COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Public Law Division
2006/PUB/con/0001

**IN THE MATTER OF ARTICLES 15(A), 17(1), 19(1) (3) AND 28(1) OF THE CONSTITUTION**

**BETWEEN:**

**FEIZAL KHAN**

**Applicant**

**AND**
**COMMISSIONER OF POLICE**

**1st Respondent**

**DIRECTOR OF IMMIGRATION**

**2nd Respondent**

**SUPERINTENDENT OF H.M. PRISONS**

**3rd Respondent**

**ATTORNEY GENERAL**

**4th Respondent**

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| Before: | The Hon. Mr. Justice Loren Klein |
| Appearances: | Mr. Gregory Armbrister for the Applicant |
| | Mr. Kirkland Mackey with Ms. Raquel Whyms for Respondents |
| Hearing Date: | 8 June 2020, 15 February 2021, 29 July 2021 |

## RULING

**Klein, J.**

*Constitution—Alleged breaches of Fundamental Rights—Articles 15(a), 17(1) 19(1)(3), 28(1)—Applicant arrested on suspicion of having committed bribery offences—Served with deportation Order under the hand of the Minister—Applicant discharged pursuant to Habeas Corpus application after a period of three and a half months in detention—Applicant re-arrested on the same day of his discharge for same offences and detained for approximately 13 months pending trial—Applicant acquitted following trial—Whether second arrest and detention lawful—Evidence Act—Effect of prior Judgment having a directed bearing on issues in current application—Unlawful arrest—False Imprisonment—Malicious Prosecution—Assessment of Damages—Whether compensation to be assessed on a per diem basis or in the round—Constitutional relief—Proviso to Article 28(2)—Adequate alternative relief—Abuse of Process—Article 15—Whether any justiciable rights created—Costs—Criminal matters—Whether possible to be claimed as special damages*

### INTRODUCTION

1. The applicant in this matter is a Guyanese citizen by the name of Feizal Khan—although he first introduced himself into this territory under the fictitious name of Umkan Roopnarine. But nothing turns on the issue of identity for the purposes of these proceedings.

2. In these proceedings, commenced by Notice of Originating Motion ("Motion") originally filed from as far back as 12 January 2007 (amended 30 May 2007), Mr. Khan claims damages, including aggravated and exemplary damages, for alleged breaches of various constitutional rights, including unlawful arrest and detention, and the torts of false imprisonment and malicious prosecution.

3. The claims stem from his arrest on 12 January 2006 and subsequent detention, apparently on suspicion of having committed bribery offences. However, he was not formally charged with those offences until 28 April 2006. He was eventually tried before the magistrate's court and acquitted of the charges on 21 May 2007. Mr. Khan was therefore held in custody, either at a police station or at Her Majesty's Fox Hill Prison ("HMP"), for the period from 12 January 2006 to 21 of May 2007 (nearly 17 months).

4. There is, however, an important detail to be added to the history of the applicant's detention. On the 25 April 2006, the Supreme Court granted a writ of *habeas corpus ad subjiciendum* ("*habeas corpus*") in respect of his arrest and detention from the 12 January 2006, ruling that his detention up to that point was unlawful. This is significant to the legal issues which the court has to decide in this case, and I will return to it.

**Factual and procedural background**

*The "first" arrest*

5. The applicant was "first" arrested in New Providence on 12 January 2006, apparently on reasonable suspicion of having committed bribery offences. He was initially taken to Central Police Station ("Central") where he was charged with the offence of bribery and where he remained for 15 days before being taken to HMP, where he was detained until the 25 April 2006. He was released pursuant to a writ of *habeas corpus*, granted on 25 April 2006 by Snr. Justice J. Isaacs, as he then was.

*The "second" arrest*

6. He was re-arrested on the same day of his discharge and charged with the following offences: (1) conspiracy to commit bribery contrary to ss. 3(1) (a) and 10 (b) of the *Prevention of Bribery Act* (2 counts); and (2) bribery contrary to ss. 3(1)(a) and 10(b) of the Act (2 counts). He was remanded into custody at HMP by the Magistrate's Court, where he remained until his trial for the offences. He was acquitted of all the charges after a trial on 21 May 2007. According to one of the respondent's affidavits, he was discharged due to "lack of evidence", but the Magistrate's order/decision was not in evidence before this Court.

7. Immediately following his discharge, he was turned over to Immigration authorities and deported to Guyana, via Kingston, Jamaica, on 24 May 2007.

*Prior arrests*

8. Although the above events are described in the applicant's submissions as the "first" and "second" arrests, as will come to be explained, the arrests of 12 January and 25 April 2006 were not the applicant's first entanglement with immigration and police authorities in The Bahamas. It appears he first attempted to land on 24 November 2005, on arrival from Jamaica, but was refused entry and deported. On 4 December 2005, he made another attempt to enter The Bahamas and was landed by an immigration officer, travelling under the name of Umkan Roopnarine, who was said to be a Guyanese citizen with a date of birth of 1 October 1969. He was arrested shortly after clearing Immigration by police and detained, when it was discovered that the passport under which he was travelling was fraudulent, and that he was in fact Feizal Khan, a Guyanese citizen whose date of birth appears as 23 May 1972 in his passport.

9. Based on information given to the police, and as detailed in several of the affidavits filed by the respondents, it came to light that the applicant had previous criminal convictions in the United States for which he had been deported. He was arrested in New York in 1996 and convicted of possession of a silencer, distribution of cocaine and importation/manufacture of firearms, for which he was sentenced to 30 months in prison in the United States ("US"). He was deported to Guyana on 29 March 2005 from the US. Determined to return to the US, he made several attempts to do so following his deportation, one through Canada, as a result of which he was detained in Canada for three and a half months before being deported to Guyana in November of 2005. Apparently, it was in Canada that he heard from other immigrants in the system that it was easy to cross over to Miami from The Bahamas.

10. Following his arrest in December of 2005, he was taken into custody and charged with the offence of possession of a forged document, namely the fraudulent passport. He appeared in Magistrates' Court No. 3 on 7 December 2005 to answer the charges, where he elected a summary trial and pleaded guilty. He was convicted, fined $1,000.00 and detained in the Detention Centre awaiting deportation. On 6 January 2006, he was deported to Jamaica. It is alleged, however, that it was during the period of his initial detention on the fraudulent document charges that he made contact with several persons and put in motion a criminal scheme which involved paying co-conspirators, including at least one local law enforcement official and several foreign persons, to smuggle him into the United States. These were the charges which formed the basis for his arrest on the 12 January 2006, when he returned to put his plan in action, and which led to his subsequent detention and the magistrate's proceedings, on which the claims for maliciously prosecution are predicated.

*The current application*

11. As noted, the applicant commenced the current claim on 30 May 2007, by way of amended notice of motion ("the Motion"). The Motion is rather disparately pleaded, but the main claims were false imprisonment and malicious prosecution based on the bribery charges, as well as several

constitutional claims. By Order of the then Chief Justice, dated the 13 June 2008, the notice of motion was ordered to continue as if it had been begun by writ and the affidavits ordered to stand as pleadings.

12. The facts and claims pleaded in the motion may be summarized as follows. The applicant was arrested on 12 January 2006 by police and taken to Central, where he told he was arrested in relation to bribery offences and subsequently charged with those offences. He was held in custody at Central for 15 days, and on the 27 January 2006 was served with a deportation order and taken to HMP that same day where he was detained. He was not (at this point) charged before the Courts with the bribery offences, and neither was there a committal warrant or order committing the applicant to prison after his arrest on 12 January 2006.

13. On 25 April 2006, the applicant was released pursuant to an order of Isaacs Snr. J, on a habeas corpus application. However, he was re-arrested that same evening and taken again to Central, where he was charged with the offence of bribery, and formally arraigned before the Magistrate's Court on 28 April 2006. He remained in detention at HMP until the 21 May 2007, when he was acquitted of the charges following his trial, and was handed over to immigration officials and deported on 24 May 2007.

