IN THE SUPREME COURT OF BELIZE, A.D. 2017
(CIVIL)

CLAIM No. 493 of 2017
BETWEEN:

BHREA BOWEN **CLAIMANT**

ATTORNEY-GENERAL OF BELIZE **1st DEFENDANT**
D/Cpl 275 ADRIAN LOPEZ **2nd DEFENDANT**

Before: **Madam Justice Shona Griffith**
Dates of Hearing: **8th May, 2018; 3rd July, 2018 (Oral Decision)**
Appearances: **Mr. Anthony Sylvestre, Musa Balderamos for the Claimant; Ms. Briana Williams, Crown Counsel for the Defendants.**

Introduction

1. The Claimant is Ms. Bhrea Bowen, a young lady not too long out of high school and the claim is one for redress for breach of her rights under sections 5(1)(e) (unlawful deprivation of liberty) and 6(3)(a) (protection of the law) of the Constitution. The claim arises from the arrest and prosecution of Ms. Bowen on the 6th July, 2012, for unlawful possession of ammunition contrary to the Firearms Act. Then in force was the Firearms (Amendment) Act, No. 28 of 2010, which has since been repealed (in material parts) by the Firearms (Amendment) Act, No. 18 of 2014. The claim alleges that the application of the provisions of the Amendment Act of 2010 resulted in the breach of the Claimant's rights as stated above, for which she is entitled to appropriate declarations and damages. The Defendants resist the claim on the basis that the Claimant was arrested pursuant to a law then properly in force, and as such no question of breach of her constitutional rights arises. The Defendants ask that the claim be dismissed.

Issues

2. Following pre-trial directions issued by the Court, respective Counsel for the parties identified a number of issues for the Court's determination in the matter. From these issues the Court extracted the main issues in the claim as follows:-

(i) Was the claim for constitutional redress a viable claim or liable to be defeated by reason of the repeal of the law, the existence of a parallel remedy, or delay?

(ii) If the claim for constitutional redress was properly filed, did the actions of the Defendants give rise to a breach of the Claimant's constitutional rights under sections 5(1)(e), 6(3a) of the Constitution, or both?

(iii) If the Claimant's constitutional rights were breached, is the claimant entitled to damages and in what amount?

Background

3. There was no cross examination of deponents, (one on each side) and as such there was no dispute as to the events which occurred. From the Claimant's affidavits, the material facts are that in July, 2012, she was 14 years old and resided with her mother at Lacroix Boulevard, Belize City. On Friday 6th July, 2012, armed with a search warrant, the Gang Suppression Unit of the Belize Police Department carried out a search of the premises and recovered 3 shotgun cartridges. The Claimant's mother had been about to leave the premises when the police came to search and she was arrested and taken to the police station. Warrants of arrest were issued for the Claimant as well as her brother, in whose name the search warrant was issued, but whom according to the Claimant, did not reside at the premises. The Claimant had not been at home when the search was carried out - she was at a summer camp out of city in Burrell Boom from the 3rd July, 2012. Upon her return to the city the evening of 6th July, the Claimant learnt of the warrant for her arrest, and accompanied by her elder sister, turned herself in at the police station whereupon she was arrested and charged with possession of ammunition contrary to the Firearms Act. The 6th July being a Friday, the Claimant was detained at the police station until Monday 9th July, 2012 when she was arraigned at the Magistrate's Court Belize City, on the charge of possession of ammunition. The Claimant pleaded not guilty to the charge.

4. At the Magistrate's Court the Claimant was denied bail pursuant to the Crime Control and Criminal Justice Act and kept on remand at a youth hostel for the next 70 days.

She was then granted bail by the Supreme Court in September, 2012 and after 4 years of adjourned hearings, the charge was dismissed on the 16th September, 2016 following a successful no case submission at trial. In her affidavit, the Claimant details her traumatic experience being held on remand at the police station in deplorable and unsanitary conditions from Friday night to Monday morning; and thereafter for approximately 2 months at the youth hostel, in conditions she considered akin to imprisonment. In September, 2012 the Claimant returned to school however was obliged to attend court at the various adjourned hearings for the next four years whilst she was in school, including the period April to June, 2015 when she sat CXC examinations. The Claimant alleges that upon graduating high school in June, 2015 she was unable to secure gainful employment due to the existing charge for firearm possession that remained pending and that her employment challenges continued even after the dismissal of the charges. She alleges on a whole that her physical and psychological well-being were severely affected by the charge, detention, and delay in bringing the prosecution to an end.

The Submissions – Issues (i) & (ii)

Submissions on behalf of the Claimant

5. The claim alleges breaches of sections 5(1)(e) and 6(3)(a) of the Constitution, which respectively provide for (i) protection from deprivation of liberty other than as authorized by law; and (ii) protection of the law, particularly the right to be presumed innocent until proven guilty. The first issue concerns whether or not it was appropriate for the Claimant to seek constitutional relief as opposed to pursuing the parallel remedies in private law of false imprisonment and/or malicious prosecution which are raised on the facts of the claim. Counsel for the Claimant firstly acknowledged the general dispensation of the Courts in relation to the pursuit of constitutional relief in the face of available remedies in private law, by reference to the decisions of **Harrikisoon v the Attorney-General of Trinidad & Tobago**[1]and **Lucas & Carillo v Chief Education Officer et al**[2].

[1] [1979] 39 WIR
[2] [2015] CCJ 6

These decisions underscore the position that not every alleged breach of a person's rights is properly enforced by means of redress to the Constitution. This position is taken in order for the Court to ensure that the value of the right of recourse to the Constitution for violations of fundamental rights and freedoms, is not diminished by its misuse in general substitution for normal procedures of either judicial control of administrative action; or further, save for some special circumstance, where a litigant would have had adequate recourse in private law.

