



THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

MONTSERRAT

CLAIM NO. MNIHCV 2014/0004

IN THE MATTER OF Sections 9 (2), 11 (1), 11 (2), 13 (1) and 16 (2) of the Montserrat Constitution Order 2010,

AND

IN THE MATTER OF Rules 15 (4) 18 and 24 (1) of the Prison Rules,

AND

IN THE MATTER OF an application by WARREN CASSELL for an Administrative Order, Declaratory Order and other relief under part 56 of the Eastern Caribbean Supreme Court Civil Procedure Rules

BETWEEN:

WARREN CASSELL

Claimant

AND

- (1) SUPERINTENDENT OF PRISONS (Theodore Woodley)
- (2) DEPUTY SUPERINTENDENT OF PRISONS (Rupert Harris)
- (3) ATTORNEY GENERAL
- (4) OSWALD WEST (Senior Prison Officer)
- (5) VAUGHN RYAN (Senior Prison Officer)
- (6) JASON BRADFORD (Senior Prison Officer)

Defendants

Appearances:

Ms. Lovetta Silcott and with her Warren Cassell in person - Claimant

Ms. Janine Greenaway with Ms. Amelia Daley for the Defendants

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2015: May 11th

November 9th

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JUDGMENT

- (1) **COMBIE MARTYR, J. (Ag.):** The claimant Warren Cassell was an inmate at Her Majesty's Prison in Brades Montserrat, between the period of 23rd February 2012 to 15th June 2013
- (2) During that period of incarceration, the claimant alleges that the prison administrators took the following actions (1) disallowed certain reading material in particular, a book entitled "Sh\*t My Dad Says" (2) restricted the claimant and other prisoners from watching certain television programs and turned off the television when others leave for religious instructions or education classes (3) did not provide the claimant with certain toilet articles in particular - shampoo, deodorant and mouthwash (4) denied the claimant use of his personal mini DVD player (5) imposed restrictions on the content and recorded the claimant's conversations with visitors and (6) denied the claimant a spousal visit.
- (3) The claimant further alleges that a strip search was conducted on the claimant on his return to the prison from a weekend release, which search was recorded on video. This search the claimant alleges resulted in personal injury to the claimant and disciplinary proceedings were conducted by the Visiting Committee for alleged disciplinary offences committed by the claimant as well as the suspension by the 1st defendant, of the claimant's weekend release concession.
- (4) By Originating Summons filed on the 27/5/2014 and affidavits deposed to by the claimant and filed on 5/2/2014, 27/5/2014 and 10/3/2014, the claimant seeks administrative orders, declarations, damages and other relief against the defendants relating to certain breaches of his rights under the Montserrat Constitution Order 2010 (the Constitution) and of the Prison Rules- Section 21 Prison Act Cap 10:04 Revised Edition of the Laws of Montserrat.
- (5) In response, affidavits were deposed to by the defendants (1) Vaughn Ryan then Acting Deputy Superintendent of Prison filed 25th June 2014 (2) Theodore Woodley then acting Superintendent of Prison filed 14th July 2014 and (3) Rupert Harris then Acting Deputy Superintendent of Prison filed 2nd July 2014.
- (6) *The issues for the court to consider summarized from the claimant's complaints are as follows:*
  - (1) *Whether a strip search of the claimant on his return from a weekend release and a video recording of the strip search is irrational and/or unreasonable and unconstitutional, in breach of section 9 (2) of the Constitution;*
  - (2) *Whether suspension of a weekend release is ultra vires the Prison Rules, illegal and irrational;*

- (3) *Whether turning off the television on remaining prisoners when others leave for religious instruction or education classes is in breach of section 11 (1) or 13 (1) of the Constitution and unreasonable;*
- (4) *Whether denying the viewing of certain television channels is a breach of section 13 (1) of the Constitution, unfair and discriminatory and an abuse of power as the claimant had a legitimate expectation that he would be allowed to view these channels;*
- (5) *Whether written recording of the content of the claimant's conversations or that of other prisoners with their visitors is unlawful.*
- (6) *Whether the failure by the prison to provide deodorant and /or shampoo and /or mouthwash is unreasonable and/or in breach of Prison Rule 15 (4) and whether these items are included in the definition of 'toilet articles necessary for his health and cleanliness';*
- (7) *Whether refusal to allow the claimant the use of his book titled "Sh't My Dad Says" is unreasonable and irrational and whether censorship of the book is unconstitutional, as in breach of Section 13 (1) of the Constitution, Prison Rule 24 (1) and unfair, amounting to an abuse of power on the part of the 1st and 2nd defendants;*
- (8) *Whether the denial of the use of the claimant's personal mini DVD player is unfair and /or discriminatory and amounts to an abuse of power on the part of the 1st and 2nd defendants, unreasonable and in breach of Prison Rule 24 (1);*
- (9) *Whether denial of a spousal visit is unreasonable or irrational.*
- (10) *Whether disciplinary proceedings of a Visiting Committee held 12th June 2013 is ultra vires the Prison Rules and a nullity, unreasonable and/or irrational.*
- (11) *Whether the claimant is entitled to damages and the other remedies sought.*

## **GENERAL PRINCIPLES**

- (7) The court has perused the handbook written by Andrew Coyle<sup>1</sup> submitted by the claimant as a guide to international human rights standards to be achieved in respect to prison environment and conditions. The court fully appreciates the author's exposition of the underlying principles relating to treatment of prisoners:

<sup>1</sup> Human Rights Approach to Prison Management: Handbook for Prison Staff (2nd Edition)

or persons who have been deprived of their liberty and the duties and obligations of the prison administrators in whose care prisoners have been entrusted and the placing of prison management within an ethical framework to ensure safety, security and stability in the prison.