14. The applicant claims that his "*detention and imprisonment …from the 12 January 2006 up to 21 May 2007…amounted to false imprisonment as there was no legal basis for his imprisonment*" (para. 23 of the motion). In this regard, it is claimed that the initial arrest was never supported by any judicial order and that his re-arrest following his release on the same particulars that formed the basis of his initial arrest was also unlawful, as there was in force a habeas corpus order. He also claims that during his detention at Central and at HMP he suffered degrading and/or inhuman treatment by, *inter alia*, sleeping in an overcrowded cell with others, the lack of bed and toilet facilities, and prolonged confinement to a cell.

15. In addition, he claimed that charging him for "…*bribery amounted to a (sic) abuse of process of the law and malicious prosecution…"* (para. 17). His primary basis for claiming malicious process is the assertion that the *habeas corpus* order, which discharged him on the basis that his detention was unlawful up to that point, immunized him from re-arrest on the same grounds unless the order was vacated or set aside by the court, which did not occur.

16. As result, he seeks the following declarations:

> "1. That Articles 15(a), 17(1) and 19(1), (3) and 28(1) of the Constitution have been breached by the Respondents.
>
> 2. The breach of the Applicant's Constitutional rights meet the criteria for an award of exemplary/vindicatory damages.
>
> 3. That the 1st 2nd 3rd and 4th Respondents have committed the nominate torts of false imprisonment and malicious prosecution."

17. In addition, he claimed damages for: (i) false imprisonment; (ii) malicious prosecution; (iii) breach of constitutional rights; (iv) exemplary/vindicatory damages for the actions "*of officers and servants of the state*"; and (v) for "*…professional expenses incurred in defence of his [the Applicant's] liberty in the Magistrates Court and the Supreme Court*."

18. The respondents filed a defence on 30 July 2007, for which they had been granted an extension of time. They did not deny that the applicant was detained for 15 days in Central, but they denied that he was subject to degrading and inhuman conditions. Further, they denied that there was no order committing the applicant to prison on his arrest on the 26 January 2006, but this appears to be a reference to the deportation order of 25 January 2006, which was the subject of the *habeas corpus* ruling (see further below).

19. By way of positive defence, the respondents stated that "*…the applicant was in lawful custody from the 25th of May 2006 to 21st May 2007*." (The reference to 25 May 2006 appears to be a mistake, and it was intended to say "*April*", as appears from the rest of the pleadings and affidavits.) They denied that the applicant's re-arrest was in violation of the habeas corpus order, or made the applicant's arrest unlawful, as "*…it [the habeas corpus order] was before he was charged with the offence of bribery and, therefore, it did not apply after he was charged on the 25th April 2006*." Further, they denied that the prosecution of the applicant was malicious or an abuse of the process of the court, as "*…the police was acting on information which was believed to be truthful and correct*." As a result, they denied that the applicant was entitled to the relief claimed or any relief for malicious prosecution.

*The habeas corpus application*

20. As mentioned, on 25 April 2006, the applicant was discharged on a writ of *habeas corpus* by Isaacs J. (Jon) (as he then was) on the grounds that his detention up to that point was unlawful, mainly for procedural reasons. There was a written decision dated 9 May 2006 in respect of that order: **Khan v Superintendent of Prisons and others** [2006] BHS J. No. 120 (2006/ CRI/HCS/0005).

21. The judge accepted that there was some ambiguity over the basis for the applicant's detention and that while he was ostensibly held pursuant to a deportation order (as stated in the return), it appeared that he may have also been detained with a view to the institution of criminal charges against him. Astonishingly, the judgment records (pg. 6) that counsel for the Attorney General admitted that the deportation order was a "subterfuge" for further criminal investigations and pending criminal charges. However, the court found that the detention was unlawful because the deportation order was invalid on its face for failure to comply with the provisions of the Immigration Act, in particular for omitting timeliness for deportation, and for failure to bring the applicant before the Court.

22. Furthermore, the Court found that even if the authorities had an eye to prosecuting him on bribery charges under the Prevention of Bribery Act, he was held without being formally charged and without a valid warrant of committal, and that in any event he could not be held longer than three days in the absence of a fiat from the Attorney General (section 23(2) of the Act). The judgment emphasized that detention or arrest with a view to deportation without being taken before a court is not permissible, and that any exercise of the power to detain must strictly comply with statutory requirements (citing the Court of Appeal Case of **Takitota v Attorney General et al.,** SCCivApp No. 54 of 2004).

23. This is what the court said in the habeas corpus judgment about the deportation order:

> "I return to the matter of the validity of the deportation order. Section 40 of the Act states, *inter alia*, that '…the Minister may make an order (hereinafter referred to as a deportation order) requiring such persons to leave within the time fixed by the deportation order and thereafter to remain out of The Bahamas.' This section was section 36(1) of the 1967 Immigration Act (as amended). This provision requires the Minister to fix a time period, e.g., seven days or fourteen days, for the person to leave under his own steam if he has the wherewithal to do so or through the assistance of the State if he does not.
>
> The Governor-General is authorized by section 41(4) (formerly section 37(4)) of the Act to order the detention of any person in whose case a deportation order is made. This means that the Governor-General's authority to detain is contingent upon the existence of a valid deportation order. If the deportation order is deficient, e.g., it fails to fix a time pursuant to section 40, then anything done under such order cannot be authorized. Unfortunately, I am compelled to conclude that the precondition necessary for the Governor-General to exercise his authority to order the Applicant's detention, a valid deportation order, did not exist. The detention of the Applicant cannot be maintained under the document headed "Deportation Order—General" exhibited to Mr. Ward's affidavit.
>
> The Order is bad on its face and hence it cannot authorize the detention of the Applicant even if I had not concluded that the Order was spent. It is for these reasons that I ordered the Applicant to be discharged from custody."

*Case Management*

24. Naturally, the applicant sought to make heavy weather of this judgment in his claim, and at a case management conference sought to move an application pursuant to ss. 117 to 121 of the *Evidence Act* for the *habeas corpus* judgment to be admitted in these proceedings. In particular, reliance was placed on ss. 118 and 121, which provide as follows:

> "118. Every judgment is conclusive evidence against all persons of the legal result which it effects.
>
> 121. (1) Every judgment is conclusive proof in all subsequent proceedings between the same parties or their privies, of facts directly in issue in the case actually decided by the court, but not of facts

which are only collaterally or incidentally in issue, even though the decision of such facts was necessary to the decision of the case.

(2) In order to prove that such fact was directly in issue, evidence may be given—
(a) of the judgment itself;
(b) of observations made by the court in delivering the judgment;
(c) of the proceedings in the case prior to the judgment."

25. The respondents did not object to the admissibility of the judgment as evidence directly relevant to the legality of the applicant's detention during the first period of detention. In fact, they conceded, based on the *habeas corpus* judgment, that the detention of the applicant during the first period was not legally justified, although they did not concede that the applicant was subjected to degrading or inhuman treatment as a result.

26. To expedite the hearing, in particular having regard to the long gestation of the matter, counsel for both parties agreed to proceed on the affidavit evidence filed before the Court, and the Court accordingly exercised its powers pursuant to *R.S.C. Ord. 31A, r. 18(2)(p),* and *Ord. 38, r. 2(1).*

**DISCUSSION AND ANALYSIS**

*The Applicant's submissions*

27. As mentioned, the applicant's claims and submissions rely to a great extent on the successful *habeas corpus* application and the background to that. He contends that his arrest on 12 January 2006 was "*without reasonable suspicion*" for the offence of bribery and, that in any event, the applicant should have been charged with bribery before the courts in compliance with s. 23 of the *Prevention of Bribery Act* ("the Bribery Act"). The relevant portion of that Act (s. 23) prohibits the prosecution of a bribery offence without the consent (fiat) of the Attorney General, and provides that no person shall be remanded in custody or on bail for longer than three days pursuant to such an offence unless in the meantime the consent of the AG is obtained. He submits therefore that the arrest and detention of the applicant was unlawful (as already found by the Supreme Court) and that this also amounted to a breach of the applicant's constitutional rights under articles 15(a) and 19(3) of the Constitution.

