

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV2018-00006**

**IN THE MATTER OF SECTIONS 4 AND 5  
OF THE CONSTITUTION OF TRINIDAD AND TOBAGO CHAP 1:01**

**AND**

**IN THE MATTER OF AN APPLICATION BY COLIN SIMMONS A CITIZEN OF THE REPUBLIC OF  
TRINIDAD AND TOBAGO FOR REDRESS UNDER SECTION 14 OF THE CONSTITUTION OF THE  
REPUBLIC OF TRINIDAD AND TOBAGO ALLEGING THAT CERTAIN PROVISIONS OF THE SAID  
CONSTITUTION HAVE BEEN CONTRAVENED IN RELATION TO HIM**

**BETWEEN**

**COLIN SIMMONS**

**Claimant**

**AND**

**THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO**

**Defendant**

**Before the Honourable Madame Justice Margaret Y Mohammed**

**Date of Delivery March 5, 2021**

**APPEARANCES**

**Mr. Farai Hove Masaisai instructed by Mr. Issa Jones of Messrs Hove & Associates  
Attorneys at law for the Claimant.**

**Ms. Keisha Prosper instructed by Ms. Laura Persad Attorneys at law for the Defendant.**

## JUDGMENT

### **INTRODUCTION**

1. A person who has been convicted and sentenced to prison in this jurisdiction is still guaranteed the right to equality before the law, protection of the law, equality of treatment from any public authority in the exercise of its functions and the right not to be deprived of his life, liberty, security of person and enjoyment of property without due process of the law. The State, its servants and or agents have a duty to ensure that the rule of law is observed, by ensuring that a convicted person is afforded the opportunity to appeal a decision against his conviction and or sentence within the statutory period. Unfortunately, the State, its servants and or agents failed to afford this opportunity to the Claimant. He was only able to appeal his conviction and sentence after he had served his sentence for 3 ½ years and upon appeal both his conviction and sentence were set aside. The consistent failure by various Prison Officers to facilitate the Claimant who always sought to appeal against his conviction and sentence and the delay in the Claimant obtaining Legal Aid to pursue his appeal have been the catalyst for the instant action.

### **THE FACTS/BACKGROUND**

2. The Claimant was found guilty on 25 June 2010 by Her Worship Magistrate Mc Kenzie for possession of a dangerous drug for the purpose of trafficking and attempting to export certain prohibited goods. He was sentenced to 5 years imprisonment. On the Claimant's way to Prison he was informed by a Police Officer that he had a right to appeal his conviction and sentence and that he could do so from Prison.
3. On 28 June 2010, while the Claimant was in the Tobago Prison, he expressed his dissatisfaction with his conviction and sentence and indicated his intention to appeal the decision to Prison Officer Campbell ("PO Campbell"). PO Campbell then informed the Claimant that he was being transferred to a Prison in Trinidad and he would receive the opportunity to appeal upon his arrival there. On 5 July 2010, the Claimant arrived at the Port -of-Spain Prison ("the Port of Spain Prison"). Prior to his arrival at the Port of Spain Prison, the Claimant had made repeated requests to the Prison Service to

make a phone call to his girlfriend, Ms Giselle George, to ascertain whether she was successful in retaining the services of an Attorney at law to represent him in his appeal but his requests were denied.

4. Upon the Claimant's arrival at the Port of Spain Prison, he asked the Prison Officer II whose name he was unaware of, to appeal his case. The Officer said to the Claimant: *"It is me alone working this section right now to document all of you Prisoners and I can't deal with you and your right to appeal now. Come in the morning and the officers in the office will give you the appeal."*
5. On 6 July 2010, while the Claimant was in the airing yard, he asked another Prison Officer to assist him in appealing his case. The said Prison Officer directed the Claimant to the reception area, where Prison Officer No. 1888 V Bitna ("PO Bitna") took the relevant information from him in order to process his appeal.
6. While recording the Claimant's information, PO Bitna asked the Claimant where his case was and he said *"Tobago"*. PO Bitna then asked the Claimant why he was speaking like that and he explained that *"he was born in Trinidad but lived most of his life in Barbados"*. Upon hearing this, PO Bitna instructed the Prison Officer who had been escorting the Claimant, to return him to the airing yard and informed the Claimant that he could not appeal since he was an *"outsider"*.
7. Shortly thereafter, the Claimant made several requests to Supervisors via the Prison Officers stationed in the airing yard, to obtain an audience with a Superintendent to address PO Bitna's conduct. However, none of the Claimant's requests were successful. The Claimant persistently made requests to see the Supervisors on every shift, but the Superintendents and the Prison Officers gave him different reasons which prevented him from seeing the Senior Prison Officers.
8. On or around 9 July 2010, the Claimant was transferred from the Port of Spain Prison to the Carrera Convict Prison ("the Carrera Prison"). At the Carrera Prison, the Claimant reported to Superintendent Ronald Morgan ("Superintendent Morgan") the

incidents in Tobago and at the Port of Spain Prison where he was deprived of his right to appeal. Superintendent Morgan asked the Supervisors in both prisons to conduct an investigation into the matter and to provide an explanation on the allegations made by the Claimant.

9. During the period 9 to 23 July 2010, Superintendent Morgan contacted the Claimant's girlfriend, Giselle George, and arranged for her to visit the Claimant. During this period, the Claimant was taken to the Port of Spain Prison where he met his girlfriend and enquired from her the status of retaining an Attorney at law to represent him in his appeal. The Claimant was informed by his girlfriend that she had retained the services of an Attorney at law in Tobago to assist him, but when she and the said Attorney at law visited the Prison in Tobago, he had already been transferred to the Port of Spain Prison.
10. The Claimant was then informed by Superintendent Morgan that the time for filing his Notice of Appeal had passed, and that he had to retain the services of an Attorney at law to pursue his appeal. Superintendent Morgan granted the Claimant permission to write a letter requesting legal aid assistance with respect to his matter.
11. The Claimant wrote letters to the authorities which he believed could provide guidance to him on his matter. However, the said letters were not dispatched in a timely manner, as on several occasions, the Prison Service did not provide him with copies of the appropriate forms to transcribe his letters. On many occasions, the Claimant would prepare a letter on a particular date and be unable to have it dispatched until several weeks later, as he had not received the appropriate form to transcribe his letter. In support of the instant action, the Claimant set out a detailed table of the correspondence that he had sent at paragraph 32 of the Claimant's Affidavit. According to the said table, the Claimant sent seven (7) letters to the Legal Aid and Advisory Authority ("The Legal Aid Authority") between 28 July 2010 and 7 November 2013; six (6) letters to the Ministry of Justice between 28 July 2010 and 13 December 2013; two (2) letters to the Office of the Attorney General on 5 November

2010 and 10 March 2011; and three (3) letters to the Office of the Ombudsman between 3 June 2013 and 15 October 2013.

12. The Claimant's prison sentence was completed on 31 October 2013. Upon his release, the Claimant visited the Legal Aid Authority to enquire about his request for Legal Aid and the reason he had not been sent an Acceptance Certificate while in prison. On the 4 November 2013, the Claimant received the Acceptance Certificate from an Attorney at law and on 7 November 2013, the Claimant received a letter from the Legal Aid Authority assigning two (2) Attorneys at law to represent him in his the matter, namely Mr Bindra Dolsingh as Advocate and Mr Chris Selochan as the Instructing Attorney.
13. The Claimant's Attorneys at law wrote to the Commissioner of Prisons on 12 March 2014, requesting certain information from their records, in order to prepare an application to the Court of Appeal to extend the time for the filing of the Notice of Appeal on the Claimant's behalf. The Commissioner of Prisons responded by letter dated 4 April 2014, seeking confirmation of the Claimant's representation before proceeding with the matter. The Claimant's Attorneys at law provided the requested information in writing to the Commissioner of Prisons on 10 April 2014.
14. On 18 June 2014, the Claimant's Attorneys at law received a letter from the Commissioner of Prisons attaching letters that had been written by the Claimant and forwarded by the Prison Service to various authorities. The Claimant subsequently received copies of the said letters from his Attorney at law and upon his perusal of same, he observed that the Commissioner of Prisons had only produced a small fraction of the letters which he had actually sent.
15. The Claimant's Attorneys at law received another letter dated 31 July 2014, from the Prison Service Office which indicated that another search had been conducted and that the copies of the letters submitted in its previous correspondence dated 18 June 2014, represented copies of all the letters existing on his file. The Claimant's Attorneys at law again wrote to the Prison Service by letter dated the 21 October 2014 but there was no response.

