MADHEWOO M. v THE STATE OF MAURITIUS AND ANOR

2015 SCJ 177

Record No. 108696

IN THE SUPREME COURT OF MAURITIUS

In the matter of:

Maharajah Madhewoo

Plaintiff

v.

1. **The State of Mauritius**
2. **The Minister of Information and Communication Technology**

Defendants

…..

JUDGMENT

Introduction: The declaratory orders sought

In the present action entered by way of a plaint with summons the plaintiff seeks from this Court a judgment declaring that –

> *"(1) the implementation of the new biometric identity card as per the National Identity Card Act 2013 by the agents and/or the employees of the Defendants, is in breach of Sections 1, 2, 3, 4, 5, 7, 9, 15, 16, 45 of the spirit of Constitution coupled with Article 22 of the Civil Code and therefore null and void;*
>
> *(2) the blanket power of collection and the indefinite storage of personal biometric data including the finger prints on the biometric identity card of citizens including Plaintiff by the agents and/or the employees of the Defendants are in breach of Sections 1, 2, 3, 4, 5, 7, 9, 15, 16, 45 of the spirit of Constitution coupled with Article 22 of the Civil Code and therefore null and void*."

Preliminary remarks

As a result of general elections which took place after judgment had been reserved in the present case, a new government with new Ministers took over. As the new Minister of

Information and Communication Technology was himself a plaintiff in a similar case before this Bench, the case was fixed for mention in view of ascertaining whether the stand of the

defendant No 2 was still the same. Although the statements of Counsel for the defendants were rather evasive, the stand of the defendant No 2 has remained the same both in facts and in law.

The essential undisputed facts:

The following essential facts, as can be gathered from the common statement of agreed facts filed by the parties, are not in dispute:

1. The plaintiff is a citizen of the Republic of Mauritius;

2. The National Identity Card (Miscellaneous Provisions) Bill (No. XVII of 2013) was passed on 9th July 2013;

3. The implementation of the new biometric identity card project, which was widely publicized, started as from 1st October 2013 and all adult citizens of the Republic of Mauritius have since then been under a legal obligation to apply for a new biometric Identity Card to replace the former one.

4. To obtain the new biometric Identity Card, existing card holders must register at an Identity Card Conversion Centre in Mauritius, while persons applying for an identity card for the first time have to register at the National Identity Card Unit of the Civil Status Division;

5. The National Identity Card Act provides that every person applying for an identity card is under an obligation to, *inter alia*:

   (i) allow his fingerprints, and other biometric information about himself to be taken and recorded; and

   (ii) allow himself to be photographed.

6. To get the new Identity Card, Plaintiff will have to provide biometric information, namely his fingerprints and photograph, to employees of the Defendants.

7. Plaintiff has, as at date, not applied for a biometric identity card;

8. In a number of articles in newspapers and their online versions, as listed in the parties' common statement of agreed facts, concern and qualms have been expressed about the giving of fingerprints and about other data to be contained in the new identity card.

9. The total cost of implementing the Mauritius National Identity Card Project on a turnkey basis proposed by the Singapore consortium is estimated at Rs 1.1 billion.

Outstanding issues raised in the *plea in limine*

The following points, which were raised in a plea *in limine* at the stage of pleadings, were not pressed prior to evidence being heard, but are now being raised:

(a) that adequate alternative means of redress are open to the plaintiff;
(b) that the plaintiff has failed to disclose the sections of the law under which the application for redress has been made;
(c) that the plaint does not state with precision the provisions of the Constitution which have allegedly been contravened;
(d) that the nature of the relief sought has not been stated with precision;
(e) that the defendant No. 2 should be put out of cause as a defendant as there is no prayer directed against him in that capacity.

We shall now deal with those points:

(a) The contention that adequate means of redress are open to the plaintiff

As regards (a) above, section 17(2) of the Constitution, which provides for the jurisdiction of the Supreme Court to hear applications for redress where a person alleges that any of sections 3 to 16 has been, is being or is likely to be contravened in relation to him, contains the following proviso:

> "*Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law*."

It is the defendants' submission that the adequate means of redress for the contravention alleged by the plaintiff are available to the plaintiff under the Data Protection Act. That Act, they point out, provides adequate investigatory and enforcement safeguards against the misuse of personal data.

In our view, this submission is based on incorrect reasoning as the defendants cannot invoke a law the constitutionality of which is put in question as the law under which an alternative means of redress lies.

(b) The alleged failure to disclose the section of the Constitution under which the application has been made

In relation to (b) above, we are of the view that it is clear enough from the plaint, what are the sections of the law under which the application has been made. Section 17(1) of the Constitution reads as follows:

> "*Where any person alleges that any of sections 3 to 16 has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter that is lawfully available, that person may apply to the Supreme Court for redress*."

And section 83(1) of the Constitution provides:

> "*Subject to sections 41(5), 64(5) and 101(1), where any person alleges that any provision of this Constitution (other than Chapter II) has been contravened and that his interests are being or are likely to be affected by such contravention, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for a declaration and for relief under this section*."

The alleged breaches of sections 1, 2, 3, 4, 5, 7, 9, 15 and 16 as mentioned in the plaint make it tolerably clear that redress in that connection is being sought under section 17(1) of the Constitution. Similarly, the alleged breach of section 45 falls squarely under the redress provided for in section 83(1), bearing in mind that the subsections 41(5), 64(5) and 101(1) to which the provision in section 83(1) is subjected are not applicable in the present case.

(c) The alleged failure to state with precision in the plaint which provisions of the Constitution have allegedly been contravened

It is laid down in rule 2(1) of the Supreme Court (Constitutional Relief) Rules 2000 that an application for constitutional relief must state with precision the provision of the Constitution which is said to have been, or to be likely to be, contravened. It is beyond dispute that the provisions of the Constitution which are alleged in the plaint to have been or to be about to be contravened are specified. In our view, there has been sufficient compliance by the plaintiff with rule 2(1) above and the submission of the defendants that the plaintiff has failed "*to state with sufficient precision the way in which the provisions of sections 1, 2, 4, 7, 13, 15 and 45 have been breached*" is not, in our view well grounded.

It is apposite at this juncture to point out, in relation to the points raised at heading (b) and the present heading, that, as conceded by the defendants in their written submissions, this Court has often observed that objections of a procedural nature should not be a bar to the vindication of fundamental human rights.

(d) The allegation that the nature of the relief sought has not been stated with precision

Here too is an allegation which is to our minds unwarranted. In the introductory part of this judgment we have set out the declaratory orders sought under the plaint. This is, in our view sufficient compliance with rule 2(1) of the Supreme Court (Constitutional Relief) Rules 2000 which requires the application to state with precision the nature of the relief sought.

