

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2005-00150

BETWEEN

CHANDRESH SHARMA

CLAIMANT

AND

THE ATTORNEY GENERAL OF TRINIDAD & TOBAGO

DEFENDANT



Before The Hon. Madam Justice Pemberton

Appearances:

For the Claimant: Mr A. Ramlogan & Ms. J. Furlonge

For the Defendant: Mr R. Martineau S.C. leading Mr Primus holding for Mr. S. Lalla and Ms A.

Humphrey instructed by Ms D. Dilraj

2005: November 10th

2006: January 26th

2006: March 23rd

DECISION

- [1] The Republic of Trinidad and Tobago is a democratic state. There are three branches of Government, the Executive, whose role and function is to have general direction and

control of the Government, which involves conceiving and executing policy for governing¹; the Legislature or Parliament, which makes the laws and the Judiciary which interprets and applies the law. These institutions are established and buttressed by the Constitution. Parliament is free to make any laws it considers necessary for effective and good management of all aspects of life². This power and responsibility is circumscribed by the Constitution, the supreme law of the land. Any law which is in collision with the provisions of the Constitution is void to the extent of the inconsistency³. The Constitution makes exception for certain legislation. These Acts may be valid if they expressly declare that they shall have effect in spite of the inconsistency with sections 4 and 5 and Parliament can show that they are reasonably justifiable in a society that has proper respect for the rights and freedoms of the individual⁴. The Executive is also free to make and engineer policy, but its actions may be questioned by the courts on the grounds of unconstitutionality or any other types of administrative action⁵.

[2] The Constitution itself provides that if a person alleges that any of the provisions of Chapter 1 thereof "has been, is being or is likely to be contravened in relation to him" then he may apply to the High Court for redress⁶. I shall deal with this more fully later.

[3] The Applicant, Mr Chandresh Sharma is a member of the House of Representatives, for the Fyzabad constituency. He holds office as Treasurer of the United National Congress, the Opposition Party in the House.

[4] He professes a concern over certain provisions of the **ANTI TERRORISM ACT 2005 ("THE ACT")**. Paragraph 4 of his affidavit states:

This Act was assented to on the 13th day of September 2005.

The Opposition did not support or vote for the Act because it was concerned about the dramatic and drastic nature of same (some)

¹ See Secs 74 to 89 CONSTITUTION OF TRINIDAD AND TOBAGO CHAP 1:01. ("THE CONSTITUTION")

² See Sec. 53 of THE CONSTITUTION – "peace, order and good government of Trinidad and Tobago"

³ See Sec 2 of THE CONSTITUTION

⁴ See Section 13 (1) of THE CONSTITUTION

⁵ These include actions for Judicial Review or any other reliefs as may be determined by Statute.

⁶ See Sec. 14 (1)

(sic) of the measures contained in the Act and the **possibility** that such powers could be abused and/or misused by the ruling party to arrest and detain(ed) (sic) political opponents on the pretext that they are suspected terrorists.

(Emphasis mine).

That is his case.

[5] There is no factual matrix for consideration. In other words, this case is based on the possibility that the "ruling party" is likely to misuse powers vested under the Act against "political opponents". The Act is to be used as a cover. To prevent this sinister motive from materializing Mr Sharma has moved the Court asking for:

- (a) A declaration that the **Anti Terrorism Act, 2005 (hereafter called "The Act")** is unconstitutional, illegal, null and void as contravening Sections 4 and 5 of the Constitution;
- (b) Alternatively a declaration that Sections 23, 24, 34, 36 and 37 of the said Act are unconstitutional, illegal, null and void as contravening Sections 4 and 5 of the Constitution.

[6] The grounds state that the Act contravenes Sections 4 and 5 of the Constitution and was not passed in accordance with Section 13 of the Constitution. The Act is in direct contravention with the rights and freedoms in Section 4⁷ and contrary to Section 5 (1)⁸. Mr Sharma then itemized the particular sections of the Act which he complains about.

[7] **APPROACH**

I shall structure this judgment by asking the following questions:

- (1) Do the Act or the specific sections complained about contravene Sections 4 and 5 of the Constitution so as to require that it be passed in accordance with Section 13 (1) thereof?

⁷ See Sec. 4 which gives recognition and declares the rights and freedom.

⁸ See Sec. 5 which protects those rights and freedoms.

(2) Is this the type of action contemplated by Section 14 (1) of the Constitution?

[8] **ISSUE 1:**

What is the nature of the alleged infringement? The infringement as far as I can glean, is that Parliament erred in bringing into law the Act since it contravened Sections 4 and 5 of the Constitution and having done so, it was not passed in accordance with Section 13 (1) of the Constitution. The particular infringements were conveniently listed by Mr Ramlogan and I reproduce them:

- (a) deprivation of personal liberty and the right to liberty other than personal liberty without due process of law;
- (b) the right to the enjoyment of property arising out of the provision for surrender of documents and restraint and seizure orders in respect of other property;
- (c) the right to equality before the law and the protection of the law;
- (d) the right to freedom of thought and expression arising out of liability of a detained person to interrogation;
- (e) the protection from cruel and unusual treatment;
- (f) the right to be brought when detained before an appropriate judicial authority;
- (g) the denial of the right to habeas corpus;
- (h) the denial of the privilege against self-incrimination;
- (i) the denial of the right to know the reasons for detention and interrogation.

[9] Liberty, Mr Ramlogan says, involves the following:

- (1) liberty of the person from unlawful restraint;
- (2) liberty to employ a person's talents in the pursuits which free men may undertake without transgressing the common law or Acts of Parliament which do not infringe the Constitution;

- (3) liberty to speak or be silent or to write or otherwise communicate as one wishes.

