

IN THE SUPREME COURT OF BELIZE A.D. 2020

CLAIM NO 297 OF 2020

(BETWEEN

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(SHELLY WHITNEY SCOTT

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CLAIMANT

(AND

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(ATTORNEY GENERAL OF BELIZE

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DEFENDANT

Before: The Hon Justice Westmin R.A. James

Dated 1st March 2021

Appearances: Mr Leeroy Banner for the Claimant

Mr Kileru Awich and Ms Lavina Cuello for the Defendant

DECISION ON STRIKING OUT

1. Before the Court for its determination is the Notice of Application filed by the Defendant on 3rd July in which an order is sought to strike out the Claimant's Fixed Date Claim Form filed on 26th May, 2020.
2. The Notice of Application is premised primarily on the ground that the Claim is an abuse of the Court's process and the Defendant asserts that the Claimant had an alternate form of redress and could have instituted a claim for false imprisonment and malicious prosecution.
3. Accordingly, this Court must determine whether or not the Claimant's claim amounts to an abuse of process and should be struck out.
3. It is well established that the right to apply to the Supreme Court pursuant to section 20 of the Constitution should be exercised only in exceptional cases where there is a parallel remedy. The decisions of the Privy Council in *Jaroo v Attorney General of Trinidad and Tobago* [2002] UKPC 5; *Attorney General of Trinidad and Tobago v Ramanoop* [2005] 2 WLR 1324 *Harrikissoon v Attorney General of Trinidad and Tobago* [1980] AC 265; *Chokolingo v Attorney General of Trinidad*

and Tobago [1981] 1 WLR 106 and *Hinds v The Attorney General* [2001] UKPC 56 have all establish this point. In this jurisdiction the Court acknowledges the dictum of Saunders JCCJ as he then was in *Lucas & Carillo v Chief Education Officer et al*, that constitutional redress should not be afforded, where a remedy in private law exists.

4. The Court is aware however, that the mere existence of an alternative remedy does not automatically warrant excluding constitutional proceedings. The crux is their adequacy. As stated by Sharma CJ in *Belfonte v A-G* (2005) 68 WIR 413 at [18] and relied on in *Lucas (supra)* at [138] “the determining factor in deciding whether there has been an abuse of process is not merely the existence of a parallel remedy, but also the assessment that the allegations grounding constitutional relief are being brought ‘for the sole purpose of avoiding the normal judicial remedy for unlawful administrative action.’”
5. In *Ramanoop* (supra) the Court said

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.

26 That said, their Lordships hasten to add that the need for the courts to be vigilant in preventing abuse of constitutional proceedings is not intended to deter citizens from seeking constitutional redress where, acting in good faith, they believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them. Frivolous, vexatious or contrived invocations of the facility of constitutional redress are to be repelled. But “bona fide resort to rights under the Constitution ought not to be discouraged.”

6. Therefore, the power to decline jurisdiction arises only where the alternative means of redress is considered to be adequate. If there is an adequate parallel remedy, constitutional relief is only appropriate where some additional “feature” presents itself. This includes, without being exhaustive, arbitrary use of state

power¹ or where there are breaches of multiple rights.² In *Belfonte* (supra) Chief Justice Sharma, in giving an example of a special feature which could take a case out of the Jaroo substantive limitation, stated:

Another example of a special feature would be a case where several rights are infringed, some of which are common law rights and some for which protection is available only under the constitution. It would not be fair, convenient or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights.

7. The Court must therefore evaluate the case and determine whether there is an adequate parallel remedy and if so whether there were any special features of this case that will allow for the matter to continue.