6. This acknowledgment notwithstanding, Counsel for the Claimant submitted that there was no private law remedy available to the Claimant in the instant case, thus the claim for constitutional redress was properly brought. Specifically, Counsel pointed to the causes of action of false imprisonment and malicious prosecution, as being those which obviously arise as being available to the Claimant within the circumstances of the claim. In relation to the false imprisonment, Counsel submitted that an action for false imprisonment was negated by virtue of the issue of a warrant of arrest for the Claimant. Counsel referred to Halsbury's Laws of England[3] in support of his submission that a claim in false imprisonment cannot lie where there is an intervening judicial act which sets the arrest and charge in motion. As there was the issue of a warrant of arrest at the instance of a justice of the peace (in that capacity exercising the powers of a magistrate), no claim for false imprisonment could be sustained. In relation to the claim for malicious prosecution, Counsel for the Claimant submitted that malice, being one of the essential elements of the tort, would not be able to be proven because of the provisions of section 6A of the Firearms Act. More specifically, that because section 6A(4)(a) of the Act deemed the Claimant as an occupier of the premises to be in possession of the ammunition, the Defendants would be able to meet the requirement for reasonable and probable cause for the prosecution.

7. In the absence of a viable claim in private law therefore, Counsel for the Claimant submits that his client was possessed of no other alternative but a Constitutional claim for violation of her rights to protection from unlawful deprivation of liberty and protection

[3] Halsbury's 4th Ed. Reissue, Vol 45 (2) para 458 – 459.

of the law in terms of the presumption of innocence. Alternatively, even if a remedy in private law can be said to exist, Counsel for the Claimant, points to the fact that the Defendants failed to respond to his pre-action letter putting them on notice of impending litigation. The letter further adverted to the Claimant's contention regarding the unavailability of a private law remedy and sought to ascertain the Defendants' legal position in relation that issue as well as to the allegations of the intended claim in general. Relying on the Judicial Committee's decision in ***Attorney-General for Trinidad & Tobago v Ramanoop***[4], Counsel submitted that the Defendants ought to have made it known at the earliest opportunity whether they would be challenging the allegations made and if so on what basis. The Defendants failed to answer or otherwise make known their position in response to the pre-action letter, thus Counsel contended that his client was entitled to proceed with a Constitutional claim. It was also contended that the circumstance of the challenge in respect of the applicability of a law valid at the material time but now repealed, gave the case, (as per Saunders JCCJ in the ***Juanita Lucas case***[5]), a special feature which justified seeking constitutional relief.

8. With reference to the occurrences of the constitutional breaches as alleged, Counsel for the Claimant's submissions on the issue of unlawful deprivation of liberty (which were made with particularity and thoroughness but are herein condensed according to the Court's understanding), are set out as follows:-

   (i) The Constitution of Belize protects against unlawful deprivation of liberty in section 5(1)(e) insofar as a person shall not be deprived of his or her personal liberty save as may be authorised by law "*upon a reasonable suspicion of his having committed or being about to commit a criminal offence under any law*";

   (ii) The term 'reasonable suspicion' requires that any deprivation of liberty (in the instant case - the Claimant's arrest, charge and ensuing detention in accordance with section 6A of No. 28 of 2010) be assessed against objectively determined circumstances and standards;

[4] [2006] 1AC 328
[5] *Supra* n. 2

(iii) Given that this standard is prescribed in the supreme law, the Constitution - any and all other laws must be read subject to and conform to this objective standard of 'reasonable suspicion';

(iv) Once applied, section 6A(1) of the Firearms (Amendment) Act, No. 28 of 2010 was in conflict with the requirement of reasonable suspicion as provided in section 5(1)(e) of the Constitution by virtue of the prescribed categories of persons being deemed in possession of firearms or ammunition found in premises;

(v) Further, having arisen by statute, once section 6A(1) is applied, police officers (and vicariously therefore - the State), were exempted from liability for any arrest and charge made in reliance on that section.

9. Counsel likened the Claimant's position to the applicants in **Fox Campbell & Hartley v The United Kingdom,**[6] a decision from the European Court of Human Rights**.** The parallel to this case Counsel says, is the Court's finding that the arrest of the Applicants therein, pursuant to a power of arrest based on a subjective test of suspicion of commission of terrorism related crime under the Northern Ireland (Emergency Provisions) Act, 1978 - was in conflict with Art. 5(1)(c) of the European Convention on Human Rights. The Convention's Art. 5(1)(c) prescribed that deprivation of liberty should, inter alia, be effected pursuant to arrest or detention based upon a reasonable suspicion of having committed an offence. In this authority, it was found that the circumstances of the applicants' arrests violated their Convention rights under Art. 5(1)(c). Likewise in the instant case, Counsel for the Claimant submits that the particular circumstances of his client's arrest, were such that the application of section 6A(1) of Act. 28 of 2010 resulted in an unlawful deprivation of liberty contrary to section 5(1)(e) of the Constitution.

10. Counsel for the Claimant then continued on to address the question of whether a claim for constitutional redress could be brought where the infringement is said to have been carried out pursuant to the exercise of powers under a valid law. This was in response to the Crown's contention that the police officer had acted on the authority of a law in force at the material time.

[6] [1990] ECHR 12244/86

In this regard, Counsel referred to **Elloy de Freitas v Permanent Secretary, Ministry of Agriculture et al.**[7] and ***Fox et al v United Kingdom***, as illustrative of the fact that actions carried out in pursuance of a valid law could nonetheless be challenged as unconstitutional. At all times, Counsel maintained that he was not seeking to impugn the validity of the legislation as it existed at the material time, but rather its application to his client. In practical terms, the application of the law (section 6A(1) of Act No. 28 of 2010) to the Claimant which resulted in the constitutional breaches was illustrated by reference to the section's precursor – section 6 of the principal Act. Counsel highlighted the fact that under the original section 6, it was an owner or occupier of premises who was deemed to be the owner or keeper of the firearm or ammunition found in the premises, unless the contrary was proven.