No authorities were relied upon for any of these propositions.

- [10] Mr Martineau S.C. states categorically that the Claimant is wrong in his constitutional challenge since the Act does not derogate from the fundamental rights and freedoms enshrined in Section 4 and does not infringe Section 5. In that case, Section 13 (1) is not breached since there is no need to invoke its provisions. The Act therefore is not unconstitutional or inconsistent with the Constitution.
- [11] Further the Constitution does not create new or separate rights. Section 5 particularises Section 4 rights and freedoms⁹. The rights under Section 4 are not absolute¹⁰ and are circumscribed by "due process of law". An Act can be described as contravening the "due process" requirement if it is arbitrary or oppressive or discriminating in its effect¹¹. This Act does not infringe the "due process" requirement.

[12] **ANALYSIS**

It is quite possible for me to find that the Act as a whole is Constitutional, but that certain Sections offend the Constitution. The Act purports to authorize actions taken or likely to be taken which make provision for the protection of persons within the jurisdiction from the ill-effects of terrorist activities¹². Trinidad and Tobago was a signatory or party to the several Conventions mentioned at Section 2 (1). As I see it, this Act seeks to import into our legislation the international obligations, rights, responsibilities and protections offered under these Conventions. In other words, this legislation formalizes this State's inclusion in the worldwide fight against terror. In the main, the provisions concern the safety of persons, generally and more specifically on aircrafts, and at sea. It seeks to strip hitherto

⁹ See DE FREITAS v BENNY [1976] A.C. 239 and THORNHILL v A.G. [1981] A.C. 61

¹⁰ See COLLYMOORE v AG (1976) 12 W.I.R. 5 p. 15 Letter F

¹¹ See LA SALLE v AG OF T & T (1971) 18 W.I.R. 379

¹² The Long Title to the Act reads: An Act to criminalise terrorism, to provide for the detection, prevention, protection, conviction and punishment of terrorist activities and the confiscation, forfeiture and seizure of terrorists' assets.

protected persons who abuse that protection. It also targets those persons who provide financially for illicit activities in this arena. The Act is extra-territorial in its scope and determines the mens rea necessary for the actions to which it extends.

- [13] The Act further provides for the seizure and confiscation of terrorist property, which it defines as proceeds from the commission of terrorist act¹³, property which has been, is being or is likely to be used in the commission of a terrorist act or property collected for the purpose of funding a terrorist act.
- [14] The Act creates offences such as the use of property for the commission of terrorist acts, arrangements for retention or control of terrorist property, dealing with terrorists acts, soliciting or giving support for the commission of terrorists acts, harbouring persons committing terrorist acts, recruitment of persons for terrorist purposes, provision of instruction or training to persons committing terrorist acts, providing facilities in support of terrorist acts¹⁴. Convention offences are also incorporated into our local law. These cover a wide ambit, and include endangering the safety of maritime navigation, bombing offences, protection of internationally protected persons and property, offences relating to fixed platforms (so relevant to our economic survival), nuclear matter or facilities or the use of chemical, biological or nuclear weapons.
- [15] Part IV deals with Investigation of Offences and this contains the sections discussed in the alternative relief. I shall therefore defer discussion.
- [16] Part V empowers the Court with jurisdiction to hear and determine matters arising under the Act. This merely reflects conventional learning in international law. It also mandates that the Attorney General, upon receiving information that there may be present in Trinidad

¹³ "terrorist act" is defined principally "as an act whether committed in or outside Trinidad and Tobago" which cause loss or harm or damage to person or property. It also captures acts which are inimical to national security or public safety and catches disruption of emergency services which will affect computer or electronic systems or any services directly related to banking communications, financial services, public utilities to name a few. The requisite intent – "to compel a government or an international ..."

¹⁴ See Sections 16 – 22 of THE ACT

and Tobago a person who is alleged to have committed an offence under this Act, the Attorney General shall:

- (a) cause an investigation to be carried out in respect of that allegation;
- (b) inform any other foreign State which might also have jurisdiction over the alleged offence promptly of the findings of the investigation; and
- (c) indicate promptly to other foreign States which might also have jurisdiction over the alleged offence whether to the best of his knowledge, information and belief a prosecution is intended by the Director of Public Prosecutions¹⁵.

[17] The Act at Part VI provides for information sharing, extradition and Mutual assistance in Criminal matters. Part VII deals with disclosure and information sharing and Part VIII with seizure and forfeiture of Terrorist Property. Certain specific questions were raised in relation to Part VIII which I shall address later. Part IX provides for Miscellaneous Powers. Section 39 places a duty to disclose information about passengers of aircraft and vessels on the operator of an aircraft or a Master of a vessel to the Chief Immigration Officer or the competent authority of a foreign State in accordance with the laws of that State. The Chief Immigration Officer is not to disclose/use this information **except** for the purpose of protecting national security or public safety¹⁶.

[18] A complete perusal therefore shows that the Act conforms to classic principles of identification of a problem – terrorism, the provision of rules/laws to control actions – the offences created, production of certain behavioural patterns – conformity with good and civilized behaviour or punishment for deviance. Is this law in conformity with Sections 4 and 5 of our Constitution?

[19] The Drafters of the Act as I see it, sought to observe the Constitutional safeguards at Sections 4 and 5 by providing:

¹⁵ See Section 25(3) of THE ACT

¹⁶ Section 39(4) of THE ACT – No information provided to the Chief Immigration Officer under subsection (1) shall be used or disclosed by the Chief Immigration Officer except for the purpose of protecting national security or public safety.