16. On the 15 April 2015, the Claimant's Attorneys at law filed an application for an Extension of Time to file his appeal against conviction and sentence. The Claimant's application was determined in his favour on 11 May 2015. Thereafter, the Claimant's Attorneys at law filed his Notice of Appeal within two (2) weeks as stipulated by the Court of Appeal. The said Appeal was heard by the Court of Appeal on 22 January 2016 when it was allowed and the conviction quashed.
17. Based on those facts, the Claimant seeks the following orders in the instant claim:
- i. A declaration that the failure of the Prison Service to allow the Claimant to file his Notice of Appeal within the statutory time limit is a breach of his rights as declared by sections 4(a) and (b) of the Constitution;
  - ii. A declaration that the failure by the State, its servants and/or agents to provide Legal Aid more specifically with an Attorney-at-law to assist him in applying for an extension of time for the filing of his Notice of Appeal was in breach of the Claimant's right under section 4(a), (b) and (d) of the Constitution;
  - iii. An order for monetary compensation to be paid to the Claimant including aggravated, vindicatory and exemplary damages for the failure of the Prison Service to deliver the Claimant's Notice of Appeal;
  - iv. An order for monetary compensation to be paid to the Claimant including aggravated and vindicatory damages for:- the distress and inconvenience the Claimant suffered during the period of unconstitutional detention; and loss of earnings;
  - v. Statutory interest;
  - vi. Costs;
  - vii. Any further or other relief as the Honourable Court deems fit in the circumstances.

#### **THE EVIDENCE**

18. To support his claim, the Claimant relied on his affidavit filed on 2 January 2018 ("the Claimant's Affidavit"), his supplemental affidavit filed on the 19 January 2018 and an

affidavit of Superintendent Morgan (“the Morgan Affidavit”) which was filed on the 26 October 2018.

19. The Defendant filed 3 affidavits namely from: PO Bitna<sup>1</sup>; Mr Richard Ragoobarsingh, the Secretary of the Legal Aid Authority<sup>2</sup> (“the Ragoobarsingh Affidavit”) and Dexter Hewitt<sup>3</sup>, Prison Officer I and one of the Legal Officers in the Trinidad and Tobago Prison Service (“the Hewitt Affidavit”).

### **THE ISSUES**

20. There was common ground that the following issues are to be determined:
- (a) Whether the failure by the Prison Service to allow the Claimant to file his Notice of Appeal within the statutory limit was a breach of the Claimant’s rights under section 4(a) and (b) of the Constitution;
  - (b) Whether there was a breach of the Claimant’s rights under section 4(a), (b) and (d) of the Constitution by the failure of the State, its servants and/ or agents to provide Legal Aid more specifically with an Attorney at law to assist him in applying for an extension of time to file his Notice of Appeal;
  - (c) If the Claimants succeeds in (a) and/or (b) what measure of damages is he entitled to for the breach of his constitutional rights.

### **WHETHER THE FAILURE BY THE PRISON SERVICE TO ALLOW THE CLAIMANT TO FILE HIS NOTICE OF APPEAL WITHIN THE STATUTORY LIMIT WAS A BREACH OF THE CLAIMANT’S RIGHTS UNDER SECTION 4(a) AND (b) OF THE CONSTITUTION**

21. Counsel for the Claimant submitted that the failure by the State to submit a prisoner’s Notice of Appeal within the prescribed statutory period is a breach of that prisoner’s constitutional rights, as Prison Officers are officers of the State; in the instant case the Prison Officers acted irresponsibly and recklessly in their public functions by failing to allow the Claimant to submit his Notice of Appeal in a timely manner; and more egregious, the Claimant was not even provided with the form for the Notice of Appeal despite his numerous requests for it. Counsel also submitted that the Claimant’s right

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<sup>1</sup> Filed 24 July 2018

<sup>2</sup> Filed 27 July 2018

<sup>3</sup> Filed 23 January 2019

to protection of the law was breached as he was not afforded the opportunity to ventilate his Appeal in a timely manner and this resulted in his liberty being restricted.

22. In support of these submissions, Counsel for the Claimant relied on the learning in **Quincy George v The Attorney General of Trinidad and Tobago**<sup>4</sup>; **Dereck Hamilton v The Commissioner of Prisons and Ors**<sup>5</sup>; **Jason Bissessar v The Attorney General of Trinidad and Tobago**<sup>6</sup>; **Kyle Nero v The Attorney General of Trinidad and Tobago**<sup>7</sup>; **Connolly v Governor of Wheatfield Prison**<sup>8</sup>; and **R v Secretary of State for the Home Department, ExParte Doody**<sup>9</sup>.
  
23. The Defendant's position was that the Claimant was not deprived of his statutory right of appeal or the opportunity of having his appeal heard and determined, as the delay of the Prison Service to file the Claimant's Notice of Appeal was cured when one of its members ensured that he was seen by a member of the Legal Aid Authority. As a result, an extension was sought for the filing of his Notice of Appeal after he was appointed an Attorney at law by the Legal Aid Authority. In support, the Defendant, relied on the learning in **Sam Maharaj v The Prime Minister of Trinidad and Tobago**<sup>10</sup>; **The Maya Leaders Alliance v The Attorney General of Belize**<sup>11</sup>; **Sheldon Anthony Gonzales v The Attorney General of Trinidad and Tobago**<sup>12</sup>; **Clinton Forbes v The Attorney General of Trinidad and Tobago**<sup>13</sup>; and **Hinds v The Attorney General of Barbados**<sup>14</sup>.
  
24. Section 4 (a) of the Constitution guarantees "the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law". Section 4 (b) of the Constitution enshrines the

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<sup>4</sup> CV 2011-03875

<sup>5</sup> HCA 950 of 2005

<sup>6</sup> CA P 136 of 2010

<sup>7</sup> CV 2017-02395

<sup>8</sup> [2013] IEHC 334

<sup>9</sup> [1994] 1 AC 531

<sup>10</sup> [2016] UKPC 37

<sup>11</sup> [2015] CCJ 15 (AJ)

<sup>12</sup> HCA 685/2004

<sup>13</sup> [2002] UKPC 21

<sup>14</sup> [2001] UKPC 56



fundamental right of the individual to equality before the law and the protection of the law.

25. In the local Court of Appeal judgment of **Jason Bissessar**, Bereaux JA adopted the approach of the Caribbean Court of Justice in **The Mayan Leaders Alliance**, which set out guidelines on the interpretation of the right to protection of the law. Bereaux JA stated at paragraphs 40 and 41 that:

“...Protection of the law” under section 4(b) is not confined to a citizen’s access to the courts. A far more expansive interpretation has been adopted by our courts. The dictum of the Caribbean Court of Justice in Attorney General of Barbados v Joseph and Boyce [2006] CCJ 3 (AJ) per de la Bastide P and Saunders J is relevant. At para 60 of their joint judgment they say: “... the right to the protection of the law is so broad and pervasive that it would be well nigh impossible to encapsulate in a section of a constitution all the ways in which it may be invoked or can be infringed.”

Further, in The Maya Leaders Alliance v Attorney General of Belize [2015] CCJ 15 at para 47 the CCJ stated: “The law is evidently in a state of evolution but we make the following observations. The right to protection of the law is a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property. It encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights.

However, the concept goes beyond such questions of access and includes the right of the citizen to be afforded, ‘adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power.’ The right to protection of the law may, in appropriate cases, require the relevant organs of the state to take positive action in order to secure and ensure the

enjoyment of basic constitutional rights. In appropriate cases, the action or failure of the state may result in a breach of the right to protection of the law. Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the citizen's rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy." (Emphasis added)

26. Section 130 of the **Summary Courts Act**<sup>15</sup> deals with the right of appeal against the decision of a Magistrate. It was amended by section 7 of Act No. 6 of 2004 which provided:

"7. The Act is amended by—

- (a) renumbering section 130A as section 130B; and
- (b) inserting after section 130 the following new section as section 130A:

130A. (1) Upon an application by an appellant for an extension of time to give notice of appeal under this Act, the Court of Appeal may extend the time prescribed to give the notice of appeal, on any terms and conditions as it considers just.

