

**THE EASTERN CARIBBEAN SUPREME COURT
ANGUILLA**

IN THE HIGH COURT OF JUSTICE

AXAHCV2019/0047

**In the Matter of the Prison Regulations,
RRA. P75-1 (Prison Act, RSA c. P75);
Code of Discipline for Prison Officers**

And

**In the matter of the Anguilla
Constitution Order 1982,
sections 1 and 9**

BETWEEN

ALLIN DURAND

CLAIMANT

AND

**(1) SUPERINTENDENT OF PRISONS
(2) ATTORNEY GENERAL OF ANGUILLA**

DEFENDANTS

Appearances:

Ms. Merlanih Lim of counsel for the claimant.

Mr. Dwight Horsford, Honourable Attorney General, with him Mrs. Nakishma Rogers-Hull and
Mr. Theon Tross for the defendants.

2022: May 6;
July 1.
Written submissions: May 16

DECISION ON ASSESSMENT OF DAMAGES

INTRODUCTION

- [1] **Henry, J.:** Mr. Allin Durand is employed as a prison officer in the service of the Government of Anguilla. On March 15th, 2019, he was charged by the Acting Superintendent of Prisons ('Acting Superintendent') with the offences of breach of confidence and discreditable conduct contrary to sections 14(1) and 14(2) of the Prison's Code of Discipline. She suspended him from duty on April 8th, 2019, with full pay and referred the charges to His Excellency the Governor Mr. Tim Foy for determination.
- [2] Mr. Durand protested his suspension and referral of the charges to the Governor for hearing. He received letters from the Governor informing him that it was his intention to proceed with the hearing. He invited Mr. Durand to indicate whether he admitted or denied the charges and to advise of the names of potential witnesses. Mr. Durand initiated Judicial Review proceedings in the High Court against the Superintendent of Prisons ('Superintendent') and the Honourable Attorney General for declarations that the procedure adopted in respect of the proposed disciplinary proceedings were unlawful, procedurally improper and in breach of his right to natural justice; for damages, punitive damages, and costs.
- [3] His application for leave to seek judicial review¹ was initially dismissed. On appeal, leave was granted for him to seek judicial review². At the hearing before another judge, the defendants having conceded that the disciplinary and hearing processes were characterized by procedural errors and breach of law, judgment was entered³ for Mr. Durand. Declaratory orders were made vindicating his claim that the disciplinary proceedings were procedurally defective, contrary to law and in breach of his constitutional rights to protection of the law and due process. Deadlines were stipulated by which the parties were to file submissions and legal authorities for assessment of damages and costs. The

¹ Filed on 28th October 2019.

² By Order dated 20th July 2020.

³ On October 9th, 2020.

assessment was originally scheduled to take place on April 15th, 2021, but was adjourned due to interlocutory proceedings which occasioned an appeal to the Court of Appeal.

- [4] The assessment hearing was conducted on May 6th, 2022. Mr. Durand's affidavit testimony and that of his witness Mr. Carl Palmer were received. They were not cross-examined. Mr. Durand contended that the actions by the Acting Superintendent and the Governor caused him irreparable loss of reputation, hardship and emotional and physical distress which is ongoing. He seeks general and vindicatory damages in the global sum of USD\$300,000.00 and prescribed costs of USD\$30,000.00.
- [5] The Superintendent and the Honourable Attorney General submitted that the defendants did not publicize Mr. Durand's suspension or any reasons for his suspension. They contended that Mr. Durand was suspended on full pay, suffered no pecuniary loss or reputational harm by the actions or inactions of the Superintendent or the Governor and therefore any award in damages should be nominal and costs if any, should be assessed not prescribed.

Issues

- [6] The issues are: -
1. Whether Mr. Allin Durand is entitled to recover damages and if so, how much; and
 2. On what basis should costs be awarded if any, and in what amount.

ANALYSIS

Issue 1 – Should damages be awarded to Mr. Durand?

