COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2017/CLE/gen/01166

BETWEEN

OUSMAN BOJANG

Plaintiff

AND

THE HON. CARL BETHEL
(in his capacity as Attorney General of The Bahamas)

1st Defendant

AND

THE HON.BRENT SYMONNETTE
(in his capacity as Minister of Immigration)

2nd Defendant

AND

WILLIAM PRATT
(in his capacity as Director of Immigration)

3rd Defendant

AND

PETER JOSEPH
(in his capacity as Officer in Charge of Carmichael Detention Centre)

4th Defendant

Before: The Honourable Madam Senior Justice Indra H. Charles

Appearances: Mr. Frederick Smith QC with him Mr. Martin Lundy and Ms. Raven Rolle of Callenders & Co. for the Plaintiff
Mr. Audirio Sears and Mr. Shaka Serville for the Defendants

Hearing Dates: 17 November and 18 November 2020, 23 November 2020 (Written Submissions of both parties)

Torts – Arrest and Detention – False Imprisonment – Assault and Battery – Detinue – Breach of Constitutional Rights – Article 28(2) of the Constitution of The Bahamas – Damages – Special Damages – Aggravated Damages – Exemplary Damages – Vindicatory Damages – Award at discretion of trial judge - Costs – Full Indemnity – No egregious or contumacious conduct by Defendants – Party and party basis

Immigration – Overstaying by Plaintiff – Whether Plaintiff's imprisonment was unlawful because he was not taken before court for same - Whether the imprisonment was unlawful because of no deportation order – Assessment of damages – Whether the Plaintiff can claim exemplary damages and damages for breach of constitutional rights

Constitutional relief – Article 28 Proviso – Whether there is an adequate alternative remedy

The Plaintiff, a national of the Republic of The Gambia, came to The Bahamas seeking political asylum. Upon entry, he was granted a visa to stay for fourteen (14) days as a lawful visitor. He was arrested when he visited the Department of Immigration to seek an extension on his visitor's status after overstaying. He was detained at the Carmichael Road Detention Centre. The Defendants attempted to repatriate the Plaintiff to The Gambia on a flight via Cuba, but the attempt was unsuccessful because the Cuban authorities refused to allow the Plaintiff entry for the passage to The Gambia.

The Plaintiff commenced this action against the Defendants, asserting that his detention was unlawful because he was never taken before any court and charged with an offence and because he was not the subject of any deportation order. He contends that his Article 19 right not to arbitrarily arrested and detained was infringed. He further alleges breaches of his constitutional rights under Articles 15, 17 and 25 of the Constitution and detinue of his personal belongings. The Plaintiff claims compensatory damages, exemplary damages, damages for breach of the various articles of the Constitution and aggravated damages. He also claims costs on an indemnity basis.

The Defendants deny that the Plaintiff was unlawfully imprisoned. With respect to the Constitutional breaches, they allege that, in any event, the action was an abuse of process because the Plaintiff has alternative means of redress. They also deny that he was treated in a cruel and inhumane manner at the Detention Centre and that his belongings were not returned to him.

HELD: finding that the Plaintiff was unlawfully imprisoned and therefore his constitutional rights under Article 17(1) and Article 19 were breached but not his Article 26 right since he was not assaulted or battered; the Plaintiff is entitled to compensatory damages of $125,000, exemplary damages of $40,000, damages of $1,100 for detinue and costs on a party and party basis to be taxed if not agreed.

1. Where, as in the present case, the Plaintiff alleged that he was unlawfully imprisoned for about 18 months without being charged or the subject of a deportation order, the case falls squarely within the class of cases referred to as having the additional feature, thereby rendering alternative remedies inadequate: Article 28(1) of the Constitution of The Bahamas; **The Attorney General of Trinidad and Tobago v Ramanoop** [2005] UKPC 15; **Takitota v Attorney General & Ors** [2009] UKPC 11; **Coalition to Protect Clifton Bay and another v The Hon. Frederick Mitchell (Minister of Foreign Affairs and Immigration) and another** [2016] 2 BHS J No. 94 applied.

2. The failure to have brought the Plaintiff before a court to determine whether he had committed an offence under the Immigration Act rendered it unlawful. Only the court can determine whether a person's presence in The Bahamas is contrary to the Immigration Act: **Takitota** applied.

3. The execution of a deportation order is mandatory. The point is that strict compliance with the law is required where persons' liberty is at stake. The authority to detain persons is only to the extent that it is "pending deportation": **Takitota**; **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.

4. With respect to the conditions at the Detention Centre and the Bahamas Department of Corrections, I was not convinced by the Plaintiff's evidence that the circumstances rose to the standard of depriving him of his Article 17(1) right.

5. On a balance of probabilities, I accept the Plaintiff's evidence that, upon his release, he did not receive the items which was taken away from him. His claim in detinue succeeds.

6. The award of both exemplary damages and damages for breach of constitutional rights is duplicitous: **Takitota** applied.

7. Awards for longer periods of time in detention have been reduced to take care of lump sum payment and tapering: **Thompson v Commissioner of Police of The Metropolis HSU v Same** [1998] QB 498 at 515.

8. No award is made for aggravated damages as it was already computed in the award for compensatory award. Any such award will be duplicitous: **Takitota** and **Merson v Cartwright** (2005) 67 WIR 17 relied upon.

9. The Plaintiff has not satisfied the Court that the conduct of the Defendants rose to the level of being egregious or contumacious for an award of costs on an indemnity basis. Costs shall be costs on a party and party basis.

JUDGMENT

Charles Snr. J:
Introduction

[1] By Writ of Summons filed on 27 September 2017 and amended on 02 November 2020, the Plaintiff ("Mr. Bojang"), brought an action against the Defendants alleging that he was unlawfully arrested and falsely imprisoned for 531 days from 30 December 2015 to 16 June 2017. He alleged that the imprisonment was unlawful because he was never taken before a court and was never issued a deportation order. Consequently, his constitutional right not to be arbitrarily arrested and detained was breached. He further alleged that he was assaulted, beaten, pushed around and manhandled by Defence Force officers every midnight and his personal belongings totaling $1,100 were taken away from him and never returned. He also alleged that his fundamental rights under Articles 15, 17(1), 19 (1), 19(3), 25 and 27 of the Constitution of the Commonwealth of The Bahamas ("the Constitution") were breached.

[2] Mr. Bojang seeks special damages of $1,100 for confiscation and conversion of his personal property, aggravated and exemplary damages from his wrongful arrest and false imprisonment as well as vindicatory damages for breaches of his fundamental rights under various articles of the Constitution. He also seeks costs on an indemnity basis certified fit for 3 counsel as well as interest.

[3] The Defendants denied that Mr. Bojang's imprisonment was unlawful and that his constitutional rights were breached. With respect to the alleged constitutional breaches, they allege that, in any event, the action was an abuse of process because Mr. Bojang has alternative means of redress. They also deny that he was treated in a cruel and inhumane manner at the Detention Centre and that his belongings were not returned to him upon his release.