(2) The power granted under subsection (1) may be exercised by a single Judge of the Court of Appeal."

27. The effect of the aforesaid amendment was that it empowered the Court of Appeal to extend the time for filing of a Notice of Appeal in summary matters.
28. The Claimant's evidence was that on 28 June 2010, he had indicated his intention to appeal his conviction and sentence to PO Campbell in the Tobago Prison. PO Campbell then informed the Claimant that he was being transferred to a Prison in Trinidad and upon his arrival at that prison, he would receive an opportunity to appeal. On 5 July 2010, the Claimant arrived at the Port -of-Spain Prison and immediately asked the Prison Officer II whose name he was unaware of, to appeal his case. The Prison Officer

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<sup>15</sup> Chapter 4:20

He informed the Claimant: *"It is me alone working this section right now to document all of you Prisoners and I can't deal with you and your right to appeal now. Come in the morning and the officers in the office will give you the appeal."*

29. On 6 July 2010, the Claimant asked another Prison Officer who was in the airing yard to assist him in appealing his case. The said Prison Officer directed the Claimant to the reception area, where PO Bitna took the relevant information from him in order to process his appeal. While recording the Claimant's information, PO Bitna asked the Claimant where his case was and he said *"Tobago"*. PO Bitna then asked the Claimant why he was speaking like that and he explained that: *"he was born in Trinidad but lived most of his life in Barbados"*. Upon hearing this, PO Bitna instructed the Prison Officer who had been escorting the Claimant, to return him to the airing yard and informed the Claimant that he could not appeal since he was an *"outsider"*.
30. Shortly thereafter, the Claimant made several requests to obtain an audience with a Superintendent to address what PO Bitna had done. However, none of the Claimant's requests were successful. Despite this, the Claimant persistently made requests to see the Supervisors on every shift but the Superintendent and the Prison Officers gave him different reasons which prevented him from seeing the Senior Prison Officers.
31. On or around 9 July 2010, at the Carrera Prison, the Claimant reported to Superintendent Morgan the incidents in Tobago and at the Port of Spain Prison where he was deprived of his right to appeal. During the period 9 to 23 July 2010, Superintendent Morgan contacted the Claimant's girlfriend, Giselle George, and arranged for her to visit the Claimant at the Port of Spain Prison. The Claimant met his girlfriend and enquired from her the status of retaining an Attorney at law to represent him in his appeal. The Claimant's girlfriend informed him that she had retained the services of an Attorney at law in Tobago but when she and the said Attorney at law visited the Prison in Tobago, he had already been transferred to a Prison in Trinidad.
32. The Claimant was then informed by Superintendent Morgan that the time for filing his Notice of Appeal had passed; that he had to retain the services of an Attorney at law

to pursue his appeal and the Claimant was granted permission to write a letter requesting legal aid assistance with respect to his matter.

33. PO Bitna deposed that at the time of the Claimant's detention, he was attached at the Port of Spain Prison as a Prison Officer I and that his duties in July 2010 included transferring remanded and convicted prisoners to and from various prisons. He also deposed that he was not assigned to the reception office nor was he involved in processing inmates' requests to file appeals of their sentences and/or convictions. He stated that he did not recall the Claimant nor having any interactions with him on 6 July 2020 or at any time.
  
34. The Hewitt Affidavit set out the procedure which is used by the Prison Authority when a convicted inmate is received at a prison. PO Hewitt explained that upon arrival at a prison, the inmate is received and processed by a reception officer who confirms the particulars on the warrant of commitment. The inmate's record is reviewed and an interview is conducted with the inmate, where he is advised of his right to appeal, the period of time within which he can appeal and inquiries are made to ascertain whether he wishes to exercise that right. The inmate is then categorized based on any previous convictions he might have and a note is placed on his record. An additional interview is conducted on the day following the inmate's arrival, by the Superintendent of Prisons or another senior officer and during that interview he is again advised of his rights and the details of the interview are recorded in the inmate's record. Thereafter, all convicted inmates who were not received at Port of Spain are transferred to the Port of Spain Prison and placed before the Allocation Board, which determines the Prison that the inmate will be sent to serve his sentence. PO Hewitt denied that there was any policy or practice in place regarding an inmate being placed before the Allocation Board, before the period of time for appealing has expired.
  
35. PO Hewitt explained that in the event that an inmate wishes to appeal his conviction or sentence, the general procedure is that the inmate would first speak with the reception officer and the request would be relayed to the Prison's Supervisor. Thereafter, a request sheet is completed and the Superintendent would conduct an

interview with the inmate in relation to his requested appeal. Upon granting the request, four notice of appeal forms per warrant are completed by the reception officer and signed by both the inmate and the reception officer. The information is then recorded in the inmate's appeal log book and the relevant documents are checked by a Superintendent, stamped in the office of the Superintendent and sent to the court of origin and the Court of Appeal. A copy of the appeal form and the request sheet are kept on the inmate's record.

36. PO Hewitt further explained that in the event that an inmate is transferred to another prison, his record accompanies him and it is customary for the inmate to be interviewed again by the Superintendent of that prison. In this instance, the records of the Carrera Prison indicated that the inmate's record of the Claimant was transferred to the Golden Grove Prison on 8 March 2012. The Claimant was subsequently discharged from prison custody on 31 October 2013 and despite a diligent search of the records of the Trinidad and Tobago Prison Service, the inmate's record of the Claimant could not be located. As a result, there is no record or document which indicates that the Claimant had made a request for an appeal. Additionally, there is no record in the Prison Appeal Register in Port of Spain regarding any pending appeals for the Claimant.
37. Superintendent Morgan stated that the Claimant was a prisoner at the Carrera Prison, having been transferred from the Port of Spain Prison on 9 July 2010. He also stated that he interviewed the Claimant, as it was customary for the Superintendent in charge of a prison to interview the new inmates entering the prison and during the interview, the Claimant's penal record was reviewed and the Claimant was asked questions about his skills, in order to determine an appropriate area within the prison industry where those skills could be most useful.
38. Superintendent Morgan explained that during his interview with the Claimant, the latter informed him that he was missing some of his property and that he had made a request in Tobago to apply to appeal his conviction and sentence, but that request had been denied and he was instructed to wait until he arrived in Trinidad. Upon the

Claimant's arrival in Trinidad, he made another request to apply for his appeal at the Reception Area of the Port of Spain Prison but that request was also denied. Despite inquiries made on behalf of the Claimant, Superintendent Morgan was unable to obtain any information from the Tobago or Port of Spain Prison concerning the Claimant's requests to apply for his appeal. Superintendent Morgan stated that during the period 9 July 2010 to 23 July 2010, he had checked the time for the filing of the Claimant's appeal and realized that the time had already expired. The Claimant was then informed and advised to obtain the assistance of an Attorney at law.

39. The cases of **Clinton Forbes, Sheldon Gonzales, Dereck Hamilton** and **Quincy George** were matters where the respective Claimants were prisoners, who claimed that there was a breach of their constitutional right to the protection of the law, due to the failure of the Prison Service to file their respective notice of appeal.
  
40. In **Clinton Forbes**, the Appellant was convicted and sentenced at the Princes Town Magistrates' Court on 14 April 1987, to five years imprisonment with hard labour. The Appellant gave notice of his appeal, applied for bail on 15 April 1987 and was granted bail on 15 November 1988. The appeal came on for hearing on 24 March 1997. Although the Magistrate had not given any reasons for the decision, the Court of Appeal examined the record and found that there was sufficient evidence upon which the Appellant could properly have been convicted. The Court of Appeal dismissed the appeal but varied the Appellant's sentence to 18 months' imprisonment with hard labour, commencing from the date on which it gave its decision. The Appellant obtained special leave to appeal the judgment of the Court of Appeal.
  
