Easter Term

[2021] UKPC 13

Privy Council Appeal No 0112 of 2019

JUDGMENT

Commissioner of Prisons and another (Respondents) vSeepersad and another (Appellants) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Lloyd-Jones

Lord Hamblen

Lord Leggatt

Lord Burrows

Sir Bernard McCloskey

JUDGMENT GIVEN ON

24 May 2021

Heard on 11 March 2021

Appellants	Respondents
Richard Clayton QC	Howard Stevens QC
Anand Ramlogan SC	David Goldblatt
Kate O'Raghallaigh	
Rowan Pennington-Benton	
(Instructed by Alvin Shiva Pariagsingh (Trinidad and Tobago))	(Instructed by Charles Russell Speechlys LLP (London))

SIR BERNARD McCLOSKEY:

Introduction

1.
Both appellants were at all material times minors. From the inception of the underlying proceedings culminating in this appeal to the Board each has been described by name and there has been no anonymity restriction. The first appellant, Sasha Seepersad ("Sasha"), is now aged 23 years. The second appellant, Brian Seepersad ("Brian"), attained his 18th birthday over two years ago on 18

January 2019. Sadly this young man is now deceased and his appeal is continued by his personal representative. There is no reason why their identities should at this stage be suppressed and no application to the contrary was made to the Board.

2.
While the appellants are of different gender and were of different ages at the material time, having regard to the contours of their appeals as ultimately formulated there is no relevant distinction between them. The legal rights, constitutional in nature, which they advance are the same and of similar, though not identical, impact in their respective cases. Nor is there any material distinction between the two respondents to this appeal, namely the Commissioner of Prisons of Trinidad and Tobago and the Attorney General of Trinidad and Tobago (hereinafter “the respondents”).

The Underlying Litigation

3.
While the litigation history is somewhat protracted and not without its complexities, the key facts are few in number. In brief compass, the detention of each appellant was the impetus for the separate proceedings commenced on their behalf in the High Court of Trinidad and Tobago in August and September 2015. These were combined judicial review and constitutional relief proceedings. Both appellants, having been charged with murder, had been remanded in custody by the Chief Magistrate to certain institutions. They contended that their detention was unlawful and unconstitutional. In the High Court, at first instance, they were successful. The remedies granted consisted of, firstly, declarations that their detention during specified periods, of some six months and nine months respectively, were (a) unlawful, being in contravention of certain provisions of primary legislation and, (b) unconstitutional, being in violation of specified provisions of the Constitution of Trinidad and Tobago (“the Constitution”). The second remedy granted was an award of damages of $300,000 and $150,000 to the appellants respectively.

4.
On appeal the Court of Appeal upheld the High Court’s declarations that the detention of the appellants during the identified periods was unlawful as being in contravention of the relevant primary legislation, while reversing all of the other remedial orders made. The sole question for the determination of the Board is whether the detention of the appellants during the relevant periods was in breach of either, or both, of the provisions of the Constitution noted in para 8 below.

5.
It is convenient to note two matters at this stage. First, the partial success of the appellants before the Court of Appeal is not the subject of challenge by cross-appeal. Second, neither appellant has pursued any private law remedy against the respondents. All that remains in the legal proceedings which they have brought is the Board’s determination of whether their detention during the relevant periods was unconstitutional.

The Constitution of Trinidad and Tobago

6.
There have been two incarnations of the Constitution of Trinidad and Tobago. Each has protected rights which have become increasingly familiar through a series of international instruments and, in the United Kingdom context, the Human Rights Act 1998 in particular. The original Constitution came into operation on 31 August 1962 when independence from Britain was secured and Trinidad and Tobago became a member of the Commonwealth. The operative date of its second incarnation was 1

August 1976, when Trinidad and Tobago became a constitutional republic. While there have been subsequent amendments these are of no moment in the context of these appeals. The provisions invoked by the appellants date from the original version, unchanged.

7.
The Preamble to the Constitution is not readily amenable to dissection and is better reproduced in full:

“Whereas the People of Trinidad and Tobago -

(a) have affirmed that the Nation of Trinidad and Tobago is founded upon principles that acknowledge the supremacy of God, faith in fundamental human rights and freedoms, the position of the family in a society of free men and free institutions, the dignity of the human person and the equal and inalienable rights with which all members of the human family are endowed by their Creator;

(b) respect the principles of social justice and therefore believe that the operation of the economic system should result in the material resources of the community being so distributed as to subserve the common good, that there should be adequate means of livelihood for all, that labour should not be exploited or forced by economic necessity to operate in inhumane conditions but that there should be opportunity for advancement on the basis of recognition of merit, ability and integrity;

(c) have asserted their belief in a democratic society in which all persons may, to the extent of their capacity, play some part in the institutions of the national life and thus develop and maintain due respect for lawfully constituted authority;

(d) recognise that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

(e) desire that their Constitution should enshrine the above-mentioned principles and beliefs and make provision for ensuring the protection …”

Section 1 proclaims that the Republic of Trinidad and Tobago shall be a sovereign democratic state. section 2 declares that the Constitution is the supreme law of this state. These provisions belong to the “Preliminary” compartment of the instrument.

8.
This is followed by Chapter 1, which is entitled “The Recognition and Protection of Fundamental Human Rights and Freedoms”. section 4, which follows, provides in material part:

“It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:

(a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;

(b) the right of the individual to equality before the law and the protection of the law …”

Pausing, the task of construing the meaning and ambit of these two provisions in the fact sensitive context of these conjoined appeals falls upon the Board. These two specific “rights” are followed by a list of other rights and freedoms, nine in total, none of which bears directly on the issues to be decided by the Board.

9.
Bearing in mind one aspect of the argument on behalf of the respondents, it is appropriate to draw attention to section 5 of the Constitution. The thrust of this is apparent from subsection (1) and the beginning of subsection (2):

"(1) Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared …

(2) Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not - …"

There follows a series of prohibitions on what Parliament may do. By these provisions Parliament may not, inter alia, authorise or effect the arbitrary detention, imprisonment or exile of any person. The relevance of section 5 to these appeals will be revisited infra.

The Relevant Statutory Provisions

10.
There are four measures of primary legislation to be considered. First, by virtue of section 5(2) of the Bail Act (No 18 of 1994) the grant of bail is prohibited in respect of a person charged with (inter alia) murder, irrespective of age. Next, two provisions of the Children Act (No 12 of 2012) fall to be considered. The first is section 54(1), which provides:

"(1) A court, on remanding or committing for trial a child who is not released on bail, shall order that the child be placed in the custody of a community residence named in the Order for the period for which he is remanded or until he is brought before the court."

The second is section 60(1) and (5):

"(1) A court shall not order a child to be detained in an adult prison.

(5) Where a child is detained in any facility he shall not be allowed to associate with adult prisoners except with the express permission of the court in respect of the adult prisoner named in such order."

The preceding provisions of section 60 contain a series of specially tailored prescriptions to apply in any case where a child is convicted of certain types of offence or is liable to imprisonment in default of payment of a fine, damages or costs.

