COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2017/CLE/gen/001180

BETWEEN

RAMON LOP

Plaintiff

AND

ATTORNEY GENERAL OF THE BAHAMAS

First Defendant

AND

MINISTER OF IMMIGRATION

Second Defendant

AND

DIRECTOR OF IMMIGRATION

Third Defendant

AND

OFFICER IN CHARGE OF THE CARMICHAEL DETENTION CENTRE

Fourth Defendant

Before: The Honourable Madam Senior Justice Indra H. Charles

Appearances: Mr. Fred Smith QC with Mr. Crispin Hall and Ms. Raven Rolle of Callenders & Co. for the Plaintiff
Mr. Kirkland Mackey with Ms. Raquel Whyms of the Office of the Attorney General for the Defendants

Hearing Dates: 26 February 2020, 23 November 2020, 24 November 2020

Immigration – Arrest and Detention – Illegal entrant - False Imprisonment – Assault and Battery – Breach of Constitutional Rights – Articles 17, 19, 25 and 26 of the Constitution of The Bahamas – Whether the Plaintiff's imprisonment was unlawful where he was not charged with illegal landing and taken before court for same – Unknown citizenship status

of foreigner – Whether the Immigration authorities had jurisdiction to imprison the Plaintiff when there was nowhere to deport him to

Damages – Compensatory damage –Exemplary damage

After arriving in The Bahamas by boat, the Plaintiff, a foreigner, was arrested and detained for eight (8) months without being brought before a court. The Immigration authorities were unable to repatriate him to either of the two (2) countries to which he had ties because neither country wanted him. As a result, he was released with a work permit. After being convicted of two (2) misdemeanours, the Plaintiff was detained again. He was released after filing a habeas corpus application. The Plaintiff commenced this action seeking damages including aggravated damages, exemplary damages, vindicatory damages, compensation and damages for alleged breaches of the Constitution. The gist of his allegation is that both periods of his detention were unlawful since he had never been taken before a court and as such, no deportation order had been executed. He also alleged that the periods for which he was detained pending deportation were unduly long.

The Defendants denied that the Plaintiff's detention was unlawful. Instead, they contended that the circumstance was a difficult one in that the Plaintiff's nationality, being unknown, the only two countries to which he had ties, declined to accept him. The length of time of his detention, according to the Defendants, was the result of the difficulty in relocating the Plaintiff to a country.

In addition to the false imprisonment cause of action, the Plaintiff alleged that during his detention, he was assaulted and battered. He also alleged that some of his fundamental rights under the Constitution were breached namely (i) the right not to be subjected to inhuman treatment under Article 17(1); (ii) the right not to be arbitrarily arrested or detained under Article 19; (iii) the right to freedom of movement under Article 25 and (iv) the right not to be treated in a discriminatory manner under Article 26.

The Defendants denied that the Plaintiff was assaulted, battered or suffered any breach of any of his rights under the Constitution. They contended that the conditions at the Detention Centre were satisfactory.

HELD: finding (i) both periods of imprisonment were unlawful however the unlawful imprisonment cause of action in respect of the first detention period is time-barred and (ii) the Plaintiff's constitutional rights under Articles 17 (1), 19, 25 and 26 were not breached, the Plaintiff is awarded the sum of $198,200 in compensatory damages and $50,000 in exemplary damages for the second detention period of 994 days with interest thereon at the rate of 6.25% per annum from the date of judgment to the date of payment and costs to be taxed if not agreed.

1. Time in respect of the first period of detention started running when the Plaintiff was released and permitted to remain in the country with a right to work. It follows that the limitation period in respect of that detention had lapsed 12 months after his release. This

action, not having been filed until 29 September 2017, the cause of action in respect of that first detention period is time barred: Section 12 of the Limitation Act applied.

2. The laws that drastically interfere with personal liberty ought to be strictly complied with: **Jean and others v Minister of Labour and Home Affairs and others** (1981) 31 WIR 1 and **Bruno Ruffa v Minister of Immigration** SCCivApp No 131 of 2016 applied.

3. Where an arrest is effected under section 9 of the Immigration Act in accordance with the Criminal Procedure Code Act, the person arrested must be brought before a magistrate's court without undue delay, and not later than forty-eight hours after arrest – **Takitota v Attorney General of The Bahamas** SCCivApp No. 54 of 2004 applied.

4. The jurisdiction of the authorities to detain persons is only to the extent that they are awaiting deportation. If there is nowhere to deport an illegal immigrant to, the Immigration authorities have no authority to detain him because he is no longer being held "pending deportation:" **Takitota v Attorney General of The Bahamas** SCCivApp No. 54 of 2004 applied.

5. In assessing damages, it is more appropriate for awards to be made under each head claimed: para 15 in **Merson v Cartwright and Another** [2005] UKPC 38 relied upon.

6. The *locus classicus* in this jurisdiction for long periods of wrongful detention is the Bahamian case of **Atain Takitota v The Attorney General and others** [2009] UKPC 11. Cases like **Merson v Cartwright and Another** [2005] UKPC 38 and **Tynes v Barr** (1994) 45 WIR 7 are not helpful when the court is dealing with a long period of wrongful detention.

7. Damages for false imprisonment are incapable of exact estimation and their assessment must necessarily be a matter of degree, based on the facts of each case: **Douglas Ngumi v The Hon. Carl Bethel et al** SCCivApp No. 6 of 2021, paras 23-28 applied; **Nathanson v Mteliso and others** [202]] 2 LRC 135 and **Ruddock & Ors v Taylor** [2003] NSWCA considered.

JUDGMENT

Charles Sr J

Introduction

[1] The Plaintiff ("Mr. Lop") filed a Habeas Corpus application on 26 July 2017 asserting that his arrest and detention was unlawful. Shortly thereafter, on 4 August 2017, he was released. On 29 September 2017, Mr. Lop filed a Specially Indorsed Writ of Summons seeking damages including aggravated damages, exemplary damages, vindicatory damages, damages under the Constitution of The Bahamas ("the Constitution") for alleged breaches, compensation under Article 19(4) of the Constitution, interest and costs.

[2] The gist of Mr. Lop's claim is that he was falsely imprisoned first for eight (8) months and then for two (2) years and nine (9) months since he was never taken before a Magistrate's Court in accordance with the law and no deportation order had been executed. He also alleged that the periods for which he was detained pending deportation were unduly long.

[3] In addition to the false imprisonment cause of action, Mr. Lop alleged that, during his detention, he was assaulted and battered and that some of his fundamental rights under the Constitution were breached namely: (i) the right not to be subjected to inhuman treatment under Article 17(1); (ii) the right not to be arbitrarily arrested or detained under Article 19; (iii) the right to freedom of movement under Article 25 and (iv) the right not to be treated in a discriminatory manner under Article 26. Mr. Lop alleged that he is entitled to aggravated damages and exemplary damages arising from his wrongful arrest and false imprisonment, confiscation and conversion of his personal property, and damage including vindicatory damages for breaches of his rights under Articles 15, 17, 19(1), 19(2), 19(3) and 27 of the Constitution.