- (1) A definition of the purpose of the Act and the actions, which are likely to trigger an offence, prosecution and a penalty. Section 4 (b) is of relevance here.
- (2) Guidelines for the investigation of offences, under the Act, disclosure and sharing information.
- (3) Section 31¹⁷ of the Act specifically recognises and preserves the fundamental right expressed at 4 (c), which was not raised in the written submissions but is an outflow from paragraph 4 of Mr Sharma's affidavit.

In fact, as observed throughout the Act "reasonableness" is mandated. There is no provision which authorizes the arbitrary exercise of power by any of the State functionaries or organs. In fact, the sections and structure of the Act speak against this. It is my view that the Act as a whole has covered the fundamental bases necessary for "a fair system of justice"¹⁸.

[20] There was not much submission on the entire Act. Counsel instead focused on the Sections of the Act, his alternative grounds. In any event, I do not agree that The Act as a whole is offensive to Sections 4 and 5 of the Constitution.
I sections 23 and 24 of the Act together.

[21] **SECTIONS 23 AND 24**

I shall address sections 23 and 24 of the Act together. Section 23 of the Act states:

- (1) *Subject to subsection (2) a police officer may, for the purpose of preventing the commission of an offence under this Act or preventing interference in the investigation of an offence under this Act, apply ex parte, to a Judge in Chambers for a detention order.*

¹⁷ Sec 31 of The Act – "Notwithstanding anything in the Extradition Act or the Mutual Assistance in Criminal Matters Act, an offence under this Act or an offence under any other Act where the act or omission constituting the offence also constitutes a terrorist act, shall, for the purposes of extradition or of mutual assistance, be deemed not to be an offence of a political character or an offence connected with a political offence or an offence inspired by political motives."

¹⁸ See Lord Hoffman in THE STATE v BRAD BOYCE Privy Council Appeal No. 51 of 2004 para. 14.

- (2) *A police officer may make an application under subsection (1) only with the prior written consent of the Director of Public Prosecutions.*
- (3) *A Judge may make an order under subsection (1) for the detention of the person named in the application if he is satisfied that there are reasonable grounds to believe that the person is –*
 - (a) *interfering or is likely to interfere with an investigation of;*
 - (b) *preparing to commit; or*
 - (c) *facilitating the commission of,*
an offence under this Act.
- (4) *An order under subsection (3) shall be for a period not exceeding forty-eight hours in the first instance and may be extended for a further period provided that the maximum period of detention under the order does not exceed fourteen days.*
- (5) *Every order shall specify the place at which the person named in the order is to be detained and conditions in respect of access to a medical officer.*
- (6) *An accurate and continuous record shall be kept in accordance with the Schedule, in respect of any detainee for the whole period of his detention.*

[22] Mr Ramlogan states that Section 23 authorises detention, which is contrary to the common law which does not give and cannot give power to a judge to make a detention order in the circumstances outlined there where the subject is not charged or arrested or detained on suspicion of having committed a criminal offence. He opines that Section 23 purports to abridge the protection from detention which, the common law gave to a person at the commencement of the Constitution. The provision contravenes the due process of law by authorizing the detention for which it provides. This detention is outside the process of the criminal law which, is recognized by the common law or statute and therefore is contrary to

the fundamental rights and freedoms which are expressly declared to have applied in Trinidad and Tobago prior to the promulgation of the Constitution.

[23] The detention contravenes the right of a free man to devote his time and energy to peaceful pursuits such as he cannot do, undertake or pursue while he is in detention. In other words, his right to liberty other than personal liberty is infringed. The section further permits the police or other functionaries of the State to cause the detainee to submit to compulsory interrogation during the entire period of detention. Any activity which may be undertaken by a person who enjoys freedom without restraint may not be pursued by the victim in detention. This denial of liberty is a denial without due process of law. He quoted Fraser J.A.¹⁹ to define the scope of the guarantee of liberty and referred me to the judgment in its entirety to elicit the meaning and scope of "due process of law" as provided for in Section 4 (a) of the Constitution.

[24] He concludes that in relation to the detention itself the procedure established under Section 23 enabling physical restraint cannot be effected without a contravention of due process of law since at the heart of the contravention is a denial of physical liberty without charge or hearing. This is a denial of other civil liberties while the detention lasts. He further questions the interrogation allowed under the Act. The detention is also characterized as cruel and unusual punishment, a denial of a hearing and other protection including the right of Counsel as well as the denial of the right to habeas corpus. For good measure Mr Ramlogan further stated that Section 23 makes no provision for impugning the detention order. An order under Section 23 is effectual (effective) as soon as it is made.

