THE COURT ORDERED that no one shall publish or reveal the name or address of the child who is the subject of these proceedings, or publish or reveal any information which would be likely to lead to the identification of the child or any member of his family in connection with these proceedings, in accordance with the Court Order of 13 October 2022.

Michaelmas Term
[2022] UKPC 54
Privy Council Appeal No 0018 of 2022

JUDGMENT

Attorney General of Trinidad and Tobago (Respondent) *v* JM (A minor by his kin and next friend NM) (Appellant) (Trinidad and Tobago)

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

before

Lord Hodge
Lord Leggatt
Lord Burrows
Lady Rose
Lord Richards

JUDGMENT GIVEN ON
19 December 2022

Heard on 13 October 2022

Appellant
Anand Ramlogan SC
Robert Strang
Adam Riley
Ganesh Saroop
(Instructed by Freedom Law Chambers (Trinidad))

Respondent
Howard Stevens KC
Katharine Bailey
(Instructed by Charles Russell Speechlys LLP (London))

LORD BURROWS (with whom Lord Hodge, Lord Leggatt, Lady Rose and Lord Richards agree):

1. Introduction

1. JM, who is now 19 years old, suffers from a rare genetic disorder called Prader-Willi Syndrome ("PWS"). Typically, PWS inhibits physical and cognitive development, produces feelings of insatiable hunger leading to obesity, and is associated with behavioural problems. At the age of nine, JM was removed from the care of his mother and placed in the care of the State. He was sent to St Michael's Boys Industrial School ("St Michael's"), an institution for young offenders aged 10-16, even though JM was only aged nine and had neither committed, nor been charged with, any criminal offence. Some four years later, he was transferred to an adult psychiatric hospital, St Ann's Psychiatric Hospital ("St Ann's"), despite the fact that he was still a child and that PWS is not itself a mental illness. In both institutions, JM suffered appalling physical and sexual abuse and ill-treatment.

2. JM (through his mother) brought a claim alleging that the State, represented by the Attorney General of Trinidad and Tobago, had infringed JM's constitutional rights under sections 4 and 5 of the Constitution of Trinidad and Tobago ("the Constitution"). That claim succeeded before the trial judge, Quinlan-Williams J, who awarded JM compensatory damages of $921,200 plus vindicatory damages of $1,000,000 (throughout this judgment the relevant currency being referred to is the Trinidad and Tobago dollar). On appeal by the Attorney General, the compensatory damages were reduced by the Court of Appeal to $844,650 and it was held that no vindicatory damages should be awarded. JM now appeals to the Privy Council seeking the restoration of the compensatory and vindicatory damages awarded at first instance.

3. The main issue, both as a matter of principle and in terms of practical importance, is whether vindicatory damages should be awarded in this case and, if so, whether the quantum of $1,000,000 is excessive. There are also issues relevant to the quantum of the compensatory damages. The correct analysis of the constitutional rights infringed (ie of JM's cause of action) will also be examined albeit that that analysis has a limited bearing on the damages issues that are being appealed.

4. It is helpful to set out straightaway the sections of the Constitution that are relevant. They are sections 4 and 5 which, as far as material, provide as follows:

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

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

(b) The right of the individual to equality before the law and the protection of the law;

…

5. …

(2) … Parliament may not—

(a) authorise or effect the arbitrary detention, imprisonment or exile of any person;

(b) impose or authorise the imposition of cruel and unusual treatment or punishment;

…"

2. Facts

5. On 17 September 2012 JM, then aged nine, was removed (with his younger sister) from the care of his mother and placed into the care of the State. The event precipitating this removal was that JM's mother ("NM") had been arrested and charged with child abandonment and neglect under section 3(1) of the Children's Act (No 4 of 1925) as amended (which for shorthand will be referred to as the "Old Act"). The Old Act (including amendments) was replaced by the new Children Act (No 12 of 2012) which, so far as relevant to this case, came into force on 18 May 2015.

6. On 27 September 2012, the Magistrates' Court made an order that JM be "remanded" to St Michael's "for safe keeping". St Michael's was an industrial school not an orphanage. By sections 29 and 43 of the Old Act, industrial schools were designated for housing and educating young offenders between the ages of 10 and 16. By sections 29 and 44, orphanages were designated for housing and educating other children. JM was not an offender and, as has already been said, in September 2012 was nine years old.

7. Nearly two years later, on 30 June 2014, NM was convicted, in the Magistrates' Court, of the charges in respect of JM. On the same date, the magistrate ordered that JM be "committed to St Michael's Boys Industrial School with effect from 30.6.14 until he attains the age of 18 years".

8. Over the course of his first months at St Michael's, JM underwent assessment. In about January 2013, he was diagnosed with PWS. PWS is a rare and complex genetic disorder and is not itself a mental illness. It is characterised by low muscle tone, short stature, incomplete sexual development, cognitive disabilities, speech, sleep and motor problems, chronic feelings of insatiable hunger and a slowed metabolism that can lead to morbid obesity. Behavioural problems are also common and include stubborn, angry, controlling, manipulative behaviours, temper tantrums – especially when denied food – intolerance for changes in routine, obsessive-compulsive or repetitive behaviours, anxiety and skin-picking.

9. St Michael's staff produced a care plan for JM but in the latter part of 2014 most of the medical treatment and therapy ceased. The evidence of the manager of St Michael's was that St Michael's was not the proper environment to ensure the success of the interventions instituted under the care plan, or to provide long term management of JM's diagnosis, or to promote his growth and development. It was not disputed that St Michael's did not execute the care plan. A further care plan was completed in November 2015, but the social worker assigned in March 2016 to monitor the implementation of the recommendations of that plan reported that St Michael's was unable properly to implement them.

10. During the course of JM's detention at St Michael's, on 18 May 2015, the main provisions of the Children Act (No 12 of 2012), of the Children's Community Residences, Foster Care and Nurseries Act and of the Children's Authority Act came into force.

11. Over the course of his time at St Michael's, JM suffered from incidents of bullying and physical and sexual abuse by other residents and staff. The history of such incidents included the following:

(i) JM's care plan of 6 March 2013 noted that he had a black eye, said to have been the result of being struck by another boy.

(ii) On 30 April 2014, three other boys burned JM using insect spray and a lighter.

(iii) On 26 May 2014, JM was beaten with a piece of wood by a member of staff. The Inspector of Orphanages and Industrial Schools was appointed to investigate.

(iv) In early 2015, a resident threw pepper sauce in JM's eyes.

(v) On 30 June 2015, JM complained that he was subjected to oral sex and buggery by a 14-year-old resident.

(vi) On 28 July 2015, a member of staff reported that an inmate had beaten and threatened JM.

(vii) In about May 2016, a security guard was specially assigned to JM to protect him from other residents, in response to continued incidents of physical abuse. However, after 30 days the guard asked to be reassigned because JM's behaviour was out of control, and no other guard was willing to take his place.

