**EASTERN CARIBBEAN SUPREME COURT**
**SAINT CHRISTOPHER AND NEVIS**

**IN THE HIGH COURT OF JUSTICE**

**CLAIM NO. SKBHCV2015/0248**

**IN THE MATTER of Sections 5 (1), 5 (1) (f); 5 (3) (b); 5 (5) and 5(6) of the Constitution and Nevis**

**and**

**IN THE MATTER of an Application for Declatory and Compensatory relief by KHRYSTUS WALLACE pursuant to Section 18 (1) & (2) of the Constitution of St. Christopher & Nevis**

**BETWEEN:**

**KHRYSTUS WALLACE**

**Claimant**

**and**

**CHARLES SMITHEN**

**1st Defendant**

**and**

**THE ATTORNEY GENERAL OF ST. KITTS AND NEVIS**

**2nd Defendant**

**Appearances:-**

Ms. Marsha Henderson for the Claimant.
Ms. Nisharma Rattan-Mack and Ms. Eshe Henderson for the Defendants.

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2018: May 22nd

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## JUDGMENT

[1] The claimant is a self-employed computer technician, computer instructor, printer, graphic designer and an ordained pastor. On 27th May, 2013 he was arrested by the 1st defendant and charged with publication of a seditious publication. He was detained for six months before being released on bail on 29th November, 2013. The Director of Public of Prosecutions discontinued the proceedings against him in 2015. The claimant seeks redress by way of originating motion filed on 15th November, 2015 against the 1st the defendant and the Attorney General as representative of the Crown. The claimant seeks declarations and compensatory reliefs pursuant to Section 18 of the Constitution of St. Kitts and Nevis.

### Background

[2] On 27th May, 2013, the first defendant received an email from the Blazing Star Movement website which is owned and operated by the claimant. The email was captioned "An Open Letter To Commissioner of Police – CG Walwyn – Prepare to temporarily head a Military Government." The email was also published on the claimant's website: theblazingstarmovement.com. Having read the email, the 1st defendant obtained a search warrant and, together with a party of police officers, proceeded to the claimant's home at Boyd's Village. There is some divergence as to what transpired at the claimant's home that morning.

### The claimant's evidence

[3] According to the claimant, he was aggressively roused from slumber by the police at about 6:00 a.m. No warrant was presented or read to him but the police officers proceeded to ransack and raid his home purportedly looking for guns, ammunition and drugs. During the process he asked Superintendent Smithen whether he had a search warrant. Only then did Superintendent Smithen pull from his pocket something that seemed like a blank piece of paper and read it quickly. When the

claimant's mother asked to see the document Superintendent Smithen became enraged and said: "You don't have to see this, you don't have to see this."

[4] The claimant contends that the police party removed much of the electronic devices used in his business, namely 8 computer processing units, 3 laptops, 6 external hard drives, 3 cellular phones 10 pen drives or dongle keys, 2 CPU desk top computers with written software to run printing machines and one bag of documents. The cell phones, he averred, held critical contact information of local, regional and international business customers.

[5] The claimant further alleges that the presence of the party of police officers at his premises quickly attracted a crowd of curious neighbours who were on hand to witness him being hustled into a police vehicle in handcuffs much to his shock and humiliation. He was taken to the Basseterre Police Station and charged.

[6] The following day, 28th May, 2013 the claimant appeared before the Magistrate, District A. He was denied bail by the Magistrate upon objection being made by Superintendent Smithen that the claimant was on bail for another offence when he allegedly committed this offence. On 14th June, 2013 the claimant applied to the High Court for bail but was denied. A renewed bail application was made in August 2013 before a different magistrate. Bail was granted and the claimant was released. However, the very next day his bail was revoked by the Magistrate who had seemingly been made aware that the claimant had previously been denied bail by the High Court.

[7] On 29th November, 2013 the claimant once again moved the High Court for bail. On this occasion he was successful and was admitted to bail in the sum of EC$5,000.00 on condition that he report to the Old Road Police Station twice per week.