[25] Mr Martineau emphatically disagrees with Mr Ramlogan's interpretation of the meaning and effect of Section 23 in light of Section 4 and 5 of the Constitution. The reasoning which supports his conclusion that any detention Order made pursuant to Section 23 does not violate the fundamental rights and freedoms or the provision for the protection of those freedoms can be summarized as follows:

¹⁹ See **FRASER JA in LA SALLE & ORS v ATTORNEY GENERAL OF TRINIDAD AND TOBAGO (1971) 18 WIR 379**

- (1) Section 23 established a regime under which detention orders can be made which ensures that Section 4 (a) the due process requirement is observed.
- (2) The presence of due process therefore removes the detention from being arbitrary.
- (3) The requirement for the consent of the Director of Public Prosecutions and the role of the Judge satisfied the protection of the law requirement in Section 4 (b).
- (4) Further the length of the period of deprivation – 48 hours in the first instance is one accepted as being within the limits of the Constitution.
- (5) A combination of 2, 3 and 4 ensures that Section 5 (2) (a) is not violated.
- (6) There is no violation of Section 5 (2) (b) since detention by order of a Judge for fourteen days is neither cruel nor unusual. Judges do inflict on persons by Order detention for even longer periods without such detention being considered cruel and unusual.
- (7) Section 5 (2) (c) is not isolated since the Section does not speak to a removal of an individual's right to be informed promptly and with sufficient particularity of the reason for his detention. It does not deprive him of his right to retain and instruct without delay a legal adviser and to hold communication with him. It does not deprive him of his right to be brought promptly before an appropriate judicial authority. In fact, the section is premised on the detainee's case being reviewed after forty-eight hours and there is nothing to prevent a Judge requiring the detainee to be heard. Section 23 of the Act does not deprive a detainee of a remedy by way of habeas corpus.
- (8) With respect to Section 5 (2) (d), the Section does not authorize any public authority to compel the detainee to give evidence or deprive him of the protection against self incrimination.
- (9) Section 5 (2) (b) is not violated since it does not deprive the detainee of any right to procedural protection.
- (10) With respect to the claim that the Section is at variance with the Common Law, the case of **DALLISON v CAFFERY**²⁰ gives a clear exposition as to the detention of an individual by the police without being charged with an offence. Further the

²⁰ **DALLISON v CAFFERY (1964) 2 All E.R. 610, 617 B – D per Lord Denning**

Common Law never placed a specific time limitation as to how long an individual can be detained by the police without being charged for an offence. What is of crucial importance is that such detention must not be for a longer period than is reasonably necessary.

- (11) In addition, one must consider the purpose and intention of Section 23 in determining this issue. Section 23 of the Act is found in Part IV of the Act under the heading "*Investigation of Offences*". Section 23 states that its purposes is to prevent the commission of an offence under the Act or to prevent the interference with an investigation of an offence under the Act. These are important considerations to be taken into account in determining the length of time an individual can be detained.
- [26] Mr Ramlogan countered that the circumstances in which a person may be arrested and detained at common law in respect of the commission of an offence are known. Section 23 of the Act is intended to add to those circumstances and to avoid resort to the common law to support the denial of liberty. The Act in so far as it allows grounds for detention of person other than common law grounds is a contravention of section 4 and any particulars in section 5 where matters covered by section 4 are given greater particularity.
- [27] Mr Ramlogan then sought to defend further his position that the Director of Public Prosecutions and the Judge ought not to be involved in the detention process in this way. He opined that the references to the Director of Public Prosecutions and to a Judge are part of the machinery for a detention which is constitutionally unlawful. The Director of Public Prosecutions performs an executive function under section 23. The Judge does not hear the person affected by his order which is prima facie an order in breach of the rules of natural justice. Further the question of habeas corpus is irrelevant to the constitutionality of section 23²¹. In the event that the section is used, a victim may seek habeas corpus. That is not the purpose of these proceedings which are intended to prevent section 23 being used at all by a declaration of its unconstitutionality.

²¹ even though this was raised by Mr Ramlogan

[28] SECTION 24

That section provides:

- (1) *Subject to subsection (2), a police officer of the rank of Inspector or above may, for the purpose of an investigation of an offence under this Act, apply ex parte to a judge in chambers for an order for the gathering of information from named persons.*
- (2) *A police officer may make an application under subsection (1) only with the prior written consent of the Director of Public Prosecutions.*
- (3) *A judge may make an order under subsection (1) for the gathering of information if he is satisfied that the written consent of the Director of Public Prosecutions was obtained and -*
 - (a) *that there are reasonable grounds to believe that an offence under this Act has been committed and that –*
 - (i) *information concerning the offence; or*
 - (ii) *information that may reveal the whereabouts of a person suspected by the police officer of having committed the offence,*
is likely to be obtained as a result of the Order; or
 - (b) *that –*
 - (i) *there are reasonable grounds to believe that an offence under this Act will be committed;*
 - (ii) *there are reasonable grounds to believe that a person has direct and material information that relates to the offence referred to in subparagraph (i); or*
 - (iii) *there are reasonable grounds to believe that a person has direct and material information that may reveal the whereabouts of a person who the police officer suspects may commit the offence referred to in subparagraph (i); and*
 - (iv) *reasonable attempts have been made to obtain the information referred to in subparagraph (ii) or (iii) from the person referred to therein.*
- (4) *An Order made under subsection (3) may –*
 - (a) *include conditions or terms which the judge considers reasonable;*

- (b) *order the examination on oath of the person named in the order;*
 - (c) *order the person to attend at a time and place fixed by the judge, for the purpose of being examined; and*
 - (d) *order the person to bring and produce any document or thing in his control or possession for the purpose of the examination.*
- (5) *An Order made under subsection (3) may be executed anywhere in Trinidad and Tobago.*
- (6) *The judge who made the order under subsection (3), or another judge of the same court, may vary its terms and conditions.*
- (7) *A person named in an order made under subsection (3) shall answer questions put to the person by the Director of Public Prosecutions or the Director of Public Prosecution's representative, and shall produce to the presiding judge documents or things that the person was ordered to bring, but may, subject to the ruling of the judge under subsection (8), refuse to do so if answering a question or producing a document or thing would disclose information that is protected by the law relating to non-disclosure of information or privilege.*
- (8) *The presiding judge shall rule on every objection or issue relating to a refusal to answer any question or to produce any document or thing.*
- (9) *A person shall not be excused from answering a question or producing a document or thing on the ground that the answer, document or thing may incriminate him or subject him to any penalty or proceedings.*
- (10) *Notwithstanding subsection (9) any –*
 - (a) *answer given;*
 - (b) *document or thing produced; or*
 - (c) *evidence obtained,**from that person shall not be used or received against him in any criminal proceedings other than in a prosecution for perjury.*
- (11) *A person may retain and instruct counsel at any stage of the proceedings under this section and counsel so retained may attend and represent the person named in the order when he is being examined.*
- (12) *The presiding judge, if satisfied that any document or thing produced during the course of the examination is likely to be relevant to the investigation of any offence under this Act, shall order that the document or thing be given into the custody of the police officer or someone acting on the police officer's behalf.*