In their written submissions, Counsel for the defendants have pointed out that the "National Identity Card Act 2013" as referred to in the first declaratory order sought does not exist. However, nobody can be misled by the incorrect mention of the year 2013 after the correct appellation of the Act – "The National Identity Card Act". Indeed it can be gathered from the agreed statement of facts, the agreed statement of disputed facts and the common statement of outstanding issues of law, that the provision of law the implementation of which is being contested is section 4(2)(c), as amended by section 15 of Act 20 of 2009 to introduce the requirement that every person who applies for an identity card shall "*allow his fingerprints and other biometric information about himself, to be taken and recorded*" for the purpose of the identity card. That amendment came into operation on 16 September 2013 by virtue of Proclamation 42 of 2013, and this is no

doubt the explanation for the erroneous reference to the "*National Identity Card Act 2013*".

(e) The contention that defendant No. 2 should be put out of cause

It is contended by the defendant No. 2 that he should be put out of cause as a defendant inasmuch as there is no prayer against him. A perusal of the plaint shows, however, that the declaratory orders sought in paragraph 27 of the plaint with summons are in respect of the implementation of the new biometric card and the collection and indefinite storage of personal biometric data by the agents and employees of both defendants. The defendant No. 2 cannot in the circumstances be put out of cause.

In view of our conclusions above, all the outstanding points contained in the plea *in limine* and raised at the end of the trial, must fail.

The alleged breaches of the Constitution

We now turn to the alleged breaches of sections 1, 2, 3, 4, 5, 7, 9, 13, 15, 16 and 45 as a result of the implementation of the new biometric identity card and the powers granted for the collection and storage of personal biometric data.

For reasons which will become evident later in the judgment, we propose to deal, in the first place, with the provisions of the Constitution dealing with specific rights other than the alleged right to privacy, namely sections 4, 5, 7, 13, 15, 16 and 45 of the Constitution.

The alleged breach of the right to life protected by section 4 of the Constitution

Section 4(1) of the Constitution provides:

> "*No person shall be deprived of his life intentionally save in execution of the sentence of a Court in respect of a criminal offence of which he has been convicted*."

Section 4(2) then enumerates four circumstances where a person shall not be regarded as having been "deprived of his life" in contravention of the section.

It is the contention of the plaintiff that the right to life subsumes the right to privacy. Counsel for the plaintiff has referred to Article 21 of the Constitution of India which provides that no person "*shall be deprived of his life …. except according to procedure established by law.*"

And he has pointed out that it has been held in the Indian case law that a scheme – The Aadhaar Scheme – whereby the applicants were required to part with personal information on biometrics, iris and fingerprints was in breach of Article 21 inasmuch as it infringed their right to privacy which was part of their right to life.

Counsel for the defendants has submitted, in reply, that there is nothing in plaintiff's evidence nor in the written submissions of plaintiff's Counsel, indicating how plaintiff's right to life is jeopardized.

In our view the reference to Article 21 of the Indian Constitution and to the record of proceedings of the **Aadhaar case** which was put in by Counsel for the plaintiff cannot be of assistance to the plaintiff's case inasmuch as section 4 of our Constitution cannot, having regard to its specific wording, be construed in the same way as Article 21 of the Indian Constitution. Indeed, the wording of section 4 of our Constitution makes it clear that the constitutional protection afforded is in respect of life in contradistinction from death. It is significant that all four circumstances set out under section 4(2) as those where a person shall not be regarded as having been deprived of his life in breach of the section relate to the person's death as a result of force that is reasonably justifiable for certain purposes. We consider therefore that the law for the implementation of the new biometric card and for the collection and storage of personal biometric data does not constitute a breach of the right to life protected by section 4 of the Constitution**.**

The alleged breach of the right to liberty as afforded by section 5 of the Constitution

The plaintiff is complaining that there is breach or likely breach of his right to liberty as afforded by section 5 of the Constitution**.**

Section 5(1) of the Constitution provides that "*No person shall be deprived of his personal liberty save as may be authorised by law*" in a number of circumstances listed (a) to (k).

The plaintiff has averred in that respect that *"the unilateral decision of Defendants of imposing a legal obligation upon him to submit his fingerprints and this, without his consent and further the collection, processing and/or retention of Plaintiff's personal biometric information including his fingerprints constitutes a serious interference by Defendants and/or their agents*

and/or their employees with Plaintiff's basic fundamental constitutional rights amongst the right to liberty and the right to protection of private life."

The plaintiff is also contending that "*The blanket power of collection and the indefinite storage of personal biometric data, including fingerprints, on the biometric identity card of citizens, including Plaintiff, are in breach of section 5 of the Constitution*".

Furthermore, the plaintiff is challenging the constitutionality of section 7(1) and (1A) of the National Identity Card Act as being violative of his fundamental right to liberty. It has been argued, in that connection, that the plaintiff has a serious apprehension that he will be legally compelled to show his biometric identity card on request by any person. He will thus be compelled to produce his card forthwith or within a reasonable time and there is no indication in the law as to who is authorized to ask for the production of his identity card and when.

The defendants' stand is that the question of plaintiff being deprived of his personal liberty does not arise at all. There is close similarity between section 5 of the Constitution and Article 5 of the European Convention, hence the propriety of referring to the jurisprudence on the European Convention. An overview of local jurisprudence as well as that of the European Court of Human Rights in relation to section 5 of the Constitution and to Article 5 of the European Convention reveals that the right to liberty being conferred is the right not to be detained physically either arbitrarily or unlawfully. The imposition upon the plaintiff of a legal obligation to allow his fingerprints to be taken does not amount to actual physical deprivation of the plaintiff's personal liberty. Nor do the collection and retention of fingerprints deprive the plaintiff of his physical liberty.

A careful examination of section 5 of the Constitution lends support to the stand of the defendants. The circumstances listed (a) to (k) in which the law may provide for the deprivation of a person's personal liberty make it clear that the protection which is afforded under section 5 is essentially in respect of the deprivation of the physical liberty of that person. Section 7(1) and (1A) of the National Identity Card Act only creates a legal obligation for a person to produce his National Identity Card. This can only be done according to the Act, upon a request made by a person who is empowered by law to ascertain the identity of a person in reasonable circumstances. Such a request does not amount, in our view, to any physical deprivation of a person's liberty as contemplated by section 5 of the Constitution. Similarly, the legal obligation created under section 4(2)(c) of the National Identity Card Act for a person to allow his fingerprints to be taken, and the provision under the Data Protection Act for the collection,

retention and storage of personal data cannot be said to amount to an actual physical deprivation of personal liberty in breach of section 5 of the Constitution.

The alleged breach of section 7 of the Constitution which provides protection from inhuman treatment

Section 7(1) of the Constitution provides:

"No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment."

"*Inhuman*" in section 7 of the Constitution has been defined in **Virahsawmy and Anor v The Commissioner of Police [1972 SCJ 169]** (Sir Maurice Latour-Adrien CJ and Ramphul J.) as "*brutal, unfeeling, barbarous*". In the **Handbook issued by the Council of Europe on the Prohibition of Torture**, it is made clear that ill-treatment that does not have sufficient "*intensity or purpose*" to amount to torture, will be classed as "*inhuman*" or "*degrading*" when it deliberately causes "*severe suffering, mental or physical, which in the particular situation is unjustifiable*".