11.
By virtue of section 3(1) of the Children Act, in conjunction with section 2 of the Children's Community Residences, Foster Care and Nurseries Act 2000 (the "Community Residences Act") "community residence" means a Children's home or rehabilitation centre". The body corporate known as the Children's Authority of Trinidad and Tobago ("the Children's Authority") was established by section 4 of the Children's Authority Act 2000. By section 6 the Children's Authority is charged with a series of duties all of which are couched in general terms, ranging from the promotion of the wellbeing of the child to the promotion of contact between the child and its parents. By section 6(1)(h) it must, in the exercise of its statutory powers with regard to any child, act "so as to serve the best interests of that child". By section 6(2), when determining what is in the best interests of a child it must take into consideration a range of specified factors.

12. Under the Community Residences Act the Children's Authority has a series of duties and functions with regard to "community residences" (as defined: see above). section 3 of that Act provides, in terms, that a community residence may not operate unless licensed to do so by the Children's Authority. The Board was informed that the relevant parts of section 3 had not been commenced at the time of the events giving rise to these proceedings.

12.
A perusal of the statutes noted above indicates a particular feature of the legal system of Trinidad and Tobago whereby certain provisions of primary legislation take effect on the date when the statute comes into operation, whereas others are expressly excluded from doing so. Statutory provisions belonging to the latter category remain dormant unless and until brought into operation by Presidential Proclamation. In the specific case of the Children Act this commencement mechanism is specified in section 1(2). By Presidential Proclamation No 5 of 2015 a lengthy series of previously dormant provisions of the Children Act was brought into operation, with effect from 18 May 2015. These included section 54(1) and section 60(1) and (5), which are of central importance in these appeals.

The Material Facts

13.
While the route whereby these conjoined appeals have come before the Board has been a protracted one, spanning a period of some seven years, it will suffice to detail a modest number of key dates and events. These are as follows:

i)
On 29 January 2014 the appellants were charged with robbery and murder. They were then aged 16 and 13 years respectively. They were brought before the Chief Magistrate, who remanded Sasha to the Women's Prison and Brian to the Youth Training Centre ("YTC").

ii)
During the period of some 15 months which followed further remand orders, in the same terms, were made from time to time.

iii)
On 18 May 2015, as noted above, section 54 and section 60(1) of the Children Act came into operation.

iv)
On 30 June and 29 July 2015 the Chief Magistrate made further remand orders in the same terms as in (i).

v)
Judicial review proceedings were commenced by both appellants. The respondents were the Chief Magistrate and the Attorney General of Trinidad and Tobago. Leave to apply for judicial review was granted to the appellants by successive orders of the High Court dated 20 August 2015 and 2 September 2015. By order of the High Court the Children's Authority became a party to the proceedings from the outset.

vi)
In the case of Brian, the order of the High Court dated 20 August 2015 also granted interim relief. The effect of this was to require the Children Authority to make certain enquiries and assessments with a

view to inter alia transferring him from the YTC to a suitable community residence or other suitable accommodation.

vii)
A consequential order giving further effect to the initial order of the court was made on 4 September 2015.

viii)
In the case of Sasha, the order of the High Court dated 2 September 2015 also contained a provision for interim relief which, in summary, directed the Authority to take certain steps with the aim of bringing about the transfer of Sasha to a community residence.

14.
It is not necessary to delve into the dense detail of what happened in the months which followed. It suffices to record that on 7 December 2015 Sasha was transferred from the Women's Prison to St June's Home For Girls, an unlicensed institution having the appellation of industrial school/temporary rehabilitation centre. This new arrangement was of relatively brief duration since, having attained her 18th birthday on 24 January 2016, by order of the Chief Magistrate dated 27 January 2016 she was remanded once again to the Women's Prison. Brian's fate was somewhat different. In his case, the effect of the interim relief orders of the High Court was that the Children Authority was granted access to him at the YTC and certain improvements in his conditions followed. With effect from 14 April 2016, when aged 15 years and three months, he was transferred to another institution, St Michael's Home for Boys. Brian was at no time detained in a licensed community residence. There was no implementation of the Children Authority's statutory licensing function: section 3(1) and (2) of the Community Residences Act remained dormant throughout.

The Underlying Proceedings

15.
Following the flurry of interim and interlocutory activity rehearsed above, the substantive judgment of the High Court was promulgated on 24 May 2016. As the proceedings brought by the appellants included asserted breaches of constitutional rights they were treated as combined judicial review and constitutional claims. Kokaram J found in favour of both appellants. He concluded that the orders of the Chief Magistrate dated 29 July 2015 remanding the appellants to the Women's Prison and YTC respectively until 16 September 2015 were unlawful as they contravened sections 54 and 60(1) of the Children Act. The High Court made declarations accordingly together with orders of certiorari quashing the remand warrants. The court further made declarations that the failure of the state to provide the appellants with accommodation in a community residence compliant with the Community Residences Act from 15 May 2015 had breached their rights under sections 4(a) and (b) of the Constitution. While this discrete order further declared a breach of the appellants' rights under section 5(2)(b) of the Constitution - the prohibition against cruel and unusual treatment or punishment - this matter had become moot by the stage of the hearing before the Board.

16.
The High Court also awarded the appellants damages: $300,000 (Sasha) and $150,000 (Brian). This was a discretionary remedy designed to vindicate the appellants' success in establishing breaches of their constitutional rights. In para 315 of a lengthy judgment, Kokaram J adverted to -

"the very fact that these children were subjected to conditions which were unsuited to them and not in conformity with the philosophy of their rehabilitation or their best interest."

The judge added at para 316:

“The compensation to be awarded to the claimants is as a result of the failure of the legal system or the executive’s administrative process to have in place a community residence appropriate for their respective detentions.”

In the case of Sasha, the judge stated at para 318:

“[Sasha] was subjected to ‘prison like’ conditions and treated as a young adult in an adult prison. She ought not to have been placed in a women’s prison amongst other convicted persons and in conditions which were designed to treat and reform adult prisoners. She associated with adults even in a limited way through the eyes of the child. This would have been a startling, frightening and scarring experience. There was an apparent lack of proper amenities and facilities to preserve her human dignity as a vulnerable child.”

As regards Brian, the judge (at para 317) highlighted inter alia his age, the period of his detention, the conditions of his detention, his deficient learning skills, his social interaction with teenagers aged over 18 and, finally, “the failure of the YTC to provide a relevant and child specific treatment plan … to address his obvious deficiencies”.

17.
The respondents appealed to the Court of Appeal of Trinidad and Tobago. The appeal succeeded in part. By its judgment delivered on 19 December 2018 the Court of Appeal affirmed the declarations of the High Court that the remand orders of the Chief Magistrate whereby the appellants were detained in the Women’s Prison and YTC respectively were unlawful, being in contravention of sections 54(1) and 60(1) of the Children’s Act, in respect of the periods 29 July 2015 to 16 September 2015 (Sasha) and 29 July 2015 to 14 April 2016 (Brian). All of the remaining orders of the High Court were reversed.

The Appeals

18.
Given the factor of alleged breaches of constitutional rights, the appeals to the Board are brought by the appellants as a matter of right, under section 109 of the Constitution. There are two issues to be decided by the Board. Each of these is formulated on the uncontroversial premise that the remand of both appellants to the institutions and for the periods noted above was unlawful. The two issues are:

i)
Were the appellants detained without due process of law in breach of section 4(a) of the Constitution?

ii)
Was there a violation of the appellants’ rights to the protection of the law under section 4(b) of the Constitution?

19.
The appeals to the Board initially included a third limb, whereby the appellants were seeking to reinstate the declarations of Kokaram J that their detention during the relevant period had been in violation of the cruel and unusual treatment prohibition in section 5(2)(b) of the Constitution. As noted, this is no longer pursued.

