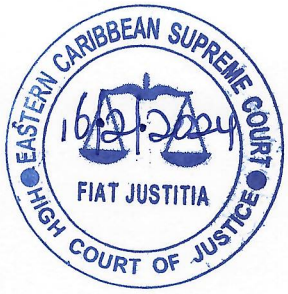
THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES




IN THE HIGH COURT OF JUSTICE

SVGHCV2019/0110

IN THE MATTER OF THE APPLICATION FOR CONSTITUTIONAL REDRESS UNDER SECTION 16 OF THE CONSTITUTION

BETWEEN

JAVIN KEVIN VINC JOHNSON

CLAIMANT

and

THE ATTORNEY GENERAL OF SAINT VINCENT AND THE GRENADINES

DEFENDANT

and

THE INCORPORATED TRUSTEES OF THE SEVENTH-DAY ADVENTIST CHURCH IN SAINT VINCENT, THE INCORPORATED TRUSTEES OF THE EVANGELICAL CHURCH OF THE WEST INDIES, THE NEW TESTAMENT CHURCH OF GOD, THE ARCHBISHOP & PRIMATE (SPIRITUAL BATIST) OF SAINT VINCENT AND THE GRENADINES, THE CHURCH OF GOD (SAINT VINCENT AND THE GRENADINES) THE INCORPORATED TRUSTEES OF THE NEW LIFE MINISTRIES, THE LIGHT OF TRUTH CHURCH OF GOD, KINGSTOWN BAPTIST CHURCH OF SAINT VINCENT AND THE GRENADINES, LIVING WATER MINISTRIES INTERNATIONAL (SAINT VINCENT AND THE GRENADINES) AND HOPE EVANGELISM OUTREACH MINISTRIES

INTERESTED PARTIES

and

VINCYCHAP INC

ADDED INTERESTED PARTIES

CONSOLIDATED WITH

SVGHCV2019/0111

**BETWEEN**

**SEAN MACLEISH**

**CLAIMANT**

**and**

**THE ATTORNEY GENERAL OF SAINT VINCENT AND THE GRENADINES**

**DEFENDANT**

**and**

**THE INCORPORATED TRUSTEES OF THE SEVENTH-DAY ADVENTIST CHURCH IN SAINT VINCENT, THE INCORPORATED TRUSTEES OF THE EVANGELICAL CHURCH OF THE WEST INDIES, THE NEW TESTAMENT CHURCH OF GOD, THE ARCHBISHOP & PRIMATE (SPIRITUAL BATIST) OF SAINT VINCENT AND THE GRENADINES, THE CHURCH OF GOD (SAINT VINCENT AND THE GRENADINES) THE INCORPORATED TRUSTEES OF THE NEW LIFE MINISTRIES, THE LIGHT OF TRUTH CHURCH OF GOD, KINGSTOWN BAPTIST CHURCH OF SAINT VINCENT AND THE GRENADINES, LIVING WATER MINISTRIES INTERNATIONAL (SAINT VINCENT AND THE GRENADINES) AND HOPE EVANGELISM OUTREACH MINISTRIES**

**INTERESTED PARTIES**

**and**

**VINCYCHAP INC**

**ADDED INTERESTED PARTIES**

**Appearances**:

Mr. Joseph Middleton KC with him Mr. Peter Laverack, Mr. Jomo Thomas and Ms. Shirlan Barnwell of counsel for the claimants in both claims

Solicitor General Ms. Karen Duncan with her Snr. Crown Counsel Mrs. Cerepha Harper-Joseph and Crown Counsel Ms. Franeek Joseph for the defendant in both claims.

Mrs. Mandella Peters with her Mrs. Cheryl Bailey instructed by Mrs. Meisha Cruickshank for the 1st interested parties in both claims.

Mr. Christopher Hamel-Smith with him Mr. Grahame Bollers for the added interested parties in both claims.

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2023: May 11, 16, 18 & 30

Jun. 19

2024: Feb. 16

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## JUDGMENT

### INTRODUCTION

[1] **Henry, J**.: These two claims[1] were brought by Mr. Javin Johnson and Mr. Sean MacLeish ('the claimants') against the Honourable Attorney General to challenge the constitutionality of sections 146 and 148 of the **Criminal Code of Saint Vincent and the Grenadines**[2] ('the Challenged Provisions') which criminalize bestiality, consensual sexual intercourse and sexual intimacy between same-sex adults and buggery between consenting adults. The claims were consolidated and heard together.

[2] Mr. Johnson and Mr. MacLeish contend that the challenged provisions are unconstitutional, illegal, null, void, invalid and are of no effect because they infringe respectively, sections 1(c), 3, 5, 7, 9, 10, 12 and 13 of the **Constitution of Saint Vincent and the Grenadines**[3] **('**the **Constitution'**) and their fundamental rights to privacy, personal liberty, protection from inhuman treatment, protection from arbitrary search and entry, freedom of conscience, freedom of expression, freedom of movement and protection from discrimination.

[3] Messrs. Johnson and Mac Leish have asked the court to strike down the challenged provisions or modify them to bring them into conformity with the Constitution; or grant orders declaring that the challenged provisions are unconstitutional, illegal, null, void, invalid and are of no effect. Alternatively, they seek orders declaring that the challenged provisions abridge, abrogate, infringe, violate and/or contravene their constitutionally protected rights and are arbitrary, irrational and/or contrary to the common law prohibition of unequal treatment on irrational grounds.

[4] A coalition of Churches operating in Saint Vincent and the Grenadines applied to be joined as Interested parties to the proceedings and their application was granted. Their position aligns with the Honourable Attorney General's. The Grenadines Chapter of the Caribbean HIV/AIDS

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[1] Commenced by Fixed Date Claim Forms filed on 26th July 2019.

[2] Cap. 171 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

[3] Cap. 10 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

Partnership (VincyChap SVG) Inc. ('VincyChap') also applied and was permitted to participate in the proceedings

as an added interested party and is supportive of the claimants' stance in these proceedings.

[5] The Honourable Attorney General opposed the claims and contended that the challenged provisions are not unconstitutional or illegal and are reasonably justifiable on the grounds of public morality and public health. On his behalf the learned Solicitor General submitted that Messrs. Johnson and MacLeish lack the requisite legal standing to prosecute these claims because they do not have a sufficient interest in the subject matter of the claims.

[6] The matter proceeded to trial on May 11th 2023 and after several days' testimony, the decision was reserved on June 19th 2023. The pleadings, evidence, written submissions and other documentation are voluminous comprising seven boxes.

[7] For the reasons set out in this judgment, I have found that Messrs. Johnson and MacLeish have not made out their respective claims. Both claims are accordingly dismissed with costs.

**ISSUES**

[8] The issues are: -

1. Whether Mr. Johnson or Mr. Mac Leish has locus standi to prosecute these claims?
2. Whether section 1(c) of the **Constitution** is justiciable?
3. Whether the challenged provisions contravene sections 1(c), 3, 5, 7, 9, 10, 12 and/or 13 of the **Constitution** and are therefore illegal, null, void, invalid and are of no effect?
4. To what remedy if any, is Mr. Johnson and/or Mr. MacLeish entitled?

**FACTUAL BACKGROUND**

Claimants' Evidence

[9] It is useful to summarize the factual matrix at this juncture. Mr. Johnson and Mr. MacLeish supplied affidavit testimony and were cross-examined. In some respects, there are similarities and slight overlap in their accounts in so far as it relates to aspects of their experiences as children and young men living in Saint Vincent and the Grenadines.

Mr. Johnson

[10] Mr. Johnson testified that he was born in Saint Vincent and the Grenadines in November 1966 and

is a gay man. He stated that he re-located to the UK in June 2017 and currently lives in Doncaster, United Kingdom. He claims that he made an asylum claim in the UK on the basis that he would face a significant risk of persecution due to his homosexuality if he returned to Saint Vincent, and that the Vincentian authorities had failed to protect him against such risks. He explained that he was granted refugee status and a five-year residency by the UK Home Office.

[11] He asserted that he believes that the risks he faced as a gay man in Saint Vincent are both the direct and indirect outcomes of the challenged provisions and it is because of those risks that he can no longer live in Saint Vincent his home and country of birth. He described his childhood in Lowmans, where he was raised mainly by his aunt as his mother worked at a hotel in Mustique and also because he never had a close relationship with his father.

[12] He recalled getting along well with his classmates at the primary school he attended - Lowmans Windward Anglican School - that he worked hard, got good grades and enjoyed primary school. He remembers that things started to get tough from sixth grade onwards. He had always known that he was different from other boys in his class, but as he got older it started to become a point of conflict, and other students began calling him names, like 'battyman' and 'bullerman'. He attributes that to the fact that he befriended only girls and acted in a 'girly' manner. His recollection is that things got worse when he started secondary school at St Martins. Students mocked and abused him verbally and physically, often destroyed his 'things', and pushed him around.

[13] The worst abuse came from teachers. One teacher in particular would mimic him in a 'girly' voice, and would always tell him to stop behaving girly in front of classmates. He said that the teacher picked on him in class and made it clear that he did not approve of 'people like him'. He described it as being horrible, remarking that the person who was meant to protect him was the one bullying him. He averred that he used to feel so much shame and embarrassment when he was in class. Despite the fact that he wanted to do well at school and get good grades, he avoided going to class

whenever he could. As a result, his grades suffered. When he did attend classes, he would often react angrily to the teacher's comments or refuse to participate in class if he mocked him.

[14] It felt to him like his teachers and fellow students wanted him to repress his identity and become someone who he was not. However, he tried to remain himself although at times it made him feel guilty about who he was. Sometimes he did not even want to be there and it did not feel 'worth being alive'.

[15] He claimed that in 2009 when he was in second form, a teacher told him that he would not be there [at St Martins] next year. He interpreted that as a clear threat of an expulsion. Soon after, his mother received a letter from the school's principal informing her that he had been expelled from St. Martins due to his 'disruptive attitude'. The letter specifically referred to problems his teacher reported having with him. He felt then, and still feels that the main reason he was labelled 'disruptive' was due to his refusal to accept repressing aspects of his personality associated with homosexuality. As far as he was concerned, his teacher had been the one who had been 'disruptive' in his life. The teacher affected his relationship with school and his family, and got in the way of his academic progress. In those formative years, the way the teacher treated him had a considerable impact on his personal development. Throughout his experience as a teenager, he came to identify and be identified as a 'disruptive' and 'difficult' child, when really he was just a little boy who happened to be gay.

[16] Mr. Johnson asserted that he started at the new school, Emmanuel, in his third year of secondary school. He really wanted to study science, but due to the fact that he had joined the school part-way through his secondary education, and on relatively short notice, the science class was full. Consequently, he had to settle for business studies, which restricted the academic and professional opportunities open to him later in life. Originally, he saw the change of school as an opportunity to put an end to the abuse he had received from the students and teachers at St Martins. He adapted how he spoke and how he walked, forcing himself to check character traits that he perceived had bothered others so much. He claimed that he began acting more 'manly' and even had a girlfriend for the first few months. He averred that he had to pretend to be heterosexual to avoid getting bullied.

[17] Eventually, he stopped putting up a front as it was exhausting for him to act 'straight'. The bullying re-started as soon as he became more honest with others and himself about who he really was and stopped trying to force alien behaviours on himself. As the kids got older and stronger, the abuse became more violent and he got shoved, kicked and punched. He tried to put up a fight, 'but it was hard when it was five against one'. He tried complaining to the teachers about the constant taunting and abuse that he was subjected to, but they just laughed it off, impersonating and dismissing him. One time in particular, a classmate hit him out of the blue. The principal called them in, and he was the one who got into trouble and was suspended. He asserted that there were no attempts from the school to address homophobic bullying. The message from the school was that, if he was going to act in the way he did, he had to put up with bullying. It always felt like the school saw him as being at fault for causing problems. They saw him as gay so he deserved it.

[18] When he was fourteen his aunt Helen passed away. He considered it a real loss because she had effectively raised him while his mother was out working in Mustique. He had always felt like his aunt was more accepting of his sexuality than his other family members. She bought him dolls and let him play with them. After she passed away, he moved into a house with a cousin who was very vocal about disliking gay people. As a result, he felt very alone at school and at home; like there was no one to protect him from the homophobic bullying at school, and to provide love and support when he got home. It was difficult for him to concentrate at school as his mind was elsewhere and he constantly felt uneasy and unsafe at school.

[19] Nothing changed when he went to the St. Vincent Community College Division of Technical and Vocational Education. He claimed that he was the object of bullying and discrimination from the school itself. By way of example, one day, a teacher told him that he had a very girly bag and that he could not take it into college. He wrote about it on Facebook, asking his Facebook friends why he could not use the bag he wanted. One of the students told his teacher about what he wrote on Facebook and this led to him being suspended for two weeks. I note that this description about what the student reportedly told the teacher is hearsay evidence. For obvious reasons, there is no probative value to this hearsay material and it is disregarded.

[20] Mr. Johnson averred further that he was the butt of verbal abuse from some of the teaching staff at the College. Although they did not use terms like 'battyman', they referred to him as a girl or

'impersonated the way he spoke'. Due his treatment at college he started to skip class again, and his grades slipped further. He left halfway through his studies and after the first year because he was constantly getting suspended and taunted. However, he never told his mother about why he was getting picked on, hit and bullied as he did not want her to feel ashamed about her only son.

[21] Instead, he went along with the story that he was disruptive rather than simply reacting to the homophobic abuse that he was suffering just because he was gay. To him, life was much easier that way. When he was at home, he usually locked himself in his room. That was the only space where he felt totally safe. He recounted stories about a half-sister whom he claimed meted out similar treatment to him. He introduced inadmissible hearsay material about that sister and her father. It is therefore omitted, as is his attempt to explain why he thinks they behaved in that manner.

[22] He testified that there was and still is so much stigma attached to being gay in Saint Vincent. Mr. Johnson said that throughout his childhood he felt an overwhelming sense that being gay was wrong and this was reinforced by newspaper articles and comments from people on the subject. He did not fully understand from where that stigma stemmed. As an adult looking back, he can see that this is largely due to the challenged provisions which not only criminalize sexual acts but stigmatize and forbid an entire identity. The stigma runs so deep and broad that as a child who was not sexually active and had no concept of his homosexuality when the bullying started, he was crushed by it.

[23] When he was seventeen, he travelled to Barbados to attend a cross-dressing pageant. He said that when photos of him at the pageant emerged on social media, he started receiving threatening messages on Facebook. He produced none of those messages and attributed the threats to no particular individual. He said that there was no escape from the homophobic abuse even when he was out of the country. He stated that there is no public space for the LGBT community to interact and voice opinions in Saint Vincent - no gay bars or parties, no civil society organisations asserting those rights and no representation either in government or within companies. As a result, he felt totally isolated and ostracised as a gay person while there.

[24] Mr. Johnson claimed that in recent years, he has felt increasingly unsafe as a gay man in Saint Vincent. He recounted that when he went out to a club, the DJ played nasty Jamaican songs about shooting 'battymen' and people in the club insulted and hit him and his friends. In a one incident, a good friend was allegedly stabbed in the arm in a homophobic attack. He claimed that he tried to report these assaults to the police several times. However, when he went to the police station, policemen refused to take a statement from him and laughed at him. He testified that he has seen many videos surfacing of gay men being beaten up in Saint Vincent including recently when an entire whole village in South River chased and assaulted a gay man just because of his sexuality.

[25] He remarked further that victims of criminal offences who are gay are not taken seriously in Saint Vincent. In the eyes of the law, it feels like gay victims simply do not 'count' as much as victims who are straight. He averred that homophobia affected almost every aspect of his day-to-day life in Saint Vincent. He claimed that it was more than just insults. It affected his ability just to move around the country because bus drivers and other passengers often refused to let him ride with them. He said that many times he was told that he could not get on the bus or was asked to leave because his sexuality made people 'uncomfortable'. They did not want to share space with a 'battyman'. He stated that not knowing whether he would be able to get a seat on the bus made it difficult to hold down a job, because he could never predict how long it would take to travel from point A to point B.

[26] According to Mr. Johnson, when he was younger, he wanted to become a lawyer or a teacher. However, those jobs were closed off to him because in order to access good jobs in Saint Vincent, one needs to fit into the mould that society wants. He asserted that there are no gay role models. From the way people acted around him, it was clear that he could never be a teacher as people would not accept that their children could be taught by a gay man. Furthermore, although he wanted to be a lawyer, his experiences at secondary school made it clear that further education would be a challenge beyond just the effort of learning. Overall, he felt that his career options were limited for no reason other than his sexuality.

[27] Mr. Johnson averred that he cannot live an ordinary life as an openly gay man in Saint Vincent. The jobs available to him and his safety, mobility and ability to form romantic relationships were all restricted because of his sexuality. He explained that walking down the street in Saint Vincent as

an openly gay man feels like walking down the street smeared with filth. People abuse you verbally and the police offer no protection. Although they are supposed to protect all citizens equally, they fail to uphold their duty when it comes to LGBT people and they too participate in the abuse. He asserted that they feel entitled to do so because by the challenged provisions, society has labelled him a criminal. He cannot perceive how abuse against LGBT people, based on that identity, will ever end or be diminished while the challenged provisions continue to exist.

[28] By 2017, when he was 20 years' old, he felt that he had no choice but to leave Saint Vincent and he did so. He claimed that he had been forced from his home, friends and family and was not allowed by the law and the attitudes brought about by it to live a life worth living in Saint Vincent. He declared that no matter how much he misses them, he refuses to return to Saint Vincent if the challenged provisions remain in place. Without providing proof, he added that this exile is sadly not unusual and he is by no means the only gay man to have left Saint Vincent for this reason.

[29] Mr. Johnson said that his motivation for bringing this claim lies in a desire to ensure that no other Vincentian is treated the way that he has been. He stated that it should not be illegal to love another adult. He also wants the State to be held to account for what it did to him and what it allowed others to do to him. He remarked that no one should be seen as a legitimate target of abuse, violence or hate based on their identity. He averred that while the challenged provisions remain on the statute books, it is impossible to be an openly gay man and live in Saint Vincent. He hopes that this legal challenge can start the process towards LGBT people living their lives freely and without fear.

[30] During cross-examination he testified that he works in restaurant management and as a makeup artist. He admitted that he had no legal training, or training in sociology or psychology, and that he does not hold himself out as a legal expert or an expert in sociology or psychology. He acknowledged that he has not conducted formal research in Saint Vincent and the Grenadines as it pertains to LGBT people.

[31] Mr. Johnson outlined several grounds underpinning his claim:

1. The challenged provisions and their mere existence denied and still deny him the rights and freedoms guaranteed by the **Constitution** as described above and have thereby inflicted on

him multiple and overlapping infringements of those rights and freedoms. Further, such interference is not justifiable where the pleaded rights are qualified rights.

2. His right to personal liberty secured by section 3 of the **Constitution** has been breached as the mere existence of the challenged provisions affects important and fundamental life choices and/or his psychological integrity. He has no personal autonomy to live his own life and to make decisions that are of fundamental personal importance and which directly affect his choice of whether to enter a relationship, whether to engage in sexual conduct or whether to exile himself from Saint Vincent and the Grenadines.

3. The mere existence of the challenged provisions unlawfully constrains his personal liberty in a manner and for a purpose that is not authorised by section 3(1) of the **Constitution**.

4. In breach of section 5 of the **Constitution**, the challenged provisions impose severe punishments on him for his form of sexual expression. He was and remains at risk of inhuman and degrading punishment for that expression. The mere existence of the challenged provisions degrades and devalues his human dignity amounting to inhuman and/or degrading treatment.

5. The existence of the challenged provisions resulted in him being subjected to abuse from State and non-State actors of a severity to place the State in breach of both its negative obligation to abstain from acts of inhuman and degrading treatment and its positive obligation to protect; and that such obligations cannot be met towards him, other homosexual people and those perceived to be homosexual while the challenged provisions subsist.

6. The challenged provisions constitute a breach of his rights to freedom of conscience and expression under sections 9 and 10 of the **Constitution** because he has not and cannot freely engage in sexual intimacy with other consenting males, which is a primary expression of his personhood, due to the State's imposition of the challenged provisions. Further, he lacked and lacks the freedom of choice in matters which amount to the expression, manifestation and exercise of personal sexuality. He has not fully enjoyed and cannot fully enjoy his life, expression of his personality or autonomy about his intimate relationships without penalisation or the persistent risk of the same.

7. He was not and is not free from nor immune to invasions of his freedom of expression and freedom of conscience and/or abusive and/or arbitrary and/or unwarranted censure and punishment or the risks of the same by the police and/or other State actors in Saint Vincent and the Grenadines due to his homosexuality or perceived homosexuality.

8. He has not, cannot now or in the future freely express in public an integral part of his personality. The challenged provisions allow extensive societal prejudice, persecution, marginalisation, and a lifelong entrenched stigma that result in the suppression of an integral part of his personhood that unlawfully hinders his freedom of conscience and freedom of expression. The State has failed in its positive duty to enable such expression.

9. The challenged provisions operate to curtail, supress and/or eradicate the expression of an integral part of his identity in both private and public.

