In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012 No: 154

IN THE MATTER OF CHAPTER 1, SECTIONS 1, 3, 8, AND 15 OF THE BERMUDA CONSTITUTION ORDER 1968

AND IN THE MATTER OF ORDER 114, RULE 1 OF THE RULES OF THE SUPREME COURT 1985

AND IN THE MATTER OF AN ACTION

BETWEEN:-

ERWIN LEON NISBETT

Plaintiff

-v-

(1) ATTORNEY GENERAL
(2) COMMISSIONER OF PRISONS

Defendants

EX TEMPORE RULING

(In Chambers)

Date of Hearing: 21st September 2012

Mr. Valdon Caesar, Caesar's Law Chambers, for the Plaintiff
Ms. Shakira Dill, Attorney-General's Chambers, for the Defendant

Introduction

1. This is an application by the Defendants, the Attorney-General and the Commissioner of Prisons, by way of a summons dated 7th June 2012, to strike out an originating summons issued by the Plaintiff, Erwin Nisbett, dated 30th April 2012.

2. The Plaintiff seeks a declaration that his constitutional rights under Chapter 1, sections 1, 3, 5 and 8 of the Bermuda Constitution Order 1968 ("The Constitution") were violated as a result of various infractions alleged to have been committed by corrections officers, and inmates under their charge, whilst he was incarcerated at the West Gate Correctional Facility between 24th January 2002 and 29th September 2007. He claims damages in the sum of $471,648.00.

Allegations

3. The Plaintiff's allegations are set out in his affidavit dated 26th April 2012. In summary, he alleges that: (1) on four occasions he was assaulted by beating by prison officers, or by inmates at their instigation, contrary to section 3(1) of the Constitution; (2) he was wrongfully subjected to solitary confinement and that the conditions of the solitary confinement were cruel, inhuman and degrading, contrary to section 3(1) of the Constitution; (3) he was subject to unjustifiable restrictions on family visits, contrary to section 3(1) of the Constitution; (4) he was subject to unjustifiable restrictions on his special dietary requirements, the Plaintiff being a vegetarian and Seventh Day Adventist, contrary to section 8(1) of the Constitution; (5) parole documents were wilfully destroyed by corrections officers in breach of section 1(a) of the Constitution; (6) he suffered loss of earning as a result of his release on license being wrongfully delayed by two years, also contrary to section 1(a) of the Constitution; and (7) he was subjected to regular exposure to second hand cigarette, cannabis, and crack cocaine smoke from other inmates' cells, contrary to section 1(a) of the Constitution.

4. Complaints (5) and (6) are in substance one complaint, namely that the Plaintiff was wrongfully imprisoned for a period of two years after he should have been released, contrary to section 5 of the Constitution.

Constitutional provisions

5. The relevant provisions of the Constitution are as follows.

6. Section 1 of the Constitution addresses the fundamental rights and freedoms of the individual. It provides:

"*Whereas every person in Bermuda is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right,…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,…

(c) …the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms subject to such limitations of that protection as are contained in those provisions,…"

7. The interpretation of this section was the subject of some debate during the course of this hearing. Mr. Caesar, who appears for the Plaintiff, urged me to find that it conferred free standing and self-contained rights, such that an infringement of any one of those rights would be a breach of the Constitution, irrespective of whether any other provision of the Constitution was also infringed.

8. Ms. Dill, who appears for the Defendants, agreed with the suggestion from the bench that although section 1 of the Constitution confers or recognizes certain fundamental rights, the constitutional protection of these rights is limited to that provided by sections 2 – 13. Thus, in order for there to be a breach of section 1 of the Constitution, there must also be a breach of at least one of sections 2 –13. Absent a

breach of any one of sections 2 – 13, there would be no breach of section 1 of the Constitution.

9. I find that that this construction is correct. In order for a claim for constitutional relief to succeed, the Plaintiff would have to establish that one of sections 2 – 13 of the Constitution has been breached. Such a breach would in itself constitute a breach of section 1.