- [7] By order of court dated 9th October 2020 and entered on 11th November 2020, the learned judge ordered: -
- '1. ...
 2. Judgment is granted in favour of the Claimant ... as follows: -
 - 1) A Declaration is hereby granted that the decision made on 8th April 2019 by the Acting Superintendent of Prisons Kerrice Saunders Lake-Banks, to refer the disciplinary charges laid against the Claimant pursuant to sections 2(a)(i) and 2(g) of the Code of Discipline for Prison Officers, Prison Regulations, RRA P75-1 (the "Code") (the "First Decision", was

contrary to the provisions of sections 5 and 7 of the Code and further in breach of the Claimant's rights to protection of the law and to natural justice contrary to sections 1 and 9 of the Anguilla Constitution Order 1982, and therefore unlawful and invalid.

2) A Declaration is hereby granted that the decision made on 8th April 2019 by the Acting Superintendent of Prisons Kerrice Saunders Lake-Banks, to suspend the Claimant from his duties at Her Majesty's Prison (the "Second Decision"), Anguilla was contrary to the provisions of section 14 of the Code and in breach of the Claimant's rights to protection of the law and to natural justice contrary to sections 1 and 9 of the Anguilla Constitution Order 1982, and therefore unlawful and invalid.

3) A Declaration is hereby granted that the decision made by His Excellency the Governor of Anguilla, Tim Foy, to conduct a hearing with the Claimant in respect of the charges laid by the Superintendent of Prisons against the Claimant pursuant to sections 2(a)(i) and 2(g) of the Code (the "Third Decision"), was contrary to the provisions of sections 5, 7, 9, 10 and 11 of the Code and in breach of the Claimant's rights to protection of the law and to natural justice contrary to sections 1 and 9 of the Anguilla Constitution Order 1982, and therefore unlawful and invalid.

3. Costs and damages to be assessed if not agreed within 21 days of today's date.

4. The Claimant shall file and serve submissions and authorities on or before 6th November 2020.

5. The Defendants shall file and serve submissions and authorities in reply on or before 13th November 2020.'

[8] It is manifest from the Order that the learned judge had made certain findings as to liability and the reliefs to which he found Mr. Durand to be entitled. As to costs and damages, there is no doubt that he found that damages flow from the declaratory orders. I make the observation that each declaration was made in respect of constitutional breach of sections 1 and 9 of the Anguilla Constitution. They respectively make provision to secure the protection of the law for each person who finds himself in conflict with the law. Among other things, it establishes the right to a fair hearing before an independent and competent tribunal constituted in accordance with applicable law.

- [9] Mr. Durand's evidence is that he wrote numerous letters to the Governor over a period of 4 months regarding his unjustified and unlawful suspension. He asserted that despite the clear provisions of the Prison Regulations His Excellency in response informed him that the suspension was lawful based on legal advice received. Mr. Durand claimed that he has been made to suffer the consequences of the Governor's repeated directive that he attends before him to answer the charges, failing which they would be heard in his absence. He averred further that the litigation has caused him significant distress and expense which could have been avoided had the defendants accepted from the inception that they had erred.
- [10] Mr. Durand asserted that irrespective of the fact that he has received his full pay while on suspension, his professional standing and esteem have been negatively impacted by the suspension particularly within the context of life in a small community such as Anguilla where everyone knows everyone else. He stated that one's reputation is paramount and fair value must be placed on his reputational loss as a result of the defendants' actions. He asserted further that he has been treated by his colleagues and members of the wider public with a great deal of ill-feeling and ill-will. He indicated that he suspects that his prison workmates view him with great disdain and consider him to be disreputable for being out on suspension with full pay while they have to show up to work every day.
- [11] By way of example, Mr. Durand recounted an incident involving the cook from his place of employment who, in or around September 2019 accosted him in a public place, taunted him in the presence of bystanders and then proceeded to laugh along with the bystanders. According to him the cook told him: -
- "Conning Durand! You think you getting away this time! Kerrice and Walker [referring to the Acting Superintendent of Prisons and her Acting Deputy] have you by the balls this time. You playing lawyer trying to outsmart the system and staying home doing nothing with full pay while we have to buss our asses at the same pay as you but that will come to an end. They will finish you off, then deport your ass back to Dominica on the Banana Boat. Think you can just come Anguilla and use Anguillans! This time they have you. No escape this time. Saunders and Walker have you by the balls this time."