The Claim

8. The Claimant seeking the following constitutional reliefs
 - a. *A Declaration that actions of members of the Belize Police Department as agents of the State by arresting and charging the Claimant for the offences of Kept Firearm and Kept ammunition without a licence contrary to 3(1), 5, 32(1), 32(4) and 37(1)(d) of the Firearm Act Chapter 143 of the substantive laws of Belize Revised Edition 2011 with no reasonable and probably cause which lead to her incarceration was contrary to section 5(1)€ of the Constitution specifically relating to the Claimant's right not to be unlawfully deprived of her liberty;*
 - b. *A Declaration that actions of members of the Belize Police Department as agents of the State by arresting and charging the Claimant for the offences of Kept Firearm, Kept Prohibited Firearm and Kept Ammunition without a Licence, contrary to 3(1), 5, 32(1), 32(4) and 37(1)(d) of the Firearm Act Chapter 143 of the substantive laws of Belize Revised Edition 2011 with no reasonable and probably cause which lead to her incarceration was contrary to section 6(1) and 6(3)(a) of the Constitution specifically relating to the Claimant's to be presumed innocent until proven guilty;*
 - c. *A Declaration that the actions of the members of the Belize Police Department as agents by arresting and charging the Claimant for the offences of Kept Firearm, Kept Prohibited Firearm and Kept Ammunition without a Licence, contrary to*

¹ *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 2005; *Takitota v AG I* [2009] UKPC 11

² *Belfonte v Attorney General* [1968] W.I.R. 416 (CA TT)

3(1), 5, 32(1), 32(4) and 37(1)(d) of the Firearm Act Chapter 143 of the substantive laws of Belize Revised Edition 2011 with no reasonable and probably cause which lead to her incarceration was contrary to section 3(a) of the Constitution specifically relating to the Claimant's right to protection of the law which is premised on fundamental notions of justice and the Rule of Law;

- d. A Declaration that the state violated Rule of Law based on the Supreme Court decision in the case of Allyson Major Sr v The AG and Brea Bowen v the AG of Belize Claim No 493 of 2017 in which similar actions by agents of the State was found to be in breach of the Constitution and the State has a Constitutional duty to prevent a continued breach of the law by its servants*
 - e. Compensatory as well as vindicatory damages based on the breach of the Claimant right to protection of the law;*
 - f. An order that damages be assessed;*
 - g. Special Damages \$4000.00*
 - h. Interest*
 - i. Costs*
 - j. Such of all reliefs as the Court just and equitable;*
9. The Claimant indicated that on the 15th May 2019, she was charged for the offences of Kept Firearm without a Licence, Kept Prohibited Firearm without a Gun Licence, and Kept Ammunition without a Licence (two counts) as a consequence of her Belize Social Security Card being found in a house where the weapons and ammunition were found. The Claimant was incarcerated at the Kolbe Foundation from May 15th 2019 to 24th May 2019 when she was granted bail by the Supreme Court.
10. The Claimant was charged but the charges were withdrawn and discontinued by the prosecution on 11th November, 2019. The Claimant alleges that there was no connection between the Claimant and the firearms.
11. The Defendant's evidence was that of Police Constable Amiel Cantun. PC Cantun was one of the arresting officers that day. He deposed that on 15th May 2019 there was an anonymous caller about the whereabouts of a stolen motorcycle. The information revealed that the stolen motorcycle was located at a red and white board house situated opposite of the Roaring Creek cemetery on top of the hill in Roaring Creek Village, Cayo District. He indicated that he, WPC Clara Michael and Special Constable Wynmark Emmanuel all went to the location.
12. He deposed that when they went to the house, the front door was closed. One officer went to the back door and he pushed the front door because he heard a

noise which turned out to be a fan. With the front door open he was able to see to the back door where the other officer was standing. He and Special Constable Emmanuel entered the house while WPC Michael stood outside. He said when he went into the bedroom he noticed a 16 gauge double barrelled sawed off shot gun with cartridges on a dresser and a black 9mm Glock pistol laying on the floor near the bedroom door. There was no one inside the house.