41. While awaiting the outcome of his appeal, the Appellant issued a constitutional motion in October 1997 for a declaration that the failure or refusal of the Magistrate to give reasons deprived him of his constitutional rights to (i) due process; (ii) the protection of the law; (iii) a fair hearing; and (iv) the procedural provisions necessary for giving effect to such rights. The Appellant also sought an award for monetary compensation. On 23 March 1998, the Appellant issued another constitutional motion, wherein he sought a declaration that the Court of Appeal's erroneous

approach to the consequences of the Magistrate's failure to give reasons had contravened his constitutional rights (i) not to be deprived of his liberty except by due process and (ii) to the protection of the law, and for an award of monetary compensation.

42. The two constitutional motions were dismissed by the domestic courts, on the basis that the Magistrate's failure to give reasons and the approach adopted by the Court of Appeal to the question of whether the Magistrate's failing invalidated the conviction, were errors of law which had been remedied on appeal and could not form a continuing basis for constitutional relief. The Appellant appealed to the Privy Council.
  
43. The Board dismissed the appeal and found that the Appellant's constitutional rights had not been infringed. In addressing the issue of whether a person who has served a term of imprisonment before his conviction is quashed on appeal, has been deprived of his constitutional right to due process and the protection of the law, the Board relied on its previous decisions in: **Maharaj v A-G of Trinidad and Tobago (No 2) [1978] 2 All ER 670; Chokolingo v A-G of Trinidad and Tobago [1981] 1 All ER 244; Boodram v A-G [1996] 2 LRC 196; Hinds v A-G [2002] 4 LRC 287**. It stated that a resort to constitutional redress would only be considered appropriate in rare cases where there has been a fundamental subversion of the rule of law. The constitutional right to due process and the protection of the law does not guarantee that the judicial process will be free from error and where an error has occurred, the affected party is entitled to engage the appellate process and seek redress. In that case, the Appellant was deprived of his liberty after a fair and proper trial before the Magistrate that is to say by due process of law. The Appellant was able to challenge his conviction by way of appeal to the Court of Appeal and when the Court of Appeal wrongly failed to quash his conviction, by way of further appeal to the Privy Council. The appeals were conducted fairly and without procedural error, let alone any subversion of the judicial process. The Appellant thus enjoyed the full protection of the law and its internal mechanisms for correcting errors in the judicial process.

44. In **Sheldon Anthony Gonzales** the Applicant was convicted and sentenced to four (4) years imprisonment with hard labour on 11 September 2000 by the Magistrate presiding in the Tunapuna Magistrates' Court. The Applicant was taken to the Golden Grove State Prison on the said 11 September 2000 and sometime between then and 13 September 2000, he signed a notice of appeal which he returned to a prison officer. However, that notice of appeal was not forwarded to the Tunapuna Magistrates' Court until 27 September 2000, which was after the prescribed time for its filing. Nevertheless, the Applicant was treated as having a valid appeal pending and his conviction was stayed. The Applicant remained in custody following his conviction and sentence, for approximately one (1) month before he was granted bail pending the outcome of his appeal. At the hearing of the Applicant's appeal, the Court of Appeal declared that the appeal had been filed out of time but adjourned the appeal to a date to be fixed. The Applicant remained on bail between 5 December 2003 when his "invalid" appeal was adjourned and 7 July 2005 when his "validated" appeal was finally determined. On 7 July 2005 the Court of Appeal allowed the appeal and the matter was remitted to be heard by another Magistrate.
45. The Applicant instituted constitutional proceedings, wherein he claimed that his right to due process and protection of the law had been infringed by the Prison Service's failure to file his notice of appeal, before the expiration of the prescribed time for lodging an appeal.
46. The Court refused the reliefs sought by the Claimant on the basis that prior to the Applicant's constitutional application being filed, the Legislature had passed Act No. 6 of 2004 which amended section 130 of the Summary Courts Act. The effect of the said amendment was that it relaxed the provisions for applications that sought an extension of time to file an appeal against a conviction and/or sentence; section 10 of Act No 6 of 2004 validated the Applicant's notice of appeal and procedural provisions had been introduced which restored his right to protection of the law.
47. In **Dereck Hamilton** the Applicant, was convicted and sentenced to seven (7) years imprisonment on 11 December 1997. On the said day the Applicant completed a



notice of appeal form and returned it to one of the prison officers. However, the notice of appeal was not forwarded to the Court until 6 January 1998, which was outside of the prescribed time for the filing of a notice of appeal. In his constitutional motion, the Applicant submitted that the failure of the Commissioner of Prisons to deliver his notice of appeal in time, denied him of his right to appeal and as result his constitutional right not to be deprived of his liberty except by due process of the law had been contravened and he was entitled to compensation.

48. The Court held that the Applicant's right to liberty, to security of the person and the right not to be deprived thereof except by due process, had been contravened by the failure of the Prison Service to file the Applicant's notice of appeal with the Clerk of the Peace in time. The Court found that the concept of due process included the right of appeal and the failure of the prison authority to deliver the notices of appeal to the Clerk of the Peace in time, had resulted in the dismissal of the applicant's appeal without recourse to the merits of the appeal. The Prison Service, through its actions, had breached the applicant's right not to be deprived of his liberty except by due process of the law and he was entitled to damages.
  
49. **Quincy George** was a more recent case where the Claimant was convicted and sentenced in the High Court on 28 July 2006, to 5 years and 6 months' imprisonment to run consecutively. After being sentenced, the Claimant immediately completed a notice of appeal form and returned it to one of the prison officers at the Port of Spain prison. However, the Claimant's notice of appeal was never forwarded to the Court and as a result he was denied his right to appeal. No explanation or reason was given for failing to forward the Claimant's notice of appeal. The Claimant was placed in the remand section of the Golden Grove prison and was treated as an appellant/ prisoner awaiting appeal (within the meaning of the Prison Rules) until his release. Having no valid appeal, the Claimant was in fact a convicted prisoner incarcerated under a convicted warrant of commitment. If the Claimant had been treated as serving his sentence of imprisonment, he would have qualified for the earliest possible date of release and ought to have been released on 26 February 2010. The Claimant was not

released until 12 October 2011, after instituting a Writ of Habeas Corpus on 10 October 2011.

50. On the said 10 October 2011, the Claimant had also brought a constitutional motion where he claimed that the Prison Service's failure to deliver the notice of appeal to the Court of Appeal, had caused him to be deprived of his statutory and constitutionally guaranteed right of appeal, which by extension deprived him of his liberty without due process of law and his right to the protection of the law.
51. The Court held that the Claimant's rights under sections 4(a), (b) and 5(2)(h) of the Constitution, had been contravened by the failure of the Prison Service to deliver the Claimant's notice of appeal to the Court of Appeal. It also held that the Claimant's continued detention between 28 July 2006 as a remanded Applicant until his release on 12 October 2011, breached his rights under section 4(a) and 5(2)(h) of the Constitution. The Court found that there was no statutory duty that required the Prison Service to deliver notices of appeals on behalf of the convicted persons who are in their custody. However, a public law duty does arise where the prison service (through one of its agents/officers) voluntarily assumed that responsibility and undertook to do so.
52. **Quincy George** followed the other decisions of the High Court (**Christopher Lezama v AG<sup>16</sup>**; **Perry Matthew v AG<sup>17</sup>**; **Winston Gittens v AG<sup>18</sup>**; **Aaron Karim v AG<sup>19</sup>**; **Neil Ambrose v AG<sup>20</sup>** and **Bryan Lynch v AG<sup>21</sup>**) which found that the failure of the Prison Service to deliver an incarcerated prisoner's notice of appeal within the prescribed time limit amounted to a breach of the prisoner's constitutional rights.

