants knew or ought to have known at the relevant period of time of the existence of a real and immediate risk to his life. Counsel for Mr. Coke has submitted that, based on the letters written by Mr. Coke and his attorneys to the relevant authorities, the State was well aware of the existence of a real and immediate risk and that they failed to take any preventative measures to protect his life which resulted in the bloodletting that was inflicted on him.

[144] However, in my assessment of the evidence, it fails to reveal the existence of a real and immediate risk to his life from the [criminal] acts of any agent of the State. Certainly, this is not apparent from any circumstances arising on the 9th, 10th and 12th of January 2012. His complaints do not reveal the existence of any real or immediate risk to his life. Similarly, the video footage in relation to the incident of the 30th of January fails to do so. In relation to the incident on the 21st February, there is nothing in the evidence from which I could conclude that there was evidence of a planned attack of which the defendants ought to have been aware. Mr. Coke has not placed any credible factual evidence before this court to sustain any such premise.

[145] In **Keenan**, the court expressed that the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on

the authorities. Accordingly, not every claimed risk to life can entail for the authorities a convention requirement to take measures to prevent the risk from materializing. It is my opinion therefore that even if a positive obligation existed, the claimant has not proved on a balance of probabilities that the State failed to take preventative measures to protect his life.

The Failure to Investigate

[146] Mr. Cameron has submitted that the jurisprudence on the scope of the State's obligation to safeguard the right to life stipulates that when there is a breach by agents of the State, an independent, investigative mechanism must be triggered which has no institutional or hierarchical connection with the agents of the State under investigation. He referred the court to the decision of The Inter American Commission of Human Rights [IACHR] in **Michael Gayle v Jamaica**, case 12.418, Report No. 92/05 [delivered October 24, 2005] where these principles were stated. In **Michael Gayle**, a mentally ill man was killed by police officers. The IACHR found that Jamaica was in breach of his right to life as there was no effective and independent investigation into his death.

[147] Again, these principles at this time in our jurisprudence presuppose the death of the person whose right was breached. Mr. Cameron relied also on **Ramsahai and others v the Netherlands**, Application 52391/99 ECHR, 15.5.2007, a case alleging breach of Article 2 of the European Convention in circumstances where a **Mr. Ramsahai** was shot dead by a police officer. One of the findings of the court was that the obligation to carry out a prompt and effective investigation when individuals have been killed as a result of use of force was not dependent on whether the said use of force was ultimately found to constitute a violation of Article 2 [paragraph 322].

[148] The court also considered the scope of the effectiveness of the investigation and expressed that it must first be adequate as well as independent [paragraphs 324 and 325]:

"That is, it must be capable of leading to the identification and punishment of those responsible. This is not an obligation of result, but one of means.

The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident. Secondly, for the investigation to be 'effective' in this sense it may generally be regarded as necessary for the persons responsible for it and carrying it out to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence. What is at stake here is nothing less than public confidence in the State's monopoly on the use of force."

Evidence Relating to Lack of Effective Investigation

[149] Mr. Coke has complained that the soldiers manning SP11 were a law unto themselves and there was no effective internal complaints process available to him. He also described the actions of the soldiers as being very oppressive and abusive which resulted in him complaining to INDECOM but that he is unaware of any commencement of investigations. In relation to the alleged incidents of the 9th, 10th and 12th of January 2012, he made a report to his attorneys. He stated that he was advised by them that a letter was written to INDECOM and copied to one Lieutenant Colonel Patrick Cole of the JDF with a view to bringing the threats and actions of these men to the authorities. The letter dated 17th January 2012 is part of the agreed bundle.

[150] In the letter dated 30th January 2012 referred to previously, Mr. Coke and other inmates complained of being beaten by a group of soldiers on that day about 4:30 p.m. They identified a lieutenant by the name of Mr. Hudson who gave the order to the others to 'deal with them.' Mr. Coke also made reference to a second letter written by the inmates dated 1st February 2012 to the Minister of Justice. This letter was signed by the said inmates and complained of the treatment of the soldiers and again complained of the assault by the soldiers on the 30th.

[151] Mr. Cameron submitted that in spite of all the allegations of physical abuse and general complaints, no state agency has completed any form of investigation more than fourteen (14) months after the incident in spite of the fact of several letters being written to several authorities.

[152] In relation to the letter written to the Minister of Justice, Mr. Cameron stated that a reply dated 16th April 2012 was received by attorney Mrs. Reid Cameron from the legal officer in the Ministry who stated that the letter had been forwarded to the Ministry of National Security, the Jamaica Defence Force and the Department of Corrections for their necessary action. In that letter, the following view was expressed:

“We believe that these entities may be better able to investigate these very serious allegations and, if necessary, to take steps to alleviate the problem. We will, of course, continue to follow up on this matter...”

[153] Mr. Cameron has also submitted that in relation to the incident of the 21st of February, there has also been no effective investigation more than a year after. He stated that without an independent investigation by a third party, the court is left with bald denials among soldiers who have had over one year to collude and plan the answers. He also complained that the claimant is left in the position where he has no independent evidence to corroborate his version of the events. Finally, he stated that the State ought not to be allowed to say there were no threats when they negligently failed to conduct any investigation into the reports that were made in writing to the authorities.

Evidence of the Defendants

[154] It is important to note the evidence of Lieutenant Colonel Prendergast as it relates to the circumstances surrounding Mr. Coke's incarceration at SP11. He told the court that SP11 is designated for high risk remandees. Mr. Coke was placed there based on allegations that he was among a group of men who fired shots at police officers and JDF soldiers during a State of Emergency declared in May 2010 when the security forces went into Tivoli Gardens in search of Christopher 'Dudus' Coke. The claimant is the brother of Christopher Coke who was subsequently extradited to the United States of America (USA) in relation to drug trafficking charges. The claimant was secured in SP11 pending his trial. Platoon Commander Hudson stated that the securing of the high risk inmates was a major priority for the JDF and the Department of

Corrections. These inmates included Mr. Coke and all the names listed on the letter of complaint to the Minister.

[155] Lieutenant Colonel Prendergast denied that the claimant was threatened or abused or treated inhumanly while at HARC. There is no documentary evidence from the defendants in relation to investigations of the reports of Mr. Coke concerning alleged incidents in January in spite of the several requests for intervention. Lieutenant Colonel Prendergast outlined the system of investigation that took place after the incident on the 21st February. He stated that he contacted the senior JDF officer at the facility and obtained a briefing. He also spoke to Dr. Royer-Powe and obtained an assessment of Mr. Coke's condition. He also instructed the duty officer to prepare an incident report and gather statements. He stated also that he approved Dr. Royer-Powe's advice to send Mr. Coke to hospital for assessment and arranged the military escort for him. He indicated that he was later informed that Mr. Coke was treated and returned to HARC the same evening.

[156] A copy of the incident report logged by the duty officer was exhibited to his affidavit. This report gave a description of the incident and identified all the soldiers involved. The final paragraph of this report reads as follows:

"Remandee Coke's attack on the soldiers was a deliberate act of defiance with intent to cause grievous bodily harm and should be made to face the Department of Correctional Services Tribunal... ."

The Court's Analysis

[157] While this may accord with internal procedures of HARC, it could hardly be considered an independent investigation of the alleged incident. However, Mr. Coke did not suffer death and the court takes note of the role of INDECOM in relation to investigations of the abuse of the rights of citizens by members of the security forces.

The Role of INDECOM

[158] The Parliament of Jamaica passed The Independent Commission of Investigations Act in 2010. It is described as an Act for the purposes as set out below:

“...to make provision for the establishment of a Commission of Parliament to be known as the Independent Commission of Investigations to undertake investigations concerning actions by members of the Security Forces and other agents of the State that result in death or injury to persons or the abuse of the rights of persons and for connected matters.”

[159] Mrs. Reid Cameron, co-counsel for Mr. Coke, wrote to this organization on his behalf on the 17th of January 2012 requesting an investigation into the threats and actions of the soldiers at HARC. In that letter, she stated that she was again writing based on an incident that took place on the 9th, 10th and 12th of January 2012. She reported that she had been advised that persons dressed in civilian clothes entered her client's cell on those occasions and ordered him out of the cell. She wrote a follow-up letter on the 15th of November 2012 indicating that she was aware that they had commenced investigations as members of that organization had interviewed her client. She asked them to indicate whether their investigations were complete and requested a copy of the report to assist with the present court case.

[160] The reply from Mr. Nigel Morgan, Director of Complaints for INDECOM dated 27th November 2012 is part of the agreed bundle. In that letter, Mr. Morgan indicated that they were awaiting documents from the JDF for completion and at that time the report of the Commissioner of INDECOM would be completed and forwarded to her. It is to be noted that up to the time of hearing of this matter, the claimant did not provide any updated letter or affidavit from INDECOM indicating whether they had or had not yet received any documentation.

[161] Lieutenant Colonel Prendergast did state that he was aware that INDECOM was investigating the incident and it is his belief that he was the one who brought it to their attention. He also stated that it is part of the correctional institution's responsibility to

report it. However, he admitted that he did not think any statements were handed over to INDECOM. In relation to the letter written by Mr. Morgan described above, Lieutenant Colonel Prendergast indicated that no requests from INDECOM to the JDF were passed through him. He stated, however, that in the interests of transparency and to fully cooperate with the investigations by INDECOM, the Ministry or the police if they so chose, he did not request that his staff obtain statements from other inmates.

[162] Certainly, if there is to be any independent and even adequate investigation, it would have to be done by INDECOM which is the mandated authority for that purpose based on the objectives of the Act. This is obviously Parliament's attempt at an independent body to investigate actions taken by security forces as described above. This court has no evidence [at the time of hearing] as to whether their investigation is complete or not and if not, the reason for this. What the evidence does reveal is that INDECOM was notified in relation to the incident of the 21st of February. While there is no such evidence pertaining to the complaints of incidents in January, the complaints were passed on to INDECOM by Mr. Coke's attorneys and they have indicated they have commenced investigations.

[163] In relation to these issues, Lieutenant Colonel Prendergast testified also that he visited Mr. Coke in his cells and had discussions with him, but he cannot recall Mr. Coke complaining that he was threatened. However, he did receive complaints from Mr. Coke. He referred to the Corrections Act which makes provision for the inmates to submit complaints to the Superintendent and stated that the JDF soldiers were briefed that complaints were to be recorded and reported to the Superintendent. He stated that he made no record in writing of these complaints as he was present. However, he did not instruct the Superintendent to investigate these complaints neither did he so instruct the Duty Officer of the JDF.

[164] It is my considered opinion that there does appear to be a certain level of sluggishness on the part of the 1st and 2nd defendants in responding to requests from various agencies for investigations into Mr. Coke's numerous complaints. However, I note that the complaints essentially concern incidents in January and February of 2012.

The Fixed Date Claim Form and affidavit in support from Mr. Coke were filed in March 2012 in relation to this application for judicial review. In November 2012, the officers of INDECOM were still in the throes of their investigation. Bearing in mind all of the above circumstances, it is extremely difficult to reach a conclusion that the claimant has proved a breach of his right to life by the failure of the state to conduct an independent and prompt investigation.

Torture/and Inhuman and/or Degrading Treatment

[165] Section 13[6] of the Jamaican Charter provides that no person shall be subjected to torture or inhuman or degrading punishment or other treatment. Section 13[3][o] grants the right to protection from torture, or inhuman or degrading punishment or other treatment. Mr. Coke alleges that these rights were breached by the defendants in several respects. He relies on the medical certificates of Dr. Ford dated April 10, 2012 and Dr. Irons dated 16th November 2012 as well as the various letters of complaint mentioned above as support for his evidence on the issues raised. His evidence has been challenged and contradicted by the witnesses for the defendants.

[166] I will summarize the evidence of the claimant and the defendants before considering the authorities relied on by both counsel. It is to be noted, however, that Mr. Coke is essentially relying on the same evidence to sustain all his allegations of breach of his constitutional rights.

Summary of Evidence Relied on by Claimant

[167] Mr. Coke states that persons in civilian clothing ordered him out of his cell on the nights of the 9th, 10th and 12th of January 2012 and when he refused he was spat on. He also refers to his account of an unprovoked attack by the soldiers on the 21st of February 2012. The details of this attack have been described previously. He also speaks to threats made by the defendants to poison his food which resulted in his refusal to eat.

[168] Mr. Coke also reports that the soldiers shone a bright light in his cell twenty-four (24) hours a day which prevented proper sleep. He also alleges that searches were

conducted three times a day and that the soldiers continuously walked through the corridors outside the cells and made noise in order to prevent him from sleeping.

[169] In relation to the conditions of the remand facility, he complained that there was no natural lighting or ventilation coming through a vent in the cell and that the roof was made of zinc which caused temperatures in excess of 100 degrees. All these factors combined resulted in him suffering from severe physical exhaustion.

[170] He complains also that the inmates were forced to live in their own excrement for up to a month at a time or at various times used for the purpose of punishment. He also states that he was deprived of water to flush the toilet which resulted in maggot infestations as well as an unbearable stench. He reports also that he was deprived of the opportunity to have a daily bath for up to a month and that, on occasions, he was also deprived of recreational time as a form of punishment.

[171] Mr Coke claims that he was filmed while bathing which has stripped him of his privacy and dignity and reports that this as well as sleep deprivation and hot temperatures are constant factors which have resulted in feelings of fear, anguish humiliation and debasement.

[172] It is to be noted also that Mr. Coke states that it is not his belief that the authorities were attempting to extract any information from him as they have never attempted to do so but it is his belief that they were "trying to break him and his manhood with a view to silencing people the State thinks that he represents." He also stated that he believed he is being punished because of his name.