[8] The claimant avers that during his period of incarceration he was forced to endure the horror of imprisonment in a filthy cell shared with between twenty and twenty three inmates. For most of his detention, he slept on a mat on the floor. He also

experienced severe and constant headaches and toothaches on account of the stress caused by his arrest and incarceration. He claims that it was difficult to access pain killers which he was denied by prison officers causing him to have to beg other inmates in order to get them.

[9] Additionally, the claimant alleges that being away from his family caused him great frustration and anguish as he had never been away from them before, except for brief periods of travel.

[10] On 11th May 2015, the then Director of Public Prosecutions discontinued the case against him.

[11] The claimant further avers that when the items which had been seized from him were eventually returned to him in April 2015 most of them were in an unusable state. The two CPU desk tops which were used in the business were destroyed. This led to the destruction of his banner printing machine. Two of the laptops were returned damaged. Three of the external hard drives containing client printing portfolios and graphic files digitized were destroyed. Two of the CPU desk top computers with custom written software to run the printing machine were returned in non-working condition.

[12] The claimant avers that his wrongful arrest, charge and detention has wrecked his life and sullied his character as a preacher and business man. The claimant cites the eventual discontinuance of the case against him as evidence that neither the police nor the Crown had prima facie evidence against him when he was arrested and charged.

[13] On 11th November, 2015 the claimant instituted these proceedings seeking declarations and compensatory orders under Section 18 of the Constitution.

[14] Specifically, the claimant seeks the following reliefs:

(I) A declaration that his arrest/detention and incarceration for the offence of Seditious Publication for a period of 6 months from 27th May, 2013 to 29th

November, 2013 without trial was unreasonable.

(II) A declaration that his arrest/detention and incarceration for the offence of Seditious Publication for a period of 6 months from 27th May, 2013 to 29th November, 2013 without trial violated his constitutional right to personal liberty and was in contravention of sections 5(3) (b) 5(5) and 5(6) of the Constitution;

(III) An order that he is entitled to compensatory relief and damages for the unconstitutional deprivation of his personal liberty;

(IV) Special Damages in the sum of $82, 800.00 for loss of earnings from 27th May, 2013 until 29th November, 2013;

(V) Special damages in the sum of EC$125,323.78 for loss and damage to personal property;

(VI) Special damages in the sum of EC$500,000.00 for loss and damage of critical work stored on three external hard drives.

(VII) Special damages in the sum of $EC240,504.83 for loss of business at KVK Enterprises from the date of his arrest until April , 2015 when his equipment was returned to him;

(VIII) Special damages in the sum of $EC230,359.03 for loss of business at The Supply Shop KVK Enterprises from the date of his arrest until April , 2015 when his equipment was returned to him;

(IX) Aggravated damages;

(X) Interest;

(XI) Such further or other relief as may be just;

(XII) Costs.

**The Defendants' Case**

[15] The defendant asserts that Superintendent Smithen acted with reasonable and probable cause when he arrested and charged the claimant on 27th May, 2013. The particular averments as to reasonable and probable cause are set out at paragraph 15 of the 1st defendant's affidavit which was ordered to stand as

evidence in chief. It is in the following terms:

> "(a) On May 27th 2013 I received an email from the Blazing Star Movement Website which is owned and operated by the Khrystus Wallace via my personal email address c_smithen@live.com.
>
> (b) The content of the email reveal the elements of the offence of sedition. The claimant published material with the intention to promote feelings of ill will and hostility between different classes of the population of the state and to bring into hatred or contempt to excite disaffection against the person of the Crown or Government of the State as by the law established. The claimant wrote two members of the Royal St. Christopher and Nevis Police Force recommending that the Federation goes into Military leadership if the then Prime Minister did not return for his weekly ASK THE PRIME MINISTER programme on ZIZ. The claimant stated that he has personal text messages between himself and the then Prime Minister, the Hon. Dr. Denzil Douglas, where he told him to quickly leave the country and seek asylum. He accused the then Prime Minister of money laundering and said he told the then Prime Minister he would arrest him. He accused the then Prime Minister of trying to kill him on more than one occasion. The claimant made accusations and violent threats to the then Prime Minister.
>
> The content of the claimant's email was also published on his website www.the blazingstarmovement.com. Then Acting Director of Public Prosecutions, Ms. Rhonda Nisbett-Browne gave her written consent to have prosecution commenced against the claimant by the powers vested in her under section 5 of the Sedition and Undesirable Publications Act. Chapter 4.34 …"