13. He said that the officers called for a Justice of the Peace and when the Justice of the Peace along with Scene of Crime Technician arrived at the premises, he conducted a full search of the premises. He indicated that he found two social security cards, one belonging to the Claimant and another belonging to a female minor. He also found a cell phone along with adult and children female clothing in the house. When they concluded the search and seized the items they left.
14. The officer then indicated that when driving down the hill where the house was located, they stopped at another house. He said that WPC Michael approached a female that was standing on the veranda of another house located in the same yard and called her by her name. He indicated that in his presence she asked the female if she knew who lived in the house at the top of the hill and she responded she lived there.
15. He indicated that the Claimant was then taken to the police station and charged with the offence of "Kept Firearm without a Gun License, Kept Ammunition without a gun licence" and "Kept Prohibited Firearm." The PC indicated that he had reasonable suspicion that the Claimant was keeping the firearms that were found in the house due to the fact that her Social Security Card was found in the bedroom where the firearms were found, and no other identification document for any other person with the age of criminal responsibility was found in the house. Furthermore, the bedroom had female clothing only.
16. He said he then handed over the case to the Prosecution Branch who he later was informed withdrew the charges against the Claimant.
17. Importantly, PC Cantun indicated in paragraph 25 of his Affidavit that *"the Claimant was not treated differently from any other similarly circumstanced comparator or person in whose address unlicensed firearms and ammunition and prohibited firearms are found."* He later goes on to say in paragraph 28 that *"the Claimant was not arbitrarily singled out for adverse treatment or arrest and charge. Furthermore, the Claimant's arrest and charge was done under the provisions of the Firearms Act Cap 143 of the Substantive Laws of Belize currently in force and not under the repealed provisions*

of the Firearms Act; the application of which was ruled to be contrary to the Rule of Law in Claim 478 of 2014 Allyson Major Sr v Attorney General of Belize and Claim 493 of 2017 Brhea Bowen v The Attorney General of Belize."

Analysis

18. In relation to the arrest and charge of the Claimant I am constrained to agree with the Applicant that there is indeed a parallel remedy available to the Claimant in false imprisonment and unlike in *Brhea Bowen v AG of Belize* there was no judicial act which gave rise to the Claimant's arrest that would have prevented the use of that remedy. The Claimant would not be precluded from seeking relief through a false imprisonment claim because the Magistrate was obligated to remand the Claimant as a matter of law under the Crime Control and Criminal Justice Act and Act No 25 of 2003 and so did not and could not exercise any decisional freedom when remanding the Claimant into custody. I also accept the Defendant's contention that as stated in *AG v Margaret Bennet et al* the CA held that damages were recoverable in a claim for false imprisonment not only for the original arrest but also whilst the Appellants were on remand in custody.
19. The Applicant also submitted that the Claimant had an adequate parallel remedy in malicious prosecution. The Applicant submitted that the Claimant would have no difficulty in establishing malice in a claim for malicious prosecution because the Defendants cannot proffer the argument that malice cannot as a matter of law be established since the prosecution was effected in furtherance of a valid and subsisting law. The Applicant argued that the argument that the prosecution was effected in furtherance of a valid and subsisting law was a special feature in *Brhea Bowen v AG of Belize (supra)* which made it appropriate for the Court to allow that Claim to be pursued as a constitutional claim. The Applicant argues that once the claimant establishes that there was no reasonable suspicion for her arrest, she can rely on the lack of reasonable suspicion to establish malice in relation to her alleged malicious prosecution.
20. I however disagree with the Applicant in this regard. While the Applicant indicated in submissions that the prosecution was not effected in furtherance of a valid law permitting arrest. The evidence submitted by the Applicant from PC Cantun in paragraph 28 was that "*the Claimant's arrest and charge was done under the provisions of the Firearms Act Cap 143 of the Substantive Laws of Belize currently in force.*" PC Cantun also indicated that he had reasonable suspicion that the Claimant had committed the offences of 'Kept Firearm without a gun licence, Kept Prohibited Firearm and kept ammunition without a gun licence consistent with

any person in whose address unlicensed firearms and ammunition and prohibited firearms are found.