In the light of the above definitions, we agree with the submission of Counsel for the defendants that the plaintiff has failed to show how the collection and retention of fingerprints data amount to a breach or a likely breach of section 7 of the Constitution. Plaintiff has complained that he feels he is being treated as a criminal when he feels compelled, under penal sanction, to provide his fingerprints. However, as rightly pointed out by the defendants' Counsel in their written submissions, the plaintiff is wrongly associating the collection of fingerprints for the purpose of the NIC with the collection of fingerprints of people convicted of criminal charges or subject to criminal investigation. Fingerprints are collected and retained to allow identity authentication and to prevent usurpation of identity. Furthermore, they are provided to the Registrar of Civil Status in a conversion centre and not given in a police station in circumstances in which one is being treated as a suspect. The plaintiff has failed to establish that the taking of fingerprints or the procedure for the collection and storage of data prescribed under the Act and Regulations would subject the plaintiff "*to torture or to inhuman or degrading punishment"* in violation of section 7 of the Constitution.

The alleged breach of section 13 of the Constitution which provides for protection of freedom of assembly and association

Section 13(1) provides:

> "*Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and, in particular, to form or belong to trade unions or other associations for the protection of his interests*."

Section 13(2) then sets out the circumstances in which a law shall not be held to be inconsistent with or in contravention of this section.

In para 59 of plaintiff's written submissions, it is submitted that the implementation of the new biometric identity card scheme by the employees of defendants is in breach of section 13 of the Constitution; and that the blanket power of collection and the indefinite storage of personal biometric data, including fingerprints, on the biometric identity cards of citizens, including plaintiff, by the employees of defendants are also in breach of section 13 of the Constitution.

We however agree with the submission of Counsel for the defendants that in view of the plaintiff's broad and unsubstantiated submission at paragraph 59 of his written submissions, the plaintiff has not in any way shown how section 13 of the Constitution has been breached or is likely to have been breached in relation to him.

The alleged breach of the freedom of movement guaranteed by section 15 of the Constitution

Section 15(1) of the Constitution provides:

> "*No person shall be deprived of his freedom of movement, and for the purposes of this section, that freedom means the right to move freely throughout Mauritius, the right to reside in any part of Mauritius, the right to enter Mauritius, the right to leave Mauritius and immunity from expulsion from Mauritius*."

Section 15(2) and (3) then provides in which circumstances restrictions on a person's freedom of movement shall not be inconsistent with or in contravention of this section.

We agree with Counsel for the defendants that no cogent submissions have been made on behalf of the plaintiff on the issue of breach of this section.

In the plaint with summons plaintiff has claimed that his freedom of movement is likely to be breached because it has been announced that persons above 60 years of age will have to show their new identity card whilst travelling by bus, and plaintiff will turn 60 next year. However as rightly pointed out by Counsel for the defendants, the above facts and the evidence of the

plaintiff do not disclose a breach or likely breach of plaintiff's freedom of movement, especially as there is no constitutional right to travel free by bus in Mauritius and, as per the evidence of Mr. Ramah, only the photograph on the card and the "SC" logo will be relevant for the purposes of bus travel. No contravention of the plaintiff's right to freedom of movement has been established.

The alleged breach of section 16 of the Constitution which offers protection from discrimination

Section 16(1) provides that no law shall make any provision that is discriminatory either of itself or in its effect. Section 16(3) defines "*discriminatory*" as meaning "*affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, caste, place of origin, political opinions, colour, creed or sex*." Sections 16(4), (5) and (7) then provide in which circumstances a law shall not be held to be inconsistent with or in contravention of this section.

As rightly submitted by Counsel for the defendants, the plaintiff has not made out any case for a breach or likely breach of section 16 of the Constitution.

The alleged breach of section 45 of the Constitution

Section 45 provides that "*subject to this Constitution, Parliament may make laws for the peace, order and good government of Mauritius*".

The Mauritian Parliament is thus vested with exclusive power to pass any laws which in its wisdom will promote "*peace, order and good government,"* and the only limitation to this power is that it must not be exercised in breach of the Constitution. The role of the Court is therefore to decide on the constitutionality of any law enacted by Parliament and the Court's intervention falls squarely within the ambit of section 2 of the Constitution which reads:

> "*This Constitution is the supreme law of Mauritius and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void".*

As the only arguments of the plaintiff in relation to section 45 of the Constitution question issues of policy and good governance generally including disbursement of allegedly excessive funds, and do not indicate any specific breach of the Constitution in the exercise of the Constitutional law making powers under section 45, we do not consider that our intervention as a constitutional Court is warranted.

The alleged breaches of constitutional provisions relating to privacy

We now turn to the constitutional provisions which are alleged to confer a right of privacy and the legislative provisions which are alleged to be violative of that right.

The relevant provisions of the National Identity Card Act ("NIC Act")

There is a legal duty on every adult citizen of Mauritius to apply for the issue of an identity card under Section 4 of the NIC Act.

For that purpose section 4(2) provides that:

"*2. Every person who applies for an identity card shall –*

(a) *produce his birth certificate or his certificate of registration or naturalisation as a citizen of Mauritius, as the case may be;*

(b) *produce such other documents as the Registrar may require;*

(c) *allow his fingerprints, and other biometric information about himself, to be taken and recorded; and*

(d) *allow himself to be photographed;*

for the purpose of the identity card."

"Biometric information" is defined in section 2, which is the Interpretation section of the Act, in the following terms:-

"*biometric information" in relation to an individual, means data about his external characteristics, including his fingerprints*;"

Section 5(2)(h) further provides that every identity card shall contain, in electronic form or otherwise "*such other information as may be prescribed".*

Section 7 deals with the requirement to produce an identity card when requested. Section 7(1) of the Act provides as follows:

"*7. Production of identity card*

(1) Every person may –

(a) in reasonable circumstances and for the purpose of ascertaining the identity of another person; or

(b) where he is empowered by law to ascertain the identity of another person,

request that other person to produce his identity card where that person is a citizen of Mauritius."

Section 7(1A) of the NIC Act further provides as follows:

"*(1A) Where a person is required to produce his identity card in accordance with subsection (1)(b), he shall –*

(a) forthwith produce his identity card to the person making the request; or

(b) *where he is not in possession of his identity card, produce his identity card within such reasonable period, to such person and at such place as may be directed by the person making the request."*

Section 3 of the Act provides that the Registrar of Civil Status shall cause to be kept a register in which shall be recorded particulars of the identity of every citizen of Mauritius. Section 3(2)(b) reads as follows:

"3(2) *The particulars required to be recorded in respect of any person under subsection (1) shall be –*

(a) the sex and names of that person; and

(b) such other reasonable or necessary information as may be prescribed regarding the identity of the person."