12. On 4 October 2016, Dr Jacqueline Sharpe, whose patients included residents of St Michael's and who had made the original diagnosis of PWS in respect of JM, wrote to Dr O'Brady-Henry at St Ann's thanking him for agreeing to admit JM. She wrote that JM was being physically abused by other residents of St Michael's and was unable to defend himself well. She explained that the boys were all sharing a makeshift dormitory and that the transfer would be a temporary arrangement until ongoing construction work had improved the physical conditions at St Michael's.

13. The transfer of JM to St Ann's was made by way of an application under section 7 of the Mental Health Act. The application was made on 6 October 2016 by Keisha Sullivan, an employee of St Michael's who declared that JM was mentally ill and that it was in the interest of his health and/or the safety and protection of others that he be admitted to the hospital. She said that she was making the application in her capacity as "Court Officer/Care Giver" and said that the basis for her application was "Complications arising as a result of his Prader-Willi[s] Syndrome".

14. Upon examination of JM, Dr Stafford Pierre at St Ann's on 6 October 2016 certified that JM was mentally ill and ought to be detained in hospital, giving as his reasons: bodily scars consistent with burns and multiple scars about his chest, abdomen, arms and face; that JM was reported to be suffering from PWS; that the court officer stated that JM had been the victim of abuse, aggression and torture; and that St Michael's supervisor had reiterated that there had been abuse and violent behaviour against JM.

15. The trial judge, at para 25 of her judgment, said this:

> "Apart from deficiencies in the care meted out to [JM] by St. Michael's, [JM] was also the victim of repeated physical, sexual, mental and emotional abuse. [In her affidavit his mother] claimed, '[JM] was also the victim of constant sexual harassment and abuse by both staff and residents who would force him to perform sexual favours.' She [said] that on several occasions during her visits to St. Michael's, [JM] would break down in tears while explaining his experience. On more than one occasion [JM] told her that he was made to perform oral sex on male residents of St. Michael's and when he refused they became aggressive and beat him which were evidenced by large blue-black marks visibly apparent to her about his body."

16. Speaking of the position JM was in at St Michael's, Rajkumar JA, giving the judgment of the Court of Appeal, provided the following succinct description at paras 81-82:

> "JM was vulnerable and a minor in an unsuitable environment. He was different, overweight, and had communication issues. He was an easy target and he was targeted. The evidence discloses horrific instances of attacks by inmates - and one by a member of staff. One does not need to speculate that if there were these there would have been others less apparent in their effects, coupled with the constant fear of other attacks, sufficient to render the stay at St. Michael's *a living hell*…. there is sufficient evidence to justify a finding of an environment of insecurity with sufficiently regular but unpredictable serious attacks to justify an inference that someone,

> especially *a young child in such an environment would have been living in constant fear*." (emphasis added).

17. Staff at St Ann's struggled to manage JM's needs and there is no doubt that JM's behaviour was very challenging. Among other things, the notes record abusive, aggressive and sexualised behaviour, and the regular need to resort to holding JM in seclusion sometimes using restraints. In her judgment, Quinlan-Williams J explained, at para 231, that she and the parties had visited St Ann's on 16 October 2017 and had viewed the seclusion rooms. She went on:

> "They can best be described as a hole surrounded with walls; no furniture, no windows, no bathroom facilitates, no opportunity for any form of physical or mental stimulation. It was tiny, gloomy and scary. This is from an adult's perspective. What was JM's perspective?"

18. Quinlan-Williams J also explained (at para 37) that at St Ann's JM was placed on a low calorific diet with weekly weight monitoring, engaged in physical therapy and was treated with Haldol, an antipsychotic drug, twice daily.

19. On 2 October 2017, JM was allegedly subjected to buggery by another patient.

20. On 5 October 2017, NM, now acting as JM's kin and next friend, made an application for interim relief. The Court ordered that JM be placed in the care and control of the Children's Authority, and on 12 October 2017 JM was transferred to the Children Authority's Child Support Centre. A new treatment plan was finalised in January 2018.

3. The judgment of Quinlan-Williams J

21. Focusing on the trial judge's decisions on the law and her application of the law to the facts, it is helpful to make a division between her analysis of the breach by the State of JM's constitutional rights and her analysis of the damages to be awarded.

22. As regards the breach of JM's constitutional rights, she held as follows:

(i) The State had the duty to protect JM against the breach of his constitutional rights while he was at St Michael's and St Ann's and the Attorney General was therefore a proper party to be sued (see paras 172-214).

(ii) There was a continuing breach of JM's right to security of the person, contrary to section 4(a) of the Constitution, at both St Michael's and St Ann's, which started when he was first taken into St Michael's (on 27 September 2012) and continued until he left St Ann's (on 12 October 2017). Referring to the Canadian case of *Blencoe v British Columbia (Human Rights Commission)* [2000] SCC 44; [2000] 2 SCR 307, Quinlan-Williams J indicated that, in order for there to have been a breach of section 4(a), the individual must have suffered physical or serious psychological harm by reason of the conduct of the State and that that was made out on the facts of this case. See paras 85-131 and 224-225.

(iii) For the same period of time, there was a continuing breach of JM's right to protection of the law, contrary to section 4(b) of the Constitution. The State had a duty, which it had failed to comply with, to take positive action to protect a child taken into its care from the abusive treatment he suffered. This was to apply the broad approach to this right recognised in, for example, *The Maya Leaders Alliance v Attorney General of Belize* [2015] CCJ 15 (AJ) ("*Maya Leaders*"), at para 47, and with specific reference to the rights of children in *BS and SS v The Chief Magistrate et al* CV2015-02799 and CV2015-03725, at paras 276-287 (which was the first instance decision of Kokaram J that was ultimately – and subsequent to Quinlan-Williams J's decision - upheld on section 4(b) by the Board in *Seepersad v Commissioner of Prisons of Trinidad and Tobago* [2021] UKPC 13, [2021] 1 WLR 4315 ("*Seepersad*")). See paras 155-158.

(iv) JM's right not to be subjected to cruel and unusual treatment or punishment, contrary to section 5(2)(b) of the Constitution, had been infringed. For this right to be infringed, it was necessary for a minimum level of severity to be reached and that was here satisfied by reason of the physical and sexual abuse JM suffered at St Michael's and by his being placed in seclusion at St Ann's, which Quinlan-Williams J regarded as akin to solitary confinement. Furthermore, he was a child requiring a special treatment plan for his condition and the way he was treated in both institutions was the very "antithesis to what was required to be done" (para 146). The case of *B v The Children's Authority & The Attorney General of Trinidad and Tobago* CV2016 – 04370, in which Kokaram J held that the remanding of a minor by himself, as the only person at a particular residence, did not amount to cruel and unusual

treatment or punishment, was "totally distinguishable" (para 146). See paras 132-154.