[4] The Defendants denied that Mr. Lop's arrest and detention were unlawful. Instead, they asserted that he was detained for the extended periods because every effort was made to return him to either Cuba or the United States but both countries declined to accept him. With respect to the first period of detention at the Carmichael Road Detention Centre ("Detention Centre"), the Defendants contended that it was time-barred pursuant to section 12 of the Limitation Act, Ch. 83. With respect to his second period of detention, the Defendants asserted that Mr. Lop's release into society was not in the best interest of national security. They also denied that the conditions at the Detention Centre were inhumane and that he was assaulted and/or battered whilst there.

Background facts

[5] The background facts are not substantially in dispute and are gleaned from the documentation adduced and used at the trial. To the extent that some of the facts

may be in dispute, then what is expressed must be taken as positive findings of fact made by me.

[6] Mr. Lop was born in Cuba on 3 July 1962. He moved with his family to the USA when he was an infant. He is currently stateless.

[7] Sometime around 27 May 2009, Mr. Lop arrived in Grand Bahama by boat at somewhere other than an authorised port of entry. He was subsequently arrested and brought to New Providence.

[8] In New Providence, he was detained at the Detention Centre, where he remained for eight (8) months ("first detention period"). Mr. Lop was not taken before a court after being arrested.

[9] During the time that he was detained, the Defendants alleged that they made every effort to have Mr. Lop repatriated to the USA and/or Cuba but since neither country wanted him, he was released with periodic status (a work permit).

[10] On 3 September 2010, Mr. Lop was found guilty of shop breaking and stealing. He was sentenced to imprisonment at the Bahamas Department of Corrections ("BDOC") for six (6) months for shop breaking and six (6) months for stealing.

[11] Then, on or around 6 September 2014, Mr. Lop was charged and sentenced to imprisonment for two (2) months for vagrancy and was ordered to be deported.

[12] Upon his release from BDOC on 14 November 2014, Mr. Lop was detained at the Detention Centre.

[13] During his detention, the Bahamas Government petitioned several countries including the USA and Cuba to accept him. The Government was unsuccessful in its petition. Additionally, Mr. Lop was not considered suitable for resettlement in a third country through the Office of the United Nations High Commissioner for Refugees ("UNHCR") process.

[14] Upon consideration of the information received by the Bahamian Government, the refusal of Mr. Lop to be settled in a third country and his previous infraction of the law, the Defendants continued to detain him at the Detention Centre.

[15] On 26 July 2017, Mr. Lop filed a habeas corpus application. He was released shortly thereafter, on 4 August 2017.

[16] Mr. Lop filed this action on 29 September 2017 seeking damages including aggravated damages, exemplary damages, vindicatory damages, compensation, damages under the Constitution for alleged breaches, interest and costs.

The evidence

Ramon Lop

[17] Mr. Lop filed a Witness Statement on 5 July 2019 which stood as his evidence in chief at trial. He testified that he was born in Havana, Cuba but moved to the USA with his family when he was a young baby. He eventually obtained a US Residence card.

[18] He alleged that while he resided in the USA, he served as a Lieutenant in the United States Marine Corp for many years before he retired. According to him, at one time, he was even deployed to Iraq to fight for the USA. Upon his return, he became emotionally unstable due to what he had experienced when he was in combat which caused him to retire.

[19] Mr. Lop stated that, sometime in 2002, he went on a fishing trip with another man off the coast of Florida. As a result of engine failure, they unintentionally and unknowingly drifted into Bahamian waters. They were brought to the shore of Grand Bahama by another boat crew. As they were repairing the boat with the intention of returning to the USA, they were approached by 2 police officers who asked for his documents. He told them that he did not have them with him because he was only supposed to be on a fishing trip.

[20] Mr. Lop stated that the officers insinuated that he and his friend were attempting to take part in human smuggling despite not finding any undocumented humans on the boat. Despite his explanation, he was arrested and detained at the Immigration Department in Grand Bahamas before being flown to New Providence where he was unlawfully kept for 8 months. During that time, he was never taken before any Court or charged with any crime.

[21] During his detention, Mr. Lop stated that he continuously begged the Immigration Officers to assist him to get back to the USA. He said that Officer Stephen La-Roda told him that the USA would not accept him since he had been out of the country for more than 3 months. He alleged that Officer La-Roda intimated to him that his only option is to be deported to Haiti but he declined since he has no ties to Haiti. Subsequently, a Cuban representative visited the Detention Centre and told him that they had checked the system and found no records of him in Cuba. He said he is stateless as he has neither Cuban nor American citizenship.

[22] Mr. Lop alleged that the conditions in the Detention Centre were not good. He was forced to sleep in a crowded cell where there was very little space to move around. The toilets were always clogged causing him to use the bathroom outside in the open. Additionally, there was never any toilet tissue to use.

[23] Mr. Lop further stated that, while he was detained, he assisted with offloading boxes of water and lifting kitchen pots and pans. He was never compensated for such work. As a result of the lifting, he developed terrible pains in his lower back. The doctors informed the officers that he required an operation and the officers told the doctors that it was too expensive. He was given ointment for his back and took a considerable amount of Motrin 500.

[24] Mr. Lop alleged that he was used as an interpreter for Cuban immigrants who were brought to the Detention Centre.

[25] Under further examination in chief by his Counsel, Mr. Hall, the evidence of Officer La-Roda was put to Mr. Lop – that the conditions at the Detention Centre were

satisfactory. Mr. Lop asserted that the showers were hardly operational and the windows had cracks which caused them to get wet when it rained. He also alleged that the portions of food were too small. In summary, he said it was "*really really really bad*".

[26] After being detained for 8 months, he was released and was told by the Immigration Authorities that he could remain in The Bahamas.

[27] According to Mr. Lop, in 2010, he was charged and convicted for shop breaking and stealing. He was sentenced to 6 months on both counts to run concurrently. In 2014, he was charged and convicted for vagrancy. He was sentenced to 2 months' imprisonment and then deportation. Mr. Lop maintained that he was not guilty of either offence. On both occasions, he said, he was unrepresented and was advised by police officers to plead guilty to avoid the long wait time for trial.

[28] After his last imprisonment at the BDOC, he was sent back to the Detention Centre although he was ordered to be deported. He remained there until August 2017.

[29] On 20 July 2017, he retained Counsel to issue a Writ of Habeas Corpus for his release. He was released from the Detention Centre on 4 August 2017 before his application could have been heard by a Judge of the Supreme Court.

[30] Since his release, Mr. Lop said that he has applied to the Bahamas Department of Immigration for Refugee Status. On 18 October 2018, he received a letter acknowledging his application and allowing him to remain in The Bahamas until a determination was made on his application. The certificate was valid until 17 April 2019. Since then, he was unable to have the status renewed, as he was in hospital after suffering injuries.