Section 10 of the Act empowers the Minister responsible for the subject of Civil Status to make such Regulations as he deems necessary for the purposes of the Act.

Section 9(2) and (3) of the Act provides that any person who contravenes the Act, or any regulations made under it, shall commit an offence for which he or she shall be liable, on conviction, to a fine not exceeding 100,000 rupees and to imprisonment for a term not exceeding 5 years.

Section 12 of the Act further provides that the collection and processing of personal data, including biometric information under the Act shall be subject to the provisions of the Data Protection Act.

The National Identity Card (Particulars in Register) Regulations 2013 made pursuant to sections 3(2)(b) and 10 of the NIC Act, prescribe the particulars to be included in the Register. Regulation 3 reads as follows:

> "*3. For the purposes of Section 3(2)(b) of the Act, the following particulars of a person shall be recorded in the register –*
>
> *… …*
> *(f) fingerprints; and*
> *(g) encoded minutiae of fingerprint*s."

The Constitution

We need to consider in the first place whether the legislation breaches any of the fundamental rights of the plaintiff invoked by him.

Before the issue can be addressed it is necessary to consider the essential characteristics and functions of our Constitution. These were conveniently set out and explained in **Ahnee v Director of Public Prosecutions [1999] 2 AC 294, 302-3** and cited with approval in **The State v Khoyratty [2006] UKPC 13**:

(a) Mauritius is a democratic state based on the rule of law.

(b) The principle of separation of powers is entrenched.

(c) One branch of government may not trespass on the province of any other in conflict with the principle of separation of powers.

Subject to the Constitution, the sole legislative power is vested in Parliament (Section 45). But the Constitution being the Supreme law of Mauritius, any law which is inconsistent with the Constitution should to the extent of its inconsistency with any of the provisions of the Constitution be declared void by the Supreme Court [section 2].

The Supreme Court is vested under sections 17 and 83 of the Constitution with wide constitutional powers to enforce protection of any of the Constitutional rights of a citizen.

Whilst Chapter I of the Constitution provides that Mauritius shall be a sovereign democratic state, Chapter II goes on to spell out the provisions guaranteeing the protection of fundamental rights and freedoms of the individual. The plaintiff has invoked a breach of several of these fundamental rights which include sections 3, 4, 5, 7, 9, 13, 15 and 16 of the Constitution.

Much emphasis has been laid, however, by the plaintiff, on sections 3 and 9 of the Constitution and Article 8 of the European convention which, it has been submitted, establish a constitutionally protected right to privacy and private life.

It has been submitted on behalf of the defendants that the protection offered by sections 3 (c) and 9 of the Constitution cannot be interpreted as affording a general right to privacy or private life for the following reasons:

(1) The framers of our Constitution have clearly departed from the wording of Article 8 of the European Convention although it is generally accepted that the Chapter II rights of the Mauritian Constitution have been modelled on that Convention and had they intended to adhere to the provisions of that article they would have expressly done so as has been done in other Commonwealth Constitutions.

(2) The wording used in the European Convention is different from that used in sections 3 (c) and (9) of the Constitution of Mauritius: therefore it cannot be assumed that sections 3(c) and (9) of the Constitution were meant to confer a general right to privacy.

(3) Even though constitutional provisions are generally given a generous and purposive interpretation, wholesale articles from the European Convention cannot be blindly imported into the Constitution of Mauritius.

(4) The Judicial Committee of the Privy Council in **Matadeen v Pointu [1998 MR 172]** points out that the case of the **Société United Docks v Government of Mauritius [1985] AC 585** is only authority for the principle that section 3 of the Constitution is a *"freestanding enacting section which has to be given effect in accordance with its terms".* The Judicial Committee stressed that the words of section 3 of the Constitution should be given their natural and ordinary meaning and section 3 should not be construed as creating rights which it does not contain.

(5) As opposed to those countries where the right to privacy or the respect for one's private life is constitutionally entrenched, in Mauritius the right to privacy is not provided for in the Constitution, but in article 22 of the Civil Code: see **Soornack v Le Mauricien & Ors [2013 SCJ 58].** It is also secured through the Data Protection Act. This means that the right may be limited, modified or varied by a subsequent statute.

On the other hand, it has been strongly argued on behalf of the plaintiff that there is a constitutionally protected right to privacy and private life as a result of which the provisions of

the law for the exercise of taking fingerprints as well as the processing and retaining of the personal data of the plaintiff would violate his fundamental rights.

It is not in dispute that the biometric concept involves the extracting of *minutiae* from the fingerprints of the plaintiff which will be finally recorded and stored in a database. The exercise is in distinct phases. The plaintiff must first allow for the taking of his fingerprints. The data obtained are then processed and encoded in his identity card. Subsequently, the data prescribed under regulation 3 of the National Identity Card (Particulars in Register) Regulations 2013 are retained and stored in a register kept and managed by the Registrar of Civil Status.

One of the first questions which therefore arises at this juncture is whether the taking of the plaintiff's fingerprints would in such circumstances constitute a breach of any of his fundamental rights protected under the Constitution. It is the plaintiff's case that the taking of fingerprints against his will breaches his right to privacy, which is afforded entrenched constitutional protection under Sections 3 and 9 of the Constitution. The relevant parts of Section 3 and 9 read as follows:

> ***"3. Fundamental rights and freedoms of the individual***
>
> *It is hereby recognized and declared that in Mauritius there have existed and shall continue to exist without discrimination by reason of 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, each and all of the following human rights and fundamental freedoms –*
>
> (a) *the right of the individual to life, liberty, security of the person and the protection of the law;*
>
> *(b) freedom of conscience, of expression, of assembly and association and freedom to establish schools; and*
>
> (c) *the right of the individual to protection for the privacy of his home and other property and from deprivation of property without compensation*
>
> ***9. Protection for privacy of home and other property***
>
> *(1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises*."

It was incumbent upon the framers of our democratic constitution to determine to what extent they would entrench in our Constitution the protection for the privacy of the individual. Firstly, as regards Section 3, an analysis of the precise words used in Section 3(c) tends to show that the protection does not extend to the physical privacy of a person. The words used are "*the right of the individual to protection for the privacy of*

his home and other property". Section 3 does not therefore contain words or terms which confer a right to the privacy of the person and which may encompass any protection against the taking of fingerprints from a person. Section 3 thus appears to afford protection only for the privacy of a person's home and property.

