

IN THE SUPREME COURT OF BELIZE A.D. 2020

CLAIM NO. 773 OF 2020

BETWEEN:

GREG NUNEZ

CLAIMANT

AND

COMMISSIONER OF POLICE

FIRST DEFENDANT

ATTORNEY GENERAL OF BELIZE

SECOND DEFENDANT

CLAIM NO. 49 OF 2021

BETWEEN:

BRYTON CODD

CLAIMANT

AND

COMMISSIONER OF POLICE

FIRST DEFENDANT

ATTORNEY GENERAL OF BELIZE

SECOND DEFENDANT

Before: Hon Westmin R.A. James

Date: 19th July 2021

Appearances: Ms Leslie Mendez and Mr Anthony Sylvestre for the Claimants

Mr Kileru Awich and Mr Jorge Matus for the Defendants

JUDGMENT

1. This consolidated matter surrounds a prevalent practice of Belizean police officers in stopping and searching of citizens in Belize and the photographing of their identification cards. The searches of the Claimants in this case occurred on the same day, at different times, at different locations and by different police officers. Yet still, the claims are strikingly similar. Both claims impugn searches carried out by police officers conducting mobile patrols on the 4th of August 2020, which end with the taking of the Claimants' information and photographing of their identification cards. Both claims assert constitutional breaches of Sections 9 and 14 of the Constitution. Both seek declarations, damages and other constitutional relief for the violations of their rights.

2. The Claimants commenced their claims for the following reliefs:

- a. A Declaration that the search of the Claimant's person carried out by officers of the Belize Police Department, on the 4th of August 2020, in the absence of any reasonable suspicion of criminal activity, contravened Section 9 of the Belize Constitution and is unlawful being disproportionate and in excess of any statutory authority to search the Claimant's person;
- b. A Declaration that the photographing of the Claimant's identification card constitutes an unlawful and disproportionate interference with the Claimant's right guaranteed under Section 14 of the Belize Constitution to not be subjected to arbitrary or unlawful interference with his privacy, except under the authority of a law which makes reasonable provision in accordance with Section 9(2) of the Constitution;
- c. A Declaration that the retention of the photograph of the Claimant's identification card further constitutes an unlawful and disproportionate interference of his right guaranteed under Section 14 of the Belize Constitution to not be subjected to arbitrary or unlawful interference with his privacy, except under the authority of a law which makes reasonable provision in accordance with Section 9(2) of the Constitution;
- d. A Declaration that the actions of officers of the Police Department, on the 4th of August 2020 failed to recognize and treat the Claimant with even a bare modicum of the dignity and respect required by Section 3 of the Belize Constitution; (only in Claim 773 of 2020]
- e. An injunction restraining the Defendants, their servants or agents or otherwise from taking and retaining photographs of persons not charged or convicted with an offence in the absence of any law authorizing and regulating the same;
- f. An injunction ordering the Defendants, their servants or agents or others, to destroy the photograph of the Claimant's identification card; and
- g. Damages for constitutional relief, including vindicatory damages;

3. The issues for determination as seen by the Court are as follows:

- a) Whether the searches of the person and property of the Claimants were unlawful and in breach of sections 3 and 9 of the Constitution?
- b) Whether the taking and retaining of the photograph of the Claimants' identification card breached the Claimants' right to privacy as guaranteed under Section 14 of the Constitution?
- c) If so, what are the appropriate remedies which the Court should order?

Arbitrary Search

4. A search of one's person especially without judicial oversight involves an affront to the dignity and privacy of the individual and is really an incursion on the rights which citizens have to generally go about their lawful business unhindered by the State authorities. The Constitution protects the citizens from having their freedom interfered with unless it would be lawful to do so.
5. Section 9 of the Constitution guarantees that:

9.-(1) Except with his own consent, a person shall not be subjected to the search of his person or his property or the entry by others on his premises.

(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 makes reasonable provision-

- (a) that is required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilisation of mineral resources or the development or utilisation of any property for a purpose beneficial to the community;*
- (b) that is required for the purpose of protecting the rights or freedoms of other persons;*

Consent

6. The Defendants argued that the Claimants consented to the searches and therefore falls outside of Section 9. They argued that there was no evidence that the Claimants did not consent. In relation to Greg Nunez, they argued that he

anticipating the search complied and he merely asked the reason for the search. He told the officers that 'they did not have any probable cause to search...' he told the officer that he 'did not have no drugs or guns' he 'asked the officers for their names. In relation to Bryton Codd in his affidavit, PC Tzul states that "*the five male persons all allowed me to search their person and the heavily tinted Gold Toyota Corolla.*"

7. I find this argument disingenuous, compliance with a police officer's instructions especially when the officers did not ask for consent cannot be considered consenting. If that was the case then no search by a police officer could be impugned unless a person resists the police. This is in a context where, if a person resists the search or protest, could be subject to detention or a charge of resisting arrest or interfering with a police officer in the course of executing their lawful duties. The Claimant's don't have to prove they did not consent, the Defendants have the burden to show that they got consent. The Claimant, Greg Nunez, expressly objected to others being searched he himself said they had no probable cause to search him if that isn't considered objecting, I do not know what anyone could do.
8. From the evidence presented to the Court, it is clear that officers took no steps to determine or ensure that they had the true consent of the Claimants. In their Affidavits, the Defendants assertions that the Claimants consented was not borne out by the evidence. They provide no information to Court on the manner in which consent was sought or obtained, the language the officers used in the encounter, and their general demeanour towards the Claimants I agree with the Claimants could not in any way be considered to be requesting or even cared about consent.