11. The interpretation of the original section 6 was such that whilst 'owner' included a person legally entitled to possession, and occupier meant a person who exercised physical control over the premises, neither of the two would have included a fourteen year old teenager who resided at her parent's premises, and exercised no physical control over such premises. Section 6A(1) on the other hand, went beyond owner and occupier and included a person ordinarily resident on the premises, thereby casting a far wider net beyond persons exercising control or otherwise legally in possession of the premises. In this regard, the circumstances of the Claimant's arrest vis-à-vis her status in relation to the premises demonstrated the consequences of the unlawful application of section 6A(1) to her detriment. These circumstances were that:-

    (i) The Claimant, as a minor in high school, could not be said to be in physical control of the premises;

    (ii) The Claimant was not at home and had not been at home for 3 days prior to the discovery of the ammunition;

    (iii) The ammunition was found under the house, which being in an unfenced yard, was open to access by any persons besides occupants of the house;

[7] [1998] 2UKPC 30; para 92 of Submissions on behalf of the Claimant

(iv) In spite of these circumstances, the provisions of section 6A nonetheless entitled the Police to arrest and charge the Claimant because of the single reason that she resided there.

For reasons set out in the Court's discussion of this issue later on in this judgment, Counsel for the Claimant's arguments on the claim for breach of protection of the law need not be set out.

Submissions on behalf of the Defendants

12. The arguments on behalf of the Defendants inter alia challenged the viability of the claim on the basis that the relevant legislation had been repealed. According to Crown Counsel the claim was rendered moot and academic, particularly having regard to section 28(1) of the Interpretation Act, Cap. 1, which sets out the effects of repealed legislation. Additionally, it was submitted that the claim was academic on the basis that there was already a decision of a concurrent court in which the question of the unconstitutionality of section 6A had already been decided[8]. In this regard, albeit not bound by the decision of the concurrent court, it was contended that this Court ought to follow the earlier decision of the concurrent court unless intending to depart from it. Counsel for the Crown also submitted that the Claimant delayed in bringing her claim for constitutional relief as her right of action arose from the time she was arrested and charged. In support of this contention, Counsel relied on the authority of **Sealey v Attorney-General of Guyana**[9] in which it was held that delay may render a constitutional claim an abuse of process where no cogent explanation for the delay is provided. The Crown also argued that the Claimant had a viable action in private law for malicious prosecution on the basis that her prosecution ought not to have continued after the law was repealed.

[8] Allyson Major v Attorney General et al
[9] CCJ App. CV No. 4 of 2007

Discussion and Analysis – Issues (i) & (ii)

(i) The viability of the claim

13. Crown Counsel for the Defendants contended that the claim, being based on repealed legislation ought not to be entertained - as it was academic and moot. The argument was well supported by reference to the Interpretation Act, section 28(1); legal treatise Bennion on Statutory Interpretation; as well as relevant case law,[10]all pertaining to the effect of repealed legislation generally and with respect to criminal prosecutions. Albeit not misstated, the Court does not find it necessary to delve into this particular submission as the Claimant was not seeking to enforce a right to which she was entitled under repealed legislation. The Claimant was seeking to enforce rights afforded her under the Constitution – sections 5(1)(e) and 6(3)(a) – which she alleges to have been infringed by actions carried out by the Defendants under a law now repealed. So long as the claim was not seeking to impugn the law itself, which Counsel for the Claimant maintained it was not, the fact of the repeal of the law subsequent to the acts carried out under it, is a circumstance affecting the remedy which the Court may or may not choose to afford the Claimant if successful.

14. With respect to the question of the existence of parallel remedies, the circumstances of this case raise the existence of claims in private law for false imprisonment and/or malicious prosecution. As a matter of general principles, the Court agrees with principles stated by Counsel for the Claimant, that in order to safeguard the importance of the fundamental rights, courts are obliged to assess the appropriateness or not of the institution of claims for constitutional relief. With reference to the question of parallel remedies, the Court acknowledges the dictum of Saunders (then JCCJ now PCCJ) in **Lucas & Carillo v Chief Education Officer et al,**[11] to the effect that constitutional redress should not be afforded, where a remedy in private law exists, save for the presence of some feature which justifies resort to the Constitution.

[10] Chief Adjudication Officer et anor v Maguire Lexis Citation 2315; R V Wicks [1946] 2 All ER 529
[11] [2015] CCJ 6 (AJ)

Further, as was earlier stated in **Harrikisoon v Attorney-General for Trinidad and Tobago**[12] constitutional redress should not be sought where other means of legal redress is available, unless that other means of redress, at least arguably, would be inadequate to address the complaint. In the absence of such a feature, it was said that to seek constitutional redress would be a misuse or abuse of the court's process.

15. Considering these principles with respect to the case at bar, the Court agrees with Counsel for the Claimant that an action for false imprisonment would have been precluded by the judicial act which gave rise to the Claimant's arrest, namely the issue of a warrant of arrest by a justice of the peace. Additionally, it is also agreed, that as an alternative mode of redress, an action for malicious prosecution could arguably be regarded as unlikely to afford the Claimant adequate redress, thereby justifying resort to the claim for constitutional redress. This is considered arguably the case, having regard to the Court's views (expressed in a previous decision) in relation to the high threshold to be met in establishing malice,[13] buttressed by an expected counter argument already proffered in favour of the Defendants, that the prosecution was effected in furtherance of a valid and subsisting law (namely section 6A of the Firearm Act No. 28 of 2010). Further, in terms of the question of whether to seek relief afforded by the private law claims, a relevant consideration that could arguably have affected the claim was the repeal of a material provision of the law under which the prosecution was commenced. In these circumstances, it is found that there was sufficient justification for the Claimant to seek relief by means of constitutional action as opposed to a claim in private law.

16. The final question affecting the viability of the claim is that of delay. Crown Counsel for the Claimant makes a valid point that the claim for constitutional relief need not have awaited the conclusion of the proceedings and that a challenge could have been made at any time after the Claimant's arrest and charge.

[12] [1979] 39 WIR 348

[13] **Alrick Smith et al v Attorney-General et anor**. Belize Supreme Court Claim No. 389 of 2015 @ paras 43 – 50.

