

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO.: ANUHCV2022/0036

IN THE MATTER OF SECTIONS 7 AND 18 OF THE CONSTITUTION OF ANTIGUA AND BARBUDA

IN THE MATTER OF AN APPLICATION FOR ADMINISTRATIVE ORDERS

IN THE MATTER OF AN APPLICATION FOR DECLARATIONS PURSUANT TO CPR 56.7 (1) (A)

BETWEEN:

[1] MEHUL CHOKSI

Claimant

-And-

[1] THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

[2] THE COMMISSIONER OF POLICE

Defendants

Appearances:

Mr. Edward Fitzgerald KC, Mr. Justin L. Simon KC, and with them, Mr. Jomokie Phillips for the Claimant

Mr. Anthony Astaphan SC, and with him, Deputy Solicitor General, Mrs. Carla Brookes-Harris for the Defendant

2022: November 10th

2023: March 3rd

JUDGMENT

[1] **ROBERTSON, J.:** This matter concerns a constitutional safeguard. *"The judges are the mediators between the high generalities of the constitutional text and the messy details of their application to concrete problems"*¹.

¹ Lord Hoffman in *Boyce and Joseph v R*, 64 W.I.R. 37 at 28.

[2] By way of an Amended Fixed Date Claim, the Claimant, Mehul Choksi, seeks constitutional redress. The Claimant indicates that by virtue of **sections 3 and 7 of the Constitution** the state of Antigua and Barbuda is under an implied positive obligation to investigate "arguable claims" of inhuman or degrading treatment and that such investigation must be "effective".

[3] The Claimant contends that the Claimant has an arguable claim that he was subjected to inhuman or degrading treatment or punishment and that there is a duty on the Defendants to conduct an effective investigation. The Claimant's position is that the Defendants are in contravention of their obligations under the Constitution and the Claimant seeks the following reliefs:

- (1) A Declaration that the Claimant is entitled to a speedy and effective investigation as to the circumstances of the Claimant's forcible abduction and removal from the jurisdiction of Antigua and Barbuda on or around 23 May 2021, and that the second Defendant be directed to take effective action in accordance with the directions of the Court and to report to the Court without any further delay.
- (2) A Declaration that the first Defendant and/or second Defendant have/has failed to conduct a speedy and effective investigation regarding the circumstances of the Claimant's forcible abduction and removal from the jurisdiction of Antigua and Barbuda on or around 23 May 2021.
- (3) Further or in the alternative, a Declaration that the first Defendant is to establish an independent, judicial inquiry as to the circumstances of the Claimant's forcible abduction and removal from the jurisdiction of Antigua and Barbuda on or around 23 May 2021.
- (4) A Declaration that the second Defendant has a duty to confirm to the Dominican police that the evidence supports that the Claimant was forcibly removed from the jurisdiction and taken to Dominica against his will.
- (5) An Order that the Claimant may not be caused to leave and/or be removed from the jurisdiction of Antigua and Barbuda without an order from the High Court after an inter partes hearing and subject to the Claimant exhausting any appeals or other legal relief provided by law.
- (6) An Order that the second Defendant releases the statement taken by its officers from the Claimant on 15 August 2021. A further Order that the second Defendant provide formally forthwith to the Court and the Claimant the

investigation reports dated 4 June 2021 and 19 June 2021, and any further such reports since submitted including the DNA analysis of the blood found by the police at a specified address.

- [4] Further, the Claimant in its claim sought an order adjourning specific matters which were issued by the Claimant until the determination of this claim, damages and costs.
- [5] The Defendants have filed an application that the claim be struck out pursuant to Rule 26.3 (1) (b) of the Civil Proceedings Rules and the Court's inherent jurisdiction and that certain paragraphs of the affidavits filed in support of the claim be struck out as inadmissible hearsay and opinion evidence. The Defendants' grounds for the application are that the matters which are hearsay and opinion evidence in the Claimant's affidavit are matters which the Claimant is unable to prove from his own knowledge; that the amended claim discloses no reasonable cause of action under the Constitution against or any specific breach of the Constitution; that the claim discloses no reasonable cause of action of inhuman or degrading punishment or other treatment inflicted or authorized by the Defendants.
- [6] Alternatively, the Defendant contends that there is no proper pleading which discloses a cause of action of any failure to conduct an "effective" and "prompt" investigation within the jurisdiction under section 7 of the Constitution. The Defendant further contends that the claim is frivolous, vexatious and an abuse of the process of the Court.
- [7] The matter before this Court is the application filed by the Claimant to strike out the claim.

Relevant Background

- [8] The events deposed in the Claimant's affidavits in support of the claim include collusion, forced abduction, removal from Antigua and Barbuda, assault and battery. The Claimant was taken by force on a water vessel to the Commonwealth of Dominica.
- [9] The Claimant deposes that he met a specific person in August of 2020. On 23rd May 2021, at approximately 17:00, the Claimant attended at a villa in Jolly Harbour at the instance of that person.