[16] In his viva voce evidence, Superintendent Smithen testified that he obtained a search warrant and proceeded to the claimant's home in search of guns, ammunition, drugs, computers, cell phones and other accessories related to cell phones and computers. Accompanying him were Police Constable PC Dexter

Lawrence and Police Constable Carlos Duncan. All three arrived in a police vehicle and were dressed in plain clothes. This team was complemented by an officer and dog from the police canine unit who arrived in a small bus belonging to that unit and one special services officer dressed in military green fatigues who drove the Special Services Unit bus.

[17] Superintendent Smithen testified that upon arrival at the claimant's home they could not enter owing to the presence of dogs on the property. The claimant's mother, whom he said knows him well, came to the gate. He read the warrant to her. She secured the dogs and allowed the police access to the property and led them to the claimant's bedroom door and called out to him.

[18] The claimant emerged dressed in a vest and boxer. Superintendent Smithen testified that he showed and read the warrant to the claimant who was very cooperative and ushered them inside. He said on entering he, PC Lawrence and Duncan had their firearms concealed. The canine officer's .45 hand gun was holstered on his side as was the gun of the Special Services Unit officer.

[19] Superintendent Smithen said he seized several computers, hard drives and other electronic devices from the claimant's property to assist with his investigations. However, he left behind an embroidery machine and a computer associated with that machine which the claimant told him was his tool of trade. He testified that the claimant told him that the other computers were used to assist children with their homework. The seized items were turned over to the Cyber Crime Unit for processing.

[20] It is accepted that there was some delay in processing these items. PC Audain, who was tasked with this responsibility, attributes the delay to the attempts to renew a licence for the software used to image the devices without which it would have been illegal to examine them.

[21] He testified that while he had the software to image the computer devices when he received them on 29th May, 2013, the software needed a licence to validate it

but that licence had expired. He immediately brought this fact to the attention of his superiors. As soon as the licence was renewed he commenced his examination of the devices except for the cell phones for which he lacked the appropriate software.

[22] PC Audain testified that it was not necessary to and he never turned on the computers since he examined them by making an image of all the hard drives. He used a right blocker which would cause any information that was on the hard drive to remain unaltered. He then made copies of the hard drives.

[23] According to him, the task of examining the contents of the hard drives was very tedious and strenuous as there were in excess of $20,000 thousand emails and files on the hard drive which took him a few months to go through. The process also entailed recovering and examining deleted files.

[24] He concluded his testimony by saying that he had used the same software many times before to image hard drives and it had never caused any damage to the hard drives in his experience.

[25] When he completed his examination of the hard drives, he concluded that no further incriminatory material relative to the charge was found on them. He therefore handed them over to PC Lawrence.

[26] PC Audain further testified that sometime after he had completed his examination of the items the claimant attended the police station with a technician who wanted to examine the items in his office. He advised the claimant's technician that his office was not accessible to the public and asked him to leave. The technician told the claimant that he was going to examine the items to make sure they were working.

[27] The evidence does not give a clear indication of the date when the licence was eventually obtained or when exactly the items were imaged but it establishes that on 5th November, 2014 a total of five computer processing units, three hard drives

and one Dell Battery were returned to the claimant. On 6th March, 2015 the remaining items were returned to the claimant. On both occasions the hand over was recorded in the Police Exhibit Register which the claimant signed acknowledging, "Items were handed over in good condition" and "Handed over as received" on 5th November, 2014 and 6th March, 2015 respectively.

[28] The defendant denied that the claimant has suffered any loss or damage as alleged or at all.

[29] On 11th May 2015, the Director of Public Prosecutions discontinued the case against the claimant.