Crown Counsel referred to CCJ's decision of **Sealey v Attorney-General of Guyana**[14] which affirmed its earlier decision of *Edwards v Attorney-General of Guyana et anor*.[15] These decisions were to the effect that inordinate delay in bringing a claim for constitutional redress, without a cogent reason for such delay could amount to an abuse of the Court's process or misuse of the jurisdiction to bring a constitutional claim. Crown Counsel also commended the CCJ's reference in ***Sealey*** to Privy Council decision ***Durity v Attorney General for Trinidad & Tobago***[16] apparently in which a delay of 5 years was referred to as having been unsatisfactorily explained and as such fatal to the claim. The Court notes however that the decision in ***Durity*** involved multiple claims for relief and was principally a claim for judicial review. It was however a failure to explain the delay in bringing the claim for judicial review that was addressed by the Privy Council. The constitutional aspect of the claim was not addressed by the Privy Council and the matter was referred back to the Trinidad & Tobago Court of Appeal by the Privy Council to address a number of issues, including the constitutional claim.

17. This clarification is made with respect to the context of the authority as put forward by Counsel for the Crown as it was an inaccurate account of the dictum insofar as it was intended to illustrate an instance in which the time period of five years delay in bringing a constitutional claim served as a bar to the claim. That was not the case in this authority ***Durity***. Were that nonetheless the case, the particular circumstances of the instant claim would nonetheless have to be examined to assess whether or not there exists any sufficient reason for the delay. In the instant case, the criminal prosecution against the Claimant remained ongoing until September, 2016, when it was dismissed. This fact alone, accounts for four years of the delay occasioned from the time of arrest to the time of institution of this claim. It is not unreasonable for there not to have been any consideration given to impugning the validity of those proceedings from the inception, as it cannot be disregarded that the Supreme Court's decision in **Allyson Major Sr. v**

[14] [2008] CCJ 11 (AJ)
[15] CCJ Appeal No 3 of 2007
[16] (2002) 60 WIR 448

Attorney General of Belize et al[17], was most likely a factor in the institution of this claim and this decision was not given until April, 2016. The delay in this case, is therefore not considered a bar to the claim, but can be considered as a relevant factor in respect of any remedy afforded the Claimant, if successful.

18. With respect to consideration of the claim proper, despite Counsel for the Claimant's arguments to the contrary, it is found that the argument in relation to the alleged breach of section 6(3)(a) of the Constitution does in fact amount to an attempt to impugn legislation no longer in force. The gist of this argument was that the deeming of possession created by section 6A(1) along with the requirement under section 6A(4)(b), for the person presumed to be in possession (of the firearm/ammunition) to adduce evidence to rebut that presumption, was a violation of the Claimant's constitutional right to be presumed innocent until proven guilty. In particular, unlike section 6(10) of the Constitution, the effects of section 6A(1) and 6A(4)(b) did not require a person charged to prove evidence of a particular fact, but required proof of the absence of an essential element of the offence, viz, the intention to possess. In such circumstance, the Claimant was required to disprove her innocence[18]. As the only context of this argument could be that section 6A(4)(b) of the Act was itself unconstitutional, this argument could not stand as it amounted to a claim to impugn legislation already repealed. The sole consideration in this Claim is thus the Claimant's argument that the application of section 6A(1) infringed her Constitutional right to protection from unlawful deprivation of liberty pursuant to section 5(1)(e) of the Constitution.

19. With respect to the unlawful deprivation of liberty point, Counsel for the Claimant maintains that the claim is not impugning the legislation and that the legislation was correctly applied to the Claimant. In this regard, it is found that this argument when stated in that way, is untenable. If the legislation was correctly applied and Counsel is not seeking to impugn the legislation, there is nothing to be argued before the Court.

[17] Belize Supreme Court Claim No. 470 of 2014

[18] Counsel relied on **Edison Palacio v Joseph Grant et al, Belize Criminal Appeal No. 27 of 2005** in support of this point.

In ***Fox et al v United Kingdom***, which is primarily used by Counsel for the Claimant to illustrate his entire argument, it was stated therein[19] that it was not necessary to consider the validity of the impugned legislation *in abstracto*, but to examine its application in those particular circumstances. When considering this case as the illustration of the argument put forward on behalf of the Claimant, it is considered that it is perhaps more apt, for the claim to be advanced on the basis that the legislation was not properly applied. Semantics aside however, it is considered that the Court's understanding of how the claim is derived, is ad idem with that of Counsel for the Claimant. The Court finds it useful to examine ***Fox et al*** in order to demonstrate its understanding of the parallel sought to be drawn by Counsel for the Claimant in the instant case. In ***Fox***, the applicants were arrested and charged pursuant to anti-terrorism legislation which prescribed a subjective test for arrest.

20. Two of the applicants were stopped whilst travelling in a car which was searched. They were arrested and detained on suspicion of being terrorists. At the police station they were interviewed about their movements that day particularly in respect of suspected work for the terrorist organization the Provisional IRA. They were released without charge after detention of approximately 45 hours. Both of these applicants had prior convictions for terrorism related offences. The third applicant was arrested from his home on suspicion of having been involved in a kidnapping earlier that month. This applicant was also released without charge after being questioned about the incident and after approximately 30 hours of detention. In the proceedings before the Commission, the UK Government agreed that having a 'reasonable suspicion', (as prescribed by section 5(1)(c) of the Convention presupposed '*the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence*'[20]. Further, that what was reasonable, would depend on all the circumstances.

[19] Fox supra @ paras 29 - 38
[20] Fox supra @ para 32

21. The UK Government, argued nonetheless that given the difficulties inherent in investigating and prosecuting terrorist offences in Northern Ireland, the question of '*reasonableness' 'could not be judged according to the same standards as conventional crime.*'[21] In response to this contention however, the Court found that 'the exigencies of dealing with terrorist crime could not justify stretching the notion of reasonableness to the point where the essence of the protection provided by the Convention (Article 51c) was impaired. It was found that the Government had failed to provide any information upon which the Commission could make any finding as to the reasonableness of the arresting officer's suspicion or not. In spite of the Government's plea that the provision of any information to justify the suspicion could place the lives and safety of others in danger, the Court found that in order to assess whether or not the applicants' convention right had been impaired, the Court required information as to the basis of the suspicion for the arrest. It was also found that the requirement for a bona fide (subjective suspicion) by the legislation under which the arrest was made had been met, but the arrest nonetheless infringed the applicants' Convention rights as the Court was unable in the absence of information, to assess the reasonableness or otherwise of the suspicion.