On that day, the Claimant's affidavit evidence is that when he entered the villa, he was immediately surrounded by approximately six (6) to eight (8) men who claimed to be from the Antiguan police force and stated that they wanted to take the Claimant to St. John's police station. The Claimant indicates that none of the men were in police uniform or were in clothing that he recognised to be police attire.

[10] The Claimant's evidence is that at the moment when he was accosted by the men, he requested to speak with his lawyers, but that request was refused. He stated that he was physically restrained and beaten by the men. One of the men put his hand around the Claimant's neck and started to choke the Claimant. They began to beat the Claimant about his body, they punched him repeatedly in his head, arm, chest, and leg. A taser was discharged to the Claimant's face, hands and other exposed areas of skin causing burns, bruises, and immense pain. Each time the Claimant was tasered the Claimant describes that it felt unbearable. As a result of the aggression of the men the Claimant sustained an injury to his head which started to bleed. The Claimant describes that what appeared to him to be a kitchen knife was pointed at the Claimant and his life was threatened by one of the men.

[11] The Claimant was forcibly placed into a wheelchair, and his hands, legs and body were tied to the frame of the wheelchair. The Claimant describes that the men continued to beat him on his head and about his body. A gag was pushed into the Claimant's mouth, and a mask was placed over his head which prevented the Claimant from seeing. The Claimant recounts that at this stage he was barely conscious, in considerable pain and found it difficult to breathe.

[12] The Claimant recalls that during the assault the person who he met at the villa did nothing to assist him, and the person did not appear surprised by the presence of the men at the villa. The Claimant indicated that he was taken from the property to a small watercraft and was subsequently moved to a larger vessel. The Claimant states that after the gag was removed and he was untied, he asked his captors where he was being taken. It is the Claimant's averment that he was told to remain silent and was threatened with a knife.

[13] During the journey on the vessel, the Claimant indicates that he observed that the vessel had two men of Indian origin on board, and three crewmen of Caribbean origin. One of the Indian-origin

captors informed the Claimant that they had been monitoring him for over one year and described private details of his daily living. The other Indian captor demanded details of hidden bank accounts and threatened the Claimant that there would be dire consequences for him and for his family when he returns to India.

[14] One of the men of Indian-origin told the Claimant that he had previously killed a man. The Claimant states that he was shown a BBC media article in support of the man's boast. The evidence of the Claimant is that his captors indicated that they were agents from the Research and Analysis Wing ("RAW"), which the Claimant disclosed to be the Indian foreign intelligence service.

[15] The Claimant indicates that he was told to admit to wrongdoing in relation to the Punjab National Bank Case and told to implicate a specific group. The captors videotaped the Claimant, however, the Claimant indicated that he refused to comply. The Claimant states further that he was made to speak with someone on a mobile phone who identified himself and who stated that he was in charge of the Claimant's case; that he was in Antigua when the Claimant was abducted and once the Claimant got to Dominica, the Claimant was to agree to return to India or serious harm would befall him and/or his family. The Claimant indicated that he was told: *"I will tie you upside down and skin you alive, and your family would be next. I have done this many times before."*

[16] During the journey, the Claimant indicated that he was 'tasered' and beaten at intervals which caused him to lose consciousness on several occasions as he was unable to breathe properly from the gag which was placed in his mouth. On one occasion one of the men took out a knife and put it to the Claimant's throat and issued further threats.

[17] On 24th May 2021, having been at sea for approximately 15 to 17 hours, the vessel stopped. The Claimant indicates that he subsequently realised that he was in Dominican waters.

Events in Dominica

[18] The Claimant indicated that throughout the journey, he was repeatedly beaten and ill-treated, including further 'tasered', that he lost consciousness on many occasions due to ill-treatment and fear, and that on the night of 24th May 2021, he was removed from the vessel and the Claimant

contends that he was then placed on a coastguard vessel. The vessel was staffed by men in dark blue uniforms. None of his captors boarded the other vessel.

[19] The Claimant was taken ashore and disembarked at a wooden marina, which the Claimant later learnt was Cabrits Ferry Terminal in Dominica. A photograph was taken of the Claimant, which the Claimant contends shows signs of injury to his face. The Claimant states that he was greeted by a considerable number of police, who informed him that an Interpol Red Notice was issued against him. The Claimant avers that he informed those in attendance that he had been kidnapped, beaten, and taken from Antigua against his will. Thereafter, he was handcuffed and taken to a police station, which he subsequently established was in Roseau, the capital of Dominica. At the police station, the Claimant states that his requests for access to an attorney at law, medical treatment for his injuries, and nutritious food were refused.