Reasonable suspicion and Reasonable belief

9. The Defendants argued that the searches were conducted pursuant to Sections 25(2) of the Misuse of Drugs Act and Section 22 of the Firearms Act which provide officers with search powers and therefore constitutional. Here, it would be useful to look at relevant provisions:
10. Section 25(2), the Misuse of Drugs Act reads:

(2) If a member of the Belize Police Department has reasonable grounds to suspect that any person is in possession of a controlled drug in contravention of this Act, or of any regulations made thereunder, the member of the Belize Police Department may, subject to subsection (3)-

(a) search that person, and detain him for the purpose of searching him;

11. Section 22 of the Firearms Act provides:-

22. Any police officer may arrest without warrant any person whom he believes to be in possession of, or to be using or carrying a firearm or ammunition in contravention of any of the provisions of this Act, and may search that person and, whether arresting him or not, may seize and detain any firearm or ammunition in his possession, or used or carried by him.

12. The main issue to be resolved here therefore was whether the officers had reasonable grounds for suspicion or reasonable belief and whether those grounds were justified.

Test

(a) Misuse of Drugs Act

13. The provision permit police officers to, without a warrant, search persons they reasonably suspect to be in possession of illegal drugs. The police can only do so on reasonable grounds: *Brazil v Chief Constable of Surrey [1983] 3 All E.R. 537*. The test for whether the officers had reasonable grounds to suspect the Claimant of being in possession of a controlled drug is an objective one. In *Cedeno v O'Brien* (1964) 7 W.I.R. 192 Wooding CJ said those words imposes the condition that "*there must in fact exist reason to suspect known to the officer, and not merely speculation or conjecture or even suspicion harboured or entertained by him, before he can validly exercise the authority.*" The test must relate to the standards of a reasonable man and not whether this police officer believed he had reasonable grounds for suspicion, since as experience tells us, some people's suspicions are easily aroused.

14. The mind of the officer is relevant and the matters creating the suspicion in the Police Officer's mind must reasonably give rise to such suspicion and they must be both honestly held in the officer's mind and reasonably believed by the officer: *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] 1 All ER 129.

15. In the recent decision of the Privy Council, *Betaudier v the Attorney General of Trinidad and Tobago* [2021] UKPC the Board affirmed the test set out in *O'Hara* for reasonable suspicion. At paragraph 11, the Board states:

11. In the present case the trial judge, des Vignes J, and both Mendonca JA and Rajkumar JA in the Court of Appeal all referred to the speech of Lord Hope in O'Hara v Chief Constable of the Royal Ulster Constabulary [1997] AC 286, which refers to section 12(1) Prevention of Terrorism (Temporary Provisions) Act 1984. That provision authorises a constable to arrest a person whom he has reasonable grounds for suspecting to be concerned in acts of terrorism. Lord Hope stated (at p 298 A-E):

“My Lords, the test which section 12(1) of the Act of 1984 has laid down is a simple but practical one. It relates entirely to what is in the mind of the arresting officer when the power is exercised. In part it is a subjective test, because he must have formed a genuine suspicion in his own mind that the person has been concerned in acts of terrorism. In part also it is an objective one, because there must also be reasonable grounds for the suspicion which he has formed. But the application of the objective test does not require the court to look beyond what was in the mind of the arresting officer. It is the grounds which were in his mind at the time which must be found to be reasonable grounds for the suspicion which he has formed. All that the objective test requires is that these grounds be examined objectively and that they be judged at the time when the power was exercised.

This means that the point does not depend on whether the arresting officer himself thought at that time that they were reasonable. The question is whether a reasonable man would be of that opinion, having regard to the information which was in the mind of the arresting officer. It is the arresting officer's own account of the information which he had which matters, not

what was observed by or known to anyone else. The information acted on by the arresting officer need not be based on his own observations, as he is entitled to form a suspicion based on what he has been told. His reasonable suspicion may be based on information which has been given to him anonymously or it may be based on information, perhaps in the course of an emergency, which turns out later to be wrong. As it is the information which is in his mind alone which is relevant however, it is not necessary to go on to prove what was known to his informant or that any facts on which he based his suspicion were in fact true. The question whether it provided reasonable grounds for the suspicion depends on the source of his information and its context, seen in the light of the whole surrounding circumstances."