Construing the Constitution of Trinidad and Tobago

20.
The two live issues require the Board to construe the two provisions of the Constitution of Trinidad and Tobago noted above. The most comprehensive guidance on how this exercise is to be conducted is found in the judgment of Lord Bingham in Reyes v The Queen[2002] 2 AC 235 in a passage which bears repetition in full, at para 26:

“When (as here) an enacted law is said to be incompatible with a right protected by a Constitution, the court’s duty remains one of interpretation. If there is an issue (as here there is not) about the meaning of the enacted law, the court must first resolve that issue. Having done so it must interpret the Constitution to decide whether the enacted law is incompatible or not. Decided cases around the world have given valuable guidance on the proper approach of the courts to the task of constitutional interpretation: see, among many other cases, Weems v United States (1909) 217 US 349, 373; Trop v Dulles (1958) 356 US 86, 100-101; Minister of Home Affairs v Fisher[1980] AC 319, 328; Union of Campement Site Owners and Lessees v Government of Mauritius [1984] MR 100, 107; Attorney General of The Gambia v Momodou Jobe[1984] AC 689, 700-701; R v Big M Drug Mart Ltd[1985] 1 SCR 295, 331; State v Zuma 1995 (2) SA 642; State v Makwanyane 1995 (3) SA 391 and Matadeen v Pointu [1999] 1 AC 98, 108. It is unnecessary to cite these authorities at length because the principles are clear. As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the Constitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society: see Trop v Dulles 356 US 86, 101. In carrying out its task of constitutional interpretation the court is not concerned to evaluate and give effect to public opinion.”

Lord Bingham added, at para 28, that it is appropriate to take into account international instruments incorporating relevant norms to which the state in question has subscribed. The Board will elaborate on this in considering the section 4(b) ground of appeal.

21.
One of the main reasons for the generous and purposive approach advocated by Lord Bingham is readily ascertainable. The terms in which individual rights and guarantees are formulated in constitutional instruments are typically broad and open textured, unaccompanied by definition or particularity. Thus while the exercise of construing a statute has certain similarities, a court engaged in the construction of constitutional provisions must adopt a somewhat broader perspective. The analogy with construing a legal instrument such as a contract or a will is, as Lord Bingham makes clear, inappropriate. Furthermore, the Board considers that the court engaged in the interpretation exercise must be alert to the historical context of the constitutional instrument in question. It is trite to add that the constitutional provision under scrutiny must be construed by reference to the whole of the instrument in which it is contained.

22.
In this respect, in Thornhill v Attorney-General of Trinidad and Tobago[1981] AC 61, 70B, Lord Diplock noted the “lack of all specificity” in the descriptions of the rights and freedoms contained in section 1 (now section 4) (a) to (k) of the Constitution. He then elaborated on the assistance to be derived from section 2 (now section 5) in construing the immediately preceding section. His particular focus was on the question of -

“what limits upon freedoms that are expressed in absolute and unlimited terms were nevertheless intended to be preserved in the interests of the people as a whole and the orderly development of the nation” (at 70C/D).

Having noted that recourse to an examination of the law of the state as it was when the Constitution was adopted may be an appropriate interpretive aid in certain instances, he continued (at 70D/E):

“But this external aid to construction is neither necessary nor permissible where the treatment complained of is of any of the kinds specifically described in paragraphs (a) to (h) of section 2.

Section 2 is directed primarily to curtailing the exercise of the legislative powers of the newly constituted Parliament of Trinidad and Tobago …

But section 2 also goes on to give, as particular examples of treatment of an individual by the executive or the judiciary, which would have the effect of infringing those rights, the various kinds of conduct described in paragraphs (a) to (h) of that section. These paragraphs spell out in greater detail (though not necessarily exhaustively) what is included in the expression ‘due process of law’ … and ‘the protection of the law’ …” (as noted, section 2 is now section 5) (emphasis added).

23.
The exercise of construing both section 4(a) and section 4(b) will also be informed by the immediate context of these provisions. They are contained in Chapter 1, the subject matter whereof is “The Recognition and Protection of Fundamental Human Rights and Freedoms”. Furthermore the Preamble, which overarches the entire instrument, must also be considered. In the context of these appeals the phrases which resonate in the Preamble are “faith in fundamental human rights and freedoms … the dignity of the human person … belief in a democratic society … (and) respect for … the rule of law”. The overarching purpose of the Constitution is to -

“enshrine the above-mentioned principles and beliefs and make provision for ensuring the protection in Trinidad and Tobago of fundamental human rights and freedoms.”

In this way the Constitution proclaims and establishes a constitutional democracy.

24.
Every constitution, of course, has its limits. In the specific case of the Constitution of Trinidad and Tobago, this has been highlighted by the Board. In Harrikissoon v Attorney-General of Trinidad and Tobago[1980] AC 265, Lord Diplock said at p 268:

“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.”

In Attorney-General of Trinidad and Tobago v McLeod[1984] 1 WLR 522 at 530B Lord Diplock, again, cautioned:

“The Judicial Committee has previously had occasion to draw attention to the necessity of vigilance on the part of the Supreme Court to prevent misuse by litigants of the important safeguard of the rights and freedoms enshrined in sections 4 and 5 that is provided by the right to apply to the High Court for redress under section 14.”

Lord Diplock then quoted the above passage in Harrikissoon, before recalling that in Chokolingo v Attorney-General of Trinidad and Tobago[1981] 1 WLR 106 and Maharaj v Attorney-General of Trinidad and Tobago (No 2)[1979] AC 385 the Board had held that the procedure for redress under section 6 of the Constitution was not to be used as a means of collateral attack upon a judgement of a court of justice of Trinidad and Tobago acting within its jurisdiction, whether original or appellate (at 530g).

25.
Taking into account the guidance to be distilled from the decided cases considered above and later in this judgment, the assessment of the Board is as follows. The Board considers that section 4(a) and section 4(b), in common with many constitutional provisions, are protean in nature. Constitutions are living instruments. They are to be construed by reference to the situation of and conditions prevailing in the society which they serve as these evolve from time to time. It is for this reason that the approach of the interpreting court should ordinarily be more liberal than it would be in construing, for example, a measure of legislation or legal instruments such as deeds and contracts. In short, the court is enjoined to adopt a broader perspective.

The section 4(a) Ground

26.
The cornerstone of each of the two grounds of appeal is the unchallenged finding by both the High Court and the Court of Appeal that the orders of the Chief Magistrate remanding the appellants to the Women’s Prison (Sasha) and the YTC (Brian) during the periods noted above were unlawful. The essence of the illegality vitiating these orders was that they contravened the following three provisions of the Children Act:

i)
Section 54(1) which, with effect from 18 May 2015, mandated that the Chief Magistrate remand both appellants to a community residence;

ii)
Section 60(1) which, with effect from the same date, precluded the Chief Magistrate from ordering the detention of Sasha in an adult prison; and

iii)
Section 60(5) which, with effect from the same date, prohibited the association of both appellants with adult prisoners in the absence of the express permission of the court.

The periods under scrutiny have been specified above and the case made by each appellant is in substance indistinguishable. While the factual matrix pertaining to the two appellants differs somewhat, this is a matter of no moment in the exercise of construing section 4(a) – or, indeed, section 4(b) - in the context of these appeals.