[31] Under cross-examination by Mr. Mackey, Mr. Lop's Affidavit which was filed on 26 July 2017 in support of his habeas corpus application, was put to him in an effort to point out inconsistencies in his evidence. He said "*I guess that's my signature but I don't remember doing this. I don't recall this*." He agreed that the Affidavit

stated that he came to The Bahamas by boat in 2004 and not 2002 as his evidence now states. Mr. Mackey also highlighted that the Affidavit stated that the reason why he did not have his documents when he was apprehended by police was because they were lost at sea.

Ebony Bonamy

[32] Ebony Bonamy was the first witness called by the Defendants to testify on their behalf. Her evidence in chief is contained in her Witness Statement which was filed on 18 July 2019. She testified that she is a corporal of police assigned to the Court Liaison Section of the Office of the Attorney General. Her duties include data entry into the Police AS400 system and clerical work.

[33] On 12 July 2019, Corporal Bonamy was requested to assist with research on Ramon Lop in the AS400 system. The AS400 system revealed that Mr. Lop was convicted and found guilty of Shop Breaking and Stealing. He was sentenced to 6 months imprisonment for Shop Breaking and 6 months for Stealing. Additionally, Mr. Lop was sentenced to one month imprisonment at BDOC for vagrancy.

Stephen La-Roda

[34] Stephen La-Roda ("Officer La-Roda") filed a Witness Statement on 15 July 2019 which stood as his evidence in chief at trial. He is the Superintendent of Immigration at the Ministry of Foreign Affairs and Immigration and has been employed by the Refugee Administration Unit from 2013 to present.

[35] Officer La-Roda testified that Mr. Lop was arrested on 7 May 2009 in Bahamian waters. He was found on board an unnamed 25 foot sea craft. Mr. Lop failed to clear into a port of entry and, of particular note, Mr. Lop had eleven extra fuel canisters on board and a number of life vests, all indicative of a human smuggling operation.

[36] He stated that while Mr. Lop was detained, the Refugee Administration Unit made efforts to have his immigration status recognised by the USA, but such efforts were unsuccessful.

[37] He further stated that the U.S. authorities refused to accept Mr. Lop back into their country because he was a prolific offender and was ordered to be removed from the USA. However, he admitted that he does not have any personal knowledge of this. The Defendants did, however, produce evidence that Mr. Lop had a criminal history in the USA although that evidence did not conclusively prove that such criminal history was the reason for the revocation of his status in the USA.

[38] Officer La-Roda stated that Mr. Lop's criminal history also prevented him from being assisted by the United Nations High Commission for Refugees ("UNHCR") and other channels of the Ministry of Foreign Affairs for resettlement into a third country. He said he obtained this information from communications with the UNHCR's office in Washington.

[39] Officer La-Roda further stated that because of the failed efforts to have Mr. Lop sent elsewhere, he was released from the Detention Centre and permitted to remain in The Bahamas. He said it was upon his recommendation that Mr. Lop be released.

[40] When Mr. Lop was detained for the second time after his release from BDOC, Officer La-Roda said that it was not in the best interest of national security to release him due to his continued infraction of the law.

[41] Officer La-Roda denied that the conditions at the Detention Centre were less than satisfactory as alleged by Mr. Lop. According to him, it was not overly crowded and was cleaned daily by a janitorial service. Mr. Lop received three (3) balanced meals a day. With respect to the toilets, Officer La-Roda stated that detainees constantly attempt to destroy the plumbing and, as a result, contracted plumbers effect the repairs as often as necessary and sometimes daily. He further testified that the medical staff would never permit the outside being used as toilets. He admitted that he had no personal knowledge of most of the conditions experienced by Mr. Lop at the Detention Centre but stated that most of his evidence with respect to the conditions were matters of policy. He said that he visited Mr. Lop several times

at the Detention Centre but he could not recall the dates. He further stated that the reason for Mr. Lop's release was due to concerns about his lengthy detention but he did not qualify for asylum status.

[42] Mr. La-Roda could not verify (nor did the Defendants produce documentary evidence) the date when Mr. Lop was released from his first period of detention. He also could not say (and the Defendants produced no documentary evidence in respect of it) whether a Deportation Order was ever issued in respect of Mr. Lop.

[43] Mr. La-Roda said that, although he has been an Immigration Officer for approximately 35 years, he only now knows that persons are not to be held for more than 48 hours before being taken before a court and charged with an offence.

Issues

[44] The issues before the Court are as follows:

1. Whether Mr. Lop was unlawfully arrested and detained at the Detention Centre?

2. Whether Mr. Lop's constitutional rights under Articles 17, 19, 25 and 26 were breached?

3. Whether Mr. Lop was assaulted and/or battered by officers of the Detention Centre?

4. If the Court finds affirmatively to the above, whether Mr. Lop is entitled to damages and/or compensation and the amount of such damages and/or compensation?

Preliminary Issue – limitation period

[45] Mr. Mackey made a preliminary submission with respect to the limitation period and its application to the periods of detention. He submitted that the first period of detention is time barred since the limitation period for bringing this type of claim,

pursuant to section 12 of the Limitation Act, is 12 months after the act, neglect or default complained of.

[46] Section 12 of the Limitation Act provides:

> **"12 (1) Where any action, prosecution or other proceedings is commenced against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the provisions of subsection (2) shall have effect.**
>
> **(2) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or in the case of a continuance of injury or damage within twelve months next after the ceasing thereof."** {Emphasis mine")

[47] Mr. Lop contended that he was detained two times: in 2009 and in 2015. The Writ of Summons was filed on 29 September 2017.

[48] Learned Queen's Counsel Mr. Smith, appearing for Mr. Lop, submitted that while there may be a limitation period for the false imprisonment claim with respect to the first detention period, there is no limitation period with respect to the claims pleaded under Articles 17 and 19 of the Constitution. He further submitted that there is no limitation period provided under Article 19 or Article 17 for unlawful arrest, unlawful detention, inhumane and degrading treatment. According to him, the legislature has given the power under Article 28 to make rules in relation to causes of action under Article 28 or for recovery of damages for breaches of constitutional rights.

[49] In my judgment, the two (2) periods of detention were independent of each other. I accept the evidence of Officer La-Roda that Mr. Lop was released from the first detention period with the ability to remain in The Bahamas because efforts to have him repatriated were futile. I also believe Officer La-Roda's testimony that Mr. Lop's second detention period was as a result of him having committed two (2) offences after being permitted to remain in the jurisdiction. As such, the two periods

of detention cannot be said to have been a continuing act by the governmental authorities.