(v) JM's right not to be arbitrarily detained under section 5(2)(a) of the Constitution was also infringed in respect of his detention at St Ann's. This was because he was not mentally ill and it was inappropriate for someone suffering from his genetic condition to be put in an adult psychiatric hospital. See paras 159-171. The declarations made by Quinlan-Williams J included a declaration that JM's right not to be arbitrarily detained had been infringed in respect of his detention at St Michael's (see para 215(i)) but that was not expressly explained by her prior reasoning in the body of the judgment.

23. Turning to the damages to be awarded, Quinlan-Williams J held as follows:

(i) Declarations as to the infringements of JM's rights were not a sufficient remedy in this case. Compensatory and vindicatory damages were also required. The judge made overall awards of such damages for all the rights infringed (rather than separating out the damages to be awarded for each of the four different rights infringed).

(ii) Compensatory damages, taking into account aggravating factors, were assessed on a per diem rate of $450 at St Michael's and $700 at St Ann's totalling $921,200. This was because Quinlan-Williams J considered that JM suffered more harm at St Ann's than at St Michael's. See paras 217-233.

(iii) This was a case where, applying the seminal decision of *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15, [2006] 1 AC 328, explaining the functions or purposes of "vindicatory damages", vindicatory damages were appropriate (paras 234-235). And, having looked at some other awards of vindicatory damages (the highest of which was $500,000) Quinlan-Williams J considered that the appropriate amount to award as vindicatory damages was $1,000,000 (paras 235-236). She said this at para 235:

> "Having regard to the purpose of vindicatory damages and … that vindication involves an assertion that the right is a valuable one, that is particularly important in light of the obligations that the state has assumed and assured. The award of vindicatory damages is not to punish the Executive and in this case the court is of the view that vindicatory damages is appropriate because of the value of

> the rights [JM] was entitled to. Inadequacies in funding to house [JM] safely and appropriately cannot be asserted as an appropriate explanation. The court also considered the sense of public outrage and the importance of this award to deter further and similar breaches."

4. The Court of Appeal's judgment

24. The Attorney General appealed to the Court of Appeal of Trinidad and Tobago against the decision of Quinlan-Williams J. The appeal partly succeeded. The Court of Appeal's judgment was given by Rajkumar JA, with whom Pemberton and Dean-Armorer JJA agreed. The appeal was against both the decision on the infringement of JM's constitutional rights and the compensatory and vindicatory damages awarded. But there was no appeal against Quinlan-Williams J's decision that the State was responsible for the protection of JM's constitutional rights while he was at St Michael's and St Ann's and that the Attorney-General was therefore a proper party to be sued.

25. As regards the constitutional rights infringed, the Court of Appeal held as follows:

> (i) Largely in agreement with the trial judge, there had been continuing breaches of JM's right to security of the person contrary to section 4(a) of the Constitution during his detention at St Michael's and at St Ann's. There was a breach of this right "from inception [at St Michael's] and [this right] continued to be breached throughout his stay" (para 72). "His right to security of the person over that entire period [at St Michael's] was breached by permitting the possibility of [the] attacks and failing to prevent those that occurred" (para 83). The breaches were manifested by the specific attacks on him and the opportunities for such attacks at St Michael's; and, at St Ann's, primarily by the alleged incident of buggery and the unacceptable opportunity for interaction between adult inmates and JM. But contrary to the trial judge, the Court of Appeal considered that the infringement of JM's right to security of the person was to a lesser extent at St Ann's than at St Michael's. See paras 12(i), 72 and 83.
>
> (ii) There had been a breach of JM's right to the protection of the law, contrary to section 4(b) of the Constitution but, disagreeing with the trial judge, that breach was held to have occurred only after 18 May 2015 when the new Children Act came into force. Applying the Board's decision in *Seepersad*, there was a breach of JM's right to protection of the law because it

was at that date that the State had a duty to have children's community residences or equivalent places of safety available and the State had failed to comply with that duty. See paras 11B and 60.

(iii) Disagreeing with the trial judge, there was no breach of JM's right not to be subjected to cruel and unusual treatment or punishment contrary to section 5(2)(b) of the Constitution. This was because the physical and sexual abuse at St Michael's was, except in one documented case, effected by inmates and was not the intentional conduct of the State or its agents. And at St Ann's, the use of seclusion was an appropriate measure to separate JM from other inmates and staff either to protect himself or to protect others; and a similar justification applied to the medication that was administered on the direction of medical specialists. See paras 11C(ii) and 11F(ii), 84-109 and 136-153.

(iv) Disagreeing with the trial judge, there was no breach of JM's right not to be arbitrarily detained whether at St Michael's or at St Ann's because each of the detentions was effected by due process of law. See paras 11A and 11Dii, 46 and 116.

26. Moving on to the award of damages, the Court of Appeal decided as follows:

(i) As regards the breach of JM's right to protection of the law after 18 May 2015, it was appropriate to apply a per diem rate (as the trial judge had done albeit for a longer period). Applying a per diem rate of $450 - and the fixing of that rate was within the discretion of the trial judge - the compensatory damages for breach of this right for the shorter period totalled $394,650. Disagreeing with the trial judge, there was no justification for awarding JM a higher per diem sum for his time at St Ann's than his time at St Michael's. See paras 13, 174-192 and 203.

(ii) As regards the compensatory damages for infringement of JM's right to security of the person, the correct approach, so as to avoid double compensation, was to compensate for the particular attacks on him rather than, as the trial judge had done, applying a per diem approach. Taking the particular incidents, five merited compensatory damages at $75,000 each and three merited compensatory damages of $25,000 each. The total award for breach of this right was, therefore, $450,000. See paras 14-17 and 193-194.

(iii) Adding together the compensatory damages for the breach of JM's right to security of the person and to protection of the law came to a total of $844,650 (see paras 18 and 194). That was the correct award of compensatory damages and was lower than the trial judge's award of $921,200 compensatory damages.

(iv) Disagreeing with the trial judge, no vindicatory damages should be awarded. This was because, while there had been institutional inertia, there had not been deliberate conduct or malice by the authorities. In any event, the quantum of $1,000,000 could not stand as it was completely out of line with previous awards. See paras 19 and 195-201.

5. What is the correct analysis of the constitutional rights infringed?

(1) Introduction

27. The Board can put to one side at the outset the right not to be arbitrarily detained. This is because there has been no appeal by JM against the Court of Appeal's decision that that right was not infringed in this case. It can also be seen that the Court of Appeal and the trial judge were in agreement – and this is no longer an issue in dispute - that there was a breach of JM's right to security of the person from the start of his detention in St Michael's. This leaves two issues regarding the breach of JM's constitutional rights on which there was disagreement in the courts below and which may have some bearing on the damages issues with which this appeal is principally concerned. These are, first, whether there was a breach of JM's right to the protection of law prior to 18 May 2015; and, secondly, whether there has been any breach of JM's right not to be subjected to cruel and unusual treatment or punishment.