28. Further, to the extent that reliance was placed on the deportation order for the applicant's detention, it is submitted that the order failed to comply with the strict requirements of s. 40, which rendered it defective. In this regard, the applicant relies primarily on the *habeas corpus* judgment, which referred to and cited the principle from the Court of Appeal case in **Takitota v Attorney General et al.** (*supra*) that "*Detention or arrest with a view to deportation without being taken before a Court is not permissible*".

*The second arrest*

29. With respect to the second arrest and period of detention, the applicant argues that his arrest on the 25 April 2006 was "without reasonable suspicion". Further, as it was based on the same particulars that formed the basis of his initial arrest, he contended that "*it put the applicant in double jeopardy and was unlawful, as there was in force and effect a release Order issued on an application for a writ of habeas corpus ad subjiciendum*."

30. For this proposition, the applicant relied on s. 5 of the *Habeas Corpus Act* 1679 (Ch. 63) and the decision of the House of Lords in the historic case of **Cox v Hakes** (1890) 15 App Cas 506. Section 5 of the *Habeas Corpus Act*, so far as is material, and reproduced in its original form, provides as follows:

> "…noe person or persons which shall be delivered or sett at large upon any habeas corpus shall at any time hereafter bee againe imprisoned or committed for the same offence by any person or persons whatsoever other than by the legall order and processe of such court wherein he or they shall be bound by recognizance to appeare or other court having jurisdiction of the cause….".

31. Counsel for the applicant also referred to the speech of Lord Halsbury in **Cox v Hakes**, which he submitted was authority for the proposition that once a person is released from detention on a *habeas corpus* application, he cannot again be charged with the same offence and there is no right of appeal from a discharge. Reference was also made to para. 21 of the PC's decision in **The Superintendent of Her Majesty's Foxhill Prison and Anor. V Viktor Kozeny** [2012] UKPC 10 ("*Kozeny*").

32. In **Cox v Hakes**, Lord Halsbury said (at p. 514):

> "My Lords, probably no more important or serious question has ever come before your Lordship's house. For a period extending as far back as our legal history, the writ of habeas corpus has been regarded as one of the most important safeguards of the liberty of the subject. If upon the return to that writ it was adjudged that no legal ground was made out in to appear justifying detention, the consequence was immediate release from custody. If release was refused, a person detained might -- see *Ex parte Partington* 13 M&W 679. 684 – make a fresh application to every Judge or every Court in turn, and each Court or Judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge. If discharge followed, the legality of that discharge could never be brought in question. No writ of error or demurrer was allowed: *City of London's Case* 8 Rep 121 b."

33. In **Kozeny**, the Privy Council said (at 21):

> "The prerogative writ of habeas corpus was a summary and final process. Historically, once discharged pursuant to a writ of habeas corpus, a detainee was entitled to his liberty and the legality of that discharge could not be brought into question: section 5 of the Habeas Corpus Act 1679. The detainee relies upon the decision of the House of Lords in *Cox v Hakes* (1890) 15 App Cas 506 for the proposition that, at common law, where a person has been discharged under a writ of habeas corpus, in the absence of an express statutory provision, the Court of Appeal has no authority to entertain an appeal by the detainer. The Board accepts that, by a majority of five to two, *Cox v*

*Hakes* is indeed authority for that proposition: see in particular, per Lord Halsbury LC at p 514 and 522, Lord Bramwell at p 525 and Lord Herschell at p 534."

34. These authorities, says the applicant, illustrate that there was a violation of the constitutional principle governing the finality of *habeas corpus* orders.

*Malicious prosecution*

35. As to malicious prosecution, the applicant relies on a number of cases and textbooks for the elements of the tort. For example, reference was made to *Clerk & Lindsell* on Torts, 23rd ed., which listed the elements of the tort and the factors which the claimant must prove as follows: (i) that he was prosecuted by the defendant; (ii) that the prosecution terminated in his favour; (iii) that it was without reasonable and probable cause; and (iv) that it was malicious.

36. Counsel for the applicant also referred to **Trevor Williamson v The Attorney General of Trinidad and Tobago** [2014], where the Privy Council stated:

> "11. In order to make out a claim for malicious prosecution, it must be shown among other things, that the prosecutor lacked reasonable and probable cause for the prosecution and that he was actuated by malice. These particular elements constitute a significant challenge by way of proof. Is has to be shown that there was no reasonable or probable cause for the launch of the proceedings. This requires the proof of a negative proposition, normally among the most difficult of the evidential requirements."

37. Based on the applicable principles, the applicant submits that he is able to establish the elements of malicious prosecution as follows (summarized):

(i) There was no reasonable and probable cause to prosecute the applicant "*in the absence of the Attorney General's fiat within three days of FK's initial arrest*";
(ii) FK was subject to losing his liberty and was put to expense to defend his liberty;
(iii) The prosecution terminated in favour of FK;
(iv) The admission of counsel for the 4th Respondent that the deportation order was a "subterfuge" is evidence of bad faith of the prosecution against the applicant.

38. The reference to "subterfuge" appears to be a reference to a passage in the *habeas corpus* judgment, as follows:

> "While Miss Williams was applying for an adjournment and opposing bail for the Applicant, she advised the Court that the deportation order was not the only reason for the Applicant being detained; and that other investigations were ongoing. I enquired of Miss Williams whether the deportation order was a subterfuge and she, quite startlingly, admitted that it was. On the basis of that admission, Mr. Armbrister sought to press home the advantage gained and persuade me that the writ should issue immediately. In an effort to be fair to Miss Williams as she may not have appreciated the import of her response to my question I postponed my decision pending receipt of the Respondent's response and submissions on the matter."

39. I will return to this, as while the rather infelicitous "admission" would have been of significance to the *habeas corpus* proceedings (as the Judge pointed out), I am not of the view that it has the significance which counsel for the applicant attributes to it in respect of the applicant's second arrest and detention.

*Claims for damages*

40. As a result, the applicant claims damages at common law for unlawful arrest and detention and malicious prosecution, as well as exemplary and vindicatory damages for alleged breaches of his constitutional rights.

41. With respect to the principles relating to the quantification of damages, he referred the court to the decision of Charles J. in **Douglas Ngumi v Hon. Carl Bethel et. al.** 2017/CLE/gen/01167, where the Court employed the per diem rate of $250.00 in calculating the initial award for a long period of detention (2,316 days), although she significantly tapered this award to end up with $386,000.00 having regard to all the circumstances of the case. He stressed, however, that the per diem approach was not a hard and fast rule, and that the court ought to depart from it if it would not adequately compensate the claimant. (Incidentally, the **Ngumi** case has since been appealed to the Privy Council, which has issued recent guidance on the calculation of awards in constitutional/tortious claims involving false imprisonment, and the case is reported as **Ngumi v The Attorney-General of the Bahamas & Ors** [2023] UKPC 12.)

42. As an example of where the per diem rate was not followed, counsel for the applicant cited the approach in **Martin Orr v Attorney General and Ors.** (2017/CLE/gen/00983), where Winder J. (as he then was) awarded $140,000.00 in damages for arbitrary arrest, false imprisonment, malicious prosecution and constitutional breaches, as well as $15,000.00 for exemplary and aggravated damages where the plaintiff was detained for a period of 151 days.