[20] The Claimant contends that on 25 May 2021, that the Joint Director of the CBI, New Delhi (India) wrote a letter to the Dominican authorities requesting that the Claimant be deported directly from Dominica to India. On 26 May 2021, an attorney at law, attended the police station to speak with the Claimant on behalf of the Claimant's counsel in Antigua. The evidence of the Claimant is that the meeting was not permitted by the police. On 27th May 2021, the Claimant was visited by another attorney at law who was able to speak with the Claimant for a few minutes before the meeting was terminated by a senior police officer. On 27 May 2021, the High Court of Dominica issued an Order, which directed the police to allow the Claimant access to counsel, and which prohibited the Claimant's removal from Dominica. An attorney visited the Claimant at the Roseau police station. The Claimant describes that he was "very badly injured. He had a "black eye", and the sclera of his left eye was red. I also noticed injuries on his arms".

[21] The Claimant was charged in Dominica on suspicions of entering the country illegally. On 12th July 2021, the Claimant was granted bail in Dominica and permitted to return to Antigua and Barbuda, where he remains.

Investigation in Antigua

[22] On 3rd June 2021, the Claimant, through his legal representative, made a report to the second Defendant regarding the Claimant's 'forceable abduction and unlawful removal' from Antigua and Barbuda. In that report, the Claimant provided an account of his kidnapping.

[23] The Claimant received two unsigned police reports from the police officials in Antigua and Barbuda. The first report is dated 4th June 2021 outlined a series of activities which the author of the report qualified as being suspicious, leading up to the Claimant's disappearance. The report concludes by stating the following:

"The further along this investigation progresses the more the facts are aligning with Mr. Choksi's unofficial version of the events that led to his appearance in the State of Dominica. The plethora of real and circumstantial evidence makes it clear that a case of kidnapping with broad collusion among multiple conspirators exists. ... ranks at the top of the list of persons of interest."

[24] The second report dated 19th June 2021 is generally an updated version of the first report. It includes further documentation and has been amended to include another person as being at the top of the list of persons of interest with involvement to the incident.

[25] Attached to the first report is a recommendation which reads:

"As we endeavor to continue this investigation and with a view to appreciate and unravel the gravity of this crime the investigating team is proposing the following recommendations and official request for assistance ultimately with the aim of laying charges:

- (1) Facilitation for investigators to travel to Dominica to interview and possibly record witness statements from Mehul Choksi, border agents and local investigators and gather other documentary evidence.
- (2) Facilitation for investigators to travel to St. Lucia to interview the tour operators and original crew of both vessels and gather documentary evidence.
- (3) Permission to secure Warrant in the First Instance for Barbara Jarabik for Conspiracy to Kidnap.

(4) Request from Interpol in identifying the location and possible return of Barbara Jarabik, Gurmit Singh and Gurjit Bhandal to be interviewed.”

[26] The Claimant returned to Antigua on 15th July 2021. On 5th August 2021, the Claimant and his chef were interviewed by police officers in relation to the matter. The Claimant indicates that since 3rd December 2021, there has been no communication from the Second Defendant and that there is no evidence that any further steps have been or are being taken to identify the persons who perpetrated the abduction and assault.

[27] The Claimant contends that three nation states were involved in his forceable abduction and removal from Antigua and that there is evidence to implicate the three nation states.

Inhuman and Degrading Treatment

[28] The Claimant contends that the matters which indicate that the Claimant was subjected to inhuman and degrading treatment or punishment include that:

- (a) The Claimant was abducted, deprived of his freedom, repeatedly tasered, beaten, forceably restrained, gagged, hooded and threats made to his life and limb.
- (b) Photographs were taken of the Claimant with physical signs of his being assaulted.
- (c) The medical records of injury sustained from the hospital in Dominica.
- (d) Medical assessments and/or reports conducted following the Claimant’s return to Antigua.

Hearsay Evidence- The Law and the Ruling of the Court

[29] Hearsay evidence in its legal sense is evidence given by a testifying witness of a statement made on some other occasion, when it is intended as evidence of the truth of which was asserted².”

² Halsbury's Laws of England/Civil Procedure (Volume 11 (2020), paras 1–496; Volume 12 (2020), paras 497–1206; Volume 12A (2020), paras 1207–1740)/18. Evidence/ (10) Hearsay Evidence/ (ii) Admissibility under the Civil Evidence Act 1995/D. Evidence Formerly Admissible at Common Law/861. The former common law rule against hearsay; admissibility under the legislation.