[173] Finally, Mr. Coke stated that Dr. Bernard diagnosed him with severe depression. Dr. Bernard is a psychiatrist attached to the Correctional Services Department. This diagnosis has not been denied by the defendants. He has also asked that the court have regard to the medical reports of Dr. Ford and Dr. Irons. It is to be noted that Mr. Coke was remanded in custody on the 1st June 2010. In April 2011, a bail application was refused on his behalf by the Supreme Court. The Application for Judicial Review

was filed in March 2012 so he would have been incarcerated for almost two (2) years preceding his application for judicial review.

Evidence of the Defendants

[174] The evidence in relation to the dates of the 9th, 10th, 12th and 30th of January has already been reviewed. Platoon Commander Hudson described the incident of the 30th of January and the activities of the Quick Response Team. It is apparently this exercise that led to a cell by cell visit described by Mr. Coke on the 30th. Some of this video footage have been rehearsed above.

[175] As this court had previously indicated, the video footage does not support the evidence of Mr. Coke and materially affects his credibility and reliability as a witness in relation to any incidents on the 30th of January. Platoon Commander Hudson also denied that Mr. Coke was threatened or that the inmates were told that their food was going to be poisoned.

[176] Lieutenant Colonel Prendergast spoke to the issue of complaints by inmates on SP11. He stated that he got a firsthand view of the conditions on a number of occasions. He found the corridors littered with garbage, food, faeces and liquid. He also observed on the security footage that these items were thrown into the corridor by the inmates in their cells. He stated that on many occasions he encouraged them to desist and asked them to clean up the mess. However, they refused his request on most occasions. He stated that after discussions with Dr. Royer-Powe, he took the decision to arrange for the cells and corridors to be cleaned regularly by low risk inmates from another institution. He also stated that many of these low risk inmates felt intimidated by the inmates on SP11 so a decision was taken to temporarily relocate these inmates when the cleaning was scheduled. Lieutenant Colonel Prendergast stated that it was for the above reason that Mr. Coke was directed to SP7 at the time of the incident on 21st February 2012.

[177] In relation to threats and other relevant complaints described above, Lieutenant Colonel Prendergast denied that there were any threats to poison the food of Mr. Coke and other inmates. He also denied that he was subjected to inhuman or degrading treatment. He stated that he could not recall getting a copy of the letter written by the legal officer of the Ministry of Justice to attorney Carolyn Reid Cameron on 16th April 2012 which referred to complaints of the inmates but he knew that the matter was being investigated by INDECOM, the JDF and the Minister of National Security. He also stated that he was aware of complaints of SP11 concerning the conditions while Mr. Coke was there and he made regular visits on a number of occasions to SP11 to observe conditions and speak to the inmates. He had therefore a firsthand view as to what was taking place.

[178] In relation to the physical condition of SP11, he has stated that these are typical of remand centres island wide and correctional facilities generally. He described the cells as being constructed of concrete walls with sheet reinforcements. They have security grills at the front of the cells which would range in size but be modest in dimension. Each cell had its own toilet and a face basin. It is to be noted that the court did observe the cells in the video footage and that they do accord with the above description.

[179] In relation to Mr. Coke's psychological ailments, Lieutenant Colonel Prendergast denied that it was due to his institutionalization. He denied that he was given any such information by Dr. Bernard. He admitted that Dr. Bernard had treated Mr. Coke on one occasion and he was aware that a request had been made for a medical report but he did not request one from Dr. Bernard and it was not to his knowledge that one was provided.

[180] In relation to the lighting of the cells, he states that lights were required for security reasons as the inmates contained were high risk. But he explained that not all the lights were on twenty-four hours daily and that those lights illuminated the corridor and were not directed to shine directly into the cells. He also stated that barriers were not placed on the cells to prevent ambient light as that would impede observation.

[181] Finally, he denied that Mr. Coke was deprived of basic necessities of life such as sleep, food and cleaning supplies and opportunities to bathe. He also stated that there were occasions when Mr. Coke was involved in incidents threatening the security of the centre and at these times certain restrictions were placed on his privileges.

Punishment of Inmates under the Corrections Act

[182] Sections 35 to 38 of The Corrections Act speak to the process involved in the meting out of punishments to inmates and sanctions to be applied. The sanctions include dietary restrictions and suspension or postponement of privileges. Section 35 provides that an inmate is not to be punished without being given an opportunity to hear the charge against him and to make a defence. Section 37 states that the Superintendent is to keep a record of every punishment imposed on an inmate in a register.

[183] Lieutenant Colonel Prendergast stated that he would have oversight and review the nature of the offence and extent of the punishment by virtue of the register. He agreed that it is one of the requirements for the proper administration of the correctional system. However, he stated that he discovered after the incident of the 21st February that the institution was not keeping the register but that the Superintendent was keeping a record on each inmate's penal record. He stated further that he failed in his statutory duty in this regard. He also stated that he was aware that Mr. Coke's attorney had requested a review of the register and admitted that he did not send the records being kept by the Superintendent.

[184] I would therefore have no documents to assist in whether Mr. Coke had committed violations for which he had been punished. However, the issue of the breach of statutory duty in relation to the keeping of the register is not an issue before this court.

[185] In relation to the issue of handheld cameras, he stated that these could only be used with his permission and that he did give authority for their use over an assigned

period. The staff under the guidance of the Superintendent are allowed to use cameras to maintain security. He stated that as Commissioner, he determined that footage of various interactions with inmates would help in maintaining professionalism of the staff and discourage misconduct by remandees. He explained further that handheld cameras could be used under the supervision of senior staff but there was no direction for them to be used in areas not covered by mounted cameras, however, they could be so used. He explained further that it would not be left to the discretion of junior staff to decide what would be filmed. Finally, Lieutenant Colonel Prendergast stated that it would be inappropriate and unnecessary to record an inmate while bathing. However, while he observed footage from mounted cameras, he made no request to see footage from other cameras.

[186] Platoon Commander Hudson also spoke to the issue of lighting and made reference to a general roof light which shines down into the corridor of SP11 and which was always on as part of security measures. He stated that the JDF had no general control over the operation of the facility's lighting system. Mr Hudson also explained that the lighting fixtures in the cells were controlled by a main switch at the JDF Duty SP NCO post and that these lights were usually turned off between 10:00 p.m. to 6:00 a.m.

[187] In relation to the issue of sleep deprivation, Platoon Commander Hudson explained that the soldiers were required to patrol the cells frequently in order to ensure that remandees were not engaging in prohibited activity or had contraband in their possession.

[188] Platoon Commander Hudson also denied that Mr. Coke and others were forced to live in their excrement for up to a month and that once they had showered they would fill their buckets with water and take it back to their cells to flush the toilets. They were also provided with water daily for the same reason. Platoon Commander Hudson stated that the only time faeces and urine accumulated in the cells was when the remandees deliberately did so to throw it on the corridors or unto the soldiers. He spoke to the fact also that they are given garbage buckets which are emptied daily by cleaning teams from Tamarind Farm Prison but that inmates often throw garbage outside the cell to be

disruptive. The court noted that at various points on the video footage, inmates were observed throwing 'liquid or other substance/objects out onto the corridors.'

[189] In relation to the issue of cameras, Platoon Commander Hudson stated that there were no cameras in the showers. However, he admitted that handheld cameras are used on the instruction of a duty officer and these are employed to photograph any physical damage on SP11 or any injury on a remandee. He stated also that at least two (2) such cameras are kept in the duty officer's office and he has used them to take photographs. He stated that he saw photographs of Mr. Coke's injuries in the media but he cannot say if photographs were taken by the duty officer on 21st February 2012.

[190] For the most part, these factual issues can only be decided by an assessment of the credit worthiness of all the witnesses. It is the word of Mr. Coke against the words of the witnesses for the defendants. In assessing these, Ms. Jarrett has asked that the court pay particular attention to the following admissions by Mr Coke:

- He was in a cell by himself.
- There was a toilet and face basin in the cell.
- There was an area for showering on the SP and he would collect water in a bucket to flush the toilet in cell.
- He was provided with drinking water and food daily.
- He was allowed to read the newspaper at his pleasure and use electronic devices except for cellular phones at times.
- There were electric fans on in the corridor that was turned on sometimes.
- There was a television set also in the area at times.
- There was a recreation area outside and he was given one hour for recreation and would play football at times, however, he did not get this privilege daily.

- On the wall facing outside SP11, there were louvre windows that led outside; however, he felt no ventilation coming through these windows.
- There was a garbage bin placed in front of each cell.
- Inmates do throw garbage in the corridors and not in the bins.
- It is the responsibility of the inmates to flush toilets with the bucket provided, however, they sometimes store the faeces to throw on the corridor in order to get attention from the soldiers, for example when they needed medical attention.

[191] Ms. Jarrett has submitted that the above evidence is consistent in every material particular with the evidence of the defendants and that the totality of the evidence reveals that the facilities and conditions on SP11 were good and could not be remotely compared with the conditions that existed in the case of **Doris Fuller v Attorney General**, [1998] 56 WIR 337, a case referred to by both counsel and considered below in this judgment.

Analysis

[192] In assessing and analysing the evidence, this court cannot ignore the conclusion reached previously that Mr. Coke's credibility has been severely challenged by the video footage. It is not difficult to come to a conclusion that Mr. Coke is, to put it delicately, guilty of exaggeration in relation to several of these issues. This is also so in relation to the issue of the filthy conditions of the cells and environs. Based on the court's observation on the video footage, I accept the evidence of the defendants in relation to the action of the inmates which has been admitted by Mr. Coke to some extent. The actions of the inmates would have posed severe challenges to the Correctional Services in maintaining hygiene.

Authorities in Relation to Torture/Inhuman and Degrading Treatment

[193] However, taking the most charitable view of the allegations of Mr. Coke, I will consider whether there are any factual situations that would warrant a declaration that his rights have been breached. Both parties agree that that the right under section 13 [6] of the Charter not to be subjected to torture, inhuman or degrading punishment or other treatment is the same right that existed under section 17 [1] of the old chapter 3 of the Constitution. Section 17 [1] was considered by the Court of Appeal in the case of **Fuller**. Section 17 [1] as well as section 13 [6] of the [New] Charter are almost identical in language to Article 3 of the European Convention which reads as follows:

"Prohibition of Torture - No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[194] The facts in **Fuller** were greatly disturbing to say the least. The victim in that case, A B, Doris Fuller's son, was subjected to appalling conditions of incarceration in cells at Constant Spring Police Station. He and seventeen (17) other men were placed in a cell measuring 8 feet by 7 feet at 7:30 p.m. The cell was constructed of concrete walls and roof; it had no windows; its door was made of two metal sheets with holes for ventilation; the holes were not aligned, so that it was not possible to see into or out of the cell; there was no light in the cell and very poor ventilation. The cell was wet and extremely hot. The detainees were deprived of adequate food and water. They were let out briefly about 7:00 a.m. the next day and also at 1:00 p.m., then locked up again at 1:45 p.m., and remained there until 7:00 or 8:00 a.m., on the following day without food and water. During the night, the detainees beat their hands on the door to attract the attention of the police, however, they were ignored. The police officers, who were playing dominoes, increased the volume of a radio that was playing. Three detainees including A B died that night. AB's death was due to cardio-respiratory failure.

[195] In that case, a majority verdict of the Court of Appeal was delivered [per Patterson and Harrison JA, [Downer JA dissenting], Harrison JA treated the issue of inhuman and degrading treatment as separate from the issue of torture.

[196] He referred to the decision [majority] of the European Court of Human Rights in **Republic of Ireland v United Kingdom** [1978] 2 ECHR 25 where the distinction was made between torture and inhuman and degrading treatment. He adopted that court's definition of torture. Harrison JA stated as follows [page 65]:

'...Torture, the court found, involved' '...deliberate inhuman treatment causing very serious and cruel suffering....' '... of a particularly high level of intensity... .'

[197] In **Ireland**, the court had to consider five (5) techniques used by the police on several prisoners. These involved the following activities:

- [a] "Wall standing" forcing the detainees to stand "spread-eagled" against a wall with arms outstretched overhead and fingers against a wall, standing on their toes for hours;
- [b] hooding: putting a hood over detainees' heads during interrogation;
- [c] subjecting the detainees to a continuous loud hissing noise before interrogation;
- [d] depriving detainees of sleep and;
- [e] depriving the detainees of food and drink and giving them a reduced diet.

[198] The court found that these techniques amounted to inhuman and degrading treatment for the reasons as described as follows [paragraph 167]:

"The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3 [part 3]. The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority

capable of humiliating and debasing them and possible breaking their physical or moral resistance.”

[199] The court then considered whether the five techniques should also qualify as torture and stated that the distinction derived principally from a difference in the intensity of the suffering inflicted. In conclusion, that court considered that it was the intention that the Convention, with its distinction between ‘torture’ and ‘inhuman and degrading treatment’ desired by the first of these terms to attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.

[200] The court concluded that the circumstances did not meet the criterion to establish torture [paragraph 167]:

“Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.”

[201] In **Fuller**, the court allowed an appeal for constitutional redress under section 17 [1] in relation to the issue of inhuman and degrading treatment. By majority verdict however, they refused the application to amend the claim to include an allegation of torture and held that, although the police had displayed a callous indifference, a lack of care and an absence of concern for the detainees’ suffering, it did not amount to a deliberate act to cause suffering and accordingly, fell outside the term ‘torture’ in section 17[1] of the Constitution.