Some facts

[4] The facts as I found them are as follows: Mr. Bojang, a national of The Gambia, came to The Bahamas with the intention of seeking political asylum. He arrived at

Sir Lynden Pindling International Airport by plane on 5 December 2015. Mr. Bojang did not tell the immigration officers that he was coming here to seek political asylum. He was granted a temporary visitor's visa for fourteen (14) days. His stay expired on or about 19 December 2015.

[5] On 30 December 2015, Mr. Bojang visited the Department of Immigration, seeking an extension to his visitor's status. Upon presenting himself to the Department of Immigration, it was discovered that he had overstayed the lawful time permitted for him to remain in The Bahamas. He was subsequently arrested by two senior immigration officers. At the time of his arrest, he did not indicate to the officers that he was seeking political asylum. He was taken to the Carmichael Road Detention Centre ("the Detention Centre").

[6] Mr. Bojang was not taken before any courts in The Bahamas prior to his release on 16 June 2017 nor was he the subject of any deportation order.

[7] On 25 May 2016, the Immigration authorities attempted to deport Mr. Bojang back to his homeland. He was sent on a flight to Cuba *en route* to The Gambia but was refused passage by Cuban authorities. Mr. Bojang was then returned to The Bahamas. He was taken to the Detention Centre.

[8] For a short period of time during his imprisonment, Mr. Bojang was moved from the Detention Centre to The Bahamas Department of Corrections (the "BDOC") and then returned to the Detention Centre.

[9] On 16 June 2017, Mr. Bojang was brought before Stephen Isaacs Snr. J pursuant to a Habeas Corpus application. He was granted a conditional release on the following terms and conditions:

i. Mr. Bojang is conditionally released and is to report to the Department of Immigration, at its headquarters located at Hawkins Hill, Nassau, New Providence every Monday, before 4.00 p.m;

ii. Mr. Bojang is given temporary permission to remain in The Bahamas until a determination is made on his asylum application by the United Nations High Commission for Refugees ("UNHCR") or his return to The Gambia, whichever occurs first.

[10] On 5 August 2020, Mr. Bojang was issued refugee status by the UNHCR.

Witness statements

[11] It is perhaps fitting that I say something about witness statements because, after Mr. Bojang stood by his witness statement, learned Queen's Counsel Mr. Smith requested that he expound on the conditions at the Detention Centre and the BDOC. The Court did not permit him since he had extensively done so in paragraphs 19, 20, 21, 25, 26, 27 and 28 of his witness statement which was filed 15 days before the commencement of the trial.

[12] The starting point is the Court's duty, under RSC Order 31A, to actively manage cases. O. 31A r. 1 (l) states:

> **"1. The Court shall deal with cases actively by managing cases, which may include-**
>
> **(l) giving directions to ensure that the trial of the case proceeds quickly and efficiently…"**

[13] O. 31A r. 13(1) provides that at a case management conference, the Court must consider whether to give directions for – (b) service of witness statements."

[14] O. 31A r. 18 (2) (k) states:

> **"(2) Except where these Rules provide otherwise, the Court may –**
>
> **(k) require the maker of an affidavit or witness statement to attend for cross-examination;**
> **……**
> **(p) direct that any evidence be given in written form;**
>
> **(s) take any other step, give any other direction or make any other order for the purpose of managing the case and ensuring a just resolution of the case."** [Emphasis added]

[15] On 23 May 2018, the Court gave directions in preparation for the trial. Paragraph 4 of the Order, prepared by Callenders & Co. reads:

> **"(4) The parties are to file and serve witness statements of all witnesses who will be called to give evidence at the trial on or before 31 January 2019:**
>
> **4.1 The Plaintiff will call three (3) witnesses;**
>
> **4.2 The Defendants will call three (3) witnesses;**
>
> **4.3 All witnesses shall attend for cross-examination unless such attendance has been dispensed with in writing."**

[16] So, the law is clear that the Court has an unfettered discretion to give any direction or make any order for the purpose of managing the case and ensuring a just resolution of it. Although not expressly stated in O. 31A, the Court has the power to control the way in which evidence is placed before it and may even limit cross-examination. The Court also has the power to say whether it requires a particular witness to give evidence "viva voce" or whether his evidence in writing is sufficient.

[17] In trials, a witness statement will ordinarily stand as the witness' evidence in chief and the basic emphasis of the rules is on not allowing the witness to give evidence on other matters not contained in the witness statement. In other words, the witness statement is a written statement signed by the witness which contains the evidence and only that evidence which that witness would be allowed to give orally. This prevents "ambushing" of evidence. It is however possible, with the Court's permission, to "amplify" a witness statement and to give evidence in relation to new matters which may have arisen since the statement was filed and served, such permission will only be granted if the Court "considers that there is a good reason not to confine the evidence of the witness to the contents of his witness statement". There is a discretion to allow a witness to give evidence on matters not covered by his witness statement.

[18] Essentially, a witness giving oral evidence may, with the permission of the Court:

1. amplify the evidence set out in his witness statement if that statement has disclosed the substance of the evidence which the witness is asked to amplify;

2. give evidence in relation to new matters which have arisen since the witness statement was served on the other parties or;

3. comment on evidence given by other witnesses.

[19] The usual rule in civil trials is that the maker of the statement must be called and tendered for cross-examination, his statement having stood as his evidence in chief.

[20] Mr. Bojang's attempt to add flavour to what is already contained in his witness statement did not fall within the permissible strictures stipulated above. The Court still could assess his credibility from his evidence and especially during cross-examination.

The evidence
Ousman Bojang

[21] Mr. Bojang filed a witness statement on 2 November 2020. It stood as his evidence in chief.

[22] He stated that, on 5 December 2015, he arrived as a lawful visitor in Nassau and was granted a 14-day visa to remain in The Bahamas. According to him, his reason for leaving The Gambia was to seek political refugee status. He said that he was unaware that he needed to declare that to the immigration officer at the time of his arrival although it was suggested to him while in Africa that he should consider The Bahamas so he travelled to Nassau to explore his options for asylum.

[23] Mr. Bojang asserted that, between 5 and 30 December 2015, he asked local people how to find the United Nations High Commission's office and no one could have assisted him. After about 2 weeks, he was directed to go to the Department of Immigration ("DOI"). He visited the DOI a few times but the lines were extremely long or they were closed before he could get access to service. It was around the Christmas holidays so it was very busy and people told him to try after the holidays.

[24] On 30 December 2015, after numerous attempts to get assistance to extend his stay and asylum, he finally got to an immigration officer. He said that he explained to the officer that he was from The Gambia; he was in fear for his life and he was seeking political asylum. He gave the Officer some documents. The Officer took them and went into an office. When he returned, the officer asked him to follow him outside which he did. They asked him to travel with them in a motor vehicle and he complied. He directed them to where he was staying.