21. The Applicant also contends once a lack of reasonable suspicion is proven malice in relation to alleged malicious prosecution is proven. The Applicant presented no authority for this proposition and it in fact goes against the trend of cases in this area.
22. It is settled law that in a claim for malicious prosecution, the claimant must prove (a) that the law was set in motion on a charge for a criminal offence by the defendant, (b) that he was acquitted of the charge or that the proceedings were otherwise determined in his favour, (c) that in instituting and continuing the prosecution the defendant did so without reasonable and probable cause, (d) that the defendant was actuated by malice and (e) as a consequence the claimant suffered damage. Failure to establish any one or more of these requirements will result in the claimant losing his action for malicious prosecution. While there is overlap between malice and reasonable and probable cause they are separate requirements for the Claimant to prove.
23. Where a police officer had a belief even if wrongly that they had a reasonable and probable suspicion without proof of some further, you may not be able to show malice. In *Sibbons v Sandy*, [TT 1983 HC 87] it appeared that the police constables did believe, though they had no reasonable or probable cause for so believing, that the claimant committed the offence. The Court held that if it can't be shown to have 'acted with any wrong or indirect motive', they were not liable for malicious prosecution. Similarly, in *Paul v Attorney General* [TT 1998 HC 71], Bharath J held that a constable who had laid a charge of larceny against the claimant had acted incautiously and imprudently, but since there was no evidence of a motive to 'pull the plaintiff down', malice had not been established.
24. Further, in the Privy Council decision of *Sandra Juman v The Attorney General of Trinidad and Tobago* [2017] UKPC 3 a case where the claimants were charged on suspicion of unlawful possession of firearms and ammunition found at premises, shows how difficult it is to prove malice. The PC held

"The essence of malice was described in the leading judgment in Willers v Joyce at para 55:

"As applied to malicious prosecution, it requires the claimant to prove that the defendant deliberately misused the process of the court. The most obvious case is where the claimant can prove that the defendant brought the

proceedings in the knowledge that they were without foundation ... But the authorities show that there may be other instances of abuse. A person, for example, may be indifferent whether the allegation is supportable and may bring the proceedings, not for the bona fide purpose of trying that issue, but to secure some extraneous benefit to which he has no colour of a right. The critical feature which has to be proved is that the proceedings instituted by the defendant were not a bona fide use of the court's process."

19. *A failure to take steps which it would be elementary for any reasonable person to take before instituting proceedings might in some circumstances serve evidentially as a pointer towards deliberate misuse of the court's process, but sloppiness of itself is very different from malice. In the present case there was no cause to doubt that the first respondent believed, rightly or wrongly, that there were sufficient grounds to prosecute, or that the object of charging the appellant was to place the matter before the magistrate for the court to decide the question of her guilt; and there was no suggestion that he had any ulterior improper motive. Even if the court had decided that objectively the first respondent lacked reasonable and probable cause to prosecute the appellant, there was no basis to hold that he acted with malice."*

25. Inferring malice from lack of reasonable and probable cause is rare and in those cases involving officers in which malice was inferred usually involved some determination early on of the person's guilt and an absence of proper motive. In *Jango v Gomez*, TT 1984 HC 49 it was held that the defendant security officer 'did not honestly believe in the case he had put forward, and, having regard to the statement made by him upon his arrival at Sankai's office that the claimant was a thief, the prosecution could be accounted for only on the basis of an improper motive. It was both without reasonable and probable cause and malicious.' In *Rowley v Sylvester* TT 1985 HC 147 the security guard was given a reasonable explanation for the presence of the oil in the claimant's car and who was willing to take the security guard to prove same but the security guard refused. The Court believed that the premature belief of the claimant's guilt precipitate, less than honest and in any event unreasonable basis for the arrest. The Court believed that because of that the guard closed his eyes to the probability that what the claimant was saying was true. The Court is also cognizant of the Privy Council's rejection of equating the failing to carry out sufficient investigation and malice in *Juman* (supra). The Privy Council stated that "*the Board would reject the appellant's attempt to treat the first respondent's alleged failure to carry out sufficient investigation before charging the appellant as amounting or equivalent to malice; or similarly the attempt to treat "recklessness" as tantamount to malice. "Reckless" is a word which can bear a variety*

of meanings in different contexts. It is not a suitable yardstick for the element of malice in malicious prosecution."