**Counsel's submissions**

[30] On behalf of the claimant, Learned Counsel Ms. Marsha Henderson, submitted that Superintendent Smithen had no reasonable and probable cause to arrest the claimant since nothing contained in the admitted publication could have grounded an honest belief on reasonable grounds that the claimant was guilty of the offence of publishing a seditious publication. Ms. Henderson relied on **Alanaov v The Chief Constable of Sussex Police**[1] as authority for the meaning of reasonable grounds for suspicion. Learned counsel submitted that the defendants have failed woefully to discharge their burden of proving the existence of reasonable grounds for suspicion.

[31] Accordingly, Ms. Henderson asks the court to find that there was no legal basis to detain the claimant for 187 days. Such detention, she submitted, was therefore in breach of constitutional rights guaranteed by Sections 5(1)(e), 5(3)(a)&(b), 5(5) & 5(6).

[32] In her submissions relating to compensation and damages, learned counsel asked the court to consider a number of factors including the claimant's loss of liberty for 187 days; his loss of reputation; the humiliation and disgrace caused to

[1] [2012] EWCA Civ 234

the claimant; his loss of enjoyment of life; loss of potential normal experiences such as starting a family; and the pain and suffering, emotional and mental stress he endured while in prison.

[33] As to aggravated/exemplary damages, learned counsel submitted that in arriving at such an award the court should consider that the servants and or agents of the Government acted oppressively towards the claimant.

**Defendant's submissions**

[34] On behalf of the defendants, Learned Crown Counsel, Ms. Nisharma Rattan Mack, submitted that the 1st defendant had reasonable and probable cause to arrest the claimant based on the contents of the publication which revealed the elements of the offence of sedition.

[35] Further, Ms. Rattan Mack submitted that the claimant has not properly discharged his duty to prove that he was denied what she described as a right to a speedy trial. On the contrary, submitted learned crown counsel, the evidence adduced at the trial through Superintendent Smithen and PC Audain provided valid reasons that justified the delay in the investigation of the matter.

[36] Ms. Rattan Mack submitted that the claimant was lawfully arrested and detained and, as such is not entitled to compensatory relief of any kind.

**Issues**

[37] The principal issues for resolution in this case are:

(1) Whether the arrest, charge and incarceration of the claimant for the period of six months between 27th May, 2013 and 29th November, 2013 violated his constitutional right to personal liberty;

(2) Whether the incarceration of the claimant for the period of six months between 27th May, 2013 and 29th November, 2013 without trial was unreasonable.

[38] The answer to these questions will determine whether the declaratory and compensatory reliefs sought by the claimant are sustainable.

**Discussion**

[39] The first issue requires the court to determine whether the 1st defendant had reasonable and probable cause to arrest the claimant for publishing a seditious publication. While I entertain some reservations about whether this aspect of the claim is properly brought as a constitutional motion, I will proceed to treat with it.

**Reasonable and probable cause**

[40] Section 5(1)(f) of the Constitution authorizes the arrest of a person upon reasonable suspicion of him having committed, or being about to commit, a criminal offence under any law. Section 6(1) (a) of the Police Act, Cap. 19.07 provides that a police officer may, without warrant, arrest a person whom he reasonably suspects of having committed an offence.

[41] When a police officer is exercising his power of arrest he must have an honest belief, based on reasonable grounds, that on the material available to him at the time of the charge there was a case fit to be tried. Thus, there is both a subjective and objective element to the test. The objective test asks whether a reasonable man, assumed to know the law and possessed of the information which in fact was possessed by the 1st defendant, would believe that there was reasonable and probable cause to suspect that the claimant had committed the offence.

[42] It is important to keep in mind that the test is not whether he has an honest belief in the guilt of the accused. In **Glinski v McIver**[2] Lord Denning described the nature of the belief in the following way:

> "In the first place, the word guilty is apt to be misleading. It suggests that

[2] [1962] A.C. 726

> in order to have reasonable and probable cause a man who brings a prosecution, be he a police officer or a private individual must, at his peril, believe in the guilt of the accused. That he must be sure of it, as a jury must, before they convict. Whereas in truth he has only to be satisfied that there is a proper case to lay before the court, or in the words of Lord Mansfield that there is a probable cause "to bring the [accused] to a fair and impartial trial"…Guilt or innocence is for the tribunal and not for him…the truth is that a police officer is only concerned to see there is a case proper to be laid before the court."