[202] Counsel for the defendants has asked the court to adopt the interpretation of torture under Article 3 of the European Convention on Human Rights in **Ireland** as well as **Gafgen v Germany** [2010] 28 BHRC 46 [paragraph 90] where the court considered the distinction also between the terms:

*"In determining whether a particular form of ill treatment should be classified as torture, consideration must be given to the distinction embodied in part 3 between this notion and inhuman or degrading treatment. As noted in previous cases, it appears that it was the intention that the convention should by means of such distinction, attach a special stigma to deliberate, inhuman treatment causing very serious and cruel suffering. [see **Ireland v UK** [1978].....In addition to the severity of the treatment, there is a purposive element to torture as recognized in the United Nations Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment, which in part 1 defines torture in terms of the intentional infliction of severe pain or suffering with the aim, inter alia of obtaining information, inflicting punishment or intimidatory [see **Akkoc v Turkey** [2000] ECHR 22947/93 at para 115]."*

[203] Counsel Ms. Jarrett has submitted that, even if the treatment was, as alleged, meted out to the claimant, which is strongly denied, it does not attain the minimum level of severity required for torture. She further submitted that there is no evidence that the alleged mistreatment was for the purpose of obtaining information, or for punishment or intimidation.

[204] On this issue, Mr. Cameron has also submitted that forcing the claimant to bathe naked in front of a camera amounted to aggravated and deliberate form of cruel, inhuman or degrading treatment of the intensity that can be categorized as psychological torture. In the alternative, he submitted that even if these actions do not amount to torture, the activities of the State amounted to cruel and inhuman treatment or punishment. Counsel also pointed out that the State has an obligation to treat persons deprived of their liberty with humanity and with respect for the inherent dignity of the human person and in the absence of this, there is a violation of sections 13[1], 13[3][o] and 13[6] of the Charter.

[205] Counsel has further submitted that depriving Mr. Coke of sleep, food, water and other basic necessities amounted to inhuman treatment and that the activities of the

servants of the defendants were designed to dehumanize him and subject him to gross assaults on his human dignity. Counsel has submitted also, that threats of violence against a victim can constitute inhuman treatment where such threats are sufficiently real and immediate. However, it must be shown that the threats caused the level of suffering normally required with inhuman treatment.

[206] Counsel referred the court to **Campbell and Cosans v The United Kingdom**, Application no. 7511/76; 7743/76 delivered on 25th February 1982. This case involved alleged violations of Article 3 of the European Convention in circumstances where two school children were threatened with corporal punishment. The court stated that a mere threat of conduct prohibited by Article 3 may itself be in conflict with that provision, however, the situation that the two children found themselves in did not amount to torture or inhuman treatment within the meaning of Article 3 and there was no evidence that they underwent suffering of the level inherent in these notions as they were interpreted and applied in **Ireland** [paragraphs 26 - 28].

[207] Finally, counsel has submitted that the applicants' rights continued to be violated as long as he remained incarcerated in the same conditions and state of affairs. He referred the court to the letters written by Mr. Coke's attorney to the 1st defendant requesting that he be taken out of the oppressive circumstances. This letter was copied to other authorities as mentioned previously but the letter remained unanswered and the authorities took no steps to improve the conditions.

Was Mr. Coke Subjected to Torture or Inhuman or Degrading Treatment?

[208] This court is well aware that a high standard is increasingly being required in the area of protection of human rights and fundamental privileges [Selmouni v. France] ECHR. However, an examination of the authorities considered above and relied upon by the Court of Appeal in Fuller; reveal that there are no factual situations relied upon by Mr. Coke that could remotely attract a finding of torture by this court. There is no evidence of a deliberate, inhuman treatment causing very serious and cruel suffering to Mr. Coke. Certainly also, there is no evidence as Mr. Coke has himself admitted, that

any alleged mistreatment was for the purpose of obtaining information or for punishment or intimidation. Acts of punishment in relation to recreation are allowed under the Corrections Act for disciplining of Inmates. If the facts in Ireland did not constitute torture, there is no basis for this court to entertain such a proposition in relation to the circumstances as described in this case.

[209] In relation to the issue of inhuman and degrading treatment, Ms. Jarrett referred the court to **Attorney General of St. Christopher and Nevis and Anguilla v Reynolds** [1979] 43 WIR 108. In that case, the court held that imprisonment which was said to be insanitary and humiliating was contrary to section 7 of the then Constitution which was similar in language to section 17 [1] of the Jamaican Constitution and also section 13 [6] of the New Charter which replaced the latter provision.

[210] She submitted that the threshold to be met for the purpose of Article 3 of the European Convention has frequently been expressed to be ill treatment that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. She referred the court also to **Pretty** where the court considered Article 3 of the European Convention. It was noted that an examination of that court's case law indicated that Article 3 had been most commonly applied in contexts in which the risks to the individual emanated from intentionally inflicted acts of the State agents. The court stated also that it may be described as imposing a primarily negative obligation on States to refrain from inflicting serious harm on persons within their jurisdiction [paragraph 50]. The court also discussed the types of treatment which fell within the scope of Article 3 [paragraph 52]:

"...the court's case-law refers to 'ill-treatment' that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering...'. Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterized as degrading and also fall within the prohibition of Article 3... ."

[211] Ms. Jarrett submits that this threshold has not been met in the present case based on the evidence. She stated that the claimants' allegations have been refuted in respect of the detention conditions at SP11 and that Mr. Coke was provided with food, water and sanitary facilities, therefore the conditions were not analogous to those described in **Reynolds** or in **Fuller**. She submitted also that the evidence is clear that any unsanitary conditions that existed at the material time were the direct consequence of the deliberate actions of the detainees whenever they chose to be defiant, disruptive and resistant.

[212] In relation to the issue of recreation, Ms. Jarrett submitted that the evidence revealed that the detainees were allowed one hour outside for activities. They had reading material and were allowed various electronic devices. There were no cameras in the shower and they were not photographed while bathing. There were fans and a television set on SP11. There was a ventilation system that pulled hot air out of the building and slotted windows on the entire front wall of the entrance to the SP11 which allowed air and light from outside. The claimant and the other six detainees on SP11 at the time each occupied their own cells.

[213] Counsel also asked the court to bear in mind that the evidence shows that the detainees were not systematically beaten on January 30th or 31st. Nor was there any evidence to substantiate Mr. Coke's assertions that he was abused verbally, beaten or spat upon by men in civilian clothes on January 9th, 10th and 12th 2012. In relation to the incident of the 21st February, she submitted that the evidence shows that the actions of the JDF personnel were not unprovoked as the claimant refused to follow instructions and accosted the escort team punching two of them and taking away a baton.

[214] Finally, counsel submitted that Mr. Coke is seeking to build his case for contraventions of his rights under section 13 [3] [o] and 13 [6] of the New Charter and an alleged failure on the part of the State to properly respond and/or investigate alleged reports of threats on his life and torture. She concedes that section 13 [3] [o] is clearly suggestive of a positive obligation on behalf of the State to protect the right of

individuals not to be subject to torture or inhuman or degrading treatment. She denies, however, that Mr. Coke was ever so subjected. She also submitted that there is no evidence that there was any failure on the part of the State to discharge this obligation.

Is There Evidence to Substantiate Unsanitary and Inhuman Conditions?

[215] In deciding on the issue, I note that the video footage revealed that Mr. Coke and the others in SP11 occupied single cells with toilets built in. The cells opened onto a corridor. A fan was observed on that corridor. Some of the inmates were seen at various times throwing material and/or liquid unto the corridor. The soldiers interacted with the inmates in a most restrained manner. The living conditions cannot be compared to the circumstances revealed in **Fuller**. It also cannot be described without more as inhuman or degrading. The issue of sanitation is, however, crucial. Both parties admit it is a vexed issue. However, I cannot base my decision on this fact alone without considering the context surrounding the issue.

[216] The evidence of the soldiers in relation to the actions of the inmates in throwing faeces out onto the corridor is cogent and compelling having regard to actions seen on the video footage. This fact is also supported by Mr. Coke although he gives a different reason for the actions of the inmates. The evidence clearly revealed that the inmates possessed a certain aptitude for throwing material out onto the corridor indiscriminately. It would appear therefore that the blame for certain unsanitary conditions that may have existed from time to time is to be laid at the feet of the inmates. The actions of the inmates would have posed severe challenges in maintaining hygiene. I accept that the authorities have sought to deal with the issue as efficiently as the circumstances would allow.

[217] In relation to the issue of privileges associated with periods of recreation, I note that at the time of the incident of the 21st, Mr. Coke was returning from recreation in spite of the fact that he reported increased threats from the soldiers from January. This incident is the only one in which he has complained that he received injuries and if he were believed, there would be some basis to consider these acts as indicative of cruel

and inhuman treatment. I bear in mind also, that apart from Mr. Coke's testimony, there is nothing to support his evidence that he was threatened and abused by soldiers or that it was to the extent of intense physical and mental suffering on the dates alleged in January or previously.

[218] In relation to the issues of lighting and ventilation, I do accept that there would be limitations and challenges for security purposes. However, the footage does establish a view of fairly decent conditions which again, has been somewhat confirmed by Mr. Coke. I do not accept that there were deliberate actions taken by the staff to disturb Mr. Coke's sleep and to cause him stress, anguish and torment. The factual circumstances stated by Mr. Coke lack compellability, even on a balance of probabilities. The only remaining issue that could be said to be suggestive of inhuman or degrading treatment would be if he were subjected to being photographed while bathing. However, Mr. Coke's evidence on this point is affected by my assessment of unreliability in relation to other material issues. I have no valid reason to reject the evidence of the defendants in relation to the hand held cameras and the photographing of Mr. Coke in the showers.

[219] Having regard to all the circumstances above including the evidence of the defendants in relation to the issue of sleep, lighting, and food, I am not of the opinion that Mr. Coke has proved on a balance of probabilities that his right not to be subjected to inhuman or degrading treatment has been breached. He has also failed to prove that his right to be protected from torture and or cruel and inhuman or other degrading treatment has been breached.

[220] The medical certificates do not assist his case as the court has already formed the view that Mr. Coke failed to establish that the soldiers were unjustified in their use of force on the 21st of February. In relation to Dr. Iron's diagnosis of mild post traumatic stress disorder, it is not unreasonable to conclude that a person detained in such a facility for the purpose of facing a criminal trial could have a similar assessment. In other words, this court has not been assisted with any evidence that could suggest a contrary view, or that his diagnosis was unusual and out of the ordinary for someone in his position especially if he received punishments for refractions committed.

[221] As expressed by the court in **Ireland**, the proof as to whether there has been a violation of Article 3 may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un-rebutted presumptions of fact [paragraph 161]. Such inferences to be drawn from the evidence do not benefit the case for Mr. Coke but cast grave doubts on his credibility. The factual circumstances relied upon by him have been rebutted with compelling vigour by the defendants. I am unable therefore to grant the declarations requested.

Simmons, J.

[222] On the 23rd May 2010 a state of emergency was declared as part of an effort by the State to locate Christopher Coke who was to be extradited to the United States of America. During what became known as the Tivoli incursion it was alleged that the claimant and other men fired shots at the police in Tivoli Gardens. On the 1st June 2010 he turned himself in to the police and was taken into custody. He was detained at the Horizon Adult Correctional Centre (HARC) from August 5, 2010 until that matter was determined. During that time he was housed at Security Post SP 11 (SP 11).

[223] On the 21st February 2012 an incident occurred at HARC between the claimant and members of the Jamaica Defence Force (JDF) who were deployed at that facility. Mr. Coke was injured and as a result has filed this action in which he seeks the declarations listed at paragraph 38 of the judgment of Straw, J.

[224] The reliefs sought at paragraphs iii, iv and vii are largely dependent on the evidence that has been presented and therefore require an assessment of the credibility of the witnesses. The issues of whether the JDF soldiers were properly deployed at HARC and whether the claimant's right to instruct his Attorney-at-law was breached are issues of law.

Did the State breach the claimant's right to life?
Claimant's submissions

[225] Mr. Cameron submitted that Mr. Coke's right to life was contravened in the following ways:

- (i) By the alleged beating of the claimant by JDF soldiers on the 21st day of February 2012;
- (ii) By the failure of the authorities to investigate alleged threats made on his life on various dates including the 30th day of January 2012; and
- (iii) By the State's failure to protect the claimant having been advised of the threats that were allegedly made on his life.

[226] Counsel submitted that the right to life imposes the following duties on the State:-

- (i) An obligation not to take a life;
- (ii) An obligation to protect the lives of person in its care; and
- (iii) To undertake an independent, adequate and effective investigation of threats made to the lives of such persons.

[227] He argued that the right to life is the supreme right of a human being and is basic to all other human rights. Mr. Cameron stated that the State therefore had a duty to protect the claimant's life against unwarranted actions of public authorities. He stated that the right to life could be contravened even in circumstances where death did not occur. He relied on the European Court of Human Rights case of *Ilhan V. Turkey* (2002) 34 EHRR 36, in support of that submission. He also stated that the inclusion of the right to life in *the Charter of Fundamental Rights and Freedoms (the Charter)* is recognition of its importance by the State.

[228] Mr. Cameron submitted that the right to life as guaranteed by *the Charter* imposes a positive duty on the State to take preventative measures to protect an individual whose life is at risk, from the criminal acts of another individual. He relied on

the European Court of Human Rights case of **Osman v. The United Kingdom** 23452/94 [1998] ECHR 101 (28 October 1998) to support this submission.

[229] He stated that by way of letters dated the 30th January (addressed to a Judge) and the 1st February 2012 (addressed to the Minister of Justice), the State was made aware that the claimant's life was at risk. Counsel also indicated that by way of letter dated the 17th January 2012, the claimant through his Attorneys-at-law informed the Commissioner of the Independent Commission of Investigations (INDECOM) that he was ordered out of his cell on the 9th, 10th and 12th days of January 2012 between the hours of 12:00 a.m. and 3:00 a.m. by persons dressed in civilian clothing and that he was fearful for his life. He further stated that no preventative measures were taken to protect Mr. Coke's life and there has been no investigation of his complaints.

[230] Where persons in custody are concerned, reference was made to the case of **Renolde v. France** (S608/05) (2009) 48 EHRR 42 in which the European Court of Human Rights stated that persons in custody are in a "vulnerable position" and that the authorities are under a duty to protect them. Mr. Cameron submitted that the State can also be held to have contravened the right to life, of an inmate where the event in question is not considered lethal.