[30] Thus, a statement is not hearsay if it is being tendered for another purpose other than the truth of its contents. The Court of Appeal in the case of **Franciscus Petrus Vingehoedt v Stanford International Bank Limited (In Liquidation)**³ noted the statement of principle in relation to the rule against hearsay as articulated by Kingsmill More J in the decision of **Peter Cullen v William Clarke**⁴ :

"In view of some of the arguments addressed to the Court, it is necessary to emphasise that there is no general no general rule of evidence to the effect that a witness may not testify as to the words spoken by a person who is not produced as a witness. There is a general rule, subject to many exceptions, that evidence of the speaking of such words is inadmissible to prove the truth of the facts which they assert; the reasons being that the truth of the words cannot be tested by cross examination and has not the sanctity of an oath. This is the rule known as the rule against hearsay.

...[E]vidence may properly be given of words uttered by persons who are not called as witnesses ... where the utterance of the words may itself be a relevant fact, quite apart from the truth or falsity of anything asserted by the words spoken. To prove, by evidence of a witness who heard the words, that they were spoken, is direct evidence, and in no way encroaches on the general rule against hearsay."

[31] In Antigua and Barbuda, the common law rules regarding hearsay evidence are applicable⁵. The common law rules regarding hearsay are considered in the context of the provisions of the CPR⁶.

[32] The position of the Defendants is that paragraphs 67, 119, 213 to 222 of the Claimant's affidavit filed on 11th February 2022 were inadmissible hearsay and opinion evidence, and not matters which the Claimant can prove from his own knowledge. The Defendants adopted a similar position towards paragraph 5 of the Claimant's affidavit filed on 6th April 2022 and paragraph 2 of the Claimant's affidavit filed on 9th May 2022.

³ ANUHCVP2014/0030.

⁴ [1963] IR 368.

⁵ Section 12 of the Evidence Act was repealed by section 64 of the Evidence (Special Provisions) Act No. 5 of 2009.

⁶ See: CPR 30.3 and 56.3(4).

[33] Counsel for the Claimant in response to the hearsay challenges raised by the Counsel for the Defendants contends, among other things, that in cases involving a “political character” the strict rules of evidence do not apply⁷ and that over time the non-application of the strict rules of evidence has been applied to human rights and abuse of process cases⁸. It is noted that the cases to which the Counsel for the Claimant referred were cases relating to habeas corpus proceedings and extradition proceedings. It is also noted that the challenged statements could be received for purposes other than for the truth of its contents.

The objections and the findings of the Court.

[34] The Affidavit filed on 11th February 2022. Paragraph 67 reads:

“They told me they were police officers and that they knew who I was, and they had been watching me for a while and following my movements. They said that they were there to escort me to the St. Johns Police station because the Indian authorities were waiting there to interrogate me.”

[35] Counsel for the Claimant contends that the statement is an admission against interest, which is admissible at common law⁹. Counsel for the Defendant refutes this submission. The Defendant asserts that the ‘alleged admission by persons allegedly claiming to be police officers involved in an alleged crime may only be relevant against them, if true and identifiable, and no one else’. The principle from **Slatterie v Pooley** is that, a parole admission by a party to a suit is receivable in evidence against him. The persons who made the statement are not parties to this suit. The paragraph does not fall within the hearsay exception, but it is admitted as a relevant fact quite apart from the truth or veracity of the statement.

[36] Paragraph 119 reads:

“I could see that from this area there were three steps that led to the outside deck. The two Indian men were now wearing western clothes, they had removed their Indian Punjabi suits. They showed me a news article with a picture of my chef Govind and said that he had told a reporter that I had fled to Cuba. They were laughing and were very excited. They told me that

⁷ *Schtracks v Israeli* [1964] AC 556 at 582.

⁸ *R (B) v Westminster Magistrates’ Court* [2015] AC 1195 [21].

⁹ *Slatterie v Pooley* (184) 151 ER 579.

Prime Minister of Antigua, Mr. Gaston Browne was going to disown me in a day or two and say that I cannot come back to Antigua because I had fled without informing immigration. They said that everything was going according to plan. I gained the clear impression that the authorities in Antigua were aware of the plot to kidnap me."

[37] Regarding paragraph 119 this Court makes the following observation. The first three sentences in the paragraph, can be received. The words, "They told me that Prime Minister of Antigua, Mr. Gaston Browne was going to disown me in a day or two and say that I cannot come back to Antigua because I had fled without informing immigration. They said that everything was going according to plan.", are admitted into evidence not for the truth of its contents but for what the Claimant represents was said as the words present the context of the Claimant's statement in the last sentence in the paragraph. The last sentence is also admitted into evidence.

[38] Paragraph 138 reads:

"He told me that the authorities in Antigua had agreed to my abduction but on a clear understanding that Jolly Harbour events and the kidnappings must not be mentioned as it would hurt their tourism. I was to say that I saw them 'the Indian officers' on the road near my home and they approached me, and I told them that I am going to co-operate with them and that I was ready to surrender myself and go back to India. I was not to make any mention of Barbara or her house because my wife would be crushed that I was at a white lady's house."