(13) *Subject to subsection (8), nothing in this section requires the disclosure of any information which is protected by privilege.*

[29] From this Mr Ramlogan extrapolates that the section offends the right of the subject in that:

- (a) The right to liberty and the enjoyment of property and the right not to be deprived thereof except by due process of law by the obligation to submit to questions and the production of documents;
- (b) Equality before the law and the protection of the law is breached;
- (c) Allowing for arbitrary detention for purposes of questioning;
- (d) Deprivation of freedom of thought and expression;
- (e) Violation of the protection against unusual treatment by the involuntary submission to detention while being questioned;
- (f) The right to be brought before an appropriate judicial authority when detained is infringed;
- (g) The denial of the right to habeas corpus while being detained for questioning;
- (h) The denial of the protection of the law by the requirement to answer without the privilege against incrimination;
- (i) The denial of a right to challenge the order made ex parte by any form of procedure thereby depriving the subject of the order of procedural protection which is guaranteed by the Constitution.

[30] Mr Martineau countered that the provision allows functionaries to exercise great flexibility in dealing with the application. The fact that the Judiciary is involved at this stage ensures observance of an individual's rights under Sections 4 and 5. There is nothing in Mr Ramlogan's arguments that show a departure from due process. The existing laws of the land permit the making of orders by Judges for persons to give evidence and be examined. In so far as section 24 requires this to be done²², it is not unconstitutional since the right to freedom of thought and expression as it existed at the commencement of the Constitution was already subject to the making of such orders by Judges. Further, section 24 does not deal with detention and so section 5(2)(a) of the Constitution is not engaged. It does not

²² see section 24(4) and (7) of the Act (infra)

deny the right to habeas corpus by implication or otherwise. In any event, there can be no such implication since courts would interpret legislation in a manner that does not infringe fundamental rights. The Section does not violate the protection against self-incrimination because section 24(10) provides that any answer, document or evidence of the person cannot be used or received against him in any criminal proceedings other than in a prosecution for perjury²³. Section 24 cannot be said to deprive a person detained of the procedural provisions which Mr Sharma says are absent. It is not a case of deprivation. In addition, the validity of section 24 orders can be challenged, for example, on the ground of constitutionality.

[31] **ANALYSIS**

The provisions of the sections are clear. The words are unambiguous. There is no need to import any other interpretations especially those which may be nefarious. An unbiased reading will produce the conclusion that all the Constitutional safeguards have been observed. There is explicit recognition of the due process requirement of both sections. The role, responsibility and function of police officers, the Director of Public Prosecutions and the Judge are clearly spelt out and are in keeping with respect for rights, freedoms and privileges of individuals.

[32] Further, there is no denial of the right to habeas corpus nor is there any abrogation of a person's right to appeal from an order made by the Judge. The Judge is required to consider the case before him fairly and impartially. I associate myself with the Learned Judges in **RE BAGRI**²⁴ when they say: "A failure on the part of a hearing judge to exercise his or her discretion in this manner will constitute reviewable error". Nowhere is this right of appeal or review abrogated or taken away entirely. The right to impugn any order made by the judge remains intact. I therefore have no doubt that Mr Sharma's challenge against these sections fails.

²³ See **Re BAGRI** 240 D.L. R. (4th) 81

²⁴ **RE BAGRI** (*supra*) para. 89

[33] SECTION 34 provides:

34. (1) Any customs officer, immigration officer or police officer who has reasonable grounds to believe that property in the possession of any person is –

(a) intended to be used for the purpose of a terrorist act;
or

(b) terrorist property,

may apply to a judge in Chambers for a restraint order in respect of that property.

(2)

(3) Subject to subsection (4), a restraint order made under subsection (1), shall be valid for a period of sixty days, and may, on application, be renewed by a Judge of the High Court, for a further period of sixty days or until such time as the property referred to in the order is produced in court in proceedings for an offence under this Act in respect of that property whichever is the sooner.

(4) A Judge of the High Court may release any property referred to in a restraint order made under subsection (1) if –

(a) he no longer has reasonable grounds to suspect that the property has been, is being or will be used to commit an offence under this Act; or

(b) proceedings are instituted in the High Court for an offence under this Act in respect of that property within one hundred and twenty days of the date of the restraint order.

(5)

(6) An appeal from a decision of the judge made under this section shall lie to the Court of Appeal.

[34] Mr Ramlogan interprets this as allowing a Judge to make a restraint order on suspicion or belief and that suspicion on reasonable grounds equals belief. No authority was cited for this proposition. The time limits imposed by Section 34 were still branded unconstitutional

since seizure under the section for any time was unlawful. Again no basis for that conclusion was advanced.