[50] Mr. Smith QC has attempted to limit the application of the limitation period to the false imprisonment claim. The section speaks to actions brought for acts done in execution or intended execution of a written law, duty or authority. This includes any allegation that a governmental authority deprived a person of his right to be protected from inhuman treatment under Article 17 and any allegation that a governmental authority has breached a person's right not to be arbitrarily arrested or detained under Article 19. In both cases, the damage being complained of is unfair treatment by a person acting in execution of statutory or other public duties, to which the limitation period applies. It does not follow from the absence of a limitation period in the Constitution for bringing an action that there is no limitation period. The Constitution is merely the document that codifies the rights. How those rights are to be litigated are subject to other laws. The limitation period of bringing actions against persons acting in execution of public duties was applied to constitutional rights in **Michael Russell v The Attorney General of The Bahamas & Ors** (SCCivApp.No. 83 of 2016). In **Russell**, the Court of Appeal determined that it was unable to determine whether section 12 of the Limitation Act applied to the Plaintiff's claim of police brutality because it was unclear whether the police officers were acting on a frolic of their own.

[51] Time in respect of the first period of detention started running when Mr. Lop was released and permitted to remain in the country. It follows that the limitation period in respect of that detention had lapsed 12 months after his release. This action having not been filed until 29 September 2017, I agree with Mr. Mackey that the cause of action in respect of that first detention period is time barred.

Law

The statutory framework

[52] Mr. Lop takes issue with the failure to accord with proper procedure as well as the undue length of the detention periods. The cases advanced by Counsel for the

parties centered around the failure of the authorities to strictly adhere to proper procedure and the length of time of the detention of Mr. Lop.

[53] The starting point for aliens and the right of a State to have them expelled is that it is a power of every State to refuse to permit an alien. Mr. Mackey correctly stated that in **Desmond Alphonso v The Attorney General for the Virgin Islands** Claim No BVIHCV2010/0105 (Unreported) Judgment delivered on 8 February 2011). Hariprashad-Charles J, at para. 85 stated that it is a fundamental principle of immigration law that an alien does not have an unqualified right to enter or remain in a State. The Court quoted from the speech of Crane JA in **Rolf Brandt v AG of Guyana et al** (1971) 17 WIR 448 at 516, where she relied on the speech of Lord Atkinson in AG for **Canada v Cain** [1906] AC 542:

> **"This right to expel or deport an alien at pleasure was expounded in the case of A-G for Canada v Cain ([1906] AC 542, [1904-07] All ER Rep 58, 75 LJPC 81, 95 LJ 314, 22 TLR 757 PC, 2 Digest (Repl) 180, 99), when Lord Atkinson, in delivering the opinion of their Lordships' Board, advised His Majesty in a matter involving the expulsion of an alien from the Dominion of Canada thus ([1904-07] All ER Rep at p 584):**
>
> > **"One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from that State, *at pleasure,* even a friendly alien, especially if it considers his presence in the State opposed to its peace, order and good government, or to its social or material interests: Vattel: LAW OF NATIONS, bk 1, s 231; bk 2, s 125. The Imperial Government might delegate those powers to the governor or the government of one of the colonies, either by royal proclamation which has the force of a statute (*Campbell v Hall* (1774), 20 State Tr 239), or by a statute of the Imperial Parliament, or by the statute of a local Parliament to which the Crown has assented. If this delegation has taken place, the depository can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them…. The power of expulsion is, in truth, but the complement of the power of exclusion. If entry be prohibited, it would seem to follow that the government which has the power to exclude should have the power to expel the alien who enters in opposition to its laws."**

And I would respectfully add, <u>as a general proposition it seems to follow that if an alien has no right to enter any State, he can have no right not to be expelled therefrom.</u>"[Emphasis mine]

[54] However, the State's right to hold and expel aliens is not unfettered. Learned Queen's Counsel Mr. Smith urged the Court to recognize that the process of deportation must be strictly adhered to and he cited **Bruno Ruffa v Minister of Immigration** SCCivApp No 131 of 2016 in support.

[55] Section 9 of the Immigration Act ("IA") empowers any immigration officer or police officer who has reasonable cause to suspect that any person, other than a citizen of The Bahamas or a permanent resident, has committed an offence under the IA or regulations, to arrest that person without a warrant. It provides:

> **"9. If any Immigration Officer or police officer has reasonable cause to suspect that any person, other than a citizen of The Bahamas or a person who is a permanent resident, has committed an offence under the Act or any regulations and if it appears to him to be necessary to arrest such person immediately in order to secure that the ends of justice for the purposes of this Act shall not be defeated, he may arrest such person without warrant whereupon the provisions of section 18 of the Criminal Procedure Code Act shall apply in every such case."**

[56] Where such an arrest is effected, in accordance with the Criminal Procedure Code, the person arrested must be brought before a magistrate's court without undue delay, and not later than forty-eight hours after arrest (unless he is earlier released on bail by a police officer having power in that behalf under the Police Act).

[57] Section 19 of the IA deals with restriction on landing and embarking. It provides:

> **"19. (1) Subject to the provisions of this Act, a person shall not land in The Bahamas from any place outside The Bahamas or embark in The Bahamas for any destination outside The Bahamas –**
>
> > **(a) save with the leave of an Immigration Officer; and**
> >
> > **(b) elsewhere than at an authorised port or at such other place as an Immigration Officer may in any particular case allow."**

[58] Section 40 prescribes the procedure where deportation is desirable. It states:

> **"40. (1) If at any time after a person, other than a citizen of The Bahamas or a permanent resident, has landed in The Bahamas, it shall come to the knowledge of the Minister that such person —**
>
> > **(a) has landed or remained in The Bahamas contrary to any provisions of this Act;**
> >
> > **(b) has been convicted of any offence against this Act or of any other offence punishable on indictment with death or imprisonment for two years or upwards; or**
> >
> > **(c) is a person whose presence in The Bahamas would in the opinion of the Board be undesirable and not conducive to the public good,**
>
> **the Minister may make an order (hereinafter referred to as a "deportation order") requiring such person to leave The Bahamas within the time fixed by the deportation order and thereafter to remain out of The Bahamas."**

[59] Succinctly, section 40 provides that the Minister can make a deportation order requiring any person (other than a citizen of The Bahamas or a permanent resident) to leave The Bahamas within the time fixed by the order and to remain out of The Bahamas in certain circumstances.

[60] Section 41(1) deals with the removal from The Bahamas of persons who are subject to deportation orders under section 40. It states:

> **"41. (1) Subject to the provisions of subsection (5) of this section any person in whose case a order has been made may be placed, under the authority of the Governor-General, on board any ship or aircraft which is about to leave The Bahamas and the master of the ship or commander of the aircraft shall, if so required by an Immigration Officer, take such steps as may be necessary for preventing the person from landing from the ship or aircraft before it leaves The Bahamas, and may for that purpose detain the person in custody on board the ship or aircraft."**

[61] Section 41(4) provides that any person in respect of whom a deportation order has been made may be detained under the authority of the Governor General until he is placed on a ship or aircraft pursuant to 41(1). It provides:

> **"(4) Subject to the provisions of subsection (3) of this section any person in whose case a deportation order has been made may be detained, under the authority of the Governor-General until he is dealt with under subsection (1) of this section; and a person in whose case a recommendation for deportation is in force under section 40 shall (unless the court, in a case where the person is not sentenced to imprisonment, otherwise directs) be detained until the Governor-General makes a deportation order in his case or directs him to be released."**

[62] And section 41(3) expressly provides that the Governor-General may apply any money or property belonging to any such person to be deported in payment of the whole or any part of the expenses to the voyage from The Bahamas and the maintenance until departure of the person and his dependants (if any).