[39] Paragraph 138 is inadmissible hearsay evidence.

[40] Paragraph 213 reads:

"I have been informed by a well-placed source that the government has deliberately stopped funding for the investigation."

[41] Paragraph 213 is inadmissible hearsay.

[42] Paragraph 214 reads:

"I have also received communication from a high-level Antiguan governmental source who has confirmed to me that the government believes that I was abducted. I do not at present feel that I can go into details. But I would be prepared to disclose it to an independent inquiry."

[43] Paragraph 214 is inadmissible hearsay. Accordingly, this paragraph is struck out in its entirety.

[44] Paragraph 215 reads:

"I have also received intelligence from well-placed and credible sources that there are further plans to abduct and kidnap me. Due to the nature of the sources, I cannot give any further details."

[45] Paragraph 215 is inadmissible hearsay. Accordingly, this paragraph is struck out in its entirety.

[46] With reference to the paragraphs numbered 216 to 221 the contents are admitted for the fact of the statements.

[47] Paragraph 216 reads:

"On 25 May 2021, the Prime Minister of Antigua made a statement that it is very likely that I was still in the country and that the authorities are trying to locate me. The PM gave a statement in the Parliament that they are collaborating with the Indian government, neighbouring countries and international police organization to locate me. A copy of the news report about this statement is exhibited at page 154 of MC1. "

Paragraph 217 reads:

"Even the Indian media as of 25 May 2021 were saying that the whereabouts of the applicant was not known. A copy of the news report is exhibited at page 155 of MC1."

[48] Paragraph 218 reads:

"On the same day i.e. 25 May 2021, Mr. Anurag IPS, Joint Director of the CBI, New Delhi (India) wrote a letter to request that I be deported directly from Dominica to India: page 161 of MC1. This demonstrates that the Indian government knew where I was."

[49] Paragraph 219 reads:

"On 27 May 2021, the PM of Antigua gave an interview in which he said that he was "gung-ho" about stripping me of my citizenship, that the government of Antigua did not want me to return to Antigua

where I had constitutional and legal rights; and further stated that the Indian, Dominican and Antiguan governments should work together to render me directly from Antigua to India: page 162 of MC1."

[50] Paragraph 220 reads:

"On 26 and 27 May 2021, the Prime Minister of Antigua categorically stated that I will be put on a private jet and deported to India from Dominica: page 163 of MC1."

[51] Paragraph 221 reads:

"On 28 May 2021, reports appeared in the media that a plane had arrived in Dominica to fly me back to India: pages 166-168 of MC1."

[52] The Defendant also sought to have paragraph 222 from affidavit of 11th February 2022 struck out. Paragraph 222 reads as follows:

"It seems to me entirely obvious that the Indian government is behind my abduction and ill-treatment. They are incredibly frustrated at the progress of the litigation in Antigua and Barbuda relating to the process to revoke my citizenship and the challenge to the extradition request. There were reports in India Today on 1 March 2021 that PM Ambassador Lionel Hurst, Chief of Staff to the Prime of Antigua and Barbuda stated that it could take 7 years before the citizenship proceedings were resolved: page 176 of MC1."

[53] This paragraph contains opinion evidence and speculative statements. The first sentence represents the Claimant's opinion presumably based on his collective experience. The first sentence is admitted into evidence. The second sentence, "They are incredibly ...request", is determined to be speculative and inadmissible. The third sentence commencing, "There were reports in India...MC1" is admitted for the fact of the statement.

[54] Paragraph 5 of the affidavit filed on 6th April 2022 reads:

"The police have previously confirmed that I have been a victim of kidnapping: page 1 of MC2. I have been informed that it is now accepted by the Government of Antigua and Barbuda that the Indian Government was involved in my abduction. Nonetheless, I am concerned that the Government of Antigua and Barbuda was involved in some way. I don't wish to believe that

this is true, but I have been informed that the Government of Antigua and Barbuda has interfered with the police investigation and stopped funding the investigation. I have also been informed that there was a meeting between the Prime Minister, Barbara Jarabik and Gurdip Bath after my abduction on 23rd March 2021 but before the latter took a flight from Antigua to Dominica. Again, I reiterate that I hope that these allegations are not true, but this information comes from well-placed sources, and I have also seen a photograph of the Prime Minister together with Gurdip Bath: page 2 of MC2.

[55] Paragraph 5 of the affidavit filed on 6th April 2022 save for the first sentence, "The police...MC2" is deemed to be inadmissible hearsay. The first sentence is admissible on the fact of the contents.