- [12] Mr. Durand averred further that he was quite embarrassed and left the area to avoid any issues with the cook because he was feeling uncomfortable. Notwithstanding, he stated that the co-worker had some parting words for him and shouted out as he was heading to his vehicle "Best you don't come back to the prison. Nobody up there like you, pardner. Go back to Dominica." Mr. Durand stated that he has had similar comments directed towards him by fellow prison officers and civilians alike.
- [13] I make the observation that the statements allegedly made to Mr. Durand appear to concern certain grievances that his colleagues have about him receiving full pay while on suspension for an extended period of time. Mr. Durand makes no direct connection between those statements and the conduct of the defendants about which he complains.
- [14] By this I mean that the issue of payment while on suspension has been addressed by the learned judge by quashing the unlawful decisions about which complaint has been made. However, no decision was taken by the Court to quash the disciplinary charges.
- [15] To the extent therefore that those charges were pending at the time of the encounter with the cook and may still be pending, I make no finding of fact attributing to the unlawful decisions (and related conduct by the defendants) any such comments made to Mr. Durand by the cook, his other colleagues or other members of the public and/or any reputational loss, stress, discomfort or embarrassment which he may have experienced in the past or may be experiencing at present in relation to the incident out of which the charges arise. In other words, those comments if made, appear to relate to the charges directly and not to the errors made by the decision makers – the Acting Superintendent and His Excellency the Governor in establishing the tribunal to hear the charges and in making the suspension order. Accordingly, they are in my opinion too remote from and by inference unrelated to the unlawful decisions made by the defendants to attract any legal redress, whether by compensation in damages or otherwise.
- [16] Mr. Durand asserted that since his suspension he has sought medical attention for physical and emotional injury and irreparable harm. He asserted further that such injury is directly referable to and

is a direct consequence of his unlawful suspension. He averred that being paid is not everything and one otherwise desires the satisfaction of knowing that one has given a good and fair day's work for a good day's pay. He stated that the emotional distress of waking up each day and not being able to prepare for work like normal folks and not deriving the satisfaction that such normalcy produces has been palpable and has oftentimes engendered a parlous emotional and psychological effect in him. He stated that his good reputation of being an upstanding and highly responsible officer who went about his job in a thoroughly professional manner has been severely impaired and this has added to his psychological stress and emotional pain.

[17] Mr. Durand stressed that the defendants' concession that they erred, was long in coming having been made only after the Court of Appeal's ruling in July 2020. As to the Acting Superintendent's statement that she was new to the post and did not know how to resolve the issues without referring them to the Governor, Mr. Durand retorted that this is ironic and disingenuous since she was competent enough to be appointed. He considered that it is reasonable that she should have known how to read and apply the applicable Regulations.

[18] Mr. Durand said as a result of his mounting emotional distress following his suspension, he collapsed on November 12th, 2019, one day before one of his court appearances and had to be rushed to the hospital where he was examined by the medical staff. He indicated that he conversed with one of the medical doctors about his collapse and resulting injury to his head and ear and about the depression and distress which he has been experiencing. He stated that he underwent an MRI because he was experiencing severe headaches, hearing impairment and aggravating pain to his back and was consequently unable to run and lift heavy objects which he is required to do as part of his regular duties as a prison officer.

[19] Mr. Durand asserted that he subsequently sought medical attention in Dominica because his health condition did not improve. He exhibited copies of medical documents which he obtained from a Mr. Irving Pascal, Ms. Diana Baron-Belfield, Dr. Robyn Perkins and Dr. Oluwakemi M Linda Banks. None of those persons testified at the hearing. Neither did any medical professional as to the contents of those documents which are purportedly medical records. I therefore take no account of their contents

since they were not produced by a registered medical expert in accordance with Part 32 of the Civil Procedure Rules 2000 ('CPR').