(2) Was there a breach of JM's right to protection of law prior to 18 May 2015?

28. To recap, JM was detained at St Michael's from 27 September 2012 until 4 October 2016 and at St Ann's from 6 October 2016 until 12 October 2017 (when he was moved to the Child Support Centre). It is no longer in dispute that, after the coming into force of the new Children Act on 18 May 2015, JM's detention at St Michael's (after 18 May 2015) and his detention for the whole of his time at St Ann's was in breach of his right to protection of the law. This was because, on the Court of Appeal's reasoning, the new Children Act imposed a duty on the State to provide a community residence (or an equivalent place of safety) for JM. Its failure to do so constituted a breach of JM's right to protection of the law.

29. As regards JM's detention at St Michael's after 18 May 2015, Rajkumar JA referred extensively to the Board's decision in *Seepersad* which he thought was particularly relevant as it also concerned the detention of minors (albeit charged with a serious offence). In that case, the claimants were a sister and brother, then aged 16 and 13, who were charged with murder. They were remanded by the Chief Magistrate in a women's prison and a youth training centre respectively. This was despite the fact that, by the time of their third remand order, sections 54 and 60 of the new Children Act had come into force which required them to be remanded in a community residence. It was held that their remand was not only unlawful, as being in breach of the primary legislation, but was also an infringement of their constitutional rights to the protection of the law under section 4(b) of the Constitution. The Board referred to the expansive approach that had been taken to the protection of the law provision, extending beyond access to the court system, in earlier cases such as the *Maya Leaders* case and *Maharaj v Prime Minister (Trinidad and Tobago)* [2016] UKPC 37. Among other facts which the Board considered to be relevant, in what was stressed to be "a fact-sensitive and case-specific question" (para 62, *Seepersad*), it focused on the fact that the Executive had frustrated the legislation by bringing the provisions into force without ensuring that the requisite detention facilities for children were in place; and that this meant that the two claimants had been exposed to conditions, environments and influences which the legislative provisions were designed to avoid. The impact of the breach was therefore "real and substantial" rather than "trivial or technical" (para 72, *Seepersad*) and there was no prompt and effective legal remedy available to the claimants (para 55, *Seepersad*).

30. After referring to *Seepersad*, Rajkumar JA said the following as regards the facts of JM's case at para 63:

> "[T]he executive brought into operation the material provisions of the new Children Act without having first put in place the arrangements necessary to give effect to them. JM was a vulnerable child who had been identified in both international law and domestic law as deserving of special protection. The failure to have in place as at May 18 2015 [c]ommunity residences or equivalent places of safety rendered that legislation impotent."

31. And at para 117, Rajkumar JA reiterated that:

> "Post May 18, 2015, community residences were supposed to be in place because the Children Act as proclaimed

> provided for them within a statutory structure that had become law. The failure to provide these from that date was … a breach of JM's right to protection of the law. His detention at St. Michael's from that date was in breach of that right."

32. Turning to JM's detention at St Ann's, Rajkumar JA continued at paras 118 and 119:

> "His detention at St. Ann's … was unconstitutional for the same reasons as his detention post May 18, 2015 at St. Michael's. If a community residence or equivalent place of safety had been available, it would not have been necessary to even consider St. Ann's as the only alternative for a temporary placement. Therefore, during the entire period of his detention from October 6, 2016 to October 12, 2017, at St. Ann's (371 days), his right to protection of the law would have been continually breached."

33. But what about JM's detention at St Michael's prior to the coming into force of the new Children Act on 18 May 2015? It is in relation to that period of detention that the Court of Appeal disagreed with the trial judge as to whether there was an infringement of JM's right to the protection of the law.

34. JM's mother was arrested and charged with child abandonment and neglect (under section 3(1) of the Old Act). As a consequence, in September 2012, JM was brought before a magistrate who, under section 11 of the Old Act, had the power to order the child to be taken to a place of safety or, for a temporary period, could "make such order as circumstances require for the care and detention of the child". The definition of a "place of safety", under section 2 of the Old Act, was "any place appointed by the Minister to be a place of safety for the purpose of the Act, or any hospital or other suitable, secure place the occupier of which is willing temporarily to receive a juvenile." On 27 September 2012, the magistrate remanded JM to St Michael's. After conviction of the mother on 30 June 2014, section 12 of the Old Act gave a court the power to order the child to be committed to the care of a relative or other fit person or to be sent to an orphanage. Under section 29 of the Old Act, an orphanage was defined as "a school for the industrial training of children, or a home or institution, in which children are lodged, clothed and fed, as well as taught". It was to be distinguished from an industrial school which was defined in section 29 as "a school for the industrial training of youthful offenders, in which youthful offenders

are lodged, clothed, and fed, as well as taught." On 30 June 2014, the magistrate committed JM to St Michael's until the age of 18.

35. The trial judge considered that JM's detention at St Michael's was unlawful throughout because the magistrate had no power to remand or commit him, as a child non-offender, to St Michael's, which was for young offenders (and was not a relevant place of safety) rather than to an orphanage. Moreover, because the detention was unlawful, JM was being denied the protection of the law throughout his detention at St Michael's (starting on 27 September 2012). See paras 49, 55 and 157 of her judgment.

36. In contrast, the Court of Appeal held that the initial order of the magistrate remanding JM to St Michael's on 27 September 2012 was lawful and that the trial judge had overlooked the magistrate's power to "make such order as circumstances require for the care and detention of the child". His detention at St Michael's only became unlawful after his mother's conviction on 30 June 2014 (paras 36 and 43 of Rajkumar JA's judgment). However, even though the detention was unlawful after 30 June 2014, the Court of Appeal did not regard that as constituting a breach of JM's right to the protection of the law so that the infringement of that right only occurred after 18 May 2015 (see para 13 of Rajkumar JA's judgment).

37. On this issue, the Board considers that the trial judge was correct and that the Court of Appeal made an error of law in overruling the trial judge. The Court of Appeal's reliance on the magistrate's power to "make such order as circumstances require for the care and detention of the child" is misplaced. That provision cannot be correctly interpreted as allowing the magistrate to make an order that would place the child in an institution that was not safe for that child. And in so far as there was no practical alternative open to the magistrate other than sending JM to an inappropriate and unsafe institution such as St Michael's, that would constitute a breach of his right to the protection of the law applying analogous reasoning to that adopted by the Court of Appeal concerning the new Children Act. In other words, even under the Old Act, and by analogous reasoning to that taken by the Board in *Seepersad*, the State had a duty to ensure that magistrates had options open to them that could provide safe care for children in JM's position. One might further say that the purpose of the distinction drawn in the primary legislation between industrial schools and orphanages was being frustrated by reason of JM, as a non-offender, being sent to an industrial school and by the magistrate having no practical alternative option available. The impact on JM was real and substantial rather than trivial or technical and there was no prompt and effective legal remedy available to him. On these facts, therefore, to send JM to an institution designed for offenders over the age of 10 when he was a non-offender under the age of 10 was a breach of JM's right to the protection of the law. It further follows that, in these circumstances,

Rajkumar JA was incorrect to say, as he did, that, while the detention of JM was unlawful after his mother's conviction on 30 June 2014, that did not constitute a breach of his right to protection of the law (so that there was only such a breach after 18 May 2015).