10. The existence of the challenged provisions, their effects on him, and society's perception of him that arise from their existence, have resulted in his *de facto* expulsion from Saint Vincent and the Grenadines, in breach of section 12 of the **Constitution**.

11. In breach of section 13 of the **Constitution**, the challenged provisions violate his right to non-discrimination as they unfairly discriminate solely and expressly on the basis of his sex and his male partners. Sex is not a legitimate or lawful basis for differential treatment that results in exclusion, marginalisation, stigma, punishment and/or inferior treatment.

12. Section 148 of the **Criminal Code** is overtly discriminatory on the ground of sex as it criminalizes conduct between male-male composite couples and female-female composite couples, while leaving unaffected by the criminal law the same conduct between male-female composite couples. Section 148 arbitrarily penalizes same-sex couples and is unequal in its treatment of them on the prohibited ground of sex.

13. In as much as section 146 embraces acts involving both males and females, it is discriminatory in its effect, as it has a greater and disproportionate impact upon homosexual couples.

14. The challenged provisions violate his right to protection of his fundamental right to the privacy of his home guaranteed by section 1(c) of the **Constitution**. The provisions of Chapter 1 of

the **Constitution** have effect for the purpose of affording protection of that right and freedom. One or more of the rights and freedoms at Sections 2 to 13 of the **Constitution** must secure him with his right to privacy of the home.

15. His right to privacy of the home is locatable within one or more of Sections 3, 5, 9, 10, 12 or 13.

16. Additionally, or in the alternative, section 1(c) of the **Constitution** itself is invokable and a basis for relief.

17. The existence of the challenged provisions denies him the privacy and autonomy to engage in consensual intimacy with other males, even in the privacy of his own home.

Mr. MacLeish

[32] Mr. MacLeish based his claim on the same grounds as Mr. Johnson. He lives in Chicago, Illinois, USA having moved there in 1987 to pursue university studies. Like Mr. Johnson, he was born in St. Vincent in 1966. He claims to be a gay man living with his partner of 13 years. He asserted that he misses Saint Vincent but has no choice other than to stay abroad in the USA.

[33] He averred that returning to St Vincent, whether to live there or simply to visit, is not a realistic option. He remarked that having to stay away from Saint Vincent is despite his ownership of land in the country, where he wishes to build a home and live a peaceful life with his partner either now or in their retirement. He produced no proof of land ownership in Saint Vincent. He stated that the negative effects of the challenged provisions make Saint Vincent and the Grenadines an unsafe, anxiety-filled and humiliating place for him. Further, that to return to the State while the challenged provisions persist would be to submit to a life of intolerance and of a constant risk of arrest, persecution and abuse.

[34] He spoke about homophobia being meted out to other people who were suspected of being gay but said that he was not an eyewitness to the assault he described. Such testimony is therefore not probative and is inadmissible based as it is on hearsay. Mr. MacLeish explained that although he did not 'come out' until the age of thirty, he knew he was different from an early age. His family did not treat him differently, but he remembers being teased a lot in school by being called feminine

names like ‘Shirley’ or being at the receiving end of homophobic insults like ‘antiman’ and ‘bullerman’. He claimed that the school kids made fun of the way he walked and talked.

[35] He recalled that from a young age he was acutely aware that he was different in a manner that Vincentian society would not accept. Being marked out as different came not only from other kids but also from people in positions of authority. When he was fourteen, his chemistry teacher picked on him in front of the whole class for being effeminate. When he answered a question he was called ‘Miss’. At that age it was devastating for him. Due to the taunts and verbal abuse received he learned to modify his behaviour sub-consciously, to fit in and act in a way that he felt was expected. This put tremendous pressure on him and, as a result, he began to stutter and stammer, and so avoided speaking as much as he could. I make the observation that Mr. MacLeish has not presented any professional expert evidence as to the cause of his stutter and therefore he has not supplied proof
capable of establishing causation.

[36] He explained that most of his friends were female. He did not realize at the time that he was scared of being around people of the same sex. But he now feels that deep down he was terrified. He feared how they would react to him if they saw him for who he truly was.

[37] He recalled that the first time he found out about the challenged provisions he was a teenager. He had read a newspaper article that discussed the ‘homosexuality disease’ in reference to the AIDS crisis. He then set out his recollection of the gist of that article. I have however omitted what Mr. MacLeish said about the contents on the grounds that it is inadmissible hearsay. He claimed that the article reinforced the idea in his mind that homosexuality was a horrible disease, something to be ashamed of and to avoid at all costs. He recalled that one day, when a man he suspected of being gay went to the bathroom before him, he felt the need to clean the toilet seat obsessively out of fear that the man’s homosexuality would ‘contaminate’ him.

[38] He averred that the realization that homosexuality was not just morally frowned upon, but also criminalized was traumatic for him. To him, being a gay man meant being a criminal. This made him feel more isolated, and deeply fearful that anyone would find out about his sexuality, because

he now realized that the repercussions were not just psychological and physical abuse; there was also the possibility of arrest, detention and a 10-year prison sentence. Knowledge of the criminal law also made him understand why people were disgusted by homosexuality. In his mind, in the eyes of the law homosexuals had the same status as murderers or thieves. To announce that he was gay was unthinkable. It would be like declaring to the world that he was a leper who had to be shunned, a pervert who had to be beaten, or a defective person who deserved ridicule and abuse from acquaintances and strangers alike. To avoid this - at a great personal toll - he deeply suppressed an essential characteristic of who he is.

[39] He said that he knew early on that if he wanted to be happy, he had to leave Saint Vincent because he realized by then that he was different, and that there was no place for that difference in his country. He felt that he had no choice but to get out as soon as he could and for that reason he left for the USA. He went there in 1985 as part of a student exchange programme, moved back to Saint Vincent for a year, and then returned to the USA for his university studies. On finishing university in 1991 he settled permanently in the USA.

[40] Mr. MacLeish said that during his student exchange, he lived in a small town in Pennsylvania and went to the local high school where he was one of two Black students in that school. For the first time, he experienced racism, but claims that it did not affect him and he remains living in the USA after 25 years, very secure in his racial identity. He stated that he has Saint Vincent to thank for that because growing up, he was never discriminated against or made to feel worthless because of the colour of his skin. However, whilst the USA lacks racial equality, at least it offers space for different sexual identities where one can walk in the street with a partner of the same sex and not be fearful of verbal abuse, physical attacks or arrest. He said that in the USA you are not made to feel worthless or to feel like a criminal because of something as arbitrary as who you love.

[41] He explained that despite living in the USA, a country that is far more accepting of homosexuality than Saint Vincent, it took him over ten years to 'come out' to himself and to those around him. He said that his experiences in Saint Vincent where he grew up believing that homosexuality was a crime, had scarred him. He knew that one day he would have to deal with his sexuality, but kept it at the back of his head for as long he could. He thought that if he opened that box of being gay, it would destroy him; the pieces that made up who he was would fall apart and it would be impossible

to put them back together. This need to censor his own thoughts, and to suppress and control his instincts and emotions, eventually manifested itself in his outward behaviour.

[42] He explained that books, pens, clothes and the rest of his physical surroundings needed to be compartmentalised and organized with mathematical accuracy. He said that he was suffering from obsessive compulsive disorder, which he believes was caused by the increasing difficulty he was having in supressing what he had been conditioned in Saint Vincent to see as the 'criminal' expression of his sexual identity. Mr. MacLeish supplied no expert medical opinion regarding these alleged manifestations of a medical condition. I therefore place no reliance on his self-diagnosis as he presented no credentials to the court of any experience or training in the field of psychology or other relevant discipline to support same and he was not deemed by the court to be an expert witness.

[43] Mr. MacLeish stated that when he was 30 years old he experienced the greatest loss in his life – his mother. He claimed that this helped liberate him from the internal imprisonment that he had felt for so long. Her death triggered something and made him re-assess his life and consider what was making him so unhappy. Initially, as he began to admit to himself that he is a gay man, he was overcome by self-disgust and shame. He felt that being gay was the worst thing that he could be. He began seeing a counsellor and after months of therapy sessions began dealing with the legacy that growing up in Saint Vincent had left him.

[44] He explained that he gradually came to terms with who he is, and that his sexual orientation is just another characteristic of his human condition, like race, religious beliefs, height and eye colour. For the first time in his life, he experienced intimacy with another person. He let himself love and be loved. For 30 years he had denied himself those basic securities and pleasures, simple acts that make one human and humane. He claimed that he had missed out on his twenties and his youth. Looking back, he says that he feels sorry for his younger self and for the extent he suffered during the earlier years of his life.

[45] He claimed that he has lost most of his friends from Saint Vincent after he 'came out' publicly. He repeated conversations with one such friend which are excluded from this judgment because it is hearsay. He explained that when he visited Saint Vincent in 2003, his older brother refused to host

him. He last visited Saint Vincent in 2005. Since then, he has been a very vocal critic in the media about the criminalization of homosexuality and discrimination against lesbian, gay, bisexual and trans ('LGBT') people. He said he has written an open letter to the Honourable Prime Minister Dr. Ralph Gonsalves and regularly writes opinion pieces on online platforms that have not been well received.

[46] He stated that he was censored on a Vincentian social political Facebook group because he posted too much about LGBT rights. He opined that his ability to freely express himself was sacrificed for 'their comfort'. He expressed the fear that if he came back to Saint Vincent he would be silenced in more violent ways.

[47] Mr. MacLeish stated that a lot of positives have come from his online political activism and he has received dozens of messages from gay men and women in Saint Vincent. He stated that his motivation for bringing this claim is to uphold the rights granted to him by the **Constitution** and the dignity afforded by it to him as a member of the human family. He longs to build a home on the land that his mother left to him, to sit on the porch and gaze out with his partner by his side. Saint Vincent and its people are a central part of his identity. But another part of his identity is his homosexuality. He lamented that those two aspects of who he is are irreconcilable.

[48] He averred that when you grow up in Saint Vincent, you realize very quickly that it is not acceptable to be gay. When he is in Saint Vincent he says that he felt burdened between choosing either to hide who he is, or to express himself fully and risk severe criminal sanction. He indicated that he knows that as an openly gay man, he cannot go home. He accepts that he may go to jail for merely expressing who he is. Out of respect for himself and to preserve his dignity, he said that he cannot even consider returning until the challenged provisions are removed.

[49] He claimed that while he lived in Saint Vincent, he internalized the idea that there was something fundamentally wrong with him, something so horrendous that he should do everything to erase it, and when he could not erase it, to bury it deep and to hide himself away from sight. He was terrified that, through a slip of the tongue or a lingering gaze, others would see him for what he is: a gay man, and therefore, a criminal.

[50] He averred that there were no role models who were openly gay, so he had no one to look up to. He therefore isolated himself, avoided social engagements and limited what he said out loud. He said that he was depressed, socially anxious and obsessed with controlling and organizing his physical surroundings. He censored what he allowed himself to think and to feel. If he sensed a tingle in his stomach when an attractive man walked down the street, he supressed his instincts to the best of his ability. And then he would pray or bathe to cleanse himself of what he had been taught to believe was an awful crime.

[51] He expressed the view that he feels that criminalization is the reason why he was treated badly as an effeminate child and later as an openly gay adult. He opined that criminal laws socialize people, control people and determine what is and what is not socially acceptable. In his opinion, the challenged provisions leave people believing that it is fundamentally wrong to be gay and that homosexuals are second-class citizens. He often felt like these laws put a target on his back, leaving him as fair game for abuse. He believes that the challenged provisions primarily exist to punish him and other LGBT citizens; to mark them out as inferior irrespective of whether the law is enforced against them. He stated that living under these laws means that he does not have the same rights, protections and freedoms as the heterosexual citizens of Saint Vincent and the Grenadines, and he consequently experiences a life less worth living than them for no other reason than his sexuality.

[52] Mr. MacLeish testified that in his view, it is no coincidence that there is a direct correlation between democratic credentials and the absence of laws like the challenged provisions. He stated that his experience as a gay man in Saint Vincent made him realize that power and dominance are not always visible.

[53] He averred that his motivations for bringing this claim are not just personal. He explained that he was raised in a middle class family. However, his family members were not vocal supporters of his sexuality but they never attacked him for being gay.

[54] He said that he was gifted in school which meant that studying and working abroad was a realistic option and he considers himself to be more privileged than most LGBT people in Saint Vincent. Consequently, he was able to leave Saint Vincent and move to a place where he could freely

express who he is without a constant fear. He explained that this case is not just for him but also for other gay and LGBT persons. He stated that by bringing this challenge he is seeking to uphold the fundamental rights affirmed in the **Constitution** for all citizens of Saint Vincent.

[55] Like Mr. Johnson, he listed the remedies being sought in the claim: a declaration that the challenged provisions are unconstitutional, illegal, null, void, invalid and are of no effect to the extent that they criminalize any consensual conduct between persons above the age of consent; alternatively, a declaration that the challenged provisions abridge, abrogate, infringe, violate and/or contravene the rights guaranteed to him by the **Constitution**, namely protection of the right to personal liberty; protection from inhuman treatment; protection of freedom of conscience; protection of freedom of expression; protection of freedom of movement; protection from discrimination and privacy of the home enshrined in sections 1(c), 3, 5, 7, 9, 10, 12 and 13; an order striking down the challenged provisions; such further and/or other reliefs, orders, declarations or directions as the Court may in exercise of its jurisdiction under section 16 of the **Constitution** and that it considers appropriate under its inherent jurisdiction for the purpose of enforcing and protecting or securing the enforcement

and protection of his constitutional and/or common law rights and costs.

[56] He indicated that he is a Cito technologist and is employed at a hospital where he microscopically examines cells to diagnose cancer. He admitted that he has no legal training or training in sociology and does not consider himself to be a legal expert, or an expert in the field of sociology or psychology.

[57] The claimants presented expert testimony from Professor Christopher Charles Beyrer a world-renowned professor of epidemiology, international Health, Health Behaviour and Society, Nursing and Medicine at Johns Hopkins, with an extensive list of qualifications, experience and training in the field of HIV epidemiology, HIV prevention and human rights. He is also well-published having co-authored with other experts, with over 400 publications to his name including in peer-reviewed medical journals such as the Lancet on related subjects. Professor Beyrer produced an expert report[4] that was co-authored with Associate Professor Stefan Baral MD, MPH, MBA, MSc who did

[4] Report dated 27 June 2020 filed on 9th Nov. 2020 – (TB 2 – tab 7.2).

not testify in these proceedings. Professor Beyrer also produced a list of 295 questions posed to him by the Churches along with his answers to them[5].

[58] In his report and testimony, Professor Beyrer opined that there are various sources of direct evidence that indicate that the criminalization of same-sex sexual intimacy is correlated with increased HIV prevalence. He referred to an abstract authored by Lyons et al and accepted to the 23rd International AIDS Conference 2020, in which the authors examined the correlation between HIV prevalence and same-sex policies in 10 countries in Sub-Saharan Africa. The study referenced in the publication used individual-level data from 8113 Men who have sex with men ('MSM') from Burkina Faso, Cameroon, Cote d'Ivoire, Gambia, Guinea-Bissau. Nigeria, Senegal, eSwatini, Rwanda and Togo incorporating data from a survey administered utilizing an established categorization for levels of criminalization of same-sex sexual intimacy. He also referenced Millet et al's 2012 article on HIV in Black MSM worldwide which arrived at the same conclusion as Lyons et al in the referenced survey.

[59] Professor Beyrer reported that both the researchers in both instances concluded that their study shows that there is a strong association between prevalent HIV infection and criminalization of same sex activity. Arising from the research conducted in those countries, he identified the three main findings to be that:

1. Men who have sex with men (MSM) living in countries that criminalize same sex activity were 5 times more likely to have HIV infection.
2. MSM living in countries where people were being actively prosecuted for same sex behaviours have even higher burdens of HIV infection - close to 10 times the rate.
3. MSM living in countries where it is illegal to organize service organizations were also more likely to be living with HIV than men living in countries where community services organizations are allowed to legally exist.

He highlighted that more than 8,000 men across the 10 countries were involved in this research. He indicated that to the best of his knowledge, there is no published research suggesting that there is a decrease in HIV infection linked to de-criminalization.

[5] Filed on 11-6-2021 – TB 2 pg. 322 – 388 – tab 7.4.

[60] Professor Beyrer also cited other data gathered in 28 African countries and reported by Stannah et al who examined the impact of the severity of anti-lesbian, gay bisexual and transgender ('LGBT') legislation on HIV prevalence and healthcare utilization. They concluded that less severe penalties for same-sex relations are significantly associated with higher proportions of MSM being tested for HIV. He reasoned that this demonstrates that criminalization of same-sex intimacy negatively impacts MSM's uptake of HIV testing. He acknowledged that additional factors may confound this association. He pointed to other research[6] that argues that criminalization can drive MSM underground because of fear of legal consequences, stigma and discrimination.

[61] Professor Beyrer posited that the criminalization of same-sex sexual intimacy is correlated with increased HIV incidence and prevalence. It therefore logically follows that the criminalization of same-sex sexual intimacy is associated with increased HIV incidence and prevalence increases, both directly in terms of the cost of HIV prevention and care and addressing STIs and mental health issue ad indirectly in the form of a country's loss of economic growth/reduced gross domestic product, potentially resulting in a decreased quality of life for all its citizens. He conceded that the correlation is not causal in nature.

[62] Professor Beyrer provided very helpful testimony regarding the research conducted in several countries worldwide in particular in Africa. He sought to extrapolate the conclusions from those studies to the reality in Saint Vincent and the Grenadines. He quite properly conceded that having not conducted any similar studies in Saint Vincent and the Grenadines and having not been privy to any relevant data from Saint Vincent and the Grenadines. He indicated that he has no evidence that MSM do not received culturally competent health care in Saint Vincent and the Grenadines and admitted that he could not say with certainty that criminalization of same sex activity leads to an increased HIV prevalence in Saint Vincent and the Grenadines.

Defendant's evidence

[63] The Honourable Attorney General's witnesses were retired Assistant Commissioner of Police ('ASP') Mr. Richard Browne; Mr. Cuthbert Knights, Permanent Secretary in the Ministry of Health, Wellness and the Environment with the Government of Saint Vincent and the Grenadines; and

[6] Altman et al, 2012 Lancet Viewpoint article on discrimination towards MSM.

registered medical practitioner Dr. Jose Davy, a medical doctor employed by the Ministry of Health Wellness and the Environment as an Infectious Diseases Specialist and Senior Registrar.

Mr. Richard Browne

[64] ASP Browne denied Mr. MacLeish's assertion that for him to return to Saint Vincent and the Grenadines would be to submit to a life of intolerance and a constant risk of arrest, persecution and abuse. He averred that the members of the Royal Saint Vincent and the Grenadines Police Force ('RSVGPF') do not target gay men and further that it is not against the law to be gay. He said that persecution and abuse of any kind against anyone in Saint Vincent and the Grenadines are not permitted or tolerated by the RSVGPF.

[65] He refuted Mr. MacLeish's assertions that homosexuality is criminalized, that being a gay man meant being a criminal and that in the eyes of the law homosexuals had the same status of murderers or thieves. He countered say that the laws of Saint Vincent and the Grenadines do not criminalize homosexuality as it is not against the law to be gay nor do the laws make criminals of gay men or result in homosexuals having the same status of murderers or thieves.

[66] He asserted that as a law enforcement officer he is aware that the USA decriminalized their buggery

laws at the Federal level only in 2003 and further that a recent spate of violence against LGBT have been experienced by people in jurisdictions where laws against buggery have been struck down. He referred to a number of articles in the New York, The Guardian out of England, The Local, a publication out of France and exhibited them to his affidavit. The contents are not considered since they constitute inadmissible hearsay.

[67] ASP Browne remarked that while he is in no position to admit or deny Mr. MacLeish's description of conditions that he attributed to the consequences of being subjected to living in Saint Vincent as a gay man, he noted that the conditions referred to by Mr. MacLeish are unsupported by medical evidence which can correlate to the challenged provisions. He stressed that there is no criminal severe or other sanction in Saint Vincent and the Grenadines for being gay; and that a gay person cannot be sent to jail for being gay. Rather, Saint Vincent and the Grenadines is a country of laws.

He reiterated that violence against LGBT people in jurisdictions where laws against buggery have been struck down persists, despite the decriminalization. He denied that the existence of the laws is the cause of the violence.

[68] ACP Browne noted that there are a number of activities that take place between consenting adults in private that are regulated by the law. He highlighted incest between consenting adults, which is prohibited by sections 142, 144 and 145 of the **Criminal Code**[7]; prostitution, which occurs between consenting adults, and which is prohibited by sections 131-137 of the **Criminal Code**; and bigamy, which is prohibited by section 152 of the **Criminal Code**. He noted further that there are also activities of a non-sexual nature that take place in private which are likewise prohibited, including prohibition regarding the use or consumption of illegal narcotics. He said that the State is empowered to retain laws prohibiting consensual adult incest, prostitution and drug use that occur in private.