[25] They drove to where he was staying and the officers asked him to take his luggage. He took his luggage and got back to the vehicle. He was handcuffed and taken to the Detention Centre where he was imprisoned without explanation.

[26] Mr. Bojang said that he was booked in. Two cell phones, 2 chargers, MP3 players, his passport, the letter from the UDP Party of The Gambia and cash of $22 were taken away from him and never returned. He was placed in a large, overcrowded dorm which had about 300 to 400 people. For the first 2 weeks, he slept on the floor until he found an old dirty mattress which he slept on until his release on 16 June 2017.

[27] He further stated that, for many days, he went without food as they would serve pork chops with white rice. He said that, due to religious reasons, he does not eat pork. It was a frequent item on the menu so, on most days, he would have 2 slices of bread for breakfast and white rice without any form of protein for dinner. Occasionally, they served rice with tuna. He also drank tap water. After a year, they changed to bottled water but it was limited to one bottle per day. He said that, after some time, a water cooler was placed outside of the dorm.

[28] Mr. Bojang alleged that every night he and the other detainees were awakened at around midnight by the defence force officers and they all had to stand outside, sometimes for hours, sometimes all night. The defence force officers did not care whether it was cold or not. He said that the defence force officers counted them by nationality and they would search the dorms while they stood outside.

[29] Mr. Bojang further stated that, whilst at the Detention Centre, he was interviewed by a representative from the UNHCR but he was unaware of any attempts to assist him or even consider his situation.

[30] Under cross-examination, he said that he raised the issue of the conditions at the Detention Centre with the UNHCR representatives but he forgot to mention it in his witness statement.

[31] Mr. Bojang stated that, on 25 May 2016, he was placed on a Bahamas Air flight to Havana, Cuba but he was returned to The Bahamas because it appeared that he did not have a ticket to The Gambia. He further stated that when he got back to The Bahamas, he was taken to the Detention Centre and then to the BDOC. At paragraphs 25 to 28 of his witness statement, he bitterly complained about the conditions at the BDOC but this was not pleaded in his Amended Writ of Summons and Statement of Claim.

[32] Parties are bound by their pleadings. This point was emphasized by the Court of Appeal in **Bahamas Ferries Limited v Charlene Rahming** SCCivApp & CAIS No. 122 of 2018. At para 39 of the Judgment, Sir Michael Barnett JA (as he then was) stated:

> **"The starting point must always be the pleadings. In Loveridge and Loveridge v Healey [2004] EWCA Civ. 173, Lord Phillips MR said at paragraph 23:**
>
> > **"In *Mcphilemy vs Times Newspapers Ltd. [1999] 3 ALL ER 775* Lord Woolf MR observed at 792-793:**
> >
> > > **'Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties.** What is important is that the pleadings should make clear **the general nature** of the case of the pleader.' "[Emphasis added]

[33] At para 40, Sir Michael went on to state:

> **"It is on the basis of pleadings that the party's decide what evidence they will need to place before the court and what preparations are necessary for trial."**

[34] I will therefore strike out paragraphs 25 to 28 of Mr. Bojang's witness statement which concentrate on the conditions at the BDOC.

[35] I will also strike out paragraphs 38 to 41 of Mr. Bojang's witness statement for irrelevance.

Superintendent Peter Joseph

[36] Supt. Joseph filed a witness statement on 12 November 2020 which stood as his evidence in chief. He is presently the Officer-In-Charge of the DOI. He has been an immigration officer for over 40 years.

[37] He stated that during Mr. Bojang's stay at the Detention Centre, he was never threatened, beaten, pushed around and manhandled by any officers of the Royal Bahamas Defence Force ("RBDF"). Additionally, he has never received any reports from his officers and/or defence force officers nor was he aware of any formal complaints being lodged by Mr. Bojang.

[38] Supt. Joseph explained that a detainee's contact with the RBDF officers attached to the Detention Centre is limited and only arises during a customary security secondary search of new detainees or detainees returning to the Detention Centre from a temporary custodial pass. Otherwise, the only circumstance by which RBDF officers may have reason to interact or physically encounter a detainee is to bring peace and civility at the Detention Centre, where an insurgence of violence ensues among detainees.

[39] He also stated that he was advised that it is a standard practice at the Detention Centre, that upon the detention of any person, their personal effects are taken away from them and, in the case of Mr. Bojang, the officers received the following personal items for safe keeping namely: 2 cellular phones, a lighter, 1 telephone

charger, earphones, earplugs and US$23. Upon his release from the Detention Centre, these items were returned to Mr. Bojang.

[40] Supt. Joseph further stated that he was advised and believes that Mr. Bojang was afforded human treatment, 3 balanced cooked meals daily, access to proper medical care, if need be; frequently cleaned environmental services, maintenance of personal hygiene without restriction or limitation and non-restricted socialization with the general male population.

[41] He maintained that Mr. Bojang was provided with basic human necessities, such as running water, soap, towels, bedding (weekly professional laundering of sheets and blankets) and clothing (if necessary). He also maintained that Mr. Bojang was never restricted to any number of or length of time for baths. He also stated that the Detention Centre imposes no bedtime or wake time for Mr. Bojang and provided him with at least 3 hot meals per day (breakfast, lunch and dinner) and Mr. Bojang had 24-hour access to a washer tub and detergent to clean dirty clothing.

[42] Supt. Joseph iterated that it is a practice at the Detention Centre that a team of medical professionals visit and assess detainees daily.

[43] Mr. Smith QC, who appeared as lead Counsel for Mr. Bojang, had no questions for Supt. Joseph as he submitted that most of his evidence is hearsay.

Superintendent Stephen La-Roda

[44] Supt. La-Roda filed a witness statement on 12 November 2020 which stood as his evidence in chief. He has been an immigration officer for over 34 years. He is presently the Officer-In-Charge of the Refugee Administration and Trafficking in Persons Unit at the DOI.

[45] Supt. La-Roda stated that he and Mr. Beneby, Deputy Director of Immigration, escorted Mr. Bojang to the Detention Centre. According to him, Mr. Bojang never made a formal application to the DOI seeking asylum of any sort.

[46] He explained that the first time he became aware of Mr. Bojang's desire to seek political asylum was on 23 May 2017 after reading his papers relating to his Habeas Corpus application.

[47] Supt. La-Roda stated that, to date, he is unaware of any form of asylum that Mr. Bojang is seeking since he has not formally applied to the DOI but he has made an application for a work permit in 2018.

[48] Mr. Smith QC did not cross-examine Supt. La-Roda.

Assessing the evidence

[49] On a balance of probabilities, I prefer the unchallenged evidence of Supt. Joseph and Supt. La-Roda to that of Mr. Bojang. In my judgment, Mr. Bojang has exaggerated his evidence about (i) the conditions of the Detention Centre; (2) that he was deprived of the basic necessities of human existence and; (3) he was subjected to cruel, inhumane and degrading conditions at the Detention Centre.