16. Neither the Act nor the Police Regulations set out the procedure or guidelines for a police officer exercising their stop and search power.

17. The English Police and Criminal Evidence Act and the subsidiary Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search ("Code A"). Code A sheds some further light on the meaning of "reasonable grounds to suspect". At paragraph A2.2 the guidance offered for police officers is that:

"A2.2 Reasonable grounds for suspicion depend on the circumstances in each case. There must be an objective basis for that suspicion based on facts, information, and/or intelligence which are relevant to the likelihood of finding an article of a certain kind.....Reasonable suspicion can never be supported on the basis of personal factors alone without reliable supporting intelligence or information or some specific behaviour by the person concerned. For example, a person's race, age, appearance, or the fact that the person is known to have a previous conviction cannot be used alone or in combination with each other as the reason for searching that person. Reasonable suspicion cannot be based on generalizations or stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity.

A.2.3 Reasonable suspicion can sometimes exist without specific information or intelligence and on the basis of some level of generalization stemming from the behaviour of a person. For example, if an officer encounters someone on the street at night who is obviously trying to hide something, the officer may (depending on other surrounding circumstances) base such suspicion on the fact that this kind of behaviour is often linked to stolen or prohibited articles being carried."

Firearms Act

18. In relation to the Firearms Act the Defendants have submitted unlike the Misuse of Drugs Act a police officer conducting the search only requires a belief and the test is subjective. In aid of their argument, they cited the decision of Madam Justice Griffith in *Claim No. 389 of 2015 Alrick Smith v AG*. I disagree with this submission. Madam Justice Griffith in *Smith* stated:

*"In section 22, the police officer may arrest without warrant, any person 'whom he believes to be in possession of...a firearm.' It is noted, that unlike the requirement for reasonable cause for suspicion in order to enter and search for a firearm which immediately follows in section 23, the belief of the officer as to possession is not qualified by 'reasonable'. However, according to the approach to construction espoused by Lord Mustill in *Ohara v Chief Constable*, it is considered that the standard against which that belief is to be judged must still be reasonable. This is so also given the views expressed by Lord Diplock in *Mohammed-Holgate v Duke*, with respect to the continued application of common law principles even where powers of arrest are provided in statute. Given the terms of section 22 however, the standard applicable in this case would be much broader than that which arose out of the statute under consideration in *Ramsingh*."*

19. Madam Justice Griffith made it clear that the belief must be assessed against the standard of reasonableness. She stated *"There is the accepted element of reasonable relevant to the circumstances which must underscore his belief, and thus one must consider what circumstances Cpl Castellanos was faced with which led to the arrest of the Claimants."* Madam Justice Griffith then conducted a detailed assessment of the facts of the case to assess the belief of the officer.

20. Therefore, a Court must evaluate either provision by examining all the known circumstances of the case dispassionately and they must be assessed objectively according to the standards of a reasonable man to determine the existence or absence of grounds for the reasonable suspicion or reasonable belief.

21. What is clear from the Acts is that it does not give the power to police officers just to stop and search anyone anytime anywhere for any reason. The two Acts are specific in when and what basis a police officer can search a person under this Act.

Analysis of the evidence

22. In the Joint Affidavit of the Lawrence Martinez and Waldemar Veliz, the officers stated that they were on mobile patrol operations in Belama, Belize City when they noticed a group of men who they approached and proceeded to search them. The Claimant who was not a part of the group of men began to shout at them saying they were conducting an illegal search of the young men and that the photographing of these persons was unlawful. The officers in their Affidavit said that one of the young men who was being searched and photographed by them stated that we should also search the Claimant because the Claimant was unjustifiably interfering with their search of the young men. As a result, they said they approached the Claimant. In the Affidavit they said the reason for approaching the Claimant was because the Claimant was interfering with their search of the group of young men.

23. PC Lawrence then said that when he got closer to the Claimant, he noticed a bulge on the side of the Claimant's waist. This aroused his suspicion that the Claimant might be in possession of an illegal firearm given that the group of young men they had just searched had indicated that the officers should also search the Claimant. He said that the Claimant had been vocally protesting their search of the group of young men and the Claimant had a bulge to the side of his waist which they had reason to believe might be a concealed illegal firearm. PC Lawrence in his Affidavit said that it was only after he saw the bulge that they decided to conduct a search the Claimant for firearms and drugs. They said that

from their experience persons suspected of possessing illegal firearms who are actually found with illegal firearms, also tend generally, to also be in possession of controlled drugs in contravention of the Misuse of Drugs Act. They said that PC Veliz then proceeded to request the Claimant to search his person based on the bulge that appeared on the side and the Claimant complied with their request. They said they informed the Claimant that the reason for the search was drugs and firearms then proceeded to search the Claimant. The search yielded nothing.