[69] He testified further that he is unaware of any situation where the RSVGPF has ever entered the home of consenting adults with a view to arresting or prosecuting them for contravening the challenged provisions. Further, that any matter prosecuted or investigated would have been reported to the RSVGPF. He noted that consenting adults, whether male or female, are not generally prosecuted under the challenged provisions. However, charges are brought under section 146 of the **Criminal Code** where the complainant is a male or female child and/or the alleged conduct is non-consensual. He was not aware of any incident where the RSVGPF arrested any person participating in consensual anal intercourse in private.

[70] He produced a document from the RSVGPF containing statistics compiled by the RSVGPF during the period 2008 – 2018 detailing reports of buggery against a person. He also produced a document from the Office of the Criminal Investigation Department dated October 8, 2019 containing additional details on the complaints. He explained that he caused a search to be made at the Criminal Records Office and they did not reveal that Mr. MacLeish has been arrested. He was unaware of any pending report that he is likely to be arrested for in relation to charges under the challenged provisions. He pointed out that there are openly gay persons living in Saint Vincent

[7] Cap. 171 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

and the Grenadines and there are also persons who freely express themselves in their choice of clothing by wearing clothes that are traditionally worn by the opposite gender. He stated that all persons in Saint Vincent and the Grenadines are protected under the law.

[71] As to Mr. Johnson's testimony, ASP Browne asserted that he is unaware of and cannot comment on the basis upon which his asylum application was granted as no evidence was provided. He repeated his statements about violence being present in jurisdictions where buggery laws have been decriminalized. He denied Mr. Johnson's claims that he made multiple complaints to the RSVGPF which were not recorded. He averred that the members of the RSVGPF are trained to treat all reports and deal with all persons fairly. He was unaware of any such allegation against any member of the RSVGPF being made to the Police Public Relations and Complaints Department or any other person or departments or stations in relation to Mr. Johnson.

[72] In relation to Mr. Johnson's account about residents of a village chasing and beating a gay man because of his sexuality, ASP Browne denied it. He testified that he is aware that the RSVGPF investigated the matter and proffered a charge of common assault against the individual alleged to have committed the attack and that a charge of impersonation was brought against the person who was allegedly attacked as it was alleged that he had pretended to be a female. He said that it was reported that several persons from the community were protecting the individual who was allegedly assaulted and that they voiced their opinion that he should be left alone. Ultimately, the prosecution withdrew the charge of impersonation and the charge of common assault was dismissed due to the non-appearance of the complainant at court.

[73] During cross-examination he was asked specifically about whether the young man was being chased by a mob. He could not recall that the young man was chased by a mob. He accepted that there was a YouTube video about the incident but did not recall that the villagers were shouting homophobic abuse in the video. He explained that the charge of impersonation was did not stem from the young man being a homosexual.

[74] He denied that members of the RSVGPF discriminate against LGBT people. He averred that the members of the RSVGPF are trained to execute their duties professionally and with full respect for every member of society. Further, sensitivity training is an integral part of the training program for

officers who offer protection to all persons. He explained that if someone experiences a problem with police officers there are avenues to seek redress. He or she can either make a report to the Public Relations and Complaints Department or to a senior officer. If on investigation the report is substantiated, disciplinary charges may be instituted against such officer. He said that he has made checks at various police stations going back several years and s found no reports bearing Mr. Johnson's name.

[75] He denied Mr. Johnson's assertion that it is 'illegal to love another adult' in Saint Vincent and the Grenadines. He refuted his claim that the State caused or allowed to be done what Mr. Johnson alleged.

[76] Under cross-examination he accepted that the police has the power to arrest people for same sex consensual activity between adults under the challenged provisions, even though such offences are neither investigated nor prosecuted and although persons are not arrested for consensual sexual intercourse. He testified that police would arrest persons who are victims of coercive sex and sex with children if reports are made to the police. He did not accept the suggestion that homophobia is a prevalent problem in Saint Vincent and the Grenadines. He was unable to say whether members of the RSVGPF engage in homophobic behaviour or whether there is homophobic behaviour among them.

[77] ASP Browne maintained that he has never seen any report made by Mr. Johnson against any police
officer at any of the police station. He explained that if Mr. Johnson showed up at the police station

his name would be recorded as arriving there. However, no such record exists.

[78] He agreed that the fact that there are limited or almost limited arrests in respect of consensual buggery is due to the lack of reporting and further that if persons engage in consensual buggery they are not likely to report on each another. In his years as a police officer he recalled receiving zero reports in respect of consensual buggery.

[79] ASP Browne testified that to the best of his knowledge there is no level of homophobia and prejudice against LGBT persons in Saint Vincent and the Grenadines. He accepted that to the extent that there is homophobia and prejudice against LGBT persons in the community there would

be such homophobia and prejudice among members of the police force. He accepted too that each and every time a gay man expresses his feelings, his love or his commitment to another man he is committing a crime under Saint Vincent and the Grenadines law. He acknowledged that those men are not prosecuted because the RSVGPF does not investigate. He admitted that it is the duty of the RSVGPF to investigate and prosecute crimes and it would be the duty of the police to investigate, arrest and prosecute if they receive a report of same sex intercourse between gay men, if a report is made by one of the parties.

[80] Mr. Knights testified that as Permanent Secretary, he is the Accounting Officer for the Ministry of Health and is familiar with the recurrent and capital expenditure in that Ministry. He stated that the State has a policy of providing antiretroviral medication to persons infected with the human immunodeficiency virus (HIV) and the purchasing of antiretroviral medication for persons infected with HIV is a recurrent expense. It also employs persons to deliver and administer antiretroviral medication to infected persons. He said that antiretroviral medication is purchased through the Organisation of Eastern Caribbean States' Pharmaceutical Procurement Service ('OECS/PPS') and that it has a formulary list of agents to treat infected persons. He produced a copy of the list.

[81] Mr. Knights explained that the cost to the Government to provide antiretroviral medication varies each year but ranged from XCD$51,644.00 to XCD$185,311.00 over the period 2015 to 2018. He substantiated his claim with a copy of a document from the OECS/PPS entitled, 'Value of Antiretroviral Medicines Purchased by SVG'. He stated that the value of antiretroviral medicines procured by Saint Vincent and the Grenadines' for the period October 2018 to November 2019 is XCD$163,534.80 and he provided documentary proof.

[82] The Permanent Secretary stated further that the OECS/PPS noted in its June 2016 document, '30th OECS/PPS Policy Board Meeting', that Saint Vincent and the Grenadines has the highest number of persons living with HIV in the OECS. He supplied a copy of the relevant pages from a document entitled, '30th OECS/PPS Policy Board Meeting, dated October 12, 2016.

[83] Under cross-examination, Mr. Knights accepted that the Ministry would support anything that would get people to come forward for treatment on public health grounds and as a way to save public expense. He noted that pre-exposure prophylaxis ('PREP') is a medication available in and from the State to persons pre-disposed to contracting HIV. His Ministry recognizes the critical

importance of having wide-spread HIV testing in the State and conducts wide-spread HIV testing. However, he did not know whether stigma is one factor that hinders the Ministry's efforts in achieving greater testing. He confessed not knowing whether the stigma of homosexuality constrains such testing.

[84] Dr. Davy prepared and produced an expert medical report largely commenting on publications by other professionals in the filed including Professor Beyrer's. She holds a master's degree in Infectiology and Tropical Diseases; is the Clinical Care Coordinator for HIV/AIDS in Saint Vincent and the Grenadines and Infection Control Officer. In the expert opinion prepared by her and produced in this matter, she referenced a number of sources including the Lancet Special Issue on HIV in MSM July 2012 that quoted studies from Professor Beyrer et al. She concluded that all of the material studied demonstrate an increased incidence of STD/HIV with unprotected anal intercourse. She concluded that the studies were not clear as to whether anal receptive or anal insertive intercourse led to disease risk either because the parameter was not defined or in most cases both receptive and insertive anal intercourse were practised by the same participants making it difficult to conclude.

Interested Parties Witnesses

[85] The Churches presented testimony from Reverend Adolf Davis and Pastor Terrence Haynes, ministers of religion respectively from the Methodist and Seventh Day Adventist denominations. In essence, they articulated their denominations' and their own personal objections to the decriminalization of the challenged provisions on the grounds of public health and public morality.

[86] Rev. Davis testified that his affidavit evidence is provided in his capacity as the Superintendent of the Kingstown/Chateaubelair Circuit of the Methodist Church, as a Pastor and Christian and in his personal capacity as a concerned citizen of Saint Vincent and the Grenadines, who is entitled to observe and protect the **Constitution** whose Preamble states that, *inter alia*, the nation of Saint Vincent and the Grenadines is founded on the belief in the supremacy of God. He explained that the Methodist Church of St. Vincent and the Grenadines was one of the Churches that joined with the Interested Parties and their members in a National March and Rally on 14th November 2019 to address the instant claims, the crime situation and other issues affecting families in the State.

[87] He recalled that the March was attended by a very large number of churches from several denominations, who are not Interested Parties in these proceedings. He said that having read the claimants' affidavits he understood their main objective to include creating an environment of approval of and acceptance for homosexuality in general. He adopted the averments made by Pastor Haynes in his affidavit.

[88] Rev. Davis stated that they affirm that all human beings are equal before God, find their true identity in God, have God's gift of free will and are to collectively pursue the fulfilment of their personhood. They respect the rights of every individual to live a life free from unjust discrimination and therefore condemn intolerance and violence against LGBT. They recognize that homosexuality is a contentious issue which has raised other contentious issues as to whether it is a condition of birth, or a learned behaviour. He opined that it is clear that their ultimate objective for challenging the legitimacy of challenged provisions is to foster societal acceptance of homosexuality as an alternative lifestyle. This directly and deliberately undermines the teachings of the Church, biblical authority and God and the world view of the vast majority of Vincentians.

[89] He expressed the view that the removal of the challenged provisions will enable the LGBT agenda to be forced upon a community whose religious ethos is totally at odds with it. For instance, in the United Kingdom, the current flashpoint affecting that society is about the sensitive issue of sex and relationship education. He stated that as a Minister of the Gospel, he has been afforded the opportunity to take part in several faith-based leaders' consultations with Pan Caribbean Partnership Against HIV/AIDS (PANCAP), both locally and regionally. He claimed that through his involvement with PANCAP, he became aware that similar comprehensive sex education initiatives have already been suggested to Caribbean Governments for implementation within the curriculum of our education system.

[90] He added that what he has observed in the United Kingdom is that there have been changes in legislation and policy and those changes are accelerating the normalization of same sex sexual activities, a change that the Vincentian Society is simply not ready for as demonstrated by the overwhelming support that the March and Rally received from Vincentians from all walks of life. Saint Vincent and the Grenadines is generally acknowledged as a highly conservative, Christian

society, and the LGBT agenda is anti-Bible and anti-God. It is an affront and an attack on decades and centuries long, valid, tried and tested values of the Christian faith within our society.

[91] Rev. Davis explained that in early November 2019, he participated in a learning exchange where he visited Belize, along with other Vincentians, for the purpose of exploring various areas of reform of our sexual offences legislation. This visit was sponsored by Human Dignity Trust (HDT). He was very concerned that HDT, as the primary facilitator of our visit, was very clear regarding its agenda, and by extension, what its funding is intended to facilitate. As such, one of the questions that lingered for him is what would be the implications of that partnership, since they were clear as to their primary agenda item, decriminalization being their platform issue, alongside other intentions and expectations which include anti-discrimination and hate crime legislation. He was of the view that most of the suggested reforms are coming at a time and pace that is not in accord with 'our Caribbean culture and traditions'.

[92] He said that he is not aware of any laws in Saint Vincent and the Grenadines that ban or prevent persons who identify themselves as part of the 'LGBT' community from forming associations or advocating on behalf of members of their community. He is aware however of a non-profit organization 'VincyCHAP' which was registered in Saint Vincent and the Grenadines in 2007 and is a support group for the LGBT community. He indicated that he is also aware that VincyCHAP, and another similar organization, Care SVG in Saint Vincent and the Grenadines has done extensive work in relation to HIV prevention and education programmes and offer care and support to persons infected with or affected by HIV/AIDS. Those organizations are known to cater to certain key populations affected by HIV/AIDS, including men who have sex with men. This clearly demonstrates the existence of Vincentian organizations which openly reach out to members of the Vincentian society who identify as homosexuals notwithstanding the presence of the challenged provisions.

[93] Under cross-examination he stated that he is not sufficiently of aware of the views of all Vincentians but is fairly confident, that if an effort is made to ascertain their views, it will be discovered that the vast majority are of the view that the practice of buggery should not be encouraged in the State and the legislation in that regard should be maintained. He added that it

seems from what he has read from the claimants and from 'this exercise' that there is a general acceptance that the vast majority of Vincentians hold the view that the Churches hold.

[94] For his part, Pastor Haynes testified that he is a full-time Pastor. He is the Public Affairs and Religious Liberty Director of The Seventh-Day Adventist Church in Saint Vincent, a position he has held since 2014. He indicated that the Seventh-Day Adventist Church in Saint Vincent and the Grenadines consists of forty-four (44) congregations with approximately fifteen thousand (15,000) members.

[95] He stated that Pastor Carlos Cepeda, the Moderator and a Trustee of The Incorporated Trustees of the Evangelical Church of the West Indies has informed him and he believes that the Evangelical Church of the West Indies consists of thirteen (13) congregations with approximately seven hundred (700) members; that Bishop Byron Davis, the Administrative Bishop of The New Testament Church of God has informed him and he believes that the New Testament Church of God consists of twenty-three (23) congregations with about two thousand seven hundred (2700) members.

[96] He provided similar details with respect to the other interested parties, signifying that among them they have congregations ranging from 50 to 3,000 members respectively. He averred that the Churches collectively represent their respective congregants, the majority of whom are residents and citizens of Saint Vincent and the Grenadines, have the same or similar interests and are entitled to observe and protect the **Constitution** and fundamental freedoms.

[97] He said that the Churches and their members participated in a National March and Rally on 14th November 2019 in response to the instant claims, the crime situation and other issues affecting families in Saint Vincent and the Grenadines, that was attended by a very large number of church leaders and members from several denominations, who are not parties to the instant claims. Also in attendance were many Vincentians who are not affiliated to any particular church or denomination, estimated to comprise thousands of Vincentians.

[98] The Churches acknowledge that the Preamble to the **Constitution** states that, inter alia, the nation of Saint Vincent and the Grenadines is founded on the belief in the supremacy of God, and that Judeo-Christian principles are the foundation of many of the laws of the State of Saint Vincent and

the Grenadines and they firmly believe and uphold Judeo-Christian principles. The orders being sought contravene the Judeo-Christian principles upon which the laws of Saint Vincent and the Grenadines were founded and which the congregants of the Interested Parties seek to uphold, that if granted would affect how they live, what they practice and what the Interested Parties teach their members and society as a whole. They oppose the practice of buggery and acts of gross indecency between persons of the same sex generally on biblical, medical, and social grounds and this is a part of their teaching to their members, adherents and congregants. He asserted that the Churches genuinely believe that if the claimants are successful, there will be a marked increase in new cases of STDs and HIV/AIDS among persons who engage in the act of buggery and acts of gross indecency between persons of the same sex.

[99] He stated that the **Constitution** provides that the fundamental rights and freedoms of an individual are subject to respect for the rights and freedoms of others and the public interest. He asserted that if the claimants were to succeed, the Churches genuinely believe, based on the history of decriminalization of buggery and acts of gross indecency between persons of the same sex in other countries, that their rights, the rights of their members and the rights of future generations would be adversely affected in that their right and the right of their members to:

1. freedom of expression, freedom of thought, conscience and belief in relation to matters concerning buggery and acts of gross indecency between persons of the same sex will be adversely affected;
2. seek, receive, distribute or disseminate information, opinions and ideas in opposition to buggery and acts of gross indecency between members of the same sex through any media will be adversely affected;
3. equality before the law will be adversely affected;
4. enjoy a healthy environment will be adversely affected;
5. freedom of religion, either alone or in community with others and both in public and in private will be adversely affected;
6. manifest and propagate religion in worship, teaching, practice and observance will be adversely affected; and
7. freedom from discrimination on the ground of religion will be adversely affected.

[100] Pastor Haynes denied that it is a regular or normal occurrence for violence or abuse to be meted out against persons who identify themselves as being part of the 'LGBT' community in Saint Vincent and the Grenadines. He said that he is aware of several individuals who identify as being homosexuals and who hold prominent positions in the Vincentian society and he is also aware of openly gay men who live freely in Saint Vincent and the Grenadines without persecution. He added that he is aware that the challenged provisions do not criminalize one's sexual identity and it is not a crime to be a homosexual. Instead, those two sections criminalize a specific and limited type of sexual behaviour.

[101] Pastor Haynes stated that he has been a Pastor in the Seventh Day Adventist Church since 2001, and began residing in Saint Vincent and the Grenadines in 2004. He has had multiple interactions with Vincentians living in St. Vincent and the Grenadines who identify as having same sex attractions. Some of these persons have been members of his church. One male student who is now a lawyer and a self-declared homosexual was actively involved in church activities before taking up a promotion outside of Saint Vincent and the Grenadines. While living in Saint Vincent and the Grenadines, he represented the Church at the national and international levels, despite his obvious effeminacy. He, like all other young people in the congregation, was encouraged to maintain his sexual purity until marriage and to desist from engaging in sexual immorality and temptation. The leadership of the Church never treated him with disdain or disregard; he was given equal opportunity to participate in Church activities and was well loved by Church members.

[102] He added that there are organizations within Saint Vincent and the Grenadines whose work includes HIV prevention, education programmes and treatment, care and support to persons infected with or affected by HIV/AIDS. Those organizations are known to cater to certain key populations affected by HIV/AIDS, including men who have sex with men. The HIV/AIDS Coordinator (formerly AIDS Secretariat) within the Ministry of Health, Wellness and the Environment is one such organization. This clearly demonstrates the existence of Vincentian organizations which openly reach out to

members of the Vincentian society who identify as homosexuals notwithstanding the presence of the

challenged provisions. These averments contradict Mr. Johnson's testimony to the contrary. I prefer Rev. Haynes' account on these matters and reject Mr. Johnson's and Mr. MacLeish's statements to the contrary. I find that there are indeed such civil society organizations in the State of Saint Vincent and the Grenadines and that openly gay men live in Saint Vincent and the Grenadines freely without persecution.

[103] Pastor Haynes asserted that there are strong and compelling moral, public health, public policy and philosophical considerations for the maintenance of the present *status quo* in Saint Vincent and the Grenadines. The challenged provisions are necessary in Saint Vincent and the Grenadines for their instructive role and undergirding of a coherent philosophical perspective on socialization. The Churches hold that the presence of those sections represent a type of philosophy that accords with the reality of nature and serves the common good. Pastor Haynes stated that to the best of his knowledge, anyone, whether or not he or she identifies as heterosexual, homosexual or otherwise, may without reference to his or her perceived or identified sexuality be punished under the challenged provisions if he or she engages in the prohibited acts. Like Rev. Davis, he struck me as a sincere and truthful witness and believe them.

[104] The Churches also led evidence from Dr. Brendan Bain who is regarded as one of the pioneers in Clinical Infectious Diseases in the Caribbean, having taught and conducted research in the Faculty of Medical Sciences at the Jamaica campus of the University of the West Indies (UWI) from 1980. He received special training in Infectious Diseases at the University of London as the recipient of a Wellcome Trust Fellowship, authored more than 30 articles in peer-reviewed journals, three monographs and is co-author of the book, Education and AIDS in the Caribbean, published by UNESCO. Like Professor Beyrer, he is eminently qualified to speak on matters related to the medical science including treatment of persons infected with HIV and AIDS.

[105] He noted that the challenges related to the use of anti-retroviral drugs ('ARV') for prevention of HIV have to do with the relatively high cost of those drugs and the risk of unpleasant or otherwise harmful side effects when they are used in persons who are otherwise healthy. In addition, in

poorer countries, an important ethical consideration was whether ARVs should be reserved for persons with known infection rather than making them available for PREP in healthy persons who could prevent themselves from exposure to HIV by avoiding situations that increase the risk of exposure to HIV. Other concerns regarding the use of ARVs for PREP are that more widespread use of these valuable drugs could promote development of drug resistance and hamper future treatment and prevention programmes; such use for preventative purposes is likely to lead to an increase in the occurrence of other STIs which cannot be treated by anti-HIV drugs; and possible unwillingness of persons to take the medication regularly. He noted that anal intercourse is heavily implicated in the spread of a long list of other sexually transmitted infections, including in situations where HIV is on the decline.

[106] As regards the impact of decriminalizing anal intercourse on the incidence of HIV rates, he opined that to date, available data do not show a direct causal relationship between rescinding the law on buggery and a reduction in the rate of HIV although an association can be made in this regard. On that, he and Professor Beyrer are agreed. He stated that a range of confounding factors may account for the association but he did not identify such factors. He explained that 'incidence' incidence refers to new cases and 'prevalence' to all cases at a particular point of date collection. He stated that the term 'confounding factors' refers to the setting in which anal intercourse happens, in that it can differ in different places and the opportunities that people have to engage in MSM intercourse may be different as well as the number of partners that people have intimate contact with varies and these factors are not always captured in research.