- [20] Mr. Carl Palmer attested that Mr. Durand has complained to him about headaches, about feeling dizzy and weak and regarding daily and ongoing depression and stress challenges arising from his suspension. He indicated that Mr. Durand also spoke to him about how the suspension has affected his mental state and physical health. Mr. Palmer opined that he could see signs 'apparent even to a layman' that Mr. Durand was affected by some form of emotional distress.
- [21] He recalled driving Mr. Durand back to his home late in the evening on 12th November 2019 after taking him to run errands. He observed that Mr. Durand did not seem well and that 'in his demeanour and facial expression' he was looking visibly depressed and abnormal. He remembered that Mr. Durand told him on that occasion about his loss of appetite and abnormal bowel movements. About 45 minutes after leaving Mr. Durand at home he received a telephone call from him asking that he return urgently to take him to the hospital. In the telephone conversation, Mr. Durand said that he had collapsed while taking a shower, that he had hit his head, was feeling heaviness in the head and experiencing a loud whistle in his right ear.
- [22] He met Mr. Durand lying face-down on the ground, his upper body on the porch steps and his lower body on the porch. He appeared to Mr. Palmer to have fallen. He put him in the car and took him to the hospital in what appeared to him to be a state of unconsciousness. Mr. Palmer was informed by the doctor that Mr. Durand would be admitted for observation. Mr. Palmer expressed the opinion that Mr. Durand continued to suffer from bouts of depression and a multitude of physical and psychological stresses from his work-related problems.
- [23] I make the observation that Mr. Palmer did not hold himself out to possess any medical qualifications, training or experience. Therefore, his pronouncements as to Mr. Durand's physical, psychological or other medical difficulties are useless for purposes of assessing whether Mr. Durand experienced any of those conditions. In similar fashion, Mr. Durand's own personal assessments in respect of medical diagnoses do not assist his case.

- [24] There is no medical evidence from which this court can find that Mr. Durand experienced any medical conditions attributable wholly or largely to the defendants' unlawful decisions. It is remarkable that no medical expert was presented to substantiate same. The Court does not discount Mr. Durand's own assertions that he experienced a measure of stress related to his suspension and the other unlawful decisions which are the subject of his claim and I find that he did to some extent. I make no finding however that he lost consciousness and sustained any physical injury arising from those decisions. He has presented no proof of financial expense which arises from those decisions. It is accepted that his legal costs were reasonably and necessarily incurred.
- [25] On Mr. Durand's behalf, learned counsel Ms. Lim submitted that Mr. Durand suffered emotional distress, anguish, humiliation, reputational loss, inconvenience and financial expense as a result of the defendants' unlawful actions, stemming from his suspension, the referral of the charges to the Governor and the Governor's decision to conduct the disciplinary hearing. She argued that these have been further aggravated by the unnecessarily adversarial and litigious stance adopted by the defendants. She submitted that the Court's time and resources have been wasted. It is also her submission that punitive and wasted costs should be awarded.
- [26] Learned counsel Ms. Lim acknowledged and quite rightly so, that remedies in judicial review claims are all discretionary and that damages are generally awarded if a claimant 'can clearly demonstrate in his pleaded case that his administrative claim was one which could have been made in private law.' She cited in support **Delon Charles v The Commissioner of Police**⁴, **Dr. Abner James v The Medical and Dental Council**⁵, **Delon Charles v The Commissioner of Police**⁶ and **The Attorney General of Grenada and Muhammed Ehsan**⁷.

⁴ ANUHCv2011/0623.

⁵ SLUHCvAP2018/0018.

⁶ ANUHCv2011/0623

⁷ GDAHCv2019/0020

[27] As to the underlying causes of action, learned counsel submitted that the matters pleaded by Mr. Durand are actionable in private law against the defendants for breach of contract and/or alternatively in negligence. With respect to breach of contract, she reasoned that it is an implied or express term of Mr. Durand's employment contract with the Government that they must act in accordance with the Prison Act and Regulations and the Anguilla Constitution Order. She submitted that the declaratory reliefs affirm his claim that the defendants acted in breach of the law as a direct consequence of which Mr. Durand suffered detriment. She argued further that the defendants owed Mr. Durand a duty of care to ensure his safety at his workplace at Her Majesty's Prison. She reasoned that safety encompasses mental health and protection from stress and emotional distress.