[43] The required belief has been alternatively expressed as a case fit to be tried. See **Coudrat v Commissioners of Her Majesty's Revenue and Customs**.[3]

[44] In practical terms, the question is whether, in effecting the arrest of the claimant, Superintendent Smithen had reasonable and probable cause to suspect that he had published a seditious publication intending to bring about any of the proscribed results at section 3(1) of the Seditious and Undesirable Publications Act, Chapter 4.34. The burden is on the defendant to show the existence of reasonable and probable cause for the arrest.

[45] The answer to this question necessitates an assessment of the provisions of the Seditious and Undesirable Publications Act, Chapter 4.34 and the information or material on which Superintendent Smithen acted.

[46] Section 4 (1) of the Seditious and Undesirable Publications Act, Chapter 4.34 provides:

> "(1) A person who…
>
> (a) Does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention;
> (b) utters any seditious words;
> (c) prints, publishes, sells, offers for sale, distributes, or reproduces any seditious publication;
> (d) Imports any seditious publication, unless he or she has no reason to believe that it is seditious.
>
> commits an offence and shall be liable, for a first offence to imprisonment with or without hard labour for a term not exceeding

[3] [2005]EWCA Civ. 616.

two years or to a fine not exceeding one thousand five hundred dollars or to both, and for a subsequent offence, to imprisonment with or without hard labour for a term not exceeding three years."

[47] A seditious publication is defined at section 2 to mean a publication having a seditious intention.

[48] Section 3 defines seditious intention:

> "(1) A "seditious intention" is an intention
> (a) to bring into hatred or contempt or to excite disaffection against the person of the Crown or the Government of the State as by law established;
> (b) to excite any person to attempt to procure the alteration, otherwise than by lawful means, of any other matter in the State as by law established;
> (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in the State; or
> (d) to promote feelings of ill-will and hostility between different classes of the population of the State.

[49] There is no dispute that on 27th May, 2013, the claimant published an email captioned **"An Open Letter To Commissioner of Police – CG Walwyn – Prepare to temporarily head a Military Government."** by distributing it to persons on his global mailing list, which included the 1st defendant, and by placing it on his website. The contents of that document formed the basis of his arrest and charge. It is important and necessary to set out the material parts in some detail with its original emphasis:

> "Dear Mr. Walwyn,
> …I don't want to make this letter too lengthy. I want to get straight to the point and recommend that the Federation of St. Kitts-Nevis goes into Military Leadership from 12 noon on 28th May, 2013 if Prime Minister Dr. The Right Honourable Denzil Douglas does not return to St. Kitts-Nevis to conduct his weekly ASK THE PRIME MINISTER programme on ZIZ radio-LIVE or call in from where ever he is in the Middle East to tell us what is going on….
> Sir Walwyn, I therefore request that you have an urgent meeting with Legal Personal *(Sic),* the Queen and the Governor General so as to confirm NOT ASCERTAIN – CONFIRM that you can run the country until the 1st of June, 2013 when we have an official swearing in Ceremony of 8 Fresh Totally New Ministers of Government and extra Senators that I will put in place.

> I was sent by God to ROOT UP CORRUPTION and I have done a lot of that. To further continue will only cause my New Blazing Star Administration to have more work to do…I have some personal texts between myself and Dr. Douglas and I told him to quickly leave the country and seek ASYLUM to which he has complied…
> Lawyers were looking for an approach to help me rid the corrupt Prime Minister…
> Sir Walwyn, according to the QCs that have been advising me internationally the procedure is to request that the nation firstly go into Military Leadership and during the time it is in Military Leadership and then you can set a date for a FRESH GENERAL ELECTIONS…
> Sir Walwyn I will not repeat Dr. Douglas' favourite phrase- "Remember I can incite you know – Remember 1993 The Lord has assured my team, and I in 2 Chronicles 20:17 – Ye shall not *need* to fight in this *battle:* set yourselves, stand ye still, and see the salvation of the LORD with you, O Judah and Jerusalem: fear not, not be dismayed; tomorrow go out against them: for the Lord *will* be with you…"