26. In the present case PC Cantun contends that he had reasonable and probable suspicion based on the discovery of the social security card, the women's clothing where the guns were found and the answer the claimant allegedly gave. I therefore disagree that the Claimant could easily prove malice by the lack of reasonable and probable cause. Based on the evidence before the Court at this stage it is more likely than not that the Claimant would have a difficulty in proving malice. Therefore, malicious prosecution would not be an adequate alternative remedy.

Protection of the Law and Rule of Law

27. The Claimant in this case also seeks the following declarations

- c. A Declaration that the actions of the members of the Belize Police Department as agents by arresting and charging the Claimant for the offences of Kept Firearm, Kept Prohibited Firearm and Kept Ammunition without a Licence, contrary to 3(1), 5, 32(1), 32(4) and 37(1)(d) of the Firearm Act Chapter 143 of the substantive laws of Belize Revised Edition 2011 with no reasonable and probable cause which lead to her incarceration was contrary to section 3(a) of the Constitution specifically relating to the Claimant's right to protection of the law which is premised on fundamental notions of justice and the Rule of Law;
 - d. A Declaration that the state violated Rule of Law based on the Supreme Court decision in the case of *Allyson Major Sr v The AG and Brhea Bowen v the AG of Belize Claim No 493 of 2017* in which similar actions by agents of the State was found to be in breach of the Constitution and the State has a Constitutional duty to prevent a continued breach of the law by its servants
28. The Claimant alleges that her right to protection of the law was breached as the State failed to take positive steps from preventing its agents from applying the Firearms Act contrary to the law and as a consequence breached the rule of law, because the state failed to protect and promote the fundamental right of the Claimant.
29. The Claimant points to the Supreme Court decisions in the case of *Allyson Major Sr v The Attorney General of Belize Claim No 4789 of 2014* and *Brhea Bowen v The Attorney General of Belize Claimant No 493 of 2017* which found similar

actions by agents of the state were in breach of the Constitution. No doubt the Claimant is alleging that there is a practice or pattern of behaviour on the part of police officers to arrest a person above the age of criminal culpability for suspicion of possession of a firearm by virtue of them living at a premises or house and the State has not done anything to protect and promote the citizens' rights from such arbitrary actions by police officers. This is more important having regard to the fact that a person is unable to get bail at the Magistrate Court for any such offence.

30. There is indeed some basis for this allegation as is contained in the Affidavit of PC Cantun who said at paragraph 25 that *"the Claimant was not treated differently from any other similarly circumstanced comparator or person in whose address unlicensed firearms and ammunition and prohibited firearms are found."* And then later goes on to say in para 28 that *"the Claimant was not arbitrarily singled out for adverse treatment or arrest and charge. Furthermore, the Claimant's arrest and charge was done under the provisions of the Firearms Act Cap 143 of the Substantive Laws of Belize currently in force."* The PC is therefore indicated that this is the practice of police officers in effecting arrest under the Firearms Act Cap 143.
31. What the Claimant is alleging is that there is breach of a positive duty of the State to protect the citizens against arbitrary power of police officers. Useful dicta in relation to this right can come from the Inter American Human Rights system to which Belize is subscribed to and which has been acknowledged by the CCJ as relevant in the interpretation of the Belizean Constitution. (See *Mayan Alliance* [2015] CCJ 15.)
32. The scope of the juridical concept of positive obligations within the Inter-American system is discerned from Articles 1 and Article 2 of the American Convention, which provides as follows:

Article 1

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

Article 2

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this

Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

33. The Inter American Commission on Human Rights and the Inter American Court of Human Rights have repeatedly examined the scope of these provisions in establishing positive obligations on a state in the realm of human rights. The Inter American Court, specifically, has established that