(3) Was there a breach of JM's right not to be subjected to cruel and unusual treatment or punishment?

38. As the Board has observed, Quinlan-Williams J held that the facts of this case crossed the necessary minimum level of severity. This was because of the level of physical and sexual abuse JM suffered at St Michael's and by his being regularly placed in seclusion at St Ann's, which she regarded as akin to solitary confinement. She also described his treatment throughout as the antithesis of what was required to be done for someone suffering from PWS. In contrast, the Court of Appeal focused on the fact that the physical and sexual abuse at St Michael's was, except in one documented case, effected by inmates and was not the intentional conduct of the State or its agents; and that at St Ann's, seclusion was being used to separate JM from other inmates and staff either to protect JM or to protect others and the medication was being administered by medical specialists who were motivated by the interests of JM and other inmates.

39. It is here helpful to refer to two cases that, from the wealth of authority on this constitutional right, were focussed on by counsel for the respondent. In *Reyes v The Queen* [2002] UKPC 11, [2002] 2 AC 235, Lord Bingham of Cornhill giving the judgment of the Board noted, at para 30, that the "essential thrust" of the protection against inhuman/cruel/unusual treatment or punishment is the same under certain Commonwealth constitutions, the United States Constitution and the European Convention of Human Rights ("ECHR"), albeit expressed differently. It follows that cases on, for example, article 3 of the ECHR are helpful in interpreting section 5(2)(b) of the Constitution.

40. The second case is *Ahmad v United Kingdom* (2012) 56 EHRR 1. The claimants, who were alleged terrorists, were challenging extradition from the UK to the USA. They submitted that their right not to be subject to inhuman or degrading treatment or punishment under article 3 of the ECHR would be infringed because, inter alia, there was a real risk that they would be sent to a particular prison in the USA which allegedly used solitary confinement for long periods. The European Court of Human Rights first set out some general principles applicable to article 3 before moving on to look specifically at solitary confinement. The general principles included the following (paras 201-203):

(i) In order to amount to inhuman or degrading treatment or punishment, the ill treatment must attain a minimum level of severity, the assessment of which is relative and depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the state of health of the victim. Whether the purpose of the treatment was to humiliate or debase is relevant, but the absence of this cannot conclusively rule out breach of article 3.

(ii) For a breach of article 3 to arise, the conditions of detention, suffering and humiliation must go beyond the inevitable element connected with a given form of legitimate treatment or punishment: the State must ensure that a person is detained in conditions that are compatible with respect for human dignity.

(iii) In assessing conditions of detention, account has to be taken of the cumulative effect, as well as specific allegations. The length of period during which a person is detained in the particular conditions has also to be considered.

41. The Court then turned specifically to look at solitary confinement and articulated the following principles (paras 205-212):

(i) Solitary confinement, which consists of complete sensory and social isolation, cannot be justified for any reason. Other forms of solitary confinement, falling short of complete sensory isolation, may also violate article 3.

(ii) The prohibition of contact with other prisoners for security, disciplinary, or protective reasons does not in itself amount to inhuman treatment or punishment.

(iii) Prolonged removal from association with others is undesirable, but whether it infringes article 3 will depend on the particular conditions, stringency of the measure, its duration, objective and the effects on the person concerned.

(iv) The decision to place someone in solitary confinement ought to be subject to appropriate procedural safeguards, guaranteeing welfare and the proportionality of the measure.

42. Particularly in relation to JM's detention at St Michael's, it is also important to point out that it is well-established that article 3 of the ECHR may impose a positive obligation on a State to protect a prisoner from violence by other prisoners: see, eg, *Premininy v Russia* (Application No 44973/04) (2011) 62 EHRR 18 especially at paras 72-73. See analogously, in the context of sexual abuse by a teacher, *O'Keeffe v Ireland* (Application No 35810/09) (2014) 59 EHRR 15, especially at para 144.

43. Although as is explained below (see para 68), it is unnecessary in this case for the Board to reach a conclusion on this issue, it is the Board's view that the section 5(2)(b) right of JM was infringed. While, as regards the seclusion at St Ann's, the Board accepts that there is a difference between seclusion for relatively short periods of time and solitary confinement for long periods, one has to assess this issue in the light of the context. Looking across both institutions, that context is of a child who had committed no crime and was suffering from a genetic disorder, PWS, that is not itself a mental illness (albeit that JM was certified as suffering from mental illness on admission to St Ann's). The State was responsible for his being sent to two institutions for a prolonged period of time (over five years) that were wholly inappropriate for him. He should never have been in either institution. As Rajkumar JA said, he experienced a "living hell" at St Michael's and it seems inevitable that being regularly put in the seclusion area at St Ann's, sometimes with restraints, would have been deeply distressing for a child. Quinlan-Williams J was entitled to decide that, taking into account JM's age and the time period in question, the level of physical and sexual abuse and ill-treatment at both St Michael's and at St Ann's crossed the minimum level of severity that is a necessary requirement for an infringement of this right. Moreover, as the *Ahmad* case indicates (see para 40(i) above), it appears that the Court of Appeal was wrong in law in so far as it considered it necessary to show an intention to harm or a bad motive for this right to be infringed. The Board's conclusion on this issue is that Quinlan-Williams J was entitled to take the view that, in the overall context, what JM suffered was an infringement of his right not to be subjected by the State to cruel and unusual treatment.

6. Should the Court of Appeal have overturned the trial judge's award of compensatory damages?

(1) Introduction

44. There are two issues that the Board needs to resolve in relation to the compensatory damages. The first is, what is the correct period of time for the award of per diem compensatory damages? The second is, whether there should be a

higher per diem rate for the compensatory damages covering the period at St Ann's compared to the period at St Michael's?

(2) What is the correct period of time for the award of per diem compensatory damages?