43. For the law on exemplary damages, he relied on the **Takitota** case, where the Privy Council said [at 13]:

> "The award of exemplary damages is a common law head of damages, the object of which is to punish the defendant for outrageous behavior and deter him and others from repeating it. One of the residual categories of behavior in respect of which exemplary damages may properly be awarded is oppressive arbitrary or unconstitutional action by the servants of the government, the ground relied upon by the Court of Appeal in the present case. It serves, as Lord Devlin said in *Rookes v Barnard* [1964] AC 1129 at 1223, to restrain such improper use of executive power. Both Lord Devlin in Rooke v Barnard and Lord Hailsham of St. Marylebone LC in *Broome v Cassell & Co. Ltd.* [1972] AC 1027 at 1081 emphasized the need for moderation in assessing exemplary damages. That principle has been followed in The Bahamas (see *Tynes v Barr* (1994) 45 WIR at 260, but in *Merson v Cartwright and the Attorney General* [2005] UKPC 38, the Privy Council upheld an award of $100,000 exemplary damages, which they regarded as high but within the permissible bracket."

44. The applicant claimed damages at large in his Motion, but in supplemental closing submissions suggested a global award of $345,000.00, which was said to be apportioned as follows: $50,000.00 for the unlawful arrest and detention from 12 January 2006 to 25 April 2006 (the first period); $185,000.00 for the period from 25 April 2006 to 21 May 2007 (the second period), inclusive of $75,000.00 for false imprisonment, $85,000.00 for exemplary damages attributable to both phases of detention, and $25,000.00 for arbitrary use of state power; and $120,000.00 for malicious prosecution. (It is to be noted that these totals actually add up to $355,000.00.)

*Evidence*

45. The main evidence of the applicant was to be found in his affidavits sworn 15 January 2007 and 22 May 2007 (both filed 30 May 2007). In the first, the applicant states that he was held in custody at Central for 15 days and that while there he was locked in a cell "6ft x 9ft" and endured "*unsanitary and unhealthy conditions*". He continues that while he was imprisoned at HMP, he suffered "*degrading and/or inhuman treatment*", which he says consisted of:

> "a. sleeping in a cell approximately 6x9 with five persons which at its maxim (*sic*) should accommodate no more than 2 persons.
> b. no beds or toilet facilities in the cell.
> c. The long hours of confinement to a cell constituted inhuman treatment.
> d. That I am a diabetic and my health has suffered as a result of my confinement at H.M. Prison Nassau, N.P. Bahamas."

46. In the second affidavit, he deposed as follows:

> "2. That I was arrested on the 12th January 2006 for the offence of Bribery and charged by a police officer at Central Police Station, where I was held in custody and subsequently transported to H.M. Prison, Nassau, NP Bahamas, on 27th January 2006, without a committal warrant or order signed by a Magistrate or Judge; that I was unlawfully taken into custody by a member of the Royal Bahamas Police Force on the 25th April 2006, after I was released pursuant to an order of Justice of the Supreme Court of the Commonwealth of the Bahamas, on an Application for a Writ of Habeas Corpus Ad Subjiciendum, which was still in force and effect at the time I was taken into custody, and again imprisoned at H.M. Prison, Nassau, NP, Bahamas."

47. In that second affidavit he also states that he was "*not charged for the offence of Bribery until the 28 April 2006, which was some four months or thereabouts after my arrest on 12 January A.D. 2006*." This, it is said, amounted to malicious prosecution because the prosecution was not commenced within the timeframe specified in the Bribery Act, and there was no compliance with the requirement to bring a person arrested on suspicion of a crime before the Court with undue delay.

*The Respondent's arguments*

48. The Respondents conceded that the applicant was unlawfully imprisoned from 12 January 2006 until his release on 25 April 2006, which they calculated as a period of 104 days. In other words, they accepted, based on the *habeas corpus* judgment, that the applicant was not lawfully detained during that period and accepted liability. Thus, the only outstanding issue was determining the quantum of damages.

49. The respondents did not suggest a figure for this, but commended to the Court the approach of Charles J. in **Douglas Ngugmi v Hon. Carl Bethel et. al.** 2017/CLE/gen/01167, where the judge used a rate of $250.00 per diem as a rule of thumb, whilst acknowledging that the approach had been subject to some judicial disapproval.

*Constitutional claims*

50. As to the constitutional claim, the respondents take the preliminary and procedural point that the proviso to Article 28(2), which precludes constitutional relief where there are adequate alternative remedies available to the applicant, should apply and the resort to constitutional redress in those circumstances is an abuse of process. As a result, they argue that the constitutional claims are misconceived and should be "disregarded" by the court.

51. Further, they submit that in any event the right to liberty under the Constitution is not absolute and that the Constitution itself imposes limitations on the right of liberty, including the right to impose on that liberty where there is reasonable suspicion that a person has committed or is about to commit a criminal offence (19(1)(d)). They argue that there was reasonable suspicion for the respondents to have arrested and detained the applicant, and that the proper procedures were followed during the second arrest.

*Unlawful arrest and detention*

52. Whilst conceding unlawful detention with respect to the first period of detention, the respondents deny that the second arrest and/or detention was unlawful. They contend that the applicant was lawfully re-arrested on the evening of the 25 April 2006, the same day of his *habeas corpus* discharge, and formally charged on the 28 April 2006 before the magistrate's court with the bribery offences and remanded to HMP by the Magistrate. At this point, the OAG had secured the AG's fiat to the prosecution of the applicant (and the other persons allegedly involved in the scheme). A copy of the fiat of the Acting Attorney-General, dated 25 April 2006, in respect of the applicant was exhibited to the affidavit of Kingsley Smith, which was filed 19 July 2021.

53. As explained below in the section dealing with the allegation of malicious prosecution, the respondents submit that there were reasonable grounds for the arrest and charging of the applicant. The respondents had conducted an interview of the applicant and others when he was initially taken into custody in January of 2006, and he had also given a statement to police. Based on the police investigation and the applicant's statement, they contend that the respondents formed an honest belief that the accused had committed the offences for which he was charged. The

applicant's record of interview, a typewritten copy of his statement, and the investigator's report were exhibited to the affidavit of David Whyms, filed 3 March 2020. The applicant's original statement taken down by the police was exhibited to the affidavit of Karine MacVean, filed 23 July 2021.

*Malicious prosecution*

54. The respondents strongly deny the claim of malicious prosecution. They submitted that based on the information that was available to the prosecutors and which formed the basis for the charges, they had ample grounds on which to form an honest belief that the accused had committed the offences for which he was charged and prosecuted. Further, they relied on a number of leading authorities for the proposition that the burden of proof is on the applicant or claimant to prove malice and lack of probable cause, and that the applicant did not satisfy this test: **Abrath v N.E. Ry** (1883) 11 Q.B.D. 247; **Stapeley v Annets and Another** [1970] 1 W.L.R. 20, **Hicks v Faulker** (1878) 8 QB 167, **Juman v The Attorney General of Trinidad and Tobago** [2017] UKPC 3.

55. In **Stapeley**, Lord Denning said [pg. 22]:

> "To this argument, I think the simple answer is this: In an action for malicious prosecution, the burden is on the plaintiff to prove malice and the absence of real and probable cause. If the defendant denies this, it is not the practice to require the defendant to give particulars of his denial."

56. In **Hicks**, Hawkins J stated [p. 173]:

> "The question of reasonable and probable cause depends in all cases, not upon the actual existence, but the reasonable bona fide belief in the existence of such a state of things as would amount to a justification of the course pursued in making the accusation complained of–no matter whether this belief arises out of the recollection and memory of the accuser, or out of information furnished to him by another. It is not essential in any case that facts should be established proper and fit and admissible evidence to be submitted to the jury upon an issue as to the actual guilt of the accused. The distinction between facts to establish guilt and those required to establish a bona fide belief in guilt should never be lost sight of in considering such cases as that I am now discussing. Many facts admissible to prove the latter, would be wholly inadmissible to prove the former."

> Later (at pg. 175) he stated:

> "Want of reasonable cause is for the judge alone to determine, upon the facts found, for the jury, who, even if they should think there was want of probable cause, might nevertheless think that the defendant acted honestly and without ill-will, or any motive or desire than to do what he bona fide believe to be right in the interest of justice—in which case they ought not, in my opinion, to find the existence of malice."