[28] She submitted further that the defendants' unlawful conduct caused Mr. Durand to suffer foreseeable psychological injury, emotional distress and loss of reputation which is quantifiable as an award of damages. Citing **Inniss v Attorney General**⁸, learned counsel argued that the Court in that case ruled that damages and vindictory damages are available for constitutional breach. She quoted the following passage from the judgment in support of those contentions: -

[21] ... The function that the granting of relief is intended to serve is to vindicate the constitutional right. In some cases a declaration on its own may achieve all that is needed to vindicate the right. This is likely to be so where the contravention has not yet had any significant effect on the party who seeks relief. But in this case the contraventions was, as the judge said, calculated to affect the appellant's interest and it did so...'

[29] Learned counsel Ms. Lim also referenced the Board's decision in **AG v Ramanoop**⁹ where the Court opined that where a parallel remedy is available constitutional relief should not be sought unless the complaint includes some feature making that course appropriate. She also relied on **In the Matter of the Representation of the People Act and ors v Sir Gerald Watt, KCN, QC**¹⁰ and **Durity v The**

⁸ [2008] UKPC 42.

⁹ [2205] UKPC 15.

¹⁰ ANUHCVP2012/0005.

Attorney General¹¹. She concluded that the unlawful decisions in this case were made at the highest level within the Prison and within the civil service and therefore Mr. Durand is entitled to an award of general damages for the loss and injury he foreseeably sustained and is experiencing.

[30] She reasoned that this is a case in which the declaratory relief is insufficient to vindicate Mr. Durand's rights and an award of damages is justified to properly acknowledge and reflect the gravity of the referenced breaches and the public outrage and repugnance against such breaches which constitute an abuse of power at the highest level; to serve as a deterrent against the committal of such breaches by the defendants and other parties and to send a clear message that the law is to be respected and upheld by all.

[31] The Honourable Attorney General submitted that damages should not be awarded. Relying on **Maharaj v Attorney General of Trinidad and Tobago**¹² and **Attorney General v Henry and Anor**¹³, he contended that damages are compensatory in nature and purpose, are discretionary and not automatic. He argued that Mr. Durand has the burden to prove that he incurred loss and damage and must lead evidence to such effect. He relied on **James v Attorney General of Trinidad and Tobago**¹⁴ and **Veronica Charles v Attorney General and Public Service Commission**¹⁵.

[32] The learned Attorney General contended further that if damages are awarded, they should be nominal and in line with the determination in **Bibi Ally v The Commissioner of Police et al**¹⁶ where the claimant being unable to substantiate any pecuniary loss and was awarded \$5,000.00 for vindication of the breach of her constitutional right. In that case, the court made declaratory orders

¹¹ [2008] UKPC 59.

¹² (2015) 86 WIR 537.

¹³ [2021] 1 LRC 579.

¹⁴ [2011] 2 LRC 217.

¹⁵ GDAHCV2020/0243.

¹⁶ GDAHCV2014/0121, decision delivered on March 28th, 2018.

that the claimant's constitutional right to protection of privacy was violated when the Police conducted an unlawful search warrant at her house and removed computer and other electronic devices.

- [33] The Honourable Attorney General contrasted this award with the award of EC\$10,000.00 that the Board directed must be paid to Mr. Horace Fraser¹⁷ for procedural irregularity in disciplinary proceedings against him resulting in his unlawful termination while serving as a Magistrate. The learned Attorney General contended that Mr. Fraser held one of the highest graded posts in the civil service to which was attached certain constitutional protections. He argued that unlike Mr. Fraser, Mr. Durand still holds his post and enjoyed full pay throughout his suspension.

Analysis

- [34] The principles on which damages are awarded in respect of constitutional breaches are settled. They were articulated by the parties by reference to the cases cited. In the **Delon Charles** case, Her Ladyship Justice Remy stated and reiterated the learning from **Blackstone's Civil Practice**¹⁸ that 'all public law remedies are discretionary' and that the court may refuse relief for example where the public body has 'already remedied its position to meet the claimants' demands.' Even where the claim has been successful, an award of damages is not automatic.

- [35] Furthermore, as articulated by the Court of Appeal in **Elmoalis Ltd. V The Attorney General of Anguilla**: -

'It is simply not sufficient for a party to assert, as a basis for entitlement to an award of damages, that they were treated unfairly by a public authority and that they have suffered pecuniary harm as a consequence. To obtain an award of damages in judicial review proceedings, a claimant must plead and prove a recognised private law cause of action, for which damages would be available as a remedy.'¹⁹

¹⁷ In *Horace Fraser v The Judicial Services Commission* [2008] UKPC 25, judgment delivered on May 6th, 2008.