- [8] As stated by Coyle "The essence of imprisonment is deprivation of liberty and the task of the prison authorities is to ensure that this is implemented in a manner which is no more restrictive than is necessary. It is not the function of prison authorities to impose additional deprivations on those in its care."
- [9] Nevertheless, Madame Justice Gobin in the **Edghill case**<sup>2</sup> citing the words of Justice Rehnquist in *Bell v Wolfish* (1979) 441 U.S. 520 at 537 stated that: whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility . . ."
- [10] In **Thomas v Baptiste (1998) 54 WIR 387**, the Privy Council had this to say of prison conditions in third world countries "... often fall lamentably short of the minimum which would be acceptable in more affluent ones". It was noted then that there was need for improvement in the conditions of the prison to reflect the sentiments expressed in **Section 8 of the Constitution** that "*All persons deprived of their liberty (prisoners) shall be treated with humanity and with respect for the inherent dignity of the human person*".
- [11] This Court has embraced the significance of the **Mandela Rules**<sup>3</sup> which set out what is generally accepted as good principles and practice in the treatment of prisoners and prison management and for Prison Rules to reflect the international minimum standard, incorporating human rights.
- [12] The court is guided by the principle in the **Simms case**<sup>4</sup> that a prisoner's civil right is preserved unless it has been expressly removed or its loss is an inevitable consequence of lawful detention in custody and that the extent to which a power is impliedly conferred by statute to interfere with fundamental rights must be the minimum necessary to fulfil that need.<sup>5</sup>
- [13] The court's consideration of the facts in this case is guided by the general principles of irrationality or unreasonableness as defined in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1974] 2 AER 680** and **Lord Diplock in Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 AER 935** which defines: "*irrationality or unreasonableness as arising from a decision which is outrageous in its defiance*

<sup>2</sup> *Edghill v (1) Carlo Mc Honey- Commissioner of Prisons of Trinidad and Tobago and (2) The Attorney General of Trinidad and Tobago* Claim No. 3178 of 2009

<sup>3</sup> United Nations Standard Minimum Rules for Treatment of Prisoners (revised 2011) - 2015

<sup>4</sup> *R v Home Secretary ex parte Simms* [2000] 2 AC 115

<sup>5</sup> *R v Home Secretary ex parte Leech* 1984 QB 198

*of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at.*"

- [14] Lord Phillips MR in the case of *R (Mellor) v Secretary of State for the Home Department* [2001] 3 WLR 533 stated that, "the consequences that the punishment of imprisonment has on the exercise of human rights are justifiable, provided that they are not disproportionate to the aim of maintaining a penal system designed both to punish and to deter." In *Hirst v Secretary of State for Home Department* [2002] ECWHC 602, it was stated that- *it is well established that in order to show that any interference with the right is justifiable, it is necessary for the party seeking to justify the interference to show that the doctrine of proportionality has been complied with.*
- [15] In *de Freitas v Permanent Secretary of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, the Privy Council adopted a three stage test. Lord Clyde observed at pg 80 that *-in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself whether (i) the legislative objective is sufficiently important to justify limiting a fundamental constitutional right (ii) the measures designed to meet the legislative objective are rationally connected to it and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.*
- [16] Against the backdrop of the aforementioned and within the context of prison facilities in small countries such as Montserrat, the legislative provisions of the Prison Act, Prison Rules and the Constitution, this court will consider the complaints of the claimant and examine the facts, allegations and evidence in this matter.

#### **ANALYSIS OF THE ISSUES, EVIDENCE, PRISON RULES, CONSTITUTION AND SUBMISSIONS OF THE PARTIES.**

- [17] The court has perused the evidence of the parties as contained in the affidavits of the claimant filed on the 5/2/2014, 10/3/2014 and 27/5/2014, the affidavits of the defendants filed on the 25/6/2014, 14/7/2014 and 2/7/2014 and the DVD recording of the strip search conducted on the claimant on his return from weekend release. The court will consider only those aspects of the several exhibits filed, that relate to the matter at bar and will refer to excerpts of the affidavits, skeleton arguments and submissions of counsel that it considers necessary and material to address the issues.

**(1) Whether a strip search of the claimant on return from a weekend release and a recording of the strip search is irrational and/or unreasonable and unconstitutional in breach of section 9 (2) of the Constitution;**

**(2) Whether suspension of a weekend release is ultra vires the Prison Rules, illegal and irrational;**

- [18] **Section 21 (1) of the Prison Act and Subsidiary Legislation Cap 10.04 Revised Edition of the Laws of Montserrat - Power to make rules** provides that: *The Governor in Council may make rules for the regulation and management of prisons the conduct, discipline and duties of the officers employed therein and the classification, treatment, employment, discipline and control of prisoners.*

*The Prison Rules are contained in Subsidiary Legislation in Section 21 of the Prison Act.*

- [19] **Section 9 (2) of the Constitution** states that: *Except with his or her consent, no person shall be subjected to the search of his or her person or property or the entry by others on his or her premises.*