[107] In relation to the cost for care for persons infected with HIV, Dr. Bain stated that individual countries that belong to the Organization of Eastern Caribbean States (OECS) including Saint Vincent and the Grenadines have benefitted from participation in PANCAP (54) and depend heavily on external grants to supplement their national budgets in order to cover the full cost of prevention, care and treatment related to HIV/AIDS. He added that without the external funds for support of HIV programmes in the Caribbean, the budgets of individual countries like Saint Vincent and the Grenadines would be severely strained. He sounded a caution by pointing out that a fact of life in the OECS that is easily verified is that as gains are made in reducing rates of HIV, eternal agencies appear to lose interest in providing financial support to these countries and seem to turn their focus toward countries with larger incidence and prevalence rates of HIV infection.

[108] VincyChap did not adduce any evidence. However, they filed written submissions.

**LOCUS STANDI**

Attorney General's submissions

[109] The learned Solicitor General contended that neither Mr. Johnson nor Mr. Mac Leish has the requisite legal standing to pursue these constitutional claims in Saint Vincent and the Grenadines because they are not in the State, have no plans to be here, were not prosecuted under the challenged provisions and are outside the reach of the challenged provisions. She noted that they have both stressed that their perception of rampant homophobia makes their return to the State unlikely. She argued that section 96(1) of the **Constitution** stipulates that such relief may be obtained only by a person with a relevant interest. Further, that section 1 of the Constitution makes it clear that under the fundamental rights provisions of the **Constitution** relief is available only to persons 'in Saint Vincent'.

[110] The material portion of section 1 (the chapeau) provides:

> 'Whereas every person **in Saint Vincent and the Grenadines** is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following…' (Emphasis added)

It continues at paragraph (c) to state:

> 'protection for the privacy of his home and other property and from deprivation of property without compensation.'

[111] The learned Solicitor General submitted that within the Eastern Caribbean and, generally, at common law, it is settled that the litigant must have a real stake in the determination of the challenge to any law at issue. Citing **Gillis v. Star Properties Corp.**[8] she extracted from it a quotation considered by Lanns J from the treatise **Constitutional Law of Canada**, authored by Professor Hogg in which he opined:

> 'The question of whether a person has 'standing' or locus standi to bring legal proceedings is a question about whether the person has a sufficient stake in the outcome to invoke the

[8] ANUHCV2015/0035 (Antigua & Barbuda), at paragraph 29.

judicial process. The question of standing focuses on the position of the party seeking to sue, not on the issues that the lawsuit is intending to resolve.'

[112] Learned counsel submitted that by virtue of section 16 of the **Constitution** the claimants are required to indicate that a specific constitutional right 'has been, is being or is likely to be contravened in relation to him'. Therefore, they must demonstrate that there is a significant nexus between them and the claim. She cited in support **Edward Phillip Mathurin & Anor and Magadalene Wilson et al**, in which Barrow J. articulated the principle as follows:

> 'The litigant must have some recognizable legal or other interest in the issue not being merely intellectual prospective or indirect. The rationale for the requirement of locus standi is well established. There must be a limit to the category of persons who can be allowed to litigate an issue otherwise any idle or completely unconnected person would be able to mount a challenge to something with which he has not the slightest legally recognizable connection.'[9]

[113] She submitted further that the issue of standing is to be determined not as a preliminary issue but rather after the facts have been elicited. She cited **Attorney General of St. Lucia v Martinus Francois**.[10] She relied also on **Attorney-General v Payne** where Chief Justice Robotham explained:

> 'Whether or not a person has a relevant interest can only be determined after the facts have been heard, and not as a preliminary issue. On the conclusion, it then becomes a matter for the judge to decide whether a relevant interest has been established or not, in granting or refusing the application.'[11]

[114] For further support, she highlighted the pronouncement by Chief Justice Dennis Byron in **Baldwin Spencer v the Attorney General of Antigua and Barbuda et al** that:

> '… the common premise on which all these decisions seem to have been based was that before any question of locus standi can arise, there must be a sustainable allegation that a provision of the constitution has been or is being contravened, and that the alleged contravention affects the interest of the applicant. … In my view it is essential that the two requirements of the alleged contravention of the constitution and a resultant affect on the interest of the applicant must both exist. …

---

[9] Saint Lucia High Court Civil Suit No. 326 of 1999, at para 19.

[10] Saint Lucia Civil Appeal 3 of 2004 (Rawlins JA) at paragraph 146.

[11] (1982) 30 WIR 88 at page 98.

> In the Application of Kareem Abdulgani (1985) LRC(Const) 425 Singh J. adopted the same approach. He **first** considered the merits and concluded that the Minister of Home Affairs refusal to register the applicant as a citizen was a contravention of section 100(1) of the constitution. It was only then he considered the issue of relevant interest and concluded in favour of the applicant on the ground that the contravention occurred in his application to be registered as a citizen.'
>
> …
>
> In **Attorney General v Lawrence** (1983) 31 W.I.R. 176. In that case the decision of the court was given by Sir Neville Peterkin. He adopted the same approach some several years later. He considered the merits of the case and it was only after he concluded that the learned trial Judge was right to in deciding that such deprivations as Lawrence had alleged fell within the purview of section 6 of the constitution that he turned to the question of locus standi. He established the principle: "I turn now to the second aspect, namely did Lawrence have a locus standi in the constitutionality of the impugned Act? It is submitted not. To make out a case as alleged, it is incumbent upon Lawrence to establish not merely that the law affects his fundamental rights guaranteed by the Constitution then on, but also that it is beyond the competence of the legislature. No-one but one whose rights are directly affected by a law
> can raise the question of the constitutionality of that law.'[12]

[115] Learned counsel contended that during their testimony neither claimant introduced evidence that established their standing to pursue this litigation and neither averred that they engaged in anal intercourse while in Saint Vincent and the Grenadines. She pointed out that their evidence revealed that neither of them lives in Saint Vincent and the Grenadines; they left Saint Vincent and the Grenadines respectively in 1987 and 2017 because of perceived anti-homosexual bias, not because of the law; and Mr. MacLeish last visited Saint Vincent and the Grenadines in 2005. She argued that the evidence shows that they will not return. She reasoned that Mr. Johnson claims that he left the country because of specific bias and that he now has asylum status, which implies an inability to return in the near term. She submitted that for his part, Mr. MacLeish stated that though he would like to return, he will not do so because of bias..

[116] Counsel compared these cases to the factual background underlying constitutional legal challenges recently made in other countries including Belize, Antigua and Barbuda and Trinidad and Tobago in

[12] Antigua and Barbuda Civil Appeal No. 20A of 1997 pages 24 - 26.

relation to laws criminalizing buggery. She argued that in each of those other cases unlike this one, the claimants were resident in or regular visitors to the country whose laws they challenged. She referenced **Orozco v. Attorney General of Belize** in which the claimant was a citizen of Belize and resident in Belize City and who by his own admission on oath is a homosexual adult male disposed to engaging in anal intercourse[13]. In **Jason Jones v. Attorney General of Trinidad and Tobago**[14], the claimant was resident in London but 'habitually visits [Trinidad and Tobago] from time to time.'[15] In **Orden David et al v. Attorney General of Antigua and Barbuda**, the claimant 'an openly homosexual man, … works as a counsellor and tester at the Ministry of Health in Antigua and Barbuda.'[16]

[117] Learned counsel argued it was the respective claimants' presence in those jurisdictions coupled with the possibility that they may be arrested while engaged in anal sex in the jurisdiction that supplied the requisite nexus to ground their standing to file suit. She reasoned that such nexus is absent in the present litigation. She stated that a distant, absent claimant cannot challenge a law that has not and cannot affect his interests.

[118] Learned counsel submitted further that courts of law are not courts of public opinion. A court of law cannot issue rulings that reverse societal bias, cure homophobia, or settle thorny moral and religious disputes. She concluded that a court of law, must focus as its name implies, on the law at issue.

[119] The learned Solicitor General stated that the claimants have sought to conflate allegations of societal bias and widespread homophobia with a specific challenge to a discrete law. The two are not the same. A ruling on the constitutionality of a provision on buggery will not resolve the societal biases that the claimants assert drove them to migrate from Saint Vincent and the Grenadines. Addressing those alleged latent biases, whether real or imagined, is beyond the purview of this Court. In this regard, she referenced the testimony of retired ASP Browne that he is aware of a

[13] Paragraph 17, Claim No. 668 of 2010

[14] (Claim No. CV2017-00720.

[15] Paragraph 5, Claim No. CV2017-00720

[16] Paragraph 5, Claim No. ANUHCV2021/0042

recent spate of violence against lesbian, gay, bisexual and transgender ('LGBT') people in jurisdictions where laws against buggery have been struck down. Learned counsel contended that this illustrates that societal biases exist independent of the existence of such laws.

[120] Contrasting the referenced cases from the instant one, learned counsel stated that this Court is being asked to consider two claimants, non-resident in the jurisdiction. Notwithstanding their non-resident status, they are seeking to challenge a law that does not apply to them and cannot affect them in their adopted homelands because it does not have extraterritorial applicability. Far from establishing a sufficient stake in the outcome of this litigation, the claimants have failed to allege that they have suffered any actual, concrete or likely injury beyond a generalized grievance common to all participants in anal sex, wherever they reside in the world. They therefore lack standing to bring this litigation.

[121] Learned counsel submitted that the claimants are seeking a radical expansion in the doctrine of *locus standi* in Saint Vincent and the Grenadines. Rather than limit constitutional claims to individuals or groups actually or probably affected by laws of Saint Vincent and the Grenadines, this expansion would open Vincentian laws to review and constitutional challenge by litigants and groups from around the world. By that measure, the Courts would be forced to consider all manner of theoretical claims filed on constitutional grounds from far-flung litigants whose only connection to the issue at hand is a generalized theoretical interest.

[122] She stated that the Court has historically guarded against being a forum for busybodies and claimants without standing, seeking to resolve unripe or esoteric legal issues. This judicial wisdom militates against any decision to ignore or reimagine the doctrine of standing. Therefore, the claims in this matter do nothing more than advance an academic argument. She submitted further that the claimants' documents are not in evidence and there is therefore no proof whatsoever of any discrimination from either of them before the Court: **Allen v Wright**[17].

Messrs. Johnson and MacLeish

[17] 468 U.S. 737 (1984).

[123] The claimants maintained that they have the necessary legal standing to launch and pursue these claims. They submitted that the learned Attorney General relies on the wrong legal test for assessing whether they have legal standing. They contended that the Attorney General falls into an error of law

concerning a lack of criminal charges and by not engaging the relevant facts.

[124] They contended that the correct test is set out at section 16(1) of the **Constitution** which states:

> '***16.— Enforcement of protective provisions.***
>
> (1) If any person alleges that any of the provisions of sections 2 to 15 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, that person (or that other person) may apply to the High Court for redress.'

[125] On their behalf, learned Kings Counsel Mr. Middleton submitted that the Attorney General's reliance

on section 96(1) of the **Constitution** is misplaced because it contains the two-stage test of (1) an alleged contravention and (2) a relevant interest and section 16(1) does not. Section 96(1) provides:

> "**96.— Original jurisdiction of High Court in constitutional questions.**
>
> (1) Subject to the provisions of section 22(2), 38(8)(b), 102(2) and 105(10) of this Constitution, any person who alleges that any provision of this Constitution (other than a provision of Chapter I thereof) has been or is being contravened may, if he has a relevant interest, apply to the High Court for a declaration and for relief under this section.'

[126] He contended that section 16(1) neither contains the terms 'relevant interest' nor 'a real interest'. Further, it contains no stipulation that only 'any resident person' or 'any person in the jurisdiction at the time of filing' may apply for constitutional redress and its sets out no other similar qualification. Rather, it extends protection to 'any person'. He submitted that the qualification on who has standing under Section 16(1) is found in the words: 'alleges that any of the provisions of sections 2 to 15 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him'. Further, standing is achieved when an allegation of breach of one or more of Sections 2 to 15

is made in relation to the claimant seeking redress. Moreover, the claimants have alleged contravention of sections 3, 5, 7, 9, 10, 12 and 13 of the **Constitution** which allows for allegations of contravention to cover past, present and potential future breaches.

[127] Learned Kings Counsel argued that in their affidavits, Mr. Johnson and Mr. MacLeish make allegations of infringement of their rights within all three periods – past, present and future – that arose, arise and will arise due to the criminalisation of consensual same-sex intimacy. He emphasized that the Attorney General did not challenge the claimants' affidavit evidence in cross-examination. Further, the Churches' brief cross-examination challenged none of the factual matters asserted by the claimants. There is therefore nothing inherently improbable about the evidence given by them, and there is accordingly no basis on which the Court could properly reject it.

[128] He noted that Mr. Johnson spoke about how the challenged provisions directly impacted on him in the past by criminalizing his conduct when he was living in Saint Vincent and the Grenadines, and how they continue to and will continue to directly impact him due to the criminalization of that conduct. He referenced Mr. Johnson's testimony that:

> 'I also want the State to be held to account for what **it did** to me and what **it allowed others**
>
> **to do to me**'[18].
>
> 'I contend that Sections 146 and 148, and their mere existence, **denied and still deny me** the rights and freedoms guaranteed to me by the Constitution ... **occasioning on me** multiple and overlapping infringements of those rights and freedoms'.
>
> About how Sections 146 and 148 impacted on his 'choices' of: "whether to enter into a relationship, whether to engage in sexual conduct or whether to exile myself from Saint Vincent and the Grenadines'.
>
> 'Sections 146 and 148 impose severe punishments on me **for my form of sexual expression**. I **was and am** at risk of punishment for that expression'.
>
> 'I **have not and cannot** freely engage in sexual intimacy with other consenting males, which is **the primary expression of my personhood**, due to the State's imposition of Sections 146 and 148'.
>
> 'I **have not, cannot now or in the future** freely express in public an **integral part of my personality**.'

[18] At paragraph 26.

'the effects that those Sections **have on me**, and society's perception of me that arise from their existence, **have resulted** in **my de facto expulsion** from Saint Vincent and the Grenadines'.

'By 2017, when I was just 20 years' old, I **felt like I had no choice** but to leave St Vincent. So, I left. I have been **forced from my home, my friends and my family**. **I was not allowed, by the law** and the attitudes brought about by it, to live a life worth living in St Vincent.'

'I was granted refugee status and a five-year residency by the UK Home Office. My asylum claim was accepted on the basis that **I would face** a significant risk of persecution due to my homosexuality were I to go back to St Vincent, and that the **Vincentian authorities had failed** to protect me against such risks.'

'the direct and indirect outcomes of Sections 146 to 148" and states that "due to these risks I can no longer live in St Vincent, my home and the country of my birth'.

[129] Learned Kings Counsel submitted that Mr Johnson's past-looking claim relates to recent conduct by the State towards him, in that his affidavit was dated 2019, just two years after he migrated to the UK and that in any event there is no limitation period for bringing constitutional proceedings for past contraventions of sections 2 to 13 of the **Constitution**.

[130] He submitted further that Mr. MacLeish for his part, records in his affidavit how sections 146 and 148 directly impacted on him in the past by criminalizing his conduct when he was living in and visiting Saint Vincent and the Grenadines, and how those sections continue to and will continue to directly impact him due to the criminalization of that conduct. In this regard, he gave a similar account as Mr. Johnson in relation to his experiences at school, and stated further that he has no choice but to remain in the USA and that the negative effects of the challenged provisions make it an unsafe, anxiety-filled and a humiliating place for him. That to return to St Vincent while the challenged provisions persist would be to submit to a life of intolerance and a constant risk of arrest, persecution and abuse.

[131] He contended that Mr. MacLeish outlined further and specific present and future contraventions of his rights that arise from his wish to return to Saint Vincent and the Grenadines as a family unit comprising him and his long-term partner. Learned Kings Counsel stated that both claimants' affidavits clearly articulate allegations of past, present and future infringements of sections 3, 5, 7, 9, 10, 12 and 13 of the **Constitution** that were, are or will be directly and/or indirectly caused by

the challenged provisions. He argued that it will be obvious that the claimants' complaints arise due to (i) the experiences they had when they were in Saint Vincent and the Grenadines, and (ii) the lack of enforcement in Saint Vincent and the Grenadines of their constitutional rights, which in the past drove them from and presently and perpetually prevents them from returning to Saint Vincent and the Grenadines. He concluded that there is therefore nothing in the point raised by the Attorney General that the opening words of section 1 of the **Constitution** refer to every person 'in Saint Vincent'.

[132] He reasoned that the claimants have standing to bring their respective claims and the Attorney General's position on standing is an attempted abdication of State responsibility to abide by the **Constitution**. He added that the Attorney General is asking this Court to set a precedent that would sanction the State driving from this jurisdiction 'undesirables' lest they assert their constitutional rights before this Court.

[133] Learned Kings Counsel submitted further that the Attorney General's position that the claimants lack standing as they have not been charged under the challenged provisions is bad in law. Various judgments from around the world on provisions equivalent to the challenged provisions have held that non-enforcement is irrelevant. It is the mere existence of these laws that infringes the rights and freedoms of people like the claimants.

[134] He highlighted in particular:

1. **Norris v Ireland** a decision from the European Court of Human Rights, which observed:
   'The Government's statistics show that no public prosecutions, in respect of homosexual activities, were brought during the relevant period except where minors were involved or the acts were committed in public or without consent.'[19]

He pointed out that on that basis the Government of Ireland denied that Mr. Norris was a victim of the impugned legislation. He noted that the European Court of Human Rights determined that notwithstanding non-enforcement, Mr. Norris's right had been infringed, and it opined:

> 'It is true that, unlike Mr. Dudgeon [in Dudgeon v the United Kingdom], Mr. Norris was not the subject of any police investigation. However, the Court's finding in the

[19] (1991) 13 EHRR 186 at paragraph 22.

Dudgeon case that there was an interference with the applicant's right to respect for his private life was not dependent upon this additional factor.'[20]

2. **Modinos v Cyprus**[21] where there was a policy of non-enforcement, despite which the European Court of Human Rights still found an infringement of the Applicant's rights and held:

'23. It is true that since the DUDGEON judgment the Attorney General, who is vested with the power to institute or discontinue prosecutions in the public interest, has followed a consistent policy of not bringing criminal proceedings in respect of private homosexual conduct on the basis that the relevant law is a dead letter.

Nevertheless, it is apparent that this policy provides no guarantee that action will not be taken by a future Attorney-General to enforce the law, particularly when regard is had to statements by Government ministers which appear to suggest that the relevant provisions of the Criminal Code are still in force. Moreover, it cannot be excluded, as matters stand, that the applicant's private behaviour may be the subject of investigation by the police or that an attempt may be made to bring a private prosecution against him.

24. Against this background, the Court considers that the existence of the prohibition continuously and directly affects the applicant's private life. There is therefore an interference.'[22]

3. **Toonen v Australia** in a communication concerning the rights contained in the International Covenant on Civil and Political Rights ("**ICCPR**"), the UN Human Rights Committee determined at paragraph 8.2:

'In this context, it notes that the policy of the Department of Public Prosecutions not to initiate criminal proceedings in respect of private homosexual conduct does not amount to a guarantee that no actions will be brought against homosexuals in the future, particularly in the light of undisputed statements of the Director of Public Prosecutions of Tasmania in 1988 and those of members of the Tasmanian

[20] At paragraph 38.

[21] (1993) 16 EHRR 485.

[22] At paragraphs 23 and 24.

> Parliament. The continued existence of the challenged provisions therefore continuously and directly 'interferes' with the author's privacy.'[23]

[135] Learned Kings Counsel contended that the ICCPR is an international treaty to which Saint Vincent and the Grenadines has acceded, and therefore the Human Rights Committee's communications, like the judgments of the European Court of Human Rights, provide authoritative guidance in the interpretation of the **Constitution**.

[136] He also cited **National Coalition v Minister of Justice and Others**[24] a judgment of South Africa's Constitutional Court, where Justice Ackermann held:

> '[23] The discriminatory prohibitions on sex between men reinforces already existing societal prejudices and severely increases the negative effects of such prejudices on their lives.
> 'Even when these provisions are not enforced, they reduce gay men . . . to what one author has referred to as 'unapprehended felons', thus entrenching stigma and encouraging discrimination in employment and insurance and in judicial decisions
> about custody and other matters bearing on orientation.'[25]; and

**Jones v the Attorney General Trinidad and Tobago** in which Rampersad J. in the High Court of Trinidad and Tobago held:

> '... In a case such as this, she/he must be able to make decisions as to who she/he loves, incorporates in his/her life, who she/he wishes to live with and make a family with and not have to live under the constant threat, the proverbial "Sword of Damocles", that at any moment she/he may be persecuted or prosecuted. That is the threat that exists at present. It is a threat that is sanctioned by the State and that sanction is an important sanction because it justifies in the mind of others in society who are differently minded that the very lifestyle, life and existence of a person who chooses to live in the way that the claimant does is criminal and is deemed of a lesser value than anyone else. ... In this way, Parliament has taken the deliberate decision to criminalize the lifestyle of persons like the claimant whose ultimate expression of love and affection is crystallized in an act which is

[23] [1994] Comm No. 488/1992, [1994] UN Doc CCPWC/50/C/488/1992.