¹⁸ 2011 Ed. pg. 1191., para. 74.53.

¹⁹ AXAHCVP2019/0002, delivered on May 21st, 2021, at. para. [63].

[36] In **Ramanoop** the Board explained that 'compensatory' damages may be awarded by the Court for constitutional breach where the claimant has suffered wrong in much the same way and by the same measure that damages are awarded at common law in tort. This is usually referred to as general damages. The Court also referred to another element of damages sometimes termed 'punitive' or 'exemplary' damages which may be ordered as an additional remedy and sum to not to punish the defendant but 'to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches.'

[37] On this issue, Lord Nichols of Birkenhead opined: -

'When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under ... is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action at law.

'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.²⁰

- [38] Applying those principles to the instant case, the Court must determine whether to exercise its discretion and award Mr. Durand damages in addition to the declarations made by the learned judge. Regrettably, he had to endure a full hearing in the High Court and before the Court of Appeal before his protestations against the unlawful conduct was heeded. The proceedings have now spanned a period of 2 ½ years. During that time, it is reasonable to expect that he must have experienced a measure of uncertainty, emotional distress, and anguish especially since his letters to the Governor did not produce the desired result of withdrawal of the order of suspension and reversal of the referral of the disciplinary proceedings to the Governor. That in my estimation would be the reasonable and expected impact on any employee.
- [39] I am of the view that Mr. Durand was entitled to bring a regular claim under the **Prison Act and Regulations** for statutory breach of the procedures outlined therein. He would have been entitled to recover damages had he done so. He pleaded that cause of action in his originating motion. I therefore adopt and apply the reasoning of the Board in **Fraser, Inniss and Ramanoop** and find that in the circumstances an award of damages is appropriate to vindicate Mr. Durand's constitutional rights to protection of the law and due process under sections 1 and 9 of the Constitution.
- [40] Having regard to the facts as found, I am of the considered opinion that Mr. Durand is entitled to an award of damages in respect of the damage suffered by him as manifested in his averments that the defendants' refusal to consider his written representations that they had erred, caused him periods of anxiety and forced him to take legal action. This is manifest from the record and the course that the litigation has taken. I find however, that although ill-advised the defendants were not motivated by malice or spite and meant him no ill-will apart from their obvious determination to pursue disciplinary charges in accordance with the Prison Code. Their belated concessions make this abundantly clear.

²⁰ At paragraphs 18 and 19.

- [41] The reality is that Mr. Durand suffered no reduction in remuneration from his employment and had the opportunity while at home to pursue healthy no-cost avenues to ameliorate any stress that may have been occasioned by the unlawful conduct. I do not think that he reasonably experienced an inordinate amount of stress that would elicit a significant award in damages. This case is also not one which justifies making an additional award to reflect the sense of public outrage alluded to in **Ramanoop** and urged on Mr. Durand's behalf. I am satisfied that the declaratory reliefs achieved that objective. I agree with the learned Attorney General that Mr. Durand has produced no evidence of pecuniary loss and therefore the award contains no such element.
- [42] The approach taken by the Court in the **Bibi Ally** case commends itself to me. In that regard, I am satisfied that a nominal sum will adequately compensate Mr. Durand for any feelings of embarrassment and emotional distress which was occasioned by this unfortunate incident, and vindicate the related negative fallout he experienced from the constitutional breaches, procedural irregularities and absence of due process.
- [43] I had solicited from counsel submissions as to the inflationary effect on previous awards such as **Bibi Ally's**. Learned counsel Ms. Lim referred the Court to **Francis Maurice v Clarence Mangal**²¹ and **PL a child Mackiba Halley by her litigation/next friend v Blessings Bus Service LLC et al**²². No submissions were made by the learned Attorney General on that point. The rate of inflation used in the former does not assist this Court because of the time difference between the two cases and the periods under consideration in each. The latter did not add anything further.
- [44] In the circumstances, using the **Ally** award of \$5,000.00 as a baseline and taking into account the indisputable inflationary effects which have been evident throughout the region and specifically in Anguilla since 2018 when that award was made, and without any scientific calculations, I would add a sum of \$250.00 to the **Ally** award for present purposes to capture that upward inflationary

²¹ SLUHCV2005/0176.