27.
What, then, are the meaning and reach of section 4(a) of the Constitution? It forms no part of the Board's function to attempt a comprehensive reply to this question. Rather, this is a question which falls to be answered by reference to the facts of these individual cases. This is so not least because constitutions are living instruments, organic in nature and responsive to the changing circumstances of the society which they serve. Furthermore, individual rights must take their colour from the concrete factual matrix in which they arise.

28.
That part of section 4(a) of the Constitution which arises in these conjoined appeals is the right of the individual not to be deprived of their liberty "except by due process of law". This is proclaimed as one of the "fundamental human rights and freedoms" which the Constitution protects.

29.
The Board has taken note of the leading cases in which section 4(a) has been the subject of previous judicial consideration. It considers that these cases have an unmistakable central theme and orientation. In short, "due process" has generally been considered to protect rights of a procedural nature, fair trial rights, in particular (though not exclusively) the right to procedural fairness. This is a right which is engaged in all kinds of contexts, both judicial and administrative. In the present cases the focus is on the judicial, namely the orders of the Chief Magistrate dated 29 July 2015 and subsequently which required both appellants to be detained in accommodation which did not have the status of a community residence as required by the Children Act. Did these orders deprive the appellants of their liberty in contravention of the "due process of law" protection enshrined in section 4(a) of the Constitution?

30.
The interplay between the former sections 1 and 2 (now sections 4 and 5) of the Constitution was considered by Phillips JA in Bazie v Attorney General (1971) 18 113 WIR at 123:

"The object of section 2 is to secure the protection of all the rights and freedoms which are enshrined in section 1. Since the administration of justice is the instrument by means of which the citizen seeks to enforce or prevent encroachment on [his] rights, the scheme of section 2 is to prohibit the enactment of legislation which may have the effect either of (a) abrogating, abridging or infringing any of those rights or (b) depriving the citizen of the benefit of any of several procedural safeguards established for the purpose of ensuring the due administration of justice. The observance of these safeguards is, in my view, an essential requirement for the preservation of all the substantive rights and freedoms guaranteed by section 1 of the Constitution."

As Thornhill later made clear, the rights listed in section 5 of the Constitution are not necessarily comprehensive of everything included in the compendious expression "due process of law".

31.
Section 1(a) has been considered in a number of reported cases. In Lasalle v Attorney-General (1971) 18 WIR 379, which concerned a court martial, one of the complaints about the legal process was that it infringed the appellant's rights under section 1(a). Phillips JA stated at 389G:

"This is the first occasion on which the due process clause of the Constitution has been the subject matter of interpretation by this court. Little authority is to be found with reference to the interpretation of its counterpart in the Canadian Bill of Rights. The expression 'due process of law',

although having its roots in Magna Carta (1215), which has come to be regarded as the palladium of the basic liberties of the British citizen, has not found a firm footing in British legal terminology …

Its origin is generally accepted as being in the 39th clause of Magna Carta wherein it was provided that:

'No free man was to be arrested, imprisoned, put out of his free hold, outlawed, destroyed or put upon in any way except by the lawful judgement of his peers or the law of the land'."

Phillips JA then traced the use of this phrase in subsequent English legislative enactments, the Fifth Amendment of the Constitution of the USA and the Canadian Bill of Rights. He also noted the analysis of Professor Holdsworth in History of English Law (Vol 1, p 63 and Vol 2, pp 215-216), passages in which one finds emphasis on the protection of the citizen against arbitrary government conduct, including arbitrary deprivation of personal liberty. Phillips JA continued, at 319G:

"The concept of 'due process of law' is the antithesis of arbitrary infringement of the individual's right to personal liberty; it asserts his 'right to a free trial, to a pure and unbought measure of justice'. While it is not desirable and, indeed, may not be possible to formulate an exhaustive definition of the expression, it seems to me that, as applied to the criminal law … it connotes adherence, inter alia, to the following fundamental principles:

(i) reasonableness and certainty in the definition of criminal offences;

(ii) trial by an independent and impartial tribunal;

(iii) observance of the rules of natural justice."

His Lordship then noted that two of these safeguards are expressly specified in paragraphs (e) and (f) of section 2 (now section 5) while the third is impliedly provided for in paragraph (c).

32.
Finding that there was no breach of the appellant's constitutional right not to be deprived of his liberty except by due process of law, the court expressed itself satisfied that there had been no infringement of any of the three fundamental principles set out above and that the requirement of due process had been adequately observed by the statutory provisions under which the appellant's court martial had been conducted. Notably, Phillips JA attached particular significance to the absence of any complaint by the appellant of any of the "procedural safeguards" guaranteed by section 2 (now section 5) of the Constitution (at 392D).

33.
An elaborate exposition of the interplay between sections 4 and 5 of the Constitution is found in the judgment of Fraser JA at 411C – G:

"The references which I have cited, both from the United States and from Canada, serve to demonstrate that in both countries 'due process' is seen to be construed as a restraint upon action or a limitation on law which affects personal liberties to a degree of unreasonableness or arbitrariness which is coloured by discrimination or otherwise. The introduction of the due process clause in the Constitution of Trinidad and Tobago seems to me to have been similarly inspired, although the method has been different and at the same time more clearly explicit of the legislative intention. Section 1 (a) of the Constitution declares a fasciculus of individual rights to have existed and assures their continuity without deprivation except by due process of law; but the section does not itself provide the means whereby the individual might be protected against their abrogation, abridgment or

infringement. Such protection is to be found in section 2 of the Constitution and because this is so I think that subsections 1 (a) and 2 are complementary and, together, provide the content and values which underscore the legal civil liberties of the individual as distinct from his political civil liberties, his economic civil liberties or his egalitarian civil liberties. The individual legal civil liberties concern the justice of the legal order and speedy trial, and include freedom from arbitrary arrest, or arbitrary search and seizure of person, premises and papers; protection of impartial adjudication, involving notice and fair hearing, an independent tribunal and the right to counsel, the privilege against compulsory self-incrimination, the protection from cruel and unusual treatment and punishment; the right to be informed promptly of the reasons for his arrest or detention; the presumption of innocence; the right to the assistance of an interpreter and to all the other facilities and rights. It is not necessary or even possible to venture a comprehensive definition of the phrase 'due process of law' such as might be of permanent application."

His Lordship added (at 412C) that the declaration of the individual rights in section 4(a) and the stipulation for due process of law in the deprivation of any of them -

"is intended basically to ensure the individual against oppressive or arbitrary use of authority."

This is a clear reference to the interface between the executive and the courts. Furthermore the rule of law is readily discernible in this pithy statement.

34.
The "due process of law" clause in section 4(a) of the Constitution has been considered by the Board in several cases. There are four of particular note. The first is Thomas v Baptiste [2000] 2 AC 1. Lord Millett, giving the judgment of the Board, traced the history of the clause in essentially the same terms as Phillips JA in Lasalle and continued (at 21H-22E):

"Transplanted to the Constitution of Trinidad and Tobago, the due process clause excludes legislative as well as executive interference with the judicial process.

But the clause plainly does more than this. It deliberately employs different language from that found in the corresponding provisions of the Universal Declaration of Human Rights and the European Convention on Human Rights. They speak merely of 'the sentence of a court of competent jurisdiction'. The due process clause requires the process to be judicial; but it also requires it to be 'due'. In their Lordships' view 'due process of law' is a compendious expression in which the word 'law' does not refer to any particular law and is not a synonym for common law or statute. Rather it invokes the concept of the rule of law itself and the universally accepted standards of justice observed by civilised nations which observe the rule of law …

The clause thus gives constitutional protection to the concept of procedural fairness". (Emphasis added)

Their Lordships further endorsed the view that the clause embraces the right to a fair trial. One further striking feature of this decision in the context of the present appeals is the potential importance of the state's ratification of an international treaty in determining the reach of section 4(a) in a given case: see 23A/F.