45. Even if the Board were to confine itself only to the infringement of JM's right to security of the person, it is clear, with respect, that something has gone awry with the reasoning of the Court of Appeal. This is because the compensatory damages awarded by the Court of Appeal for breach of this right do not reflect its own reasoning that the breach of this right ran from the start of JM's detention at St Michael's (see para 25(i) above). Put another way, by giving compensatory damages (in relation to St Michael's) only for the actual incidents of violence and abuse, there was a lacuna because, as the Court of Appeal recognised, JM was suffering a breach of his right to security of the person from the start of his detention at St Michael's on 27 September 2012. The trial judge correctly reflected this by awarding a per diem rate of compensatory damages from 27 September 2012. The Court of Appeal did apply a per diem rate for compensatory damages for breach of protection of the law but, because it held (incorrectly as the Board has explained in para 37 above) that that ran only from 18 May 2015, no per diem rate was therefore being applied by the Court of Appeal for the period 27 September 2012 to 18 May 2015. Therefore, even viewing the relevant right infringed as just being the right to security of the person, the Court of Appeal was making an error of law: it is doubly an error of law because JM's right to protection of the law was also infringed from the start of his detention at St Michael's on 27 September 2012.

(3) Should there be a higher per diem rate for the compensatory damages covering the period at St Ann's compared to the period at St Michael's?

46. The trial judge awarded JM compensatory damages at a per diem rate of $450 for his time at St Michael's and $700 for his time at St Ann's. The Court of Appeal thought that there was no justification for that difference and awarded $450 as the per diem rate at both institutions (although, unlike the trial judge, the Court of Appeal also awarded damages for eight specific incidents of violence or sexual abuse, seven at St Michael's and one at St Ann's).

47. This issue can be broken down into two sub-issues. The first is whether, looking at JM's detention at St Ann's in its own right (ie without reference to his detention at St Michael's), the trial judge overstated the harm suffered by JM at St Ann's so that the figure of $700 per diem was outside the permissible range of awards. The second is whether the harm suffered by JM at St Ann's was significantly

greater than that suffered at St Michael's so as to justify the disparity in the amount awarded.

48. As regards the first of those sub-issues, the Court of Appeal criticised the trial judge's reasoning for several specific reasons. First, the trial judge found that JM was not suffering from a mental illness when admitted to St Ann's even though that was contradicted by the medical assessment of him at that time (paras 11D(i), 115 and 140 of Rajkumar JA's judgment). Secondly, the trial judge impermissibly found (apparently on the basis of her own Google searches) that inappropriate medication was administered to JM (paras 11F(i), 127-128, 185 of Rajkumar JA's judgment). Thirdly, the trial judge wrongly equated occasional instances of seclusion for limited periods with solitary confinement (para 183 of Rajkumar JA's judgment). Fourthly, the trial judge found that JM suffered physical and psychological pain or trauma when placed in seclusion, when there was no evidence to support this (paras 11F(ii) and 141 of Rajkumar JA's judgment).

49. But there are counter-points that can be made to those specific criticisms. First, there was evidence that the reason for JM's transfer to St Ann's was not a belief that he needed treatment in a psychiatric hospital (let alone an adult one) but was to move him away from St Michael's to somewhere where it was hoped he might be safer (see para 12 above). The trial judge was entitled to find that, even if the intention was good, he was placed in a wholly unsuitable institution. Secondly, although the trial judge did suggest (without a proper evidential basis) that inappropriate medication was administered, this was not the focus of her finding about the conditions at St Ann's. That finding was based primarily on (i) the fact that JM was forced to mingle with adults who were mentally ill and (ii) the cruelty involved in the use of seclusion (see especially para 231 of her judgment). Thirdly, the trial judge visited St Ann's and viewed the seclusion rooms (see para 17 above). She was entitled to place weight on her own observations. Fourthly, there was evidence that seclusion was not just used to manage difficult behaviour but, as the Court of Appeal itself recognised (see para 11F(ii) of Rajkumar JA's judgment), as a disciplinary measure and the trial judge was entitled to find that, whatever the intent, the effect was humiliating and degrading. Fifthly, the trial judge did not equate seclusion with solitary confinement: rather she considered it "akin to solitary confinement" (paras 121 and 142 of her judgment).

50. It is the Board's view that, in the light of those counter-points, it cannot be said that the trial judge overstated the harm suffered by JM at St Ann's or awarded compensatory damages for the period of his detention there which were outside the range of permissible awards. Indeed, the Court of Appeal's own award for JM's time at St Ann's, although calculated differently, was not substantially different from the figure awarded by the trial judge. The Court of Appeal awarded 371 days x $450 =

$166,950 + $75,000 damages for the sexual assault on 2 October 2017 = $241, 950. This is approximately 93% of the sum of 371 days x $700 = $259,700 awarded by the trial judge. The difference is not sufficient to justify interfering with the trial judge's figure.

51. As regards the second sub-issue, the Board, like the Court of Appeal, has some difficulty in seeing that the conditions for JM were significantly worse at St Ann's than at St Michael's. As Rajkumar JA said, JM's time at St Michael's was a "living hell". Nevertheless, the trial judge took the view that JM suffered greater harm, and she presumably meant by this, mental harm, at St Ann's than at St Michael's (see para 23(ii) above). This was presumably because, in general terms, he was being kept in an adult psychiatric hospital, when he was a child and PWS is not itself a mental illness; and more specifically, as explicitly focused on by the trial judge, because of the effect that the use of the seclusion rooms would have had on JM which had no parallel at St Michael's. These were matters of fact on which the trial judge should only be overturned if she was plainly wrong (see, eg, *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd* [2014] UKPC 21, [2014] 4 All ER 418, paras 11-18). In the Board's view, that high threshold for intervention by an appellate court has not here been crossed.

52. It follows from the Board's analysis of the two sub-issues that the trial judge's per diem assessment of the compensatory damages should not have been overturned by the Court of Appeal and should be restored.

53. Counsel for the respondent submitted that there should be a tapering down over time of the per diem award by analogy to the approach taken to per diem awards in cases of false imprisonment (see *Thompson v Comr of Police of the Metropolis* [1998] QB 498). But the two situations are not analogous. No doubt in false imprisonment cases "the clang of the prison gates" can be expected to produce an initial shock to the system that may abate over time. But there is no direct parallel on the facts of this case and the trial judge was entitled to decide that the same per diem rate (of $450 at St Michael's and $700 at St Ann's) was appropriate throughout the time spent in each institution.

7. Should the Court of Appeal have overturned the trial judge's award of vindicatory damages?

54. Finally, the Board comes to the main issue which is whether the Court of Appeal was correct to have overturned the trial judge's award of vindicatory damages of $1,000,000.

55. It is now well-established through the decisions of the Board that "vindicatory damages" can be awarded for breach of constitutional rights see, eg, *Attorney General of Trinidad and Tobago v Ramanoop ("Ramanoop")* [2005] UKPC 15, [2006] 1 AC 328; *Inniss v Attorney General of St Christopher and Nevis* [2008] UKPC 42; *Subiah v Attorney General of Trinidad and Tobago* [2008] UKPC 47; *Takitota v A-G of the Bahamas* [2009] UKPC 11; and *James v Attorney General of Trinidad and Tobago* [2010] UKPC 23. Lord Nicholls in giving the judgment of the Privy Council in *Ramanoop* carefully explained that "vindicatory damages" have several functions (or purposes). He said at para 19:

> "An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award … Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions 'punitive damages' or 'exemplary damages' are better avoided as descriptions of this type of additional award."