²² MNIHCV2020/0025.

movement. In the premises, I make an award of \$5,250.00 to Mr. Durand as ‘general’ damages in respect of the constitutional breaches by the defendants of his right to protection of the law and due process in relation to the declarations made by the learned judge. No pre-interest judgment figure is included in light of the relatively short time that transpired between the date of the order by the learned judge in 2020 and the Court’s determination that the figure proposed embodies any amounts which may reasonably have been incurred as interest during that period.

Issue 2 - On what basis should costs be awarded and in what amount?

[45] Learned Counsel Ms. Lim submitted that costs are awarded at the Court’s discretion with the aim of reflecting the overall justice of the case. She contended that full prescribed costs including an element of punitive and wasted costs should be awarded. She submitted that in awarding costs the court should take into account that costs have been aggravated by the unnecessarily adversarial and litigious stance adopted by the defendants. She submitted further that the Court’s time and resources have been wasted.

[46] The Honourable Attorney General submitted that the Court is empowered by Civil Procedure Rules 2000 (‘CPR’) rule 56.13(5) to decide the amount of costs in judicial review proceedings by assessing them. In this regard, he argued that the Court must assess what is a reasonable amount having regard to the factors listed in CPR rule 65.2(3). In support he cited **Friar Tuck et al v International Tax Authority**²³. Placing reliance on **SOF 82 Anguilla Holdings LLC v Executive Council (Government of Anguilla)**²⁴ he submitted further that a party is entitled only to such costs as are reasonably incurred and proportionate to the case and not to a full indemnity of the cost of litigation. In that case the learned judge had before him a bill of costs. None was presented in the instant case.

[47] On the date set for delivery of this decision, learned Crown Counsel Mr. Theon Tross helpfully directed the Court’s attention to the decisions in **National Bank of Anguilla (Private Banking and Trust Limited in Administration and another v National Bank of Anguilla (in Receivership) and**

²³ BVIHCVAP2017/0003.

²⁴ AXAHCV2019/0004, at paras. 37-55.

others²⁵ and Paradise Beach Holdings Limited v Nevis Paradise Limited et al, delivered on 18th Dec. 2020²⁶ in which the court held that EC\$400.00 is an appropriate daily rate for advocacy by a legal practitioner of under 18 years call. Learned counsel Ms. Lim submitted that her usual daily rate varies between USD\$300.00 and USD\$400.00. For consistency, I adopt and apply the rates outlined in the two cases cited by learned Crown Counsel.

[48] The costs under consideration relate to the preparation of the Originating motion, supporting affidavit, submissions in respect thereof, the application for assessment of damages and costs, the supporting affidavits of the claimant and Mr. Palmer and the time spent in Court presenting the Originating Motion and Notice of Application. They are properly to be assessed pursuant to CPR 56.13.

[49] No evidence was supplied as to the time spent preparing the referenced documents. In light of her years call²⁷, the competence with which Ms. Lim conducted this matter and the content and quality of the filings, I consider that she would have expended no less than 20 working hours preparing the documents including taking instructions and conducting research. Roughly one hour was spent in the Court during the assessment phase of the hearing. I reasonably believe that the hearing before the learned judge at the liability stage took no more than an hour having regard to what it entailed. For those efforts, I consider that costs of ECD\$8,000.00 representing an hourly rate of ECD\$400.00 is appropriate in all of the circumstances.

ORDER

[50] It is accordingly ordered:

1. The Acting Superintendent of Prisons and the Governor shall pay to Allin Durand general damages of EC\$5250.00

²⁵ AXAHCV2016/ 0032.

²⁶ NEVHCV2017/0093 delivered on 4th June 2018.

²⁷ Roughly 12 years.

2. The Acting Superintendent of Prisons and the Governor shall pay to Allin Durand assessed costs of ECD\$8,000.00 pursuant to CPR rule 56.13(5).

[51] I am grateful to the legal practitioners for their submissions.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar