

IN THE SUPREME COURT OF BELIZE, A.D. 2022

CLAIM No. 125 of 2022

BETWEEN

NOLAISY FERNANDEZ ARENCIBA CLAUDIA LISET PEGUERO DIAZ HECTOR LUIS DIAZ GONZALEZ ZENaida GONZALEZ SOCARRAS ADRIAN CARRASCO GARCIA KEILAN CALDERIN GONZALEZ YOAN LAZARO SANCHEZ DELGADO	APPLICANTS
--	-------------------

AND

SUPERINTENDENT OF PRISONS MINISTER OF FOREIGN AFFAIRS, FOREIGN TRADE, AND IMMIGRATION THE ATTORNEY GENERAL	RESPONDENTS
---	--------------------

BEFORE The Honourable Madam Justice Patricia Farnese

Hearing Date: March 17, 2022

Appearances

Mr. Leo Bradley, for the Applicants

Ms. Agassi Finnegan together with Ms. Alea Gomez for the Respondents

DECISION RE DAMAGES AND COSTS

1.0 Introduction

[1] An application for a writ of *habeas corpus ad subjiciendum* (“*habeas corpus*”) was made on behalf of 7 Cuban nationals who had been held in the Belize Central Prison pending repatriation to Cuba. On March 17, 2022, I issued a writ of *habeas corpus* after the respondents failed to establish that the applicants’ detention was lawful. I adjourned the question of what, if any, damages were owed to give the parties the opportunity to make submissions.

[2] Subsection 5(6) of *The Constitution of Belize* provides that anyone who is unlawfully detained is entitled to compensation. There is nothing inherent to a writ of *habeas corpus* that precludes compensation if it is pleaded. Likewise, neither the limitation found in subsection 5(6) of *The Constitution of Belize* that prevents compensation where a breach arises from the performance of a judicial function, nor the principle of judicial immunity apply to this case. The respondents’ breach does not arise from the Magistrate’s decision to detain, but from the failure to respect the procedural protections the applicants are constitutionally guaranteed. I award \$7000 in compensation to each applicant and an additional \$7000 to those applicants who were separated from their children during detention. Having been successful, the applicants are entitled to their costs in this claim.

2.0 Legal Framework

[3] This application for compensation is properly before the Supreme Court. Section 20 of *The Constitution of Belize* gives this court the authority to provide redress for breaches of constitutional rights, including compensation.¹ Section 20 provides:

(1) If any person alleges that any of the provisions of sections 3 to 19 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction-

(a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section,

and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 19 inclusive of this Constitution.

The constitutional protections to prevent the unlawful deprivation of one's liberty are found in subsection 5(1).

[4] The Caribbean Court of Justice (CCJ) outlined the test that must be met to obtain a monetary award for a constitutional breach as:²

(1) The existence of a constitutional right for [a person's] benefit;

(2) A contravention of that right; and,

(3) That a monetary award is the appropriate redress for the contravention.

¹ *The Maya Leaders Alliance v The Attorney General of Belize* [2015] CCJ 15 (AJ) at para 7.

² *The Maya Leaders Alliance v The Attorney General of Belize* [2015] CCJ 15 (AJ) at para 7.

The final step of this test reflects jurisprudence from the Commonwealth Caribbean that has established that the right to compensation for a contravention of the constitution is not automatic.³ Damages must be proven to be awarded as a form of redress.⁴

[5] In *James v. The Attorney General of Trinidad and Tobago*, the Privy Council has explained why something more than a “statement to that effect” is required as redress to the violation of someone’s constitutional rights:⁵

This is required in order to reflect the importance of the constitutional right and the need for it to be respected by state authorities. A risk of the devaluation of such rights would obviously arise if the state could expect that the most significant sanction for their being flouted was a declaration that they had been breached.

Therefore, the purpose of constitutional damages has been described as threefold: (1) to compensate the claimant for any losses that resulted from the breach; (2) to vindicate the constitutional right by highlighting the importance of the right and underscoring the gravity of the breach; and, (3) to deter future breaches by the state and its agents.⁶

³ *James v Attorney General of Trinidad and Tobago* [2010] UKPC 23 (PC).