In the light of Lord Nicholls' analysis, there are four preliminary observations to be made about "vindicatory damages".

56. The first is that one has to be very careful with terminology so as to avoid needless confusion. Most remedies for wrongs may be said to have the *subsidiary* function of vindicating the right infringed. So, for example, the primary function of compensatory damages is to compensate the loss of the claimant but, in so doing, one is also inevitably vindicating the right infringed. And the primary function of an account of profits awarded for a wrong (such as breach of fiduciary duty) is the disgorgement of the gains made by the wrong but, in making such an award, one is also vindicating the underlying right. In contrast, the *primary* function of vindicatory damages, as explained by Lord Nicholls, is to vindicate the right infringed by emphasising its importance. Other functions are, as he made clear, to reflect the

sense of public outrage, to emphasise the gravity of the breach, and to deter future breaches.

57. The second observation is that there is a parallel between vindicatory damages and punitive (otherwise known as exemplary) damages that may be awarded at common law. In English law, punitive damages can be awarded for torts but, as laid down by Lord Devlin giving the leading speech in the House of Lords in *Rookes v Barnard* [1964] AC 1129, only in three categories of case. The first of those categories is where there has been "oppressive, arbitrary or unconstitutional action by the servants of the government". This may be thought to be somewhat similar to breach of a constitutional right. Moreover, some of the functions of punitive damages (eg, deterrence and to reflect the sense of public outrage) match the functions of vindicatory damages and it is for this reason (ie to avoid duplication) that, as laid down in *Takitota v Attorney General of the Bahamas* [2009] UKPC 11, a court should not award both punitive damages for a tort and vindicatory damages for breach of a constitutional right. But the essential and crucial difference, as Lord Nicholls made clear in *Ramanoop* (in the passage cited at para 55 above), is that vindicatory damages, unlike punitive damages, are not concerned to inflict punishment, in the sense of retribution, on the defendant.

58. The third observation is that, as Lord Nicholls made clear, vindicatory damages are additional to any compensatory damages. It is only if compensatory damages are inadequate to vindicate the right (and to achieve the other functions of vindicatory damages) that vindicatory damages should be awarded. This may be expressed by saying that vindicatory damages should be awarded "if but only if" compensatory damages (which may include so-called "aggravated damages" reflecting the mental distress caused to the claimant by the particularly bad conduct of the defendant) are inadequate to vindicate the right. Such a restriction has its parallel in relation to punitive damages because Lord Devlin in *Rookes v Barnard*, at pp 1227-1228, said that, if a case fell within one of the categories, a jury should be directed that:

> "if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct … then it can award some larger sum."

59. The fourth observation is that, under the present law, vindicatory damages can be awarded only for breach of constitutional rights. As indicated by a majority of the Supreme Court in *R (Lumba) v Secretary of State for the Home Department* ("*Lumba*") [2011] UKSC 12, [2012] 1 AC 245 (per Lord Dyson at paras 97-101),

vindicatory damages cannot be awarded for torts (or, one might add, for any cause of action other than breach of a constitutional right). The constitutional rights are those laid down in written constitutions in jurisdictions such as Trinidad and Tobago and The Bahamas. Some commentators have argued that vindicatory damages should have a wider role to play or that they are already being awarded without overt recognition: see, eg, David Pearce and Roger Halson, "Damages for Breach of Contract: Compensation, Restitution and Vindication" (2008) 28 OJLS 73. But that view is difficult to reconcile with the reasoning of Lord Dyson in *Lumba*. For an interesting general discussion of "vindicatory damages", see *McGregor on Damages* (ed Edelman) 21st ed (2021) chapter 17.

60. Why on the facts of this case did the Court of Appeal decide that no vindicatory damages should be awarded? As set out at para 26(iv) above, the Court of Appeal overturned the trial judge's award of vindicatory damages because, while there had been institutional inertia, there had not been deliberate conduct or malice by the authorities. In considering vindicatory damages Rajkumar JA said this, at paras 196 and 198:

> "When the circumstances giving rise to the breaches in this case are examined it is clear that they did not occur as the result of malice …, ill will or deliberate behavio[u]r or systematic ill treatment. Rather they occurred as a result of institutional inertia and were more the result of omissions on the part of the authorities that were responsible for ensuring that they did not occur, rather than part of any deliberate pattern of conduct… [T]he need for some further award [beyond compensatory damages] in vindication of [the right] breached is not justified. The institutional inertia, as oppose[d] to deliberate inaction or malice or other deliberate conduct, could not be a circumstance that could give rise to an award of vindicatory damages."

61. It is clear that this restrictive approach to an award of vindicatory damages is not justified either in principle or on the authorities. In principle, especially given that a purpose of vindicatory damages is not to punish, there is no reason why a necessary requirement for the award of such damages should be deliberate conduct or malice rather than institutional inertia. The functions or purposes of vindicatory damages – stressing the importance of the right and the gravity of the breach, reflecting public outrage, and deterrence - can apply to situations of institutional inertia.

62. Counsel for the respondent was unable to point to any authority laying down such a restriction. In contrast, there are several cases where vindicatory damages have been awarded even though the facts concerned negligence or inertia by the State rather than deliberate conduct or malice.

63. For example, in *Alleyne v Attorney General for Trinidad and Tobago* [2015] UKPC 3, 88 WIR 475 one of the issues was whether the Court of Appeal had been correct to uphold the trial judge's refusal to award vindicatory damages. The State had failed over many years to pass regulations governing the conditions of employment of municipal police with the result that they had suffered unequal treatment when compared with other police officers. This was held to constitute a breach of municipal police officers' constitutional right under section 4(b) of the Constitution to equality before the law and the protection of the law. The Court of Appeal decided that the trial judge's decision not to award vindicatory damages had not been plainly wrong saying that the failure to enact the appropriate regulations was "not so much a question of wilful neglect as it is one of administrative sloth and inertia" (Civil Appeal No 52 of 2003, at para 73). The Privy Council disagreed. In remitting the case back for the assessment of damages, the Board held that, on these facts, there were ample grounds on which a trial judge might decide to award vindicatory damages, particularly the lengthy time which the State had had to redress the situation and its shoddy treatment of the municipal police officers. Although it referred to the Court of Appeal's description of "administrative sloth and inertia" as "mild", it did not suggest that deliberate misconduct as opposed to institutional inertia is a necessary requirement for vindicatory damages. On the remitting of the case, Kokaram J awarded $300,000 vindicatory damages (in addition to compensatory damages) to each of the claimants having regard to what he described as the "unreasonable delay and indifference of the State" (see para 145, HCA No 3133 of 2003), its failure to explore short term measures and the difficulty in quantifying certain losses. Although the Court of Appeal (on an appeal against the damages awarded by Kokaram J) reduced that sum of vindicatory damages to a range of $75,000 to $125,000 for each of the claimants for their "prolonged and shoddy treatment" (para 66, Civil Appeal No P377 of 2018) no doubt was cast on vindicatory damages being appropriate even though the conduct of the State was negligent and indifferent rather than deliberate or malicious.