Analysis

[63] In the event that I am wrong in my analysis that the first detention period of eight (8) months is time barred, I shall consider the lawfulness of that period.

[64] As Mr. Lop embarked in The Bahamas at a place that was not an authorised port of entry, he had entered the jurisdiction illegally. The fact that Mr. Lop had been suspected of human trafficking, as stated by Officer La-Roda, is hardly relevant. As such, Mr. Smith's submission that the failure to charge Mr. Lop with an offence related to the suspected human trafficking is untenable. It was sufficient that he had entered at an unauthorised port of entry (and consequently illegally) for him to have been taken into custody.

[65] Mr. Smith urged the Court to find that Mr. Lop had never been brought before a court and that no detention order had been made in respect of him. On that basis, he submitted that his detention was unlawful.

[66] It is true that Mr. Lop was never brought before a court and it is also true that no deportation order was made in relation to him. As there was no deportation order, Mr. Lop was arrested pursuant to section 9 of the IA. The following sub-issues arise namely: (i) whether the failure to bring Mr. Lop before a court after his arrest

rendered his detention unlawful; and (ii) whether the failure to execute a deportation order rendered his detention unlawful.

[67] The failure to bring Mr. Lop before a court following his arrest rendered his detention unlawful. In **Jean and others v Minister of Labour and Home Affairs and others** (1981) 31 WIR 1, the applicants made habeas corpus applications and the Court had to decide whether an oral deportation order made by the Minister was sufficient. The Court explained that the laws that drastically interfere with personal liberty ought to be strictly complied with. At page 21, Blake J said:

> **"All the authorities go to show that when drastic powers are given to interfere with personal liberty, there must be the strictest compliance with the letter of the law, be the person affected a subject by birth or naturalisation, or a stranger within the gates. Thus in Musson v Rodriguez <u>[1953] AC 530</u>, where the appellant had been ordered to be removed from Trinidad and Tobago and was detained in custody meanwhile pursuant to a decision of the Governor-in-Council that he was an undesirable inhabitant, Lord Normand, delivering the judgment of the Judicial Committee of the Privy Council, said at page 533:**
>
> > **"The drastic power given to the Governor-in-Council … to interfere with personal liberty may be exercised without any antecedent judicial enquiry, and without the persons who are affected having had any opportunity of making representations. It is not subject to any appeal to a court of law or to any form of review at the instance of the affected persons. <u>When such a power is committed to the Governor-in-Council there must be the strictest compliance with the provisions by which it is granted</u>."[Emphasis supplied]"**

[68] The learned judge determined that there was no valid deportation order under section 36(1) of the IA before the arrest of the applicants since the deportation order was not made in writing. As such, the detention of the applicants before the deportation order was made was unlawful.

[69] The point is that strict compliance is required. If an oral order which was subsequently reduced to writing was insufficient to justify the arrest of the applicants in **Jean**, then it cannot be said that the authorities' failure was

insignificant. The failure to bring Mr. Lop before a court after his arrest which was pursuant to a provision that expressly states that it is subject to being brought before the court, is, in my considered opinion, fatal.

[70] In **Takitota v Attorney General of The Bahamas** SCCivApp No. 54 of 2004, the Court of Appeal was confronted with the question of whether an immigrant who had been detained for eight (8) years without having been brought before a court for illegal landing, which was expressed to be the Respondents' basis for his detention, constituted unlawful detention. The Court of Appeal held that the whole period of Mr. Takitota's incarceration amounted to unlawful detention. The Court of Appeal opined that the failure by the Immigration Authorities to charge him with illegal landing was astonishing since it was their premise for asserting that his imprisonment was lawful.

[71] The Court of Appeal explained the importance of not imprisoning persons without allowing them a trial. At paras 70-71, the Court stated:

> **70 In arriving at his decision that the appellant landed illegally in The Bahamas, the learned judge did not appear to consider such decisions as Eshugbayi Eleko v Government of Nigeria <u>[1931] AC 662</u> and Liversidge v Anderson <u>[1942] AC 206</u>. In Eshugbayi Eleko v Government of Nigeria at page 670 Lord Atkin said:**
>
> > **"In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that the judges should not shrink from deciding such issues in the face of the executive."**
>
> **And in Liversidge v Anderson, Lord Atkin at page 245 said -**
>
> > **"... <u>in English law every imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify his act</u>."**
>
> **<u>Those comments are equally applicable to the jurisprudence of The Bahamas which not only inherited the British system of justice but also entrenched those principles in the Bill of Rights in the</u>**

Constitution. In this case, for more than 8 years there was no attempt by the executive to justify the appellant's incarceration to any court and even when the appellant applied to the court for redress after the appellant had been released from custody on bond following an application for habeas corpus, the executive still tried to justify their detention of the appellant on the ground that he was guilty of illegal landing but did not produce any records to support that allegation. The fact that the appellant is not a Bahamian citizen does not mean that he is not entitled to all the protection of the laws of The Bahamas. As their Lordships emphasised in Khawaja's case, in cases where the executive is given power to restrict human liberty, the courts should always regard with extreme jealousy any claim by the executive to imprison a citizen without trial and allow it only if it is clearly justified by the statutory language relied on - see per Lord Bridge of Harwich at p. 122. This principle applies equally to everyone within the jurisdiction of the court whether or not he is a citizen of the country - see Khawaja's case at p. 111-112 per Lord Scarman.