[231] It was also argued that the taking of or attempt to take a life by the State must be subject to investigation in order to determine if the use of force was justified and if so, whether it was reasonable in all of the circumstances. Reference was made to the case of **Keenan v. The United Kingdom** [2001] ECHR 242 (3 April 2001) where the court stated:-

"In the context of prisoners, the Court has already emphasised in previous cases that persons in custody are in a vulnerable position and that the authorities are under a duty to protect them. It is incumbent on the State to account for any injuries suffered in custody, which obligation is particularly stringent where that individual dies (see, for example, Salman v. Turkey [GC], no. 21986/93, § 99, ECHR 2000-VII). It may be noted that this need for

scrutiny is acknowledged in the domestic law of England and Wales, where inquests are automatically held concerning the deaths of persons in prison and where the domestic courts have imposed a duty of care on the prison authorities in respect of those in their custody”.

[232] Reference was also made to the case of **Michael Gayle v. Jamaica**, ICHR Report No. 92/05 dated October 24, 2005 to make the point that the State has a duty to provide an independent and impartial mechanism for the investigation of complaints that a citizen’s constitutional rights have been breached by the authorities. Mr. Cameron stated that Jamaica has three (3) independent bodies that have been established to provide for and enhance the promotion of human rights. These bodies are INDECOM, the Office of the Public Defender and the Inspection Unit within the Ministry of National Security.

[233] He stated that there has been no investigation of Mr. Coke’s complaints and as such the evidence of the defendants’ witnesses that there were no threats made on his life ought to be rejected.

Defendants’ submissions

[234] Counsel for the defendant submitted that there is no dispute that the claimant is entitled to the right to life under section 13(3) (a) of **the Charter**. She stated that the defendants are of the view that these rights were not contravened by the State while the claimant was an inmate at HARC.

[235] Miss Jarrett submitted that in order to ground liability under this section, the claimant must have been deprived of his life and that it was not done in the execution of a sentence of the court. She indicated that prior to the enactment of **the Charter**, this right was guaranteed by section 14 (1) of **the Constitution of Jamaica (the Constitution)** which stated that no one should be intentionally deprived of his life.

[236] It was further submitted that the right to life as provided by **the Charter** is substantively the same as that contained 14 (1) of the **Constitution**. She referred to the case of **Fuller v. Attorney General** (1998) 56 WIR 337 in which the Jamaican Court of

Appeal considered whether the State had breached that right. Miss Jarrett indicated that in that case, Harrison, JA stated that the right is not breached unless there has been a death. She argued that since there had been no death in the instant case, the claimant is not entitled to the relief sought.

[237] Where the issue of whether the authorities failed to take preventative measures to protect the life of the claimant is concerned, Counsel stated that those allegations are premised on the assumption that section 13 (3) (a) creates a positive right or an obligation on the State to protect an individual's rights under that section. She submitted that positive rights must be distinguished from negative rights which require some active conduct by the State in order to ground liability. Positive rights on the other hand give rise to an obligation on the part of the State to protect an individual's rights against infringement by a third party. Reference was made to the case of **YL (by her litigation friend the Official Solicitor) v. Birmingham City Council** [2007] UKHL 27 in support of that submission.

[238] Miss Jarrett also referred to Part I Section 7 of the Canadian **Constitution Act 1982** which she said, is similar to section 13 of **the Charter** and was the subject of analysis in the text **Constitutional Damages Worldwide** by Ken Cooper-Stephenson. The learned author at page 58 stated:-

“Art. 3 of the Universal Declaration states simply that: ‘Everyone has the right to life, liberty and security of person’. The phrase is reproduced verbatim in some constitutions, as in the Canadian Charter, although, following the example of the United States, it is often qualified in such a manner as to lead to an interpretation that it gives only a ‘negative right’ rather than imposing a positive obligation on the state to guarantee those protected interests. In the European Convention, the protection of life is given treatment separately from liberty and security. Furthermore the protection of life is stated to be a positive right to be ‘protected by law’ in Art. 2, with the exceptions concerning the negative ‘deprivation of life’ through judicial sentencing (in some situations) law and order”.

[239] Reference was also made to the Canadian case of **Gosselin v. Quebec (Attorney General)** 2002 SCC 84 in which the court examined the effect of section 7 of the **Canadian Constitution**. The court found that that section which speaks to the right not to be deprived of life, liberty and security did not place a positive obligation on the State to ensure that persons enjoyed those rights.

[240] Counsel also referred to the case of **Osman v. The United Kingdom** (supra) where the court stated at paragraph 115:-

“The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the L.C.B. v. the United Kingdom judgment of 9 June 1998, Reports of Judgments and Decisions 1998-III, p. 1403, § 36). It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual”.

[241] Miss Jarrett argued that in the present case there has been no incident of death and as such, no further analysis is required under this section of **the Charter**. It was further submitted that the claimant has not met the requirements to seek a declaration concerning his right to life.

Discussion

[242] Section 13 (2) of **the Constitution** guarantees the:-

“right to life, liberty and security of the person and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence of which that person has been convicted”.

[243] Article 2 of the **European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention)** which states:-

“1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

[244] Section 7 of the **Canadian Charter of Rights and Freedoms** which is drafted in similar terms as Article 2 of **the European Convention** states:-

“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”.

Section 1 which guarantees this right states as follows:-

“The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

[245] In order to determine whether the claimant's right to life under section 13 of **the Constitution** has been infringed, it must first be ascertained whether he has been deprived of that right. Once that threshold has been passed, it must be determined whether it was done in execution of the sentence of a court. In the Canadian case of **R v. Beare**, [1988] 2 S.C.R. 387, La Forest J. in his discussion of the methodology which should be employed stated where it is alleged that there was a breach of section 7 stated:-

"To trigger its operation there must first be a finding that there has been a deprivation of the right to 'life, liberty and security of the person' and, secondly, that the deprivation is contrary to the principles of fundamental justice".¹

[246] It seems therefore that in order for Mr. Coke to convince the court that he is entitled to the relief in paragraph (i), he would have to establish that the facts on which he relies are true and that they can be properly classified as a deprivation of his right to life under section 13 (2) of **the Charter**.

[247] The meaning and scope of section 7 was also explored in the case of **Gosselin v. Quebec (Attorney General)** (supra) which was referred to by counsel for the defendants. In that case, the court held that the above section created a negative right as against a positive one. Positive rights require that some action be taken by the State whilst negative action requires that it refrains from doing anything to interfere with the particular right. In **YL (by her litigation friend the Official Solicitor) v. Birmingham City Council** (supra), Baroness Hale stated:-

"There is, of course, a difference between the negative obligation of the state to refrain from violating an individual's rights and the positive obligation of the state to protect an individual from the violations of others..."²

¹ Page 401

² Paragraph 60

[248] The right to life has been stated by the Jamaican Court of Appeal to arise only in instances of death. In **Fuller v. Attorney General** (supra) Harrison JA said :-

*“The right is a new right given by the Constitution. **It is a right that arises because of death**; It did not exist before because of the rule in Baker v Bolton (1808) 1 Camp 493. However for this right to be contravened, the unlawful deprivation by the State must be done intentionally”.*³

[Emphasis mine]

[249] It should however be noted that the above case was decided before the enactment of **the Charter**. The old provision which was expressed in similar terms was contained in Section 13 (a) which stated:

“Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-

(i) Life, liberty, security of the person, the enjoyment of property and the protection of the law...”

[250] I agree with counsel for the defendants that both sections are substantively the same. It is therefore my view that the court’s interpretation of the right to life in **Fuller v. Attorney General** (supra) is still relevant and should be applied to the evidence in this matter. Counsel for the claimant has however directed the court’s attention to cases in which the view has been expressed that the right to life may be breached even where there has been no incident of death.

[251] Mr. Cameron has urged the court to consider whether the circumstances of the case take it outside of the view expressed in **Fuller v. Attorney General** (supra). In **Ilhan v. Turkey** (supra) which was referred to by Mr. Cameron, the European Court of

³ Page 319

Human Rights stated that in assessing whether an individual's right to life had been infringed, the court could treat with the matter under Article 2 where death did not occur. The court whilst acknowledging that Article 2 was primarily concerned with the deprivation of life was of the view that in exceptional circumstances physical ill treatment by State officials may disclose a breach of that Article. In its statement as to the ambit of Article 2 the court stated:-

*"Nonetheless, the degree and type of force used and the unequivocal intention or aim behind the use of force may, among other factors, be relevant in assessing whether in a particular case the State's agents' actions in inflicting injury short of death must be regarded as incompatible with the object and purpose of Article 2.....**In almost all cases where a person is assaulted or ill treated by the police or soldiers, their complaints will fall to be examined rather under Article 3 of the Convention**".*

[Emphasis mine]

[252] In that case the applicant's brother was apprehended by the gendarmes during an operation in the village of Aytepe. He was kicked and beaten with rifles. The evidence was that he was unable to walk and had to be carried by the applicant to the next village where they obtained a donkey. He was assisted by the applicant to stay in the saddle. They passed a hospital on the way to the police station. When they reached the police station, a Doctor without conducting an examination said that İlan was exaggerating his symptoms. The Doctor did not appear at the trial and the paramedic who had allegedly seen him did not recall being called to examine him. No medical records were produced to substantiate that İlan was treated.

[253] The applicant also stated that İlan lost control of his bowels and was unable to walk. He was taken to the hospital and admitted one day later. His injuries were said to be life threatening. He also suffered brain damage. The court in handing down its decision said;-

“...the Court is not persuaded in the circumstances of this case that the use of force applied by the gendarmes when they apprehended Abdüllatif İlhan was of such a nature or degree as to breach Article 2 of the Convention. Nor does any separate issue arise in this context concerning the alleged lack of prompt medical treatment for his injuries. It will, however, examine these aspects further under Article 3 of the Convention below.

78. It follows that there has been no violation of Article 2 of the Convention concerning the infliction of injuries on Abdüllatif İlhan”.

[Emphasis mine]

[254] Counsel for the clamant also referred to the case of ***Osman v. the United Kingdom*** (supra) the police had been notified on several occasions that the lives of the Osmans were at risk. The applicant and his father were subsequently shot and seriously injured by a civilian. The father succumbed to his injuries. In that case the court found that there was no breach of Article 2 by the State. The court stated that a State's obligation under the said Article *“...must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities”*.

[255] Reference was also made to ***Renolde v. France*** (supra) where the applicant who was known to have been suffering from a psychiatric disorder was placed in pre-trial detention in April 2000. He attempted suicide and was placed on medication. He was placed in a punishment cell for forty nine (49) days after he threatened a trainee warder and threw a stool in her face. The authorities did not monitor Mr. Renolde to ensure that he took his medication. He committed suicide on July 20, 2000.

[256] The European Court of Human Rights stated that persons who are in custody are in a vulnerable position and that the authorities have a duty to protect them. In that matter, the court held that the authorities breached their positive obligation to protect his life. The court also stated:-

“...the first sentence of Article 2 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take

appropriate steps to safeguard the lives of those within its jurisdiction. The Court's task is therefore to determine whether, given the circumstances of the case, the State did all that could have been required of it to prevent the applicant's brother's life from being avoidably put at risk (see, for example, L.C.B. v. the United Kingdom, 9 June 1998, § 36, Reports 1998-III)".

[257] Whilst it is clear, that the general rule is that there will be no breach of the right to life where there has been no incident of death, the authorities reveal that the court in matters of this nature have adopted a flexible approach. This is perhaps a recognition that whilst the treatment that has been complained of may not be fatal, its extreme nature and consequences may in some circumstances deserve consideration under this head. The learned author of the text ***Constitutional Damages Worldwide*** (supra) described the approach taken by the courts in this way:-

"The scope of the various international protections of life, liberty and security is dependent on varying interpretations in different jurisdictions and is in a constant state of development and fluidity".⁴

[258] The evidence of the claimant is that on the day in question he was beaten by members of the JDF until he felt his body "go limp as if on the verge of death". He said that the blows stopped when he played like he was dead. He said that they dragged him down the stairs to the medical station and left him in a pool of blood.

[259] Mr. Coke stated that the doctor on duty ordered that he be taken to the hospital immediately. He was then transported to the University Hospital of West Indies (UHWI) where he received stitches to his head.

[260] The claimant indicated that he was subsequently examined at the HARC by a medical practitioner of his own choice, Dr. J. Ford who prepared a medical certificate. It is alleged that Dr. Ford was prevented from seeing him on a later occasion.

⁴ Page 55

[261] The medical report of Dr. Michelle Royer-Powe who was assigned at HARC indicates that she saw the claimant at about 2:40 p.m. on the 21st February 2012. The report also states that at the time, the claimant was lying on the floor outside the medical office “...covered in blood with wounds that appeared to be actively bleeding on his head. He was conscious and vocal at the time. He was surrounded by several soldiers, and both parties were engaged in a loud verbal battle”. The Doctor also stated that she asked him to be calm and quiet so that she could conduct an examination and assess his injuries.

[262] Doctor Royer-Powe also stated in her report that Mr. Coke told her that he was beaten by soldiers but did not report any loss of consciousness. He was described as being “...oriented in time, place and person”. She also indicated that he obeyed all vocal commands but had to be assisted in moving as he was weak. He was then referred to the University Hospital of the West Indies.

[263] She listed the claimant’s injuries as follows:-

- (i) Head – 4cm laceration on the left side of his face, 6cm laceration over the Parietal and Temporal bones of the left side of his head;
- (ii) Left hemi thorax tender and swollen;
- (iii) 6 cm haematoma on the Left upper limb;
- (iv) Multiple small superficial abrasions on the anterior and posterior areas of his torso; and
- (v) Soft tissue swelling on the left knee.