24. In cross examination PC Lawrence stated that it was after about 5 minutes after the search of the young men did, they decide to go search Mr Nunez. PC Lawrence said that they pursued Mr Nunez via car and that is when he noticed the bulge. After cross examination PC Lawrence seem to not know where exactly he saw this bulge. In answer to the Court PC Lawrence admitted that before even seeing the bulge he was going to search the Claimant, Mr Nunez. Asked why they were going to search him before this bulge, PC Lawrence said random searches.
25. PC Lawrence in a statement given in January 21st before the Affidavit indicated that he could not remember the Claimant Mr Nunez and could not remember the details of the search. He admitted he refused to provide the Claimant with his name.
26. PC Veliz also said he could not recall the details of the search or anything about the search and did not recall a bulge. He did admit that the Claimant Mr Nunez shouting at them pissed them off and they were in the habit of searching persons while on patrol. He said that in the police perspective everything would draw suspicion. A civilian seated in a different way. He admitted that anything that a person does can be suspicious and you can search them.
27. The Claimant gave evidence that at around 12:35 pm he was walking on Albert Hoy Street when he noticed a group of young men being searched and photographed by police officers. Observing the encounter between the young men and the police officers, the Claimant told the officers from across the street that their actions of searching and photographing the young men were unlawful. Having said this, one of the officers, PC Lawrence Martinez, shouted back at him

that he *“should stay out of f*cking police business.”* He decided to walk away. As he was walking away, he noticed that the police mobile was now heading in his direction so he took out his phone to make a call. The mobile then caught up with him and the two officers exited yelling at him to *“get off that f*cking phone”*. PC Veliz told him *“mek we get a search since you wanna get inna f*cking police business.”* PC Martinez then shouting *“keep you f*cking hands up, keep your fucking hands up.”* In his Affidavit, the Claimant says that *‘fearing a physical attack’* he complied with the search. He said he asked the reasons for the search. It was not until the police officers were already conducting the search that they told him blankly that they were searching him for drugs and firearms. Nothing illegal was found on his person. The Claimant asked the officers to provide them with their names. They repeatedly refused until PC Veliz finally said *“Veliz”*. PC Martinez, however, never provided him with his name.

28. As indicated by PC Lawrence, the officers decided to search the Claimant before approaching the Claimant because as they termed it, he was interfering with their search of the young men. With all due respect to the learned Counsel I cannot accept that that simple fact of protesting a search of young men induce an ordinary reasonable man to entertain a reasonable suspicion that a person so behaving was in possession of firearm nor had a controlled drug in his possession. In fact a person who was in possession of illegal drugs and illegal firearms would most certainly not drawing the police attention to him. Having regard to the fact that neither officer could recall this particular search and PC Lawrence could not be consistent about the bulge and the fact they already had the intention of searching the Claimant I do not believe they noticed a bulge. Further, by the officer’s own affidavit their experience was that if a person was found in possession of an illegal firearm, then they also tend to be in possession of controlled drugs. The Claimant was not found in possession of any firearm so there could have been no reasonable cause to search the Claimant for drugs. Further the admittance of the police officers that they went in search of Mr Nunez and they were going to do a random search and anything would make them suspicious shows that there was no reasonable ground to suspect that the Claimant Mr Nunez had anything firearm and drugs.

Bryton Codd

29. PC Elvis Tzul gave evidence in relation to the search of the Claimant Bryton Codd. In his Affidavit he said that on 4th August 2020 at around 5:50 pm he was conducting police patrols. He said he had received information over the police radio that a theft had just been reported as having occurred on Mercy Lane, Belize City. He said while patrolling with PC Raymond Requena and PC R Riverol he saw a gold Toyota Corolla car with heavily tinted windows, proceeding into Mercy Lane from the direction of Coney Drive. He said that PC Requena turned on the revolving lights of the vehicle because he wanted the heavily tinted gold Toyota Corolla to come to a stop because the car aroused his suspicion given that they had received a report of a theft on Coney Drive. He said the vehicle was heavily tinted and could not see persons inside while they were driving from behind. He said in his experience heavily tinted windows which do not have a permit from the Minister are more likely than not to be used for criminal activities and to conceal the identity of criminals.
30. He said that the vehicle did not immediately come to a stop and that raised his suspicion even further that the persons in the car might be the suspects involved in the theft on Mercy Lane. The vehicle stopped about 100 ft away from where he first saw it when they turned on the revolving lights. He walked to the driver's side of the heavily tinted Gold Corolla and requested the driver to exit the vehicle. The driver complied. He then asked the other 4 male persons in the car to exit the vehicle. He said he warned them about wearing masks and social distancing consequent on the Covid 19 regulations and then ordered them to put on masks which they did.
31. He said that he then informed the 5 male persons that he wanted to search their person and conduct the search of the vehicle for illegal firearms and ammunition. He said his reason for wanting to conduct the search was because of the suspicion raised by the report of the theft, the tint which could be used to conceal criminals and when the car did not stop immediately when the light turned on. He said his experience was that person who are actually found with illegal firearms also tend generally also tend to be in possession of controlled drugs contrary to the Misuse of Drugs Act.