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<sup>16</sup> HCA 2098 of 2002

<sup>17</sup> HCA 3342 of 2004

<sup>18</sup> HCA 518 of 2005

<sup>19</sup> HCA 1348 of 2004

<sup>20</sup> HCA S 1667 of 2004

<sup>21</sup> CV 2008-01595

53. Although Counsel for the Defendant relied on the learning in **Sheldon Anthony Gonzales** to support the contention that the Claimant was not denied due process and the protection of the law, I am not persuaded. In my opinion, the instant case is distinguishable from the cases of **Clinton Forbes, Sheldon Anthony Gonzales, Dereck Hamilton** and **Quincy George** where the Notices of Appeal were signed by the convicted persons and either delivered outside the prescribed statutory period or none at all. In the instant case, the Claimant was never even given the opportunity to sign a notice of appeal to be delivered while he was incarcerated.
54. In my opinion, the concept of due process includes the right of appeal and by extension being afforded the opportunity to file a notice of appeal within the statutory period. This right also places a duty on the agents of the State, in the instant case, the Prison Service to ensure that there are adequate procedures which prevent the arbitrary deprivation of this right by the actions of Prison Officers who are also agents of the State, as the persons who are incarcerated are in a condition of dependence.
55. According to the Hewitt Affidavit there is an established procedure to be followed in the Prison Service for the timely filing of a Notice of Appeal. In my opinion, this established procedure demonstrates that the Prison Service has recognised that it has a duty to make appropriate arrangements to give convicted prisoners the opportunity to file their notice of appeal within the prescribed statutory period. Despite this established procedure, there was no evidence from the Prison Service which disputed the Claimant's evidence that on several occasions during the period 28 June 2010 to 6 July 2010, he had informed various Prison Officers that he wanted to lodge an appeal against his conviction and sentence and he was not provided the opportunity to do so before the statutory period expired.<sup>22</sup> PO Bitna's evidence was of little assistance as he was unable to recall the incident the Claimant referred to in the Claimant's Affidavit. Therefore, the undisputed evidence was that despite repeated request during the period 28 June 2010 to 6 July 2010, the Prison Officers, the servants and or agents of the State, were either careless or reckless in failing to facilitate the Claimant

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<sup>22</sup> Paragraphs 22 to 25 of the Claimant's Affidavit

in filing his Notice of Appeal. The statutory time limit for filing the Claimant's Notice of Appeal was still valid during the period 28 June 2010 to 6 July 2010 and only expired on 10 July 2010.

56. Further, Superintendent Morgan's actions, did not as Counsel for the Defendant submitted cure the alleged breach by the other prison officers, as there was no evidence that Superintendent Morgan on the 9 July 2010 (which was still within the prescribed statutory period to file an appeal) had made any arrangements for the Claimant's Notice of Appeal to be filed.
57. In my opinion, the failure by the Prison Service to take positive steps to ensure that there were adequate safeguards to prevent the arbitrary exercise of power by the Prison Officers, resulted in the Claimant being deprived of the opportunity to file his Notice of Appeal within the prescribed statutory period. As a consequence of the Prison Service's failure, the Claimant's right to protection of the law was breached by the careless and reckless actions of the Prison Officers and he was deprived of his liberty without due process.

**WHETHER THERE WAS A BREACH OF THE CLAIMANT'S RIGHTS UNDER SECTION 4(a), (b) AND (d) OF THE CONSTITUTION BY THE FAILURE OF THE STATE, ITS SERVANTS AND/ OR AGENTS TO PROVIDE LEGAL AID MORE SPECIFICALLY WITH AN ATTORNEY AT LAW TO ASSIST HIM IN APPLYING FOR AN EXTENSION OF TIME TO FILE HIS NOTICE OF APPEAL**

58. Counsel for the Claimant argued that the inexcusable delay by the servants and/or agents of the State to provide the Claimant with Legal Aid and more specifically with an Attorney-at-law to assist him in applying for an extension of time for the filing of his Notice of Appeal, amounted to a breach of the Claimant's rights under sections 4(a), (b) and (d) of the Constitution. In support of these assertions, the Claimant relied on the learning in **Hunte and Khan (Appellants) v The State (Respondent) (Trinidad**

**and Tobago)<sup>23</sup>; Connolly v Governor of Wheatfield Prison<sup>24</sup>; Wrenwick Theophilus v The Attorney General of Trinidad and Tobago<sup>25</sup>; Jamaicans for Justice v The Police Service Commission & Anor<sup>26</sup>; Hardeo Sinanan v Her Worship Senior Magistrate Mrs Marcia Ayers-Caesar<sup>27</sup>.**

59. The Defendant's position was that the Claimant had been provided with an Attorney at Law by the Legal Aid Authority before his sentence ended, as his Acceptance Certificate Form from the Legal Aid Authority was confirmed on 15 February 2013 (whilst his prison sentence ended on 31 October 2013) and he was provided an opportunity to extend the time to file his Notice of Appeal.
60. Counsel also submitted that according to paragraph 18 of the Ragoobarsingh's Affidavit it usually takes 18 to 24 months for a criminal appeal to be listed and heard. Counsel argued that although there was a delay in the signing of the Acceptance Certificate Form, the Claimant still had to wait until 2013 for the listing and hearing of his matter by the Court of Appeal. Therefore, the delay in obtaining the signing of the Acceptance Certificate Form and obtaining the services of a legal aid Attorney at law did not result in a breach of the Claimant's rights under 4(a),(b) or (d) of the Constitution, since the Claimant's matter would have been heard at or about the same time he was released on 31 October 2013.
61. Section 4 (d) of the Constitution guarantees "the right of the individual to equality of treatment from any public authority in the exercise of any functions".
62. The Claimant deposed that while he was in prison he wrote several letters to a number of institutions seeking assistance in order to pursue his appeal. He also stated at paragraph 31 of the Claimant's Affidavit that:

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<sup>23</sup> [2015] UKPC 33

<sup>24</sup> [2013] IEHC 334

<sup>25</sup> CV 2009-01683

<sup>26</sup> [2019] UKPC 12

<sup>27</sup> HCA No. S-1179 of 2004; Civil Appeal No. 137 of 2006

“...in addition, many prison officers had a very hostile attitude towards the few inmates like me who wrote letters of complaint and as such they were not cooperative in getting the letters sent out. I am therefore not in a position to say for sure when the letters that I wrote were actually sent out. In addition, prior to sending out any letter I had to indicate to the superintendent who I was writing, for what purpose I was writing and then obtain permission to do so.”

63. Paragraph 36 of the Claimant’s Affidavit deposed that:

“On 12<sup>th</sup> March, 2014 my Attorney at Law Mr Chris D. Selochan wrote to the Commissioner of Prisons requesting certain information from their records to with a view to preparing an application to the Court of Appeal to extend the time for the filing of the Notice of Appeal on my behalf.”

64. The Ragoobarsingh Affidavit stated that Mr Ragoobarsingh is an Attorney at law and has been the Secretary to the Legal Aid Authority since November 2017. Prior to that date he was the Assistant Secretary to the Legal Aid Authority from June 2014 and he was a Legal Officer from September 1991. Mr Ragoobarsingh explained that the role of the Legal Aid Authority is to provide legal assistance to persons of small and/or moderate means.

65. Mr Ragoobarsingh deposed at paragraphs 5 to 7 of the Ragoobarsingh Affidavit that the Legal Aid Authority’s records had indicated that on 27 September 2010, it had received two letters from the Claimant dated 28 July 2010 ("the July 2010 letter") and 16 September 2010 ("the September 2010 letter") requesting legal aid and representation. These letters were seen by the then secretary Ms Arneaud on 13 October 2010 and should have been forwarded to him as he was the officer who visited the prisons. In both letters, the Claimant indicated that he was a prisoner at the Carrera Prison, having been found guilty of the offence of drug trafficking and he was sentenced by the Scarborough Magistrates’ Court to 5 years’ imprisonment. The Claimant had also highlighted the irregularities that had occurred upon his arrest and at his trial, namely the denial of his right to have an Attorney at law represent him. In the September 2010 letter, the Claimant stated that on 6 July 2010 while he was at

the Port of Spain Prison, he had made a request to appeal his conviction and sentence but his request was denied.