[50] Superintendent Smithen stated in his affidavit that he considered that the contents of the email revealed the elements of sedition and was published with the intention to promote feelings of ill will and hostility between different classes of the population of the State and to bring into hatred or contempt to excite disaffection against the person of the Crown or Government of the State as by law established; incited the setting up of a military government; accused the then Prime Minister of criminal conduct and had threatened to arrest the Prime Minister if he returned to the Federation.

[51] The clamant testified that the Blazing Star Movement was a youth political party, thus the words published must be assessed against the background of the capacity in which the claimant was distributing them. In the court's view these words were reasonably capable of being objectively viewed as constituting a seditious publication. They were capable of conveying to the reasonable man to whom they were published and who knows the law that the claimant was demanding that the Commissioner of Police set up a military government by noon the following day to oust the then Prime Minister from office and install eight new Government Ministers and additional Senators of the claimant's choosing. The words were capable of meaning that the claimant was advocating an immediate

change of government in a manner not provided for by the laws of the Federation. Indeed, the very caption of the email proclaims its purpose.

[52] When the claimant accused the then Prime Minister of having engaged in criminal conduct and threatened to arrest him if he dared land in the Federation, the words could reasonably be construed as meaning that the then Prime Minister had committed criminal offences and should be viewed with hatred and contempt and removed from office by force if necessary.

[53] That the claimant possessed the intention to bring about these purposes can be inferred from the words themselves. Notwithstanding the claimant's occasional employment of biblical allegory, which his counsel submitted rebuts an intention to actually incite anyone, it is well to bear in mind that in inferring intention from the words used such intention is not necessarily to be judged upon the face value of the words used. The point is vividly illustrated by Latham CJ in the case of **R v Sharky**[4], a judgment of the High Court of Australia:

> "Intention – which is a matter of inference from words or conduct – is not by any means necessarily to be judged upon the face value of words used. The earnest advice of a pretendedly disinterested bystander to an excited crowd in possession of a victim "Don't duck him in the horse trough" can be interpreted, quite reasonably in some circumstances, as an incitement to the action which the speaker professes to discourage."

[54] I am of the opinion that the reasonable man could conclude that the claimant's intention was to bring into hatred or contempt or to excite disaffection against the Government of the State as by law established and to excite persons to attempt to procure the alteration of the composition of the executive, otherwise than by lawful means. In that regard the published words could reasonably be viewed as manifesting a seditious intention within the meaning of section 3(1)(a) and (b).

[55] I therefore find that Superintendent Smithen honestly believed on reasonable grounds that the claimant had committed the offence of publishing a seditious publication and was therefore justified in arresting and charging the claimant on

[4] [1949] HCA 46; 79 CLR 121

the written consent of the Director of Public Prosecutions.

[56] Accordingly, the claimant has failed to establish a breach of his constitutional right to personal liberty and as such is not entitled to damages for wrongful arrest and detention.

**Delay issue**

[57] The lawfulness of the arrest notwithstanding, the court must next consider whether the claimant's arrest and detention for six months without trial was unreasonable and in breach of his constitutional rights.

[58] It is important to note that the relevant period of delay as pleaded by the claimant at paragraph 2 of his originating motion is the six month period commencing 27th May, 2013 (the date of his arrest) until 29th November, 2013 when he was released on bail. This period of delay, asserts the claimant, violates the provisions of sections 5 (5) and 5(6) of the Constitution which provide:

> "(5) If any person arrested or detained as mentioned in subsection (3)(b) is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions , including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial, and such conditions may include bail so long as it is not excessive.
>
> (6) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefore from that other person or authority on whose behalf that other person was acting."

[59] The claimant has not pleaded a breach of Section 10 of the Constitution which guarantees a fair hearing within a reasonable time. He has invoked Section 5(5) which guarantees the right to be released if not tried within a reasonable time.