⁴ *Attorney General of Trinidad and Tobago v. Ramanoop* (Trinidad and Tobago) [2005] UKPC 15 (23 March 2005) at para 28 [*Ramanoop*].

⁵ *James*, *supra* note 3 at para 35.

⁶ *Ramanoop*, *ibid.* at paras 18 and 19 [*Ramanoop*].

3.0 Issues

[6] The application of the CCJ's test for compensation to this case raises three issues:

- How were the applicant's constitutional rights breached?
- Are the applicants entitled to a monetary award for that breach?
- If a monetary award is warranted, what is the appropriate quantum of the award?

4.0 Analysis

How were the applicant's constitutional rights breached?

[7] Step 1 of the CCJ's test for awarding compensation is satisfied because subsection 5(1) is a constitutional right that exists for the applicants' benefit by protecting their personal liberty. The constitution permits the denial of a person's liberty in limited circumstances, including to facilitate their lawful removal from Belize. That detention, however, is subject to the provisions outlined in subsection 5(2):

(2) Any person who is arrested or detained shall be entitled-

(a) to be informed promptly, and in any case no later than twenty-four hours after such arrest or detention, in a language he understands, of the reasons for his arrest or detention;

(b) to communicate without delay and in private with a legal practitioner of his choice and, in the case of a minor, with his parents or guardian, and to have adequate opportunity to give instructions to a legal practitioner of his choice;

(c) to be informed immediately upon his arrest of his rights under paragraph (b) of this subsection; and

(d) to the remedy by way of *habeas corpus* for determining the validity of his detention.

[8] The respondents assert that damages are not owing because there has been no finding as to their liability regarding the detention. The decision on the underlying immigration offence that led to the applicants' detention has not been overturned. If the respondents were correct, step 2 of the CCJ's test would not be established. The respondents' liability for the constitutional breach, however, is not dependent on whether the Magistrate had cause to issue the removal order and to continue their detention.

[9] The denial of the applicants' access to the procedural protections found in subsection 5(2)(a),(b), and (c) establishes Step 2 of the CCJ's test. The applicants were interviewed by the police, charged, arraigned, and appeared before the Magistrate where they pled guilty to a charge under the *Immigration Act* and received a removal order without the opportunity to speak with a lawyer. Much of this also occurred without the right to translation being afforded to the applicants. It is not clear to this court that the applicants fully understood the legal significance of these events or the options available to them to challenge the removal order. These constitutional protections are not discretionary. The respondent is only permitted to deprive a person of their liberty if the requirements of subsection 5(2)(a), (b), and (c) are satisfied.

[10] In *Seepersad & Anor v. The Attorney General (Trinidad and Tobago)*, the Privy Council held that two minors convicted of murder were entitled to have the court consider the appropriate damage award "to ensure that their rights under the Constitution are fully vindicate."⁷ The Privy

⁷ [2012] UKPC 4 at para 40.

Council made this decision after finding that the state breached similar procedural protections that guarantee no one will be deprived of their liberty except by due process of the law.

Are the claimants entitled to a monetary award for that breach?

[11] The respondents argue that the damages are not appropriate because the court's role in *habeas corpus* applications is limited to reviewing the lawfulness of the detention. The respondents rely on two authorities for this proposition. In *Rhett Fuller v The Attorney General of Belize*, an application was made for *habeas corpus* based on an allegation that the government's delay in deciding to extradite the detained person was an abuse of process.⁸ The respondents offer a quote from the decision in support of the court's limited role. A full reading of the decision reveals that the quote is taken from one of the party's arguments.⁹ The court reached the opposite conclusion and found that because the detention decision is intertwined with the extradition decision, the court can determine whether the delay in the extradition decision was an abuse of process.¹⁰

[12] The second case, *Boatswain v The Superintendent of Prisons*, also involves a *habeas corpus* application arising from an extradition.¹¹ The respondents reference, *inter alia*, the

⁸ [2011] UKPC 23 [*Rhett Fuller*].

⁹ *Rhett Fuller, ibid.* at para 46.

¹⁰ *Rhett Fuller, ibid.* at para 50.