22. Against this backdrop of ***Fox et al***, the argument made on behalf of the Claimant is as the Court understands it, that the legislation, valid at the time, was incorrectly applied to the Claimant and it is that incorrect application that has amounted to a breach of her Constitutional right not to be unlawfully deprived of her liberty. The breach is understood to have occurred in the following manner:-

(i) The Constitution inter alia, provides for deprivation of liberty, only according to written law as stated in 5(1)(e) – upon reasonable suspicion of having committed or committing an offence;

(ii) As illustrated by ***Fox et al***, reasonable suspicion is interpreted to mean the existence of objectively reasonable circumstances justifying arrest;

[21] Fox supra, para. 32

(iii) The provisions of section 6A of the Firearms Act enabled arrest of the Claimant at a standard that did not accord with reasonable suspicion. Particularly, as the category of person 'ordinarily resident' in premises in which a firearm or ammunition is found, would not automatically give rise to the constituent elements of possession, namely – knowledge as the mental element of possession, as well as the physical element of control;

(iv) The particular circumstances of claimant's arrest did not reasonably justify any suspicion or well-founded suspicion of physical or mental elements of possession given that the Claimant:-

(a) was away at the time of discovery of the ammunition and had been for 3 days prior;

(b) was a school child, dependent upon her parent for lodging and as such had no control over the premises, particularly the part of the premises where the ammunition was found (underneath the house);

(c) the location of the ammunition was such that its ownership could not definitively be imputed to any resident of the premises;

(d) the premises itself facilitated access to the location of the ammunition by persons other than its residents as the yard was unfenced;

(e) the person named in the search warrant did not reside at premises (there was no dispute as to this evidence).

23. Now that the argument has been illustrated in relation to the context of ***Fox et al***, the question is whether or not this Court agrees with that argument. Firstly, it is not considered necessary to rely on ***Fox et al***, for the notion that notwithstanding the provisions of section 6A of the Firearm Amendment Act, the circumstances giving rise to the Claimant's arrest must accord with the provision of 'reasonable suspicion' for arrest as prescribed in section 5(1)(e) of the Constitution. The Constitution being the supreme law, it is obvious that any power of arrest in any law, regardless of whether so stated or not, is circumscribed by the requirement for reasonable suspicion under the Constitution.

The more relevant question is the mechanics of how a determination can be made as to whether an act of arrest carried out in pursuance of a valid law, is to be adjudged as having properly been based upon a reasonable suspicion. That such an assessment can be achieved is observed from the decision of **Elloy DeFreitas v Permanent Secretary Ministry of Agriculture et al [22],** which was cited by Counsel for the Claimant in support of the protection of the law point. This case concerned the infringement of the appellant's (a senior civil servant) fundamental right to freedom of expression, alleged to have occurred by his interdiction and disciplinary charge, following upon the appellant partaking in peaceful demonstrations against the Government for corruption.

24. There were two issues for consideration before the Court. The first was a claim challenging the validity of the law which provided that civil servants were prohibited from engaging in public comment on national or international political issues; and secondly, if valid, the question whether the particular circumstances of the interdiction and disciplinary charge arising from the implementation of the Act, violated the Constitution[23]. It was found that the law itself which placed a fetter on a civil servant's right to protest against political issues was invalid,thus the narrower ground of the constitutionality of particular circumstances arising from the application of the Act was not decided. The utility of this authority is the approach of the Privy Council in isolating the particular actions arising from the exercise of powers under the Act, for determination of whether or not those actions themselves were unconstitutional. This approach supports the Claim in the instant case, that whilst the provisions of section 6A of the Firearms Act were accepted as valid, the manner in which they were applied to the Claimant, were in breach of her Constitutional right to be arrested only upon reasonable suspicion of having committed an offence.

[22] [1998] UKPC 30
[23] Ibid @ para 3.

25. At this juncture, the Court considers the gravamen of the Claim – that the application of the Act to the Claimant was unconstitutional – or as the Court sees it, that the provisions of section 6A of the Act were not properly applied and resulted in breach of the Claimant's constitutional right. The Court's consideration of this point is aided by its earlier decision in **Alrick Smith et al v The Attorney-General of Belize et anor**[24]which also concerned the arrest and prosecution of persons based upon section 6A of the Firearms Act. The Court's position in this case remains that as stated in ***Smith et al***, namely, that the provisions of section 6A concerned proof of an offence, as distinct from the exercise of powers of arrest. This is borne out by the terms of section 6A(4)(a), which provide that the presumptions in subsection (1) may be relied upon when the Crown is unable with certainty, to link the possession of the firearm or ammunition to any one person. However, it is maintained, that the presumptions did not entitle police officers to refrain from making inquiries or investigations, to satisfy the three requirements for initiation of a prosecution – i.e. the existence of sufficient evidence; a reasonable prospect of conviction; and that prosecution would be in the public interest.

26. The circumstances in ***Smith et al*** were that police pursued two fleeing young men suspected to be in possession of a firearm, into a house occupied by multiple members of the Smith family - two parents and two adult children. In the house, a firearm was found beneath a mattress in a bedroom. Upon entry by the police into the house (in pursuit of the young men), the daughter was seen in the bedroom on the bed under which the firearm was later found; and the son was seated in the living room. The two young men were apprehended in the house. The parents, in the yard at the time the police pursued the young men into the house, followed inside and a neighbor (Brooks) also joined them. The police arrested and charged all of the occupants present at the time, in addition to the neighbor Brooks who remained inside instead of leaving. In considering the claim of false imprisonment, this Court found that in relation to the occupants of the house, the circumstances in which the firearm was found gave rise to a reasonable suspicion that it could have belonged to any of the persons, particularly given that the

[24] Belize Supreme Court Claim No. 389 of 2015

daughter was immediately prior to the search, seen laying atop the bed under which the firearm was found. With respect to the neighbor Brooks, the Court found that albeit the circumstances justified her arrest upon suspicion of the offence, once removed from the tense situation inside the house, the police had a duty to make inquiries and to conduct investigations prior to formally arresting and charging the occupants of the house.