66. Mr Ragoobarsingh stated that he had not seen the July 2010 letter or the September 2010 letter and that the Legal Aid Authority had not received the Claimant's follow up letter dated 10 March 2011, which was referred to at paragraph 32 of the Claimant's Affidavit and attached as exhibit "C.S.2". However, the Legal Aid Authority had received the Claimant's letter dated 1 July 2011, where the Claimant repeated the irregularities that had occurred in the determination of his trial and requested legal advice and representation. According to Mr Ragoobarsingh, upon receipt of correspondence from inmates, the Legal Aid Authority reviews the correspondence and if there is a legal basis for which advice or an application may be necessary, the inmate is listed for the next monthly visit to their respective prison.
67. Mr Ragoobarsingh stated that upon receipt of the letter dated 1 July 2011, the Claimant was first requested for a prison visit on 8 August, 2011. He explained at paragraph 9 of the Ragoobarsingh Affidavit that:
- "I am the officer responsible for making prison visits to all the prison facilities in Trinidad. At the time in 2011 I was one of only two Commissioners of Affidavits at the Authority and the only officer making prison visits. A Commissioner of Affidavits is required to sign the relevant application form of an applicant for legal aid."
68. Mr Ragoobarsingh stated that he visited the Claimant at the Port of Spain Prison on 1 November 2011. At that time the Claimant was housed at the Carrera Prison and he was brought to the Port of Spain Prison for the visit. Based on his interview with the Claimant he issued to the Claimant a "Form 1" to make an application "To Seek Leave to Extend Time to Appeal (to appeal out of time)". He advised the Claimant that a report would have to be done to go before the Board of the Legal Aid Authority, which would determine whether he would be granted legal aid for the matter which he requested.

69. According to Mr Ragoobarsingh, the Claimant's application for legal aid was considered and approved on 18 January 2012 and by letter dated 23 January 2012, the Claimant was so informed. The Claimant was also informed in the said letter that an officer from the Legal Aid Authority would visit him to have the Acceptance Certificate for Legal Aid signed. Mr Ragoobarsingh explained that the Acceptance Certificate, sets out the terms and conditions for applicants who have been approved for legal aid in civil matters and required that applicant's signature, in order for an Attorney at law to be assigned to their matter.
70. Mr Ragoobarsingh stated at paragraphs 12 to 16 of the Ragoobarsingh Affidavit, that the records of the Legal Aid Authority had indicated that following approval of the Claimant's application, he was continuously listed for monthly prison visits at the Port of Spain Prison to sign the Acceptance Certificate Forms. These visits are generally conducted on the first Tuesday of every month and include persons who were on Remand, Death Row and at the Carrera Prison. The number of prisoners visited on those occasions varied and the Prison Service was notified of the upcoming monthly visit and furnished with a list of prisoners to be seen, so that all the necessary arrangements could be made, especially for the prisoners from the Carrera Prison. Despite this procedure some of the prisoners from the Carrera Prison were still not brought for their scheduled visits for a multitude of reasons, including that the relevant personnel did not receive the list of prisoners in a timely manner or the prisoner may have decided that he no longer wished to obtain legal aid. In the event that a prisoner was not seen at a scheduled visit, he would be automatically rescheduled for another visit regardless of the reason for their non-attendance.
71. Mr Ragoobarsingh confirmed that the Legal Aid Authority had received letters from the Claimant dated 3 May 2012 and 18 February 2013 ("the February 2013 letter"). He stated that the Legal Aid Authority first became aware that the Claimant had been transferred from the Carrera Prison to the Golden Grove Prison, after they received the February 2013 letter on 19 March 2013. The Claimant was subsequently placed on the list of prisoners to be visited on the Legal Aid Authority's next visit to the Golden Grove Prison, so that he could sign the Acceptance Certificate Forms. Mr



Ragoobarsingh stated that there was a high volume of inmates to be visited at the Golden Grove Prison and those visits took place in the Remand section because this was where most of the legal aid applications emanated from. He also stated that he attempted to gain direct access to the Claimant but he was unsuccessful, as the Claimant was a convicted prisoner and not in the Remand section. Due to those difficulties, he left the Acceptance Certificate Forms with members of the Prison Service in order to obtain the Claimant's signature. However, this was not done before the Claimant was released from the custody of the Prison Service. The Claimant did not sign the Acceptance Certificate Forms until 4 November 2013, after he had been released from prison and upon his signing he was immediately assigned an Attorney at law.

72. At paragraph 17 of the Ragoobarsingh Affidavit, it stated that:

“On the 13<sup>th</sup> October 2015, I was informed by the attorney assigned that the Claimant's application for an extension of time to file his appeal was successful and the substantive appeal of his matter was to be heard on the 21<sup>st</sup> and 22<sup>nd</sup> January, 2016. The Authority was subsequently notified that the Claimant substantive appeal was successful and his conviction and sentence were set aside.”

73. Based on the Ragoobarsingh Affidavit, there was an inordinate delay by the Legal Aid Authority in the provision of an Attorney at law for the Claimant to pursue his appeal. The reasons for this inordinate delay are alarming, as the provision of an efficient Legal Aid system for persons who are convicted is critical to an efficient and effective criminal justice system.

74. However, in the instant case, once an Attorney at law had been assigned to the Claimant, the said Attorney at law applied for and obtained an extension of time to file the Claimant's Notice of Appeal. Further, upon the hearing of the substantive appeal on 22 January 2016, the Claimant was successful with his appeal as both his conviction and sentence were set aside. Therefore, there is no evidential basis to support a declaration that the Claimant's rights under section 4(a), (b) and (d) were breached as

the State, its servants and/or agents provided the Claimant with legal aid and more specifically with an Attorney at law who assisted the Claimant in applying for an extension of time for the filing of his notice of appeal.

**IF THE CLAIMANTS SUCCEEDS IN (a) AND/OR (b) WHAT MEASURE OF DAMAGES IS HE ENTITLED TO FOR THE BREACH OF HIS CONSTITUTIONAL RIGHTS.**

75. The Claimant has sought monetary compensation including aggravated, vindictory and exemplary damages, due to the failure of the Prison Service to deliver his Notice of Appeal. His claim for monetary compensation included damages for distress and inconvenience which he suffered during the period of unconstitutional detention and loss of earnings. In the written submissions Counsel for the Claimant also argued for an additional award.
76. Jamadar JA (as he then was) in **The Attorney General of Trinidad and Tobago v Selwyn Dillon**<sup>28</sup> set out the following principles as a guide in the assessment of damages for breach of a constitutional right. He stated at paragraph 20 that:
- (1) the award of damages is discretionary;
  - (2) the nature of any award of damages is always with the intention and purpose of upholding and/or vindicating the constitutional right(s) infringed and in furtherance of effective redress and relief for the breaches;
  - (3) whether an award of damages is to be made depends on the circumstances of the case, including consideration whether a declaration alone is sufficient to vindicate the right(s) infringed and whether the person wronged has suffered damage;

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<sup>28</sup> Civil Appeal P 245 of 2012

- (4) in determining the sufficiency of a declaration and/or the need for damages, the effect(s) of the breach on the party seeking relief is a relevant and material consideration;
- (5) compensation can thus perform two functions - redress for the in personam damage suffered and vindication of the constitutional right(s) infringed;
- (6) compensation per se is to be assessed according to the ordinary settled legal principles, taking into account all relevant facts and circumstances, including any aggravating factors;
- (7) in addition to compensation per se, an additional monetary award may also need to be made in order to fully vindicate the infringed right(s) and to grant effective redress and relief;
- (8) such an additional award is justified based on the fact that what has been infringed is a constitutional right, which adds an extra dimension to the wrong, and the additional award represents what may be needed to reflect the sense of public outrage at the wrongdoing, emphasise the importance of the constitutional right and the gravity of the breach, and/or to deter further similar breaches;
- (9) the purpose of this additional award remains, as with compensation, the vindication of the right(s) infringed and the granting of effective relief and redress as required by section 14 of the Constitution, and not punish the offending party; and
- (10) care must be taken to avoid double compensation, as compensation per se can also take into account similar considerations, including relevant aggravating factors and is also intended to uphold and/or vindicate the right(s) infringed.