35.
Lord Millet's analysis of the due process clause was later considered by the Board in State of Trinidad and Tobago v Boyce[2006] 2 AC 76. Lord Hoffmann, giving the judgment of the Board, identified two different meanings, one wider than the other, of the clause, at paras 13-14:

“13. … In one sense, to say that an accused person is entitled to due process of law means that he is entitled to be tried according to law. In this sense, the concept of due process incorporates observance of all the mandatory requirements of criminal procedure, whatever they may be. If unanimity is required for a verdict of a jury, a conviction by a majority would not be in accordance with due process of law. If the accused is entitled to raise a defence of alibi without any prior notice, a conviction after the judge directed the jury to ignore such a defence because it had not been mentioned until the accused made a statement from the dock would not be in accordance with due process of law.

But ‘due process of law’ also has a narrower constitutional meaning, namely those fundamental principles which are necessary for a fair system of justice. Thus it is a fundamental principle that the accused should be heard in his own defence and be entitled to call witnesses. But that does not mean that he should necessarily be entitled to raise an alibi defence or call alibi witnesses without having given prior notice to the prosecution. A change in the law which requires him to give such notice is a change in what would count as due process of law in the broader sense. It does not however mean that he has been deprived of his constitutional right to due process of law in the narrower sense.”

The particular issue in that case was the constitutionality of a statute which provided for an appeal by the prosecution against the acquittal of an accused person. The judgment continues at [16]:

“There is nothing particularly unfair or unjust about a statutory rule which enables an appellate court to correct an error of law by which an accused person was wrongly discharged or acquitted and order that the question of his guilt or innocence be properly determined according to law. Such a rule exists in many countries.”

The constitutionality challenge was rejected.

36.
In Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago[2005] 1 AC 190, para 88 the Board, echoing what Lord Diplock had stated in Maharaj v Attorney-General of Trinidad and Tobago (No 2)[1979] AC 385, emphasised that in determining whether a person has been deprived of their liberty by due process of law it is necessary to consider the legal system as a whole. In both cases this entailed taking into account the availability of judicial remedies.

37.
In Ferguson v Attorney General[2016] UKPC 2; [2016] 40 BHRC 715, which concerned the repeal of a statutory limitation period for prosecutions, the appellants, all of whom found themselves exposed to the criminal process in consequence, complained that the repeal was in breach of section 4(a). Lord Sumption, giving the judgment of the Board, observed at para 12 that the rule of law was the overarching principle engaged. Echoing other reported decisions he noted at para 14 that this Constitution had been fashioned according to the so-called “Westminster model”. It provided separately for the existence and functions of the principal institutions of the state namely the legislature, the executive and the judiciary. In this way the separation of powers was established.

38.
With specific reference to section 4(a), Lord Sumption described the treatise of Lord Millett in Thomas v Baptiste as the “classic statement of the principle”, observing at para 18:

“What is comprised in due process has never been exhaustively defined. But it has always been taken to include the resolution of justiciable issues by courts of law without interference by the executive or the legislature.”

The fundamental reason for rejecting the breach of section 4(a) complaint in Ferguson was that the legislation had not interfered with judicial proceedings to the extent of purporting to exercise an inherently judicial power. Furthermore, while under the previous statutory regime the appellants could not have been prosecuted:

“The right to be acquitted and discharged without trial and irrespective of innocence or guilt is not as such a right protected by section 4(a) or any other provision of the Constitution” (see para 35).

The Board further emphasised that the due process rights of the appellants would be guaranteed by their fair trial rights protected by the Constitution. Mere exposure to possible deprivation of liberty or property, each being a possible outcome in the event of a conviction, did not contravene their rights under section 4(a).

39.
The submissions of Mr Richard Clayton QC on behalf of the appellants focused mainly on the rule of law. This is most clearly expressed in the following excerpt from the appellants’ case:

“Due process rights must include the most basic of all requirements of the rule of law, namely to be treated in accordance with the legislative framework in force. However, this was rendered impossible by the executive’s unexplained failure to do what it was statutorily required to do, which was to give effect to sections 54(1) and 60(1) of the Children Act” (Original emphasis.)

Mr Clayton further submitted that this failure by the executive deprived the appellants of the benefits of the aforementioned two statutory provisions and diluted their right of access to the court.

40.
The emphasis in the submissions of Mr Howard Stevens QC on behalf of the respondents was on the judicial function triggered by the initial arrest and charging of the appellants and the fairness and propriety of the ensuing judicial process. In particular, Mr Stevens supported the reasoning of the Court of Appeal of Trinidad and Tobago at paras 110-112 of its judgment:

“110. Insofar as the Chief Magistrate is concerned, there is no issue of arbitrary or high-handed action on her part. As far as she was aware there were no community residences in existence to which she could remand the children. She had no discretion to grant bail or to release the children into the care of their mother. She considered the possibilities which were available to her and eventually remanded Brian to St Michael’s YTC and Sasha to the Women’s Prison. There is no question raised as to her bona fides in doing so.

111. In addition, no question has been raised that the Chief Magistrate did not constitute an independent and impartial tribunal. If the Chief Magistrate made an error of law in remanding the children to places which were not community residences then the legal system provides avenues of redress in the form of judicial review, or an appeal of the decision.

113. Likewise, there is no question of arbitrary or high-handed conduct on the part of the state or the Commissioner of Prisons in depriving the children of their liberty. No issue has been raised that there was a failure by the state or the Commissioner of Prisons to observe any rule of natural justice in depriving the children of their freedom. The issue that has been raised is whether the failure of the

state to provide licensed community residences suitable to accommodate the children at the time that the suite of children legislation was proclaimed amounted to a breach of the right to due process."

The Court of Appeal, focusing on the narrower meaning of due process expounded by Lord Hoffman in Boyce, reasoned and concluded, at para 115:

"The issue becomes whether the breach of the statutory mandate to place child offenders in community centres under the circumstances as they existed at the time renders the system of justice unfair. This court believes that the breach in these circumstances did not." (Emphasis added.)

The section 4(a) Ground: Conclusions

41.
The Board's analysis of the ambit and operation of the due process clause in these two cases is as follows. One element of the applicable laws, namely the Bail Act, required that the appellants be remanded in custody at all times. The orders which remanded both appellants to institutions other than those mandated by the Children Act were made by an independent, impartial and duly constituted court. The jurisdiction of this court extended to specifying the institutions in which the appellants were to be accommodated. There is no complaint about the procedural fairness or, indeed, any aspect of the conduct of the judicial proceedings. Nor is there any suggestion that the criminal justice protections to which the appellants were entitled were denied in any way. Furthermore, as in Lasalle, the absence of any suggested violation of any of the rights conferred on the appellants by section 5 of the Constitution is a material factor.

42.
The Board recognises that there were undeniable failings of significant dimensions on the part of the state throughout the relevant period. While the Board will examine the full legal outworkings of this in their consideration of the section 4(b) ground, one of its consequences was plainly detrimental to both appellants as they found themselves accommodated in institutions which were not suited to their ages and needs. However this, correctly analysed, was the deprivation of a substantive benefit which the Board considers remote from the due process clause in the circumstances of their cases.