[50] Mr. Bojang told an untruth when, upon his arrival at the Sir Lynden Pindling International Airport, he stated that he was coming here on vacation when he was planning to seek political asylum. Having had the opportunity to see, hear and observe his demeanour, I also did not believe him that the lines were too long at the DOI for him to wait on such an important issue as seeking an extension of time after overstaying. In addition, he never told Supt. La-Roda when he was escorted to the Detention Centre that he was seeking asylum of any sort.

[51] As I stated above, I am of the view that Mr. Bojang exaggerated his evidence about the conditions at the Detention Centre. I prefer Supt. Joseph's evidence in this regard, that a detainee's contact with the RBDF officers attached to the Detention Centre is limited and only arises during a customary security secondary search of new detainees or detainees returning to the Detention Centre from a temporary custodial pass.

[52] It seems highly implausible and unconvincing that every midnight, RBDF officers would make them stand in the open air from midnight and sometimes all night. I do not believe that these officers are so cruel that they will search the detainees' dorm every day at midnight.

[53] In my judgment, Mr. Bojang was treated humanely as detailed by Supt. Joseph. As I said in **Ramon Lop v Attorney General of The Bahamas & Ors** (2017/CLE/gen/001180), at para 84, that "*while the Detention Centre is not a five-star facility, it was more likely than not that conditions there are fair*" and not unfit for human existence.

The issues

[54] The following issues arise for determination:

1. Whether the failure to bring Mr. Bojang before a court after his arrest and/or the failure to issue a deportation order rendered his detention unlawful?

2. Whether the conditions and the treatment of Mr. Bojang's detention at the Detention Centre amounts to constitutional breaches?

3. Whether Mr. Bojang's belongings were unlawfully taken away and retained by Officers at the Detention Centre? and

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

The law

[55] A convenient 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. In **Desmond Alphonso v The Attorney General for the Virgin Islands** Claim No BVIHCV2010/0105 (Unreported), (a Judgment of mine), I stated, at para 85, 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.

[56] In **Desmond Alphonso**, I quoted from the speech of Crane JA in **Rolf Brandt v AG of Guyana et al** (1971) 17 WIR 448 at 516, where the Court 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, 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."** [Emphasis added]

[57] That said, however, the State's right to hold and expel aliens is not unfettered. Mr. Smith QC 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.

[58] 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 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 case."**

[59] Where such an arrest is effected, 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 (unless he is earlier released on bail by a police officer having power in that regard under the Police Act).

[60] Section 19 of the IA restricts the landing and embarking in The Bahamas. 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 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."**

[61] 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. 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."**

[62] 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."**

[63] 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 section 41(1):

> **"(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."**

[64] 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 dependents (if any).

Preliminary Issue – Alternative remedy

[65] In their Defence, the Defendants asserted that Mr. Bojang's claim is an abuse of process and violation of the proviso under Article 28(2) of the Constitution because there were other means of redress available to him. They did not, however, assert what those means might be.

[66] Article 28(1) of the Constitution provides that persons who allege a breach of the fundamental rights contained in Articles 16 through 27 of the Constitution are entitled to bring an action in the Supreme Court for redress. Subsection (2), however, is a proviso which precludes bringing an action for constitutional redress where there is a parallel remedy available. It provides:

> **28. (1) If any person alleges that any of the provisions of Articles 16 to 27 (inclusive) of this Constitution 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 Supreme Court for redress.**
>
> **(2) The Supreme Court shall have original jurisdiction —**
>
> > **(a) to hear and determine any application made by any person in pursuance of paragraph (1) of this Article; and**
> >
> > **(b) to determine any question arising in the case of any person which is referred to it in pursuance of paragraph (3) of this Article,**
>
> **and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of the said Articles 16 to 27 (inclusive) to the protection of which the person concerned is entitled:**
>
> **Provided that the Supreme Court shall not exercise its powers under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law."**

[67] Mr. Smith correctly submitted that the determining factor is whether the alternative means of redress is adequate. In **The Attorney General of Trinidad and Tobago v Ramanoop** [2005] UKPC 15, the Privy Council explained when constitutional relief ought not be sought where there is an alternative remedy by contrasting the absence of a proviso in the Constitution of Trinidad & Tobago with the presence of a proviso in that of The Bahamas. At paras 23-25, the Privy Council stated:

> **"[23] The starting point is the established principle adumbrated in Harrikissoon v Attorney-General of Trinidad and Tobago [1980] AC 265. Unlike the constitutions of some other Caribbean countries, the Constitution of Trinidad and Tobago contains no provision precluding the exercise by the court of its power to grant constitutional redress if satisfied that adequate means of legal redress are otherwise available. The Constitution of The Bahamas is an example of this. Nor does the Constitution of Trinidad and Tobago include an express provision empowering the court to decline to grant constitutional relief if so satisfied. The Constitution of Grenada is an instance of this. Despite this, a discretion to decline to grant constitutional relief is built into the Constitution of Trinidad and Tobago. Section 14(2) provides that the court "may" make such orders, etc, as it may consider appropriate for the purpose of enforcing a constitutional right.**
>
> **[24] In Harrikissoon the Board gave guidance on how this discretion should be exercised where a parallel remedy at common law or under statute is available to an applicant. Speaking in the context of judicial review as a parallel remedy, Lord Diplock warned against applications for constitutional relief being used as a general substitute for the normal procedures for invoking judicial control of administrative action. Permitting such use of applications for constitutional redress would diminish the value of the safeguard such applications are intended to have. Lord Diplock observed that an allegation of contravention of a human right or fundamental freedom does not of itself entitle an applicant to invoke the s 14 procedure if it is apparent this allegation is an abuse of process because it is made "solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right": [1981] AC 265, 268 (emphasis added).**
>
> **[25] In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse,**

> **of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power."**

[68] In **Coalition to Protect Clifton Bay and another v The Hon. Frederick Mitchell (Minister of Foreign Affairs and Immigration) and others** [2016] 2 BHS J No 94, this Court dealt with the very issue of the proviso. Where there is a parallel remedy, constitutional relief is appropriate where there is an "additional feature" such as arbitrary use of state power, a lawful visitor being imprisoned for eight (8) years without being charged, or where multiple breaches are alleged. At para 250, this Court stated:

> **"[250] The mere existence of an alternative remedy does not automatically warrant excluding constitutional proceedings under the proviso to Article 28(2). The crux is their adequacy. The power to decline jurisdiction arises only where the alternative means of redress is considered to be adequate. In this regard, the Courts have offered some guidelines in assessing the requirement of adequacy. One of these is that where there is a parallel remedy, constitutional relief is only appropriate where some additional "feature" presents itself. The additional feature could be the arbitrarily use of state power -- as where an off-duty policeman brutalised the claimant for what was a private dispute between the claimant and the policemen's friend: Attorney General of Trinidad and Tobago v Ramanoop [2005] UKPC 2005, or where a lawful visitor to the Bahamas was imprisoned for eight years without charge: Takitota v AG. Another additional feature is where there are breaches of multiple rights, for example, in Belfonte v Attorney General [1968] W.I.R. 416 (CA TT). Belfonte had been imprisoned for non-payment of a fine, even though his mother had in fact paid the fine by cheque which became lost in the police bureaucracy. During his imprisonment, the applicant's locks were cut and he was forced to eat meat in violation of his religious practices. On these facts an alternative remedy was held to be inadequate given that he had endured multiple breaches, spanning from tortious imprisonment and several violations of his fundamental rights enshrined in the Constitution."** [Emphasis added]

[69] I therefore agree with Mr. Smith that, in the circumstances, where Mr. Bojang has alleged that he was unlawfully imprisoned for about 18 months without being charged or issued a deportation order, the case falls squarely within the class of cases referred to by this Court as having the additional feature, thereby rendering alternative remedies inadequate.