57. In **Juman**, the Privy Council emphasized that malice was not to be implied simply because of the failure to take certain steps before charging a person, or sloppiness or even recklessness in

the investigatory process. The PC concluded that even where the court decided objectively that the prosecutor lacked reasonable and probable cause, that alone was no basis to hold he acted with malice.

58. Based on all of these factors, they submitted that the malicious prosecution claim is ill-conceived and should be rejected by the court.

**Court's discussion and analysis**

*The Constitutional claims*

59. As noted, the applicant made claims under art. 15(a), 17(1), and 19(1)(3), and 28(1) of the Constitution, and sought declaration and damages in respect of those alleged breaches. For completeness, I should indicate that during oral submissions, counsel for the respondents mentioned that the parties were in discussions regarding a possible settlement of the constitutional claims, including any claim for exemplary damages, and the court had in fact permitted an opportunity during the case management stage for the parties to explore settlement options. However, no settlement had been concluded at the time of the hearing (and none was subsequently indicated to the Court), so the Court had to deal with the claims as constituted.

*Article 15*

60. I start with article 15 of the Constitution. It is never specified which of the rights stated in 15(a)—"*life, liberty, security of the person and the protection of the law"*—is said to be violated, but it may be presumed from the facts that it is "liberty". With respect to this claim, I will repeat what I said in **Daxon v Drexel Armbrister et. al.** [2013/PUB/Con/00006] (30 November 2023):

> "…the law is settled, at least for those countries that subscribe to the Privy Council as the apex court, that art. 15 in the Bahamian Constitution and those with similar enacting formulae, contains only a preambular statement of subsequently conferred rights which are not justiciable (see *Newbold and Ors. v Commissioner of Police and Ors.* [2014] UKPC 12; cf. *Nervais v The Queen and Severin v. The Queen* [2019] CCJ 19 (AJ)."

61. Thus, the claim for breaches of art. 15 is misconceived and dismissed.

*Article 28(1)*

62. The claim for a declaration that art. 28(1) has been breached is also misconceived. That is the enforcement provision which provides for how breaches of the enumerated rights provisions of the Constitution are to be redressed, and which empowers the court to grant redress. It does not in and of itself create any freestanding rights. The claim for any breach here is also dismissed.

*Article 19*

63. Article 19 protects against arbitrary arrest or detention. Sub-paragraph (1) provides, in material part, that no person is to be deprived of their personal liberty except as authorized by law in the following cases:

> "(c) for the purpose of bringing him before a court in execution of the order of a court;
> (d) upon reasonable suspicion of his having committed, or of being about to commit a criminal offence."

Sub-paragraph (3) provides that where a person is arrested pursuant to 1(c) or (d), and is not released, they shall be brought before a court "*without undue delay*" and if they cannot be tried within a reasonable time, released unconditionally or on conditions (e.g., bail). Sub-paragraph (4) provides that a person who is unlawfully arrested or detained by any other person shall be entitled to compensation from that person.

64. Is trite law that false or unlawful arrest and imprisonment, in addition to being torts, are also constitutional breaches. As mentioned, the applicant claims in tort for false imprisonment and malicious prosecution. The respondents take the point that, as the applicant claims in tort for his imprisonment and detention, it would be an abuse of process to also stake a constitutional claim in that regard, based on the proviso to Article 28(2).

65. I agree. The point is clear enough from the proviso, but the position was authoritatively stated in **Farrington v The King** [2024] UKPC 34, where the Privy Council contrasted the proviso to Art. 28(2) with the discretion under the Trinidad and Tobago Constitution to refuse constitutional relief where adequate alternative redress existed, highlighting the preclusive nature of the discretion in the case of the Bahamian Constitution. The Board said:

> "80. In The Bahamas, the proviso to article 28(2) of the Constitution provides that were the court is satisfied that adequate means of redress are available elsewhere, it "shall not" grant any relief under article 28(2). If there is any doubt as to the adequacy of the alternative means of redress, so that the court is not so satisfied, then the possibility of constitutional relief remains open. However, if the court is so satisfied, then the proviso shuts out completely the grant of constitutional redress.
>
> 81. The rationale underpinning the proviso to article 28(2) of the Constitution of The Bahamas is the same rationale that underpins the discretion under the Constitution of Trinidad and Tobago, namely, to prevent "misuse of abuse, of the court's process." The proviso to article 28(2) in The Bahamas and the discretion in Trinidad and Tobago are both forms of the abuse of process doctrine. However, in The Bahamas the parameter of the abuse of process doctrine is fixed by the Constitution. The proviso is expressed in mandatory terms so that circumventing another adequate means of redress and instead seeking constitutional redress is an abuse of process."

66. I am satisfied that the applicant has adequate alternative means of redress for the claim of false arrest or imprisonment by way of the tortious claims he has advanced. I therefore refuse the declaration as to breaches of any rights under article 19.

*Article 17(1)*

67. Article 17(1) provides in material part that "*no person shall be subjected to torture or to inhuman or degrading treatment or punishment*." In his Motion, the applicant pleaded that he suffered degrading and/or inhuman treatment while being locked up both at Central and HMP as a result of the following conditions (allegations which were also made in the applicant's affidavit filed 30 May 2007):

> "a. sleeping in a cell approximately 6ft x 9ft with five persons which at its maxim (sic) should accommodate no more than 2 persons
> b. no bed or toilet facilities in the cell.
> c. the long hours of confinement to a cell…".

68. In their pleadings, the respondents did not admit the allegations in respect of the prison conditions and put the applicant to "strict proof". I repeat the caution I sounded in **Executive Ideas of The Bahamas (1973) Ltd. v Rodney Wallace** (2018/CLE/gen/00539) [at 101], as follows:

> "If a defendant denies an allegation, he or she must state the reasons for that denial, and if advancing a different version of events, must set out those reasons. If a defendant fails to properly deal with an allegation (as here), it is deemed admitted: see *Saeed Akbar v Mohammed Sajead Ghaffer* [2024] EWHC 50 (Ch.)."

69. But for the bare pleadings, I was not addressed in any detail on the prison conditions and the law relating to the same. In **Grant v Ministry of Justice** [2011] EWHC 3379 (QB), Mr. Justice Hickinbottom had to determine whether conditions at a UK prison violated Article 3 of the European Convention on Human Rights ("ECHR"), which is the acknowledged template for article 17 of The Bahamas Constitution and which is in the same terms as Article 17. In the course of his judgment, Mr. Justice Hickinbottom quoted with approval the oft-cited European Court of Human Rights ("ECtHR") decision in **Kalashnikov v Russia** [2003] 36 EHRR 34 discussing article 3 of the ECHR, as follows: [para.95 of the ECtHR ruling; para. 42 of **Grant**]:

> "…The suffering and humiliation involved [for there to be violation of Article 3], must in any event go beyond that inevitable element of suffering or humiliation connected with a give form of legitimate treatment or punishment.
>
> Measures depriving a person of his liberty may often involve such an element. Yet it cannot be said that detention on remand in itself raises an issue under Article 3 of the Convention. Nor can that Article be interpreted as laying down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to maintain specific medical treatment.
>
> Nevertheless, under this provision, the State must ensure that a person is detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding that unavoidable

> level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured."

70. Closer to home, in **Thomas and Another v Baptiste and Others** [1999] UKPC J0127-1, the Privy Council said, in considering the corresponding article to 17 in the Trinidad and Tobago Constitution (although in the context of persons convicted of the death penalty):

> "…the question for consideration is whether the conditions in which the appellants were kept involved so much pain and suffering or such deprivation of the elementary necessities of life that they amount to treatment which went beyond the harsh and could properly be described as cruel and unusual. Prison conditions in third world countries often fall lamentably short of the minimum standards which would be acceptable in more affluent countries. It would not serve the cause of human rights to set such demanding standards that breaches were commonplace. Whether or not the conditions in which the appellants were kept amounted to cruel and unusual treatment is a value judgment in which it is necessary to take account of local conditions both in and outside the prison."