The report also states that the claimant’s wounds were cleaned and sutured and that he was then referred to the University Hospital of the West Indies (UHWI) for a skull x-ray and consultation. This is in contrast to Mr. Coke’s evidence that he was rushed immediately to the UHWI. The Doctor’s report also differs from the claimant’s evidence that the JDF soldiers left him at the Medical Office on the day in question.

[264] Sergeant Patrick Robinson also gave evidence that the claimant was taken to the Medical post by members of the team including himself, who were detailed to take him

to Security Post 7 (SP 7) that day. He also stated that they waited until he was treated and then transported him to the UHWI.

[265] Lance Corporal Kevin Smith gave evidence that on the day in question at about 2:35 p.m. he was part of an escort team which was detailed to escort the claimant from the recreation area to Security Post 7 (SP 7). He stated that this was being done to facilitate the cleaning of SP 11 where the claimant was normally housed.

[266] The witness stated that the claimant refused to go to SP 7 and pushed past him in an effort to go to SP 11. He indicated that when the claimant attempted to mount the steps which led to SP 11 he grabbed his legs in an effort to prevent him from doing so. A struggle ensued, during which the witness was punched on his nose. Other officers including Sergeant Patrick Robinson tried to restrain the claimant. Lance Corporal Smith stated that during the incident the claimant relieved Private Kylan Parkes of his baton and punched Sergeant Robinson in the face.

[267] The Lance Corporal also stated in evidence that they had to use batons to restrain and subdue the claimant and that the force used was reasonable in the circumstances. He said that he noticed that the claimant was bleeding and he and other officers took him to the Medical Post for treatment.

[268] In cross examination he stated that the baton which he had in his possession was made of hard plastic. He also explained that when he stated in his affidavit that the officers were able to "control" the claimant he meant that they were able to hold him. He elaborated by saying that he held the claimant's legs and that Privates Parkes and Rowe also held onto him.

[269] He stated that the claimant took a baton from Private Parkes and punched Sergeant Patrick Robinson. He said that four officers were involved and that they had to use batons to try to control the claimant. He indicated that it was after they used their batons that the claimant was lifted. At that time the witness said that Mr. Coke was still cursing and behaving "really badly". He said that the claimant was bleeding and the officers lifted and carried him to the Medical Office. The witness maintained that the claimant punched him in the face and stated that he also had to seek medical attention.

[270] Sergeant Patrick Robinson gave evidence that he was part of the escort team on the day in question. He stated that he instructed the claimant to go to SP 7 and that he refused to do so. He said that the claimant became boisterous and tried to make his way up the stairs to SP 11.

[271] This witness also stated that the claimant punched Lance Corporal Smith in the face and relieved Private Parkes of his baton. He said that he too received a punch in his face courtesy of the claimant. He indicated that they had to use their batons to restrain and subdue the claimant and were able to retrieve Private Parkes' baton from him.

[272] Where the injuries sustained by the claimant are concerned, Mr. Cameron has urged the court to find that the injuries sustained by Mr. Coke were unprovoked and were an attempt on his life. The evidence of the defendants' witnesses is that they were attacked by the claimant and that he was injured in their attempt to subdue him. There is also evidence that two of the members of the Quick Response Force (QRF) were also injured during the incident.

[273] Whilst it is regrettable that anyone should sustain injury at the hands of officers of the State they pale in comparison to those suffered by the applicant's brother in the case of ***Ilhan v. Turkey*** (supra) which was cited by Mr. Cameron. Counsel has referred to his client's injuries as "life threatening" but this has not been borne out by the medical evidence which has been presented to this court. In ***Ilhan v. Turkey*** (supra) the treatment of the applicant's brother post injury was also quite callous. Mr. Coke, unlike Ilhan was taken for medical attention right after the incident and there is no medical evidence that he has suffered any permanent disability as a result.

[274] In this matter, the claimant's injuries did not result in death. In ***Ilhan v. Turkey*** (supra) the court was of the opinion that where a victim's injuries are so serious that they may be described as being just "short of death", the court could explore the circumstances in order to determine whether actions of the perpetrator were incompatible with the object and purpose of Article 2. However, based on the views expressed by the Court of Appeal in ***Fuller v. Attorney General*** (supra) there can be

no question of Mr. Coke's right to life being infringed. Even if that was not the case, the circumstances in which he was injured and the extent of those injuries has not met the very high threshold required to prove an infringement of that right.

[275] Mr. Cameron has also raised the issue of the failure of the authorities to investigate threats that were allegedly made on the claimant's life. He stated that this failure according to the cases could possibly be deemed to be a breach of Mr. Coke's right to life.

[276] The claimant has stated that through his Attorneys-at-Law, reports were made to INDECOM on the 17th January 2012 that on the 9th, 10th and 12th January men in civilian attire visited his cell between the hours of 12:00 a.m. and 3:00 a.m. It was also stated in that letter that the claimant was in fear of his life. To date, there is no evidence of any investigation being carried out in respect of that complaint. There is also no evidence of any response being made to those letters.

[277] Lieutenant Sean Prendergast has however indicated that he had spoken to the claimant on many occasions when he visited HARC and could not recall the claimant making such a complaint. He was also unaware of any threat being made on the claimant's life. Lieutenant Jevon Hudson also stated in his evidence that none of the officers comprising the Quick Response Force (QRF) or any other soldier threatened Mr. Coke. I have also noted that it was never suggested to Lance Corporal Smith or Sergeant Robinson that they had tried to kill the claimant on the 21st February 2012.

[278] In the cases of ***Osman v. The United Kingdom*** (supra) and ***Renolde v. France*** (supra) the court considered whether the State committed a breach of Article 2 of ***the European Convention*** by its failure to investigate threats to the lives of the victims. In essence, did its inaction amount to a failure to protect their lives? In ***Osman*** one of the victims succumbed to his injuries whilst the other survived. The court in its consideration of the matter did not make any distinction between the victims.

[279] In the Jamaican context, any alleged breach of the right to life as guaranteed in section 13 (2) of ***the Constitution*** may only be considered in circumstances where the victim has died. An alleged failure by the State to investigate threats to his life would not

be sufficient to constitute a breach of that right. It may however, be a factor which could be considered in the assessment of damages once liability has been determined.

[280] In the circumstances, I find that there has been no breach of the claimant's right to life.

Was the claimant subject to torture and /or cruel and inhumane treatment?

Claimant's submissions

[281] Mr. Cameron stated that the claimant's right not to be subjected to torture or inhumane treatment was breached on February 21, 2012 when he was beaten by JDF soldiers at HARC.

[282] It was submitted that the right of a person not to be subject to torture or inhumane treatment involves the right of an accused to be protected against physical abuse at the hands of the State.

[283] Counsel indicated that a definition of torture may be found in Article 1 of the ***United Nations Conventions against Torture (UNCAT)***. He submitted that in order to determine whether the acts complained of properly be described as torture, the following factors are relevant:-

- (i) The nature of the act
- (ii) The intention of the perpetrator
- (iii) The purpose of the act
- (iv) The involvement of public officials.

[284] It was submitted that where torture or ill-treatment is alleged to have taken place during the detention of an individual, the State is burdened with the responsibility of providing an explanation. The case of ***Dedovskiy and Others v. Russia*** (2008), Application 7178/03, was referred to support the submission that the actions of first and second respondents amounted to torture in this matter. Mr. Cameron argued that the alleged beating of the claimant was an aggravated form of cruel treatment.

[285] He stated that the actions of the JDF soldiers on the day in question were contrary to rules 90 and 91 of the ***Correctional Institution (Adult Correctional Centre) Rules, 1991***, which state:-

"90. No member of staff shall strike an inmate except in self-defence and in any case in which it shall be necessary to use force to an inmate. No more force than is necessary shall be used.

91. No member of staff shall inflict any punishment or privation of any kind upon any inmate unless ordered so to do by the Commissioner or the Superintendent".

[286] Where the conditions on SP 11 are concerned, Mr. Cameron directed the court's attention to the claimant's evidence that there was a bright light which focused directly into his cell twenty-four (24) hours per day. This light it was said resulted in his being unable to distinguish between night and day and prevented him from sleeping.

[287] It was further argued that this caused the claimant to be confused, stressed and tired. Counsel also argued that as a result of the light being used for nightly searches, the claimant suffered from physical exhaustion and severe headaches. Mr. Cameron also indicated that the claimant had complained of being deprived of his recreation time as a form of punishment and that there was insufficient water to bathe and use for other hygienic purposes.

[288] Mr. Cameron directed the court's attention to the claimant's evidence that he cannot remember basic things and finds it difficult to concentrate as a result of the conditions to which he was subjected on SP 11. He said that the claimant has also stated that he suffers from feelings of fear, anguish and low self-esteem.

[289] Counsel also argued that the claimant's right to privacy had been infringed by JDF soldiers who his client said used cameras to record the remandees while they showered. He stated that this activity was an aggravated and deliberate form of cruel, inhuman and degrading treatment.

[290] It was submitted that the claimant is physically, psychologically and emotionally traumatized as a result of the alleged threats made against his life. A report of Dr. Aggrey Irons was relied on by Mr. Cameron to support his submission. He stated that Dr. Irons found that the claimant was suffering from phobic avoidance of the police and military. Mr. Cameron submitted that the State has a duty to protect the dignity, physical and mental integrity of its citizens. Sections 13 (1)(a), 13(3)(o) and 13 (6) of **the Charter**, were relied on by Counsel in support of that submission.

[291] Mr. Cameron stated that inhuman treatment was defined by the court in **Ireland v. United Kingdom** (1978) 2 EHRR 25, as treatment which is capable of not only causing bodily injury but also, at the very least intense physical and mental suffering as well as acute psychiatric disturbances.

[292] He argued that the State has a positive duty under section 13 (1) of **the Charter** to encourage universal respect for and observance of human rights and freedoms. As such, Mr. Cameron submitted that all persons deprived of their liberty ought to be treated with humanity and respect for inherent dignity of the human person.

[293] Counsel relied on the case of **Fuller v. The Attorney General of Jamaica** (1998) 56 WIR 337, to support his submission that the deprivation of food, sleep and water amounted to inhuman treatment. He also argued that threats of violence may be considered to constitute inhuman treatment.

Defendants' submissions

[294] Miss Jarrett agreed that section 13 (6) of **the Charter** protects all persons from torture or inhuman or degrading punishment. She submitted that this provision is identical to that which existed under section 17(1) of the **Constitution** prior to its amendment and is drafted in almost identical terms as Article 3 of the **European Convention**, which reads :-

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[295] It was submitted that in determining whether or not there has been a breach of section 13 (6) of **the Charter**, the court should assess whether the conduct which is complained of should either be classified as torture or cruel or inhuman or degrading punishment. She argued that a distinction should be made between acts which amounts to "torture" and those which may be described as "inhuman or degrading punishment or treatment". Reference was made to the case of **Fuller v. Attorney General** (supra), where Harrison JA , adopted the definition of 'torture' of the European Court of Human Rights in **Republic of Ireland v. United Kingdom** (1978) 2EHRR 25. The learned Judge said:-

*"The European Court of Human Rights in **Republic of Ireland v United Kingdom** (1978) 2 EHRR 25 by a majority, made a distinction between 'torture 'on the one hand and Inhuman and degrading treatment' on the other. Torture, the court found, involved '...deliberate inhuman treatment causing very serious and cruel suffering ... of a particularly high level of intensity. The Court was considering certain techniques used by the United Kingdom Government on detained persons in Northern Ireland. Called the 'five techniques' it involved:*

- (a) "wall-standing" forcing the detainees to stand "spread - eagled" against a wall with arms outstretched overhead and fingers against the wall, standing on their toes for hours;*
- (b) hooding; putting a hood over detainees' heads during interrogation;*
- (c) subjecting the detainees to a continuous loud hissing noise before interrogation;*
- (d) depriving the detainees of sleep and;*
- (e) depriving the detainees of food and drink and giving them a reduced diet The court found that the techniques amounted to inhuman and degrading treatment'.*

The General Assembly of the United Nations by Resolution 3452 on 9 December 1975 in art5 declared: Torture constitutes an aggravated and

deliberate form of cruel and inhuman and degrading treatment or punishment. The European Court of Human Rights in the Ireland case, having referred to that resolution, held (at para 167):

'Although the five techniques, as applied in combination undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and for information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as understood'.

I humbly adopt the above reasoning".⁵

[296] Counsel relied on the case of **Gafgen v. Germany** (2010) 28 BHRC 463, where insight was given as to what conduct under the **European Convention on Human Rights** constitutes 'torture'. Paragraph 90 of the Judgment from the European Court of Human Rights states as follows:

"In determination whether a particular form of ill-treatment should be classified as torture, consideration must be given to the distinction embodied in article 3 between inhuman or degrading treatment... it appears that it was the intention that the convention should by means of such distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering ...in addition to the severity of the treatment, there is a purposive element to torture as recognized in the UN Convention against torture and other cruel and inhuman or degrading treatment which in article 1 defines torture in terms of the international infliction of severe pain or suffering with the aim inter alia of obtaining information, inflicting punishment or intimidating" .

⁵ Page 418

[297] She invited the Court to adopt both the reasoning of Harrison JA and the interpretation of torture as stated in **Gafgen v. Germany** (supra). Miss Jarrett stated that the defendant's deny the allegations made by the claimant and submitted that even if those allegations are true, the minimum level of severity required in order to prove torture has not been met. Miss Jarrett noted that no evidence was adduced which suggests that the alleged mistreatment was for the purpose of obtaining information, or as a form of punishment or intimidation.

[298] Miss Jarrett asked the Court to find that the claimant was not subjected to any form of torture, while he was a remandee at HARC.