64. Again in *Attorney General of Trinidad and Tobago v Dillon* Civil Appeal No P245 of 2012 (in a judgment delivered by Jamadar JA on 9 March 2018) the Court of Appeal awarded vindicatory damages of $200,000 (on top of compensatory damages of $2,500,000) in respect of the incarceration of a mentally ill man found guilty of killing his mother, but insane when he did the act. He was incarcerated for 20 years during which he received no care, treatment or evaluation. Jamadar JA said, at para 37, that his unconstitutional detention amounted to:

> "…an uncaring and careless, if not wilfully negligent or reckless, abandonment in disregard of his inherent (and constitutionally recognised and valued) dignity and personhood, and to his needs for care and treatment as a mentally ill person. This renders the gravity of the constitutional violation extremely egregious."

Jamadar JA was therefore saying that the conduct of the State towards the claimant was uncaring and negligent and, at most, reckless but there was no finding of malice or deliberate misconduct. He went on to say that there was inevitably a sense of public outrage that a mentally ill person could be so disregarded (para 38).

65. Most recently in *Attorney General of Trinidad and Tobago v Akili Charles* [2022] UKPC 49 the Privy Council upheld an award of compensatory and vindicatory damages of respectively $150,000 and $125,000 awarded to the claimant whose constitutional right to protection of the law under section 4(b) of the Constitution had been infringed by his being kept in prison awaiting trial for murder for nearly nine years before being freed as he had no case to answer. The damages were awarded to reflect the fact that he was kept in prison for longer than he should have been because of a "colossal misstep" by the State (paras 19, 26 and 93) in allowing the Chief Magistrate dealing with his case to be promoted to the High Court with 53 part-heard cases still in play and which therefore had to start again. The important point for our purposes is that the conduct of the State towards the claimant was not deliberate or malicious but was rather incompetent and negligent and comprised a colossal mismanagement of the judicial appointments system. Yet vindicatory damages were considered appropriate.

66. Counsel for the appellant also pointed to several other cases (*Greenidge v Attorney General of Trinidad and Tobago* Claim No CV 2018–04275, *Carmichael v Attorney General of Trinidad and Tobago* Claim No CV 2019-02214, *Friday v Attorney General of Trinidad and Tobago* Claim No CV 2021-02843) where, as he correctly submitted, vindicatory damages were awarded in Trinidad and Tobago for infringement of constitutional rights where there was no finding of malice or deliberate misconduct.

67. It is clear, therefore, that the Court of Appeal made an error of law in regarding it as a necessary requirement for vindicatory damages that there has been deliberate misconduct or malice by the State. Once that error is exposed, the Board has no hesitation in deciding that the trial judge was entitled to hold that, on the exceptional facts of this case, vindicatory damages were appropriate.

68. On these facts the institutional inertia resulted in JM suffering appalling physical and sexual abuse and ill-treatment over a five-year period. He was a child, with a genetic disorder that is not itself a mental illness, who had committed no offences and was detained in inappropriate institutions for young offenders or for adults with mental illnesses. His rights to security of the person and to the protection of law were both infringed. The Board has also taken the view (see para 43 above) that the trial judge was justified in finding that his right not to be subjected to cruel and unusual punishment was infringed: but even if that particular right was not infringed, there can be no denying that he was in a "living hell" at St Michael's and that at St Ann's he was regularly sent to a seclusion room, sometimes with physical restraints.

69. Quinlan-Williams J set out the purposes of vindicatory damages, laid down by Lord Nicholls in *Ramanoop*, and then said this at para 235:

> "[I]n this case the court is of the view that vindicatory damages [are] appropriate because of the value of the rights [JM] was entitled to. Inadequacies in funding to house [JM] safely and appropriately cannot be asserted as an appropriate explanation. The court also considered the public outrage and the importance of this award to deter further and similar breaches."

Although Quinlan-Williams J should have made clear that she considered the compensatory damages and the declarations she was making inadequate to vindicate JM's rights (and to achieve the other functions of vindicatory damages), it was implicit in her reasoning that that requirement was satisfied. The Board considers that, given the exceptional nature of the facts, she was fully justified in awarding vindicatory damages and the Court of Appeal erred in law in deciding that no vindicatory damages were here appropriate.

70. However, the Board would stress that it is a useful discipline in this context for judges explicitly to apply, by analogy, the "if but only if" test referred to at para 58 above. It cannot be correct that every infringement of a constitutional right attracts an award of vindicatory damages. It is "if but only if" compensatory damages are inadequate to vindicate the constitutional rights infringed (and to achieve the other functions set out by Lord Nicholls) that vindicatory damages should be awarded.

71. What about the quantum of $1,000,000 awarded as vindicatory damages? The trial judge looked at several other awards of vindicatory damages in a range from $60,000 to $500,000, what those cases were about, and the dates of the awards. She

then said that the appropriate sum on the facts of this case was $1,000,000. While that sum is perhaps higher than the Board would itself have awarded, the Board does not consider that it was outside the range of awards that was open to the trial judge and the quantum of such an award is pre-eminently a matter on which, absent a clear flaw in the reasoning, appellate courts should be reluctant to interfere with a trial judge's assessment. There was nothing wrong with the reasoning of the judge on this issue and she has had the benefit of being closer to the facts of this appalling case than the Board. Certainly, counsel for the respondent made no suggestions as to any guiding principles that would lead to a lower quantum. The Board also does not accept his submission that the trial judge was duplicating, in the award of vindicatory damages, the compensation she had already awarded. On the exceptional facts of this case, the Board considers that the trial judge was entitled to make the high award she did and therefore upholds that award.

8. Conclusion

72. For these reasons, the appeal should be allowed and Quinlan-Williams J's award of compensatory damages of $921,200 and vindicatory damages of $1,000,000 should be restored.

73. In line with the order of the Court of Appeal (which, at the hearing before the Board, counsel for the appellant accepted should in this respect stand) the total amount of the damages is to be paid into court to be placed on an interest-bearing account. Payments out of that account are to be paid on application to the Registrar or a Master for expenses necessarily incurred for the care, treatment, welfare and accommodation of JM or for such other necessary expenses established to be in his best interests.