43.
The Board considers that the due process clause is not designed to provide protection against this type of loss of benefit. Nor did the Chief Magistrate's inability to order the detention of the appellants in the kind of accommodation to which the newly commenced statutory provisions entitled them give rise to a breach of due process, for the reasons explained. Finally, the executive's failings did not impinge on the appellants' right of access to a court. As emphasised by the Court of Appeal, the remedies of an appeal against the offending remand orders of the Chief Magistrate and a challenge by judicial review proceedings, which could also (and did) encompass a constitutional challenge, were available to the appellants at all times and were pursued by them. The real mischief was constituted by a failing on the part of the executive which the Board will scrutinise more fully in its consideration of the section 4(b) ground of appeal.

44.
Accordingly, the Board would not disturb the decision of the Court of Appeal of Trinidad and Tobago on the section 4(a) ground.

The section 4(b) Ground

45.

The question raised by this ground is whether there has been a violation of the appellants' rights to the protection of the law guaranteed by section 4(b) of the Constitution. The appellants' case on this issue is based on both act and omission on the part of the executive. In short, the executive brought into operation the legislative protections for children in sections 54(1) and 60(1) and (5)of the Children Act without having first made provision for community residences as required by these legislative provisions. It was contended that the executive had acted arbitrarily. The appellants' submissions characterised the absolute prohibition on children being detained in an adult prison and the requirement for them to be detained in a community residence as foundational to the regime which applies to juveniles in the criminal justice system of Trinidad and Tobago. The other main ingredients in Mr Clayton's argument were the breadth of the constitutional language, the impingement on the separation of powers, the "friction" between the Bail Act and the relevant Children Act provisions, the impact which the executive's actions had on the discharge of the judicial function in remanding the appellants and the shortcomings in the remedies available to them in their combined judicial review and constitutional claims.

46.
Mr Stevens, responding, characterised the failing of the state as "administrative" in nature. He submitted that, having regard to significant matters of overlap between sections 4(a) and 4(b), the latter provision was not engaged in either appellant's case. His alternative submission was that adequate protection of the law for both appellants was available in any event by their access to the court in the combined judicial review and constitutional claims in pursuit of remedies which he contended were sufficiently prompt and efficacious.

47.
Mr Stevens' primary submission was founded on the decision of the Board in Central Broadcasting Services Ltd v Attorney General of Trinidad and Tobago [2006] 1 WLR 2891. Their Lordships consider that this decision does not support the argument. This case is quite different from the present appeals, entailing as it did an allegation of discrimination, giving rise to complaints of a breach of the appellants' right to equality before the law without discrimination contrary to section 4(b) and their right to equality of treatment from public authorities contrary to section 4(d). The complaint under section 4(b) was rejected on the ground that neither the law itself nor its administration by the courts was discriminatory of the appellants. It is in this context that Lord Mance, giving the judgment of the Board, stated at para 20:

"Section 4(b) is in the Board's view directed to equal protection as a matter of law and in the courts."

Four observations are apposite. First, the case in question concerned the equality before the law clause in section 4(b), rather than the protection of the law clause. Second, the whole of the passage in question is directed to the issue of discriminatory treatment. Third, Lord Mance was not purporting to formulate an exhaustive statement of the protections of section 4(b). Fourth, precisely the same analysis applies to the obiter statement of Lord Carswell in the case to which Lord Mance refers, Bhagwandeen v Attorney General of Trinidad and Tobago[2004] UKPC 21, para14.

48.
The Board has considered the leading cases in which section 4(b) has arisen. In Attorney-General of Trinidad and Tobago v McLeod the question was whether an Act of Parliament had been adopted in breach of the Constitution. The substantive issue was whether under sections 49 and 54 of the Constitution the statute was vitiated for want of a specified parliamentary majority. The Board resolved the appeal in favour of the Attorney General. While this disposed of the appeal, Lord Diplock,

giving the judgment of the Board, turned to consider section 4(b) in an obiterpassage beginning at 530A. The view expressed was that even if the statute in question had been adopted in breach of the Constitution, specifically the supremacy clause in section 2, this (at 531) -

"… deprives no one of the 'protection of the law', so long as the judicial system of Trinidad and Tobago affords a procedure by which any person interested in establishing the invalidity of that purported law can obtain from the courts of justice, in which the plenitude of the judicial power of the state is vested, a declaration of its invalidity that will be binding upon the Parliament itself and upon all persons attempting to act under or enforce the purported law. Access to a court of justice for that purpose is itself 'the protection of the law' to which all individuals are entitled under section 4(b)."

In the passage which followed Lord Diplock declined the invitation to supply a comprehensive definition of the expression "the protection of the law". In doing so he drew attention to the passage in Thornhill noted in para [23] of this judgment and, in particular, the words in parenthesis "(though not necessarily exhaustively)".

49.
In Attorney General of Barbados v Joseph and Boyce[2006] 69 WIR 104; [2006] CCJ 3 the Caribbean Court of Appeal devoted considerable attention to section 4(b) of the Constitution. In this case the Barbados Privy Council had tendered its advice to the Governor General (under section 78 of the Constitution) to execute the death sentences for murder which had been imposed upon two accused persons found guilty of murder in circumstances where their petitions to the Inter-American Commission on Human Rights for declarations that their rights under the American Convention on Human Rights had been violated remained undetermined. The act said to have been in breach of section 4(b) was that of the Privy Council tendering its advice to the Governor General rather than awaiting the outcome of the aforementioned process. The appellants succeeded before the Court of Appeal and the ensuing appeal by the Attorney General was dismissed.

50.
In so deciding the Caribbean Court of Justice expressed the view that the "protection of the law" clause is of "wide scope", at para 62. The court opined that Lord Millett's formulation relating to "due process of law" in Thomas v Baptiste was equally applicable to the protection of the law clause: see paras 64 and 67-70. They found support for this in the judgment of the majority of the Board in Lewis v Attorney General of Jamaica [2000] WIR 275; [2001] 2 AC 50. Interestingly, all of the cases to which the judgment refers at paras 61-66 were in essence concerned with procedural unfairness. However, reading the judgment as a whole, the court was clearly not espousing the thesis that the reach of section 4(b) is restricted in this way.

51.
The section 4(b) jurisprudence was developed in a further decision of the Caribbean Court of Justice, The Maya Leader's Alliance v Attorney General of Belize [2015] CCJ 15. The Board would offer the following summary of this lengthy judgment:

i)
The right asserted by the appellants, namely a right to protection of Maya customary land tenure, was protected by the relevant provisions of the Belize Constitution.

ii)
By section 3(a) of the Constitution of Belize every person in Belize enjoyed, amongst other "fundamental rights and freedoms of the individual … the protection of the law".

iii)
While this right has “traditionally” been considered to guarantee access to courts and tribunals which are independent and impartial, the court considered this an unduly “narrow interpretation”: see paras 39-41.

iv)
The right to protection of the law encompasses “access to and the enjoyment of the fundamental rules of natural justice”: see para 42.

v)
This right “… goes well beyond the issue of access to judicial or quasi-judicial proceedings”: para 44.

vi)
It is a “broad spectrum right”: para 45.

vii)
This right also “… encompasses the international obligations of the state to recognise and protect the rights of indigenous people … to honour its international commitments” see para 52.