77. More recently, Kokaram J (as he then was) at paragraph 76 of **Oswald Alleyne v The Attorney General of Trinidad and Tobago**<sup>29</sup> added the additional factors which a Court must consider. He stated:

“76. I will only add to those useful principles the following in relation to the assessment of a compensatory award under the Constitution:

- The award must be no more than necessary to give recognition to the value and importance to the constitutional rights and violation caused by their denial. **Naidikie v Attorney General, Mukesh Maharaj v Attorney General.**
- The Court will require proof of damages, the burden of which lies on the Claimant. The award of compensation is fact sensitive. The quality of evidence required will depend on the facts and nature of the case. **Romauld James v Attorney General, Dennis Graham v Attorney General and Central Broadcasting Services.**
- Any speculative loss does not automatically deprive the Claimant of his right to compensation so long as the Court can exercise its discretion to make an appropriate award having regard to the nature of the breach and the right that has been violated. **Oswald Alleyne v Attorney General, Sam Maharaj v Attorney General.**
- Monetary compensation can be awarded by reference to comparable common law measures of damages as a guide. **Ramanoop v Attorney General, Oswald Alleyne v Attorney General, Naidikie v Attorney General.**
- Where there is evidence of direct loss that is recoverable as a component of compensation. Another component of compensation is to address non-pecuniary matters such as distress and inconvenience. **Subiah v Attorney General, Maharaj v Attorney General.**
- Another relevant factor in assessment is the seriousness of the breach. The gravity of the constitutional breach can be a factor which warrants

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<sup>29</sup> CV 2018-00447

an uplift in the award of compensation. Aggravating factors are also to be taken into account. **Naidikie v Attorney General.**”

78. In my opinion, a declaration alone is not sufficient to vindicate the rights of the Claimant which have been infringed, as he has put forward evidence to justify that he suffered personal loss as a result of his constitutional rights being infringed. In this regard, I will address the Claimant’s claim for both compensatory and vindictory damages.

#### **Compensatory damages**

79. The guiding principle for compensatory loss is that the Claimant is to be placed in as far as possible the position as if his constitutional rights had not been infringed. In **Oswald Alleyne**, Kokaram J (as he then was) described compensatory damages in a constitutional claim at paragraph 94 as:

“...the notion of compensation encompass two streams of loss: the first, any direct provable loss or pecuniary loss and the second, any other intangible loss such as mental distress, inconvenience or aggravating circumstances which ought to be the subject of compensation. I have loosely referred to this as pecuniary and non-pecuniary loss in this judgment...”

#### **Pecuniary loss**

80. Counsel for the Claimant submitted that the Claimant should be compensated for his loss of earnings in the sums of \$240,000.00 for the period 25 June 2010 to 31 October 2013 and \$535,392.00 for the period 17 July 2008 to 31 October 2009.<sup>30</sup>
81. Counsel for the Defendant argued that (i) the Claimant was imprisoned by a judicial authority and he is not entitled to compensation for loss earnings during his time of lawful imprisonment; (ii) the Claimant has not provided any evidence to prove his employment with Royal Caribbean Liberty of the Seas or Island Grillers; and (iii) the

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<sup>30</sup> Claimants Submissions filed 9 October 2020, page 31.

letters from potential employers which the Claimant annexed to the Claimant's Affidavit did not indicate that he was unsuccessful due to his imprisonment.

82. The Claimant described his loss of earnings at paragraphs 49 to 53 of the Claimant's Affidavit. He stated that he is a qualified Chef as he has a diploma from the Barbados Community College and the Hospitality Institute. He was also trained on the Royal Caribbean Liberty of the Seas Cruise Ship and he did a course in the United States of America on public health. According to the Claimant, upon being charged he lost his job as a chef on the Royal Caribbean Liberty of the Seas Cruise Ship. He earned approximately \$4,000.00 USD per fortnight and his passport was retained by the police. The Claimant further stated that whilst he was on bail and his matter was before the Court, he worked as a chef at Tobago Island Grillers where he was paid approximately \$8,000.00 per month. However, upon his incarceration he lost his job at Tobago Island Grillers and since his release in October 2013 he has made several applications for employment at various place but he has not been successful. He stated that most potential employers have requested a certificate of good character which he has not been able to obtain. The Claimant attached to the Claimant's Affidavit as "CS 26", copies of 4 letters which he wrote during the period 21 November 2013 to 7 January 2014 seeking employment at various places. He also attached to the Claimant's Affidavit "CS 27" and "CS 28", two of the responses he had received which indicated that he had not been successful.
83. The Claimant also stated that during his incarceration he lost all his personal effects which had remained in the house he was renting, as he had asked his then girlfriend to look after the contents of his rented house. The said girlfriend took the items that she wanted and discarded the others because the landlord wanted the house cleared for new tenants.
84. The nature of the evidence which a Claimant is required to present to a Court, to prove his pecuniary loss in a constitutional claim is no different from that in a private law action, as he is required to present cogent evidence of his loss. In the instant case, I am not satisfied that the Claimant has presented cogent evidence to prove his loss of

earnings as a Chef on the Royal Caribbean Liberty of the Seas Cruise Ship. In particular, the Claimant failed to provide any evidence to corroborate his assertion that he was a chef on the Royal Caribbean Liberty of the Seas Cruise Ship or at Tobago Island Grillers. There was also no contemporaneous document issued by Royal Caribbean or Tobago Island Grillers, to support the Claimant's assertion of the fact of his employment and the respective sums as his income.

85. Further, the responses the Claimant exhibited at exhibits "CS 27" and "CS 28" did not indicate that his applications for employment were unsuccessful due to his imprisonment or his failure to obtain a certificate of good character.
86. Although the Claimant stated that he lost personal effects which were in the house he rented at the time of his incarceration, he failed to prove this loss as his evidence was bare and lacking in details.
87. For these reasons, the Claimant failed to prove that he suffered the pecuniary loss as claimed.

**Non-Pecuniary loss**

88. The Claimant claimed the sum of \$900,000.00 as general damages, aggravated damages and exemplary damages for the period 25 June 2010 to 31 October 2013 for the Claimant's wrongful detention of 3 ½ years (1225 days).
89. The Defendant's position was that the trends of the case law show that the Courts have awarded Claimants a range of \$5,000.00 to \$7,500.00 for breach of a person's constitutional rights; the Claimant was not unlawfully detained for a period of 1225 days, as he was imprisoned by a judicial authority and there was no evidence of unlawful detention. Counsel for the Defendant also submitted that even if the Court determines that the delay by the Legal Aid Authority was a breach of the Claimant's rights, he should not be compensated for the said delay since the undisputed evidence shows that in any event the Claimant's matter would have been heard at or about the same time he was released.

90. The element of “distress and inconvenience “ has been applied widely and includes not only the distress suffered by the mere fact of the unlawful detention, but other aggravating factors such as the treatment, feelings and conditions endured during the period of incarceration. The court in its assessment must consider comparative and recent awards (including comparable common law awards)<sup>31</sup>.
91. I have examined the cases which were submitted by the parties. None are on all fours with the facts in the instant case. However, I find that the following cases are a useful guide in determining an appropriate range of damages.
92. In **Bryan Lynch**<sup>32</sup> on 30 November 2009, Des Vignes J (as he then was) awarded separate sums for breach of the Claimant’s constitutional rights under section 4(a) and (b) and for his unlawful and unconstitutional detention for the period 672 days. The sum of \$7,500.00 was awarded for breach of the Claimant’s constitutional rights and \$450,000.00 as compensation for the distress and inconvenience suffered during the period of unconstitutional detention. The judge took into account the unchallenged evidence of cramped, insanitary conditions and mental anguish which the Claimant suffered while incarcerated and that he spent 672 days in prison, in excess of the period of the sentence.
93. In **Funrose and Noriega v the Attorney General**<sup>33</sup> Master Paray-Durity assessed damages following constitutional proceedings for the failure to review the Applicant’s detention for 737 days. The Court awarded the sum of \$545,000.00 as compensation for breach of the Applicant’s constitutional rights and the distress and inconvenience suffered during the period of unconstitutional detention of 737 days. This sum included an additional award for vindictory damages. The Court took into account the mental anguish and suffering that the Applicant endured and the delay in conducting the review was an aggravating factor.

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<sup>31</sup> Boodoosingh J (as he then was) at paragraphs 44 and 45 in **Quincy George**

<sup>32</sup> Delivered on 30 November 2009

<sup>33</sup> HCA 1206 of 2005.