[35] In answer, Mr Martineau took me to the **ALLEYNE FORTE CASE**. The Privy Council, in dismissing this appeal, held that "a court investigating an alleged infringement of the right to property recognized by section 4(a) of the Constitution was concerned to see whether a fair balance was struck between the requirements of the community and the protection of the fundamental rights of the individual"²⁵. The Privy Council also held that since the appellant could by legal proceedings thereafter challenge the lawfulness of the removal of his vehicle, his right under section 4(b) to the protection of the law was not infringed. As far as the time limits were concerned, Mr Martineau's contention was that the section was based on the Common Law principles set out in **GHANI v JONES**²⁶.

[36] **ANALYSIS**

Mr Ramlogan's submissions were novel but did not grab my attention as conforming to the clear provisions of the sections or the law as it stands. The due process element has not been infringed, the individual's right to protection of the law remains intact and the time limits imposed by the Common Law observed to the letter. Again successful challenge of this section on the ground of unconstitutionality is elusive.

[37] **SECTIONS 36 and 37**

These Sections provide:

- (1) *Where on an ex parte application made by the Director of Public Prosecutions to a judge in chambers, the judge is satisfied that there are reasonable grounds to believe that there is in any building, place or vessel, any property in respect of which an order of forfeiture may be made under section 37, the judge may issue –*

²⁵ **LEARIE ALLEYNE FORTE v THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO** [1998] I.W.L.R. 68; 71H – 72A

²⁶ [1970] 1.Q.B. 693

- (a) *a warrant authorizing a police officer to search the building, place or vessel for that property and to seize that property if found, and any other property in respect of which that police officer believes, on reasonable grounds, that an order of forfeiture may be made under sections 37; or*
 - (b) *a restraint order prohibiting any person from disposing of, or otherwise dealing with any interest in, that property, other than as may be specified in the order.*
- (2) *On an application made under subsection (1), the judge may, at the request of the Attorney General and if the judge is of the opinion that the circumstances so require –*
 - (a) *appoint a person to take control of, and manage or otherwise deal with, the whole or a part of the property, in accordance with the directions of the judge, and*
 - (b) *require any person having possession of the property to give possession thereof to the person appointed under paragraph (a).*
- (3) *The power to manage or otherwise deal with property under subsection (2) includes in the case of perishable or rapidly depreciating property, the power to sell that property; and in the case of property that has little or no value, the power to destroy that property.*
- (4) *Before a person appointed under subsection (2) destroys any property referred to in subsection 3, he shall apply to a Judge of the High Court for a destruction order.*
- (5) *Before making a destruction order in relation to any property, the judge shall require notice to be given, in such manner as the judge may direct, to any person who, in the opinion of the judge, appears to have an interest in the property and may provide that person with a reasonable opportunity to be heard.*
- (6) *A judge may order that any property in respect of which an application is made under subsection (4), be destroyed if he is satisfied that the property has little or no financial or other value.*
- (7) *A management order under subsection (2) shall cease to have effect when the property which is the subject of the management order is*

returned to an applicant in accordance with the law or forfeited to the State.

- (8) *The Director of Public Prosecutions may at any time apply to a Judge of the High Court to cancel or vary a warrant or order issued under this section.*
37. (1) *The Attorney General may make an application to a judge of the High Court for an order of forfeiture in respect of terrorist property.*
- (2) *The Attorney General shall be required to name as respondents to an application under subsection (1) only those who are known to own or control the property that is the subject of the application.*
- (3) *The Attorney General shall give notice of an application under subsection (1) to the respondents named in the application, in such manner as the judge may direct.*
- (4) *Where a judge is satisfied, on a balance of probabilities, that the property which is the subject of the application is terrorist property, the judge shall order that the property be forfeited to the State to be disposed of as directed by the judge.*
- (5) *Where a judge refused an application under subsection (1), the judge shall make an order that describes the property and declare that it is not terrorist property.*
- (6) *On an application under subsection (1), a judge may require notice to be given to any person not named as a respondent who in the opinion of the judge, appears to have an interest in the property, and any such person shall be entitled to be added as a respondent to the application.*
- (7) *Where a judge is satisfied that a person –*
- (a) *has an interest in the property which is the subject of the application; and*
- (b) *has exercised reasonable care to ensure that the property is not the proceeds of a terrorist act, and would not be used to commit or facilitate the commission of a terrorist act,*
- The judge shall order that the interest shall not be affected by the order made under subsection (4) and the order shall also declare the nature and extent of the interest in question.*

- (8) *A person who claims an interest in property that has been forfeited and who has not been named as a respondent or been given notice under subsection (6) may make an application to the High Court to vary or set aside an order made under subsection (4), not later than sixty days after the day on which the forfeiture order was made.*
- (9) *Pending the determination of an appeal against an order of forfeiture made under this section, property restrained under section 37 shall continue to be restrained, property seized under a warrant issued under that section shall continue to be detained, and in any person appointed to manage, control or otherwise deal with the property under that section shall continue in that capacity.*
- (10) *The provisions of this section shall not affect the operation of any other provision of this Act respecting forfeiture.*

[38] Mr Ramlogan's view is that these sections allow the seizure of property called terrorist property and that is unconstitutional. Section 4(a) is contravened since these sections allow the forfeiture of that property to the state without guilt. This is at variance with the Common Law. Mr Ramlogan alludes to the application of the civil standard in this process which he states contravenes an entrenched rule of the standard of proof required in Criminal Law. Section 37 is of a penal nature and the operation of Section 36 is largely dependant upon section 37. The dealing which section 36 allows is in substance the confiscation of property without compensation and without a criminal offence being proved to have been committed by the victim of the confiscation.