[24] CAB 32

[25] (CCT11/98) [1998] ZACC 15, at para. 23.

statutorily unlawful, whether or not enforced. This deliberate step has meant, in this circumstance, that the Claimants' rights are being infringed.'[26]

[137] The claimants submitted that these cases demonstrate that the Attorney General's argument that they lack standing for a lack of criminal charges is wrong, and is unsupported by authority. They maintained that their rights are infringed by the mere existence of the challenged provisions.

**DISCUSSION**

[138] The parties all made comprehensive written legal submissions prior to the trial and after the trial. In many instances, the same legal authorities were relied on by more than one party in relation to the issues at the heart of this case. Accordingly, at times I may not set out any or all the submissions made in respect of legal principles that are not in dispute, if the principle is raised by another party or where the court addresses it elsewhere. This is not intended to be disrespectful or to reflect lack of regard for any party's contentions; but purely to eliminate as far as possible unnecessary repetition. I deliberately refrain from reciting the very voluminous legal submissions and wish to assure the parties that their legal contentions have been considered, even when not set out.

[139] It is now settled that when interpreting a constitutional instrument including the fundamental rights chapter, the Court is required to adopt a generous and purposive construction. This guiding principle has been repeated in a number of cases including in **Minister of Home Affairs v Fisher**[27], **Attorney General of the Gambia v Momodou Jobe**[28] and **Reyes v R**[29]. In **Fisher**, Lord Wilberforce declared that the fundamental rights and freedoms sections are to be given a 'generous interpretation avoiding what has been called "the austerity of tabulated legalism" suitable to give to individuals the full measure of the fundamental rights and freedoms referred to'.

[140] Lord Diplock echoed this sentiment in **Momodou Jobe** as did Lord Bingham in **Reyes**. Lord Bingham stated:

'26 A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral

[26] At paragraph 91.

[27] [1980] AC 319 (PC, Bermuda), pg. 328.

[28] [1984] AC 689 (PC, Gambia)

[29] [2002] 2 AC 235; [2002] UKPC 11 (Belize).

values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society: see Trop v Dulles 356 US 86, 101. In carrying out its task of constitutional interpretation the court is not concerned to evaluate and give effect to public opinion, for reasons given by Chaskalson P in State v Makwanyane, 1995 (3) SA 391, 431, para 88: 'Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication.' The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution… The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society.'"

[141] The *locus standi* issue necessitates an examination of sections 1, 16(1) and 96(1) of the **Constitution**. The material part of section 1 of the **Constitution** provides:

> 'Whereas **every person in Saint Vincent and the Grenadines** is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his race, place of origin, political opinions, creed, or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, …' (Emphasis added)

[142] Section 16(1) states:

> '16. (1) **If any person alleges that any of the provisions of sections 2 to 15 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him** (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, **that person (or that other person) may apply to the High Court for redress**.' (Emphasis added)

[143] Section 96(1) provides:

> "**96.— Original jurisdiction of High Court in constitutional questions.**
> (1) Subject to the provisions of section 22(2), 38(8)(b), 102(2) and 105(10) of this Constitution, any person who alleges that any provision of this Constitution (other than a provision of Chapter I thereof) has been or is being contravened may, if he has a relevant

interest, apply to the High Court for a declaration and for relief under this section." (Underlining added)

[144] The legal principles that guide the court in deciding the issue of *locus standi* for purposes of challenges to a law on the ground of unconstitutionality, was considered by the Court of Appeal in **Baldwin Spencer v The Attorney General and others**. In that case, Chief Justice Byron compared sections 18(1) and 119(1) of the **Antigua and Barbuda Constitution** which are in similar terms to sections 16(1) and 96(1) respectively of the **Saint Vincent and the Grenadines Constitution** (section 16(1) being the equivalent of section 18(1)). He highlighted two important differences between them:

> 'The first is that action under section 119 only relates to allegations that any provision "has been or is being contravened". It does not refer to the likelihood of future breaches, whereas actions under section 18(1) can relate to allegations that any provision "has been, or is being or is likely to be contravened" (the inchoate point). The second is that under section 18(1) the only person who can bring an action is a person who can allege that the contravention relates to him (except in the case of a detained person) and under section 119(1) the only
> person is a person who has a relevant interest (the locus standi point).'[30] (Emphasis added)

[145] A cursory examination of sections 16(1) and 96(1) reveals the same distinction in the Saint Vincent and the Grenadines provisions. Significantly, in **Baldwin Spencer**, the learned Chief Justice was focused on interpretation and application of section 119(1) and not section 18(1) of the Antigua and Barbuda Constitution. This fact renders **Baldwin Spencer** of limited utility in the present case in relation to the specifics of the allegations that qualify for judicial consideration.

[146] Learned Kings Counsel Mr. Middleton[31] correctly identified a further difference between the two provisions when he submitted that the test under section 96(1) is whether the claimant has a sufficient interest in the subject matter whereas under section 16(1) the sole precondition to seeking redress is whether the claimant alleges that 'any of the provisions of sections 2 to 15 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him'. It is

[30] At pg. 22.

[31] Name of legal practitioner initially entered in error, corrected under the slip rule at CPR 42.10.

also important to highlight yet another dissimilarity between the two provisions. It is that section 16(1) is the gateway provision to challenge the breach of the fundamental rights and protections set out in Chapter 1 of the **Constitution**, whereas section 96(1) excludes those provisions from its ambit. It is clearly inapplicable for present purposes.

[147] Returning to the principles that are applicable to the determination of *locus standi* issues, suffice it to

say that they were rehearsed by the parties. I bring those principles to bear in the construction of the relevant constitutional provisions in the case at bar. Distilled to their core, the guiding precepts are:

1. The claimant must have some recognizable legal or other interest in the issue - **Edward Phillip Mathurin & Anor and Magadalene Wilson et al**.

2. A determination of whether a claimant has legal standing is to await the completion of the trial when all of the facts have been laid out - **Attorney General of St. Lucia v Martinus Francois** and **Attorney-General v Payne**.

2. The claimant must have advanced a 'sustainable allegation that a provision of the constitution has been … is being [or is likely to be] contravened' and that the alleged contravention affects the claimant's interest'. In other words, are the allegations of breach of fundamental rights and freedoms caught by the constitutional provisions that have been invoked. A claimant may make out a case if he can establish that a) the law affected his constitutionally guaranteed rights and b) it entails a matter outside of the Legislature's competence - **Baldwin Spencer v the Attorney General of Antigua and Barbuda et al** and **Attorney General v Lawrence**.

[148] In **Baldwin Spencer**, the Court had no need to examine the Antigua constitutional provision that corresponds to section 1 of the **Saint Vincent Constitution** because it does not appear to have arisen in legal arguments. In any event, it was not considered. In this case, it has been invoked by the Honourable Attorney General in aid of interpretation of section 16(1) of the **Constitution** and determination of the issue of *locus standi*. In my view, it is a relevant point that needs to be considered.

[149] The language of sections 1 and 16(1) are clear and unambiguous and should therefore be given their plain and ordinary meaning. Section 1 identifies the persons to whom the protections under Chapter 1 of the **Constitution** are extended. They are described as 'every person in Saint Vincent and the Grenadines'. It is readily discernible from this description that section 1 limits the applicability of the fundamental rights and freedoms to 'persons in Saint Vincent and the Grenadines', thereby qualifying which persons may invoke the succeeding fundamental rights and freedoms provisions in Chapter 1 including sections 3, 5, 7, 9, 10, 12 and 13 under which Mr. Johnson and Mr. MacLeish seek redress.

[150] A generous and purposive interpretation would lead to a construction that would not be restricted to persons who were in Saint Vincent and the Grenadines when the **Constitution** was introduced, but rather to all persons residing or present in Saint Vincent and the Grenadines at the time of the alleged infringement of any such fundamental right and freedom. To restrict the term to residents would deprive visitors of the protections in the Constitution and would not give effect to the generous and purposive prescription inherent in constitutional construction. In the absence of judicial precedent on this term in the **Constitution**, and applying the plain language rule of interpretation, I find therefore that the words 'in Saint Vincent and the Grenadines' cover any person who is present in the State at the time of the alleged constitutional violation.

[151] On the claimants' evidence, they are not presently in Saint Vincent and the Grenadines and have not lived there since 2017 (in Mr. Johnson's case) and 1987 (in Mr. MacLeish's case). Mr. Johnson has indicated that he has not returned to the State since leaving and is the beneficiary of asylum status in the United Kingdom. Mr. MacLeish expresses a desire to return at some undefined date in the future, conditional on removal of the challenged provisions from the law.

[152] Both gentlemen have challenged the impugned provisions of the **Criminal Code** on the basis of past, present and potential future infringements of the referenced constitutional provisions. Mr. MacLeish pleaded:

> 'The Claimant is an openly homosexual male national of Saint Vincent and the Grenadines. He is in a long-term, stable and committed relationship with another male. The Claimant currently resides in the United States of America, but returns to Saint Vincent and the

Grenadines from time to time. He owns land in Saint Vincent and the Grenadines upon which he wishes to build and make a home. The Claimant will contend that Sections 146 and 148 of the Criminal Code, and their mere existence, denied and still deny him multiple rights and freedoms, occasioning on him multiple and overlapping infringements of those rights and freedoms.'

[153] He pleaded further:

'The Claimant will contend that the legislative prohibitions on homosexual activity constitute

an interference with those rights; and that the Defendant cannot justify those interferences where the pleaded rights are qualified rights.

The very existence of Sections 146 and 148 of the Criminal Code have affected and continue to affect the Claimant's rights and freedoms by forcing him either to:

(1) respect the law and refrain from engaging in prohibited acts of intimacy to which he is disposed by reason of his sexual orientation;

(2) commit the prohibited acts and thereby become liable to arrest, prosecution and imprisonment; or

(3) leave and remain exiled from Saint Vincent and the Grenadines in a country where such conduct is lawful.

[154] He added at paragraphs 2.4 to 2.7:

'Additionally, Sections 146 and 148 of the Criminal Code punish a form of sexual conduct which is identified by the wider society of Saint Vincent and the Grenadines with homosexuals. Their effect is to state that in the eyes of the legal system of Saint Vincent and the Grenadines the Claimant is a criminal, regardless of whether he commits the criminalised acts. The Claimant accordingly is and will continue to be the subject of extensive societal prejudice, persecution, marginalisation, a lifelong entrenched stigma that he is an un-apprehended criminal by virtue of being homosexual, and he experiences the lifelong fear of being punished for expressing his sexuality through consensual conduct with another male.

Sections 146 and 148 demean the Claimant and strengthen and perpetuate the view among the wider society that homosexuals are less worthy of protection than heterosexuals in Saint Vincent and the Grenadines.

Sections 146 and 148 amount to a palpable invasion of the Claimant's human dignity, exactly of the sort that is protected against by the Constitution.

The Claimant will contend that in as much as Section 146 of the Criminal Code embraces acts involving both males and females, it has a greater and disproportionate impact upon homosexual men and, further, the impact on the dignity of homosexual men is disproportionate given the deep stigmatisation caused by them being the primary targets.' (Emphasis added)

[155] In relation to personal liberty, he asserted past and present breaches as follows:

'The Claimant's right to personal liberty has been breached as the mere existence of Sections 146 and 148 of the Criminal Code affects important and fundamental life choices and/or his psychological integrity. The Claimant has no personal autonomy to live his own life and to make decisions that are of fundamental personal importance and which directly affect his choice of whether to enter into a relationship, whether to engage in sexual conduct or whether to exile himself from Saint Vincent and the Grenadines.

The mere existence of these Sections unlawfully constrains the Claimant's personal liberty in a manner and for a purpose that is not authorised by Section 3(1) of the Constitution.' (Emphasis added)

[156] On the issue of inhuman and degrading treatment, he complained of past and present infractions of his fundamental rights and freedoms:

'Sections 146 and 148 of the Criminal Code impose severe punishments on the Claimant for

his form of sexual expression. The Claimant was and is at risk of punishment for that expression.

The Claimant will contend that the mere existence of Sections 146 and 148 degrades and devalues the Claimant's human dignity amounting to inhuman and/or degrading treatment.'

The Claimant will further contend that the existence of Sections 146 and 148 resulted in his being subjected to abuse from State and non-State actors of a severity to place the State in breach of both its negative obligation to abstain from acts of inhuman and degrading treatment and its positive obligation to protect; and that such obligations cannot be met towards the Claimant, … while Sections 146 and 148 subsist.' (Emphasis added)

[157] He claimed further that in relation to the alleged breach of section 7 of the **Constitution** that he has in the past been under threat of arbitrary search and entry of his person and property:

'Sections 146 and 148 of the Criminal Code breach the prohibition of arbitrary search and entry secured at Section 7 of the Constitution

The Claimant has been and will continue to be at threat of arbitrary search and/or entry of his person and/or property while in Saint Vincent and the Grenadines. Sections 146 and

148 of the Criminal Code empower the State to search the Claimant and to enter his property on the ground of his sexual orientation.
Sections 146 and 148 of the Criminal Code's targeting on the ground of sexual orientation is arbitrary, irrational and/or contrary to the common law prohibition of unequal treatment on irrational grounds.' (Emphasis added)

[158] In relation to the alleged breach of freedom of conscience and expression, he complained of past, present and potential future violations. He pleaded:

'Sections 146 and 148 of the Criminal Code breach the Claimant's rights to freedom of conscience and expression secured at Sections 9 and 10 of the Constitution.
The Claimant has not and cannot freely engage in sexual intimacy with other consenting males, which is a primary expression of his personhood, due to the State's imposition of Sections 146 and 148. The Claimant lacked and lacks the freedom of choice in matters which amount to the expression, manifestation and exercise of personal sexuality. The Claimant has not fully enjoyed and cannot fully enjoy his life, expression of his personality or autonomy about his intimate relationships without penalisation or the persistent risk of the same.
The Claimant was not and is not free from nor immune to invasions of his freedom of expression and freedom of conscience and/or abusive and/or arbitrary and/or unwarranted censure and punishment or the risks of the same by the police and/or other State actors in Saint Vincent and the Grenadines due to his homosexuality or perceived homosexuality.
The Claimant has not and cannot now or in the future freely express an integral part of his personality. Sections 146 and 148 of the Criminal Code allow extensive societal prejudice, persecution, marginalisation, and a lifelong entrenched stigma that result in the suppression of an integral part of his personhood that unlawfully hinders his freedom of conscience and freedom of expression. The State has failed in its positive duty to enable such expression.
Sections 146 and 148 operate to curtail, supress and/or eradicate the expression of an integral part of the Claimant's identity in both private and public.' (Emphasis added)

[159] As to allegations of breach of his freedom of movement rights, he specified a past expulsion which potentially implied or alluded to a present and continuing expulsion:

'Sections 146 and 148 of the Criminal Code breach the Claimant's right to freedom of movement secured at Section 12 of the Constitution
The existence of Sections 146 and 148 of the Criminal Code, the effects that those Sections have on the Claimant, and society's perception of him that arise from their

existence, have resulted in the Claimant's *de facto* expulsion from Saint Vincent and the Grenadines.' (Emphasis added)

[160] In relation to his complaints of the alleged discriminatory effects of the challenged provisions, he made no specific allegations of past discrimination with respect to himself, only a generalized contention of the effect of the challenged provisions on same sex males. He pleaded:

> 'Sections 146 and 148 of the Criminal Code breach the prohibition of discrimination secured at Section 13 of the Constitution
>
> > 'The Claimant will contend that Sections 146 and 148 of the Criminal Code violate the right to non-discrimination as they unfairly discriminate solely and expressly on the basis of the sex of the Claimant and his male partners. Sex is not a legitimate or lawful basis for differential treatment that results in exclusion, marginalisation, stigma, punishment and/or inferior treatment.
> >
> > Section 148 is overtly discriminatory on the ground of sex as it criminalises conduct between male-male composite couples and female-female composite couples, while leaving unaffected by the criminal law the same conduct between male-female composite couples. The Claimant will contend that Section 148 arbitrarily penalises same-sex couples and is unequal in its treatment of them on the prohibited ground of sex.
> >
> > The Claimant will contend that in as much as Section 146 of the Criminal Code embraces acts involving both males and females, it is discriminatory in its effect, as it has a greater and disproportionate impact upon homosexual couples.' (Emphasis
> >
> > added)

[161] With respect to the alleged breach of privacy of the home, Mr. MacLeish once again pleaded in general terms and did not assert that the privacy of his home has been violated in the past, is being violated at present or potentially will be in the future. He claimed:

> 'Sections 146 and 148 of the Criminal Code breach a fundamental right and freedom (privacy of the home) secured at Section 1(c) of the Constitution
>
> Section 1(c) of the Constitution entitles the Claimant to protection of his fundamental right to the privacy of his home. The provisions of Chapter 1 of the Constitution have effect for the purpose of affording protection of that right and freedom. One or more of the rights

and freedoms at Sections 2 to 13 of the Constitution must secure the Claimant his right to privacy of the home.

The Claimant's right to privacy of the home is locatable within one or more of Sections 3, 5, 7, 9, 10, 12 or 13 (as pleaded above).

Additionally or in the alternative, Section 1(c) of the Constitution itself is invokable and a basis for relief.

The existence of Sections 146 and 148 of the Criminal Code deny the Claimant the privacy and autonomy to engage in consensual intimacy with other males, even in the privacy of his own home.' (Emphasis added)

[162] Mr. Johnson pleaded:

> 'The Claimant is an openly homosexual male national of Saint Vincent and the Grenadines. He has been granted refugee status in the United Kingdom due to the treatment that he experienced in Saint Vincent and the Grenadines as a result of his homosexuality. The Claimant will contend that Sections 146 and 148 of the Criminal Code, and their mere existence, denied and still deny him multiple rights and freedoms, occasioning on him multiple and overlapping infringements of those rights and freedoms.'

Thereafter, his pleadings mirrored Mr. MacLeish and do not need to be repeated.

[163] It is worth noting that neither Mr. Johnson nor Mr. MacLeish restricted their challenge to one or other paragraph of the section 146 of the **Criminal Code**, but rather attacked the provisions as a whole. As is self-evident, section 146 criminalizes not only intercourse between same sex partners but anal intercourse between heterosexual partners. Therefore, to the extent that the pleadings suggest that the entire section is objectionable on the ground that it criminalizes purely same sex sexual relations they conceal an inherent fallacy.

[164] Congruent with the learning regarding evaluation of assertions of lack of *locus standi*, I propose to examine each element of the pleaded case on its merits to determine if it sets out an allegation that is caught by the constitutional provisions that have been invoked; and if it does, to assess the allegations in light of the evidence led by Mr. Johnson and Mr. MacLeish to determine whether they have established an adequate factual nexus to confer legal standing on them to pursue that specific aspect of the claim.

[165] It is important to note that the claimants made certain assertions for which they provided no documentary or tangible evidence other than their *ipse dixit*, in relation to matters which are integral to their respective cases and which realistically called for more than bare assertions. I refer here for example to Mr. Johnson's claim that he is in England as a refugee based on an asylum application grounded in ill-treatment meted out to him in Saint Vincent and the Grenadines by reason of his homosexuality. This was not forthcoming.

[166] I remind myself of the trite principle of law that he who asserts must prove irrespective of whether the claim under consideration constitutes a constitutional challenge or is an ordinary tortious, breach of contract, trust or other type of claim. As regards, Mr. Johnson's assertion that he is a refugee by virtue of persecution due to his homosexuality, I make no finding that this is so. Mr. Johnson therefore has not established that part of his case.

[167] Mr. MacLeish's assertion that he owns land in Saint Vincent and the Grenadines was not supported by production of a Deed of Conveyance or Deed of Gift. I therefore make no finding that he owns land in this State. His averment that he wishes to build in Saint Vincent is futuristic and incapable of proof. I am mindful that people sometimes change their minds and that there may be many reasons why Mr. MacLeish may not pursue his dreams to build a home and retire in Saint Vincent and the Grenadines. Accordingly, I place very little weight on that assertion or any other future plans.

[168] Turning now to the claimants' general statements set out at paragraphs [153] and [154] above, the very first observation is that they point to alleged past and present infringements of the constitutional protections. Secondly, they allege that the claimants were compelled and continue to be coerced at present to make an election regarding whether to give full expression to or reign in their desires to engage in sexual intimacy to which they are disposed by reason of their sexual orientation or leave the State permanently. In this regard, they subsequently make a specific charge that sections 3, 5, 7, 8, 9, 10, 12 of the **Constitution** are engaged in relation to those claims. I will therefore address them when I get to that pointed contention.

[169] At paragraphs 2.4 to 2.7 of their respective claims, the claimants alleged that at present they are the subject of extensive societal prejudice, persecution, marginalization, and a lifelong entrenched stigma that they are un-apprehended criminals by reason of their sexual orientation. They assert

that their human dignity is thereby assailed and will be for the rest of their lives. They did not however plead expressly in relation thereto that any specific provision of the **Constitution** is engaged by those assertions. They sought to do so in submissions. In my view, that was too late. Moreover, limited as they are to complaints regarding alleged present constitutional breaches those assertions fall outside the scope of section 1 of the **Constitution** and are therefore ineligible for consideration because of the claimants' lack of *locus standi* to pursue those claims.