**Section 9 (3)** states that: *Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society—*

*(a) in the interests of defence, public safety, public order, public morality, public health, town or country planning, the development of mineral resources, or the development or utilization of any other property in such a manner as to promote the public benefit.*

*(b) for the purpose of protecting the rights and freedoms of other persons,*

*(c) for the prevention or detection of offences against the criminal law or the customs law.*

- [20] **Section 102 of the Schedule to the Prison Act (Regulation 41) Code of Conduct for Prison Officers - Searching of prisoners on return to prison** provides that: *An officer shall thoroughly search every prisoner on his return to the prison for the purpose of ascertaining whether he has any prohibited articles secreted on his person. All tools and other implements are to be checked at the commencement and completion of work handed over to the officer deputized for that purpose.*

- [21] The evidence of the claimant is that there was no condition stipulating that he had to be strip searched upon return to prison and that for several weeks when he returned to prison after his weekend release, he was never been searched. However on his return on 3rd June 2013, the claimant refused to be searched on the basis that the search was illegal and despite the fact that a search by metal detector could have been done, the claimant was strip searched allegedly by force, forcibly handcuffed and thrown to the ground all of which incident was recorded on video. As a result the claimant alleged that he suffered physical injury.

- [22] The evidence of the defendants is that the prison is equipped with video recording equipment which is used when the need arises to document certain incidents. For security reasons prisoners are thoroughly searched on admission.

to prison, before going to court and on his return from court, the prisoner himself removing his clothes in an orderly fashion for the item of clothing to be checked.

- (23) The evidence is that the search of the claimant was one such incident for video recording and as was evident in the video recording, the court noted that the claimant cursed expletives, threatened to kill the officers who used force as the claimant resisted the search, fought and kicked and refused to be handcuffed. The court observed that the officers remained calm and continued to encourage the claimant to relax. The court noted also that no 'intrusive search' was conducted on the claimant.
- (24) The explanation advanced by the defendants for conducting a strip search of the claimant on that occasion, is that a search in May 2013 on prisoners in the Enhanced Section of the prison where the claimant and other prisoners were being held at the time of the search, yielded a broken hacksaw blade, nails and a pair of scissors. Following that discovery a memorandum dated May 29th 2013 was circulated to all prisoners of the intended search by the prison administrators, after weekend and parole releases.
- (25) The court does not agree with the submission of the claimant that the strip search conducted on him was illegal and that such a search is confined to prisoners returning from work. The court distinguishes *Sections 101 and 102 of the Schedule to the Prison Act* as sections capable of existing independently of each other and that the first sentence of Section 102 applies to prisoners whether returning from work or from weekend or parole release and places a positive obligation on the defendants, to undertake a thorough search of every prisoner on his return to the prison.
- (26) Notwithstanding the fact that the claimant had not been previously subjected to a search on his return after weekend release, the court does not find the decision by the 1st defendant for the prison officers to conduct the search and to video record the search to be irrational and/or unreasonable, in light of the claimant's refusal to be searched and the evidence given of the items seized from prisoners on a previous search as aforementioned.
- (27) The court must review the decision to undertake the search, the actions of the prison officers in executing same and the video recording to document same, within the context and circumstances of a prison. In particular the video recording provided the court with the best evidence of the incident without the need to determine between the two accounts of the parties. The court is of the view that had the claimant co-operated fully with the defendants from the outset there would have been no need for video recording of the search or for him to sustain the injury as he alleges.
- (28) With respect to **Section 9 (2) of the Constitution** which provides for the protection of a person from search of his person and the restrictions in Section 9

(3) is a clear acknowledgement by the Constitution, that there are circumstances in the context of a prison, where safety of other prisoners and prison officers would dictate, that the search of a prisoner is necessary and reasonably justifiable in a democratic society as being (a) in the interests of ... public safety... .. protecting the rights and freedoms of other persons ... and for the prevention or detection of offences against the criminal law...

- [29] Counsel for the defendants submitted that the aim of searching inmates in prison is to ensure that escapés are prevented, threats to security, order and control are detected and deterred and that self harming by prisoners is reduced. More importantly a strip search achieves that aim, by reducing the number of illicit items, weapons, drugs and so on, from entering the prison compound.
- [30] Counsel further submitted that a balance has to be struck between the rights of prisoners on the one hand and on the other hand, the rights of prison officers and others who may be affected, by security breaches in prison, including the interests of individual prisoners in general, in keeping the prison free from drugs and weapons.
- [31] Applying Lord Diplock in *Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 AER 935*, in defining irrationality or unreasonableness, the court considers the circumstances in which the search of the claimant was conducted and the explanation given by the defendants regarding the results of a previous search conducted in May 2013, in the Enhanced Section of the prison where the claimant was being held at that time and which evidence was not refuted by the claimant, was justifiable. The court is of the view that the decisions of the 1st defendant and the action of the officers were not irrational or unreasonable, in the circumstances.
- [32] Accordingly the only issue for the court to determine is whether the defendants have shown that the doctrine of proportionality has been complied with. In applying the three stage test as set out in *de Freitas v Permanent Secretary of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69*, supra, the court is satisfied that a balance was struck in that, the strip search conducted on the claimant was justified, as being sufficiently important to ensure prison security and to prevent disorder and crime, and that the means used by the prison authority was no more than was necessary to accomplish the objective.