32. He testified that PC Raymond conducted a search of the 5 male persons and the vehicle where nothing incriminating was found. He questioned the occupants of the car, warned them about not wearing masks photographed their identification cards and left in the heavily tinted vehicle. In his affidavit he said that he would not have been suspicious of the Claimant and the four other persons had they not received the report of the theft on Mercy Lane; had the vehicle not been heavily tinted, had the vehicle come to an immediate stop and that the fact that it was rare that a heavily tinted private vehicle in Belize had an exemption granted by the Minister.

33. In cross examination he admitted that he never mentioned anything about a theft to the driver or the Claimant Mr Codd. He never searched the men in connection with the theft but rather used the Firearms Act and the Misuse of Drugs Act. The officer did not speak to the driver about the tint and in fact allowed them to go ahead after the search with the same tint. He admitted that the police did not have a photometer to check whether the tint was beyond what was required. In answers to the Court PC Tzul said that based on the report he was looking for anybody conducting illegal activity. He said he was just checking anybody. He said, tint or no tint he was going to check the occupants. He admitted nothing about the car was suspicious when he initially turned on the light to have them stop but it was because of the report of the theft and the fact he was just checking for illegal activity. He didn't ask for registration nor the permit for tint. Whoever was in the car he said was going to get searched. He also said he was following the vehicle not only for theft but other illegal activities. He said that part of their duty was to conduct searches. The evidence of PC Tzul at times was very confusing as to what exactly prompted the officer to stop the vehicle and search the men and the contents.

34. The Claimant Mr Codd in his First Affidavit, clearly describes that the vehicle in which he was travelling with other teammates, which he said the windows of which was down because of Covid protocols, was stopped by the police officers. Upon being stopped, police officers asked the Claimant to exit the vehicle spread their legs and put their hands behind their head. The police indicated that they are

doing a search for drugs, ammunition and other illegal substances. They then proceeded to search their bags and the car. Having found nothing incriminating, the officers proceeded to take information about their school, occupation and took photographs of the Claimant's identification card. In court, he stated that he did not verbally protest because it was the police and he did not want any conflict.

35. I am of the opinion that the evidence did not disclose reasonable grounds for suspicion that the Claimants were in possession of a controlled drug. Accordingly the search was not a lawful one.

36. It has become evident from the cross examination of the officers in this case is that they believed that the Section 25 of the Misuse of Drugs Act and Section 22 of the Firearms Act gives them carte blanche authority to randomly search anyone at any time and for whatever reason. I must disabuse them of such a notion. These two Acts are not a panacea to just conduct random searches of citizens. To do so criminalizes an entire population and justify the profiling of persons and subject citizens to unjustifiable intrusions into their constitutional rights. It is also not just sufficient to say that they have reasonable suspicion or reasonable belief and quote these Acts and they would be clothed with the protection of the Acts as one of the officers said anything can be suspicious. There must be reasonable grounds of possession of controlled drugs and not just any drugs as the law in Belize does allow a person to be in possession of a certain quantity of drugs. The police officers must have reasonable belief for the suspicion that the person is in possession of a firearm since a person can possess a licensed firearm. The Acts are specific and not for anything else. It is suggested that the Police Department like the United Kingdom should establish regulations that guides police officers on what constitutes reasonable suspicion and reasonable belief under these respective Act or conduct training of officer as to when they can conduct searches of citizens to avoid this systematic problem.

Privacy

37. The Claimants have alleged that the photographing of their identification cards and uploading same into a WhatsApp group chat by the officers breached their

right to privacy under the Belize Constitution. Section 14 of the Constitution reads:

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14.-(1) A person shall not be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. The private and family life, the home and the personal correspondence of every person shall be respected.

(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 makes provision of the kind specified in subsection (2) of section 9 of this Constitution.

38. Privacy is a broad concept that as the late Professor Margaret Demerieux in her 1992 book, *Fundamental Rights in Commonwealth Caribbean Constitutions* at page 298, put it, is “an assertion of a general right to freedom and personal autonomy.” Privacy includes secrecy of personal information and freedom from arbitrary searches and entry (for example *Titan International Securities Inc v AG [2018] CCJ 28 (AJ)*). Professor Demerieux goes on to say at page 297: “Privacy in its popular sense imports insulation from observation, publicity, physical invasion or intrusion and the recognition of confidentiality or even secrecy about certain types of information or data relating to the individual.” Privacy is a multifaceted right and is associated with other rights like dignity and liberty: see *Julian Robinson v AG of Jamaica [2019] JMFC 04*. Another dimension of generous interpretation of rights is to view the fundamental rights protected by the Constitution not as discrete stand alone provisions, but in an integrated fashion since many rights overlap with each other as Sachs J indicated in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others, [1999] ZACC 17*. There Sachs J observed that “The rights must fit the people, not the people the rights.” Section 14 as in this case is related to section 9 the prohibition against arbitrary search.