Issue 1: Whether Mr. Bojang's detention was unlawful?

[70] Learned Counsel Mr. Sears who appeared on behalf of the Defendants submitted that both the arrest and detention of Mr. Bojang were lawful. With respect to his arrest, Mr. Sears stated that it was lawful pursuant to section 9, as he had overstayed his time to be in the country. In determining that Mr. Bojang had committed an offence under the IA, thereby rendering the arrest lawful, Mr. Sears urged the Court to consider the facts that Mr. Bojang failed to (i) proactively extend his status before its expiry and (ii) make it clear from the outset that he was claiming asylum.

[71] Mr. Smith, on the other hand, contended that Mr. Bojang's claim for asylum (or the belatedness of his claim, as Mr. Sears puts it) is not relevant to the question of the lawfulness of Mr. Bojang's detention. Mr. Smith explained that even if Mr. Bojang had not been claiming asylum, his detention was unlawful for two (2) reasons namely: (i) he had not been brought before a court or charged with any offence and; (ii) the Immigration authorities did not have the authority to detain him.

[72] I agree with Mr. Sears that Mr. Bojang's arrest was lawful pursuant to section 9. He overstayed his stay. As such, he was in the country illegally. However, with respect to his detention, the failure to have Mr. Bojang brought before a court to determine whether he had committed an offence under the IA rendered it unlawful. As Mr. Smith correctly stated, the Court of Appeal in **Takitota v Attorney General and others** [2004] BHS J No 294 made it clear that only the court can determine whether a person's presence in The Bahamas is contrary to the IA. At para 81, Sawyer P said:

> **"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."

[73] I therefore agree with Mr. Smith that there was no basis for Mr. Bojang's detention. It had not been established that Mr. Bojang committed any offence under the IA. This determination could only be made by a court, which he ought to have been brought to, within 48 hours of his arrest.

[74] In addition to not being brought before a court, Mr. Smith argued that Mr. Bojang's imprisonment was unlawful because there was no authority to detain him, as the only two (2) sections of the IA that confer the power to detain persons did not apply to Mr. Bojang. Mr. Smith further argued that section 25 only gives the authority to detain persons pending deportation in circumstances where they are refused leave to land in the country. Mr. Smith's position was that, as Mr. Bojang was never refused leave to land, no power of arrest under this section arose.

[75] According to Mr. Smith, the other power to detain is contained in section 41, which provides that a person may be detained where there is (i) a deportation order made by the Minister; or (ii) a recommendation for deportation under section 40. He submitted that if the purported basis for Mr. Bojang's detention is that he overstayed, the relevant power to deport is contained in section 40(1)(a).

[76] Mr. Smith submitted that because no deportation order or recommendation for deportation was ever made under section 40(1)(a) or at all, the power to detain under section 41 was never engaged. He further submitted that, in any event, Mr. Bojang had not contravened section 40(1)(a).

[77] I do not accept Mr. Smith's submission that Mr. Bojang did not contravene section 40 (1) (a) or any other section of the IA. He did. He overstayed the time given to him to be in The Bahamas. In that vein, it is relevant that he did not obtain (or seek to obtain) an extension of his stay before its expiry and he had not expressed an interest in claiming asylum at the outset. Had he done so, he may not have been in breach and arrested.

[78] Aside from the failure to bring Mr. Bojang before the Court to have it determine whether he committed an offence under the IA, which I have already established rendered the detention unlawful, the question is whether the failure to issue a deportation order rendered the imprisonment unlawful having regard to the fact that Mr. Bojang overstayed the time that he was permitted to remain here.

[79] 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 stated:

> **"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 [1953] AC 530, 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. 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." [Emphasis supplied]**

[80] Blake J 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.

[81] It seems that the execution of a deportation order is mandatory. 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 to issue a deportation order is insignificant. The power of the authorities to detain persons is only with a view to and to facilitate their deportation.

[82] This was made clear in **Takitota**, where the Court of Appeal reasoned that once it became clear that there was nowhere the appellant could be deported to, there was no power to detain him because the power to detain was only "pending deportation". That same reasoning can be applied here, where Mr. Bojang was detained with no deportation order. It is difficult for the Defendants to argue that Mr. Bojang was being held pending deportation in the absence of a deportation order. The language of section 41 strongly suggests that it is the deportation order that gives rise to the power to detain: see also **Bruno Ruffa v Minister of Immigration** SCCivApp No 131 of 2016.

[83] Accordingly, the Defendants' failure to issue a deportation order before detaining Mr. Bojang rendered his detention unlawful. It follows that his Article 19 right not to be arbitrarily arrested and detained was breached.

Issue 2: Breaches of Mr. Bojang's constitutional rights

[84] In paragraph 6 of his Statement of Claim, Mr. Bojang also claims damages for breaches of his fundamental rights under Article 15, 17(1), 19 and 26 of the Constitution.

[85] In his pleadings, Mr. Bojang alleged that, in addition to his Article 19 right not to be arbitrarily arrested and/or detained, he suffered cruel, inhumane and degrading treatment in breach of his rights under Article 17 of the Constitution. He also alleged that as a result of his detention, he was discriminated against in breach of his rights under Articles 15 and 26. He further alleged that, after his release on 16 June 2017, he was further unlawfully detained immediately and was again

shackled to accused murderers, handcuffed and brought back to the Police Station and was released 4 hours later, in breach of his rights under Articles 15, 17, 19(1) and 25 of the Constitution. During this time he was not given anything to eat or drink after being in court that morning.

[86] Article 17(1) of the Constitution provides that no person shall be subject to torture or to inhumane or degrading treatment or punishment.

[87] Article 19 of the Constitution speaks to deprivation of personal liberty. Article 19 (1),(3) & (4) provides:

> **"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."

[88] 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.