71 At paragraph 34 of his judgment in this case, the learned judge wrote:

> **"34. However, as I understood the plaintiff's case it is that he was not taken before a court or charged with any offence and that his arrest presumably by Immigration Officers and subsequent detention were all unlawful."** [Emphasis added]

[72] In reviewing the trial judge's conclusion that the execution of the deportation order and detention were lawful, the Court of Appeal agreed that "*detention or arrest with a view to deportation without being taken before a court is not permissible*." However, the Court of Appeal found that it was contrary for the trial judge to conclude that the imprisonment could not be false after the Minister had issued the deportation order because a deportation order could not legitimize Mr. Takitota's detention which was already unlawful by reason that he had not been taken before a court. This is because the deportation order could only be made on the basis that Mr. Takitota landed illegally, so by failing to prove that, there was no basis for making a deportation order. At paras 81-82, the Court of Appeal continued:

81 Where, as in this case, a person reasonably suspected of illegal landing is not taken to court as required by section 9 of the Act, the deportation order by the Minister could not render the appellant's incarceration thereafter lawful because until a court had decided that

> **he had breached the law, there was no legitimate basis on which the deportation order itself could have been made. The suspicion of the officers did not concretise into a concluded decision by a judicial tribunal nor could the order of the Minister or the finding by the learned trial judge more than twelve years later clothe with legality that which was not legal at its inception. In our judgment, the whole period of the appellant's incarceration was unlawful.**
>
> **82 In *Tan Te Lam and Others* case, their Lordships also held that:**
>
> > **"(2) The question whether the applicants could be repatriated to Vietnam and were therefore being detained pending removal was prima facie a jurisdictional question; if removal was not pending within section 13D of the Immigration Ordinance, the director had no power to detain at all. Accordingly, that question was for the court to determine and it was for the director to prove to the court, on the balance of probabilities, the facts necessary to justify the conclusion that the applicants were being detained pending removal. Since no sufficient reason had been shown for overturning the judge's 35 finding that it was the policy of the Vietnamese government not to accept repatriation of non-Vietnamese nationals, it followed that the first three applicants were not being detained pending their removal and that the judge's decision to order their release was therefore correct. However, the judge's finding that the fourth applicant would be removed from Hong Kong in the near future had in the event proved to be wrong and, since it appeared that the Vietnamese government's policy of refusal was still being applied to him, it was right to order his release. The appeals would accordingly be allowed."** (Emphasis added)

[73] With respect to the failure to execute a deportation order, the question is whether its absence rendered the detention unlawful. The authority to detain persons pending deportation is provided for in section 41 (4) of the IA. Although the deportation order is not required where an arrest is effected under section 9, it seems that a deportation order is required to justify the detention of a person because the detention provided for is with a view to deportation. At para. 72, the Court of Appeal had this to say:

> **"The learned judge then referred to the powers contained in the Immigration Act which enable the executive to detain a person who is**

subject to an order for deportation. In the same paragraph, the learned judge continued -

> "**<u>Section 40 of the Immigration Act authorizes the detention of a person for the purpose of deportation. Section 9 of the act authorizes the arrest of a person on suspicion of breach of the Immigration Act but requires the arresting officer - police or immigration - to take the person before a court within 48 hours of arrest having previously explained to him in a language he understands the reason for his arrest. However, detention for the purpose of deportation must follow and not precede the signing of the deportation order for it to be lawful</u>. <u>Detention or arrest with a view to deportation without being taken before a court is not permissible. And so in the absence of any evidence that the plaintiff was taken before a court, his initial detention was not authorized by law and was therefore unlawful and would amount to a breach of Article 19 and to false or wrongful.</u>"** [Emphasis added]

[74] In this regard, Mr. Mackey's submission as to the peculiarity of the circumstances is relevant. Mr. Mackey contended that, in the circumstances, where Mr. Lop could not be returned to Cuba or the USA, the two countries to which he had ties, the circumstances were special. It was not disputed between the parties that Cuba refused to accept Mr. Lop. Mr. Mackey relied on the evidence of Officer La-Roda that despite the efforts to have Mr. Lop returned to the USA, he was refused because of his criminal antecedent. This evidence was strongly tested by Mr. Smith. However, the Defendants produced evidence that Mr. Lop did have a criminal history in the USA and that his status had been revoked. In any event, I am satisfied that the USA refused to accept Mr. Lop whatever the reason might have been.

[75] That said, I agree with Mr. Smith that Mr. Lop's detention was only lawful to the extent that it was with a view to deportation, which could only be lawfully evidenced by a deportation order. I also appreciate Mr. Mackey's submission that there was some practical difficulty which the Defendants faced with executing a deportation order when there was nowhere to deport Mr. Lop to. These circumstances are

almost identical to those in **Takitota**, where the Respondents' position was that they had nowhere to repatriate Mr. Takitota to since Japan was unwilling to accept him.

[76] In **Takitota**, the Court of Appeal opined that because Japan was unwilling to accept Mr. Takitota, his detention from the date that this was made clear by the Government of Japan was not pending his removal and the Minister's power to continue detention was no longer valid because his power was only valid to the extent that it was "pending his removal". At paras. 83-84, the Court of Appeal said:

> **"83. In this case, the question whether the appellant could be repatriated to Japan and was being detained pending removal was a jurisdictional question which could only be properly determined by a court. As the Government of Japan had not indicated that they were willing to accept the appellant, his further detention from April 1994 was clearly not "pending his removal" to Japan. The Minister's power to continue the detention of the appellant pending the latter's removal, even if it had been validly exercised in the beginning, was no longer valid since there was no country to which the appellant could be removed.**
>
> **84. An alternative argument advanced on behalf of the respondents was that the detention under the Minister's warrant was for a reasonable period and was lawful under sections 39 and 40 of the Immigration Act since they were trying to find a country which would have been willing to accept the appellant and whose culture may be more akin to that of his native land. Even if we assume that that was a reasonable position for the respondents to take, by parity of 36 reasoning with the principle in Tan Te Lam and Others case, the detention of the appellant in this case was unjustified because there was no duty on any other state to accept the appellant. The Immigration Act does not give the executive a carte blanche to detain a person without trial on the suspicion – even a reasonable one – that the person has landed in The Bahamas illegally. Very clear language would be needed to convince this court that the executive could detain a person in The Bahamas indefinitely on its warrant without a single attempt to bring a person reasonably suspected of a criminal offence before a court."** [Emphasis added]

[77] The result is that there is no merit in Mr. Mackey's submission that Mr. Lop's detention was lawful because there was nowhere to send him to. Once it became clear that the USA refused to accept Mr. Lop, the Immigration Department had no authority to detain him because the detention was obviously not "pending his

removal". The instant facts are slightly different in that no deportation was ever executed whereas in **Takitota**, the deportation order was groundless since the appellant had never been charged and convicted of illegal landing. The point is however the same: that the detention was not "pending removal" on the basis that he had entered illegally because (i) the Immigration authorities had no authority to detain him because the illegal landing that they alleged was never established and (ii) once it became clear that there was nowhere to deport Mr. Lop to, be it Cuba or the USA, the authorities had no jurisdiction to detain him. The importance of establishing illegal landing before a court is still the same here notwithstanding that no deportation order was made in respect of Mr. Lop.

[78] Accordingly, Mr. Lop was unlawfully/falsely imprisoned when he was detained at the Detention Centre on both occasions. It follows that his constitutional right not to be arbitrarily detained under Article 19 of the Constitution was breached. However, as I have already stated, the first detention period is time-barred.

Assault and battery

[79] No evidence was presented by Mr. Lop to substantiate his claim that he was assaulted and battered by Officers at the Detention Centre. In any event, I found Mr. Lop to be a shaky witness and I take his evidence with a grain of salt.