27. Had this been done, the neighbor Brooks, who did not reside at the premises nor was present at the time the firearm was found – most certainly would not have been charged for the offence of possession of the firearm as the arresting officer had no evidence to offer other than he believed that the provisions of section 6A entitled him to arrest all of the occupants of the house. The claim for false imprisonment by the neighbor therefore succeeded. In relation to the instant case, there is similarly no evidence provided, other than the arresting officer's reliance upon section 6A as to the reasons for the arrest and charge of the Claimant. As was found in the successful claim of Brooks in ***Smith et al*** however, there are circumstances in the instant case, which begged inquiry and investigation, as to the existence of 'reasonable suspicion' to issue the warrant for the arrest and to charge the Claimant. As stated before, the ammunition in this case was found underneath the house which was unfenced, meaning that any person could have had access to the premises. The Claimant had not been home for three days prior to the issue of the warrant and discovery of the ammunition and the search warrant was issued in the name of the Claimant's brother who by unchallenged evidence, did not reside at the premises. In those circumstances – what was the Claimant's suspected connection to the placement of the ammunition; if there was such a connection, why was she not included in the search warrant; if the brother did not reside at the premises, what was the information that caused the Claimant as a minor, to have been arrested?

28. As was the ECHR's determination in ***Fox et al***[25] - there has been no information given by the Defendants from which the Court can assess the reasonableness or not of the Claimant's arrest.

[25] *Supra.* para. 33

On the other hand, the circumstances of where the ammunition was found, the fact that the Claimant had not been home for several days prior to its discovery, and that the person named on the search warrant did not reside at the premises, are circumstances which militate against an automatic suspicion on the part of the Claimant. In these circumstances, the Court concludes as follows:-

(i) The provisions of section 6A of the Firearms (Amendment) Act, 2010 were nonetheless subject to the Claimant's fundamental right not to be deprived of her liberty, viz – arrested and detained – other than upon reasonable suspicion of having committed a crime;

(ii) Notwithstanding that the Claimant was ordinarily resident at the premises where the firearm was found, and as such liable to be caught within the application of section 6A of the Act, if required by particular circumstances, the police were obliged to make reasonable inquiries and investigations in order to satisfy the standard of 'reasonable suspicion' of having committed an offence, as prescribed in section 5(1)(e) of the Constitution;

(iii) The circumstances of the Claimant's arrest, were circumstances in which the police ought to have made inquiries or investigations to satisfy the standard of 'reasonable suspicion' in relation to the Claimant;

(iv) In their response to the Claim, the Defendants provided no evidence of any inquiries or investigations but instead relied solely upon the provisions of section 6A of the Act to arrest and charge the Claimant;

(v) The absence of any such inquiries coupled with the particular circumstances namely - the location of the ammunition, the Claimant's absence from the premises for three days prior to the discovery of the ammunition, and the person named in the search warrant not residing at the premises, result in absence of reasonable suspicion justifying the Claimant's arrest and charge for the offence of possession of ammunition.

(vi) In the circumstances, the Claimant's right not to be deprived of her liberty other than pursuant to law and upon reasonable suspicion of having committed a crime as provided by section 5(1)(e) of the Constitution has been breached.

Issue (iii) – what relief should be afforded to the Claimant.

Submissions

29. The question is now what relief should be afforded to the Claimant. The Claimant asserts a right to damages as compensation for the time spent on detention. The Defendants allege that damages should not be awarded at all, as the Claimant was arrested and charged pursuant to a valid law at the time – but that if damages are awarded, they should be awarded on a nominal basis only. Both counsel very helpfully referred the Court to a number of decisions where such awards have been made. Counsel for the Claimant cited OECS High Court authority **Everette Davis v Attorney-General of St. Christopher & Nevis**[26], which itself referred to several other authorities from higher courts. Counsel commended several general principles on the award of damages for breach of constitutional rights as were set out in the cases referred to in **Everette Davis**. In particular, reference was made to Bahamian authority **Doris Fuller v Attorney-General**[27]in which Patterson JA concluded (in effect) that there must be a balance between acknowledging the seriousness of a breach of the supreme law of the land, whilst guarding against blowing the infringement out of proportion. In terms of the quantum, the award should therefore '…*not be so large as to be a windfall, nor should it be so small as to be nugatory*'.

30. Also, in **Subiah v Attorney-General**[28] Lord Bingham of Cornhill stated that compensation should be assessed according to settled principles in the local jurisdiction and the facts and circumstances of each case.

[26] SKBHCV 2013/0220
[27] (1997) 56 WIR 337
[28] [2008] UKPC 47

There should also be account taken of aggravating factors but allowance [*presumably in quantum*] given for such factors need not be separately identified. With respect to the case at bar, Counsel for the Claimant commended certain factors for the Court's consideration. These factors are that (i) the Claimant's age – a minor of 14 years; the length of the detention (which was about 2 months); the humiliation and disgrace of having in the eyes of her family and peers, been arrested and charged for a criminal offence; having to attend court whilst still in school; the overall effect on her life from the stain of the criminal proceedings having been visited upon her for 4 years. The amount of $15,000 for the initial shock coupled with a sum of $370 per day for the period of detention was advocated, all to a total of $40,530. The Defendants advocated a number of factors in support of their argument that the Court should award only nominal damages. A common thread of the Defendants' argument was that the police were acting pursuant to a valid law, in social circumstances which justified the imposition of a harsh piece of legislation to counteract crime involving firearms.

31. Moreover (as paraphrased by the Court), that the Claimant's arrest and ensuing detention were in effect a consequence of a legitimate aim of legislation at the time[29]. The Defendants also submitted that it was not possible for the Court to be guided by any measure of pecuniary damages as the Claimant incurred no pecuniary losses given that she was a student at the time of the incident. It was pointed out that the Claimant had submitted no evidence in support of her claim of depression suffered as a result of the arrest and detention. It was also submitted that there should be no separate award of vindicatory damages as on the facts of the case, there was no proper basis to make such an award, especially given the fact that the Government had already repealed the legislation in question. In the final analysis, the Defendants' position in relation to damages remained that no damages should be awarded to the Claimant but that if the Court so found, the amount should be nominal. No specific amount was proffered by the Defendants as to what would suffice as 'nominal'.