[39] These sections are not ultra vires the Constitution and are no more than statutory enactments of Common Law principles with regard to seizure, detention and forfeiture of property by the police/executive. There are sufficient safeguards in the Act to ensure the protection of a person's rights and interests in property, should that person come into contact with the law in this realm. Mr Martineau opines that it is not open to Mr Sharma to challenge these sections on the basis of

infringement of section 4(a) and (b) of the Constitution. He cites the **ALLEYNE FORTE CASE**²⁷ to support him.

[40] **ANALYSIS**

Again, language, syntax and grammar do not admit of any meanings but those which are apparent. Mr Ramlogan cites no authority for his propositions on interpretation of these sections and gives no reasons as to why and how I should adopt his approach. All I can say is that sections 36 and 37 do not bear out the meaning ascribed to them by Mr Ramlogan and therefore are not unconstitutional.

[41] **SECTION 13 OF THE CONSTITUTION** states:

(1) An Act to which this section applies may expressly declare that it shall have effect even though inconsistent with sections 4 and 5 and, if any such Act does declare, it shall have effect accordingly unless the Act is shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

(2) An Act to which this section applies is one the Bill for which has been passed by both House of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House.

(3) For the purposes of subsection (2) the number of members of the Senate shall, notwithstanding the appointment of temporary members in accordance with section 44, be deemed to be the number of members specified in section 40 (1).

Since I have found that neither the Act, nor the specific sections complained, do not offend Sections 4 and 5 of the Constitution, I find that it is unnecessary for Parliament to observe

²⁷ **Supra**

the requirements of section 13. I therefore formally find that Parliament did not infringe the requirements of section 13 and neither the Act nor the sections stated can be defeated on that ground.

[42] **ISSUE #2**

IS THIS THE TYPE OF ACTION CONTEMPLATED BY SECTION 14 (1) OF THE CONSTITUTION?

Put another way, has the Applicant brought himself within the purview of Section 14 (1) so as to entitle him to bring an action for Constitutional relief?

It is useful to reproduce the provision which I do now.

SECTION 14(1):

For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.

[43] The learning in the area is quite clear, but Mr Ramlogan advanced certain novel approaches to interpretation and invited me to traverse new ground. The main thrust was that Section 14 (1) does not only confer jurisdiction where the violations complained about concern Sections 4 and 5 of the Constitution. The crux of the matter in this case is that the Act was passed in violation of Section 13 – by a simple majority when there was need for a special majority. That is a matter of pure law and on the face of it a violation specific to Mr Sharma. As a matter of Constitutional principles and public policy, Mr Ramlogan opines, there is no logic or benefit in allowing that unconstitutional Act to remain part of our law. There is no need to await an infringement of a constitutional right so as to obtain *ex post facto* vindication. The minute the Act was born, in violation of Section 13, it immediately vested a person with the right to challenge under Section 14 (1). Mr Ramlogan was

adamant that the law as it stands prevents conscious citizens from challenging the Act as concerned citizens.

[44] Mr Ramlogan then directed me to several cases dealing with sufficient standing, urged me not to get "bogged down" in rules of technicality and preferred me to look at whether Mr Sharma has a genuine case to challenge the constitutionality of the Act. He asked me to sway away from rigid rules restricting Mr Sharma's access to the court.

[45] Mr Martineau was not at all generous in that regard. Mr Sharma must satisfy the requirements of the Section 14 (1) of the Constitution for this action to stand. Unless he can show that, he has no locus. He steered me away from learning in the Judicial Review cases and advised me that my role was to look at the provisions of Section 14 (1) of the Constitution, see what it means and interpret accordingly. In relation to the specific provisions of the Act, Mr Sharma has put no evidence before the court. More particularly, there is no evidence before the Court as to how the Act or Sections 23, 24, 34, 36 and 37 infringe or authorize the infringement of the provisions of sections 4 and 5(2) of the Constitution. In the absence of such evidence, I am not in a position to make or grant a declaration that the provisions of sections 4 or 5(2) of Constitution have been infringed as alleged.

ANALYSIS

[46] In examining Section 14 (1), one must look at the nature of the wrong either done or threatened to be done. This is the usual approach taken in cases brought under this Section²⁸ and indeed in other public law matters²⁹.

[47] In fact, if it is found that the claim is unmeritorious then the courts may not go on to determine the locus standi issue³⁰. I wish to examine whether section 14(1) of our Constitution can be utilized in the way advocated by Mr Ramlogan.

²⁸ See DEAN-ARMORER J. in SMALL'S v THE ATTORNEY GENERAL HCA No. 1417 of 2004

²⁹ See RAWLINS J.A. in ATTORNEY GENERAL OF ST LUCIA v MARTINUS FRANCOIS CIVIL APPEAL 37 of 2003 ST LUCIA

[48] Mr Sharma's entire case is based on the premise that an event **may/might** occur. He advances no factual basis to buttress his fears. There is nothing which touches him. Thus the task of establishing a factual matrix within which we can operate to consider the constitutionality of the Act has not been embarked upon³¹. The authorities are clear³². The position was succinctly stated by Dean-Armorer J. in the **SMALL CASE**³³. The Learned Judge stated redress under Section 14 must be specific. On that basis, I find that Mr Sharma's concerns over the Act have not ripened into a cause of action permitting him recourse to the Court under Section 14(1).