71. The cases all emphasize that to meet the threshold for inhuman or degrading treatment, the suffering or humiliation involved must go beyond the inevitable hardship associated with lawful imprisonment. The assessment is also not based on a single factor (such as lack of space, or unsanitary conditions, or prolonged confinement) considered in isolation but on the cumulative effect of all the conditions of detention (see **Grant v Ministry of Justice**, **Thomas v Baptiste).** The cases equally show, however, that certain conditions such as overcrowding, unsanitary conditions and prolonged confinement may, depending on the circumstances, cross the Article 17 threshold and constitute degrading and inhuman treatment.

72. In its jurisprudence, the ECtHR has developed a rule of thumb that where personal space in a multi-occupancy cell falls below three square meters, this may amount to a breach of Article 3 of the ECHR (see *Badila v Romania* (2011), Application No. 31725/04). But this is not a hard and fast rule and may be rebutted by other factors. Based on the dimensions of a 6'x9' cell which the applicant indicated was shared by 5 persons, that would amount to roughly one sq. metre per person, which falls well below the suggested standard. Lack of proper bedding and toilet facilities and long periods of confinement may also constitute degrading and inhumane treatment, especially if prolonged or severe (**Grant v Ministry of Justice**).

73. Despite filing a number of affidavits in this matter, the respondents did not controvert any of the applicant's claims with respect to the poor conditions in which he alleged he was detained. Ordinarily, in proceedings where conditions of detention are in issue, one would expect the detainer to put affidavit or other evidential material before the Court setting out the conditions under which the person was detained, their bedding arrangements, diet, exercise and outdoor time, the facilities for the disposal of waste and for basic hygiene, etc. This was not done.

74. In the circumstances, the applicant's evidence is uncontroverted, and I find that the cumulative effect of the conditions complained of by the applicant reached the minimum level of severity to breach the article 17 norm for degrading and inhuman treatment. I will therefore declare

that the applicant's article 17(1) rights were breached by his detention during the first period of detention.

Unlawful arrest and detention

*The first period*

75. I deal firstly with the arrest and period of detention from 12 January 2006 to 25 April 2006, which the respondents calculated as 104 days. As noted, the notion that the applicant may have been validly detained with a view to being charged with bribery offences, as well as the validity of the deportation order, were discredited by the court in the habeas corpus ruling, which has been admitted as evidence in this claim. Furthermore, the respondents have conceded that the applicant was unlawfully detained during this period.

76. It is important to point, out, however, that while the *habeas corpus* judgment determined that the applicant's detention was unlawful, it did not determine that his arrest was unlawful. He was arrested without a warrant (or at least without being shown a warrant) on the 12 January 2006. However, it is trite law that a person reasonably suspected of having committed an offence or being about to commit an offence, may be arrested without a warrant (s. 18, *Criminal Procedure Code*, ss. 31(2), 43 of the *Police Act 2009*, and see **W/Con Sweeting and Ors. v Atisha Tinker & Omar McPhee** (SCCivApp No. 50 of 2009). By the applicant's own pleadings, he states that this is what occurred on 12 January 2006 (Motion):

> "2. The Applicant was taken to Central Police Station Nassau, N.P., Bahamas, and locked up in a cell at the said station.
> 3. The Applicant was told at Central Police Station that he was arrested for the offence of bribery and advised of his legal rights and subsequently charged with the offence of bribery by a Police Officer."

77. The Court in the *habeas corpus* Ruling found the detention unlawful for failure to comply with *procedural* requirements, i.e., he was not brought before the Court as required and charged within 48 hours (or any extension of that time) and the deportation order was found to be defective. However, for reasons that will be further explained in the section on malicious prosecution, I am not of the view that the applicant was *unlawfully* arrested. There was reasonable and probable cause for his arrest, and he could lawfully have been held pursuant to such arrest for a period of 48 hours (subject to any extension sought) before being taken before a magistrate. By his own evidence, he was taken into custody, physically confined, told the reason for his arrest, advised of his legal rights, and then charged with the offences. In light of this, I will deduct two days from the first period of detention (104 days) calculated by the respondent, and hold that the first period of detention was 102 days.

*The second period*

78. The argument of the applicant, as far as I understand it, is that because he had been discharged on a habeas corpus application, he could not be lawfully re-arrested for the same or similar offences. In my judgment, the applicant's reliance on **Cox v Hakes,** the *Habeas Corpus Act* and the **Kozeny** case for that interpretation is misplaced.

79. Properly construed, the *Habeas Corpus Act* provides that a person discharged by a *habeas corpus* order is not to be imprisoned for the same offence *other* than by the legal order and process of a court. In other words, this does not completely immunize the person against further arrest, as long as that subsequent arrest complies with all legal requirements. **Cox v Hakes** is authority for the principle that the legality of a *habeas corpus* discharge could not be challenged by demurrer (appeal), and **Kozeny** is authority (based on **Cox v Hakes**) that unless specifically provided for by statute, there was no appeal by the detainer against a person discharged by *habeas corpus*. Thus, to the extent that the applicant contends that there is no appeal against such a discharge, that is correct.

80. However, the true legal position is that a person discharged by *habeas corpus* because the prerequisites of a lawful detention have not been complied with does not prevent a second arrest on the same or similar grounds, so long as the new arrest is lawful and there is procedural compliance with the legal prerequisites: see, **R v Horseferry Road Magistrates Court, ex parte Bennett** [1994] 1 A.C. 42; **Rex v Secretary of State for Home Affairs, ex parte Budd** [1942] 3KB 14.

81. In **ex parte Bennett**, the House of Lords decided that the court had a discretion to stay as an abuse of criminal process criminal proceedings brought against an accused who was abducted in a foreign country and forcibly returned to the United Kingdom to face criminal trial based on collusion between UK and South African police officials. In the course of that decision, however, Lord Lowry stated the following principle [at p. 77]:

> "A person wrongfully arrested here can seek release by applying for a writ of habeas corpus but, once released, can be lawfully arrested, charged and brought to trial. His earlier wrongful arrest is not essentially connected with his proposed trial and the proceedings against him will not be stayed as an abuse of process."

82. In **ex parte Budd**, which is more apposite the facts of the instant case, the Court of Appeal said [at 22]:

> "The argument presented to us was based on the proposition that a person who has been released from custody on a writ of habeas corpus cannot be subjected to a second detention for the same cause. This argument, is, in our opinion misconceived. The first detention of the applicant was illegal in that the prerequisites of a lawful detention had not been complied with. In the case of the present detention, those prerequisites have been complied with and the detention is lawful. The decision in the first case was not on the ground that the real order made by the Home Secretary was one which he had no power in law to make—indeed any such decision would, in view of *Liversidge v Anderson* [(1942) A.C. 206] and *Greene v Home Secretary* [(1942) A.C. 284] be wrong in law—

> but on the grounds that the terms of the order had not been communicated to the applicant in such way as to enable him to make his representations to the Home Secretary under sub-reg. 4. There is nothing in principle or in authority to justify the view that the result of the earlier proceedings can assist the applicant in any way. The appeal must be dismissed."

83. The finding of Isaacs J. in the *habeas corpus* judgment is that the detention of the applicant plainly failed to comply with the legal pre-requisites in that: (i) he was not brought before a court and charged with any offence as required under the Criminal Procedure Code; (ii) that the offence for which he may have been arrested required a fiat of the Attorney General for prosecution and that none was produced up to the point of his release on 26 April 2006; and (iii) that the deportation order pursuant to which he was ostensibly detained was bad on its face as it did not comply with the requirements of the Immigration Act.