[29] Paragraphs 10-11 of the Defendants' Submissions on Damages (18-5-18)

Discussion and Analysis Issue (iii)

32. The starting point for consideration is the accepted position that an award of damages or any other remedy for breach of a constitutional right is discretionary – both by the terms of section 20(2) of the Constitution as well as numerous authorities.

Within the context of this particular case, it is also useful to underscore the discretion to award a remedy, in terms that there is '*no entitlement to damages*', as was observed by the Privy Council in **Seepersad v Panchoo v The Attorney-General of Trinidad and Tobago**[30]. This decision arose out of an adjudged failure of the State to conduct periodic reviews of the sentences of the appellants, who as minors at the time of their convictions for murder, were sentenced to imprisonment at the pleasure of the State. In answer to the question of whether the appellants were entitled to damages consequent upon a finding of breach of their constitutional right to protection of the law for failure to have their sentences reviewed periodically, Lord Hope, reading the judgment of the Board said as follows (emphasis mine):-

> *"38. It is well established that the power to give redress under section 14 of the Constitution for a contravention of the applicant's constitutional rights is discretionary: **Surratt v Attorney General of Trinidad and Tobago [2008] UKPC 38**, para 13, per Lord Brown of Eaton-under Heywood. The rights protected by 16 section 4 are, as Lord Bingham of Cornhill said in the first stage of the appeal before the Board in that case, at least in most instances, not absolute: Surratt v Attorney General of Trinidad and Tobago [2007] UKPC 55, [2008] AC 655, para 33. There is no constitutional right to damages. In some cases a declaration that there has been a violation of the constitutional right may be sufficient satisfaction for what has happened: Inniss v Attorney General of St Christopher and Nevis [2008] UKPC 42, para 21; James v Attorney General of Trinidad and Tobago [2010] UKPC 23, para 37. In others it will be enough for the court to make a mandatory order of the kind that was made in this case, when Madam DeanArmorer ordered that the terms of the appellants' detention should be determined by the High Court. As Lord Kerr said in James v Attorney General of Trinidad and Tobago, para 36, to treat entitlement to monetary compensation as automatic where violation of a constitutional right has occurred would undermine the discretion that is invested in the court by section 14. It will all depend on the circumstances.*

[30] [2012] UKPC 4

33. Notwithstanding the discretionary nature of the grant of redress for breach of a constitutional right, it has been consistently established that an unlawful deprivation of liberty generally attracts an award of damages. In **Ramesh Lawrence Maharaj v Attorney-General for Trinidad and Tobago**[31], in the course of affirming that an award of compensatory damages was contemplated as part of the redress afforded by the then comparable to Belize's section 20(2) of the Constitution, Lord Diplock on behalf of the Board acknowledged that a constitutional claim of deprivation of liberty was not the same as a claim in private law for damages for the tort of false imprisonment. Lord Diplock also stated that as the claim was not one in private law for false imprisonment where damages would lie at large, redress for breach of the constitutional right would not include consequential loss such as damages for loss of reputation - damages would lie for compensation for deprivation of liberty alone. It was however recognized that the compensation payable would include any loss of earnings arising from the imprisonment, as well as '*recompense for the inconvenience and distress suffered…during incarceration.*'[32]

34. In addition to the above, this Court would answer the question in relation to whether or not damages should be awarded in the instant case by adverting to the nature of the right that has been infringed. The right infringed is the specific right of deprivation of liberty, which in law is a trespass to the person and coincides with the tort of false imprisonment. This notwithstanding, the apprehension and understanding of the nature of the right remains the same whether arising in consideration of a constitutional claim or one in tort. Trespass is actionable per se and as stated by Lord Griffiths in **Murray v Ministry of Defence**[33], *"…The law attaches supreme importance to the liberty of the individual and if he suffers a wrongful interference with that liberty it should remain actionable even without proof of special damage.*" In the circumstances, having found that the Claimant's loss of liberty was not effected in accordance with section 5(i)(e) of the Constitution so that she was unlawfully detained, it is considered that an award of damages is an

[31] [1979] AC 385 @ 400
[32] *Maharaj supra @ 400*
[33] [1988] 1 WLR 692, 703A

appropriate form of redress. The question is how to determine the appropriate quantum of damages that should be awarded to the Claimant where, as pointed out by Counsel for the Defendants, there is no pecuniary measure such as loss of earnings upon which to base the award.

35. The Court prefers to briefly examine a few authorities to frame the basis upon the award is going to be made. The cases of **Subiah v Attorney-General of Trinidad & Tobago;**[34] **Attorney-General for Trinidad & Tobago v Ramanoop;**[35] and **Merson v Cartwright**[36]all concerned damages awarded for breaches of the constitutional right to protection from unlawful deprivation of liberty. Within the context of the respective cases, substantial awards of damages were made accompanied by or including additional awards arising out of appalling and contumely conduct on the part of the Executive (via their agents). It is considered, that the fact of the substantial amounts awarded in these cases should be viewed within the corresponding circumstance of behavior on the part of the Executive, which is a factor that is absent in this case. In this case, the Claimant's detention arose out of the misapplication of legislation on what can be considered a widespread basis. ***Alrick Smith et al v Attorney-General***[37] is one such example of the blind reliance on section 6A, but this instance was saved (for all but one of the five claimants) by the circumstances therein which gave rise to reasonable suspicion. The point nonetheless is that the Court views the absence of any mal fides or improper motives towards the Claimant as a relevant factor affecting its consideration of the award.

36. Additionally, the Court agrees with Counsel for the Crown that a legal challenge to the Claimant's arrest was available to her from the inception of her arrest and detention. The continuance of the legal proceedings until they were dismissed in September, 2016 did not preclude the availability of a constitutional challenge to the legitimacy of the Claimant's arrest.