The court respectfully declines to make the declarations sought:

- [33] *Temporary release Rule 8 (1) of the Prison Rules provides that: The Superintendent may, subject to any conditions he sees fit to impose, recommend the temporary release of a convicted prisoner to the Governor, to enable him to engage in employment, or receive training, or assist him in his transition to freedom, or any special purpose, and the Governor may accept or reject the recommendation.*



**Rule 8 (2) provides that:** *A prisoner temporarily released under sub-rule (1) may be recalled to prison at any time, whether the conditions of his release have been broken or not.*

- [34] Weekend release was granted to the claimant for the period 19th April to 13th June 2013, subject to certain terms and conditions contained in agreement dated 5th April 2013. The only evidence before the court is that by letter dated 7th June 2013, the weekend release was **suspended** by the 1st defendant on the basis of charges brought against the claimant by the 5th defendant arising out of the claimant's misconduct on Monday 3rd June 2013, following a strip search of the claimant on his return from weekend release.
- [35] The claimant alleges that the weekend release was granted by the Governor, the only one capable of revocation or suspension of same. Further, that a strip search was not a term or condition of his weekend release and as such, suspension of the weekend release is ultra vires the Prison Rules, illegal and irrational.
- [36] The evidence of the defendants is that arising out of the claimant's actions on his return to prison on June 3rd 2013, the claimant was charged with certain disciplinary offences including disobeying a lawful order, using threatening words, failing to comply with rules applying to him, offending against good order and discipline and assault on the 5th defendant. As a consequence, the 1st Defendant **suspended** the weekend release pending the outcome of the disciplinary offences and informed the Governor of same.
- [37] Temporary release by way of weekend release of the claimant and recall or suspension thereof by the 1st defendant whether or not conditions of his release have been broken, is in accordance with *Rule 8 (1) and (2) of the Prison Rules*. Rule 8 (1) requires the **recommendation** of the Superintendent for temporary release of a prisoner to be accepted or rejected by the Governor, but the same is not stipulated for **suspension or revocation** of temporary release.
- [38] However even if it were to be argued that the same is required for recall or revocation of temporary release, the court is satisfied that in the absence of any evidence of a **revocation** of the weekend release, suspension of the weekend release pending outcome of the disciplinary offences is not illegal or ultra vires the Prison Rules.
- [39] On consideration of the facts and evidence surrounding the suspension of the claimant's weekend release and on application of the principle in *Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 AER 935: supra*, the court is not persuaded that suspension of the weekend release was irrational in those circumstances and accordingly declines to make the declarations sought.

*(3) Whether turning off the television on remaining prisoners when others leave for religious instruction or education classes is in breach of section 11 (1) or 13 (1) of the Constitution and unreasonable;*

*(4) Whether denying the viewing of certain television channels is a breach of sections 13 (1) of the Constitution, unfair and discriminatory and an abuse of power as the claimant had an legitimate expectation that he would be allowed to view these channels;*

**[40] Section 11 of the Constitution which provides protection of freedom of conscience and of religion states that —(1) Except with his or her consent, no person shall be hindered in the enjoyment of his or her freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change one's religion or belief and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate one's religion or belief in worship, teaching, practice and observance.**

*(5) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society—*

*(a) in the interests of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practise any religion or belief without the unwarranted interference of persons professing any other religion or belief.*

**[41] Section 13 of the Constitution which provides for "Protection of freedom of expression" states that:**

**13.—(1) Except with his or her consent, no person shall be hindered in the enjoyment of his or her freedom of expression, and for the purposes of this section the said freedom includes freedom to hold opinions and **freedom to receive and impart ideas and information without interference**, and freedom from interference with his or her correspondence and other means of communication.**

*(2) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society—*

*(a) in the interests of defence, public safety, public order, public morality or public health;*

*(b) for the purpose of protecting the rights, reputations and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication or regulating public exhibitions or public entertainments; or*

*(c) for the imposition of restrictions on public officers or teachers that are reasonably required for the purpose of ensuring the proper performance of their functions.*

- [42] The claimant's evidence is that the prison is provided with a television equipped with cable service for viewing certain listed channels only. The claimant contends that denial by the 1st and 2nd defendants of the claimant and other prisoners viewing other channels or restricting the viewing of certain television channels, is unreasonable and unconstitutional and in breach of *Section 13 (1) of the Constitution*, unfair and/or discriminatory, so as to amount to an abuse of power. Further, that the claimant has a legitimate expectation that he would be allowed to view the other channels as set out in his evidence.
- [43] The defendants have justified that particular decision, by relying on the evidence that the prisoners held in the Enhanced Section of the prison, are permitted to view all television channels, as an incentive and privilege for good behavior and participation in rehabilitation programs, whilst those held on the general block are permitted to view only channels on the approved list.
- [44] The defendants state further that the viewing of certain channels which contain graphic violence, nudity, instructions on how to commit crimes, jail breaks and other similar material, are blocked from all prisoners, in an effort to keep prisoners away from material that can encourage further negative or criminal behaviour. The evidence is that from time to time a blocked channel may be temporarily unblocked if a request for a particular show is made.
- [45] The defendants explained that the prison hosts religious services on Saturdays from 3.00pm to 4.00 pm and on Sundays 2.00pm to 3.00 pm in the Staff Training Multipurpose building of the prison some 30 ft from the regular block. The prison also hosts educational classes on Sundays from 3.30 pm to 5pm in the same building. Prisoners are free to attend religious services or educational classes, but during those times, those prisoners who do not attend, are free to socialize and continue regular prison activities, except watching television which is turned off so as to keep the noise levels down and to reduce disturbances during the religious services or educational classes.
- [46] Counsel for the defendants submitted that *Sections 11 (1) and 13 (1) of the Constitution* afford the claimant protection of freedom of conscience and religion and protection of freedom of expression. Counsel stated that access and opportunity to watch television is not a right contemplated under those sections of the Constitution. The opportunity to watch television says learned counsel, is a privilege, especially in a place of confinement, subject to Prison Rules. Counsel posited that the decision to provide cable television is within the power of the prison management and the provision of same.
- [47] The court has reviewed the evidence and submissions of counsel in that regard and holds the view that the claimant does not have a constitutional right to access to television in prison, nor is it a legal requirement of prison life. Further, the court cannot appreciate the claimant's position that turning off or restricting the viewing of channels in any way, deprives the claimant of the protection