[170] Furthermore, on the authority of **Baldwin Spencer** and **Attorney General v Lawrence** I hold that neither Mr. Johnson nor Mr. MacLeish has by those pleadings at paragraphs 2.4 to 2.7 of their respective fixed date claim forms invoked any of the fundamental rights sections of the **Constitution**. They therefore do not have the requisite *locus standi* to prosecute such claims. In any event, to the extent that they thereby seek to invoke section 5 of the **Constitution**, their other detailed allegations of inhuman treatment are dealt with later in this judgment.

Section 3 – Right to Personal Liberty

[171] In relation to the alleged breach of section 3(1) of the **Constitution**, the claimants asserted past and present breaches which they claim affect important and fundamental life choices and/or their psychological integrity. As to any impact on their psychological integrity they produced no expert evidence of any such effects. Their attempts at self-diagnosis are not probative and must be ignored by the Court. Therefore, in relation to any such alleged psychological impact, the claimants do not have the *locus standi* to make such claims.

[172] On the issue of the alleged effects on their ability to make important and fundamental life choices, they pleaded in relation to their present realities. For ease of reference, I highlight the material statements as pleaded:

> 'The Claimant has no personal autonomy to live his own life and to make decisions that are of fundamental personal importance and which directly affect his choice of whether to enter into a relationship, whether to engage in sexual conduct or whether to exile himself from Saint Vincent and the Grenadines.
> The mere existence of these Sections unlawfully constrains the Claimant's personal liberty
>
> in a manner and for a purpose that is not authorised by Section 3(1) of the Constitution.' (Emphasis added)

[173] Of the four effects mentioned, they are expressed in the present tense and engage section 1 of the **Constitution**. It is of significance to those assertions that neither Mr. Johnson nor Mr. MacLeish is or has been in the State at any material time either immediately before or within a reasonable short period before or since the filing of the claims ('the relevant times'). I hasten to add that I recognize that in relation to the allegation of forced exile, although the underlying events happened in the past the claimants maintain that the status subsists. Different considerations would therefore apply.

[174] However, as regards the other three (i.e. 'no personal autonomy to live his own life; make decisions of fundamental personal importance; or engage in sexual conduct) on their own evidence, they were and are not 'in Saint Vincent and the Grenadines' at the material times as required by section 1, led no evidence that they are or were in the jurisdiction at the relevant times **and** that they were at that time affected in any of those ways by the consequences of the challenged provisions. They thereby failed to establish necessary elements of their allegations and therefore have no *locus standi* to launch those aspects of their claims to present[32] breaches of section 3 of the **Constitution**[33]. The expulsion element is captured by their challenge under section 12 of the **Constitution** and will be dealt with when I consider that issue.

Section 7 – Protection from Inhuman Treatment

[175] The claimants advanced allegations of past and present breaches of section 5 of the **Constitution** which prohibits the application of cruel and inhuman treatment on anyone. Since they are and were not present in Saint Vincent and the Grenadines at the relevant times, the reasoning applied in relation to the pleaded allegations of current infringement of their right to personal liberty, applies with equal force to this aspect of their claims[34]. I therefore hold that they do not have the legal standing to prosecute a constitutional claim in respect of allegations of present breach of section 5 of the **Constitution**.

[32] Current breaches intended.

[33] As to the alleged lack of personal autonomy to a) live his own life; b) make decisions of fundamental personal importance; or b) engage in sexual conduct.

[34] Paras. 2.91 and 2.92 of the Fixed Date Claim Forms.

[176] They have however, in their pleadings and in their testimony made a case, which on its face is arguable in respect of alleged past breaches of section 5 of the **Constitution**.[35] In this regard, I refer to their description of the treatment they experienced while attending educational institutions in Saint Vincet and the Grenadines. In the case of Mr. Johnson his testimony was more expansive and encompassed aspects of his everyday life experiences. I hold that in those respects Mr. Johnson and Mr. MacLeish have the requisite *locus standi* to pursue that part of their respective claims.

[177] With respect to section 7 of the **Constitution**, the claimants contend firstly that their fundamental right to protection from arbitrary search and entry of their property and person was breached by reason that the challenged provisions placed them in a position where they were under threat of such search because of their sexual orientation. Secondly, they asserted that the challenged provisions effectively targeted them by reason of their sexual orientation and thereby constitutes an arbitrary and irrational law that is also or alternatively, contrary to the common law prohibition of unequal treatment on irrational grounds. Both contentions presuppose that the challenged provisions apply exclusively to same sex couples. In the second case, the pleading is based on the common law and is therefore dealt with subsequently.

[178] Section 146 of the **Criminal Code** provides:

> '146. Any person who-
> (a) commits buggery with <u>any other person</u>;
> (b) commits buggery with <u>an animal</u>; or
> (c) permits any person <u>to commit buggery with him or her</u>;
> is guilty of an offence and liable to imprisonment for ten years.'

[179] Section 148 of the **Criminal Code** states:

> '148. Any person, who in public or private, <u>commits an act of gross indecency with another person of the same sex</u>, or <u>procures or attempts to procure another person of the same sex</u> to commit an act of gross indecency <u>with him or her</u>, is guilty of an offence and liable to imprisonment for five years.'

[35] Paras. 2.9.1 and 2.9.3 of the Fixed Date Claim Forms.

[180] Section 146 evidently applies not only to same sex partners of both sexes, but also to male/female, male/animal, female/animal anal (and historically in some jurisdictions vaginal[36]) coupling. On an objective analysis of the provision, in my view it is clear from the express wording that sexual orientation is not an essential element of the three offences created in it.

[181] Furthermore, neither Mr. Johnson nor Mr. MacLeish testified that they engaged in buggery with a male or a person of another gender while they resided in Saint Vincent and the Grenadines. To my mind, that is another necessary element of the offence at section 146(a) or (c) which they appear to be referencing. I make no finding that they did so because they presented no evidence that they did. Accordingly, they may not proceed with their challenge to section 146 of the **Criminal Code** for unconstitutionality on the ground that they were under threat of arbitrary search and entry by reason of their sexual orientation because they have not established the requisite legal standing.

[182] Although slightly different from section 146, section 148 contemplates that two persons of the same sex have either engaged, has been suspected of engaging or is preparing to engage in the prohibited activity of sexual intimacy. Neither claimant has professed to having participated in such activity either in public or in private. Accordingly, although they have pleaded an apprehension of threatened entry and search of their property, apart from their avowed sexual orientation while they were in Saint Vincent, they introduced no evidence which remotely suggests that they reasonably feared that they would have been subjected to such entry and search, or such searches and entries were commonplace or even took place in Saint Vincent and the Grenadines while they were in the State or since they left. For this reason, I hold that they have not demonstrated that they have the requisite *locus standi* to pursue this part of their claims which is based on a violation of section 7 of the

**Constitution**.

[183] Mr. Johnson and Mr. MacLeish linked their constitutional challenges with respect to freedom of conscience and freedom of expression. Their pleadings include allegations of present breaches. I note that Mr. MacLeish spoke about alleged censorship of his social media advocacy on related

[36] As far as animal sexual contact is concerned.

LGBT issues in the State of Saint Vincent and the Grenadines. This does not assist him because he was not in the State at those time(s).

[184] Both claimants gave accounts of being restricted in their expression, manifestation and exercise of their sexuality in the past and claim that this was done in breach of their right to freedom of expression and freedom of conscience. I therefore hold that they have *locus standi* to pursue those claims based on alleged past breaches of sections 9 and 10 of the **Constitution**.

[185] Mr. Johnson and Mr. MacLeish both claim that they have endured *de facto* expulsion from Saint Vincent and the Grenadines that occurred in breach of their right to freedom of movement and that it subsists. Their testimony lays out an arguable case. I find therefore that they are thereby clothed with legal standing to pursue those claims.

[186] In their claims that the challenged provisions are discriminatory in effect, the claimants make a single reference to themselves. They pleaded that the challenged provisions unfairly discriminate against them solely and expressly on the basis of their sex and that of their male partners. No reference is made either in the pleadings or in their evidence to any such relationships with partners when they lived in Saint Vincent or at any relevant times. In fact, apart from alluding to the possibility that they have a predilection to engage in homosexual intimacy, neither claimant averred that this lifestyle was practiced[37] by either of them. This pleading suggests that the alleged discrimination is a present one referable to present partner(s) and therefore falls outside of the parameters of section 1 of the **Constitution**. In such a case, neither Mr. Johnson nor Mr. MacLeish has established that he has the requisite legal standing to pursue this part of their pleaded case.

[187] Further, the rest of their pleading with respect to protection from discrimination is expressed in the present tense and more fundamentally speaks to its effects on same-sex/homosexual couples couples in general and neither to Mr. Johnson nor Mr. MacLeish. It is a matter of record that neither claimant applied for nor was granted permission to file their claim in a representative capacity on behalf of other persons. They simply do not have *locus standi* to represent such unnamed third parties. They have therefore failed to establish that they have the requisite legal standing to pursue

[37] During the relevant times.

their challenge to the constitutionality of the impugned provisions of the **Criminal Code** on the ground that they are discriminatory and in breach of section 13 of the **Constitution**.

[188] Turning next to the claimants' contention that they have suffered a breach of their right to privacy of home. They have again couched this assertion in general terms. Significantly, they have grounded this claim in section 1(c) and vaguely on some unspecified part of sections 2 to 13 of the **Constitution**. The learning from **Baldwin Spencer** regarding the imperative of identifying a sustainable allegation of constitutional breach is *apropos*. The pleadings disclose an uncertainty by the claimants about which if any constitutional provision is breached and stunningly a seeming invitation to the court to pinpoint the applicable section.

Justiciability of section 1(c) of the Constitution

[189] Whether section 1(c) of the **Constitution** is justiciable is an issue that can be disposed of shortly by reference to a settled principle of law that constitutional provisions akin to section 1 of the **Constitution** are prefatory and introductory, are not enforceable and therefore not justiciable. In **Gordon Newbold and others v Commissioner of Police**,[38] the Board pronounced on the justiciability of section 15 of the Bahamas Constitution which is almost identical to the chapeau to the recital at section 1 of the **Constitution**. The relevant portion of section 15 of the Bahamas Constitution provides:

> '15. Whereas every person in The Bahamas is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely- …'

[190] As to whether section 15 is justiciable Lord Mance who delivered the Board's opinion stated:

> '[32] … Article 15 is … no more than a preamble, as the Board held it to be in Campbell-Rodriques. There is a distinction between on the one hand Constitutions in the form adopted in The Bahamas, Jamaica and Malta, in which the equivalent of art 15 is wholly or predominantly a preamble and on the other hand Constitutions in the form adopted in Trinidad and Tobago and Mauritius, which contain instead an enacting provision. …

[38] [2014] UKPC 12. See also Campbell-Rodriques et al. v Attorney General of Jamaica [2007] UKPC 65, (cited by the interested parties).

> [33] In short, Mr Fitzgerald's submission does not only run counter to the natural meaning of art 15. It also ignores the word 'Whereas' and the recital in art 15 that it is 'the subsequent provisions of this Chapter' which 'shall have effect for the purpose of affording protection of the aforesaid rights'. … The Board therefore considers that art 15 has no relevance or application in this case, save as a preamble and introduction to the subsequently conferred rights.'[39] (Emphasis added)

[191] That holding by the Board is equally applicable to section 1(c) of the **Constitution** and the *ratio decidendi* is binding on this Court in interpreting an almost identical provision to the Bahamas provisions that was considered. I hold therefore that section 1(c) of the **Constitution** is not justiciable. It bestows no separate fundamental right or constitutional protection. The claimants' are therefore unable to invoke it for purposes of maintaining a claim for breach of their avowed right to protection of the privacy of their home. It follows that that aspect of their claim must be dismissed.

[192] In light of my rulings on the claimants' legal standing to pursue certain allegations in their claims, their constitutional challenges under sections 1(c), 3 and 13 are dismissed. I will next examine the merits of their remaining claims under sections 5, 7, 9, 10 and 12 of the **Constitution**.

General Propositions of Law – Breach of Fundamental Rights

[193] The claimants submitted that the protection against inhuman treatment as an unqualified right is one

> that is absolute, the interference with which cannot lawfully be balanced against the needs of other individuals or against any general public interest, as it records no exception or situation allowing for infringe by the State. As to qualified rights, they argued that in this case, the Attorney General may rely on factual and expert evidence when he seeks to justify an infringement of such rights, and they themselves may rely on factual and expert evidence to counter his arguments.

[194] They contended that a negative obligation is one imposed on the State, not itself to interfere with the exercise of a right. For certain rights protected by the **Constitution**, they allege that the State has infringed the negative obligation imposed on it by that right. It is their position that the Court can determine whether there has been an infringement of each pleaded negative obligation on the basis of legal submissions alone, by reference to the curtailment of individual freedom that is

[39] At paras. 32 and 33.

evident from the text of the challenged provisions. Accordingly, it is not necessary for them to rely on factual evidence to support the case that the State has infringed these negative obligations. Notwithstanding this overarching submission, they nonetheless rely on factual evidence in these proceedings to augment and contextualize their submissions on breach of negative obligations.

[195] As regards, positive obligations, they submitted that they are imposed on the State to take necessary measures to protect the exercise of a right, including to prevent infringement by third parties. For certain rights protected by the **Constitution**, they allege that the State has infringed the positive obligation imposed on it by the right. They submitted further that they rely on factual evidence to establish how the challenged provisions affect them and other sexual minorities at a societal level. They argued that although claimants in general allege – and courts may find – violations of the negative obligation or the positive obligation, there is not a binary division between the two. Moreover, the Court may refrain from formally adjudicating whether the situation should be examined in terms of the State's negative obligation or positive obligation: **Religious Community of Jehovah's Witnesses of Kryvyi Rih's Ternivsky District v. Ukraine**[40].

[196] The claimants contended that challenges concerning fundamental rights and freedoms have a two-stage structure. At stage 1, it is for a claimant to establish that the State has interfered with a particular right or rights (which can be an infringement of the negative obligation, the positive obligation or both). At stage 2, if infringement of a non-absolute right is found, the burden is on the Attorney General to demonstrate that the infringement is justified by reference to the closed list of justifications or exceptions within the section in question. If he does not justify the infringement, the right is violated. For absolute rights, they submitted that infringement equals violation such that it is only necessary for them to establish an interference at stage 1 of the test.

Alleged Breach of Section 5 – Inhuman Treatment

[197] On the surviving part of their claim regarding inhuman treatment, the claimants' case is that the relevant case law concerns degrading treatment that arises from targeting of a person on the basis of a defined characteristic, such as race or sexual orientation. They argued that the case law of the European Court on Article 3 of the **European Convention** is instructive for understanding the

[40] (2019), (Application no. 21477/10), para. 58.

content of section 5 of the **Constitution** since both provisions are worded in near-identical terms. Article 3 provides that:

> 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

Section 5 of the **Constitution** states:

> 'No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.'

[198] The claimants submitted further that it was established long ago by the European Court that Article 3 of the **European Convention** protects against invasions of a person's dignity and integrity by the State. In **Tyrer v United Kingdom**, (1979–80) 2 EHRR 1, the European Court explained:

> 'one of the main purposes of Article 3 [is] to protect, namely a person's dignity and physical integrity'[41].

[199] The claimants highlighted the separate opinion of Sir Gerald Fitzmaurice in **Republic of Ireland v United Kingdom** (1979–80) 2 EHRR 25 that:

> 'In the present context [the word 'degrading' in Article 3 is] intended to denote something seriously humiliating, lowering as to human dignity, or disparaging, like having one's head shaved, being tarred and feathered, smeared with filth, pelted with muck, paraded naked in front of strangers, forced to eat excreta, deface the portrait of one's sovereign or head of State, or dress up in a way calculated to provoke ridicule or contempt...'[42]

[200] They contended that it is well-established that the prohibition of degrading treatment in Article 3 prohibits severe instances of discrimination by a State. The threshold of severity may be crossed when the State targets persons on the basis of a defined characteristic, such as race or sexual orientation. They referenced their testimony as to how they felt while living in Saint Vincent and the Grenadines. Learned Kings Counsel Mr. Middleton remarked 'To borrow phrases from the dictum of Sir Gerald Fitzmaurice in **Republic of Ireland v United Kingdom** the challenged provisions 'tar and feather' the claimants and 'smear them with filth' for fulfilling or desiring to fulfil an integral aspect of their personhood, with evident severe consequences for their psychological integrity. He

[41] At paragraph 33.

[42] At paragraph 27.

continued 'the Inter-American Commission has recognized the causal nexus between laws that criminalize same-sex sexual intimacy and violations to psychological integrity and therefore the right to humane treatment'.

[201] To buttress this submissions, he quoted from the Commission's decision in **Gareth Henry & Simone Carline Edwards v Jamaica**[43] as follows:

> '59. In addition, the [Inter-American] Commission recalls that the American Convention protects the right to humane treatment, which includes physical, mental and moral integrity, and is one of the most fundamental values in a democratic society. The violation of said right can have several gradations ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors. In cases of arbitrary use of criminal law, the [Inter-American Commission] has considered that the threat of possible arrest, or the mere issuance of an arrest warrant, although not executed, can represent a violation of personal integrity inasmuch as it causes uncertainty and anxiety and can affect the physical and emotional health of the individual.
>
> '86. ... The [Inter-American Commission] has also expressed that the mere existence of sodomy laws can impact mental health by creating anxiety, guilt and depression among LGBTI persons affected by the law. 120. The Claimants invite this Court to declare a violation of the negative obligation at Section 5 of the Constitution based on these legal submissions alone (independent of the factual evidence), and/or in the alternative, based on those legal submissions in conjunction with the factual evidence in these proceedings.'[44]

[202] He submitted further that when seeking to ensure contemporary protection of rights in the light of evolving standards of decency, the Courts should look to foreign jurisdictions, in particular, common-law jurisdictions. In this regard, he noted that Saint Vincent and the Grenadines' own Saunders JA (now President of the Caribbean Court of Justice) stated in **Spence v R; Hughes v R** a judgment of the Eastern Caribbean Court of 2 April 2001:

> '[214] ... In my view we would be embarking upon a perilous path if we began to regard the circumstances of each territory as being so peculiar, so unique as to warrant a reluctance to take into account the standards adopted by humankind in other jurisdictions. Section 5 imposes upon the State an obligation to conform to certain "irreducible" standards that can

[43] Jamaica [2020] Case No 13.637, Inter-American Commission on Human Rights Report No 400/20, at [67].

[44] At paragraphs 59 and 86.

be measured in degrees of universal approbation. The collective experience and wisdom of courts and tribunals the world over ought fully to be considered.'[45]

He added that the maintenance in force of the challenged provisions by Saint Vincent and the Grenadines fails to meet both the accepted standards of decency recognized by common-law courts around the world and the obligations of the State under international treaty law.

[203] He stated that the harm occasioned by the challenged provisions more than meets the minimum level of severity to bring these claims within section 5 of the **Constitution**. He contended that the claims concern legislation that makes a crime of the expression of intimacy which differentiates the targeted minority (same-sex couples/homosexuals) from the privileged majority (opposite-sex couples/heterosexuals). The purpose of the challenged provisions is evident on their face - to impose severe punishment in order to eradicate an aspect of homosexual personhood by enforced conformity with heterosexuality or by enforced celibacy. By their direct effect – evident from the text of these sections alone – the challenged provisions lie at the most extreme end of a spectrum of discrimination against this defined group; to the severe detriment to their dignity, integrity, self-worth and personhood: **HJ (Iran)**.

[204] Learned Kings Counsel submitted that section 5 of the **Constitution** protects the right to freedom from torture and inhuman and degrading treatment which if it is infringed, permits no justification for such breach. He stated that the claimants' primary position is that the State's maintenance in force of the challenged provisions infringes its negative obligation to refrain from interfering with their right to protection against inhuman or degrading treatment. He stressed that no factual evidence is required to establish that the threshold of severity has been crossed by the challenged provisions. Notwithstanding, the evidence illustrates the degradation caused by the challenged provisions.

[205] Their secondary position is that the State is in breach of its positive obligation to take necessary measures to protect their right to protection from inhuman or degrading punishment or treatment. This is because so long as the challenged provisions persist in their present form, they and other homosexual people as a class are criminalized for expressing an intrinsic part of their personhood. Logically, the State cannot start to take necessary measures to protect that class of people from inhuman and degrading treatment from third parties while the challenged provisions persist by

[45] (Criminal Appeal No. 14 of 1997), at para. 214.

marking out sexual minorities as persons worthy of State-imposed punishment for expressing their personhood.

[206] He reasoned that this breach arises because the challenged provisions make a crime of any and all sexual intimacy for a defined group of people, namely same-sex couples/homosexuals. It is also evident from those provisions that they: (1) label members of this group as un-apprehended criminals for outwardly expressing an aspect of their personhood by engaging in sexual intimacy, or (2) compel abstinence from intimacy in contradiction to members of this group's internal feeling of self, or (3) compel both inward and outward conformity to a heteronormative life, again in a manner contradictory to members of that group's inherent sense of self.