¹¹ Eastern Caribbean Supreme Court in the High Court of Justice Civil Claim No. 130 of 2006, (Saint Vincent and the Grenadines) [*Boatswain*].

following quote in support of their assertion that compensation cannot be considered in a *habeas corpus* application:¹²

The role of the Court in reviewing Habeas Corpus applications is essentially limited to determining whether the learned Magistrate abused her discretion in ordering the committal of the Applicant.

This quote clearly outlines that at issue in *Boatswain* is the appropriate standard of review of a Magistrate's discretion to detain in an extradition process. This context is not relevant to the present case where, as explained, the unlawfulness of the detention does not arise from the Magistrate's decision, but from the absence of procedural protections guaranteed in the constitution.

[13] That the court does not have the authority to award compensation in a *habeas corpus* application is also not supported by a plain reading of *The Constitution of Belize* which expressly contains a right to compensation for unlawful detention. Subsection 5 (6) provides:

Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that other person or from any other person or authority on whose behalf that other person was acting:

Provided that no person shall be liable for any act done in the performance of a judicial function for which he would not be liable apart from this subsection.

Subsection 5(6) does exclude liability for constitutional damages for unlawful detention in one circumstance, but that circumstance does not apply in this case.

¹² *Boatswain, ibid.* at para 3.

[14] The applicants' detention was not found unlawful because of some action of the Magistrate in deciding to detain the applicants pending the removal order. In fact, had the Magistrate decided not to issue the removal order, there would still have been a constitutional breach. The breach arose from the failure to observe the procedural requirements outlined in the constitution, not in the performance of a judicial function.

[15] These actions do not fall within the scope of the exception in subsection 5(6) because the detention was in support of a judicial process authorized by law. Such a broad reading of subsection 5(6) would make it difficult to imagine any circumstance where a breach of the procedural protections would give rise to a compensation. Had that been the intent of the drafters, they would have expressly stated so.

[16] Instead, the purpose of subsection 5(6) is to underscore the fundamental importance of personal liberty by creating a right to compensation in the event of an unlawful detention. The limitation prevents judges, magistrates, and other judicial officers from being liable where their decisions to detain are overturned on appeal or otherwise reversed. For example, a judge is not liable where bail is denied and then the detainee is ultimately found innocent of charges and released. This limitation protects the impartiality of the court and is reflected in the judicial immunity principle, which has been further enshrined in law in subsection 4(5) of the *Crown Procedures Act*. Neither the limitation in subsection 5(6) nor judicial immunity operate to bar

the applicants' claims for compensation. They simply do not apply to the circumstances of this case.¹³

If a monetary award is warranted, what is the appropriate quantum of the award?

[17] Damages must be proven on a case-by-case basis as loss is subjective. Precedents, however, may be relied upon as a guide.¹⁴ In particular, the comparable common law measure of damages can assist in deciding damage awards for the breach of a constitutional right.¹⁵

[18] The applicants have argued that I should consider damages awarded for the common law action for false imprisonment when determining the appropriate damage award in this case. I agree that false imprisonment is a helpful comparison. I am mindful, however, that damages awarded for false imprisonment occur after it has been established that the respondent did not have "reasonable suspicion" that a crime had been or was about to be committed that would justify the claimant's arrest and detention. I have only decided that the applicants' detention was unlawful. I have not determined that their original arrest and detention would have been justified if the applicants' rights had been respected.

¹³ A similar argument was made and rejected in *Maharaj v. The Attorney General of Trinidad and Tobago* [2019] UKPC 6 at p. 9.

¹⁴ *The Maya Leaders Alliance v The Attorney General of Belize* [2015] CCJ 15 (AJ) at paras 65 and 66.

¹⁵ *Attorney General of Trinidad and Tobago v. Ramanoop* [2005] UKPC 15 at para 18.

[19] This distinction between false imprisonment cases and the current case is important. Damages for false imprisonment sometimes compensate for actual losses related to reputational harm, humiliation, and anxiety caused by being detained without a reasonable suspicion of having engaged in unlawful behavior. It could be that the applicants' detention in this case was justified because they were engaged in unlawful behaviour. The failure to provide the applicants with their constitutionally guaranteed procedural protections, however, prevents me from relying on their guilty pleas to make that determination.