52.
The judgment of the court, which was unanimous, contains the following passage of particular note, at para 47:

“The law is evidently in a state of evolution but we make the following observations. The right to protection of the law is a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property. It encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights. However the concept goes beyond such questions of access and includes the right of the citizen to be afforded ‘adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power’ [Attorney General v Joseph and Boyce at para 20]. The right to protection of the law may, in appropriate cases, require the relevant organs of the state to take positive action in order to secure and ensure the enjoyment of basic constitutional rights. In appropriate cases, the action or failure of the state may result in a breach of the right to protection of the law. Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the citizen’s rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy.”

The court concluded that the Government of Belize had contravened the constitutional right of the appellants to the protection of the law on account of its failure to take appropriate positive measures to provide practical and effective protection for the substantive constitutional right in play, specifically - in the language of para 59 - “the obligation to put in place special measures to give recognition and effect to these rights so that the protection of the law can be enjoyed”. The court decided that the remedy of non-pecuniary damages was appropriate.

53.
The most recent judicial learning on this subject is found in Maharaj v Prime Minister (Trinidad and Tobago) [2016] UKPC 37. There the meaning and ambit of section 4(b) were considered in a context

where the appellant had established before the Court of Appeal that his non-reappointment to the Industrial Court had been procedurally unfair. The appeal to the Board arose out of the Court of Appeal's determination to grant the appellant declaratory relief only and reject his claim for damages. The appellant made the case that his right to "the protection of the law" under section 4(b) had been violated.

55. Lord Kerr, delivering the unanimous judgment of the Board, quoted with approval the passages in Joseph and Boyce and Maya Leaders noted above. In doing so he noted at para 25 the "expansive approach" which these decisions demonstrated. At paras 37-40 Lord Kerr dilated on the scope of section 4(b). The central theme of these passages and the later passage at para 43 is that, while the right to the individual's protection of the law is capable of being fulfilled by the availability of an efficacious and timeous remedy through judicial proceedings, a breach will arise where the remedy "cannot be or is not provided": para 40. The Board considers these words to be of some importance. The "cannot be" scenario will typically arise in a case where the affected person has not initiated legal proceedings because no appropriate remedy is available. In contrast, the "is not" scenario will normally arise in a case where the person concerned has indeed pursued legal proceedings in which event the focus will be on an adverse outcome or whether any remedy secured thereby was both prompt and efficacious.

The Rights of Children

54.
A significant contextual feature of this case is that the relevant provisions of sections 54 and 60 of the Children Act were intended to give domestic effect to internationally recognised rights embodied in the United Nations Convention on the Rights of the Child ("UNCRC"), which was ratified by Trinidad and Tobago in 1991. Article 37(c) of UNCRC provides:

"Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances."

55.
Article 37(c) of UNCRC must be considered in the context of the Convention as a whole. UNCRC, at its most basic level, recognises the imperative of making special provision for one of the most vulnerable cohorts of society, namely children. It does so on a universal basis. It proclaims in its Preamble that every child "needs special safeguards and care". It further declares that every child "should be fully prepared to live an individual life in society". It also draws attention to "the importance of the traditions and cultural values of each people for the protection and harmonious development".

56.
The context in which article 37(c) falls to be considered also includes the special treatment for children involved in the criminal justice system devised by the Convention. Article 37(c) forms one part of this discrete equation. But it is far from free standing. It is buttressed by, for example, the requirement in article 37(a) limiting the imposition of both capital punishment and life imprisonment on children and article 37(b) which stipulates that the arrest, detention and imprisonment of a child is appropriate "only as a measure of last resort and for the shortest appropriate period of time". Further fortification is provided in article 37(d), namely by the right to prompt access to legal and other

appropriate assistance and the discrete right to challenge deprivation of liberty by recourse to an independent and impartial authority.

57.
The special treatment to be accorded to children in the criminal justice system is reflected in other international instruments. The most prominent of these is probably the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the “Beijing Rules”), adopted by General Assembly Resolution 40/33 of 29 November 1985. Its provisions address a wide range of issues such as privacy, due process guarantees, special training for the police and diversionary measures. Rule 13, under the rubric “Detention Pending Trial”, has a series of prescriptions:

“13.1 Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.

13.2 Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.

13.3 Juveniles under detention pending trial shall be entitled to all rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations.

13.4 Juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.

13.5 While in custody, juveniles shall receive care, protection and all necessary individual assistance-social, educational, vocational, psychological, medical and physical-that they may require in view of their age, sex and personality.”

Notably, the prohibition in rule 13.4 is expressed in absolute terms, a feature which the following Commentary reinforces:

“no minors shall be held in a facility where they are vulnerable to the negative influences of adult detainees and … account should always be taken of the needs particular to their stage of development.”

Similarly, the requirements of rule 13.5 relating to (inter alia) social, educational and vocational facilities are expressed in terms which admit of no exception.

58.
At first instance, Kokaram J, at para 88ff, devoted much attention to the topic of children in the criminal justice system. The judge’s reflections ranged from the UNCRC to V v United Kingdom(1999) 30 EHRR 121, yielding the conclusion at para 101:

“There is a sound legal basis therefore to recognise the child as a special class of person deserving of protection.”

Turning to these two cases, the judge continued at para 79:

“I am not encouraged by these stories of BS and SS as two youths in our criminal justice system. The respective stories of these children are one of fear, anxiety, shame, anger, frustration and despair. This is not the story one would expect to hear of children being rehabilitated and who are presumed innocent of any crime. These stories do not demonstrate that the youths are being removed from a criminogenic setting or are being encouraged, nurtured, protected and loved. Quite the opposite. They were in an environment that bred criminality in the case of SS or exposed their vulnerability in

the case of BS. It is the type of environment which may develop criminals of young children by failing to provide systems to support deficiencies in their development and behaviour."

59.
While the Board is mindful that the trial judge's finding that each appellant had been subjected to cruel and unusual treatment contrary to section 5(2)(b) of the Constitution was reversed on appeal, this was on the basis of the appellate court's assessment that the treatment did not attain the minimum level of severity: see paras 133-142. The passage quoted above was neither criticised nor challenged.

Was section 4(b) violated in this case?

60.
The Board considers that in any case where the court is required to determine whether there has been a breach of the protection of the law clause in section 4(b) of the Constitution of Trinidad and Tobago, it is necessary first to identify, and then evaluate, all material facts and considerations. Material in this context denotes those matters which have a bearing on the question of whether the right protected has been breached. This will in every case be a fact sensitive and case specific question.

61.
In determining whether the rights of the appellants to "the protection of the law" were violated in the present cases, three aspects of the "law" are relevant. The first of these, substantive in nature, consists of sections 54(1) and 60(1) and (5) of the Children Act. While the executive had evidently been content to leave these provisions dormant on the statute book for a period of some years, they were brought into immediate effect, by the Presidential Proclamation, on 18 May 2015. From that date the relevant provisions of the Constitution had to be construed and applied to accommodate this significant development in the laws of the state.

62.
The second relevant aspect of the "law", procedural in nature, is the law of Trinidad and Tobago which provided for recourse to the High Court by the appellants in a joint judicial review and constitutional challenge. This was made possible by a combination of the Judicial Review Act and the Constitution itself. While within the ambit of these discrete laws each of the appellants enjoyed a series of rights, springing from their basic rights to a fair hearing and those of the due process variety considered ante, none of these is in issue in these appeals. The third element of the relevant "law" is the Bail Act.