[207] The claimants relied on several authorities to illustrate their contention that inhuman and degrading treatment may be manifested through discriminatory practices. They cited **East African Asians v the United Kingdom** in which, with respect to race, the European Commission held that UK legislation that denied immigration status to the husbands of British nationals on the ground that they were East Africans of Asian origin (i.e. on grounds of race) amounted to degrading treatment under Article 3 of the European Convention. They noted that the European Commission addressed the issue as follows:

> '208. The Commission considers that the racial discrimination, to which the applicants have been publicly subjected by the application of the above immigration legislation, constitutes an interference with their human dignity which, in the special circumstances described above, amounted to 'degrading treatment' in the sense of Article 3 of the Convention.
>
> '209. It therefore concludes, by six votes against three votes, that Article 3 has been violated in the present cases.' [46]

[208] The claimants relied further on **Cyprus v Turkey**, in which the European Court likewise accepted that where conduct towards classes of people is discriminatory in nature, this can in and of itself render it degrading treatment. In that case, a group was targeted due to its ethnicity. The European Court held:

> '309 For the Court it is an inescapable conclusion that the interferences at issue were directed at the Karpas Greek-Cypriot community for the very reason that they belonged to this class of persons. The treatment to which they were subjected during the period under

[46] (1981) 3 EHRR 76 at paras. 208 and 209.

consideration can only be explained in terms of the features which distinguish them from the Turkish-Cypriot population, namely their ethnic origin, race and religion. … The conditions under which that population is condemned to live are debasing and violate the very notion of respect for the human dignity of its members.

310 In the Court's opinion, and with reference to the period under consideration, the discriminatory treatment attained a level of severity which amounted to degrading treatment. 311 The Court concludes that there has been a violation of Article 3 of the Convention in that the Greek Cypriots living in the Karpas area of northern Cyprus have been subjected to discrimination amounting to degrading treatment.'[47]

[209] Another case that was cited is **Smith and Grady v the United Kingdom** in which the European Court found that discrimination on the grounds of sexual orientation may constitute degrading treatment. The Court determined that 'treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority of the nature described above could, in principle, fall within the scope of Article 3'[48]. It explained:

'120. ... The assessment of that minimum is relative and depends on all of the circumstances of the case, such as the duration of the treatment and its physical or mental effects. ... [T]reatment may be considered degrading if it is such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance. Moreover, it is sufficient if the victim is humiliated in his or her own eyes.'[49]

The claimants placed reliance on **HJ (Iran)**, **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs**[50], **Jones** and **Vriend v Alberta**[51] in support of this argument.

[210] Regarding the State's positive obligation, the claimants argued that in **Gareth Henry & Simone Carline Edwards v Jamaica**, the Inter-American Commission determined that by maintaining in force its equivalent to the challenged provisions, the State of Jamaica had contributed to violence against the petitioners and therefore took responsibility in law for violations of the right to humane treatment. The Commission held:

[47] (2002) 35 EHRR 30, At paragraphs 309 to 311.

[48] (2000) 29 EHRR 493 at para. 121.

[49] At para. 120.

[50] [2000] 4 LRC 292.

[51] [1998] 1 SCR 493.

'87. In the instant case, the [Inter-American Commission] recalls that both Gareth Henry and Simone Carline Edwards have suffered a series of acts of violence against them related to their sexual orientation, including threats of death and physical violence and related to a context of homophobia and violence against LGBTI people in Jamaica. The continuing threats against their lives and integrity forced them to flee Jamaica and seek asylum elsewhere.

'88. The [Inter-American Commission] believes that by maintaining Offences Against the Person Act in its legislation, the State has contributed to the perpetration of said violence in the terms indicated above, for which reason it considers that it is responsible for the violations of the right to humane treatment, the freedom of movement and residence as enshrined in Articles 5.1 and 22.1 of the American Convention, in connection with the established obligations in Articles 1.1 and 2 of the same instrument, to the detriment of Gareth Henry and Simone Carline Edwards.'[52]

[211] The claimants submitted that their affidavits are replete with examples of how the criminalization of an aspect of their personhood enables third parties to abuse them and other sexual minorities in Saint Vincent and the Grenadines. They invited the Court to conclude like the Inter-American Commission in **Henry v Jamaica** by finding that there is a violation of the State's positive obligation at section 5 of the **Constitution**. They reasoned that the State cannot start to take necessary measures to protect lesbian, gay, bisexual or transgender people (or those perceived as such) from inhuman and degrading treatment from third parties while the challenged provisions remain in force to criminalize an aspect of their personhood and further those sections tar them with the perceived status of an un-apprehended criminal.

[212] The learned Solicitor General did not respond frontally to the foregoing contentions. On behalf of the Churches, learned counsel Mrs. Mandella Peters submitted that there is some semantic difference between the expressions 'cruel or unusual treatment or punishment' and 'inhuman or degrading punishment or treatment', but the general meaning remains the same. Citing **R v Smith (E. D.)** she quoted Lamer J. thus:

'I would agree with Laskin CJ in Miller and Cockriell v The Queen [1977] 2 SCR 680, where he defined the phrase cruel and unusual as a compendious expression of a norm. The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of section 12 of the [Canadian] Charter is, to use the words of Laskin CJ in Miller and Cockriell, supra, at p. 688, whether the punishment

[52] At paragraphs 87 and 88.

prescribed is so excessive as to outrage standards of decency. In other words, though the state may impose punishment, the effect of the punishment must not be grossly disproportionate to what would have been appropriate'.[53]

[213] On this issue, learned Senior Counsel Mr. Hamel-Smith cited **Gareth Henry & Simone Carline Edwards v Jamaica**. He also referred to comments by the UN Special Rapporteur on Torture[54] (which observed that "such laws foster a climate in which violence against . . . gay persons by both State and non-State actors is condoned and met with impunity").

**DISCUSSION**

[214] It is important to note that at this stage, the Court will be examining the claimants' assertions that the challenged provisions constitute a breach in respect of past incidents, it having being held that the allegations of present breaches are unsustainable due to lack of legal standing. As regards their contentions that the existence of the challenged provisions resulted in their being subjected to abuse from State and non-State actors of a severity to place the State in breach of its negative and positive obligations, their testimony is set out fully above except where the evidence relied on is inadmissible.

[215] I make the observation that at its highest, the claimants' averments as to their personhood or sexual expression at the relevant times went no further than a suggestion of effeminacy. I do not equate effeminacy with sexual orientation and the claimants made no connection between the two. In addition, their complaints about the treatment allegedly suffered at the behest of State and non-State actors fell short of attributing to the alleged perpetrators or establishing that the alleged treatment was occasioned by the alleged perpetrators' belief or knowledge that the claimants were gay and/or that such treatment was caused by the existence of the challenged provisions. By their testimony, the claimants sought to place those notions into the heads and minds of the alleged perpetrators. ASP Browne's testimony refuted their assertions that a culture of homophobia and targeted violence against homosexuals. I prefer his evidence to the claimants and I believe him.

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[53] (1987) 75 N.R. 321 (SCC).

[54] Inter-American Commission on Human Rights Report No 400/20, at [68] (citing to the UNCHR, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2016) UN Doc. A/HRC/31/57, at [15]).

[216] The claimants have invited the court to assess their claims in view of the referenced judicial pronouncements regarding negative and positive obligations. The claimants have correctly outlined pertinent legal principles by which the court is guided in evaluating complaints of this nature. In essence, the prohibition against State imposed (or facilitation of) inhuman and degrading treatment puts the Court on inquiry as to the severity of the alleged inhuman treatment since it is only 'seriously humiliating, disparaging or degrading treatment' that will constitute a breach of the constitutional protection: **Republic of Ireland v United Kingdom** and **Henry v Jamaica**.

[217] The allegations made by the claimants of inhuman and degrading treatment lack critical substance as to names and further evidenced no connection between what was allegedly done and/or said to the claimants and their assertions that such conduct emanated from the mere existence of the challenged provisions. They were simply vague and superficial and in my view fell short of the standard of proof required to establish their case on a balance of probabilities. The alleged actions by themselves, even if established, do not in my estimation amount to inhuman and degrading treatment referable to the existence of the challenged provisions.

[218] The claimants presented no evidence from which this court may draw the adverse inference that the behaviours about which they complained was directly or indirectly brought about by the challenged provisions' existence. There are any number of reasons why the teachers, students, bus drivers and other persons conducted themselves in the manner described even if those incidents took place. The claimants described their mannerisms as being possibly effeminate. I do not equate effeminacy necessarily with homosexuality and there is no evidentiary basis to conclude that the alleged perpetrators of inhuman treatment did.

[219] In any event, the behaviours about which the claimants complain do not without more cross the threshold of constituting severe punishment which amounts to inhuman and degrading treatment contemplated by section 5 of the **Constitution**, particularly where the court is being invited to draw adverse inferences as to what motivated the perpetrators, in circumstances which allow for other less uncomplimentary inferences to be drawn and where the allegations lack specificity. I so find as a matter of fact and law. In all the circumstances, the claimants have not established on a balance of probabilities that the State had failed in its negative and positive obligations to them in this

regard. Therefore, I make no finding that the challenged provisions imposed severe punishments on the

claimants in the past for their form of sexual expression or that they were in the past at risk of punishment for their sexual expression.

[220] To summarize, the conduct on which the claimants rely to substantiate their allegations that they were subjected to harassment, ridicule and verbal abuse by teachers, acquaintances and in Mr. Johnson's case other members of the public, was devoid of specificity as to names, time, places and other substantive features. In a word, it was nebulous. They argued that their accounts should be accepted at face value because they were not tested by cross-examination. The absence of cross-examination is hardly surprising since the assertions lacked depth and any sound basis for inquiry by the other parties to verify or rebut as the case may be. Moreover, the claimants did not assert that they made any homosexual overtures to anyone which might have betrayed their sexual orientation. Instead, they accused their 'tormentors' of making the assumption not that they were gay but that they were effeminate.

[221] In Mr. Johnson's case, he acknowledged that he was a disruptive student at times. Mr. MacLeish's account of ill-treatment was not as contrived as Mr. Johnson's and was for the most part abstract, in my opinion. In fact, he maintained that he did not 'come out' as gay until many years after he left Saint Vincent and the Grenadines and interestingly after his mother's death. For all of those reasons, I draw no adverse inference and make no finding that the alleged ill-treatment of the claimants by unknown teachers, classmates or other persons in Saint Vincent and the Grenadines was attributable to any overt or covert representations by Mr. Johnson or Mr. MacLeish regarding their sexual orientation, or any assumption of such by the referenced persons. I find that they have not established a case that they suffered inhuman treatment in contravention of section 5 of the **Constitution**. I therefore dismiss their claim on this ground.

Freedom of Conscience and Freedom of Expression

[222] The claimants submitted that the right to freedom of thought and conscience encompasses a right to religious belief and the manifestation of it by worship and practice. Further, that it also encompasses a right not to believe the same as others and not to adhere to the worship and practice of others. They contended that section 9 of the **Constitution** is therefore another access

right for personal autonomy. Citing **Campbell and Cosans v the United Kingdom**[55] they pointed out that the European Court set out three criteria to assess whether the right to freedom of conscience (at Article 9 of the European Convention) is engaged.

[223] It ruled that the belief must (i) 'attain a certain level of cogency, seriousness, cohesion and importance', (ii) 'relate to a weighty and substantial aspect of human life', and (iii) be 'worthy of respect in a "democratic society" and are not incompatible with human dignity'. Adopting those three criteria, the claimants submitted that their conception of themselves as gay men who desire to form a life – including a sexual life – with another man satisfies each criterion. Concerning (i), they argued that their conception of themselves as gay men is cogent, serious, cohesive and important and the substantial case law on the issues of sexual orientation demonstrates that this criterion is met. Concerning (ii), sexual orientation undoubtedly is a weighty and substantial aspect of human life, which, again, is demonstrated by the substantial body of case law on the subject. Regarding (iii), they posited that again, the case law demonstrates that their conception of themselves is both worthy of respect and not only compatible with human dignity, but dignity cannot be restored to them while the challenged provisions criminalize an aspect of their personhood.

[224] As regards, freedom of expression the claimants contended that the State has infringed its negative obligation due to the mere existence of the challenged provisions. The challenged provisions disclose on their face that they prohibit a form of expression. They also claim infringement of the positive obligation. They argued that like the rights to privacy and liberty, the right to freedom of expression is now a well-established access right for sexual autonomy. In five of the six most recent comparative foreign judgments on criminal laws equivalent to the challenged provisions, the right to freedom of expression was held to be violated by the existence of similar criminal provisions.

[225] They cited **Orozco** in which the Supreme Court of Belize held that the right to freedom of expression was violated by section 53 of the Belize Criminal Code, which criminalized "carnal

[55] (1982) 4 EHRR 293.

intercourse against the order of nature" (the scope of which encompassed same-sex sexual intercourse). Benjamin CJ held at paragraph 89:

> 'The right to freedom of expression … is consistent with and complementary to the diversity
>
> and difference of opinion contemplated in the Constitution'.

In Saint Christopher and Nevis, where section 12 of their Constitution is materially identical to section 10 of the **Constitution** Ward J. in the High Court's judgment in **Jamal Jeffers v The Attorney General**[56], cited with approval the Caribbean Court of Justice's judgment in **McEwan v Attorney General of Guyana**[57] when interpreting the breadth of the right to freedom of expression.

[226] In **McEwan**, Saunders JCCJ held:

> '[76] ... A person's choice of attire is inextricably bound up with the expression of his or her gender identity, autonomy and individual liberty. How individuals choose to dress and present themselves is integral to their right to freedom of expression. This choice, in our view, is an expressive statement protected under the right to freedom of expression.'[58]

[227] The claimants reasoned that as exemplified by **Mc Ewan**, freedom of expression is not confined strictly to speech or such forms of oral or written communication. It transcends those more obvious examples of expression and includes expressions of one's identity such as dress, action or behaviour. In that light, sexual acts between consenting adults are cognisable as a form of expression protected by the right to freedom of expression under section 3(b) and 12 of the Constitution.'

[228] The claimants relied also on **Orden David v The Attorney General** and **Jones v The Attorney General of Trinidad and Tobago** to similar effect. They submitted that the Court should therefore find that their right to protection of freedom of expression under section 10 of the **Constitution** is an infringement of the State's positive obligation to take necessary measures to protect the exercise of that right. They argued further that their affidavit accounts set out how the challenged

[56] Claim No. SKBHCV2021/0013.

[57] [2018] CCJ 30 (AJ).

[58] At paragraph 76.

provisions have caused them to suppress the expression of central parts of their identity beyond the suppression of sexual intimacy. Based on that evidence, they submitted that by maintaining the challenged provisions in force the State is in breach of its positive obligation at section 10 of the **Constitution**.

[229] The learned Solicitor General countered that the challenged provisions enjoy a presumption of constitutionality that is not rebutted by the claimants. They cited **Grant v The Queen**[59], **Attorney General of Antigua and Barbuda and Another v Goodwin and Others**[60].

[230] She argued further that the State has a legitimate and constitutionally protected interest in maintaining the challenged provisions in the interest of public health. In this regard, she submitted that anal receptive sex constitutes a public health risk that the State has an interest in minimizing. She contended that the claimants have neither challenged the well documented scientific evidence that establishes a heightened risk of HIV infection among persons who engage in anal receptive sex nor contested the fact that HIV is a contagious, incurable and potentially fatal disease. Further, that persons infected with HIV require a lifelong regimen of expensive anti-retroviral medications the cost of which is borne by the State. The State also bears the expenses of conducting counselling, outreach and the bureaucracy of delivering quality confidential HIV care, in contrast to other jurisdictions where a robust private sector or non-governmental organization presence offset such costs.

[231] Like the claimants, she highlighted aspects of the expert opinions rendered by Dr. Jose Davy, Professor Brendan Bain and Professor Beyrer. She noted for example that Dr. Davy quoted an article by Professor Beyrer and others in the Lancet 2012 publication in which the authors reported seeing HIV infection rates among MSM 3% to 25.4% higher than the rest of the population. She also referenced Professor Beyrer's and others' observation in another publication[61] which reported higher rates of HIV and STD infections among MSM.

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[59] [2007] 1 AC 1, at para. 15

[60] (1999) 60 WIR 249

[61] The series Global epidemiology of HIV Infection in men who have sex with men … UN General Assembly Special Session on HIV/AIDS (UNGASS).

[232] The learned Solicitor General also noted Professor Beyrer's report in which an article by McClean et al[62] was cited and which highlights additional costs faced by the State in addressing HIV/AIDS. In addition, in his expert report Professor Beyrer estimate that 'in terms of direct costs, it appears that, in 2012 Saint Vincent and the Grenadines spent about US$725,986.80 on HIV care and treatment. She concluded that in the context of Saint Vincent and the Grenadines, a small island developing State a mere 43 years post colonialism, that sum is considerable.

[233] She also referred to PS Knights' testimony that the State's HIV infection rate is higher than other neighbouring OECS member states eliciting necessarily either higher vigilance by State authorities or a failure to meet the cost of adequate HIV care. She submitted that while Professor Beyrer's report states that criminalizing sodomy poses the risk of increasing infection rates among persons practicing anal receptive sex and cite statistics from countries other than Saint Vincent and the Grenadines to buttress that position, that contention ignores the equally strong evidence that HIV rates are dangerously high among States where no criminal prohibition exists in relation to sodomy (such as France), and ignore the equally compelling fact that HIV rates have been declining in the Caribbean jurisdictions which largely maintain legal prohibitions against buggery.

[234] She referenced further Professor Bain's opinion that:

> 'Advocates have assumed that decriminalizing anal intercourse would reduce the incidence rates of HIV in particular jurisdictions. The reasoning is that where there is no law prohibiting buggery, citizens would be less fearful to access prevention, care and treatment services, and this would redound to their safety from contracting HIV. The counter argument is that rescinding the law against buggery would influence persons to practice this method of risky intercourse freely… To date, available data do not show a direct causal relationship between rescinding the law on buggery and a reduction in the rate of HIV. **Although data from some countries may show an association (not a direct causal relationship)** between HIV prevalence rates and the presence of absence of buggery laws, these data do not confirm direct causal relationship between rescinding buggery laws and reduction in HIV prevalence rates because a range of confounding factors influence the situation in particular countries.' (Emphasis added).

[235] Learned Senior Counsel stated that Professor Beyrer's report contains a critical acknowledgement of its limitation with respect to Saint Vincent and the Grenadines:

[62] Titled 'Austerity, and funding cuts: Implications for sustainability of the response to the Caribbean HIV/AIDS epidemic.

'Only four articles in the database contained information both about HIV and this specific country, and only one pertained to MSM. This is a limitation of this report. While the information relied on is scientifically sound and has general application, it was not all extracted directly from Saint Vincent.'

[236] As regards public morality concerns, the learned Solicitor General submitted that the State has a legitimate and constitutionally protected interest in maintaining the challenged laws in furtherance of clear public morality objectives. She contended that **Matadeen and Others v MG.C. Pointu and others** is authority for the proposition that public morality concerns permits proscription of constitutionally derived rights. In that case, the Board opined:

> 'It has often been said, in passages in previous opinions of the Board too familiar to need citation, that constitutions are not construed like commercial documents. This is because every utterance must be construed in its proper context, taking into account the historical background and the purpose for which the utterance was made. ... The background of a constitution is an attempt, at a particular moment in history, to lay down **an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account**. Furthermore, the concepts used in a constitution are often very different from those used in commercial documents. **They may expressly state moral and political principles to which the judges are required to give effect in accordance with their own conscientiously held views of what such principles entail. It is however a mistake to suppose that these considerations release judges from the task of interpreting the statutory language and enable them to give free rein to whatever they consider should have been the moral and political views of the framers of the constitution.** What the interpretation of commercial documents and constitutions have in common is that in each case the court is concerned with the meaning of the language which has been used. As Kentridge A.J. said in giving the judgment of the South African Constitutional Court in *State v. Zuma* [1995] (4) B.C.L.R. 401, 412:-
>
> > "If the language used by the lawgiver is ignored in favour of a general resort to `values' the result is not interpretation but divination." (Emphasis added)

[237] She submitted further that ignoring the clear morality concerns of the challenged provisions would effectively erase from the **Constitution** the 'public morality' clause which underpins certain criminal offences including prostitution, adult incest, obscenity, child pornography and public nudity which are all based on society's moral objections to them. She submitted further that the **Constitution** does not embody any constitutional protection for fundamental rights related to sexual orientation, sexual activity, sexual expression or to engage in anal receptive sex.

[238] She argued that the freedom of expression protection is not absolute, does not include the right to expression of sexual intimacy and is subject to rights reasonably required in the interest of public health and/or public morality. Further, the right to freedom of conscience traditionally guarantees mainly freedom of thought and religion, does not extend to sexual intimacy, has not been breached and the protection is subject to public health and/or public morality exceptions. She stated that **Jeffers** is distinguishable from the present claims because in **Jeffers** the State had not raised an objection on the ground of public health.

[239] The Churches submitted that the claimants have not established how the challenged provisions deprive them of the protection afforded under section 9 of the **Constitution** because they have not pleaded those matters with any specificity. Furthermore, the challenged provisions do not prohibit them from holding the views they espouse and therefore do not infringe their right to protection of their freedom of conscience.