[89] There was conflicting evidence with respect to the conditions at the Detention Centre. However, I prefer Supt. Joseph's evidence (notwithstanding as Mr. Smith submitted, it consisted largely of hearsay) to that of Mr. Bojang. As I stated, I am of the view that Mr. Bojang exaggerated the true conditions at the Detention Centre. In addition, he forgot to mention, in his witness statement, that he had complained about the inhumane conditions at the Detention Centre to the UNHCR Representatives. This, to my mind, was a significant omission.

[90] With respect to his Article 25 right, Supt. Joseph stated that detainees are not told what time to go to bed or to wake up. That evidence stood unchallenged. In addition, I do not believe that Mr. Bojang was discriminated against. Therefore, there was no breach of his Article 26 right.

Issue 3: Detinue

[91] Mr. Bojang alleges that his personal items, which were confiscated upon his detention, were never returned to him:

PARTICULARS OF SPECIAL DAMAGES

Loss of personal clothing and other item:

Watch US $300.00

Phone US $100.00

Bracelet and necklace US $ 200.00

Clothing US $ 500.00

TOTAL US $ 1100.00

[92] His evidence was that he went to collect his clothing and other personal items on the day after he was released but he was told that they had been disposed of.

[93] Supt. Joseph's evidence was to the contrary. He stated that he was advised and verily believes that the items received by Immigration Officers were two (2) cellular phones, one (1) lighter, One (1) phone charger, earphones, earplugs, earpiece and twenty three (23) USD dollars. He was also advised that all of Mr. Bojang's personal items that were confiscated upon his arrival were returned to him. He said that there is a log book that records the return of personal items to detainees which they are required to sign upon receipt. The Defendants did not, however, produce any proof that Mr. Bojang signed off on receiving his personal belongings.

[94] On this issue, I prefer the evidence of Mr. Bojang over the evidence of Supt. Joseph. Mr. Bojang is therefore entitled to damages of $1,100 for his personal belongings.

Issue 4: Assessment of Damages

[95] In his Amended Writ of Summons, Mr. Bojang sought damages under the following heads:

(1) Special Damages of $1,100;

(2) Aggravated Damages;

(3) Exemplary Damages;

(4) Aggravated Damages;

(5) Vindicatory Damages;

(6) Compensation under Article 19(4) of the Constitution;

(7) Damages for breaches of his rights under Articles 15, 17, 19(1), 19(3), 25 and 27 of the Constitution;

(8) Interest on each of the foregoing pursuant to statute;

(9) Costs on full indemnity and solicitor and own client basis certified fit for 3 Counsel; and

(10) Such further or other relief as the Court may think fit.

[96] However, Mr. Sears correctly submitted that an award of both exemplary damages and damages for breach of constitutional rights would be duplicitous. He relied on the Privy Council's decision in **Takitota** where the Board explained that the purpose of the award of exemplary damages covers breaches of Constitutional rights. At paras 12, 13 and 15, the Privy Council stated:

> **"[12] The award of exemplary damages is a common law head of damages, the object of which is to punish the Defendant for outrageous behaviour and deter him and others from repeating it. One of the residual categories of behaviour in respect of which exemplary damages may properly be awarded is oppressive, arbitrary or unconstitutional action by the servants of the government, the ground relied upon by the Court of Appeal in the present case. It serves, as Lord Devlin said in *Rookes v Barnard* [1964] AC 1129 at 1223, [1964] 1 All ER 367, [1964] 2 WLR 269, to restrain such improper use of executive power. Both Lord Devlin in *Rookes v Barnard* and Lord Hailsham of St Marylebone LC in *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1081, [1972] 1 All ER 801, [1972] 2 WLR 645 emphasised the need for moderation in assessing exemplary damages. That principle has been followed in *The Bahamas* (see *Tynes v Barr* (1994) 45 WIR at 26), but in *Merson v Cartwright and the Attorney General* [2005] UKPC 38, [2006] 3 LRC 264 the Privy Council upheld an award of $100,000 exemplary damages, which they regarded as high but within the permissible bracket.**
>
> **[13] <u>The award of damages for breach of constitutional rights has much the same object as the common law award of exemplary damages</u>. The relevant provisions of the Bahamian Constitution are art 17 (inhuman or degrading treatment) and art 19 (deprivation of**

> **personal liberty). The basis of the jurisdiction to award such damages was set out in *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15, [2006] 1 AC 328, [2005] 2 WLR 1324. Lord Nicholls of Birkenhead, giving the judgment of the Board, said at paras 17 – 20:…"**
>
> **…**
>
> **[15] Their Lordships consider that it would not be appropriate to make an award both by way of exemplary damages and for breach of constitutional rights. When the vindicatory function of the latter head of damages has been discharged, with the element of deterrence that a substantial award carries with it, the purpose of exemplary damages has largely been achieved. To make a further award of exemplary damages, as the Appellant's counsel sought, would be to introduce duplication and contravene the prohibition contained in the proviso to art 28(1) of the Constitution. They are of the opinion that the sum of $100,000 is justifiable on the facts of the case as an award of constitutional or vindicatory damages."** [Emphasis added]

[97] Accordingly, Mr. Bojang is not entitled to both exemplary damages and damages for breach of constitutional rights.

Damages for assault and battery

[98] Mr. Bojang did not prove his claim for assault and battery. It follows that no damages in respect of this head is awarded.

Compensatory damages for false imprisonment

[99] With respect to compensatory damages for Mr. Bojang's false imprisonment, Mr. Smith submitted that an appropriate award is $2,655,000, which he said he obtained by applying a daily rate of $5,000 per day and multiplying it by the number of days (531 days) that Mr. Bojang was wrongly imprisoned.

[100] Mr. Smith urged the Court to approach the damages by applying a daily rate and multiplying it by the length of time. He said that this has been the approach of courts in The Bahamas (**Tynes v Barr** (1994) 45 WIR 7, **Merson v Cartwright** (2005) 67 WIR 17, **Takitota v Attorney General** [2004] BHS J No 294). In an effort to convince the Court that a daily rate of $5,000 per day was appropriate, Mr. Smith referred to **Tynes** and **Merson.** Mr. Tynes was awarded $75,000 for assault, battery and false imprisonment of a few days and Ms. Merson was awarded

$90,000 for assault, battery and false imprisonment of 56/57 hours, both in 1994). With respect to the daily rate proposed, Mr. Smith acknowledged that awards for longer periods of time have been reduced (See **Thompson v Commissioner of Police of The Metropolis HSU v Same** [1998] QB 498, 515).

[101] I do not find probative Mr. Smith's contention that a higher award is appropriate for Mr. Bojang merely because the cases with shorter periods had high awards. No doubt, the award should take into account the length of time for which Mr. Bojang was unlawfully imprisoned, but as he stated, awards are to be tapered down for extended periods. It is clear that a large part of the rationale for the award of damages for unlawful imprisonment is for the *fact* of the unlawful detention. This would explain why the awards for cases of extended periods do not increase proportionately. The cases, particularly **Tynes** and **Merson** are for shorter periods of detention and are therefore very unhelpful.