[56] Paragraph 2 of the affidavit filed on 9th May 2022 reads:

"In the Fixed Date Claim at [52 (ii)], I aver the involvement of the Government of Antigua and Barbuda in my abduction, torture and attempted rendition. The involvement of the Antiguan Government is plain from the evidence contained in both my affidavits. In particular:

(i) On 23rd May 2021, my captors informed me that the PM of Antigua would "disown" me "in a day or two and say that I cannot come back to Antigua because I had fled without informing immigration": First Affidavit at [119]. This is precisely what happened: On 27 May 2021, the PM of Antigua denounced me, and stated that the government of Antigua, Dominica and India must work together directly to deport me from Dominica to India so that he could not exercise his constitutional rights as a citizen of Antigua: First Affidavit at [216] – [219].

(ii) On 24th May 2021, during a phone call with Narendra Singh, I was informed that the Antiguan authorities had agreed to my kidnap on the understanding that it not come to light as "it would hurt their tourism": First Affidavit at [138].

(iii) I have been informed that the PM of Antigua held a meeting with Gurdip Bath and Barbara Jarabik on 23 May 2021 just after my abduction, and before they

took the private flight from Antigua to Dominica, which flight is detailed in the police report: [223] (as amended by the Second Affidavit at [5]).

(iv) I have been informed that the investigation into my abduction torture and rendition has been stopped by the Antiguan government: [223] (as amended by the Second Affidavit at [5]).

(v) This is confirmed by the fact that there have been no steps since 21 June 2021 further to investigate my abduction, or to bring justice those identified as suspects in the conspiracy to kidnap.”

[57] As it relates to the contents of paragraph 2 of the affidavit filed on 9th May 2022 the Court makes the following rulings:

- (a) Paragraph 2.i. is admitted into evidence. See ruling on [119] and [216] – [219].
- (b) Paragraph 2.ii is inadmissible hearsay.
- (c) Paragraph 2.iii.is inadmissible hearsay.
- (d) Paragraph 2 iv. is inadmissible hearsay.
- (e) Paragraph 2 v. is deemed to be admissible.

The Strike Out Application.

[58] The Defendants seek to strike out the claim as the Defendants contend that the claim discloses no reasonable cause of action under the Constitution or any specific breach of the Constitution of Antigua and Barbuda. The Defendants also contend that the claim discloses no reasonable cause of action of inhuman or degrading punishment or other treatment inflicted or authorized by the Defendants.

[59] Alternatively, the Defendants contend that there is no proper pleading which discloses a cause of action of any alleged failure by the Defendants to conduct an “effective” and “prompt” investigation within the jurisdiction of Antigua and Barbuda under section 7 of the Constitution.

[60] It is an accepted principle of law that the exercise of the discretion to strike out a claim is a draconian exercise of the Court's discretion, and it is a discretion which is sparingly used and if used, is used only in the clearest of circumstances¹⁰ such as in the case of a claim being unable to stand¹¹.

[61] So averse the Courts have been to striking out a matter that the Privy Council in the case of *Real Time Systems Limited v Renraw Investments Ltd*¹² noted that:

"16. There is no reason why the court, faced with an application to strike out, should not conclude that the justice of the particular case militates against the nuclear option, and that the appropriate course is to order the claimant to supply further details, or to serve an amended statement of case including such details, within a further specified period. Having regard to rule 26.6, the court would quite probably also feel it appropriate to specify the consequences (which might include striking out) if the details or amendment were not duly forthcoming within that period".

[62] Thus, it is noted that a court would not strike out proceedings which are viable or could be viable, where facts are in dispute or in circumstances of emerging or developing areas of law.

Does This Claim Disclose a Reasonable Cause of Action under the Constitution?

[63] The Claimant seeks a declaration that the Claimant is entitled to a speedy and effective investigation in the circumstances of the incident, seeks, among other things, the establishment of an independent or judicial inquiry as to the circumstances of the incident; a declaration that the first Defendant has a duty to confirm to the Dominican police that the evidence supports the Claimant's case that he was forcibly removed from the jurisdiction and taken to Dominica.

[64] Section 7(1) and (2) of the Constitution provides:

"(1) No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment that was lawful in Antigua on 31st October 1981."

[65] It is settled law that the fundamental rights provisions of the Constitution are interpreted liberally. Section 7 of the Constitution which provides that no person shall be subjected to torture or to inhuman or degrading treatment or punishment, as other similar provisions, imposes both a negative and a positive obligation upon the State.

[66] The commitment of the Government of Antigua and Barbuda to the principle of persons not being subjected to torture and inhuman and degrading treatment or punishment arises out of the

¹⁰ *Real Times Systems v Renew Investment Ltd*. [2014] UKPC 6.

¹¹ *Baldwin Spencer v Attorney General of Antigua and Barbuda* Civil Appeal No. 20A of 1997 at p.5.

¹² [2014] UKPC 6 at [16].