The case of **The Société United Docks and Others v The Government of Mauritius [1982] PRV 34** is authority for the principle that Article 3 is not a mere preamble but is a "*freestanding enacting section which had to be given effect in accordance with its terms".*

But as was highlighted by the Judicial Committee of the Privy Council in **Matadeen v Pointu [1998 MR 172]**, section 3 or the subsequent sections of the Constitution cannot be interpreted as creating rights which they do not contain. The relevant part of the judgment reads as follows:

> "*Their Lordships have already made reference to the previous decision of the Board in the Société United Docks v. Government of Mauritius [1985] A.C 585.*
>
> *[…]*
>
> *Their Lordships do not regard this case as deciding more than that the words of section 3 should be given their natural and ordinary meaning and that they should not be artificially restricted by reference to subsequent sections, even though the latter are said to have effect for the purpose of affording protection to the rights enumerated in section 3. The Board said in its opinion that 'a Constitution concerned to protect the fundamental rights and freedoms of the individuals should not be narrowly construed in a manner which produces anomalies and inexplicable inconsistencies.'*
>
> *Their Lordships would not wish in any way to detract from this statement of principle but it cannot mean that either section 3 or the later sections can be construed as creating rights which they do not contain."*

The language of Section 3(c) of the Constitution, construed in the light of its natural and ordinary meaning, does not create or confer any right of privacy to the person and would not, in the present matter, afford constitutional protection against the taking of fingerprints as prescribed under the NIC Act and Regulations.

Furthermore, the provisions of Sections 3 and 9 of our Constitution are not the equivalent of Article 8 of the European Convention and would not as a result create constitutionally protected rights of privacy and private life in the same manner and to the same extent as Article 8 of the European Convention ("The Convention"). It is apposite to set out here Article 8 of the Convention:

"ARTICLE 8

Right to respect for private and family life

> 1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> 2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

Among the interests protected by Article 8 is the right to respect for private life. Indeed, in the decision in **S v United Kingdom [2009] 48 E.H.R.R 50** – on which the plaintiff relies – the European Court of Human Rights "*recalls that the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can therefore embrace multiple aspects of the person's physical and social identity."* [paragraph 66].

The Court states in no uncertain terms that the right protected is one to "*respect for private life*". Thus it states as follows at paragraph 68:

> *"The Court notes ….. that all three categories of the personal information retained by the authorities in the present cases, namely fingerprints, DNA profiles and cellular samples, constitute personal data within the meaning of the Data Protection Convention as they relate to identified or identifiable individuals."*

And it expresses the following view at paragraph 84:

> "……*fingerprints objectively contain unique information about the individual concerned allowing his or her identification with precision in a wide range of circumstances. They are thus capable of affecting* ***his or her private life*** *……..."* (emphasis added)

Similarly in the recent decision of the Strasbourg Court in **Michael Schwarz v Stadt Bochum** handed down on 17 October 2013, the issue considered by the Court is *"whether taking fingerprints and storing them in passports……..constitutes a threat to the rights to respect for private life…… If so, it must be ascertained whether such a threat can be justified."* [paragraph 24]. This indicates that the decisions of the European Court of Human

Rights are based on the protection of a right to respect for private life, which protection is not afforded by the wording of sections 3 and 9 of our Constitution.

Accordingly, the numerous cases referred to by the plaintiff, which are based on Article 8 of the Convention, would not readily find their application in view of the difference in the wording of that article when compared with Section 9 of our Constitution.

We may here refer to the approach adopted in that connection in interpreting the Constitution with regard to the protection of fundamental rights guaranteed under Chapter II. The Court in **Union of Campement Sites Owners and ors. v The Government of Mauritius [1984] MR 100** pointed out the following:

> "*Constitutional instruments, however, differ in their formulation, reflecting the measure in which individual, collective or institutional rights are designed to be safeguarded."*

The Court added, with reference to some provisions of The American and Indian Constitutions which had been invoked in the interpretation of fundamental rights under our Constitution –

> "*that Constitutions are formulated in different terms and must each be read within its own particular context and framework. The American and Indian Constitutions were drafted in a different age and have tended, particularly with regard to fundamental freedoms of the individual and to a greater extent than more modern Constitutions, to make broad and wide ranging formulations which have necessitated a number of amendments and specific derogations or else have required recourse to implied concepts of eminent domain or police powers in order to keep literal interpretations of individual rights within manageable limits. We should be very cautious, therefore, in importing wholesale into the structure and framework of our constitution a complete article of the kind that Article 14 of the Indian Constitution or the 14th Amendment of the American Constitution are, the more so, as section 111(2) of our Constitution requires us to look to the interpretation Act of 1889 for the purpose of construing our Constitution. We would, therefore, seek to confine ourselves to the substantive provisions of our Constitution and only go outside them, or even to the marginal notes, in the case of some patent ambiguity."*

The plaintiff also relies on what was stated in **Hurnam v The State [2005] UKPC 49**:

> "*It is indeed noteworthy that the European Convention was extended to Mauritius while it was still a Crown Colony, before it became independent under the 1968 Constitution: see European Commission of Human Rights, Documents and Decisions (1955 – 1957), p 47. Thus the rights guaranteed to the people of Mauritius under the European Convention were rights which, on independence, 'have existed and shall continue to exist' within the terms of section 3. This is a matter of some significance: while Mauritius is no longer a party to the European Convention or bound by its terms, the Strasbourg jurisprudence*

gives persuasive guidance on the content of the rights which the people have enjoyed and should continue to enjoy."

But this statement must be viewed in its context. The Judicial Committee was in the process of examining section 5(1) and (3) and section 10(2)(a) of our Constitution and had expressly observed that:

"*Section 5(1) and (3) and Section 10(2)(a) bear a very close resemblance to articles 5(1) and (3) and 6(2) of the European Convention on Human Rights."*

The Strasbourg jurisprudence therefore gives persuasive guidance on the contents of the fundamental rights embodied in Chapter II of our Constitution in respect of those rights which are couched in terms which bear very close resemblance to the corresponding articles of the European Convention on Human Rights.

We need to observe in this respect that the provisions of section 9 of our Constitution do not bear close resemblance to the detailed provisions of article 8 of the Convention. Furthermore, whilst article 22 of our Civil Code provides for a right to the protection of private life (*"Chacun a droit au respect de sa vie privée"*), that article does not have the status of a constitutional right and cannot fetter the law making powers of the legislature in enacting any other legislation.

We need therefore to turn to the substantive provisions of our Constitution in order to determine the scope of constitutional protection which is afforded to the citizens of Mauritius in respect of their fundamental rights to privacy. We have already seen that the wording of Section 3 of the Constitution, when construed in the light of its natural and ordinary meaning would not afford constitutional protection against the taking of fingerprints. We are left to consider Section 9 of the Constitution. We need to reproduce in that respect the material part of Section 9(1) in order to carry out a close scrutiny of its wording and provisions which unlike Section 3, also includes protection in respect of the privacy of a person.

"***9. Protection for privacy of home and other property***

(1) *Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises*."

For the purposes of the present case, the key words are that no person shall be subjected to the search of his person except with his own consent.