[20] Similarly, I cannot know if imprisonment is a risk the applicants voluntarily undertook thereby potentially lessening the shock and distress of the detention. The respondents argue that the removal order supports a finding that the applicants were caught in Belize while attempting to make their way to the United States to illegally enter that country. I cannot make that finding. While their removal order has not been overturned, its validity has now been called into question.

[21] The Privy Council may have had in mind the barriers I now face to determining the award when they discouraged describing compensation awards as including specific amounts for "punitive" or "exemplary" damages.¹⁶ In cases where the breach prevents actual loss from being proven, I find that it is more just to follow the Privy Council's direction and order an award reflects the language of the constitution rather than specific categories of damages. Subsection 5(6) of the constitution creates an entitlement to "compensation." Therefore, the applicants will receive

¹⁶ *Ramanoop*, *supra* note 11 at para 19.

a wholistic compensation award that reflects the purposes of the award and their subjective experiences, but does not specify amounts in distinct categories of damages.

[22] To determine the appropriate amount of compensation I have compared the length and circumstances of the applicants' detention with the false imprisonment cases provided to me as precedents. The applicants were detained for 40 days in the Belize Central prison. They were held with the general population because Belize does not have a separate immigration detention facility. Three of the applicants were separated from their children. For most their detention, the parents were not provided with any information about their whereabouts or how and when they would see their children again. The first opportunity to speak with their children came two days before their release during a single, video call. Finally, the constitutional breach was not isolated to the initial arrest. The breach continued through a judicial process that resulted in the applicants' convictions.

[23] I also considered Young J.'s decision in *Magana v Attorney General of Belize*.¹⁷ Although the claimant did not make a constitutional claim, Young J. increased the compensation award by \$1500 for reasons that included the fact that the claimant was not afforded the procedural protections guaranteed by subsection 5(2)(a),(b), and (c) during his 26.5 hour detention.¹⁸ I was unable to locate further precedents that offered guidance on quantifying the deterrence and vindication role of the award. I endorse James J. comments, however, that the "deprivation of a

¹⁷ Supreme Court Claim No. 833 of 2019 [*Magana*].

¹⁸ *Magana, ibid.* at para 19.

person's liberty, is not to be taken [lightly] and must be scrupulously protected as much as possible."¹⁹

[24] Each applicant is entitled to \$7000 in compensation for the breach of their constitutional rights. The applicants argue that an award of \$6000-7000 is appropriate given compensation awards in Belize have ranged from \$2000 for being detained for 31 hours at a police station²⁰ to \$30,000 for 11 months in prison.²¹ The respondents proposed that the amount be "nominal at best". I find an award at the top end of the range proposed by the applicants is necessary to vindicate the right and the need to deter future breaches.

[25] In addition, the applicants who were separated from their children are entitled to a further \$7000. The applicants have proposed that the award be increased to \$20,000 although they have not explained why that amount was chosen. Without that explanation, the proposal of \$20,000 appears arbitrary. I find that doubling the additional compensation award is sufficient to reflect the additional anxiety and anguish caused by the separation and lack of information about the children's whereabouts and well-being. The additional amount also expresses the court's outrage that despite having the technical capacity to facilitate video calls, regular communication between the parents and their children was not facilitated.

¹⁹ *Harris v. Attorney General of Belize et al.*, Supreme Court Claim No. 90 of 2020.

²⁰ *Thomas Greenwood Jr. v. Attorney General of Belize et al.*, Supreme Court Claim No. 611 of 2013.

²¹ *Attorney General of Belize v. Margaret Bennett*, Inferior Appeals No. 48, 49, and 50 of 2011.

5.0 Disposition

[26] It is ordered:

1. Compensation is awarded in the amount of \$7000 to each of the applicants.
2. An additional \$7000 in compensation is awarded to Noilaisy Arenciba, Hector Luis Diaz Gonzales, and Zenaida Gonzalez Socarras.
3. Interest is awarded on these sums at the assessed rate of 6% per annum from the date of the filing of the application to the date of the judgment herein and thereafter at the statutory rate of 6% until payment in full.
4. Costs are awarded to the applicants to be paid by the respondents as agreed or taxed.

Dated this 30th day of June 2022.

Patricia Farnese
Justice of the Supreme Court