10. Section 3 of the Constitution provides protection from inhuman treatment:

"*(1) No person shall be subject to torture or to inhuman or degrading treatment or punishment.*"

11. Section 5 of the Constitution provides protection from arbitrary arrest or detention:

"*(1) No person shall be deprived of his personal liability save as may be authorized by law in any of the following cases:*

(a) in execution of the sentences or order of a court, whether established for Bermuda or some other country, in respect of a criminal offence of which he has been convicted or in consequence of his unfitness to plead to a criminal charge;

. . . . .

(4) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefore from that other person."

12. Section 8 of the Constitution provides protection of freedom of conscience:

"*(1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purpose of this section the said freedom includes of thought and of religion, freedom to change his religion or belief and freedom, either alone or in community with others, and both in public or in private, to manifest*

and propagate his religion or belief in worship, teaching, practice and observance.

. . . . .

(5) 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 which is reasonably required –

> *(a) in the interests of ... public safety, public order, public morality or public health….*

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

13. Section 15 of the Constitution provides for the enforcement of fundamental rights. It states:

"*(1) If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.*

> *(2)The Supreme Court shall have original jurisdiction –*
>
> *(a) to hear and determine any application made by any person in pursuance of 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 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 foregoing provisions of this Chapter to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of

redress are or have been available to the person concerned under any other law *[emphasis added] ('The Proviso').*"

Strike Out Application

Plaintiff's claim said to be insufficiently particularised

14. The Defendants' strike out application is based on two grounds. First, the Defendants complain that the originating summons does not comply with Order 7 rule 5 of the Rules of the Supreme Court 1985 as they allege that it does not contain sufficient particulars to identify the cause or causes of action in respect of which the Plaintiff claims relief or remedy.

15. I find that this complaint is not well founded. The originating summons identifies clearly that it is alleging numerous breaches of the Constitution. In each case it indicates in summary form the nature of the breach alleged and the section that has allegedly been breached.

16. There is more substance in the implicit concern expressed in this ground that the breaches alleged are not pleaded with sufficient particularity. Should the originating summons survive the strike-out application, that is a matter that can be addressed by a direction that the Plaintiff file detailed points of claim.

Whether adequate alternative means of redress

17. The Defendants' second ground forms the meat of their application. Namely that no action for breach of the Constitution will lie because adequate alternative means of redress are or have been available to the Plaintiff.

18. In support of this ground the Defendants rely heavily on Jaroo v AG of Trinidad and Tobago [2002] 1 AC 871, PC. In this case the applicant's motor car was detained by the police, who gave no reasons for refusing to release it to him. Despite numerous requests by the

applicant the police did not return the car to him or give him any reason for its continued detention.

19. Instead of bringing an action at common law for the return of the car the applicant applied under section 14(1) of the Constitution of Trinidad and Tobago to the High Court for redress seeking an order for the return of the car, and damages for contravention of his rights under the Trinidad Constitution on the ground that he had been deprived of the enjoyment of his car without due process of law.

20. Section 14(1) of the Trinidad Constitution is analogous to section 15(1) of the Bermuda Constitution. However section 14 of the Trinidad Constitution, unlike section 15 of the Bermuda Constitution, does not contain a Proviso. The Defendants would no doubt submit that the passages on which they rely in the judgment would therefore apply with even greater force to Bermuda. These passages are as follows:

"*29 Nevertheless, it has been made clear more than once by their Lordships' Board that the right to apply to the High Court which section 14(1) of the Constitution provides should be exercised only in exceptional circumstances where there is a parallel remedy. In Harrikissoon v Attorney General of Trinidad and Tobago [1980] AC 265, 268, Lord Diplock said with reference to the provisions in the Trinidad and Tobago (Constitution) Order in Council 1962 (SI 1962/1875):*

'The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative

action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.'