94. **Miguel Francois v The Attorney General**<sup>34</sup> was a decision of Rampersad J delivered on 27 September 2012. The Court declared the Applicant's constitutional rights under sections 4(a), (b) and 5(2) (h) had been breached by the failure to review his detention while incarcerated. Despite being recommended for release by a Psychiatric Hospital tribunal on 8 March 2004, the Applicant continued to be detained for 4 years, 7 months and 19 days further until the Court ordered his release on 27 October 2008. The Court awarded the sum of \$1,000,000 general damages, which included an additional award for vindictory damages in the sum of \$250,000.00.
95. I have already set out aforesaid the facts in **Quincy George**. In that case in July 2014 the Court awarded the Claimant the sum of \$20,000.00 for the breach of his constitutional rights, \$480,000.00 as compensation for the deprivation of liberty suffered during the period of unconstitutional detention which was 593 days, inclusive of an uplift for aggravating factors and \$50,000.00 as vindictory damages.
96. The Claimant described the negative effect of the aforesaid period of incarceration on his relationship with his family and his girlfriend at paragraphs 46 to 48 of the Claimant's Affidavit. He deposed that prior to his incarceration he had regular contact with his children 15 year old Shantal Simmons and 11 year old Omari Simmons in Barbados as he was in contact with them three to four times per month. He also stated that whilst he was imprisoned he had absolutely no contact with his children and this caused him great pain. He also stated that upon his release he realised that his relationship with his children was altered as he found that they were less receptive.
97. The Claimant further stated that during his incarceration his girlfriend, Gisselle George, ended the relationship and had told him that as he was serving time in Trinidad it was difficult for her to visit him frequently. She also indicated to him that her parents did not approve of her continuing a relationship with a convict. According to the Claimant, this was very devastating to him because she was the only person who visited him in prison as most of his family lived overseas.

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<sup>34</sup> HCA No 1090 of 2004

98. The Claimant was imprisoned from 25 June 2010 and his sentence was completed on Thursday 31 October 2013. It was not in dispute that his entire period of imprisonment was approximately 1225 days or approximately 3 ½ years.
99. According to paragraph 18 of the Ragoobarsingh Affidavit:  
“18. I say that the Claimant was provide with legal aid to assist him in seeking an extension of time to file his appeal and subsequently to argue his substantive appeal on which he was successful. From my knowledge and experience it usually takes between 18 to 24 months for criminal appeals to be listed and heard. At all times the Authority acted in good faith and in accordance with its usual practice and procedures in providing the requested legal assistance to the Claimant.”  
(Emphasis added)
100. Based on Mr Ragoobarsingh’s evidence, even if the Claimant was able to file his Notice of Appeal within the prescribed statutory period, with the current state of affairs, the Claimant would still have served the greater part of his sentence before his appeal was heard and determined. I accept that Mr Ragoobarsingh’s evidence that it takes between 18 to 24 months for a criminal appeal to be listed and heard was unchallenged. The fact that it was unchallenged did not make the information set out therein as to the state of the affairs to be acceptable to this Court. Indeed, if anything it is an indictment on the criminal justice system that it takes about 2 years for an appeal of a person who is incarcerated to be listed and heard. It is of particular concern as the very nature of the appeal affects the liberty of the individual.
101. In my opinion, the failure by the Prison Service to make the appropriate arrangements for the Claimant to file his appeal within the prescribed statutory period, resulted in a deprivation of the Claimant’s liberty without due process of law and the protection of the law, as his conviction and sentence were set aside after he served 3 ½ years in prison. I therefore am of the opinion that the Claimant’s period of detention was 3 ½ years (1225 days).

102. In assessing the Claimant's non pecuniary loss, apart from the period of detention, I also took into account that if the Claimant was able to file his Notice of Appeal within the prescribed statutory period or even at all while he was incarcerated, he would have been treated by the Prison Service as a person awaiting the outcome of an appeal as opposed to a convicted person serving a sentence. Further, I considered the Claimant's mental anguish of losing contact with his 2 minor children while he was incarcerated and that this caused the relationship to change after his release. I also took into account that the Claimant's then girlfriend ended the relationship while he was in prison.
103. Having considered the principles, comparable awards and the evidence I am of the opinion that an appropriate award for the breach of the Claimant's constitutional rights is the sum of \$20,000.00. The aforesaid authorities established a reasonable range for the Claimant's damages between \$800,000.00 and \$1,000,000.00. In the instant circumstances I find that a reasonable award for general damages which includes an uplift for aggravated damages is \$900,000.00.

#### **Vindictory damages**

104. At paragraph 94 of **Oswald Allyene** Kokaram J (as he then was) drew a distinction between vindictory damages and exemplary damages. He stated that:
- “94...The latter [vindictory damages] serves a purpose of compensation for another element of the wrong and was akin to such additional award as exemplary damages but was not to be confused with the object of that award of punishment which serves no place in constitutional damages. In my view, the notion of compensation encompass two streams of loss: the first, any direct provable loss or pecuniary loss and the second, any other intangible loss such as mental distress, inconvenience or aggravating circumstances which ought to be the subject of compensation. I have loosely referred to this as pecuniary and non-pecuniary loss in this judgment. The second stream is not to be confused with a purely vindictory award which is an additional award necessary to give effect to vindicate the constitutional right. To that extent the Court must ensure it is

necessary to do so and is not subject to an aspect of double counting, if not punishment by making an oppressive and disproportionate award.”

105. Counsel for the Claimant argued that an additional award of \$100,000.00 should be awarded by the Court to fully vindicate the Claimant’s infringed constitutional rights. Counsel asserted that in the instant case, there was no adherence to the Constitution by the Prison Service and that as a consequence, the Claimant was unlawfully detained for a period of 1225 days due to the failure of the Prison Service, as servants of the State, to allow the Claimant to file his Notice of Appeal within the statutory period.
106. Counsel for the Defendant did not address the claim for vindictory damages in her written submissions.
107. In my opinion, a purely compensatory award will not vindicate the breach of the Claimant’s rights and he ought to be awarded a sum as vindictory damages, to reflect the importance of the right and/or the seriousness of the breach.
108. In arriving at a suitable award I have given regard to the following matters:
  - a) The total disregard by the members of the Prison Service during the period 28 June 2010 to 9 July 2010 of the Claimant’s continuous pleas that he wanted to appeal his conviction and sentence.
  - b) PO Bitna’s arbitrary conduct.
  - c) The continuous denial and failure by members of the Prison Service to arrange for the Claimant to have an audience with a senior officer, for him to lodge a complaint against PO Bitna’s conduct.
  - d) The lack of adequate safeguards to protect against the conduct of PO Bitna.
  - e) The inordinate delay by the Prison Service in providing the Claimant with the appropriate forms for him to transcribe letters to the relevant authorities.
  - f) The failure of the Prison Service to keep proper records of the letters which the Claimant wrote and gave to the officers to dispatch.

- g) The trends in our local jurisprudence on the awards of vindictory damages in similar circumstances. In **Miguel Francois** the Court awarded \$250,000.00 as vindictory damages; in **Quincy George** the Court awarded \$50,000.00 and in **Naidikie** the Court awarded \$75,000.00.

109. In my opinion, the conduct of the members of the Prison Service save and except Superintendent Morgan was alarming and must be denounced in the strongest manner. Members of the Prison Service must treat all persons who have been convicted and sentenced with dignity, and respect their rights which have been enshrined in the Constitution. In the instant case a reasonable range for vindictory damages is between \$50,000.00 and \$100,000.00. In these circumstances, I find it reasonable to make an additional award of \$60,000.00 as vindictory damages.

#### **Additional award**

110. In **Oswald Alleyne**, Kokaram J (as he then was) made an additional award to compensatory and vindictory damages. In the instant case, there was no evidence to support any additional award apart from compensatory and vindictory damages being made.

#### **ORDER**

111. It is declared that the failure of the Prison Service to allow the Claimant to file his Notice of Appeal within the statutory time limit breached the Claimant's rights under section 4(a) and 4(b) of the Constitution.

112. The Defendant to pay the Claimant the following sums:

- (a) \$20,000.00 for the breach of the constitutional right.
- (b) \$900,000.00 as compensation for the deprivation of liberty suffered during the period of unconstitutional detention inclusive of an uplift for aggravating factors. Interest on this sum at the rate of 2.5 % per annum from the date of service of the claim to the date of judgment.
- (c) \$60,000.00 as vindictory damages.

113. The Defendant to pay the Claimant's costs to be assessed by the Registrar in default of agreement.

**/S/ Margaret Y. Mohammed**

**Judge**