Every adult citizen of Mauritius is bound to apply for a National Identity Card and is mandatorily required, under Section 4(2) of the Act, "*to allow his fingerprints, and other biometric information about himself to be taken and recorded*". The coercive nature of this

obligation is further highlighted by the criminal sanction provided under section 9, in case of any failure by a citizen to comply with these provisions of the Act. The citizen is therefore under an obligation by virtue of these legal provisions to allow his fingerprints to be taken and recorded in conformity with the Act and Regulations. He is under compulsion to submit his fingers to the relevant authorities for the extracting of minutiae from his fingerprints in order to enable those authorities to record in the Register the encoded minutiae of his fingerprints. The evidence has indisputedly shown that the "*minutiae"* which are recorded from the fingerprints contain unique personal data peculiar to each individual.

The next question is whether, in view of the highly personal and private nature of fingerprints which contain sensitive personal information about an individual, the coercive act of taking his fingerprints would tantamount to a breach of the protection of his Constitutional right to privacy within the ambit of Section 9(1) of the Constitution. In other words, would this coercive act of the "*taking of fingerprints*" against the will of a citizen fall within the purview of a citizen being "*subjected to the search of his person*" as contemplated by Section 9(1) of the Constitution?

It is axiomatic that we should remind ourselves at this juncture of the sacrosanct rules of interpretation which apply to the construing of the wording of the Constitutional provisions which create and consecrate the fundamental human rights of the citizens of Mauritius under Chapter II of our Constitution. There is ample authority to support the view that a written Constitution should not be looked upon as an Act of Parliament, but rather as a charter or a covenant which must be given a generous and purposive interpretation. **[Olivier v Buttigieg (1967) A.C. 115; Ong Ah Chuan v Public Prosecutor (1981) A.C. 648; Attorney-General of The Gambia v Momodou Jobe (1984) A.C. 689, 700]**. The constitutional provisions enshrining fundamental rights "*call for 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*" **[Minister of Home Affairs v Fisher (1980) A.C. 319 (PC)]**.

The language used in section 9(1) no doubt seeks to afford purposive constitutional protection to the private physical integrity of a person against any form of search. In that connection, the protection is obviously not limited to a search of the whole body of a person. The search of any part of the body of a person would fall within the scope of the protection afforded by section 9(1). The protection may even extend further than that. Indeed, for instance, the search of the pocket of a garment being actually worn by a person cannot be excluded from the purview of a search of a person under section 9(1).

A purposive interpretation would not be confined to the giving of a narrow and restrictive meaning to the word "*search*" as used in section 9(1) of the Constitution. Any undue intrusion or any examination or inspection of any part of the body of a person would thus, in our view, fall within the purview of a search of a person for the purposes of section 9(1).

We are not here for that purpose concerned with the degree of intrusiveness but with a fundamental right of the protection of the privacy and integrity of the body of a person. The protection under section 9(1) would clearly be against any form of undue interference by way of a search of any part of the body of a person without his consent. The coercive taking of fingerprints from the fingers of a person and the extracting of its *minutiae* would thus clearly fall within the scope of the protection afforded to the integrity and privacy of the person under Section 9(1) of the Constitution.

We hold therefore that the provisions of the NIC Act and Regulations which enforce the compulsory taking and recording of fingerprints of a citizen of Mauritius disclose an interference with the plaintiff's right against the search of his person guaranteed under Section 9(1) of the Constitution.

We feel comforted in our view by the pronouncements in **Payet v Seagull Insurance Co Ltd and Ors [1990 SCJ 282]** and the Canadian case of **Michael Feeney v Her Majesty the Queen [1997 2 SCR 117]**.

In **Payet** (*supra*), Yeung Sik Yuen J. stated:

> *"Now, Chapter II of our Constitution which deals with the protection of fundamental rights and freedoms of the individual inter alia provides for the right of the individual to protection for the privacy of his home and other property (including his body) and also for the protection of his right to personal liberty. One cannot think of a case where the protection of fundamental rights and freedoms of the individual can be more sacrosanct than where the protection relates to the body of the individual." (Emphasis added)*

In **Michael Feeney** (*supra*), Mr. Feeney was suspected of having committed a criminal offence. He was arrested and his fingerprints were taken by the authorities. Section 8 of the Canadian Charter of Rights and Freedoms states: "*Everyone has the right to be secure against unreasonable search or seizure.*" In interpreting that section, the Supreme Court of Canada held that "*compelling the accused to provide fingerprints in the present context*" was "*a violation of section 8 of the Charter, involving as it did a search and seizure related to the appellant's body, about which, at least in the absence of a lawful arrest, there is a high expectancy of privacy*".

We note that section 9 (1) of our Constitution is couched in wider terms than section 8 of the Canadian Charter inasmuch as section 9(1) affords protection against any form of coercive bodily search whilst the protection afforded under section 8 of the Canadian Charter is in respect of any "unreasonable" search of the person.

The permitted derogation from the right under section 9(2) of the Constitution

However, the right which exists under section 9(1) of the Constitution for a person not to be subjected to bodily search except with his consent is not an absolute one. A limitation to that right is permissible under section 9(2), the relevant part of which reads as follows:

"***9 Protection for privacy of home and other property***

[……]

(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) in the interests of …… public order ……;

(b) for the purposes of protecting the rights or freedoms of other persons;

[……]

except so far as that provision or, as the case may be, the thing done under its authority is shown not to be reasonably justifiable in a democratic society."

A limitation to the right not to be subjected to bodily search is therefore permissible, under section 9(2), in the case of a provision made by a law in the interests of, *inter alia*, public order. The exception prescribed under section 9(2) would however be permissible, in the words

at the end of section 9, "*except so far as that provision or as the case may be the thing done under its authority, is shown not to be reasonably justifiable in a democratic society*".

Do the acts purporting to affect the rights of the plaintiff under section 9(1) of the Constitution constitute permissible derogations "in the interests of public order" under section 9(2) of the Constitution?

The wording of section 9(2) invites us to consider in the first place whether the impugned acts are done *"under the authority of any law".*

We may usefully refer for that purpose to the following passages from the decision of the European Court of Human Rights in **Leela Förderkreis E.V. v Germany (2009) 49 E.H.R.R. 5**.

> *"113. The Court reiterates its settled case-law that the expression 'prescribed by law' requires firstly that the impugned measure should have a basis in domestic law. It also refers to the quality of the 'law' in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct* (Gorzelik and Others v Poland [GC], No. 44158/98, § 64, ECHR 2004 1)
>
> *Further, as regards the words 'in accordance with the law' and 'prescribed by law' which appear in Articles 8 to 11 of the Convention, the Court observes that is has always understood the term 'law' in its substantive" sense, not its 'formal' one (De Wilde, Ooms and Versyp v Belgium, judgment of 18 June 1971, Series A no. 12, P. 45* § 93). '*Law' must be understood to include both statutory law and judge-made 'law' (see, among other authorities, The Sunday Times v the United Kingdom (no. 1), judgment of 26 April 1979, Series A no. 30, p. 30, § 47, and Casado Coca v Spain, judgment of 24 February 1994, Series A no. 285-A, P. 18, § 43). In sum, the 'law' is the provision in force as the competent courts have interpreted it."*

We consider that these conditions are met by the "law" which has been enacted in that respect.