[34] [2008] UKPC 47
[35] [2005] UKPC 15 @ para 18-19
[36] [2005] UKPC 38
[37] *Supra*

Albeit that the Court did not find the delay in bringing the Constitutional claim to be a bar, it is nonetheless considered a relevant factor in the quantum of damages to be awarded to the Claimant. In relation to the remand of the Claimant for two months, the Court notes that regardless of whether the Magistrate was obliged to remand the Claimant or could have released the Claimant on bail for exceptional reasons[38], at all material times during the Claimant's detention she was entitled to apply for and to be released on bail by the Supreme Court. On the one hand therefore, the Court considers that the length of detention of the Claimant as a minor of 14 years should not be an aggravating factor as there was a legal mechanism available to the Claimant to secure her release earlier.

37. On the other hand, the Court bears in mind the words of Lord Griffiths in ***Murray v Ministry of Defence***[39] that because any trespass is actionable per se, the issue is not one of *causation* of a wrongful detention, but the *fact* of the unlawful restraint of liberty. In this regard, the Court is also mindful as stated in **Stellato v Ministry of Justice,**[40] that the nature of bail is as such, that no order for release of a person on bail can detract from an underlying detention that was wrongful[41]. The Court has therefore narrowed the consideration of the award of damages according to three factors expressed in the following manner:-

    (i) The arrest was made pursuant to the exercise of powers under a statute and albeit the provisions were improperly applied, the arrest and detention were not borne out of improper motives or mal fides towards the Claimant - unlike the circumstances in both ***Subiah*** and ***Ramanoop.***

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[38] As a result of numerous amendments and inaccuracies in the consolidation of s.16 of the Criminal Justice (Crime Control) Act, Cap. 102, there is uncertainty whether the correct position is that a Magistrate is precluded from granting bail for a firearm or other listed offences or by proviso to section 16, may grant bail for such offences for exceptional reasons.

[39] *Supra. Paras 64-65*

[40] [2010] EWCA Civ 1435

[41] Ibid @ para. 23 per Stanley Burnton LJ ' … I consider that the answer is to be found in the nature of a grant of bail. *In principle, a grant of bail is not an order for the detention of the person to whom it is granted. To the contrary, it is a grant of liberty to someone who would otherwise be detained*. The legal justification for his detention is to be found elsewhere: in the case of a person suspected of crime, in the powers of arrest of a constable under a warrant … or without a warrant … and powers to remand pending trial or further hearing …'

Further, the particular section of the legislation has been repealed since 2014 which must be positively regarded as an attempt by the Government to remedy situations of injustice which were being created by the improper application of section 6A.

(ii) Although not found to constitute a discretionary bar to the proceedings the question of delay (four years) must be factored into the award of damages, as the constitutional challenge was available to the Claimant from the inception of her arrest as well as during the continuance of the proceedings. The state of the law together with the particular circumstances of the case could have seen the challenge mounted at the earliest stage of the proceedings. This delay is considered to be a limiting factor on the quantum of damages that ought to be awarded.

(iii) The length of the detention is not viewed as an aggravating factor as the Claimant was not precluded from applying for bail from the Supreme Court. This view notwithstanding, the Court is careful to state that the fact of the Claimant's detention is accepted as actionable per se, and the experience detailed by the Claimant is to be accounted for in determining the quantum of damages.

38. With respect to the factors relevant to the Claimant, the first is the Claimant's age as a minor at 14 years. This is considered a major factor that would have aggravated the effects of the detention on the Claimant. The Court accepts that such effects would have included a significant degree of emotional trauma and distress visited upon the Claimant from the fact of the detention alone, coupled with the physical conditions detailed of the police station lock up and thereafter the institutional environment in which she was placed whilst on remand. Such distress and trauma was acknowledged by Saunders PCCJ in **Lucas & Carillo v Chief Education Officer et al**[42], to be legitimately taken into account in quantifying damages for breach of a constitutional right. Further, there seemed to have been no responsiveness from the State to facilitate a 14 year old minor sitting in detention without access to resources to immediately apply as she was entitled to, for bail.

[42] Supra @ para 155 .

No comparative authority was presented to the Court regarding quantum but in the first instance, the numerical approach suggested by Counsel for the Claimant of multiplying a value by the number of days in detention is not considered suitable.

39. Additionally, it is not considered that there is much utility to be had from looking at awards in other cases involving adults or awards in relation to breaches of other constitutional rights. It is considered however, that with reference to the limiting factors discussed at paragraph 37 above, the award will be at the lower end of the scale; but in light of the harsh consequences of detention visited upon the Claimant as a minor - particularly the distress, trauma, and stain of being thrust into the criminal justice system, the award must of some significance. Of those two sides of the coin however, the Court places greater weight on the limiting factors as the actions of the state in arresting her were carried out with the intention of a lawful exercise of power of arrest. It is the case however that the Court has found that albeit so intended, the exercise of the power of arrest and detention which ensued, were not lawful based upon the particular circumstances of this case. The closest parallel found is the award of $5000 to claimant Brooks in **Alrick Smith et al**[43]. Given the Claimant's age and the fact that this is a constitutional claim, the award must be higher in this case. The sum of **ten thousand dollars ($10,000)** is considered appropriate within the circumstances of the claim and the Claimant is of course entitled to her costs.

Disposition

40. The claim for Constitutional redress on the part of the Claimant is disposed of in the following manner:-

    (i) The Claimant's arrest on the 6th July, 2012 for the offence of 'Kept Ammunition Without a Licence', pursuant to section 3 of the Firearms Act, Cap. 143 is declared to have been in breach of her right to protection against unlawful deprivation of liberty under section 5(1)(e) of the Constitution;

[43] *Supra*.

(ii) The Claimant is entitled to damages and is awarded the sum of $10,000.00 for breach of her Constitutional right not to be unlawfully deprived of her liberty;

(iii) Costs are awarded to the Claimant in the sum of $5000.00.

Dated this 27th day of September, 2018.

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Shona O. Griffith
Supreme Court Judge, Belize.