39. The full scope of the right of Privacy found in Belize can be ascertained from regional and international cases interpreting similar provisions in constitutions and international instruments. Privacy protects against the collection of personal information by State authorities without consent. It is particularly acute where the

collection is surreptitious. The *Human Rights Committee, General Comment 16* (1988) states:

The gathering and holding of personal information on computers, databanks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant. In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public [authorities] or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination. (para 10)

40. In *S and Marper v the UK* [2008] ECHR 1581, the European Court of Human Rights outlined the European case law on privacy. It stated

*"66. The Court recalls that the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002 III, 35 EHRR 1, and *Y.F. v. Turkey*, no. 24209/94, § 33, ECHR 2003 IX, 39 EHRR 34). It can therefore embrace multiple aspects of the person's physical and social identity (see *Mikulić v. Croatia*, no. 53176/99, § 53, ECHR 2002-I, BAILII: [2002] ECHR 27). Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 (see, among other authorities, *Bensaid v. the United Kingdom*, no. 44599/98, § 47, ECHR 2001, 33 EHRR 10, I with further references, and *Peck v. the United Kingdom*, no. 44647/98, § 57, ECHR 2003 I, 36 EHRR 41). Beyond a person's name, his or her private and family life may include other means of personal identification and of linking to a family (see *mutatis mutandis* *Burghartz v. Switzerland*, 22 February 1994, § 24, Series A no. 280 B; and *Ünal Tekeli v.**

Turkey, no. 29865/96, § 42, ECHR 2004 X (extracts), 42 EHRR 53). Information about the person's health is an important element of private life (see Z. v. Finland, 25 February 1997, § 71, Reports of Judgments and Decisions 1997 I, 25 EHRR 371). The Court furthermore considers that an individual's ethnic identity must be regarded as another such element (see in particular Article 6 of the Data Protection Convention quoted in paragraph 41 above, which lists personal data revealing racial origin as a special category of data along with other sensitive information about an individual). Article 8 protects in addition a right to personal development, and the right to establish and develop relationships with other human beings and the outside world (see, for example, Burghartz, cited above, opinion of the Commission, p. 37, § 47, and Friedl v. Austria, judgment of 31 January 1995, Series A no. 305-B, opinion of the Commission, p. 20, § 45, 21 EHRR 83). The concept of private life moreover includes elements relating to a person's right to their image (Sciacca v. Italy, no. 50774/99, § 29, ECHR 2005-I, 43 EHRR 20).

41. The ECtHR also found that the storing of the data itself is an interference and its subsequent use has no bearing on whether it was an infringement in the first place. They said at para 67 "*The mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8 (see Leander v. Sweden, 26 March 1987, § 48, Series A no. 116, 9 EHRR 433). The subsequent use of the stored information has no bearing on that finding (Amann v. Switzerland [GC], no. 27798/95, § 69, ECHR 2000-II, 30 EHRR 843).*"

42. Regionally, the storing of this type of information by State authorities have been considered. In *Julian Robinson v AG of Jamaica (supra)*, the Chief Justice held that privacy encapsulated 'privacy of choice and informational privacy. In its assessment of the National Identification and Registration Act the Court held that it would cause there to be a database which will become the repository of virtually all biographical information on the entire Jamaica population and ordinary residents by enabling profiling and electronic surveillance through tracking the use of the identification number. The Court also found that there weren't sufficient safeguards against the misuse and abuse of the data collected.

43. Similarly, in *Felix v the Attorney General of Trinidad and Tobago*, Claim No. CV 2020- 00858, the High Court of Justice of Trinidad and Tobago assessed the constitutionality of amendments to the Police Service Act. These amendments empowered the Police Service to take and retain measurements, photographs and fingerprint information of certain persons. The Claimant challenges these amendments on the basis that his right to privacy under the Constitution of Trinidad and Tobago were being infringed. In that case, the High Court similarly found that the sections which empower the Commissioner to retain the measurements and photographs of an individual for an indefinite period after his exoneration breached the rights of the Claimant for failing to have safeguards to ensure that the said information is not easily accessible any member of the TT Police Service. It also says that the failure to state a period of retention means that a person who has been acquitted remains “*under the eyes of the police*” In particular, the Court noted:

103. However, the said information can be used to easily identify an individual and the lack of any safeguards namely, (i) the indefinite retention of this information; (ii) the ability of any police officer to have access to the said information; and (iii) the failure by the section to bestow a discretion on the Commissioner of Police to destroy the said information within any specified period of time after a person has been exonerated, are inconsistent with a society which has a proper respect for the rights and freedoms of individuals in a democratic society, where one of the principles of the rule of law is a person is innocent until proven guilty by the State.

44. In this vein then, the Claimants submit that the taking, retention and sharing of the photographs of the Claimants’ identification cards amount to interferences with the Claimants’ right to privacy within the meaning of Section 14 of the Belize Constitution.