[102] Further, the impracticality of applying **Tynes** and **Merson** with respect to assessment of damages for false imprisonment of extended periods such as the instant one is exacerbated by the fact that the award in both cases was combined with assault and battery. It is therefore difficult or impossible to ascertain the sum that was attributed to false imprisonment. The Court observed that the awards were combined and stated that although it was reasonable, it would have been preferable to have separated the awards:

> **"[15] The judge did not identify in relation to the $90,000 award for assault and battery and false imprisonment what sum was being attributed to each tort. There were several events she had found proved, each of which constituted in law the assault and battery tort. It was entirely reasonable, in their lordships' opinion, for the judge to have made a single award to cover all of them. It would, however, have been preferable, in their lordships' view, to have had separate awards for the assault and battery damages and the false imprisonment damages. Nor did the judge identify in relation to any of the awards the element attributable to compensatory damages, including aggravated damages, on the one hand and the element attributable to exemplary damages, which are punitive in character, on the other. A reading of the judgment from the above cited passage to the announcement of the amount of the awards suggests, their lordships think, that the judge, having directed herself impeccably as to the**

approach she should adopt, formed a view as to the totality of the damages that Ms Mersonshould receive and then divided the sum, in round figures, between the three headings under which the awards were made. Their lordships do not wish to be unduly censorious of this approach but it does make difficult a critical review of the quantum of the awards. It is to be noted that in the *Tynes* case (see paragraph [4] above), in which Sawyer CJ (as the judge had become) was the trial judge and in which the same causes of actions as were found proved in the present case were found proved (but where, measured in degrees of outrageous behaviour, the facts were several degrees below those of the present case) the Court of Appeal said, per Zacca P:

> **'We wish to indicate that it would be more appropriate for the damages to be awarded under each head. The award should indicate the amount of damages awarded for assault and battery. There should be an identifiable award for false imprisonment and similarly for aggravated damages and also for exemplary damages.'**

Their lordships respectfully concur."

[103] I do not accept Mr. Smith's argument that the compensatory award should not be tapered down in this case to send a message to the State. That is the very purpose or rationale of aggravated or exemplary damages. It would therefore be duplicitous to refuse to reduce the sum to account for length for that reason.

[104] Mr. Smith urged the Court not to rely on **Takitota** which he submitted, is of no assistance for computation, since the amount was settled between the parties after the Privy Council remitted the award to the Court of Appeal for reassessment. This is true because the Privy Council did not believe that the $730,500 or $400,000 in compensatory damages was a sufficient award in the circumstances since they feel that it should be left to local courts to make that determination having regard to the conditions in the country. At para 16, the Privy Council 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. 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. The Board was invited by the Appellant's counsel itself to revise the amount of the award. In line with its established practice, however, 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. Their Lordships therefore consider that that part of the award should be remitted to the Court of Appeal for reassessment."**

[105] According to Mr. Smith, there is no authority for restricting the daily award to $250 per day.

[106] 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. Bojang's general damages to compensate him for what he has lost bearing in mind all the probabilities.

[107] 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 lower court's Judgment particularly from paras 84 to 90, where the 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 the period of over eight years' detention, taking account of the inhumane conditions and the**

misery and distress suffered by the appellant.
[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: www.salaryexplorer.com. 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".**

[108] The Court of Appeal found that the figure of $386,000.00 for false imprisonment, *assault and battery* was unreasonably low. At paragraph 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 para 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".**

[109] In para 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."**

[110] To emphasise, this is what the Board stated at para 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]**

[111] In paras 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 para 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".**

[112] 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.

[113] 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 the BDOC in addition to the Detention Centre. In this case, while Mr. Bojang was detained at the BDOC, it was for a short time.

[114] Having regard to the period of time for which Mr. Bojang was unlawfully detained and taking into account the Privy Council's guidance at para 16 in **Takitota**, a daily rate of $300 per day is reasonable in the circumstances. I do not accept Mr. Sears' submission that the period of unlawful detention was 529 days instead of 531. Had the only basis of unlawfulness of Mr. Bojang's imprisonment been the failure to bring him before a court after 48 hours, the unlawful imprisonment period would have indeed been 529 days. However, as I have already stated, the failure to issue

a deportation order also rendered the detention unlawful. Accordingly, the number of days that Mr. Bojang was wrongly imprisoned is 531 days. Therefore, the compensatory award is (531 days x $300 daily) = $159,300.

[115] In **Takitota,** the compensatory damages of $730,000 were reduced by $330,500 to account for the fact that the appellant was receiving a lump sum payment. The Court is also cognizant of the fact that in assessing the proper figure for compensation for such long detention, it ought to take into account that "any figure it might regard as appropriate for an initial short period, if extrapolated, should ordinarily be tapered….The final figure for compensatory damages should therefore amount to an overall sum representing appropriate compensation for the period taking account of the misery and distress suffered" by Mr. Bojang.

[116] In my judgment, an overall compensatory figure of $125,000 meets the justice of this case bearing in mind comparable cases involving lengthy detention emanating from our courts: see **Takitota, Douglas Ngumi and Ramon Lop v Attorney General of The Bahamas & Ors** 2017/CLE/gen/001180**.**

[117] As the Privy Council properly pointed out, it is for our courts to say what is appropriate by way of damages having regard to the conditions in the country.

Exemplary damages

[118] Mr. Bojang seeks exemplary damages of $1 million.

[119] Exemplary damages are awarded when the state or government has taken oppressive, arbitrary or unconstitutional action: **Rookes v. Barnard** [1964] A.C. 1129 is the landmark case for this head of damage. At page 1221, Lord Devlin stated thus:

> **"Exemplary damages are essentially different from ordinary, damages. The object of damages in the usual sense of the term is to compensate. <u>The object of exemplary damages is to punish and deter.</u> It may well be thought that this confuses the civil and criminal functions of the law; and indeed, so far as I know, the idea of exemplary damages is peculiar to English law. There is not any**

decision of this House approving an award of exemplary damages and your Lordships therefore have to consider whether it is open to the House to remove an anomaly from the law of England.

It must be remembered that in many cases of tort damages are at large, that is to say, the award is not limited to the pecuniary loss that can be specifically proved. In the present case, for example, and leaving aside any question of exemplary or aggravated damages, the appellant's damages would not necessarily be confined to those which he would obtain in an action for wrongful dismissal. He can invite the jury to look at all the circumstances, the inconveniences caused to him by the change of job and the unhappiness maybe by a change of livelihood. In such a case as this, it is quite proper without any departure from the compensatory principle to award a round sum based on the pecuniary loss proved.

Moreover, it is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation. Indeed, when one examines the cases in which large damages have been awarded for conduct of this sort, it is not at all easy to say whether the idea of compensation or the idea of punishment has prevailed".