Government's commitment to the rule of law and to the Constitution. The acknowledgment of the commitment is manifested by the Government's accession to the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment¹³ and other human rights international treaties.

[67] As it relates to the requirement to protect citizens from acts of torture, inhuman or degrading treatment or punishment, and a complaint by an individual that this right is not being protected the Court will be required to consider the responsibilities of the state. In this regard, this Court makes reference to cases arising from the European Court of Human Rights.

[68] In the case of *M v Italy*¹⁴ before the European Court of Human Rights on the matter of inhuman or degrading treatment, kidnapping, slavery, and human trafficking the court considered the matter of the duty which rests on a state when information of inhuman treatment is known to the authorities. In that Case the European Court of Human Rights noted articles 1 and 3 of the European Convention on Human Rights. That Court indicated:

"99. The Court reiterates that art. 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on the High Contracting Parties under art. 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with art. 3 requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.

100. The Court reiterates that art. 3 of the Convention requires the authorities to investigate allegations of ill-treatment when they are "arguable" and "raise a reasonable suspicion", even if such treatment is administered by private individuals."

[69] In the case of *Vasilyev v Russia (App. No. 32704/04)*¹⁵ the complaint of the applicant was that the police officers did not assist him when they found him unconscious on the ground, that there was inadequate medical care in the hospital as well as there was ineffective investigation carried out into his assault, into the actions of the police and into the medical negligence. The Court also noted that:

"100. Even though the scope of the State's positive obligations might differ between cases where treatment contrary to art 3 has been inflicted through the involvement of State agents and cases where violence is inflicted by private individuals (see *Beganovic*, cited above, para 69), the requirements as to an official investigation are similar."

¹³ Date of accession July 19, 1993.

¹⁴ (2[2009] ECHR 013) 57 E. H.R.R. 29 942.

¹⁵ *Vasilyev v Russia (App. No. 32704/04)* 17 December 2009.

[70] Article 1 of the European Convention on Human Rights provides:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."

[71] Section 1 of the Convention provides for the rights and freedoms. Article 3 of section 1 provides, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

[72] The Counsel for the Defendants indicates that the approach of the European Court of Human Rights is specifically guided by the Article 1 of the European Convention and where relevant to sections 1 to 3 and 6 of the Human Rights Act of 1998. In the opinion of this Court there is no reason to make such a distinction. The provisions of Article 3 are in similar terms to the provisions of Section 7(1) of the Constitution. This Court is of the view that the provisions as they relate to ill-treatment and torture should be considered in similar terms. Even if this Court is incorrect on this, this represents matters which require the trial of the Claimant's constitutional claim.

[73] The Counsel for the Defendants contends that the Claimant has not shown that the Defendants were involved in the circumstances which gave rise to the Claimant being forcibly abducted, a point with which the Claimant would strongly disagree. It is noted that even if the Claimant is accurate, in this Court's view the state's responsibility under Section 7 of the Constitution is triggered whether the actions were perpetrated by a state actor or a non-state actor. This Court refers to the judgment of Lord Kerr in the case of *D v Commissioner of Police of the Metropolis (Liberty and others intervening)*¹⁶ in which Lord Kerr noted that:

"20. Lord Hughes JSC has suggested, in para 117¹⁷ of his judgment, that the statement in para 153 of ECtHR's judgment, that "article 3 carries an obligation in some circumstances to investigate third party offending" leaves "only uncertainties about its source and thus its extent". What is not the least uncertain, however, is that, if the relevant circumstances are present, there is a duty on the part of the state authorities to investigate where non-state agents are responsible for the infliction of harm. That cannot be characterised as other than an operational duty. The debate must focus, therefore, not on the existence of such a duty but on the circumstances in which it is animated."

[74] It is to be noted that not all cases give rise to potential violations of Section 7 of the Constitution. In the circumstances of this case the Claimant contends that he was subjected to ill-treatment. The Claimant represents that he was assaulted, choked, strangled, restrained, beaten punched about the head and body; that he was tasered; threatened with a kitchen knife and subjected to death threats; that he was tied with a rope to a wheelchair; that he was gagged and blindfolded; that he was told that his family would be in jeopardy; he was ill-treated to the extent that he lost consciousness. The Claimant presents photographs and medical records to substantiate the allegations made in the claim.

¹⁶ [2018] UKSC 11.

¹⁷ Lord Hughes: "117 Whilst these paragraphs show that the court asserts that article 3 carries an obligation in some circumstances to investigate third party offending, they leave only uncertainties about its source and thus its extent."

[75] It is also noted that the absence of the Claimant from the jurisdiction and his subsequent location in the Commonwealth of Dominica was widely reported. The Claimant's account that he was forcibly removed from the jurisdiction has been, at least initially, supported by the findings in one of the police reports that, "*The further along this investigation processes more of the facts are aligning with Choksi's version of the events that lead to his appearance in the state of Dominica. The plethora of real and circumstantial evidence makes it clear that a case of kidnapping with broad collusion among multiple conspirators exists.*"¹⁸.