45. The Defendant admits and rightly so that there was no legislative authority for the taking of the photographs of the Claimants’ identification cards as they were not in custody much less post them in a WhatsApp group chat of persons. The Defendant however argues that the practice has been discontinued and the WhatsApp group was deleted and so no longer accessible. Therefore, they argue

that there has been no breach and if so, should only be related to the taking of the photos and not the retention of them. The discontinuance of the practice does not erase the fact that it was done to the Claimants and their right was infringed at that point.

46. The Defendants argue that the photographs were taken for the sole purpose of informing the duty report and making it easier to write the sitrep report. However, the photographs were not included in those reports and the officers did more than keep the photographs they uploaded it to a WhatsApp chat group. In cross-examination, PC Tzul disclosed that the photographs also served as an informal means of screening, where other police officers would indicate whether the person stopped and searched were wanted by them. It was not simply for administrative purposes as proposed by the Defendants but it was also to put persons, against whom no evidence of criminality was found, under the eyes of the police.
47. The evidence established that the photographs were stored in the phones of numerous unknown police officers, and were retained for some time, in fact, as shown by PC Veliz, even after the group was deleted, he had access to the photographs that were posted in the chat prior to its deletion. These messages could be forwarded to persons outside the group.
48. This practice I agree with the Claimants showed a complete lack of regard for the Claimants' privacy in the sharing and use of the information in this WhatsApp group. There was no policy established to guide officers on what will be the procedure of data management. There were no safeguards, and still, to date, the Defendants have not specified any specific step that has been taken to ensure that officers have in fact deleted the information from their individual phones.
49. The taking and storing the information itself was a breach of the Claimants' right, there was no consent by the Claimants to take the photos and certainly no consent by the Claimants to put that information in this group chat. I do find that there is no guarantee that the practice would not restart and there is still the possibility of that information being stored on other's cell phones and so an order about this practice is still necessary.

Human Dignity

50. In the Constitution of Belize, human dignity is a core value of the Constitution that is affirmed in the Preamble. Human dignity also lies behind all the enumerated fundamental rights. In *AG v Joseph* [2006] CCJ 1 (AJ), Wit J at paragraph 14 explained that “*the right to human dignity and the corresponding prohibition on the negation of a person’s basic humanity*” is “*the fundamental right which underlies all other fundamental rights.*”
51. As seen in *Caleb Orozco v AG of Belize* (2016) 90 WIR 161, in Belize, human dignity is specifically recognized as a guaranteed enforceable right in Section 3 of the Constitution. Unlike most Caribbean constitutions, the chapter protecting fundamental rights and freedoms in the Belize Constitution, specifically recognizes a separate right to have one’s human dignity recognized. Section 3 provides:

“Whereas every person in Belize is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely —

- a life, liberty, security of the person, and the protection of the law;*
- b freedom of conscience, of expression and of assembly and association;*
- c protection for his family life, his personal privacy, the privacy of his home and other property and **recognition of his human dignity**; and*
- d protection from arbitrary deprivation of property,*

the provisions of this Part shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.”

52. Like Belize, the Constitution of the Republic of South Africa in section 10 makes specific provision for the right to human dignity. It reads “*Everyone has inherent*

*dignity and the right to have their dignity respected and protected.” In the seminal death penalty case **State v Makwanyane** [1995] ZACC 3 at para [328] O’Regan J described dignity as a correlate of being treated with respect. She said: “Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.”*

53. The Caribbean Court of Justice in *McEwan et al v AG of Guyana* [2018] CCJ 30 [AJ] para. 69 citing the Canadian Supreme Court of Justice, described the meaning of the rights stating:-

The Canadian Supreme Court Justice, Iacobucci J, states that human dignity relates to a person’s self-respect and self-worth. It is harmed “by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits.”⁴⁵ It is also harmed “... when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within...society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?”

54. The Claimant submit that the right to Mr. Nunez’ dignity was violated by the treatment of the officers through the use of abusive and obscene language; the refusal of PC Martinez to provide him with his name; and his threatening and intimidatory attitude at the Belama Police Station.

55. Mr Nunez said he went to the Belama police station in order to get the names of the officers that searched him. He said that PC Martinez was standing 2 feet away and while using obscene language informed him that he shouldn’t come asking for his name and what he need his name for. While he continued to swear he asked the Claimant who he thought he was while he was pacing back and forth, tapping the shotgun on the ground. He said no other officer attempted to control the

officer. He said before storming out of the police station, PC Martinez angrily told him it is best he left.