[60] In considering whether a six month period of pre-trial detention was unreasonable, there are a number of questions that require consideration. In **Gladstone**

**Gooderidge v The Queen**[5] Byron C.J. enumerated the factors to be assessed:

(i) The length of the delay;

(ii) The reasons for the delay;

(iii) The responsibility of the claimant for asserting his rights;

(iv) The prejudice to the claimant.

[61] The burden of proving the unreasonableness of any delay rests on the claimant. As Byron CJ stated in **Gladstone Goodridge**:

> "The law seems to be that the burden to show the unreasonableness of the delay is primarily on the person who alleges contravention of his rights although in some cases the extent of the delay may be sufficient to discharge that burden at least *prima facie*."

[62] I turn now to consider the factors identified above in order to assess whether the period of delay was unreasonable.

**The length of the delay**

[63] The period of delay complained of in this case is six months. The court is entitled to view this period of delay in the context of local conditions relating to the justice system in St. Kitts and Nevis and to assess whether in the circumstances of this case such a period is presumptively prejudicial. It is therefore necessary to examine the reasons for the delay.

**The reasons for the delay**

[64] The reason attributed by the defendant for the delay is the challenge encountered in obtaining the necessary licence before the police could lawfully examine the computers seized from the claimant. According to the evidence, the need to examine the items sprung from a desire to ascertain whether there was additional evidence to support the charge. The court finds it regrettable, and of some

[5] Cr. App No.13 of 1997.

concern, that the necessary licence was not current at the time the items were seized. This was a system failure to ensure that the licence was kept current given its apparent importance to the work of the Cyber Crime Unit. This factor must be weighed in the scales.

[65] The evidence adduced was that the process of obtaining the licence required the input of other agencies such as the US State Department. PC Audain testified that as soon as the licence was obtained the items were examined and returned to the claimant.

[66] In my view it was legitimate to seek to determine whether additional evidence would be found to support the charge. A proper investigation should not end once a charge is laid. Additional investigation might produce evidence that may either enhance the case or lead to a review and subsequent discontinuance of the case.

[67] I further find that the police acted quite properly in seeking to obtain the licence in order to ensure that the examination of the claimant's computers was lawfully done albeit it occasioned some delay. To examine the items without having obtained the licence would have been to act unlawfully and in utmost bad faith.

[68] I therefore find that the reason proferred by the defendants justifies the delay and that the property was held for so long only as was necessary for the purpose of carrying out the examination which, on the evidence of PC Audain who impressed me as honest and forthright, was extensive and time consuming.

**The responsibility of the claimant for asserting his rights**

[69] In **Barker v Wingo**[6]**,** which the ECSC Court of Appeal in **Gooderidge** endorsed as being of persuasive authority, Powell, J explained why it is necessary to examine the claimant's responsibility for asserting his right in the face of an asserted delay:

[6] (1972) 407 U.S. 514

> "Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay and most particularly by the personal prejudice which is not always readily identifiable that he experiences. The more serious the deprivation the more likely a defendant is to complain."

[70] I have carefully reviewed the evidence of the claimant regarding the delay over this six month period. While he states that he was summoned to appear in court in more than twenty occasions betw een May 2013 and 11th May, 2015, there is no evidence that he protested or opposed any application for adjournments during the six month period of which complaint is made or, indeed at any time before the matter was discontinued in 2015.

[71] The first time the claimant asserted his right was when he filed the originating motion on 11th November, 2015. It would be fair to say that the claimant has been dilatory in asserting his right.

**Prejudice to the claimant**

[72] Underpinning the right to a trial within a reasonable time is the notion that a person should be afforded a fair trial to guard against oppressive pre-trial detention, anxiety and concern of the accused and to limit the possibility that the defence will be impaired: **Gooderidge**. None of these features is relevant in this case. Further, it is my view that a delay of six months before commencement of a preliminary enquiry is not presumptively prejudicial. In the premises, the claimant has failed to establish that he has suffered any prejudice on account of a six month delay.