[49] One can approach the issue by asking another question:

DID PARLIAMENT ACT UNCONSTITUTIONALLY IN PASSING THIS ACT IN CONTRAVENTION OF SECTION 13 OF THE CONSTITUTION?

Can one raise the issue of constitutionality of an Act in this way? Must there be some purported action taken under the offending Act for a right of approach to the court under Section 14(1). This approach was also grazed by Mr Ramlogan in his attempt to locate himself on Section 14(1). My thinking though is that either way, the dicta of Dean-Armorer J. is telling and resonant. One cannot pronounce on an Act of Parliament qua Act. The right to bring an action only arises when the State, the Executive purports to put into effect the provisions of an Act by doing something and such employment leads to a breach of or a likely breach of the fundamental provisions set out at Sections 4 and 5.

[50] **OTHER ISSUES**

I am moved to make some comment on the issues of procedure raised by Mr Ramlogan. First, Section 14 (1) mandates the procedure to be used for coming to this court for relief

³⁰ *Infra*

³¹ *DELZOTTO v CANADA* 1999 169 D.L.R.4th Series 130; *LASALLE v THE ATTORNEY GENERAL* *supra*;

³² *BANTON & ORS v. ALCOA MINERALS OF JAMAICA INCORPORATION & OTHERS* (1971) 17 W.I.R. 275; *GORDON v MINISTER OF FINANCE* (1968) 12 W.I.R. 416

³³ *CLIVE LANCELOT SMALL v THE ATTORNEY GENERAL* *supra*
"Applicants are required to show their locus standi"

under the Constitution. This is acknowledged in the CPR at Part 56.1 (1) (b), 56.7 (2)³⁴ and 56.7 (4) (c)³⁵. This is the sole issue of relevance of the **Mc CLEOD**³⁶ case to the matter at bar and the matter must now rest.

[51] Secondly, on the issue of the use of declaratory relief, I would refer to settled legal principles when this relief can be used. A person can use the vehicle of declaratory relief when he has a personal legal right or interest which an alleged illegal action or decision threatens to infringe or has infringed³⁷. For clarity and to put the matter beyond doubt I shall reproduce the words of the Learned Lord Diplock:

"But the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else....."

[52] This case is exactly the kind that is frowned upon. The court must use its scarce resources to settle real disputes, disputes based on action causing harm or likely to cause harm to persons. We cannot engage in speculation and conjecture. We are not here to

³⁴ See prov. Of CPR

³⁵ 56.1 (1) This Part deals with applications –
 (a)
 (b) **By way of originating motion under s. 14(1) of the Constitution;**
 (c)
 (d)
 56.7 (1)
 (a)
 (b)
 (c)
 (d)
 (2) **The claim form in an application under section 14(1) of the Constitution shall serve as the Originating Motion mentioned in that section and shall be headed "Originating Motion".**
 (3)
 (4) **The affidavit must state -**
 (a)
 (b)
 (c) **in the case of a claim under s 14(1) of the Constitution, the provision of the Constitution which the claimant alleges has been, is being or is likely to be breached.**

³⁶ THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO v MC CLEOD (1984) 32 W.I.R. 450

³⁷ See Lord Diplock in GOURET V UNION OF PORT OFFICE WORKERS (1978) AC 435

facilitate pre-emptive strikes. We will however deal relentlessly with illegal and improper actions but only when the need to do so is premised on some factual foundation.

[53] Thirdly, procedural rules can never alter or change substantive law. The Over-riding Objective in the Rules serves the purpose of reducing to writing a "statement of principle which the court must seek to give effect when it interprets any provision or when it exercises any discretion specifically granted by the rules"³⁸. It is not meant to be used as a slip rule to heal wounds as and when they appear in the litigation process. It cannot create substantive rights to bring actions.

[54] At the start of this matter, Mr Ramlogan sought to amend his case by including discussion of Section 32 and 33 of the Act. His main basis was so that all the provisions can be put before the court to avoid multiplicity of proceedings. This was resisted.

[55] I decided that there was no usefulness in allowing the amendment since there was no ambiguity in the proceedings as filed and arguments on these sections could be successfully and economically included in his challenge of the Act in its entirety. Whilst I had the discretion to allow the amendment I used the overriding objective more specifically those paragraphs speaking to saving expense, time and expedition as aids to the exercise of my discretion conferred under the Civil Proceedings Rules.

[56] **CONCLUSIONS:**

My findings and conclusions may be summarized as follows:

- (1) **THE ANTI TERRORISM ACT, 2005** does not offend sections 4 and 5 of the Constitution;

³⁸ See **Saunders C.J. (Ag.) in THE TREASURE ISLAND COMPANY & DAVID SIMS v AUDUBON HOLDINGS LIMITED, NORMAN ISLAND SERVICES COMPANY LIMITED AND VALARIE SIMS Civil Appeal 22 of 2003 (British Virgin Islands).**

- (2) More particularly, Sections 23, 24, 34, 36 and 37 of the Act are not in violation of sections 4 and 5 of the Constitution.
- (3) There was no need for Parliament to observe the provisions of section 13(1).
- (4) Mr Sharma does not have locus standi under section 14(1), of the Constitution.
- (5) This is not a matter amenable to declaratory relief.
- (6) The Over riding Objective Part 1 Civil Proceedings Rules cannot be used as a "slip" rule.
- (7) The application by way of Fixed Date Claim Form for declarations of unconstitutionality must therefore fail.

ORDER

- o Fixed Date Claim Form dismissed.
- o Costs in the sum of \$14,000.00 to be paid by Claimant to Defendant.

CHARMAINE PEMBERTON
HIGH COURT JUDGE