56. Throughout his encounter with the officers, the Claimant Mr Nunez said he felt that PC Martinez would harm him if he remained in the area. Upon the departure of PC Martinez, the Claimant spoke to the officer in charge of the police station who asked him if he would like to make a formal report to the Professional Standards Branch. He declined and indicated that he simply wanted to have the names of the officers so that he could consider his options.
57. The Claimant argued he felt and had all reason to feel that these officers did not recognize him as a person worthy of respect and dignified treatment.
58. The Defendants argue that the exchange between the Claimant Mr Nunez and the PC Martinez while distasteful, profane, vulgar and unprofessional was in no way demeaning, threatening, or intimidating the Claimant. Further, they argued that Mr Nunez was not discriminated against and so his human dignity was not infringed.
59. I actually agree with the Defendant that the incident at the police station alone while incredibly highly disrespectful did not to me amount to a breach to the right to human dignity especially since the Claimant refused to make a report about PC Martinez's behaviour and was content with just getting his name.
60. I however see the right to human dignity being engaged in the wider context of his case than proposed by the Counsel for the Claimants or the Defendants. The context in which these police officers, garbed with state power, aggressively confronted and searched an individual interfering with right to protest from a distance, searching him illegally and thereafter refusing to give their name and while holding a firearm belittle him when he insisted on getting their names or raising concerns about his rights; the accompanying indignity, disgrace and humiliation as a result of these illegal searches does in fact invoke the concept of human dignity. The Claimant described the experience as harrowing which caused him immense distress and humiliation with passersby looking on. He

explained that the officers used profanity and aggression that demeaned him. I agree that this practice of just random searching and the accompanying behaviour in this circumstance did not recognize right the Claimant as a law-abiding citizen to be treated as worthy of respect and concern and therefore his right to human dignity was breached.

61. It is critical that officers understand that this attitude towards the public is unacceptable as it has the potential of dissuading the public from seeking accountability of public officers, from relying and cooperating with the police and ultimately it risks fostering a populace that believes their constitutional right to respect and dignity has no real meaning in their realities.

Reliefs

62. The Defendants argues that the Claimants are only entitled to declarations as they have suffered no actual loss. I disagree, the Claimants would have experienced injury to reputation, to character, standing and fame. Further there was injury to feelings for the indignity, disgrace and humiliation caused and suffered by these illegal searches. Further the taking photographs of the Claimant's ID and placing it in this group chat associated the Claimants to criminality and kept them "*under the eyes of the police*" with the ability of any police officer to have access to the said information is unacceptable in a democratic society and not in keeping with the principles of the rule of law.
63. Having regard to the evidence before the Court and the awards in similar cases in this country I would award \$5,000.00 to Mr Nunez and \$3,000.00 to Mr Codd in compensatory damages.
64. I also am of the belief that an award of vindictory damages, the primary purpose is to uphold or vindicate the constitutional rights that has been violated is justified. As stated by the Privy Council in *AG v Ramanoop* [2006] 1 AC 328:

"An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances,

but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances."

65. Having regard to the serious abuse of authority in the present case I am of the belief that this case is a suitable case for an award of vindictory damages for the oppressive, arbitrary and unconstitutional action by servants of the Government. The actions of the police officer in searching the Claimants without reasonable suspicion or reasonable belief was arbitrary, oppressive and unconstitutional.
66. The Court having regard to the vindictory damages as of late including \$100,000.00 in *Titan (supra)* and \$60,000.00 in *Civ Appeal 5 of 2004 Wade v Roaches*, finds that in the circumstances of this case an award of \$10,000.00 to each of the Claimant in vindictory damages is reasonable to vindicate their constitutional rights.
67. Even though the matters were consolidated and heard together, there were two separate factual claims that had to be dealt with separately I therefore would award prescribed costs in the sum of \$12,500.00 to each Claimant.

The Order

68. On the basis of the above, the Court makes the following orders:-
1. A Declaration that the search of the Claimants' person carried out by officers of the Belize Police Department, on the 4th of August 2020, was in the absence of any reasonable suspicion or reasonable belief and, contravened Section 9 of the Belize Constitution;
 2. A Declaration that the photographing of the Claimants' identification card constituted an unlawful and disproportionate interference with the Claimant's right guaranteed under Section 14 of the Belize Constitution to not be subjected to arbitrary or unlawful interference with his privacy, except under the authority of a law which makes reasonable provision in accordance with section 9(2) of the Constitution;

3. A Declaration that the retention of the photograph of the Claimant's identification card further constituted an unlawful and disproportionate interference of his right guaranteed under 14 of the Belize Constitution to not be subjected to arbitrary or unlawful interference with his privacy, except under the authority of a law which makes reasonable provision in accordance with Section 9(2) of the Constitution;
4. A Declaration that the actions of officers of the Police Department, on the 4th of August 2020 failed to recognize and treat Mr Gregg Nunez with the dignity and respect required by Section 3 of the Belize Constitution;
5. An injunction restraining the Defendants, their servants or agents or otherwise from taking and retaining photographs of persons not charged or convicted with an offence in the absence of any law authorizing and regulating the same;
6. An order that the Defendants, their servants or agents or others, destroy any photograph of the Claimants' identification cards;
7. Damages in the sum of \$5,000.00 to Mr Greg Nunez and \$3,000.00 for Mr Bryton Codd;
8. Vindictory damages to each Claimant in the sum of \$10,000.00; and
9. Costs in the sum of \$12,500.00 to each Claimant.

/s/ WJames

Westmin R.A. James

Justice of the Supreme Court (Ag)