30 Lord Diplock repeated his warning against abuse of the constitutional motion in the context of criminal cases where there was a parallel remedy in Chokolingo v Attorney General of Trinidad and Tobago [1981] 1 WLR 106, 111-112: see also his observations in Maharaj v Attorney General of Trinidad and Tobago (No 2) [1979] AC 385, 399-400 and Attorney General of Trinidad and Tobago v McLeod [1984] 1 WLR 522, 530. The same point was made recently in Hinds v Attorney General of Barbados [2002] 1 AC 854, where Lord Bingham of Cornhill said, at p 870d-e, para 24, that Lord Diplock's salutary warning remains pertinent.

31 ... This procedure enables the person who seeks a quick judicial remedy to avoid the delay and expense which a trial of the case by means of an ordinary civil action will involve. ...

. . . . .

39 Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of the process to resort to it."

21. I shall consider the Defendants' submissions first with respect to what I consider the two most serious allegations made by the Plaintiff: allegation (1) – the alleged assault by beating, and allegations (5) and (6) – the alleged wrongful imprisonment for two years.

Assault by beating

22. As to allegation (1), the Defendants say that the Plaintiff could have brought an action in tort for assault and battery. However the Plaintiff has an answer to that – he says that he was prohibited from doing so by section 3(5) of the Crown Proceedings Act 1966 ("the 1966 Act"). This provides:

"*No proceedings shall lie against the Crown by virtue of this section in respect of any act by any person while discharging or purporting to discharge any responsibilities of a judicial nature which may be vested in him, or while discharging or purporting to discharge any responsibilities which may rest upon him in connection with the execution of any judicial process.*"

23. The Plaintiff relies in interpreting that section on the decision of Maharaj v AG of Trinidad and Tobago (No 2) [1979] AC 385, PC, which was applied in Bermuda in Ming v Minister for Labour, Civil Jurisdiction 2005, No. 394. The facts were these. The appellant was a barrister engaged in a case in the High Court. He was committed to prison for seven days for contempt on the order of the judge. The appellant immediately applied ex parte by notice of motion to the High Court under section 6 of the Trinidad Constitution claiming redress for contravention of his right, protected by section 1(a) of the Trinidad Constitution, not to be deprived of his liberty save by due process of law. The High Court dismissed the motion and ordered the appellant to serve his term of imprisonment. After serving his term the appellant appealed from the decision of the High Court to the Court of Appeal, which by a majority dismissed the appeal on the ground that the failure of the High Court to specify the nature of the contempt did not contravene a right protected by section 1 of the

Trinidad Constitution. The appellant appealed to the Privy Council and his appeal was upheld.

24. In the course of argument Lord Diplock noted at page 394 that the notice of motion and the supporting affidavit contained other claims and allegations, some of which would have been appropriate to a civil action against the Crown for tort. Lord Diplock observed that, "*to this extent the application was misconceived*". He continued:

"*The Crown was not vicariously liable in tort for anything done by Maharaj J. while discharging or purporting to discharge any responsibilities of a judicial nature vested in him; nor for anything done by the police or prison officers who arrested and detained the appellant while discharging responsibilities which they had in connection with the execution of judicial process. Section 4 (6) of the State (formerly Crown) Liability and Proceedings Act 1966 so provides.*"

This passage was cited with approval in Ming v Minister for Labour at paragraph 22.

25. Section 3(5) of the 1966 Act was considered by the Court of Appeal of Bermuda in Farmer v AG [2008] Bda LR 57, although that case does not assist greatly with interpreting the section. It was an appeal by Mr. Farmer against an order striking out his claim against the DPP for malicious prosecution as disclosing no reasonable cause of action. One of the questions raised by the appeal was whether prosecutorial conduct was the discharge or purported discharge of a responsibility of a "judicial nature" or of a responsibility "in connection with the execution of any judicial process", so as to engage the immunity preserved to the Crown in respect of such responsibilities by the Proviso.

26. Auld JA, giving the judgment of the Court, stated at paragraph 10:

"*The words 'execution' and 'process' in that second limb are important. In my view, they preserve the immunity of those who give effect to judicial process in the form of judicial orders or directions, not the conduct of a prosecutor giving rise to them.*"

27. During the hearing before me there was a lively discussion as to what "purported discharge" might mean in the context of section 3(5) of the 1966 Act. Whatever its meaning, the expression is not apt to cover the misconduct alleged against the prison officers in the instant case. This was set out in a letter from Mr. Caesar to the Attorney General dated 16th May 2011. The background to the allegation of assault is that prison officers were seeking to compel the Plaintiff to take a shower but that he declined to do so:

"*The following Saturday, 25th September 2004, upon returning to his cell from church, officers [1], [2] and [3] were waiting for the claimant [ie the Plaintiff] by his cell door. When the claimant entered his cell, the officers followed. Officer [2] then informed the claimant that they had come to give him a shower. The claimant replied that he bathed in his cell's baisin twice a day. Against the claimant's will, he was escorted out of his cell to the inmates' bathroom where he was left alone with Officer [2]. Officer [2] then grabbed the claimant and shoved him in the shower. The claimant resisted and a struggle ensued between the claimant and Officer [2] who had ripped off the claimant's shirt during the encounter.*

The claimant refused to comply with Officer [2] and was able to free himself from him and make his way out of the shower. Upon seeing the claimant emerge from the shower, Officer [1] rushed into the bathroom and, along with Officer [2], grabbed him and began forcefully to take off his pants. ***As the claimant struggled to prevent them from doing this, he was turned upside down by the officers who began hitting his head repeatedly on the tile floor, in an up and down motion, at least five times, despite his screaming as a result of the pain.*** *Afterwards, Officers [2] and [1] escorted the claimant naked to his cell [emphasis added]…*

. . . . .

As a result of his beating, the claimant was unable to sit up in a chair and remained in bed for three weeks. In addition, he did not receive any medical attention following the beating. During and after the time he was confined to bed, recovering from his injuries, officers made fun of the claimant and the beating he suffered. Officers also encouraged other inmates to make fun of the claimant.

The claimant also suffered beatings by inmates at the instigation of the correction officers. At or around the time our client was scheduled to be transferred from the maximum Security Unit to Unit E1, Officer [3] had told him that once he was transferred to Unit E1, he would have the claimant beaten by inmates. Within 30 minutes of his being transferred to Unit E1, three inmates entered the claimant's room and attacked him. ... Officers [3], [2] and [1] were the instigators of the claimant's beating by inmates."

28. Thus I find that the section 3(5) of the 1966 Act would be no bar to a claim in tort with respect to the alleged assault and battery. The purpose of section 3(5) is to protect people acting in good faith in the execution of what is ostensibly valid court process even if it turns out that in fact it is not valid court process. By no stretch of the imagination could the alleged conduct of the prison officers be said to fall within that category.

29. I note that in England and Wales, section 2(5) of the Crown Proceedings Act 1947 ("the 1947 Act") mirrors the terms of section 3(5) of the 1966 Act. In England and Wales it is by no means unusual for prison officers to be sued for assaulting prisoners and to the best of my knowledge[1] section 2(5) of the 1947 Act has not been raised successfully as a defence to such a claim.

30. By way of example, in Frankson v Home Office [2003] 1 WLR 1952, CA the claimants brought civil actions against the Home Office claiming damages in respect of the alleged assaults and for misfeasance in public office, and applied pursuant to the English Civil Procedure Rules for third party disclosure orders requiring the police

[1] Supported by a search on Westlaw.

to disclose to them the prison officers' statements. The judge ordered that the officers be joined as parties to the proceedings and granted the applications subject to conditions, inter alia, limiting the use of the disclosed material to inspection, drafting of witness statements and preparation for trial.

31. The officers appealed against this order, but their appeals were dismissed. Scott Baker LJ stated at page 1967 G:

"*In my judgment a judge should not be required to try actions by prisoners against the Home Office alleging assault by prison officers and misfeasance in public office in blinkers as to potentially critical evidence of what the prison officers said to the police when interviewed under caution.*"

Neither he nor his fellow judges suggested that a judge should not be required to try such actions because they were statute barred.

32. By way of further example, in Banks at al v United Kingdom (2007) 45 EHRR SE2 15, which concerned assaults and ill-treatment inflicted on prisoners in H.M. Prison Wormwood Scrubs during the 1990s, eight of the ten applicants had brought civil claims against the Home Office. In all eight cases these claims were uncontested, and consent orders were made in which the applicants accepted monetary payments in full and final settlement of their claims, including their claims of systemic negligence and malfeasance. The Home Office would have been unlikely to settle the claims if they had been statute barred.

33. I am therefore satisfied that The Plaintiff has or had an alternative remedy in tort with respect to his allegations of assault. But that is not an end of the matter. Mr. Caesar has referred me to the decision of the Privy Council in AG of Trinidad and Tobago v Ramanoop [2006] 1 AC 328. These proceedings concerned what the Privy Council described as some quite appalling misbehaviour by a police officer. Lord Nicholls, giving the judgment of the Board, stated at paragraph 25:

"*... 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.*"

34. Whether the means of legal redress are adequate is, of course, highly pertinent when considering the Proviso. In Ramanoop the arbitrary use of state power meant that alternative means of legal redress were not adequate. Thus the Board noted at paragraph 21:

"*The Attorney General raised no objection to these proceedings taking the form of an originating motion seeking constitutional relief rather than a common law action for damages in respect of Mr Ramanoop's unlawful detention and the assaults made upon him by PC Rahim. The Attorney General was right to do so. Police officers are endowed by the state with coercive powers. This case involves a shameful misuse of this coercive power: compare the approach adopted by the Board in Thornhill v Attorney General of Trinidad and Tobago [1981] AC 61, 74.*"

35. The Privy Council has applied the approach in Ramanoop in various subsequent cases, eg Subiah v AG of Trinidad and Tobago [2008] UKPC 47, which was cited to me, at paragraph 14.

36. The instant case involves allegations of assault and battery which were committed or orchestrated by prison officers acting or purportedly acting in their capacity as such. Hence it involves the arbitrary misuse of the powers and position conferred upon them by the state. I therefore find that this is prima facie an apt claim for constitutional relief. That finding, however, is subject to the question of possible disputes of fact.

37. As to factual disputes, Ms. Dill draws my attention to Jaroo v AG of Trinidad and Tobago [2002] 1 AC 871 at paragraph 36:

"*Their Lordships wish to emphasise that the originating motion procedure under section 14(1) is appropriate for use in cases where the facts are not in dispute and questions of law only are in issue. It is wholly unsuitable in cases which depend for their decision on the resolution of disputes as to fact. Disputes of that kind must be resolved by using the procedures which are available in the ordinary courts under the common law. As Lord Mustill indicated in Boodram v Attorney General of Trinidad and Tobago [1996] AC 842, 854, in the context of a complaint that adverse publicity would prejudice the applicant's right to a fair trial, the question whether the applicant's complaint that the police were detaining his vehicle was well founded was a matter for decision and, if necessary, remedy by the use of the ordinary and well-established procedures which exist independently of the Constitution.*"

38. In this case it would be premature for me to form any view as to whether there is any dispute of fact as the Defendants have not filed any substantive response to the Plaintiff's case, whether as set out in his attorney's letter of 16th May 2011, or in the originating summons and supporting affidavits. If there is a factual dispute, then the approach suggested by the Privy Council at paragraph 30 of Ramanoop will be of assistance:

"*What, then, of the case where on the information available to an applicant a constitutional motion is properly launched but it later becomes apparent … that there is a substantial dispute of fact …? … the emergence of a factual dispute does not render the proceedings an abuse where the alleged facts, if proved, would call for constitutional relief. Where this is so, the appropriate course will normally be for the applicant to apply promptly for an order that the conditional proceedings continue as though begun by writ and for any appropriate ancillary directions for pleadings, discovery and the like. Where appropriate, directions should also be given for expedition and a timetable set for the further steps in the proceedings.*"

39. The Board noted at paragraph 31 that: "*The observations in Jaroo's case are not to be taken as differing from what is set out above*".