afforded him under Sections 11 and 13 of the Constitution, nor can the court accept without any evidence from other inmates, that turning off the television can be interpreted as 'inmates being forced to attend religious services and/or educational classes'.

- [48] The court takes a different view from that of the claimant and accepts the submission of counsel for and the evidence of the defendants that periods of access when granted, were lawfully determinable by the 1st defendant. (*Ex parte Simms* supra, applied). By reason of imprisonment, the claimant's right to freedom is abrogated and as a consequence, the claimant's right of access to material and information that are normally available to a free person, is restricted.
- [49] Television viewing is at the discretion of the 1st defendant and the prison administrators and the blocking off of certain channels by the 1st defendant is in the court's view not unreasonable, in light of the explanation advanced by the defendants in the circumstances, as a means of controlling the content of the programs being viewed by the claimant and other prisoners.  
***Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 AER 935*** applied.
- [50] Furthermore, the court does not consider the decision to turn off the television during those periods of religious service or education classes or to restrict the channels viewed if considered by the 1st defendant unsuitable for viewing, to be disproportionate to its objective, in the circumstances where the activities are being conducted in a building adjacent to television viewing which may give rise to noise, disturbance and distraction. The court considers this action a most effective way in those circumstances with dealing with any noise, disturbance and distraction associated therewith.
- [51] Accordingly it is not unreasonable in those circumstances or disproportionate for the 1st defendant to turn off the television, as the decision so to do is reasonably justifiable for peace and order in the prisons. This court therefore does not consider that there is a contravention of any of the claimant's rights under Sections 11 and 13 of the Constitution and respectfully declines to grant the declarations sought.

**(5) Whether written recording of the content of claimant's conversations or that of other prisoners with their visitors is unlawful.**

- [52] The claimant in his letters dated 9th October 2012, exhibited to his affidavit of March 10 2014, stated that the officers continue to write notes about the contents of 'our' conversations with 'our' visitors. Other than that statement, the claimant did not provide the court with any supporting evidence of the notes or record taken by the prison officers of 'his conversations' with 'his visitors' or of other prisoners' visitors or any such record of same.

- (53) However the defendants' evidence confirm that prison visits are conducted within the sight and hearing of a prison officer. The defendants confirm that prison officers are permitted to take notes by way of a record of brief summaries of the conversations of prisoners and their visitors which is documented in the visit book. The defendants state further that prisoners are permitted to speak freely with their visitors, but conversations that encourage negative behaviour including violence, destructiveness, the commission of an offence or discussing prison security and operating procedures, are discouraged by prison officers and if in hearing of a prison officer, should be reported to the Superintendent.
- (54) **Rule 21 of the Prison Rules** states that *'every visit to a prisoner shall take place within the sight and, except as provided by this rule, the hearing of a Prison Officer and shall be recorded in a Visitors Book unless the Superintendent otherwise directs'*. The court is of the view that on proper interpretation of **Rule 21**, **the visit** must be in the sight and hearing (except with legal counsel) of the prison officer, but it is the **visit** of the visitors - in terms of date and time, name of visitor, name of prisoner relationship and other particulars of the visitor - that are to be recorded in the visitors book.
- (55) In that regard the court holds that any notes by way of a written record of brief summaries of the conversations of the claimant and other prisoners and their visitors which is documented in the visitors book, is unlawful and the court will not hesitate to make a declaration to that effect.
- (6) Whether the failure by the Prison to provide deodorant and /or shampoo and /or mouthwash is unreasonable and/or in breach of Prison Rule 15 (3) and are included in definition of 'toilet articles necessary for his health and cleanliness';**
- (56) **Rule 15 (3) of the Prison Rules** states: *'Every prisoner shall be provided with toilet articles necessary for his health and cleanliness, which shall be replaced as necessary'*
- (57) The claimant alleges that the 1st, 2nd and 8th defendants failed to provide him with deodorant, shampoo and/or mouthwash whilst he was an inmate and this constitutes a breach of **Prison Rule 15 (3)** and also, that the refusal to grant these items is unreasonable. The claimant seeks a declaration to that effect and a declaration that these items are included in the definition of *'toilet articles necessary for his health and cleanliness'*. The court notes however that the evidence of the claimant does not include a request for mouthwash.
- (58) The Prison Rules do not provide a definition of the items which comprise *'toilet articles necessary for his health and cleanliness'*. The evidence of the defendants is that the prison provides toilet articles which include toothpaste, toothbrush, bath soap, towels, bath rags, toilet paper, laundry detergent, washing liquid, razors, cleaning solution and bleach. These items are in keeping with the

toilet articles to prisoners in overseas territories and that extra items are issued to a prisoner on his request and after approval by the senior officer. In addition, if a prisoner has a medical condition for which a particular toilet article is required, the prison provides same on recommendation of a medical officer.