84. The respondents' case is that all of these procedural errors were cured during the second arrest and detention, and that there was no connection between his earlier detention and his trial based on the second arrest. Following his discharge, he was arrested on reasonable suspicion of having committed a criminal offence (as is detailed below) on the evening of the 25 April 2006. The applicant was interviewed by D/Sergeant 1376 Elvis Johnson and gave a statement, and D/Sgt. Johnson also interviewed a number of other person (including immigration officers and a Defence Force marine) and recommended prosecution of the applicant and others for various bribery offences.

85. In **Herniman v Smith** [1937] AC 305, the House of Lords classically formulated the test of reasonable belief to include two elements: (i) that the defendant honestly believed in the guilt of the accused (subjective element) and (ii) that there were reasonable grounds for that belief (objective element).

86. The applicant was implicated in the commission of these offences by his own statement, and while he was eventually acquitted, it may be that part of the reason for this was that other implicated persons were not available to testify (for whatever reason). For example, it was indicated that at the time of trial, the whereabouts of the American captain on whose boat the applicant was supposed to have been smuggled out, was unknown. In my judgment, the applicant's statement and the police investigation admit of no doubt that there was reasonable and probable cause to arrest and charge the applicant.

87. Furthermore, it is pleaded that he was remanded to HMP by Magistrate's Court No. 10 after his arrest on 26 April 2006 pending trial on the said bribery charges, and that he was formally charged before the Magistrate's court on the 28 April 2006 (which is accepted by the applicant). As noted, the affidavit of Kingsley Smith filed 19 July 2021 exhibited the fiat of the then Attorney General (acting) signed 25 April 2006, consenting to his prosecution for the offences of conspiracy to commit bribery (2 counts) contrary to ss. 3(1) (a) and 10 (b) of the *Prevention of Bribery Act* and bribery contrary to ss. 3(1)(a) and 10(b) of the Act. In oral submissions, counsel for the applicant suggested that there may have been a second and later fiat filed in the Magistrates' Court

in relation to the applicant, but no evidence of this was put before the court and in my view it does not change the fact that there was a fiat which ostensibly complied with the terms of the Bribery Act.

88. The applicant was acquitted of the charges following his trial on the 21 May 2007, and deported on 24 May 2007.

89. In the circumstances, I do not find that the arrest and detention of the applicant from the period 26 April 2006 until his release on 24 May 2007 was unlawful, and I would dismiss the claim for unlawful arrest and/or false imprisonment during this period.

*The tort of malicious prosecution*

90. I have already set out the basic principles relating to the tort of malicious prosecution based on the submissions of the parties. But I would also wish to refer to two recent Privy Council authorities—**Matadai Roopnarine v Attorney General of Trinidad and Tobago** [2023] UKPC 30, **Stuart v Attorney General of Trinidad and Tobago** [2022] UKPC 53, [2023] 4 WLR—where the Board very instructively set out and elaborated on the relevant principles. In **Matadai**, the Privy Council said:

> "19. As stated in the Board's recent decision in *Stuart v Attorney General of Trinidad and Tobago* [2022] UKPC 53, [2023] 4 WLR 21 ("Stuart") at para. 1:
>
> > 'The tort of malicious prosecution has five elements all of which must be proved on the balance of probabilities by the claimant: (i) that the defendant prosecuted the claimant (whether by criminal or civil proceedings); (2) that the prosecution ended in the claimant's favour; (3) that the prosecution lacked reasonable and probable cause; (4) that the defendant acted maliciously; and (5) that the claimant suffered damage. See, e.g., *Clerk and Linsell on Torts*, 23rd ed (2020), para 15-13; *Winfield and Jolowicz on Tort* 20th ed (2020), para. 20-006.'
>
> 20. As explained in *Stuart* at para 26, reasonable and probable cause means an honest belief based on reasonable grounds that there is a proper case to lay before the court—see Glinski [*Glinski v McIver* [1962] AC 726] at pp. 758 per Lord Denning.
>
> 21. Malice means an improper motive. The proper motive for a prosecution is a desire to secure the ends of justice. Malice will be established if it is shown that this was not the motive of the defendant or that something else was. Malice may be inferred from lack of reasonable and probable cause but this will depend on the facts of the individual case—see *Clerk & Lindsell on Torts*, 23rd ed (2020), para 15-57; *Williamson v Attorney General of Trinidad and Tobago* [2014] UKPC 29 at paras 11-13.
>
> Proof of absence of reasonable and probable cause

> 22. In order to establish that the relevant person did not have an honest belief based on reasonable grounds that there was a proper case to lay before a court it will generally be necessary for the claimant to identify the nature of the information upon which the decision to do so was made. As explained in *Clerk v Lindsell* at para. 15-35:
>
> > 'The question of reasonable and probable cause may create difficulties in the conduct of a trial; first, it involves the proof of a negative and, secondly, in dealing with it the judge has to take on himself a duty of an exceptional nature. The claimant has, in the first place, to give some evidence tending to establish an absence of reasonable and probable cause which is operating on the mind of the defendant. To do this, the claimant must identify the circumstances in which the prosecution was instituted. It is not enough to prove that the real facts established no criminal liability against him, unless it also appears that those facts were within the personal knowledge of the defendant. If they were not, the claimant must show the nature of the information on which the defendant acted, which is sometimes done by putting in the depositions which were before the magistrate.' "

91. In my view, the malicious prosecution claim is without merit. To begin with, and as shown by all of the authorities, it involves the difficult task of proving a negative. It would be right to say that the applicant never even attempted this task, much less succeeded in. In this regard, it is noted that the applicant never disputed or contradicted the "information" on which the police acted, which was put before the court in affidavit evidence, and there is no allegation that the statement given to the police by the applicant was anything other than voluntary. There is, further, no allegation or evidence that the prosecution was actuated by anything other than an intention to carry out and enforce the law, and even if there were no reasonable and probable cause (which is not the case here), there is no allegation of malice. As mentioned, the circumstances of his previous arrest and detention could not be transported into the second arrest and detention. Further, as set out above, the fact that the applicant was acquitted is nothing to the point as to whether there was reasonable and probable cause to prosecute him.

92. In fact, the applicant primarily rests his claim for malicious prosecution on the grounds that there was no fiat authorizing his prosecution within the required timelines, and that the timelines for holding him and charging him under the Bribery Act were otherwise not complied with—not that the prosecution lacked reasonable and probable cause. In my view, the claim for malicious prosecution fails and is rejected.

*Quantification of damages*

93. It is only left then, to properly assess the damages for the initial period of detention, which as I have indicated I have corrected to 102 days. Counsel for both parties referred to the approach of the Supreme Court in **Ngumi v Hon. Carl Bethel et. al.** but, as mentioned, that decision has since been appealed to the Privy Council and their Lordships have delivered their ruling, in which they expanded on their earlier comments in **Takitota** and gave further guidance for the calculation of damages for false imprisonment/detention.