Breaches of Mr. Lop's constitutional rights

[80] Mr. Lop alleged breaches of his constitutional rights in addition to his Article 19 right not to be arbitrarily arrested and/or detained: (i) the right not to be treated inhumanely under Article 17, (ii) the freedom of movement under Article 25 and (iii) the right not to be treated in a discriminatory manner under Article 26.

[81] Article 17 of the Constitution provides that:

> **"17 (1) <u>No person shall be subject to torture or to inhumane or degrading treatment or punishment</u>.**
>
> **(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question authorize; the infliction of any**

description of punishment that was lawful in the Bahama Islands immediately before 10th July, 1973." [Emphasis added]

[82] Article 19(1),(3) & (4) provide:

> **"19. (1) no person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases—**
>
> **(a) in execution of the sentence or order of a court, whether established for The Bahamas or some other country, in respect of a criminal offence of which he has been convicted or in consequence of his unfitness to plea to a criminal charge or execution of the order of a court on the grounds of his contempt of the court or of another court or tribunal;**
> **(b) in execution of the order of a court made in order to secure the fulfilment of any obligation imposed upon him by law;**
>
> **(c) for the purpose of bringing him before a court in execution of the order of a court;**
>
> **(d) upon reasonable suspicion of his having committed or being about to commit a criminal office;**
>
> **(e) in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare;**
>
> **(f) for the purpose of preventing the spread of any infectious or contagious disease or in case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;**
>
> **(g) for the purpose of preventing the unlawful entry of that person into The Bahamas or for the purpose of effecting the expulsion, extradition or other lawful removal from The Bahamas of that person or the taking of proceedings relating thereto; and without prejudice to the generality of the foregoing, a law may, for the purposes of this subparagraph, provided that a person who is not a citizen of The Bahamas may be deprived of his liberty to such an extent a may be necessary in the execution of a lawful order requiring that person to remain within a specified area within The Bahamas or prohibiting him from being within such area.**
>
> **(2) ….**
>
> **(3) Any person who is arrested or detained in such a case as is mentioned in subparagraph 1(c) or (d) of this Article and who is not released shall be brought without**

undue delay before a court; and if any person arrested or detained in such a case as is mentioned in the said subparagraph (1)(d) is not tried within a reasonable time he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary for trial

(4) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that other person."

[83] Article 25 of the Constitution provides for freedom of movement and Article 26 speaks to protection from discrimination by reason of race, place of origin, political opinions, colour or creed.

[84] Although it is true, as Mr. Smith argued, that Officer La-Roda could not say whether Mr. Lop was subject to humane conditions at the Detention Centre, I found Officer La-Roda to be a very convincing witness. I am of the view that while the Detention Centre is not a five-star facility, it was more likely than not that the conditions there are fair. Further, I do not consider helping to unload boxes and work of that sort without compensation to amount to working like a slave. Accordingly, I am not satisfied that Mr. Lop's rights under Articles 17, 19, 25 and/or 26 of the Constitution were infringed. I so find.

Assessment of Damages

[85] In his Specially Indorsed Writ of Summons filed on 29 September 2017, Mr. Lop sought damages under the following heads namely:

1. Damages;
2. Aggravated damages;
3. Exemplary damages;
4. Vindicatory damages;
5. Compensation under Article 19(4) of the Constitution;
6. Damages for breaches of his rights under Articles 15,17,19(1), 19(2), 19(3) and 27 of the Constitution;

7. Interest on each of the foregoing pursuant to statute;
8. Costs on full indemnity and solicitor and own client basis certified fit for three counsel and;
9. Such further or other relief as to the Court may think fit.

False imprisonment

[86] Mr. Lop is entitled to damages for false imprisonment. He was deprived of his liberty for 2 years and 9 months from 14 November 2014 to 4 August 2017 which is 994 days.

[87] The amount of such an award cannot be precisely measured. All that can be done is to award such sum, within the broad criterion of what is reasonable and in line with similar awards in comparable cases, as represents the court's best estimate of Mr. Lop's general damages to compensate him for what he has lost bearing in mind all the probabilities.

[88] In **Douglas Ngumi v The Hon. Carl Bethel et al** SCCivApp. No. 6 of 2021, the Court of Appeal, at para. 10 of their Judgment, extensively quoted from the Court's Judgment particularly paras 84 to 90, where this Court stated:

> **[84] In *Takitota*, the Privy Council stated at para 16 of the Judgment that the local courts are very much better placed than the Board to say what is appropriate by way of damages, having regard to the conditions in the country concerned. At para 17, the Board stated:**
>
> > **"The court should determine what they consider to be an appropriate figure to reflect compensation for the long period of wrongful detention of the appellant, taking into account any element of aggravation they think proper, reflecting the conditions of his detention and, in their own words, the misery which he endured. In assessing the proper figure for compensation for such long-term detention, they should take into account that any figure they might regard as appropriate for an initial short period, if extrapolated, should ordinarily be tapered, as their Lordships have pointed out in para 9 above. The final figure for compensatory damages should therefore amount to an overall sum representing appropriate compensation for**

> **<u>the period of over eight years' detention, taking account of the inhumane conditions and the misery and distress suffered by the appellant.</u> [Emphasis added]**

[85] No doubt, *Takitota* is the *locus classicus* in this jurisdiction dealing with lengthy periods of wrongful imprisonment. The principles emanating from it are helpful because the present case bears close affinity to *Takitota.* The cases of *Merson, Tynes* and the litany of cases referred to by Mr. Smith QC dealt with short periods of imprisonment. As stated in *Alseran*, a plaintiff who has been wrongly kept in custody for 24 hours would be entitled to an award (in England, about £3,000). For subsequent days the daily rate will be on a progressively reducing scale. The figures were not intended to be applied in a mechanistic manner.

[86] So, what is a reasonable and fair compensation for a man who was deprived of his liberty for over 2,316 days and kept in deplorable, inhumane and degrading conditions whilst being housed at the Detention Centre? As I stated earlier, the Court takes judicial notice that the Detention Centre is more palatable than Her Majesty's Prison (now the Bahamas Department of Corrections).

[87] Besides the inhumane conditions that Mr. Ngumi found himself in whilst awaiting his deportation to his home country of Kenya, his liberty was also taken away from him for 2,316 days. If he were not detained, he might still have been gainfully employed, as he says, as a jitney driver, perhaps something better or something worse. It is too difficult to predict the future. Although he did not particularize the monthly salary which he used to receive as a jitney driver in Kenya, the Court takes judicial notice that a person working as a bus driver in Kenya typically earns around 49,500 Kenyan shillings monthly: <u>www.salaryexplorer.com</u>. This is the equivalent of $450.10 Bahamian dollars monthly. It is unfortunate that Mr. Ngumi did not provide this evidence. Anyway, this is nothing more than a surmise and therefore unhelpful to compensate a man for 2,316 lost days of his life.