- [59] The claimant submits that the words *'toilet articles necessary for his health and cleanliness'* are not defined by the Prison Act<sup>1</sup> or in the Prison Rules and should be given their literal strict interpretation and in doing so, those words must include *deodorant and shampoo*. He further argues that where an ambiguity in a statute arises, a more lenient interpretation should be given in favour of the claimant and cites *David v Da Silva [1934] AC 106* as his authority for so saying and Lord Greene MR in *Associates Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223* supra for a definition of 'unreasonableness' in respect of a denial of his request for these toilet articles.
- [60] Counsel for the defendants point out that the claimant did not provide any evidence in support of the alleged denial by the 1st, 2nd and 6th defendants to provide mouthwash. Counsel argued that where a claim is based on a review of a decision there must be clearly identified evidence of the decision and the decision maker and whether that decision maker has the authority to make the decision. In the case at bar, counsel posits that the named defendants in any event, lacked the authority to grant the particular requests.

***Quorum Island (BVI) Limited v. Virgin Islands Environmental Council and the Minister of Planning -HCVAP 2009/021*** applied

- [61] The court takes a wider view of the evidence and considers same as a decision of the prison administrators and not restrict it necessarily to that of 1st, 2nd and 6th defendants. The court accepts that prisoners are responsible for their own personal hygiene, clothes and their accommodation and that personal hygiene is an essential element of personal dignity particularly in a prison environment. As a consequence, prisoners must have regular supplies of all necessary cleaning products and toilet articles.
- [62] The court has reviewed Prison Rules from other jurisdictions and in particular has noted the use of the words *'necessary toilet articles for cleansing his or her teeth and person'* . . . *women shall be provided with such other toilet articles as are necessary to health and cleanliness'*<sup>2</sup> and notes also that 'toilet articles' in these Prison Rules is not defined. In its review, the court has had sight of the ***Mandela Rules*** supra in which the words *"such toilet articles as are necessary for health and cleanliness"* is not defined nor does it provide any guidance of what 'toilet articles' comprise or include.

<sup>1</sup> Prison Act Cap 10:04 Revised Edition of the Laws of Montserrat

<sup>2</sup> See Rule 106 Prison Rules- Section 53 Correctional Services Act Cap. 14:02 Revised Edition of the Laws of Saint Lucia

[63] Rule 18 of the Mandela Rules provides for personal hygiene and states that:

1. Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such **toilet articles as are necessary for health and cleanliness.**
2. In order that prisoners may maintain a good appearance compatible with their self-respect, facilities shall be provided for the proper care of the hair and beard and men shall be able to shave regularly.

Preliminary observation 2 of the Mandela Rules provides that:

*In view of the great variety of legal, social, economic and geographical conditions in the world, it is evident that not all of the rules are capable of application in all places and at all times. They should however, serve to stimulate a constant endeavour to overcome practical difficulties in the way of their application, in the knowledge that they represent as a whole, the minimum conditions which are accepted as suitable by the United Nations.*

[64] The court is mindful that the social and economic conditions of various territories differ and prison budget resources may determine the ability and extent to which the prison can provide the necessary toilet articles. The court considers that it may well be desirable for a prison to provide shampoo, deodorant and even mouthwash, but in a general sense, shampoo, deodorant and mouthwash may not be absolutely necessary, as a bar of soap and toothpaste are adequate to meet the particular needs of personal hygiene of persons or prisoners.

[65] The court in its review of various reports on minimum conditions and treatment of prisoners, and of 'toilet articles' for detainees and 'toilet articles necessary for health and cleanliness for prisoners' in particular, finds that soap, water, toilet paper and tooth paste meet the minimum requirements and subject to the prison budgetary allocation, deodorant can be provided. Where deodorant is not provided, arrangements for those items such as shampoo and deodorant are made available for purchase by the prisoners within the prison commissary.<sup>8</sup>

[66] Consequently the court is persuaded that the Montserrat Prison met the minimum requirements necessary for the provision of *toilet articles as are necessary for health and cleanliness* for the claimant and its other prisoners. As such a failure by the prison administrators to provide deodorant and for shampoo and for mouthwash is not unreasonable and that there is no breach of *Prison Rule 15 (3)*. The court again declines to make the declarations sought.

**(7) Whether refusal to allow the claimant the use of his book titled "Sh\*t My Dad Says" is unreasonable and irrational and censorship of the book is**

<sup>8</sup> Bortolais Correctional Facility (Saint Louis).