[76] The assertions made by the Claimant and the observations made by an agent of the second Defendant give reason for the first Defendant to consider whether the State's obligation under Section 7 of the Constitution has been triggered and, if triggered, what should be the nature of its response. The Claimant, having issued a claim, is entitled to have a resolution as to what is an appropriate response; whether the investigation was an "effective" investigation; whether an effective investigation includes extra-territorial investigations and whether other reliefs are available to the Claimant.

[77] The effectiveness of the investigation is based on a multiplicity of factors. In the case of **Vasilyev v Russia (App. No. 32704/04)**¹⁹ the Court considered the matter of an effective investigation and noted that:

"For the investigation to be regarded as "effective", it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. That is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard, and a requirement of promptness and reasonable expedition is implicit in this context (see among many authorities, *Mikheyev v Russia* [2006] ECHR 7761/01, para 107 et seq., 26 January 2006, and *Assenov v Bulgaria* [1998] ECHR 24760/94, paras 102 et seq.). In cases under arts 2 and 3 of the Convention where effectiveness of the official investigation has been an issue, the Court has often assessed whether the authorities reacted promptly to the complaints at the relevant time (see *Labita v Italy* [2000] ECHR 26772/95, paras 133 et seq). Consideration has been given to the opening of investigations, delays in taking statements (see *Timurtas v Turkey* [2002] ECHR 23531/94, para 89, and *Terkin v Turkey* [1998] ECHR 22496/93, para 67) and to the length of the time for the investigation (see *Indelicato v Italy* [2001] ECHR 31143/96, para 37, 18 October 2001) ..."

[78] Counsel for the Defendants notes that there was an effective investigation and points out that the allegations of the Claimant were investigated, the Claimant and others were interviewed, there has

¹⁸ Report of 25th June 2021.

¹⁹ **Vasilyev v Russia (App. No. 32704/04)** 17 December 2009.

been a preliminary finding that the Claimant was forcibly abducted and removed from Antigua, that the police has named suspects and that there have been recommendations arising from the investigation.

[79] The question as to whether the investigation has been effective is not one which can be answered before the full facts are ventilated. As it stands certain reports have not been made available and those reports may influence the direction of the investigation and address whether other steps are or were required and therefore inform on the effectiveness of the investigation. The Claimant also notes that no recent steps have been taken by the Defendants.

[80] Accordingly, the Defendants have not shown the claim to be unsustainable or the claim is frivolous or vexatious. Additionally, as previously expressed, where the law is in a stage of development courts are not inclined to strike out cases and there are aspects of this claim may assist in the evolution of how the Constitution is to be interpreted.

Amendment of Claim.

[81] The Claimant by affidavit filed on 9th May 2022 sought to amend paragraph 52 of the Claimant's claim. The Claimant set out the terms of proposed amendments in that affidavit. Counsel for the Defendant has objected to the Court granting the amendment sought. This Court is in agreement with the Counsel for the Defendant as there is no proper application before the Court for the amendment sought. It is noted that "CPR 20.1 requires a party to obtain leave to amend its statement of case at any time after the date fixed for the first case management conference, which in the case of an originating motion, is the date fixed for the first hearing of the motion"²⁰. The first case management conference for these proceedings has been held.

[82] It is ordered that:

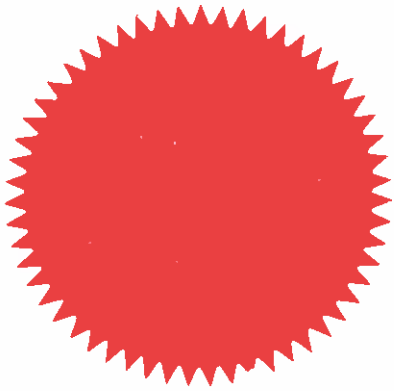
- (a) The affidavits of the Claimants to be read in accordance with the ruling of this Court.
- (b) The Defendants' have a case to answer, and the Defendants are to file and serve their defence within 28 days of today's date.
- (c) The Defendants to pay 75% of the Claimant's costs on the application.

[83] It is also ordered that:

- (a) Paragraph 6 of the order of 13th April 2022 to come up for further consideration by the Court.
- (b) There be a stay of five (5) calendar days.

²⁰ Attorney General of St. Lucia v Darrel Montrope SLUHCVAP 2019/0021.

Marissa Robertson
High Court Judge



By the Court

Cutbill

Registrar

Name: Karen-mae Sain

Date: 6-3-23

Time: 3:25 pm

Name: Jasher Michael

Date: 07.03.23

Time: 12:37 pm