[88] That said, Mr. Ngumi claims total compensation of $3,000, 000.00 under this head. Indeed, and in Mr. Smith's own words, such an astronomical amount is nothing more than a fantasy.

[89] In my opinion, even though the Court of Appeal in *Cleare* did not find favour with the $250.00 daily rate in *Takitota*, I still consider the daily rate of $250.00 to be fair and reasonable considering the socio-economic conditions in The Bahamas. I also took into account the aggravation suffered by Mr. Ngumi which was nothing short of cruel and inhumane. Therefore, for 2,316 days at $250.00 daily is equivalent to $579,000.00. As the Privy Council noted at para 9 of *Takitota,* it is usual and proper to reduce the level of damages by tapering them when dealing with an extended period of unlawful imprisonment: *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498, 515, per Lord Woolf MR. So I will reduce the quantum of damages by

one-third which equals $386,000.00.

[90] For the torts of false imprisonment, assault and battery, I assess damages in the amount of $386,000.00.

[89] The Court of Appeal found that the figure of $386,000.00 for false imprisonment, assault and battery was unreasonably low. At para. 23 of the Court of Appeal Judgment, Sir Michael Barnett, P. began by adopting the words of the High Court of Zimbabwe in **Nathanson v Mteliso and others** [2020] 2 LRC 135 where at paragraph 111, the Court said:

> **"[111] The quantification of damages is one of the greatest challenges faced by courts in many of these cases. This is primarily so because there is no mathematical formula in place which one can rely on. Invariably one has to rely on the decisions arrived at in other similar matters but bearing in mind that every case is unique in its own way".**

[90] In paragraph 24 of the Judgment, the learned President stated thus:

> **"In my judgment, the judge, by adopting the mathematical formula as she appears to have done, did not apply the guidance given to the court at paragraph 17 of the judgment in *Takitota v The Attorney General and others* [2009] 4 BHS J. 40, notwithstanding the fact that she expressly referred to that in her judgment."**

[91] To emphasise, this is what the Board stated at paragraph 17 in **Takitota**:

> **"The court should determine what they consider to be an appropriate figure to reflect compensation for the long period of wrongful detention of the appellant, taking into account any element of aggravation they think proper, reflecting the conditions of his detention and, in their own words, the misery which he endured. In assessing the proper figure for compensation for such long-term detention, they should take into account that any figure they might regard as appropriate for an initial short period, if extrapolated, should ordinarily be tapered, as their Lordships have pointed out in para 9 above. The final figure for compensatory damages should therefore amount to an overall sum representing appropriate compensation for the period of over eight years' detention, taking account of the inhumane conditions and the misery and distress suffered by the appellant. [Emphasis added]**

[92] In paragraphs 26 to 28, the learned President referred to other judicial authorities which elucidate the proper test to be applied in computing damages for false imprisonment. At para 27, reference was made to **Ruddock & Ors v Taylor** [2003] NSWCA where the court said at paragraph 49:

> **"Damages for false imprisonment cannot be computed on the basis that there is some kind of applicable daily rate. A substantial proportion of the ultimate award must be given for what is described as "the initial shock of being arrested" (Thompson v Commissioner of Police of the Metropolis [1998] QB 498 at 515. As the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish".**

[93] In reviewing the damages that the trial judge in **Takitota** awarded, the Court of Appeal observed that the judge awarded $250 per day having found that the appellant was unlawfully imprisoned for 2,922 days, which totaled $730,500. This was to account for the false imprisonment and therefore did not account for aggravated or exemplary damages. The amount was settled between the parties after the Privy Council remitted the award to the Court of Appeal for reassessment. The Board did not believe that the figure of $730,500 or $400,000 in compensatory damages was a sufficient award in the circumstances. At para. 16, the Board stated:

> **"[16] Their Lordships accordingly consider that that part of the award made by the Court of Appeal can be upheld and should not be disturbed. <u>They are unable, however, to regard the figure of either $730,500 or $400,000 by way of compensatory damages as being sufficiently securely based on the facts and the law.</u> The Board was invited by the Appellant's counsel itself to revise the amount of the award. In line with its established practice, however, <u>it is reluctant to follow this course, for it has repeatedly expressed the view that local courts are very much better placed than the Board to say what is appropriate by way of damages, having regard to the conditions in the country concerned</u>. Their Lordships therefore consider that that part of the award should be remitted to the Court of Appeal for reassessment."**[Emphasis added]

[94] It is usual for the amount of damages to be reduced for cases of false imprisonment for extended periods of time (See **Thompson v Commissioner of Police of The Metropolis HSU v Same** [1998] QB 498, 515). The conditions of the appellant's

detention in **Takitota** were much more appalling than my findings in the instant case. Further, the appellant in **Takitota** was detained at BDOC in addition to the Detention Centre.

[95] As judicial precedent from superior courts are lacking, this Court has struggled, as it did in **Douglas Ngumi**, to find an appropriate figure to reflect compensation for a long period. In this case, it was 994 days. But using its best endeavours and taking into account the Privy Council's guidance at para 16 of **Takitota**, a fair base figure is $300 per day seems to be appropriate in the circumstances taking into consideration the misery and distress suffered by Mr. Lop. Therefore, a reasonable compensatory damage is $298,200.

[96] In **Takitota**, the compensatory damages of $730,500 were reduced by $330,500 to account for the fact that the appellant was receiving a lump sum payment. The compensatory damages should therefore be reduced by $100,000 to $198,200 since Mr. Lop is receiving a lump sum payment.

[97] The Court of Appeal reasoned that the unlawful detention falls squarely within the first category of cases where aggravated or exemplary damages is appropriate. See **Rookes v Barnard** [1964] AC 1129, where, at page 1226, Lord Devlin said that:

> **"The first category is oppressive, arbitrary or unconstitutional action by the servants of the government."**

[98] The Court of Appeal reasoned that an appropriate sum to account for the unlawful imprisonment for eight (8) years and two (2) months with constitutional breaches along with the denial of the right to have a court determine the summary offence of illegal landing was $100,000. The exemplary damages were not reduced to account for lump sum payment since the purpose of the award of exemplary damages is "*to show the strong disapproval of the courts for the conduct of the respondents in this case from the time of the appellant's arrest until this case is finally disposed of*."

[99] Mr. Lop was falsely imprisoned for a shorter period of time: two (2) years and nine (9) months or 994 days and suffered the breach of his constitutional right not to be arbitrarily detained throughout that period. In the circumstances, an appropriate sum to show the disapproval of the Immigration authorities' reprehensible behaviour is $50,000.

[100] In the aggregate, Mr. Lop is awarded the sum of $248,200 in damages with interest thereon at the rate of 6.25 % per annum from the date of judgment to the date of payment. Mr. Lop is also awarded his costs to be taxed if not agreed. I need not reiterate my reasons as I did in **Douglas Ngumi** as to why Mr. Lop is not entitled to indemnity costs.

Dated this 29th day of July 2022

Indra H. Charles
Senior Justice