*unconstitutional, as in breach of Section 13 (1) of the Constitution, Prison Rule 24 (1) and unfair, amounting to an abuse of power on the part of the 1st and 2nd defendants;*

*(8) Whether the denial of the use of the claimant's personal mini DVD player is unfair and/or discriminatory and amounts to abuse of power on the part of the 1st and 2nd defendants, unreasonable and in breach of Prison Rule 24 (1);*

[67] *Section 13 (1) of the Constitution* provides ..... *freedom to receive and impart ideas and information without interference, and freedom from interference with his or her correspondence and other means of communication*

*Rule 24 (1) of the Prison Rules* states that: *Subject to any directions of the Superintendent, an unconvicted prisoner may have supplied to him at his own expense and retain for his own use, books, newspapers, writing material and any other means of occupation, except any that appear objectionable to the Visiting Committee or, pending consideration by them, to the Superintendent.*

[68] The evidence of the claimant is that one of the books entitled *Sh\*t My Dad Says* as part of the reading material brought by his wife to him whilst in prison, was not given to him by the 2nd defendant, on the basis that the 2nd defendant did not think it 'appropriate'. The claimant stated that the 2nd defendant maintained his position despite being informed by the claimant that moral censorship was not permissible and barring any serious security concerns, the claimant ought to be allowed the use and enjoyment of his book. The 1st defendant stated however that the book was not allowed, because of expletives contained therein.

[69] The claimant explained that the contents and significance of the book and due to the loss of his job and experiences as a result, the author turned adversity into a positive outcome. The book became a best seller and the author, a millionaire. To the claimant this book posed no threat to the prison and other inmates. However, the claimant agreed that there were words that may be considered 'inappropriate or offensive' but this fact alone, provided no justification by the 1st and 2nd defendants, to refuse the claimant the use of the book.

[70] The claimant alleged that there were books in the prison library replete with expletives, illicit sexual content and witchcraft instructions. Accordingly the claimant states that the refusal by the defendants is unreasonable and irrational and censorship of the book is unconstitutional, is a breach of Section 13 (1) of the Constitution and Prison Rule 24 (1), is unfair, amounting to an abuse of power on the part of the defendants. The claimant relied on the principle in *R v Ministry of Defence Ex parte Smith [1996] QB 517* as authority for saying that a court will quash an act or decision which interferes with fundamental human rights for reasonableness, if there is no substantial objective justification for the interference.



- [71] Counsel for the defendants submitted that reading is encouraged in the prison, hence the wide selection of books in the prison library. Counsel contended that as the person responsible for proper management of the prison, the 1st defendant is expected to impose reasonable restrictions on the reading material that the prisoner has access to. Counsel relied on the case of *R v Secretary of State for the Home Department ex parte Simms; R v Same ex parte O'Brien* 1999 3 AER 400 supra.
- [72] Counsel submitted that Lord Hobhouse in *Simms and O'Brien* held the view that if basic rights are being asserted, the relevant criterion to apply in evaluating any conduct alleged to interfere with those rights, is that adopted by the Court of Appeal in *R v Ministry of Defence ex parte Smith* 1996 1 AER 257 at page 263: The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision maker. But judging whether the decision maker has exceeded this margin of appreciation, the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.
- [73] Thus says counsel, access to inappropriate reading material is not a right that is bestowed on a person by Section 13 of the Constitution especially during incarceration and restriction of such a right falls within the exception under Section 13 (2). It is part of the administrative function of the 1st defendant to determine what material can be restricted.
- [74] With respect to Rule 24 (1), counsel stated that it is for the Superintendent to determine what material is considered 'objectionable' until determination by the Visiting Committee. The claimant submits that there was no evidence that the Visiting Committee had objected to the book and it was the 2nd defendant who disallowed the book on moral grounds.
- [75] The court agrees with the claimant that it is the 2nd defendant who initially disallowed the book on the basis that he did not think the book appropriate but by his own evidence, the claimant accepts that it is the 1st defendant who stated that the book was not allowed because of expletives contained therein and falls within the meaning of what can be considered by the 1st defendant as 'objectionable' in Rule 24 (3) or 'offensive or inappropriate'.
- [76] The court considers that the 1st defendant found expletives in the book 'objectionable' and the only issues for the court to consider are (1) whether that interference by disallowing the book is unreasonable and unlawful if there is no substantial objective justification for the interference and (2) whether that interference is proportionate to the objective to be achieved by the prison.

- [77] The court accepts the submission of the claimant that as a consequence of incarceration, prisoners do not enjoy absolute rights to freedom of expression. The court accepts too that certain basic rights will survive, despite imprisonment. If those basic rights are being asserted, the relevant criterion to apply in evaluating any conduct alleged to interfere with those rights is that adopted by the Court of Appeal in *R v Ministry of Defence ex parte Smith* 1996 1 AER 257 *supra*. A court will only interfere if there is no substantial objective justification for the interference with that right. The test in every case is whether the right is fundamental and whether there is anything in the Constitution, the Prison Act or Prison Rules or elsewhere which authorises the prison administrators to limit such a right.
- [78] **Section 13 (2) of the Constitution** provides lawful justification for placing limits on prisoners' rights if the court is satisfied that there was substantial objective justification for the interference such as if they are necessary for the prevention of crime or for prison security. However any limitations placed upon such rights must also be proportionate to the aim which the prison administrators are seeking to achieve.
- [79] This court is not persuaded that it is necessary to explore the detailed submissions of counsel and the claimant and its application to the particular facts and issues relating to the disallowance of the book. The court is of the view that the claimant has misconstrued the meaning of the rights that are protected under *Section 13 (1) of the Constitution*.
- [80] The court is not satisfied that the 1st defendant in disallowing the claimant the use and enjoyment of the book in and of itself restricts or curtails the claimant's right in any way, to speak, write or express freely, to hold opinions, to receive and impart ideas and information, because access to the book is not required for the claimant to exercise those rights and freedoms. The court in those circumstances is unable to grant the declarations sought by the claimant.
- [81] The claimant's evidence in respect to the refusal of the use of his DVD player is that the two foreign prisoners have been allowed use of their personal DVD players whilst he has been denied the use of his. The claimant argues that the opportunity to view documentaries on DVD would have been a source of information.
- [82] The evidence of the defendants is that all prisoners are permitted to use their laptops, ipods, mp3 players and kindles, but that DVD players are not permitted. The justification by the defendants for the permission being granted to the foreign prisoners under protective sentencing to use their DVD players, is that the foreign prisoners are deprived of family visits and communication with certain individuals for their safety. In order to make them more comfortable in a strange country they are allowed the use of their DVD players and the content viewed, is vetted and approved by the prison administrators.