94. In particular, the Privy Council clarified that for long-term detention, it is inappropriate to simply multiply a daily fixed rate by the number of days detained, and indicated that damages should be calculated in the round, having regard to all the circumstances. If the per diem approach were used to generate an initial figure, they emphasized that the resultant award should be tapered so that the marginal daily rate decreases over time, to take account of the fact that the initial shock and loss of liberty are most acute at the outset. The Board also stated that comparable awards in other cases are not binding, but they may provide useful guidance, especially where local precedents were not readily available. It is useful to set out what the Board said on the subject in some detail (Dame Simler writing on behalf of the Board):

> 72. The evaluative exercise called for in assessing the physical and mental deprivation caused by false imprisonment is no less difficult, and even less precise. There are no guidelines and no mathematical formula is available to be relied on in very case. Rather, the assessment must be sensitive to the unique facts of the particular case and the degree of harm suffered by the individual concerned, while at the same time reflecting a reasonable degree of proportionality to assessments made in similar cases and to awards for person injury given that parallels between the two types of award. It is now well-established that the initial shock of unlawful arrest and imprisonment may attract a higher notional element than a later period of detention because people do tend to adjust to their changed circumstances, and the initial shock generally gives way to adaptation and resignation, though this may not always be the case. The way in which the arrest was effected and any attendant publicity may be relevant factors in the assessment. Likewise, in assessing compensation for any later period of unlawful detention that follows, any loss of reputation, loss of enjoyment of life or normal experiences foregone, are likely to require consideration alongside the obvious factors of length of and conditions and treatment in detention.
>
> 73. But damages in these cases should not ordinarily be assessed by dividing the award into separate periods or by fixing a rigid daily rate to be awarded for each day of incarceration and multiplying it by the number of days spent in unlawful detention. Rather, as the Board held in *Takitota* at paragraph 17, compensatory damages should be assessed in the round. The appropriate figure should "reflect compensation for the long period of wrongful detention … any element of aggravation … the conditions of his detention and … the misery which he endured" and accordingly, the "final figure for compensatory damages should therefore amount to an overall sum representing appropriate compensation for the period of [lengthy] detention, taking account of the inhumane conditions and the misery and distress suffered". That is the correct approach.
>
> 74. There may be cases where a notionally separate sum is regarded as appropriate to compensate for the initial shock of unlawful detention, but it is not necessary to distinguish between the initial and later periods of detention in every case. Nor is this necessarily the most principled way of making the assessment. What the Privy Council made clear in *Takitota*, however, is that if an initial or daily rate figure is taken and simply extrapolated (by multiplying the daily rate by the number of days) to compensate for a longer unlawful detention period, then it should ordinarily be tapered for the reasons given above.

95. With these principles as a backdrop and conducting an assessment in the round, having regard to the particular facts of this case and the conditions of the applicant's detention, in my judgment an award of $60,000.00 in compensatory damages would be a reasonable and fair

amount for unlawful detention/false imprisonment for a period of 102 days. In arriving at this figure, I have given consideration to a number of pertinent factors.

96. Firstly, I have noted the poor conditions in which the applicant says he was detained as a consequence of his detention and, which, as pointed out, have not been controverted by the respondents. Further, this is purely a case of unlawful detention/false imprisonment, and the applicant has not alleged that he was assaulted or physically mistreated in any other way, which was an aggravating factor in several of the comparative cases and which justified higher awards. The period of detention is also relatively short. As noted, comparative awards may be looked at, and in this regard I am reassured by the decision of the Privy Council to award an additional $50,000.00 in compensatory damages for the additional three months in which it found the detention in **Ngumi** was unlawful, overruling the lower courts who did not find that period of detention unlawful.

97. This figure is also reasonably proportionate to other awards. For example, roughly $800,000.00 was awarded in the case of ***Ngumi***, who was detained and suffered "*appalling and degrading treatment*" for just over 6 years. In ***Takitota***, the appellant was detained in various facilities for some 8 years and subjected to "*degrading and inhumane conditions*", and was awarded $400,000.00 by the courts (later compromised in the amount of $500,000.00). And, in ***Orr***, a global award of $140,000.00 was made for false arrest and imprisonment, malicious prosecution and constitutional breaches.

98. Finally, I do not consider it necessary to award any higher notional sum for the initial "shock of unlawful detention" as, without intending to sound unsympathetic, I do not find that this is an initial shock case in light of the applicant's history.

**Other damages**

99. To the compensatory award, I would add the modest amount of $15,000.00 as a separate sum for exemplary damages, to mark the court's disapproval (which was also highlighted in the *habeas corpus* judgment) over the arbitrary and somewhat disingenuous approach to the detention of the applicant during the first period of his detention. As noted in **Takitota**, and the other cases referenced in that Ruling, such awards are intended to denounce and deter oppressive, arbitrary or improper use of executive power. Having regard to the circumstances of his initial detention and the concession of the attorney for the State in that regard, I find such an award justified. I repeat what Isaacs J. said (at p. 13) in the *habeas corpus* ruling:

> "The Respondents cannot maintain a secret purpose for the Applicant's detention. The true reason for his detention must be communicated to him to enable him to meet or challenge such reason."

*Professional expenses*

100. In support of his claim for professional expenses, the applicant submitted a "statement" claiming costs of $10,000.00 for care and conduct of the *habeas corpus* matter and $8,500.00 for care and conduct of the bribery charges before the Magistrate. I am unsure of the basis on which these claims are made. Essentially, he is seeking costs for these matters, dressed up as "special damages".

101. Firstly, even if it was appropriate to grant costs in the *habeas corpus* application, the order should have been sought from the Court which heard the application and granted the order. In any event, the claim for costs runs counter to the practice that costs are not awarded in criminal proceedings. In this regard, I refer briefly to the Court of Appeal case in **The Government of the United States et. al. v. Kozeny** (SCCiv App. No. 92 of 2007), where the Court set aside an award of costs made by the Supreme Court on the successful grant of a *habeas corpus* application, on the basis that the broad discretion to grant costs under s. 30 of the Supreme Court Act did not alter the "practice" in any criminal cause or matter—and the practice was not to grant costs. As the Court said [56, 60] (per Longley JA):

> "56. However, when sections 30(1) and 30(2) [ of the Supreme Court Act] are read together, they appear to be open to the construction that the Supreme Court has jurisdiction to make an award of costs in criminal cases and the discretion is only circumscribed by any practice that was in existence at the time of the passage of the Act in 1996 (see *R v Chief Metropolitan Magistrate, ex parte Osmand* [1988] 3 All E.R. 173 ("*Osman*"). In other words, since the prevailing practice is not altered by the enactment, the discretion of order costs in criminal causes, in my judgment, must be exercised in accordance with the prevailing practice in such cases, which practice must have predated the passage of the enactment. …
>
> 60. I have reviewed the Law reports of the Bahamas Vol. 1 and 2 for 1965-70 and 1989-90…which include several cases of habeas corpus which were decided before and after the 1978 Rules of the Supreme Court came into effect, and I have been unable to find one case where costs awarded…".

102. The other Justices of Appeal concurred, and the Rt. Hon. Dame Sawyer P., added additional reasons on the discrete issue of costs as follows:

> "5. Before the introduction of the Prosecution of Offences Act 1985 in England, the award of costs in criminal proceedings was governed by statute starting, as far as my researches went, with the Criminal Law Act 1862, the Criminal Justice Act 1907, Costs in Criminal Proceedings Act 1908, the Criminal Justice Act 1948, and the Costs in Criminal Cases Act 1952. Those statutes were not extended to the Colony of the Bahama Islands and, again as far as my research went, I did not find any statute which enabled the court to make an award of costs in a criminal case apart from section 249 of the Criminal Procedure Code Act, which is quite stringent in the size of an award of costs that could be made on an appeal from a magisterial court."

103. Having regard to these principles, I am constrained to refuse the claim for professional expenses in the *habeas corpus* application (which was intituled in a criminal cause), and likewise in the magistrate's proceedings, which involved charges for criminal offences.

**CONCLUSION AND DISPOSITION**

104. For the reasons given above, I find that the applicant was falsely imprisoned/unlawfully detained for a period of 102 days by the respondents and subjected to degrading and inhumane conditions. I award compensatory and exemplary damages to the applicant as set out above, for a total award of $75,000.00. Interest will apply to this amount at a rate of 6.25% from the date of the filing of the Motion (as converted to a writ) to judgment, and thereafter at the statutory rate until payment.

105. Although the applicant has had a measure of success, I am not of the opinion that he is entitled to the entirety of his costs on the facts of this case. In this regard, I have taken into consideration that he was unsuccessful in the claim for false imprisonment for the second (and significantly longer) period, several of the constitutional claims were misconceived, and the malicious prosecution claim was made without any reasonable basis. Furthermore, the respondents did not challenge the unlawful detention for the first period. In the circumstances, I will therefore only award the applicant 50% of his costs, to be taxed if not agreed.

**Klein J.,**

2 February 2026

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