63.
The Board would draw together the material facts and considerations in the following way. First, sections 54(1) and 60(1) and (5) of the Children Act, couched in mandatory terms, were plainly designed to provide persons such as the appellants with substantive benefits and protections which the legislature had deemed necessary. These statutory provisions failed the appellants as they were impotent throughout the periods under scrutiny.

64.
Second, this failing had a single cause, namely the failure of the executive to ensure that at the time of bringing these provisions into operation the requisite detention facilities were in place, a failure which continued thereafter.

65.
Third, the executive's aforementioned failure was in clear defiance of what Parliament had laid down in the legislation. The purpose of the legislation was frustrated by the executive's failure to ensure that, once commenced, it would have immediate and practical effect. The conduct of the executive, consisting of both acts and omissions, obstructed the proper operation of the legislation. Their Lordships consider that the conduct of the executive was not harmonious with the separation of powers.

66.
Fourth, one major consequence of the executive's conduct was that the Chief Magistrate was driven to make successive remand orders which were unlawful. This is a matter of unquestionable gravity. The Chief Magistrate was precluded from remanding the appellants to community residences because none had been provided by the executive. In this way the Chief Magistrate was compelled to discharge the judicial function in a manner which failed to give effect to the will of the legislature. In this respect also the conduct of the executive was antithetical to the separation of powers.

67.
Next it is relevant to consider whether the executive offered any defence of or justification for its conduct. There was none. The short affidavit sworn by a government official in the judicial review proceedings outlines, via a brief timeline, what was done but not why. Notably the affidavit was not based on the personal knowledge of the deponent. Rather its contents were founded on her examination of the material records of the ministry concerned. The affidavit exhibited no documents. Fundamentally, it provided no explanation of the executive's selection of 18 May 2015 as the date for the Presidential Proclamation bringing the relevant statutory provisions into operation or its failure to have the necessary detention facilities in place.

68.
Furthermore, the conduct of the executive was incompatible with a series of international law provisions and standards. In particular, it had the effect of stultifying the operation of article 37(c) of UNCRC which had progressed from being an unincorporated provision of international law to a provision of duly enacted domestic primary legislation in the legal system of Trinidad and Tobago. In addition, the state of affairs brought about by the executive's unlawful acts and omissions was in conflict with the Beijing Rules.

69.
Finally, it is necessary to consider the impact of the executive's conduct on the two children concerned. This had both legal and factual elements. The legal element is that the conduct was an interference with the liberty of the appellants. It is no answer to suggest that deprivation of their liberty was inevitable by reason of the Bail Act as the legislature had prescribed how the deprivation of their liberty was to operate. Furthermore, although the fact that they would have been detained in any event is a relevant factor, the right to be detained in a designated place with a particular environment, culture, conditions and facilities is an aspect of the fundamental right to liberty which the Constitution of Trinidad and Tobago protects. For example, if house arrest were permitted by a given law the detention of a person in prison would engage the protection of the law under the aegis of their right to liberty. (Compare for example R v Pinder, Re Greenwood(1855) 24 LJQB 148 and In re S-C (Mental Patient: Habeas Corpus) [1996] QB 599.)

70.

The factual dimension of the relevant acts and omissions of the executive concerns the resulting adverse impact on the two appellants. It is no answer, in this respect, that the domestic courts ultimately found that they had not suffered cruel and unusual treatment. That is not the applicable benchmark in this context. Indeed, a breach of section 54(1) or section 60(1) or (5) of the Children Act would readily give rise to a presumed adverse impact on the child concerned. However, resort to presumptions is unnecessary given the extensive evidence before their Lordships of the appellants' conditions of detention and the assessment of Kokaram J highlighted above. In short, as regards the children, the consequences of the executive's conduct cannot be dismissed as trivial or technical. They were, rather, real and substantial.

71.
The Board considers that all of these matters, assessed in the round, amounted on their face to a serious failure to afford to the appellants the protection of the law to which they were entitled. To determine, however, whether there has been a breach of the appellants' rights under section 4(b), it is also necessary to consider the legal proceedings brought on their behalf and in particular the question of prompt and efficacious redress. In the case of Sasha, an effective judicial remedy ultimately materialised insofar as she was transferred from the Women's Prison to a community residence but not until some seven months had elapsed following the date when the material statutory provisions had become operative. No redress was provided for that seven month period of unlawful detention in an adult prison. In the case of Brian, the corresponding period of unlawful detention in an unauthorised facility was considerably longer, though exactly when it ended is unclear. As noted, he was at no time accommodated in a licensed community residence as required by the Children Act.

72.
The Board recognises the priority and expedition accorded by the courts of Trinidad and Tobago following the initiation of the joint judicial review and constitutional claims. Standing back, however and viewed through the eyes of two teenagers, the relevant periods were of substantial dimensions. In the case of Sasha, while a judicial remedy was secured it cannot be considered prompt and efficacious in the particular circumstances. In the case of Brian, no judicial remedy was provided for the failure of the executive to provide him with the accommodation mandated by the legislation. Interim relief orders had limited practical effect. His ultimate transfer to a different institution was by voluntary act of the executive and did not rectify the illegal aspect of his detention. The Board is mindful that during at least part of the period the legal system began to provide Brian with some degree of protection, having regard to the involvement of the Children's Authority and its interaction with the Chief Magistrate. This did not, however, neutralise the absence of a prompt and efficacious judicial remedy or rectify the unlawful character of his detention.

73.
The Board would summarise the relevant acts and omissions of the executive and their consequences in the following way. Fundamentally, the executive brought into operation the material provisions of the Children Act without having first put in place the arrangements necessary to give effect to their mandatory requirements, in a context where the intended beneficiary cohort of these measures, namely children, had been identified by both international law and domestic law as deserving of special protection. This had a series of substantial consequences: the operation of several interrelated provisions of primary legislation was rendered impotent during a protracted period; the aforementioned cohort was deprived of the benefits and protections prescribed by the legislature; international norms were violated; the appellants were thereby exposed to conditions, environments and influences which the frustrated legislative provisions were designed to avoid; the Chief

Magistrate was compelled to make a series of unlawful remand orders; the Appellants were deprived of their liberty pursuant to such orders; and the legal system of Trinidad and Tobago did not provide them with timeous and efficacious remedies. Finally the executive has failed to offer any explanation of, much less any justification for, its acts and omissions. Taking into account all of the foregoing, the Board considers that the exercise by the executive of its legal powers was arbitrary, as the appellants contend.

74.
In the Board's view the combination of facts and considerations highlighted in paragraphs 64 - 75 amounted to a violation of one of the core values of the Constitution of Trinidad and Tobago. In this case neither the substantive provisions of the law of the state nor the arrangements within the legal system of Trinidad and Tobago for redress provided these appellants with the "protection of the law" guaranteed by section 4(b) of the Constitution, for the reasons given.

Conclusion

75.
The Board accordingly concludes that the appeal should be allowed on the section 4 (b) ground. The appellants are entitled to declarations that their unlawful remands to, respectively, (as regards Sasha) the Women's Prison and St Jude's Home For Girls and (as regards Brian) the YTC and St Michael's Home For Boys violated their right to the protection of the law guaranteed by section 4(b) of the Constitution. The question of damages, if not agreed, should be remitted to the High Court for assessment in the light of this judgment.