40. I therefore dismiss the application to strike out the Plaintiff's claim for constitutional relief with respect to the allegation of assault. At the conclusion of this judgment I shall invite the parties' submissions as to directions for the future progress of that aspect of his claim.

Wrongful imprisonment

41. I come to the same conclusion with respect to the allegations of wrongful imprisonment, which are detailed in Mr. Caesar's letter of 6th May 2011:

"*Chief Officer Charles Wilkinson had been summoned and requested to present the claimant's parole application documents at a meeting with Assistant Commissioner Joell-Benjamin, ahead of the claimant's parole hearing on 25th May 2005. However, Chief Officer Wilkinson was unable to provide the documents for the meeting, because he had them destroyed. ... Divisional Officer Dyer was instructed by Chief Wilkinson to destroy our client's Parole Papers, so that his application would not be heard.*"

42. I accept the Defendants' submission that the Plaintiff had alternative remedies in habeas corpus and mandamus. However, I find that the allegation of the deliberate sabotage of the parole papers would, if made out, be a classic example of the arbitrary misuse of state power. I therefore dismiss the application to strike out the Plaintiff's claim for constitutional relief with respect to this allegation also.

Remaining allegations

43. What of the Plaintiff's remaining allegations? Here the position is somewhat different. Each such allegation is in substance that the Prison Act 1979 ("the Prison Act") and/or the Prison Rules 1980 ("the Prison Rules") have been applied unlawfully and/or unreasonably.

44. Specifically, allegation (2) as to solitary confinement engages section 22 of the Prison Act and rules 32 and 33 of the Prison Rules; allegation (3) as to restrictions on family visits engages rules 64 and 67 of the Prison Rules; and allegation (4) as to restrictions on the Plaintiff's special dietary requirements engages rules 84 and 94 of the Prison Rules. The allegations about unhealthy and inappropriate prison conditions, whether relating to the conditions of the cell in which The Plaintiff was held during solitary confinement (allegation 2), or the noxious fumes to which he was allegedly exposed throughout his incarceration (allegation 7), engage rules 7, 8 and 88 of the Prison Rules.

45. Whether these provisions have been unlawfully and/or unreasonably applied is par excellence a matter for judicial review as these are allegations challenging the lawfulness of a decision, action or failure to act in relation to the exercise of a public function.

46. There is something I should add, however, with respect to allegation (2). Section 22(5) of the Prison Act, which provides that the Minister may remit or mitigate any punishment imposed under that section, does not afford an adequate means of redress within the meaning of the Proviso as it merely provides for the exercise of a ministerial discretion and not a judicial remedy.

47. I have already dealt in part with allegation (7). However the gravamen of the complaint is that the Plaintiff was deprived of the protection of the law in that he should not have been exposed to the consequences of other people's criminal activity, namely the fumes from their consumption of prohibited drugs. He relies on section 1 of the Constitution. But, as stated above, section 1 is not capable of being breached unless one of sections 2 – 13, which protect the rights conferred by section 1, has also been breached. The Plaintiff has not shown how any such breach might have occurred.

48. I therefore allow the application to strike out the Plaintiff's claim for constitutional relief with respect to the remaining allegations.

Summary

49. I allow the Defendants' application to strike out allegations (2), (3), (4) and (7) of the Plaintiff's claim and dismiss their application to strike out allegations (1), (5) and (6) of the claim.

50. I invite the parties to address me as to directions for the future conduct of the Plaintiff's claim. Then I shall hear them as to costs.

51. I should make it clear that this hearing was not concerned with the merits of the Plaintiff's claim, as to which I am not in a position to express any view.

Dated this 21st day of September, 2012 _____

Hellman J