[73] The claimant was arrested on 27th May, 2013, and taken to court promptly on 28th May, 2013. His detention was kept under review by the courts which twice authorized his continued detention until he was granted bail on 29th November, 2013. In my view, the court paid obeisance to Section 5 (5) by releasing the claimant on bail after he had been detained for six months.

[74] The claimant has therefore failed to establish a breach of his right to be released if not tried within a reasonable time and as such is not entitled to damages on account of his detention for a period of six months.

[75] Given my findings and conclusions above it is not necessary to deal with the claim for special damages. However, for completeness I would add that the court would not have entertained the claim for special damages arising out of the detention of the claimant's property until November 2014 and March 2015.

[76] This claim is not confined to loss occurring during his period of detention but extends to the entire period during which the property was detained. In essence, the complaint is that upon the claimant's arrest, his property was detained. When returned to him in November, 2014 and March 2015, some items were damaged or destroyed.

[77] This claim, it is to be noted, does not allege a breach of section 8 of the constitution which is concerned with the unlawful deprivation of property. It seems the court is being invited to treat it as loss flowing from his allegedly unlawful arrest and detention.

[78] After receiving written closing submissions, I invited counsel for the parties to submit further written submissions on whether an originating motion is an appropriate procedure for approaching the court for such relief. The court has received further written submissions on behalf of the defendants only.

[79] Learned Crown Counsel submitted that the claimant would have had an alternative remedy in tort and so should not be permitted to access the court for constitutional redress under section 18.

[80] Section 18 provides:

**"Enforcement of protective provisions.**

(1) If any person alleges that any of the provisions of sections 3 to 17 (inclusive) has been, is being or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction

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

(b) to determine any question arising in the case of any person that is referred to it in pursuance of subsection (3)

and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 17 (inclusive):

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

[81] It is well settled that an application for constitutional relief should not be used as a general substitute for the normal procedures for invoking judicial control of administrative action and where there is a parallel remedy unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course: ***Attorney General v Ramroop***[7]

[82] It is also true that it is ill suited to decide substantial factual disputes.

[83] In **Jaroo v Attorney General (Trinidad and Tobago)**[8] the appellant had purchased a car in good faith. When he applied to the Licensing Authority for the re-classification of the vehicle it was detained by the police who suspected that it was a stolen vehicle. On their instructions he took the motor car to the police so that they could examine it and conduct inquiries into its theft. After a suitable

[7] [2005] UKPC 15
[8] [2000] UKPC 5

interval, having heard nothing from them, he asked the police to return the vehicle. Repeated requests met with no reply. The appellant therefore instituted proceedings by way of originating motion under section 14 (1) of the Constitution of Trinidad and Tobago (the equivalent of Section 18, St. Kitts & Nevis Constitution). The Privy Council held that it was an abuse of process to do so instead of instituting the common law remedy for the return of the vehicle. Lord Hope stated at paragraph 39:

> "Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of the process to resort to it. If, as in this case, it becomes clear after the motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances will also be an abuse."

[84] This case illustrates the proposition that having a constitutional claim does not guarantee a right to bring a constitutional motion.

[85] Nearer home, in **Aubyn St. Price v Attorney General**[9], the Court of Appeal summed up the position thus:

> "The court's power to hear a constitutional motion are contained in section 16 of the Constitution of St. Lucia [section 18, St. Kitts and Nevis] and it is clear from the proviso to the section that the power is discretionary and the court may decline to hear the motion if adequate means of redress are

[9] SLUHCVAP2012/0027

or have been available to the applicant…Each case must be decided on its own facts."

[86] In my view, notwithstanding the manner in which the claim is formulated, the facts and circumstances relating to the detention of the claimant's property and the issues arising therefrom give rise to an alternative remedy in tort. Accordingly, I hold that resort to the procedure of originating motion is inappropriate and an abuse of process.

[87] For all of the foregoing reasons, I decline to grant the claimant the declarations or reliefs sought and dismiss the claim. I make no order as to costs.

**Trevor M. Ward, QC**
Resident Judge

**By the Court**

**Registrar**