[299] With respect to the issue of whether Mr. Coke was subjected to cruel or inhuman or degrading punishment, reference was made to the cases of **Attorney General of St Christopher and Nevis and Anguilla v. Reynolds** (1979) 43 WIR 108 and **Fuller v. Attorney General** (supra). She pointed out that in the latter case the court found that the conditions to which Agana Barrett and the other eighteen detainees were subjected constituted inhuman or degrading treatment. She indicated that in that case he and the other detainees were locked in a cell which measured eight (8) feet by seven (7) feet for several hours without food or water. The door of the cell was made of metal and there were only two holes for ventilation. Counsel also pointed out that the officers on duty were playing music so loudly that the detainees cries for help could not be heard.

[300] She indicated that the threshold which has to be met in order to establish a breach of Article 3 of the **European Convention** has been expressed in **Pretty v. UK** 2002 EHRR 1, as that which "attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering"⁶.

[301] It was submitted that the claimant has failed to adduce evidence to meet this threshold.

[302] Counsel indicated that the claimant's contention that the conditions which obtained on SP 11 and to which he was subjected amounted to cruel and inhuman

⁶ Paragraph 52

treatment has been refuted by the defendants. Miss Jarrett stated that the evidence of the defendants is that the claimant and the other remandees/inmates were provided with adequate food, water and sanitary facilities. It was submitted that any unsanitary conditions that existed on SP11 during the material time, were the direct consequences of the actions of the detainees themselves who threw garbage, water, urine and faeces on the corridors of the security post.

[303] She urged the court to accept the evidence of the defendants that the detainees were given one (1) hour outside each day for recreation. She also asked the court to accept their testimony that there were no cameras installed in the showers as claimed by the claimant. Counsel also urged the court to accept the defendants' evidence that the detainees were allowed to have reading materials and various electronic devices and were housed in separate cells with their own toilets. Miss Jarrett also asked the court to accept the defendants' evidence that there was a ventilation system on SP11 which allowed hot air to be expelled while the louvre blades and the windows on the front of the building facilitated the entry of air and light.

[304] Miss Jarrett argued that the evidence of the defendants show that there is no truth in the allegations of the claimant, that there were systematic beatings of the detainees on January 30th and 31st, 2012. She asked the court to reject the claimant's evidence that the detainees were verbally and physically abused and that he was beaten on the 21st February 2012 and spat upon by men in civilian clothes on January 9th, 10th, and 12th of 2012.

[305] Counsel submitted that in respect of the incident on February 21, 2012, the evidence of the defendants show that the claimant had refused to follow the instructions given to him by the JDF soldiers to go to SP 7 rather than SP 11 and that he accosted the escort team. She asked the court to accept the evidence of the defendants' witnesses that the claimant violently punched two of the soldiers and took away the baton of another. It was submitted that in the circumstances the actions of the JDF soldiers were lawful and were aimed at retaining control of the claimant.

[306] She also asked the court to reject the claimant's evidence that he was deprived of sleep and was denied medical treatment.

[307] Miss Jarrett submitted that in the circumstances, the claimant is not entitled to relief under section 13 (6) of **the Charter**.

Discussion

[308] Section 13 (6) of **the Charter** states that "*no person shall be subjected to torture or inhuman or degrading punishment or other treatment*". Section 13 (2) guarantees "*the right to protection from torture, or inhuman or degrading punishment or other treatment*"⁷ as provided in the above subsection. There is however no definition of what may constitute torture.

[309] Article 1 of the **United Nations Convention against Torture** defines torture as:-

"...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent or incidental to lawful sanctions."

[310] The case law in this area clearly demonstrates that just as with the law of negligence, the categories of what may amount to torture or cruel and inhuman punishment "*are never closed*"⁸. Each case falls to be determined on its own facts in accordance with the above principles. I consider the following statement of the learned Judge in **Donaghue v. Stevenson** to be equally applicable to cases such as this one:-

⁷ Section 13 (3) (o)

⁸ Per Lord Macmillan in *Donaghue v. Stevenson* [1932] AC 562 at 619

*“The grounds of action may be as various and manifold as human errancy and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion or judgment must adjust and adapt itself to the changing circumstances of life”.*⁹

[311] Article 3 of the **European Convention** states:-

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

In **Renolde v. France** (supra) the court stated that in order for a claim to fall within the ambit of Article 3 of the Convention the ill-treatment which is complained of must be of a minimum level of severity. That minimum level is however, dependent on the circumstances of each case. Some of the factors which may be considered are the duration of the treatment and its physical and mental effects. The court also stated that the authorities should try to *“ensure that the manner and method of execution of the measures imposed do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention; in addition, besides the health of prisoners, their well-being also has to be adequately secured, given the practical demands of imprisonment.”*

[312] In **Pretty v. The United Kingdom** Application no. 2346/02; 4 ECHR 2002 – III delivered on the 29th April 2002 the court said;

“As regards the types of “treatment” which fall within the scope of Article 3 of the Convention, the Court’s case-law refers to “ill-treatment” that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering (see Ireland v. the United Kingdom, cited above, p. 66, § 167; V. v. the United Kingdom [GC], no. 24888/94, § 71, ECHR 1999-IX). Where treatment humiliates or debases an individual, showing a

⁹ Page 619

lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3".¹⁰

[313] In ***Dedovskiy and others v. Russia*** European Court of Human Rights Application no. 7178/03 to which Mr. Cameron referred, the court stated:-

"71. Article 3, as the Court has observed on many occasions, enshrines one of the fundamental values of democratic society. Even in the most difficult of circumstances, such as the fight against terrorism or crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's behaviour (see Balogh v. Hungary, no. 47940/99, § 44, 20 July 2004, and Labita v. Italy [GC], no. 26772/95, § 119, ECHR 2000-IV).

72. The Court has consistently stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often involve such an element. In accordance with Article 3 of the Convention the State must ensure that a person is detained under conditions which are compatible with respect for his human dignity and that the manner and method of the execution of the measure do not subject him to distress or hardship exceeding the unavoidable level of suffering inherent in detention (see Kudła v. Poland [GC], no. 30210/96, §§ 92-94, ECHR 2000-XI).

73. In the context of detainees, the Court has emphasized that persons in custody are in a vulnerable position and that the authorities are under a duty to protect their physical well-being

¹⁰ Paragraph 52

(see *Tarariyeva v. Russia*, no. 4353/03, § 73, ECHR 2006-... (extracts); *Sarban v. Moldova*, no. 3456/05, § 77, 4 October 2005; and *Mouisel v. France*, no. 67263/01, § 40, ECHR 2002-IX). **In respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention** (see *Sheydayev v. Russia*, no. 65859/01, § 59, 7 December 2006, and *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, § 38)".

[Emphasis mine]

[314] In the above case the applicants were allegedly beaten and kicked by officers of a special purpose squad. Rubber truncheons were used in some instances. The Government in its defence had stated that they had been used lawfully and in response of the applicants' unruly conduct. Having found that there was no evidence that any of the applicants attacked the officers the court held that the authorities breached Article 3. It did however state as follows:-

*"81. The Court is mindful of the potential for violence that exists in penitentiary institutions and of the fact that disobedience by detainees may quickly degenerate into a riot which would require intervention of the security forces (see *Gömi and Others v. Turkey*, no. 35962/97, § 77, 21 December 2006). Nevertheless, as noted above, recourse to physical force which has not been made strictly necessary by the detainee's own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention...*

84. As to the seriousness of the acts of ill-treatment, the Court reiterates that in order to determine whether a particular form of ill-treatment should be qualified as torture, it must have regard to the distinction, embodied in Article 3, between this notion and that of

inhuman or degrading treatment. It appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering. The Court has previously had before it cases in which it has found that there has been treatment which could only be described as torture (see Aksoy v. Turkey, judgment of 18 December 1996, Reports 1996-VI, p. 2279, § 64; Aydın v. Turkey, judgment of 25 September 1997, Reports 1997-VI, pp. 1891-92, §§ 83-84 and 86; Selmouni v. France [GC], no. 25803/94, § 105, ECHR 1999-V; Dikme v. Turkey, no. 20869/92, §§ 94-96, ECHR 2000-VIII, and, in respect of Russia, Menesheva v. Russia, no. 59261/00, §§ 60-62, ECHR 2006-...; Mikheyev v. Russia, no. 77617/01, § 135, 26 January 2006).

85. As noted above, the use of rubber truncheons against the applicants was retaliatory in nature. It was not, and could not be, conducive to facilitating execution of the tasks the officers were set to achieve. **The gratuitous violence, to which the officers deliberately resorted, was intended to arouse in the applicants feelings of fear and humiliation and to break their physical or moral resistance. The purpose of that treatment was to debase the applicants and drive them into submission.** In addition, the truncheon blows must have caused them intense mental and physical suffering, even though they did not apparently result in any long-term damage to health. In these circumstances, the Court finds that the applicants were subjected to treatment which can be described as torture”.

[Emphasis mine]

[315] Mr. Coke's evidence is that on the 21st February 2012 when he was returning from recreation, twelve soldiers tried to kill him by beating him all over his body. He stated that they used black riot batons to hit him in his head and that this lasted for

about fifteen minutes. It was alleged that they said "bwoy nuh camera nuh deh bout yah" and "we a go kill you in ya today".

[316] He stated that during the incident he begged for his life and eventually felt his body "go limp as if on the verge of death". He said that the blows stopped when he pretended to be dead. The JDF soldiers are alleged to have dragged him down the stairs to the medical station and left him in a pool of blood. The Doctor on duty is said to have ordered that he be taken to the hospital immediately. He was taken to the UHWI where he received stitches to his head.

[317] He was subsequently examined by Dr. J. Ford at his request. It is alleged that Dr. Ford was prevented from seeing him on a subsequent occasion. He also stated that on his instructions his Attorneys-at-Law made a written request for Dr. Aggrey Irons to be permitted to see him and that the first respondent failed to respond to his request.

[318] He also stated that whilst in custody he began to experience severe headaches and had to be seen by three Doctors including a Psychiatrist and an eye specialist. He indicates that he was diagnosed with severe depression and that he was losing his vision in his left eye and required surgery.

[319] The claimant also stated that whilst housed at SP 11 at HARC he was guarded by JDF soldiers. He gave evidence that there were six other inmates on SP 11 all of whom had been convicted of murder and other serious crimes.

[320] He also complained of being in fear of his life on the 9th, 10th and 12th January 2012 when he said that he was ordered to leave his cell by persons dressed in civilian clothing and was verbally abused and spat on when he refused to do so.

[321] The claimant indicated that he brought this to the attention of his Attorney-at-Law who wrote to INDECOM requesting an investigation into the matter. That letter was copied to Lieutenant Colonel Patrick Cole of the JDF. His evidence is that there has been no response to that letter.

[322] It was also stated that on the 30th January 2012 JDF soldiers carried out a systematic beating of all the prisoners on SP 11 and that upon reaching his cell told him

that the only reason that they were not going to beat him was because he was going to court the next day. He said that he heard his fellow inmates screaming and crying for help. When challenged in cross examination and his attention directed to the footage for that day, which did not accord with his evidence, he said: *"It is not on the footage"*.

[323] His evidence is that a letter was written by the inmates to a Judge. He also gave evidence that other inmates were beaten by the soldiers on the following day and that as a result a letter was written to the Minister of Justice. The claimant also stated that he stopped eating because the soldiers had threatened to put poison in his food. He also complained that he was deprived of sleep as a result of the lights being left on twenty four hours per day.

[324] He also said that there were no windows and as such he did not know if it was day or night. He also said that there is only one vent which does not lead to the outside and as such he received no ventilation or natural lighting and that it was unbearably hot. This was denied by Lieutenant Hudson, who stated that there is a ventilation system that pulls hot air from the entire building as well as louvre blades or slotted windows on the entire front wall of the entrance to SP11. He also indicated that there were fans in the corridor which kept the SP cool.

[325] Mr. Coke also stated that he was subjected to the stench of excrement for up to a month as the JDF soldiers would sometimes deprive the inmates of water to flush their toilets. He also complained that at times the SP would be infested with maggots. He also alleged that he was deprived of a bath for up to one month as well as recreation time as a form of punishment. The claimant also gave evidence that he was filmed whilst bathing and as such was deprived of his right to privacy.

[326] In cross examination, the claimant stated that whilst he was at HARC he was the sole occupant of his cell which was fitted with a toilet and a face basin. He had drinking water and food and was allowed to read the newspaper if he so desired. He also said that he sometimes had access to the showers and collected water to flush the toilet in his cell. He disagreed with the suggestion by counsel that the only time when the

remandees were denied access to water was when they threw water onto the corridor. He also denied that this was done in an effort to disable the security cameras.

[327] The claimant also indicated that at times faeces were stored by the remandees and thrown on the corridor facing the cells. He said that this was done to get the attention of the authorities. He maintained that this was not an act of defiance and that it was sometimes not cleaned up for a period of approximately one month. He also maintained that he and others were sometimes not allowed to collect water to flush their toilets. Mr. Coke also maintained that at times there were maggot infestations on SP11.

[328] The claimant also stated that he was sometimes allowed to watch television and listen to the radio. He also gave evidence that although there were also electric fans in the corridor outside of his cell they were sometimes turned off. The front of his cell was grilled and he could see outside onto the corridor. He indicated that although there were louvre windows on the wall which faced his cell the ventilation was inadequate.

[329] The claimant also maintained that his right to privacy was infringed by the JDF soldiers who would carry hand held cameras into the showers whilst he and his fellow remandees were showering.

[330] He also indicated that although garbage containers were placed in the corridor outside of each cell, the remandees would at times, throw garbage onto the corridor.

[331] Mr. Coke gave evidence that he was entitled to one hour's recreation each day and would sometimes play football. He did however state that he and his fellow remandees were not always allowed time for recreation.