- [83] The court has noted that whilst a reason was given by the defendants for permitting the foreign prisoners under protective custody to use their DVD players, no reason or no good reason was advanced by the defendants for not permitting local prisoners the use of their DVD players. The evidence of the defendants suggests that audio as well as video content can be viewed by all prisoners using the permitted devices.
- [84] Personal DVD players are special devices for viewing video content and are capable of playing audio files. There seems to me to be no justification for excluding DVD players, given that video content may be viewed on laptops and ipods. If the 1st defendant permits devices (laptops and ipods) on which movies can be viewed by all prisoners, how then can a restriction on a device specifically dedicated for viewing movies which can be vetted and approved, be justified?
- [85] This court finds that the restriction on the use of DVD players by local prisoners seems unjustified and in that regard it is discriminatory, unfair and unreasonable. The court further finds that there is no justifiable reason for denying local prisoners the use of their DVD players with the content viewed vetted and approved. The court is mindful that the prison administrators may be unable, depending on the number of prisoner requests for the use of DVD players, to vet all the movies in a timely manner. However it is for prison administrators to determine how best to manage the vetting process for an increased number of prisoner requests.

**(9) Whether denial of a spousal visit is unreasonable and/or irrational.**

- [86] At clause 27 of the Originating Motion filed on the 27th May 2014, the claimant sought a declaration that denying the claimant a visit from his wife and friends on the 5th June 2013, was unreasonable and/or irrational. There is no evidence presented to the court in support of the remedy sought which the court can review, assess and determine whether such a declaration can be made. The court accordingly finds that the claimant is not entitled to such a declaration being made in his favour.

**(10) Whether disciplinary proceedings of a Visiting Committee held 12th June 2013 is ultra vires the prison rules and a nullity, unreasonable and/or irrational;**

- [87] At clauses 24-26 of the Originating Motion filed on the 27th May 2014, the claimant sought declarations relating to the disciplinary proceedings of the Visiting Committee. The court does not consider it necessary to list in detail rules 31-34 of the Prison Rules which it has reviewed in particular- **Rule 31: Disciplinary Charges, Rule 32: Rights of Prisoner Charged; Rule 33: Punishment and Rule 34: Referrals to the Visiting Committee.**

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<sup>1</sup> Padfield v Minister of Agriculture Fisheries & Food [1968] AC 997 applied

- (88) The court agrees with counsel for the defendants that the claimant failed to present any evidence in support of contravention of the Prison Rules, irrationality or unreasonableness of the decision or of the conduct of the disciplinary proceedings that he wishes to challenge and/or the grounds on which the allegations of contravention of the Prison Rules, irrationality or unreasonableness are founded.
- (89) The court is satisfied that the claimant has not presented any evidence in support of the remedy sought which the court can review, assess and determine and accordingly the court declines to make the declarations sought.

### DAMAGES

- (90) In considering making an award of damages to the claimant, the court is guided by the case of **Attorney-General of Trinidad & Tobago v Ramanoop 66 WIR 334, Privy Council Appeal No. 13/2004** in which the Privy Council states '...When exercising this constitutional jurisdiction, the court is concerned to uphold or vindicate the constitutional right which has been contravened... An award of compensation will go some distance towards vindicating the constitutional right which has been contravened.'
- (91) In **Inniss v The Attorney-General of Saint Christopher & Nevis [2008] UKPC 42**, it was stated at paragraph 21 'The function that the granting of relief is intended to serve, is to vindicate the constitutional right. In some cases a declaration on its own may achieve all that is needed to vindicate the right. This is likely to be so where the contravention has not yet had any significant effect on the party who seeks relief.'
- (92) The case of **Merson v Cartwright & the Attorney General [2005] UKPC 38** is instructive. At paragraph 18 the Privy Council states: *The purpose of vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant whether a citizen or a visitor, to carry on his or her life free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right, in other cases an award of damages, including substantial damages, may seem to be necessary.*
- (93) The court embraces and is guided by the principles established in the above authorities. The court holds the view that in the case at bar, where the court finds in favour of the claimant, that a suitable declaration will suffice to vindicate the rights of the claimant and will accordingly decline to make any award as to damages.

## CONCLUSION

The court therefore makes the following declarations and orders:

1. Written recording of the content of the claimant's conversation or any conversation between a prisoner and his visitor/s, is unlawful.
2. The denial of the use by the claimant or any local prisoner, of a personal mini DVD player is unfair, discriminatory and unreasonable.
3. There shall be no award of damages.
4. There shall be no order as to costs.



Cynthia Combie Marfyr  
High Court Judge (Ag)