The provisions of the law limiting the right of the plaintiff to refuse to allow his fingerprints to be taken, by availing himself of his right under section 9(1) not to be subjected to a search of his person except with his consent, are section 4(2)(c) of the NIC Act (*supra*) and the Regulations made in that connection. Section 4(2)(c) provides that every person who applies for an identity card shall "*allow his fingerprints and other biometric information about himself to be taken and recorded … for the purpose of the identity card*."

The next question which arises is whether that provision has been made in the interests of public order and whether such interference with the right under section 9(1) is justifiable. The defendants have adduced evidence in that connection.

Mr. Gunputh Rao Ramah, the project director of the Mauritius National Identity Scheme (MNIS) project gave explicit details to show what make fingerprints particularly reliable as a means of identifying or authenticating the identity of persons, hence giving an added dimension to the new identity card. Once the fingerprints have been captured, they can be used for verification purposes. He gave the following example:

> *"What happens is when a person comes to the registration centre, the fingerprints are captured. When the person comes to collect the card, the fingerprints of the person are verified against what is on the card and this is a very reliable way of actually telling if it is this person coming to collect or not."*

The great advantage of using fingerprints for identification purposes is that a person's fingerprints are unique to him and will not even be the same as those of his identical twin. Mr. Ramah has also explained how the use of fingerprints has enabled the detection and prevention of multiple enrolments:

> *"We have identified more than 700 people who have tried to register more than once. In fact they went to one centre, possibly went to a different centre … when the system analyses the fingerprints, the system flags these people as being those who tried to register twice on the same identity card for example and then there is an investigation that happens afterwards."*

The evidence of Mr Ramah has brought into focus the serious flaws inherent in the previous system and which could give rise to identity fraud. Furthermore, the previous system could not effectively prevent the issue of an identity card with the same national identity number to more than one person. On the other hand it has been amply shown that the new system is the only system which can provide effective safeguards against identity fraud and cater for identity authentication not only at the time of the issuing of a new card but also in case of renewal of a card or issue of a replacement card.

Mr. Goparlen Pavaday, Project Manager and Head of Operation of the MNIS, further highlighted the security features inherent in the new system as opposed to any other alternative system. He also explained that the authentication process through the taking of fingerprints is vital in order to prevent identity usurpation and ensure that every citizen has a unique identity

and a unique identity card. He also pin-pointed the importance of the speed and accuracy of the authentication process which would be higher with ten instead of four fingerprints.

The evidence of Mr. Ramah and Mr. Pavaday in relation to the importance of fingerprints has hardly been challenged and their testimonies have provided compelling reasons to establish that the law providing for the taking of fingerprints is fully justifiable on the grounds of public interest and public order.

We accordingly conclude that the provision in section 4(2)(c) of the NIC Act and the Regulations made under that Act have been made in the interests of public order and constitute a justifiable interference with the right of the plaintiff against the search of his person as provided for under section 9(1) of the Constitution.

Has the provision in section 4(2)(c) been shown not to be reasonably justifiable in a democratic society?

Although it has been submitted by the plaintiff that the imposition of a legal obligation upon him to submit his fingerprints without his consent would not be reasonably justifiable in a democratic society, no cogent argument has been presented before us in support of such a contention. The burden of proving that the act complained of is not reasonably justifiable in a democratic society lies on the plaintiff.

The relevant test in that connection has been laid down by the European Court of Human Rights in the case of **S and Marper v the United Kingdom [2008] ECHR 1581** (Applications Nos. 30562/04 and 30566/04 – 4 December 2008). At paragraph 101 of that judgment we read the following:

> *"An interference will be considered 'necessary in a democratic society' for a legitimate aim if it answers a 'pressing social need' and, in particular, if it is proportionate to the legitimate aim pursued and if the reason adduced by the national authorities to justify it are 'relevant and sufficient'."*

Furthermore, as was pointed out by the European Court of Human Rights in **Sahin v Turkey (2005) 41 E.H.R.R.8**, in order to assess the "necessity" for interference,

> "*103…… the Court's task is confined to determining whether the reasons given for the interference were relevant and sufficient and the measures taken at the national level proportionate to the aims pursued."*

Applying the above test to the facts of the present case, we find that it can hardly be disputed that the taking of fingerprints within the applicable legal framework pursues the legitimate purpose of establishing a sound and secure identity protection system for the nation and thus answers a pressing social need affording indispensable protection against identity fraud. Such a purpose, as has been amply demonstrated, is vital for proper law enforcement in Mauritius. Furthermore, taking into consideration the appropriate safeguards in the taking of fingerprints for their insertion in the cards, and the relatively limited degree of interference involved, we are led to conclude that such interference is proportionate to the legitimate aim pursued.

In the light of our above observations we conclude that the plaintiff has failed to discharge the burden of showing that the interference in question is not reasonably justifiable in a democratic society.

We shall now turn to the issue of the storage and retention of personal biometric data.

The issue of storage of personal biometric data including fingerprints

The relevant law

As we have seen above there is, in section 9(2) of the Constitution, a permissible derogation from the right protected under section 9(1). Section 9(2) indeed provides that "*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) in the interests of … … public order …*" (emphasis added).

It has been submitted on behalf of the plaintiff that no such law has been enacted to provide for the storage of fingerprints and other personal biometric data such that the derogation under section 9(2) is simply not applicable.

On the other hand, it has been submitted on behalf of the defendants that the retention of fingerprints and other personal biometric data has been done under the authority of the law given that such retention is prescribed in section 3 of the National Identity Card Act and the National Identity Card (Particulars in Register) Regulations 2013.

Section 3(1) of the Act provides for the keeping of a register "*in which shall be recorded particulars of the identity of every citizen of Mauritius*". Section 3(2)(b) goes on to provide that the particulars required to be recorded in section 3(1) shall include "*such other reasonable or necessary information as may be prescribed regarding the identity of the person*". Regulations have been made to provide for the particulars of a person which shall be recorded in the register

for the purposes of section 3(2)(b) of the Act. Those particulars include, *inter alia*, the "*photograph*", the "*fingerprints*" and the "*encoded minutiae of fingerprints*".

In the light of the above enactments, we agree with Counsel for the defendants that there is a law providing for the storage and retention of fingerprints and other biometric data regarding the identity of a person.

Is the law in question a permissible derogation under section 9(2)?

The next question we have to answer is whether the law in question makes provision in the interests of public order such as to fall within the derogation permitted by section 9(2) of the Constitution.