[332] In this matter the claimant has given evidence that he was threatened by JDF soldiers and was beaten on the 21st February 2012. He has also stated that threats were made to his life by JDF soldiers on other occasions.

[333] Where the conditions on SP 11 and the events of the 30th January 2012 are concerned, the evidence of Lieutenant Jevon Hudson is relevant. The witness stated that at about 1:45 a.m. he was conducting silent hour checks on SP 11 when inmate Oraine Baldie complained about the volume of the television set being turned down and

became verbally abusive. Lieutenant Hudson stated that Mr. Baldie then proceeded to throw water, food and garbage on the corridor of the SP.

[334] He indicated that silent hour checks are conducted between 12:00 a.m. and 3:00 a.m to ensure that inmates are not speaking on cell phones which had been smuggled into the SP.

[335] The witness indicated that at about 3:45 p.m. whilst in the Duty Officer's office he observed by way of a monitor that an inmate had climbed on his cell gate and spat water on the south corridor camera. He received certain information from another officer and as a result gave instructions for all excess water to be removed from the cells.

[336] The said inmate was instructed to exit his cell in order for the Quick Response Force (QRF) to remove all excess water there from. During that process the inmate attempted to reach for one of the containers, and was instructed not to do so. He also went back into his cell contrary to the witnesses' instructions. Lieutenant Hudson stated that when the inmate was instructed to exit his cell, he pushed one of the members of the QRF and was struck with a baton once on his arm. Lieutenant Hudson stated that at this point the other remandees on SP11 were throwing water bottles, faeces, urine, garbage and other items that they had in their cells at the cameras and onto the corridor.

[337] The witness indicates that members of the QRF then went to the claimant's cell. He was asked to exit the cell and at first refused to comply with the order. It was stated that he subsequently did so with little resistance. The excess water was then removed. They then went to the cell of Mr. Tesha Miller who also refused to exit his cell and was removed by members of the QRF. The witness indicated that Mr. Miller had to be restrained to the floor as he strenuously resisted being removed from the area. When the excess water was removed from his cell he was allowed to stand and at that time punched the surveillance camera housing which was situated in front of his cell. This resulted in it being damaged.

[338] The officer also gave evidence that remandee Kevin Tyndale threw faeces and urine from his cell onto the corridor. The Lieutenant's evidence is that when he went

back to the Duty Officer's office he observed on the monitor that remandee Michael Mc Lean had climbed onto the concrete shelves in his cell and had used a bottle to smash the front portion of the surveillance camera housing and had attempted to pull the camera from its mount.

[339] The witness also stated that later that evening the remandees were allowed to catch water in their buckets, for personal hygiene and were provided with a one (1) litre bottle of water for drinking.

[340] With respect to the allegation of the claimant that he was deprived of sleep due to the bright lights on SP 11, the witness indicated that a general roof light is kept switched on for security purposes.

[341] He also stated that there were light fixtures in each cell which were usually turned off between the hours of 10:00 pm and 6:00 a.m. He indicated that where the remandees wanted to sleep outside of those hours they would cover the light fixture with paper or cloth or request that they be turned off.

[342] With respect to the complaint that the JDF soldiers' patrol of the corridor on SP 11 was disruptive, the witness stated that this was necessary to ensure that the remandees did not have contraband in their cells and were not engaging in prohibited activities.

[343] Where the allegation that the authorities forced the remandees to live in their excrement up to one month is concerned, the witness indicated that they were allowed to fill their buckets with water and take it back to their cells to flush their toilet whenever they showered. He stated that the only time that faeces and urine accumulated in the cells was when the remandees themselves saved it and occasionally threw it onto the corridors or onto JDF soldiers in an effort to be disruptive.

[344] The Lieutenant also gave evidence that the garbage buckets which are placed outside each cell are emptied every day by the cleaning teams from the Tamarind Farm Prison. He said as an act of defiance the remandees regularly threw garbage outside their cells and onto the corridor.

[345] During cross examination, which was supplemented by the video footage for the 30th of January 2012, it was noted that between 3:45-3:48 pm an inmate was seen throwing something outside of his cell onto the corridor on three occasions. The inmate was also heard saying "me jus brush me teeth and spit pon it". The witness indicated that he had observed on the monitor when inmate McLean spat on the camera. It was observed that no one was screaming and crying for help as alleged by Mr. Coke.

[346] In response to questions concerning to the presence of cameras in the showers, the witness stated that there are no cameras present in the showers and hand held cameras are only to be used by the Duty Officer or on his instructions. He also stated that they were to be used to record equipment damage and any injury to an inmate where visual evidence was required.

[347] Lieutenant Sean Prendergast who was the Commissioner of Corrections also denied that the claimant was abused, tortured or oppressed by any authorized persons. The witness also stated that the conditions at HARC are typical of remand centres in Jamaica.

[348] Where the allegation of torture is concerned, the claimant is required to meet a very high threshold. His account of the incident of the 21st February 2012 would also have to be accepted as being true. His credibility and that of the defendants and their witnesses is clearly in issue.

[349] The claimant's account of that incident is that he was subject to an unprovoked severe beating at the hands of JDF soldiers. The defendants' witnesses have maintained that they used reasonable force to restrain the complainant who had disobeyed orders and assaulted them.

[350] Sergeant Patrick Robinson's evidence that he was hit in the face by the claimant is buttressed by the Injury Report prepared by Dr. Donna-Michelle Royer-Powe, which states that the left side of his face was swollen and tender.

[351] Lance Corporal Kevin Smith's who gave evidence that the claimant punched him on the nose also sought medical attention. The Injury Report states that he had a slight swelling over the nasal bone and that the area was tender.

[352] The claimant's evidence of the severity of his injuries and his condition after the incident are in sharp contrast with the report of Dr. Royer-Powe. His evidence that he was not treated at the Medical Post at HARC also differs from that indicated in the Medical Report.

[353] His evidence that he was not instructed to go to SP 7 that day also has to be considered against that given in cross examination that he had no reason to go there as that was not where he was housed.

[354] Based on the above, I do not find the claimant to be a credible witness. The defendants' witnesses have however convinced me that they are witnesses of truth. I reject the claimant's evidence that he was the victim of an unprovoked attack by JDF soldiers on the day in question. I accept the evidence of Lance Corporal Kevin Smith and Sergeant Patrick Robinson that Mr. Coke had refused to go to SP 7 as ordered on the 21st February, 2012 and assaulted both officers. I find that they used reasonable force to subdue the claimant and that he was not subjected to "*gratuitous violence*" at the hands of the JDF soldiers.

[355] I also reject Mr. Coke's evidence that inmates were forced to live in their excrement for periods up to one month. I accept the evidence of the defendants that it was the inmates themselves who stored their faeces and at times, threw those faeces, water and garbage on the corridor of SP 11.

[356] In considering whether the conditions pertaining to the lighting and the disturbance allegedly caused to the claimant by the soldiers patrolling the corridor, I bear in mind that as a correctional facility one of the main considerations of the authorities is security. Clearly one would not expect that all lights would be turned off at nights or that the security personnel would not conduct inspections at regular intervals.

[357] Where the issue of ventilation is concerned, I bear in mind the evidence of both parties that the cells on SP 11 faced a corridor which had fixed louvres. In light of the fact that front of the cells were comprised of metal bars, Mr. Coke's evidence that he did not know if it was night or day is untenable. I also accept the evidence of the defendants that fans were provided on SP 11.

[358] In the circumstances, it is my view that the claimant has failed to establish the conditions necessary to prove that he was either tortured or subjected to cruel or inhuman treatment.

Did the Chief of Staff of the Jamaica Defence Force have the authority to deploy members of the JDF to man HARC?

Claimants' submissions

[359] Mr. Cameron submitted that the presence of the JDF soldiers at HARC was unlawful as the second defendant had no authority to order their deployment in the absence of a directive from the Defence Board or the Prime Minister. It was also submitted that their appointment as authorized officers under the **Corrections Act** was ultra vires.

[360] Counsel stated that under the **American Convention on Human Rights** to which Jamaica is a signatory, members of the armed forces are prohibited from exercising direct custody of persons who have been deprived of their liberty. He stated that in March of 2008 the Inter-American Commission on Human Rights in recognition of this principle, included provision in the **Principles and Best Practices of Persons Deprived of Liberty on the Americas**. Particular reference was made to Principle XX, which states:-

"The personnel shall comprise suitable employees and officers, of both sexes, preferably with civil service and civilian status. As a general rule, members of the Police or Armed forces shall be prohibited from exercising direct custody of persons deprived of liberty, unless it is a police or military institution."

[361] Mr. Cameron submitted that the JDF was in full control of HARC and that there is no provision in the **Corrections Act** for this to be done without an order being issued by the Minister of National Security. He also submitted that such an order would be in breach of Principle XX and would be likely to contravene the Constitutional rights of citizens. He also stated that any such order should be contained in regulations and at a bare minimum be in writing.

[362] Counsel also referred to sections 5 and 9 of the **Defence Act** which deal with the functions of the JDF and the relationship between the Cabinet, the Prime Minister and the Chief of Staff. He submitted that the JDF soldiers could not have been lawfully deployed for duty at HARC unless it was done by either the Prime Minister or the Cabinet. He stated that up to the time of this hearing, no documentation had been produced which shows that either the Defence Board or the Prime Minister had issued such directions. He stated that although the Chief of Staff could properly deploy members of the JDF to assist the Commissioner of Corrections, they could not assume full control of HARC or any portion of it from the Commissioner of Corrections.

[363] Counsel stated that the letters which were sent by the Permanent Secretary in the Ministry of National Security are not on the same footing as an order of the Minister and as such the deployment of the JDF at HARC was unlawful. He stated that there was also no indication in that letter that the Permanent Secretary was acting on behalf of or with the consent or knowledge of the Prime Minister or the Cabinet. Mr. Cameron also submitted that in any event, section 5 of the **Corrections Act** does not give the Minister the power to deploy members of the JDF at a correctional facility.

[364] It was further submitted that in the event that the Court finds that the JDF soldiers were lawfully deployed at HARC, that mandate ceased when in correspondence dated the 30th March, 2004 the Chief of Staff stated:-

*"As of 30 March 2004 therefore, the Jamaica Defence Force reverted to being in assistance to the Department of Correctional Services where HARC is concerned. We do however retain **full***

control of the special detainees held at that institution and will continue to do so until further notice.”

[Emphasis mine]

[365] Mr. Cameron stated the Chief of Staff had no authority to retain full control of the special detainees including the claimant in the absence of a directive from either Cabinet or the Prime Minister.

[366] Counsel also examined the issue of whether the power conferred on the Cabinet and the Prime Minister could be delegated. He stated that where certain powers are conferred on a body or an individual, that power cannot be delegated unless such an intention may be reasonably inferred from the instrument from which that power is derived. He stated that section 9 of the **Defence Act** is clear and as such there is no basis to make any inference as to its intent.

[367] Counsel stated that in the instant case it was the Minister of National Security who by letter dated the 9th April 2002 who requested or directed the deployment of the JDF at HARC.

[368] He argued that the defendant has the burden of proving that the deployment of the JDF was lawfully conducted.

Defendants' submissions

[369] Miss Jarrett submitted the JDF soldiers were properly deployed for duties at HARC. She stated that sections 2 (a) and 15 (7) of the **Corrections Act** gave the first defendant the authority to designate any person as an “authorized person”. Such persons would then have all the powers and privileges of correctional officers where they are required to perform duties as escorts or guards at a correctional facility. Counsel stated that this she was done in March 2008 and again in February 2012.

[370] Counsel also stated that the deployment of the JDF at HARC fell within the ambit of operational use which is dealt with in Section 9 of the **Defence Act** and falls within the authority of the Chief of Staff.

[371] She stated that the Defence Board, established under Section 9 of the **Defence Act** is responsible for the command, discipline and administration of all matters concerning the JDF, while the Chief of Staff is responsible for all matters relating to its operational use. She argued that bearing in mind the reasons for the deployment of the JDF soldiers to HARC, its deployment fell within its statutory responsibilities.

[372] Counsel also submitted that based on the evidence of Lieutenant Colonel Prendergast, the JDF had operational and not full control of HARC.

[373] Miss Jarrett argued that the legality of the deployment of JDF soldiers at HARC is no longer a live issue as they are no longer there. She stated that the cases of **Tindall v. Wright** Times Law Reports, May 5, 1992 and in **Ainsbury v Millington** [1987] 1 All. E.R.929 are relevant to this issue.

[374] Reference was also made to the case of **Gouriet v. Union of Post Office Workers** [1977] 3 All E.R. 70 where Lord Diplock stated that the jurisdiction of the court is to declare subsisting or future legal rights and not to declare law generally.

Discussion

[375] Section 5 of the **Corrections Act** sets out the powers of the Commissioner of Corrections. It states:-

“Subject to the orders of the Minister, the Commissioner shall be responsible for the general administration of the correctional Services and may, as he thinks fit, issue orders (in this Act referred to as standing orders) consistent with the provisions of this Act and any instrument made thereunder, for the management and operation of correctional institutions and the direction of any person employed in the Correctional Services”.

[376] Sections 5 and 9 of the **Defence Act** state:-

“(5) The Jamaica Defence Force shall be charged with the defence of and maintenance of order in Jamaica and with such other duties as may from time to time be defined by the Defence Board.

(9) (1) There shall be a Jamaican Defence Board which shall, subject to the provisions of subsection (2), be responsible under the general authority of the Minister for the command, discipline and administration of, and all other matters relating to, the Jamaica Defence Force.