[240] They cited **EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)**[63] where the Court opined:

> '320. It is trite that a party alleging violation of a fundamental right must plead with specificity the violation, infringement or threatened violations and demonstrate that the violation or threat indeed occurred and that the Respondent was the violator. That is what constitutes a cause of action in a constitutional claim. It is not sufficient for a Petitioner to allege in general terms that a fundamental right or freedom has been violated. A court confronted with a claim of violation of a constitutional right is required to inquire into the allegations only when there are specific facts supporting a right in the constitution or the law. A Petitioner cannot merely enumerate constitutional provisions and allege their violations. He must prove the actual violations.'

[241] They submitted further that the claimants' interpretation of what the right to protection of freedom of conscience entails, is not within the ambit of section 9 of the **Constitution**, therefore their right to protection of their freedom of conscience has not been, is not being and is not likely to be infringed by the challenged provisions.

[242] VincyChap argued that intimate sexual conduct is one of the most basic and fundamental forms of human self-expression. Through engaging in sexual activity, humans can express some of our

[63] Petition 150 & 234 of 2016 (Consolidated) Kenya Law Reports 2019.

deepest and most important personal feelings and commitments to each other and are able to express our romantic attraction towards another, we are able to express our love for another and our commitment to another. VincyChap contended that the evidence from the Churches' witnesses recognized the integral role of sexual activity as a means of expression of romantic attraction, love and commitment between human beings, even if those witnesses regard this as only non-sinful in the context of monogamous heterosexual marriage. VincyChap invited the Court to find (as was done in 5 other Commonwealth Caribbean jurisdictions) that the challenged provisions unlawfully constrain and/or interfere in the claimants' private and intimate sexual conduct and activity, and impair an important aspect of their self-expression, dignity and autonomy. Therefore, the challenged provisions are inconsistent with the right to freedom of expression in sections 10 and 1(b) of the **Constitution** and should be declared unconstitutional.

[243] Learned Senior Counsel argued that the Attorney General has not discharged the heavy burden of showing that the challenged provisions are in the interest of public morality. He submitted that in **Holder-McClean-Ramirez** the Barbados Court confirmed that once the claimant has shown a *prima facie* infringement of fundamental rights, the onus shifts to the defendant to show that derogation is permissible under the strict terms and standards under the Constitution. In so doing, the Barbados Court affirmed the position advanced by VincyChap on the onus of proof.[64]

[244] VincyChap contended that mere public opinion and subjective moral and religious beliefs do not constitute a legitimate aim. They argued that the Attorney General has not discharged its heavy burden of establishing as a matter of law or fact that the multiple violations of fundamental rights caused by the challenged provisions are reasonably justifiable and proportionate measure in a democratic society and that the oral evidence served to fortify this position.

[245] They submitted further that even if public opinion or religious beliefs constituted a legitimate aim, the challenged provisions are disproportionate and neither the Attorney General nor the Churches have shown that total criminalization of same-sex intimacy is necessary and proportionate to the goal of protecting public morality. Instead, Pastor Haynes' and Rev. Davis' testimony shows that total criminalization of same-sex sexual activity would be wholly disproportionate to achieving any

[64] Jeffers (St Kitts) at [108] and De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, at p. 80F-G).

public morality goals. For example, decriminalising homosexuality would not prevent the Churches from continuing to preach that homosexuality is a sin—just as the absence of criminal laws proscribing adultery and pre-marital sex has not prevented them from preaching that either is a sin. They submitted therefore that the Churches have advanced the argument that one of their concerns is that following decriminalization what is likely to happen is that laws would be introduced to create hate crimes for teaching or preaching that buggery or sexual intimacy between same sex partners is a sin. Nonetheless it was admitted that such statutes if they infringe constitutional rights would be subject to challenge in court.

[246] VincyChap contended that similar arguments were advanced in **Orozco** and **Jeffers** and were rejected by the Court which found in both cases that religious beliefs of intervening parties on homosexuality are insufficient to constitute 'public morality' under the **Constitution**. This Court should find likewise.

[247] VincyChap submitted that the Attorney General has failed to show that the challenged provisions are reasonably required to prevent an increase in HIV incidence rates. It submitted further that the experts made multiple stark—and telling—admissions that only served to reaffirm the claimants' and VincyChap's case:

(i) No evidence was led about the impact of decriminalization in France and the Bahamas. Dr. Bain admitted in cross-examination that, without data concerning the position before and after criminalization, the figures concerning France 'tell us nothing about the impact of decriminalization in France.' Likewise, figures concerning the Bahamas also tell us 'nothing about the impact of decriminalization [in the Bahamas]. As Professor Beyrer explained at trial, Dr. Bain's data on the Bahamas does not point to a link between criminalization and HIV rates because it only compared prevalence overall in the country and among homosexual men.

(ii) No evidence of confounding factors was presented. In his expert report, Dr. Bain stated that 'a range of confounding factors' in particular countries influence the relationship between decriminalization and HIV prevalence rates, without ever explaining what these 'confounding factors' were. In the course of cross-examination, Dr. Bain admitted that it was an omission in his report.

(iii) Admission that medication provides complete protection from HIV infections. In cross-examination, Dr. Bain admitted that '[w]hen taken as prescribed, HIV medication . . . gives virtually complete protection from HIV for people who are HIV negative.' Dr Bain

also admitted that '[t]here are in fact many different kinds of HIV medication now,' so to the extent one medication does not work well (for example, because the patient develops an allergy), the patient 'can be switched to another treatment.' Further, Dr. Bain also admitted that pre-exposure prophylaxis 'is already being provided in Saint Vincent and the Grenadines [to those] who are at risk of contracting HIV.

[248] While acknowledging that Professor Beyrer, who is a world-known expert for his research and expertise in HIV infections in MSM, did not conduct research specifically in Saint Vincent and the Grenadines, VincyChap contended that this in no way detracts from his testimony. As he explained at trial, there is 'no reason' why the conclusion in his expert report would not apply to Saint Vincent and the Grenadines. Moreover, effective pre-exposure protection in the form of PREP is available, and this has shown to be highly effective at preventing HIV/AIDS. In summary, the Attorney General failed to discharge the burden to show that the decriminalization of the challenged provisions would lead to an increase in HIV incidents. As Professor Beyrer explained in an answer to the Court he is unaware of any published research suggesting that suggesting that decriminalization leads to an increase in HIV infection globally. VincyChap argued that for these reasons the Court should recognize that decriminalization would not increase HIV incidents, and therefore that the derogation is not made out.

**DISCUSSION**

Freedom of Conscience

[249] Section 9(1) and (5) of the **Constitution** state:

'**9. Protection of freedom of conscience**

(1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of conscience, including freedom of thought and of religion, freedom to change his religion or belief and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.

(5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably required-

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

(b) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practice any religion without the unsolicited intervention or members of any other religion; or

(c) for the purpose of regulating educational institutions in the interests of the persons who receive instruction in them,

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society. (Emphasis added)

[250] Sub-section (1) embodies a non-exhaustive list of the different manifestations of the enjoyment of freedom of conscience, namely freedom of thought and of religion; freedom to change one's religion or belief and freedom either alone or in community with others; and both in public and in private to manifest and propagate one's religion or belief in worship, teaching, practice and observance. Professor Lloyd Barnett in his thesis **The Constitutional Law of Jamaica**, described this right as involving:

> '… the right to carry out the external practices of one's creed, to endeavour to persuade others to adopt one's belief as well as the right to organize and manage its activities and ceremonies.'[65]

[251] Applying the plain and ordinary rule of interpretation, it is clear that section 9(1) of the Constitution embodies the right to one's own religious and fundamental convictions about life in general including to practice the same. This is in keeping the construction applied in **Campbell and Cosans v the United Kingdom**.

[252] The claimants have sought to extend the right to hold religious and related beliefs to what they described as a right to engage in sexual intimacy with other males or to otherwise express one's sexuality.[66] It is rather doubtful that freedom of conscience conferred by section 9(1) conceives of or contemplates such a right. Certainly, none of the authorities from the Commonwealth Caribbean jurisdictions adopt such an interpretation with respect to similarly worded constitutional provisions. I make no finding that section 9(1) of the **Constitution** achieves this. Accordingly, the claimants

[65] Oxford University Press for The London School of Economics and Political Science. 1977, at pg.405.

[66] Paras. 2.10.1 and 2.10.2 of the Fixed Date Claim Forms.

have not made out a prima facie case of breach of such a right and it is not necessary to consider whether the limitations of public health or public morality are applicable in relation to that provision.

[253] Section 10(1) and (2) of the **Constitution** contain the relevant provisions that provide for freedom of expression. They state:

> '**10. Protection of freedom of expression**
>
> (1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons and freedom from interference with his correspondence.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -
>
> (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;
> (b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; or
> (c) that imposes restrictions upon public officers that are reasonably required for the performance of their functions, and except so far as that provision or, as the case may be, the things done under the authority thereof is shown not to be reasonably justifiable in a democratic society.' (Emphasis added)

[254] Learned Kings Counsel Mr. Middleton and learned Senior Counsel Mr. Hamel-Smith and Mr. Graham Bollers made compelling arguments that a series of judicial decisions in neighbouring Caribbean jurisdictions have held that provisions similar to section 10 of the **Constitution** are unconstitutional. They cited **Jamal Jeffers v The Attorney General of St. Christopher and Nevis**, **McEwan v The Atorney General of Guyana**; **Orden David v The Attorney General of Antigua and Barbuda**, **Orozco v Attorney General of Belize**[67] and **Jones v The Attorney**

[67] Claim no. 688 of 2010.

**General of Trinidad and Tobago**. They also relied on extra-regional authorities including **Johar v Union of India**[68] and
**Norris v Ireland**[69].

[255] As regards the allegations of breach of sections 9 and 12 (protection of freedom of conscience and movement respectively) the claimants relied on **Campbell and Cosans v the United Kingdom**, a decision of The European Court and the UK Supreme Court's judgment in **HJ (Iran) v Secretary of State for the Home Department**.

[256] The decisions in **Jeffers**, **Jones**, **Orden George**, **McEwan** and others have emphatically held that similarly worded provisions to section 10(1) in the Constitutions of those other jurisdictions infringe the respective claimants' right to protection of freedom of expression. They are of persuasive and highly persuasive authority in this jurisdiction. It is instructive to borrow the distillation of the legal position as articulated by Ward J. in **Jeffers**. Commenting on the CCJ's ruling in **McEwan**, he opined:

> 'This case completely undermines the defendant's argument that the right to freedom of expression should not be stretched beyond the limits of the text to include matters which are not stated. Such a restrictive approach is to be eschewed. As **Mc Ewan** exemplifies, freedom of expression is not confined strictly to speech or such forms of oral or written communication. It transcends those more obvious examples of expression and includes expressions of one's identity such as dress, action or behaviour. In that light, sexual acts between consenting adults are cognisable as a form of expression protected by the right to freedom of expression under section 3(b) and 12 of the Constitution.
>
> [75] In **Johar**, the Supreme Court of India acknowledged that LGBT persons may express their identities in their choice of sexual partner, and their acts which express their sexual desire. Under the comparable provision of the Indian Constitution, the Supreme Court held that a law criminalising buggery breached the right to freedom of expression. Similar conclusions have been reached about the buggery laws in Trinidad & Tobago in **Jason Jones v AG**, where Rampersad, J held that the buggery and serious indecency laws in Trinidad and Tobago breached the claimants right, inter alia, to freedom of expression.'[70]

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[68] AIR 2018 SC 4321.

[69] (1991) 13 EHRR 186.

[70] At paras. 74 and 75.

[257] Based on those legal principles, which I adopt, I am satisfied that the claimants have established a *prima facie* case that (in relation to their assertions of breach of section 10 of the **Constitution**), they could not while in Saint Vincent and the Grenadines freely engage in sexual intimacy with other consenting males which is a primary expression of their personhood; they lacked the freedom of choice in matters which amount to the expression, manifestation and exercise of personal sexuality; have not fully enjoyed their lives, expression of their personalities or autonomy about their intimate relationships without the persistent risk of penalization; were not free or immune from invasions of their freedom of expression or risks thereof by the police; they did not freely express an integral part of their personality while there; the State failed in its positive duty to enable such expression and the challenged provisions operated to curtail, suppress and/or eradicate the expression of an integral

part of their identity in both private and public.

[258] Having found that the claimants' constitutional right to protection of freedom of expression was infringed by the State in the past, I now turn to assess whether the infringements are reasonably required and are reasonably justifiable in a democratic society.

[259] The learned Solicitor General argued that the State has a legitimate and constitutionally protected interest in maintaining the challenged provisions in furtherance of public health objectives. She submitted further that the State has a legitimate and constitutionally protected interest in maintaining the challenged provisions in furtherance of clear public morality objectives. She argued further that anal receptive sex constitutes a public health risk that the State has a public interest in minimizing. She contended that the well-documented evidence adduced in the case establishes a heightened risk of HIV infection among persons who engage in anal receptive sex. She submitted that the court need only determine whether there is a reasonable nexus between the challenged provisions and the State's public health objective to minimize the risk of incurable and potentially fatal sexually transmitted diseases.

[260] Among other things, the Churches submitted that the challenged provisions do not prohibit the claimants from holding the views they espouse and therefore do not infringe their right to freedom

of conscience. They relied on **EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)**

[261] It is not in dispute that certain of the fundamental rights provisions in the **Constitution** permit the State to impose limitations in respect of their enjoyment by a resident of or visitor to the State if 'reasonably required in the interests of defence, public safety, public order, public morality and public health', but only to the extent that such limitation or the thing done under it is shown not to be reasonably justifiable in a democratic society. **Elloy De Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing and Others**[71] established that the test of what is reasonably justifiable in a democratic society is satisfied if three distinct elements exist:

1. The limitation must have a sufficiently important legislative objective to justify limiting a fundamental right;
2. The measures designed to meet the legislative objective must have a rationale connection with it; and
3. The least drastic means are to be used to achieve the objective.

[262] The two legislative objectives advanced by the Honourable Attorney General relate to public health and public morality. In relation to public health, the Attorney General contends that the increasingly high cost of supplying medication to persons stricken with HIV provides a reasonably justifiable rationale for maintaining the challenged provisions on the statute books. I make the observation that this argument was not raised in any of the cases decided in the Commonwealth Caribbean and relied on by the claimants.

[263] The eminently qualified experts who testified in this case held differing opinions with respect to elements of the science behind the subject under consideration and to some extent in relation to interpretation of the data. This has been adequately framed in the submissions by the respective parties outlined earlier and I refrain from repeating them. However, enough similarities emerged to inform the Court's ultimate conclusion as to whether the State's maintenance of the challenged

[71] (1998) 53 WIR 131.

provisions can be objectively defended as being reasonably required in the interest of public health and as being reasonably justifiable in a democratic society.

[264] Professor Beyrer, Professor Bain and Dr. Davy were unequivocal in their opinion that persons who engage in anal receptive sex including MSMs are susceptible to a heightened risk of HIV infection which is incurable, contagious and a potentially fatal disease. Moreover, infected persons must undergo lifelong application and ingestion of expensive anti-retroviral medications at an increasing cost to the State. In addition, the experts accepted that the objective data points to an increase of HIV infection rates among MSMs. Also pertinent is Professor Beyrer's admission that this State's direct expenditure on HIV care and treatment in 2012 was in the region of over US$725,000.00. and PS Knights' testimony that the State has the highest proportion of HIV cases among neighbouring OECS States. I consider that by any standards, that is an unsustainable proposition for any small island developing State like Saint Vincent and the Grenadines.

[265] I take into consideration that none of the experts presented data as to past or current statistics relative to the HIV infection rates and related issues in Saint Vincent and the Grenadines. The claimants invite the Court to extrapolate from statistics obtained from African and other far-flung jurisdictions the likely increase in the incidence and prevalence HIV if the challenged provisions are retained. I hesitate to do so and refrain from doing so, being ever mindful that the cost and public health implications for the State are of critical importance and should not be factored based purely on theory or logic, or even imprecise suppositions and opinions that have not been scientifically verified or empirically demonstrated.

[266] Another more important consideration is the lives that may be adversely impacted by such an approach especially in view of the uncontroverted reality that available evidence suggests that HIV rates are high in jurisdictions where no criminal prohibition exists in relation to buggery and that within the Commonwealth Caribbean HIV rates have been declining in the States that retain legal prohibitions akin to the challenged provisions. Finally, I take into account the absence of critical evidence that demonstrates a direct causal relationship between the recission of buggery laws and a corresponding reduction in HIV infections while noting Professor Beyrer's opinion that there is an

association between the two. The common law concerns raised by the claimants would involve a consideration of identical matters and lead me to the same conclusion.

[267] To my mind, the thought of a public health crisis occasioned by an unstemmed deluge of new HIV is cases is a real and serious concern which reasonably justifies a public health response of the kind embedded in the challenged provisions. I recognize that all States do not have the same measure of resources to tackle the myriad of health and other issues confronting them. Without judgment, I take judicial notice of the notoriously known inadequacies of the current health care capabilities in this State amidst the increasing demands on it.

[268] As regards the public morality concerns, I note the Attorney General's and the Churches' submissions regarding the mores which informed the crafting of the **Constitution** and which permeate the society. I also remain cognizant of the claimants' contentions that public morality concerns are not a sustainable ground for maintaining the challenged provisions in the law.

[269] I also remind myself of Chief Justice Rawlins' pronouncement in **Chief of Police and Another v Calvin Nias**, that:

> 'there is no set formula by which to determine scientifically what the public morality of a particular society is at any specific time. . . 'morality' is not defined in the Constitution and cannot be derived from any particular doctrine or from any one religion. . . 'morality' means the accepted rules and standards of human behaviour which vary from society to society and from time to time. . . 'public morality' is referable to notions of good or bad conduct in a society and . . . that the immorality of an act or representation has to be determined by the moral standards of the society. …
>
> … 'public morality' encompasses those normative values of a society, which reflect the principles and moral standards, which form the society's code of good conduct, which values
>
> are generally accepted and adhered to by the society.'[72]

[270] Also instructive is the House of Lords' observation in **Regina v Henn and Darby** that:

[72] SKBHCVAP2007/010 at paragraph 27.

> 'The term "public morality" does not appear elsewhere in the [European Economic Community] Treaty. Nor has it been the subject of consideration or comment by the Court. Unlike the term "public policy", it is suggested that the term "public morality" is comparatively self-defining. Like "public policy", however, the content of "public morality" must clearly be a matter varying from country to country and indeed time to time. It is thus quite inappropriate for any absolute international standard, and a greater area of discretion must be granted to the Member State than might be appropriate with regard to some of the other, more objective grounds of derogation. . . So far as "public morality" is concerned matters of "indecency and obscenity" fall within that concept and the content of the domestic law of the Member State.'[73] (Emphasis added)

[271] I adopt and apply the foregoing eloquent elucidation of the concept of public morality and apply them to the facts and circumstances of this case. In my opinion, Pastor Haynes' and Rev. Davis' testimony gave a substantial and substantive flavour of the prevailing mores in the State of Saint Vincent and the Grenadines at the present time and even from the promulgation of the **Constitution**. I cannot ignore the presentation of this local knowledge although I admit that it is impossible to say that they represent the majority of Vincentians. Their testimony was compelling and in my opinion provides an accurate reflection of the public morality standards by which the Vincentian society governs itself. Similar considerations would apply to the claimants' common law challenge of sections 146 and 148 of the **Criminal Code**.

[272] In those circumstances, I am therefore satisfied that the policy issues which dictate the State's response are matters best left to the State. In conclusion, in all the circumstances, and in light of my observations, I harbour no doubt that the approach adopted by the State in relation to its public health and public morality concerns on this issue, have a rational connection to the stated objective and, within the context of this State's limited resources and the mores relied on, is most likely the least drastic means to achieve that goal. I therefore make no finding that the challenged provisions infringe either sections 9 or 10 of the **Constitution**. In addition, for those reasons I find that the

[73] [1981] AC 850.

challenged provisions are not arbitrary, irrational or contrary to the common law prohibition on irrational grounds.

**REMEDIES**

[273] Having found that Mr. Johnson and Mr. MacLeish have not made out their claims, it follows that they are not entitled to any of the relief sought. No declaration or other redress is granted to them.

Costs

[274] Costs generally follow the event. Accordingly, the Attorney General is entitled to recover costs from the claimants on the prescribed costs scale pursuant to CPR 65.5(2)(d). Javin Johnson and Sean MacLeish shall pay to the Attorney General costs of $7,500.00 on their respective claims.

**ORDER**

[275] It is accordingly ordered:

1. Javin Johnson's claim is dismissed in its entirety.
2. Sean Mac Leish's claim is dismissed in its entirety.
3. Javin Johnson and Sean Mac Leish shall pay the Attorney General prescribed costs of $7,500.00.

[276] I wish to thank all counsel for their very comprehensive, extremely helpful written submissions.

EASTERN CARIBBEAN SUPREME COURT · HIGH COURT OF JUSTICE · FIAT JUSTITIA

**Esco L. Henry**
**HIGH COURT JUDGE**

By the Court

REGISTRY OFFICE ST. VINCENT AND THE GRENADINES

Registrar