[P]rotection of the law consists, fundamentally, of the remedies the law provides for the protection of the rights guaranteed by the Convention. The obligation to respect and guarantee such rights, which Article 1(1) imposes on the States Parties, implies, as the Court has already stated, the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.³

34. The Court has reiterated that

(...) the general duty under Article 2 of the American Convention implies the adoption of measures of two kinds: on the one hand, elimination of any norms and practices that in any way violate the guarantees provided under the Convention; on the other hand, the promulgation of norms and the development of practices conducive to effective observance of those guarantees. Furthermore, adoption of these measures becomes necessary when there is evidence of practices that are violations of the American Convention in any way.⁴

35. Caribbean judiciaries seem previously to maintain a conservative and cautious judicial outlook as oppose to some other common law constitutional systems such as India and South Africa in relation to the positive obligations of the State. The once hesitant approach to enforceability of positive obligations has been addressed more recently within the Caribbean, where the courts have recognized that constitutional right exert some positive obligations by a State.

³See I/A Court H.R., *Velásquez Rodríguez v. Honduras Case*. Judgment of July 29, 1988. Series C No. 4, paragraph 166; and *Godínez Cruz v. Honduras Case*. Judgment of January 20, 1989. Series C No. 5, paragraph 175.

⁴ See for eg I/A Court H.R., *Castillo Petruzzi et al. v. Peru Case*. Judgment of May 30, 1999. Series C No. 52, paragraph 207; and *La Cantuta v. Peru Case. Merits, Reparations and Costs*. Judgment of November 29, 2006. Series C No. 162, paragraph 172.

36. In the case of *Francois v AG* [LC 2001 HC 16] Barrow J as he then was stated that the government had a positive constitutional duty to ensure that there was adequate protection against domestic violence in St. Lucia. Pointing out that there was a '*constitutional imperative*' for the state to protect its citizens he was acknowledging that the state has a duty to regulate the behaviour of even non-state actors and take reasonable steps to prevent human rights violations. The State therefore has to take preventative measures and exercise due diligence.
37. The CCJ have recently articulated the positive duties placed on the state by the bills of rights in *The Maya Leaders Alliance v. AG of Belize* [2015] CCJ 15. The right to protection of the law under the Commonwealth Caribbean constitutions, which is related to the concept of the rule of law, may impose positive constitutional obligations on the State vis-à-vis its citizens. The CCJ indicated that the concept of protection of the law goes beyond access to the court but includes the right of the citizen to be afforded 'adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power'. They held that '*the right to protection of the law may, in appropriate cases, require the relevant organs of the State to take positive action in order to secure and ensure the enjoyment of basic constitutional rights.*' They went on to say that '*Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the citizen's rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy.*' The CCJ found the Government of Belize breached Maya community members' right to protection of the law by failing to ensure that the existing land law system recognized and protected Maya land rights.
38. Therefore, there is jurisprudence for the Claimant to base a claim for protection of the law on the failure of the state to protect citizens from the practice of police officers from arresting and charging persons on the basis that they own a property or live or an identification card was found in a place in which a firearm was found. This also raises the issue of presumption of innocence as alleged by the Claimant that the practice of police officers in making such arrest. These matters cannot be dealt with in an ordinary claim and so there is no adequate alternative remedy
39. A proper explanation in relation to the events which led to the Claimant's arrest and charge and the practice by police officers in relation to the possession of firearm offences should as a matter of public interest be explored. It may be necessary if it is proved that the Court can order that systems must be proactively engaged so as to prevent a situation as outlined by the Claimant from reoccurring.

The Court is therefore of the view that the pleaded facts demonstrate that the instant claim falls within the realm of constitutional importance.

40. Arbitrary and unlawful practices of police officer is and should remain of paramount concern to the society and the Court.

41. For the reasons outlined above the Notice of Application is dismissed, this claim for constitutional relief is not without merit and should be determined. It is also ordered that the Defendant shall pay to the Claimant, costs in the sum of \$1,000.00.

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Westmin R.A. James
Justice of the Supreme Court (Ag)