(2) The responsibility of the Defence Board shall not extend to the operational use of the Jamaica Defence Force, for which use responsibility shall be vested in the Chief of Staff subject to the overall direction of the Cabinet:

*Provided that the Prime Minister **may** give to the Chief of Staff such directions with respect to the operational use of the Jamaica Defence Force in Jamaica for the purpose of maintaining and securing public safety and public order, notwithstanding that the directions of the Cabinet have not been obtained, and the Chief of Staff shall comply with those directions or cause them to be complied with”.*

(3) Where any member of the Jamaica Defence Force is acting pursuant to directions referred to in the proviso to subsection (2), such member shall, while so acting, enjoy all such immunities, privileges and protection as are enjoyed by a member of the Jamaica Constabulary Force.”

[377] Lieutenant Colonel Prendergast, the Commissioner of Corrections gave evidence that by way of letter dated the 11th March 2008 the former Commissioner of Corrections, Major Richard Reece designated the JDF soldiers who were carrying out duties at HARC as authorized persons. The letter states, in part:-

"Further to discussions with Lt. Col. Sean Prendergast, Commanding officer, First Battalion Jamaica Defence Force, I wish to confirm the following 'designation' which shall continue to remain in force until rescinded.

'By virtue of the powers granted by Section 2 Sub-section (a) of the Corrections Act 1985; I hereby designate all Commissioned officers, Non-Commissioned Officers and Other Ranks of the Jamaica defence Force assigned duties at the Horizon Adult Remand/Adult Correctional Centre, as Authorized Persons as defined by the Act at Section 15 Sub-Section 7, with all the privileges and powers granted to Correctional Officer under this section'."

[378] Under the **Defence Act**, the Jamaica Defence Board is responsible for the command, discipline and administration of the JDF. Section 9 (2) however, makes it clear that those responsibilities do not extend to operational matters. Such matters are strictly within in the purview of the Chief of Defence Staff, subject to the direction of the Cabinet or the Prime Minister.

[379] Section 9 also makes provision for the Prime Minister to instruct the Chief of Staff in operational matters "... *for the purpose of maintaining and securing public safety and public order*". The use of the word "may" is in my view, instructive. The Legislature through the insertion of this proviso appears to have recognized that in certain situations it may be necessary for the Prime Minister as the Minister of Defence, to instruct the Chief of Staff in operational matters, without the input of the Cabinet.

[380] This provision does not however, limit the powers of the Chief of Staff nor does it stipulate that he must receive instructions from the Prime Minister or Cabinet in operational matters. Cabinet is charged with the responsibility of the general oversight of the operational use of the JDF. That function in my view, would be limited to issues of policy.

[381] By virtue of Section 5 of the Defence Act the JDF is "...charged with the defence of and maintenance of order in Jamaica and with such other duties as may from time to time be defined by the Defence Board". It is not disputed that the manning of a correctional facility does not fall within its usual responsibilities. It would therefore follow that any decision for its members to do so would be a matter of policy. Cabinet as the body charged with the general oversight of the operational use of the JDF would therefore have to make a decision to do so and instruct the Chief of Staff accordingly. All other operational matters incidental to the deployment of members of JDF at HARC would then be the direct responsibility of the Chief of Staff.

[382] Lieutenant Colonel Prendergast provided the background to the deployment of the JDF at HARC. His evidence was that there were a series of violent riots by inmates and remandees which raised concerns pertaining to security. It was conceded by counsel for the defendants that there were no orders in writing by the Minister for the JDF to be deployed there.

[383] Miss Jarrett did however submit that the issue of whether the JDF was properly deployed to HARC has now become one of academic interest. This was based on the fact that its members as well as the claimant are no longer at that facility.

[384] In **Tindall v. Wright** Times Law Reports, May 5, 1992 and in **Ainsbury v Millingen** [1987] 1 All. E.R.929 to which she referred, the court held that it would not consider matters which were purely academic in nature. In **Ainsbury v. Millington** (supra) the appellant and the respondent were granted a joint tenancy of a council house. The respondent was later sentenced to eighteen months youth custody. During that time the appellant married and her husband came to live with her at the premises. When the respondent was released the appellant and her husband removed. They later brought an action in which they sought an injunction for the respondent to vacate the premises. The application was dismissed and her appeal to the Court of Appeal suffered the same fate. In the interim, the local authority obtained an order for

possession and the respondent was no longer in occupation. On appeal to the House of Lords, it was stated:-

"In the instant case neither party can have any interest at all in the outcome of the appeal. Their joint tenancy of property which was the subject matter of the dispute no longer exists. Thus, even if the House thought that the judge and the Court of Appeal had been wrong to decline jurisdiction, there would be no order which could now be made to give effect to that view. It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them they do not pronounce on abstract questions of law where there is no dispute to be resolved".

[385] In **Gouriet v. Union of Post Office Workers** (supra) Lord Diplock stated the principle in the following terms:-

The only kinds of rights with which courts of justice are concerned are legal rights; and a court of civil jurisdiction is concerned with legal rights only when the aid of the court is invoked by one party claiming a right against another party to protect or enforce the right or to provide a remedy against that other party for infringement of it, or is invoked by either party to settle a dispute between them as to the existence or nature of the right claimed. So for the court to have jurisdiction to declare any legal right it must be one which is claimed by one of the parties as enforceable against an adverse party to the litigation, either as a subsisting right or as one which may come into existence in the future conditionally on the happening of an event.

The early controversies as to whether a party applying for declaratory relief must have a subsisting cause of action or a right to some other relief as well can now be forgotten. It is clearly established that he need not. Relief in the form of a declaration of right is generally superfluous for a plaintiff who has a subsisting

cause of action. It is when an infringement of the plaintiff's rights in the future is threatened or when, unaccompanied by threats, there is a dispute between parties as to what their respective rights will be if something happens in the future that the jurisdiction to make declarations of right can be most usefully invoked. But the jurisdiction of the court is not to declare the law generally or to give advisory opinions: it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else.¹¹

[386] In this matter, there is no question of any subsisting or future right of the claimant being infringed. I agree with counsel for the defendants that the matter is at this time one of academic interest. In accordance with the principles articulated in the above cases, it is my view that there is no basis for the court to exercise its discretion to make any declaration in respect of this issue.

Was the claimant's right to legal representation contravened by the 1st and 2nd Respondents?

[387] Mr. Cameron submitted that the claimant's right to legal representation was breached when his then Attorney-at-Law, Mrs. Valerie Neita-Robertson was prevented from seeing him on one occasion and by the third defendant's refusal to allow him to leave HARC with the underpants that the claimant was wearing on the 21st February 2012 during the incident.

[388] He submitted that the underpants formed part of Mr. Coke's instructions and were therefore privileged. Mr. Cameron also submitted that the Standard Minimum Rules for the Treatment of Prisoners¹², should be used by the Court to assist with the

¹¹ Page 100

¹² Adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders, held in Geneva 1955, and approved by the European and social council by its resolutions 663 (XXIV) of July 31, 1957 and 2076 (LXII) of 13 May 1977.

interpretation of the claimant's right to retain and instruct Counsel as guaranteed by **the Charter**.

[389] He said that those rules provide for an untried prisoner to apply for legal aid, and be allowed visits from his legal adviser. During these visits the prisoner, is permitted to hand his adviser confidential instructions.

[390] Mr. Cameron argued that in considering whether the claimant's constitutional rights were breached a balance ought to be struck between his rights and the security interests of the State. He referred to section 15 of the **Corrections Act** to further argue that the claimant's underpants could not be considered a 'prohibited article', in accordance with the provisions of the **Corrections Act**.

[391] Counsel submitted that it is a question of fact for this Court to determine if the underpants in question constitute contraband or an article likely to be prejudicial to the life or safety of any person.

[392] Mr. Cameron urged the court to find that in the circumstances, the claimant was denied the opportunity to fully instruct his Attorneys-at-law in preparation of claim.

Defendants' submissions

[393] Miss Jarrett agreed that the claimant by virtue of section 16 (6) (c) of **the Charter** has the right to defend himself through legal representation. She stated that the claimant was never denied this right. In this regard she referred to the claimant's evidence that whilst at HARC he was visited by his Attorneys-at-law including Mrs. Neita-Robertson.

[394] She also directed the court's attention to Lieutenant Colonel Prendergast's evidence that Attorneys-at-Law were permitted to visit on Mondays to Fridays within certain specified hours which were in keeping with the high security measures at HARC. Reference was also made to Lieutenant Colonel Prendergast's evidence that where an Attorney is denied access to HARC there was a protocol in place which directed them to contact the DCS Operations Room in order to resolve the matter.

[395] Where the refusal of the authorities to allow Counsel Mr. Cameron to leave HARC with the claimant's underpants is concerned, Miss Jarrett argued that the item could not form part of his instructions to counsel and the concept of legal professional privilege was inapplicable.

[396] In addition, Miss Jarrett emphasized that there are rules that govern visits of Attorneys-at-law to detainees at HARC.

Discussion

[397] The claimant has stated that his right to legal representation was breached in two ways. Firstly, he has indicated that on one occasion he was prevented from seeing his former Attorney-at-law, Mrs. Valerie Neita-Robertson. Secondly, when Mr. Cameron was not allowed to leave HARC with the underpants that Mr. Coke was wearing on the day of the incident.

[398] Section 16 (6) (c) of **the Charter** states:-

"Every person charged with a criminal offence shall-

(a)

(b)

(c) Be entitled to defend himself in person or through legal representation of his own choosing or, if he has not sufficient means to pay for legal representation, to be given such assistance as is required in the interests of justice".

This right is embodied in the right to due process as stated in Section 13 (3) (r) of **the Charter**.

[399] There is no dispute that on at least one occasion Mr. Coke's former Attorney, Mrs. Neita-Robertson was prevented from seeing her client.

[400] Lieutenant Colonel Prendergast has however stated that all remandees at HARC are allowed visits by their families, friends and Attorneys. The witness did however, indicate that rules were in place for the scheduling of such visits and that all visitors

were subject to being searched. Specific reference was made to Standing Order dated the 26th July 2004 which govern such visits. The witness also referred to correspondence dated the 25th May 2005 from Major Richard Reece, a former Commissioner of Corrections to Mr. George Soutar Q.C., President of the Advocate's Association in which the visiting hours for Attorneys-at-Law were outlined. Lieutenant Prendergast indicated that on the day in question Mrs. Neita-Robertson had difficulty with the requirement for her to produce identification and had not to his knowledge sought the assistance of the Operations Centre as recommended in the above letter.

[401] The letter which was sent to Mr. Soutar by Mrs. Neita-Robertson indicated that she had produced her driver's licence in an attempt to satisfy the requirements for entry but had been informed that she needed an Identification Card issued by the General Legal Council.

[402] There is also no dispute that Mr. Cameron was prevented from leaving HARC with the underpants given to him by the claimant. Mr. Coke in his evidence stated that he was wearing that item of clothing on the 21st February 2012 when he was beaten by JDF soldiers and described them as being "blood soaked".

[403] Mr. Cameron has argued that the claimant's underpants were part of his instructions and were therefore privileged.

[404] The doctrine of legal professional privilege was developed to protect communications between a client and his Attorney-at-law. However, that privilege may only be invoked where those communications are made for the purpose of obtaining legal advice¹³. Such communication may be verbal or written.

[403] This issue was discussed extensively by the Court of Appeal in the case of ***The Jamaican Bar Association v. The Attorney General and the Director of Public Prosecutions*** (unreported), Court of Appeal, Jamaica [2003] Supreme Court Civil Appeals nos. 96, 102 and 108 of 2003, judgment delivered 14 December 2007. In that case, Panton, JA in discussing the ambit of legal professional privilege, referred to the

¹³ *R. v Derby Magistrates' Court, Ex p B* [1996] 1 AC 487 at paragraph 69

Australian case of *The Daniels Corporation International Pty Ltd v. Australian Competition and Consumer Commission* [2002] HCA 49 in which the court stated:-

*"It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person **to resist the giving of information or the production of documents which would reveal communications** between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings".*

[Emphasis mine]

[404] In this matter, the claimant is asking the court to treat his underpants in the same way as communication between himself and his Attorney. The first point I wish to make, is that the inflicting of injury to the claimant by JDF soldiers is first and foremost a criminal matter which would be subject to an investigation. The underpants in that context would therefore in my view be properly classified as evidence. In addition, the doctrine of legal professional privilege is only applicable to communications.

[405] Lieutenant Colonel Prendergast also gave evidence that Mr. Cameron was prevented from leaving HARC with the underpants because he had not sought or obtained permission to do so.

[406] Where the difficulties experienced by his former Attorney-at-law are concerned it is settled that Mr. Coke should not be prevented from seeing his Attorney-at-Law. By way of letter dated the 2^{6th} April 2011 Mrs. Valerie Neita-Robertson wrote to the president of the Advocates Association in which she indicated that she had been prevented from seeing the claimant despite having presented identification.

[407] There are two letters in the agreed bundle which indicate that arrangements were made for Attorneys-at-Law to meet with their clients at HARC. The first of these is dated the 25th May 2005 from Major Richard Reece to Mr. George Soutar, regarding the hours for Saturday visits. The second letter is dated the 3rd August 2011 and is addressed to Mr. Earl Witter, Q.C., Public Defender. That letter referred to an agreement arrived at in

2005 concerning the visiting arrangements for Attorneys and their clients at HARC. The letter also speaks to the absence of sound proofed interview rooms.

[408] It is unclear as to how the issue with Mrs. Neita-Robertson was resolved as that evidence has not been presented to this court. There is also no evidence which suggests that the difficulty experienced by Mrs. Neita-Robertson was not an isolated one.

[409] Where the issue of the underpants is concerned, legal professional privilege is only applicable to communication or documents between an Attorney-at-law and his client. The item in question in my view cannot be classified as either based on the plain and ordinary meaning of those words.

[410] In the circumstances there has been no breach of the claimant's right to legal representation.

Order

The declarations and orders sought are refused.

No order as to costs.

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Hibbert, J.

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Straw, J

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Simmons, J.