[120] The principles derived from **Rookes v Barnard** were adopted with approval in **Takitota**. At para 12, Lord Carswell had this to say on exemplary damages:

"The award of exemplary damages is a common law head of damages, the object of which is to punish the Defendant for outrageous behaviour and deter him and others from repeating it. One of the residual categories of behaviour in respect of which exemplary damages may properly be awarded is oppressive, arbitrary or unconstitutional action by the servants of the government, the ground relied upon by the Court of Appeal in the present case. It serves, as Lord Devlin said in *Rookes v Barnard* [1964] AC 1129 at 1223, [1964] 1 All ER 801, [1972] 2 WLR 269, to restrain such improper use of executive power. Both Lord Devlin in *Rookes v Barnard* and Lord Hailsham of St. Marylebone LC in *Broome v Cassell & Co, Ltd* [1972] AC 1027 at 1081, [1972] 1 All ER 801, [1972] 2 WLR 645 emphasized the need for moderation in assessing exemplary damages. That principle has been followed in *The Bahamas* (see *Tynes v Barr* (1994) 45 WIR at 26), but in *Merson v Cartwright and the Attorney General* [2005] UKPC 38, [2006] 3 LRC 264 the Privy Council upheld an award of $100,000 exemplary damages, which they

> **regarded as high but within the permissible bracket."**[Emphasis added]

[121] In this case, the wrongful imprisonment constitutes oppressive, arbitrary and unconstitutional action by the servants of the government. As such, the case is suited for the award of exemplary damages.

[122] In **Takitota**, the Privy Council determined that the exemplary damages award of $100,000 was appropriate. The appellant in that case was imprisoned for eight (8) years, a much longer time than Mr. Bojang. In the circumstances, an award of $40,000 is appropriate to show the strong disapproval of the courts of the conduct of the government's servants.

Aggravated damages

[123] Mr. Bojang seeks aggravated damages in the sum of $500,000. Aggravated damages are awarded when, among other things, the Defendant's conduct has caused or is capable of causing injury to feelings, for any indignity, disgrace, humiliation or mental suffering occasioned from the conduct.

[124] In **Merson** and **Takitota**, the Privy Council stated that aggravated damages form a quite distinct head of damage based on altogether different principles. This is how Lord Carswell puts it in **Takitota** at para11:

> **"In their reference to aggravated damages in para 94 of their judgment the Court of Appeal appear to have equated them with exemplary damages, whereas they form a quite distinct head of damage based on altogether different principles. In awarding compensatory damages the court may take account of an element of aggravation. For example, in a case of unlawful detention it may increase the award to a higher figure than it would have given simply for the deprivation of liberty, to reflect such matters as indignity and humiliation arising from the circumstances of arrest or the conditions in which the claimant was held. The rationale for the inclusion of such an element is that the claimant would not receive sufficient compensation for the wrong sustained if the damages were restricted to a basic award. The latter factor, the conditions of imprisonment, is directly material in the present case, and it would be not merely appropriate but desirable that the award of compensatory damages should reflect it. It may be that the Court of Appeal had it in mind when they expressed their intention in paragraph 90 to compensate the appellant "for the loss of**

> **more than 8 years of his life and for the misery which he endured by being treated in a less than humane way." They did not spell it out in their judgment, though they were not obliged to do so: see *Subiah v Attorney General of Trinidad and Tobago* [2008] UKPC 47, para 11. Their Lordships do not find it possible to ascertain with sufficient clarity whether the Court of Appeal included any element of aggravation in their calculation of the compensatory award, and if so, how much represents that element. Although they stated in para 93 of their judgment that the sum of compensatory damages "does not take into account any assessment for aggravated or exemplary damages", it is not possible to determine whether in reaching that figure they had in fact taken account of aggravating factors."**

[125] Mr. Bojang seeks aggravated damages for the following:

1. His 531 days' detention; and
2. His imprisonment in inhumane and degrading conditions (which was not established).

[126] The Court has already computed damages for his 531 days' detention so any award here will be duplicitous. I make no award under this head.

Indemnity costs

[127] Mr. Smith submitted that, given the manner in which this case was conducted by the Defendants, Mr. Bojang seeks costs on a full indemnity solicitor own client basis. He relied on the case of **R.v Christie Ex Parte Coalition to Protect Clifton Bay** 2013/PUB/jrv/0012 Ruling No. 2.

[128] In **Douglas Ngumi**, Sir Michael Barnett P, in delivering the Judgment of the Court, addressed that issue of indemnity costs at paras 63 to 65 of the Judgment. At para 65, the learned President stated:

> **"Simply put, the power to award costs is in the wide discretion of the trial judge. In this case the court made an order for costs in favour of the appellant who was successful in his claim for damages. The appellant's case is that he wanted an order for costs on an indemnity basis because of the conduct of the respondents. The judge carefully considered that submission and declined for the reasons cogently set out in her judgment and refused to make an order on an indemnity basis. There is, in my view no basis for this Court to interfere with the judge's exercise of her discretion on the issue of costs. The order that**

> **costs be paid on a party and party basis and not on an indemnity basis, is in our view, fully justified."** [Emphasis added]

[129] In this case, I am not inclined to award costs on an indemnity basis as the conduct of the Defendants did not rise to the level of being egregious or contumacious. The award of exemplary damages has already taken into account that the Defendants ought to be more proactive and resort to the courts when they have in their custody, persons like Mr. Bojang, who have nowhere to go, either because they are stateless or face persecution in their own country.

[130] I will therefore order that the Defendants do pay reasonable costs to Mr. Bojang on a party and party basis. I will order that Mr. Bojang submits his Bill of Costs within 21 days hereof for it to be taxed if not agreed. If no agreement is reached, then the parties will return to Court on a date to be agreed for this issue to be dealt with before me.

Interest

[131] Mr. Bojang seeks interest not only after judgment but from the date that the cause of action arose. He relied on the judgment in **Cara Chan v Wendall Parker** (1999) No. FP/88 [unreported], a personal injury case, to ground pre-trial interest.

[132] In para 66 of **Douglas Ngumi**, the Court of Appeal varied the order which I made in the Supreme Court and stipulated that interest will run from the date of the filing of the Writ of Summons.

[133] In the present case, I will make an order that interest will run at the statutory rate of 6.25% per annum from 27 September 2017 (date of the filing of the Writ of Summons) to the date of payment. This is in accordance with section 2(1) of the Civil Procedure (Award of Interest) Act 1992 as amended by the Civil Procedure (Rate of Interest) Rules, 2008.

Conclusion

[134] Accordingly, there will be judgment for Mr. Bojang in the following sums:

i. Compensatory damages for false imprisonment $125,000

ii.	Exemplary damages	$ 40,000
iii.	Cost of his personal belongings	$ 1,100
	TOTAL AWARD OF DAMAGES	**$166,100**

[135] There will be interest at the statutory rate of 6.25% from the date of the filing of the Writ of Summons (27 September 2017) to the date of payment. Cost to be taxed if not agreed.

Dated this 30th day of August, 2022

Indra H. Charles
Senior Justice