For reasons similar to those on which we have based ourselves to answer this question in the affirmative in relation to the law providing for the taking of fingerprints, and which have already been spelt out earlier in this judgment, we also consider that there is a public order justification for the storage and retention of a person's fingerprints and other biometric data.

"Reasonably justifiable in a democratic society"

We have already set out, earlier, the legal principles which are applicable in order to determine whether the provisions of a law are reasonably justifiable in a democratic society. We now have to apply those principles in order to determine whether the law providing for storage and retention of a person's fingerprints and other biometric data are reasonably justifiable in a democratic society. As noted earlier, the relevant legal principles have been aptly summarized in **S and Marper v The United Kingdom** (*supra*) at paragraph 101. The first sentence of that paragraph reads:

> *"An interference will be considered 'necessary in a democratic society' for a legitimate aim if it answers a 'pressing social need' and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are 'relevant and sufficient'."*

We have already explained why it does appear to us that there is a "*pressing social need*" for the implementation of a national identity card system based on the taking of fingerprints. For similar reasons, we consider that the retention and storage of biometric data would answer a pressing social need in the pursuance of a legitimate aim, namely protection against identity fraud.

However, there are highly disturbing questions which arise concerning the system and legal framework which are applicable for the retention and storage of biometric personal data for an indefinite period. It is highly questionable whether the relevant laws and existing legal framework provide sufficient guarantees and safeguards for the storage and retention of personal biometric data and whether in the present circumstances they would constitute an interference proportionate to the legitimate aim pursued.

In the present matter, the plaintiff is under the legal obligation to apply for a new biometric card fitted with an electronic chip. The plaintiff is compelled to give his ten fingerprints which will be stored for an indefinite duration in a central data base in accordance with the Data Protection Act. The minutiae of four fingers are recorded in the electronic chip contained in the card.

Witness Sookun gave expert evidence on behalf of the plaintiff as to the various types of risks and dangers to which the plaintiff will be exposed in this era of cyber hacking, email hacking and bank account hacking, the more so since no such information system and no database is foolproof and the new identity card can be read at a distance with available technological devices.

Witness Sookun gave various illustrations of how access can be gained to personal data via Government websites including the MNIC website. He added that after carrying out tests on the government email, he was led to the conclusion that the government email with the extension “@mail.gov.mu” lacks security features, can be cloned and is open to abuse. He went on to explain that it is possible to have access to the MNIS database through a proxy attack – which is an indirect attack – via the government portal. He mentioned various tools that can be used to identify all the other machines which are in the internal network, one of which will have to be the MNIS. He also laid stress on the fact that when data is uploaded on a server a copy of the data remains on the local machine unless and until the data is deleted on the local machine.

The witness also referred to the dangers of having a centralized database which makes counterfeiting easier. According to him there is no database which is foolproof to cyber criminals. Furthermore there are no sufficient security features present at the Civil Status division.

Apart from the above facts there exists, according to the witness, the potential for an overwhelming risk of abuse and misuse of the plaintiff’s personal data inasmuch as -

(i) in view of the rapid technological development in the field of information technology, there is a serious risk that in future the private life interests bound up with biometric information may be adversely affected in novel and unpredictable ways;

(ii) the MNIS database may well be connected to the internet at a later stage;

(iii) the physical security measures presently available at the MNIS Data Centre at Ebene – where all the data are stored – are inadequate in that the data base works on a network system of people and devices which is not totally secure;

(iv) the personal data of individuals with no criminal record will be retained indefinitely in the same way as the personal data of convicted persons.

On the other hand, the defendants have advanced a number of reasons in support of their contention that the legal framework and MNIC system for the storage and retention of data are reasonably justifiable in a democratic society. It has been submitted that the reasons advanced to justify the implementation of such a system are proportionate to the legitimate aim pursued. The retention of the data is said to be essential for the prevention of multiple enrolments and for identity authentication at the time of issuing a new card or a replacement card, or in case of renewal. Both Mr Ramah and Mr Pavaday have emphasised that the retention of the data is vital to the authentication process in order to prevent identity usurpation and ensure that every citizen has a unique identity and a unique identity card. They added that there are no satisfactory alternatives to the present system based on the storage and retention of the biometric personal data.

We have examined with much attention the evidence of both witnesses Ramah and Pavaday. Although their testimonies might indicate that there is a legitimate aim for storing and collecting personal biometric data, we do not find that there have been sufficiently strong reasons advanced to establish that such storage and retention of data for an indefinite period is proportionate to the legitimate aim pursued. On the other hand, witness Sookun has said enough to impress upon us the risks and damages which the storage and retention system adopted by the defendants would entail.

We now need to turn to the relevant legal provisions which have been enacted in connection with the retention and storage of personal data in order to determine whether those legal provisions are, in the present circumstances, reasonably justifiable in a democratic society.

Section 3 of the NIC Act provides that the Registrar of Civil Status shall cause to be kept a register in which shall be recorded particulars of the identity of every citizen of Mauritius.

Section 12 of the NIC Act provides that the collection and processing of personal data, including biometric information, under that Act shall be subject to the provisions of the Data Protection Act.

Under section 24(1) of that latter Act, no personal data shall be processed unless the express consent of the data subject has been obtained. However, that Act contains a number of permissible derogations from that rule.

First, section 24 (2) of the Data Protection Act provides that personal data may be processed without the express consent of the data subject where, inter alia, the processing is necessary "*for the performance of a contract to which the data subject is a party", "for compliance with any legal obligation to which the data controller is subject"* and *"in the public interest".*

Second, Part VII of that Act provides for a number of further exemptions from any of the provisions of the Act which would enable persons other than the data subject to obtain his personal data from the data base. Under section 45, such personal data become accessible where in the opinion of the Prime Minister they are required for the purpose of safeguarding national security. Under section 46 personal data may also be made available where the processing of personal data is required for the purposes of *"the prevention or detection of crime", "the apprehension or prosecution of offenders"* on *"the assessment or collection of any tax, duty or any imposition of a similar nature."* Under section 47, there can be access to the personal data where such access is being sought in relation to *"the physical or mental health of the data subject".* Under section 48, the personal data are also made accessible to the Bank of Mauritius, the Financial Services Corporation and the Financial Intelligence Unit in their discharge of any statutory function. Section 48 also allows for the processing of personal data for the purpose of the discharge, by other bodies, of relevant functions for protecting members of the public against financial loss or dishonest or incompetent practices, or against risk to health or safety. Under section 49 processing of personal data is made permissible for journalistic, literary and artistic purposes, albeit under certain conditions. Under section 53, it is further provided that personal data may be made available *"where the data consist of information in respect of which a claim to legal professional privilege or confidentiality as between client and legal practitioner could be maintained in legal proceedings, including prospective legal proceedings."*

By virtue of section 52, there can be access to personal data where –

"*(i) the disclosure of such data is required under any enactment or by a Court Order;*

(ii) the disclosure of such data is necessary for the purpose of, or in connection with, any on-going or prospective legal proceedings;

(iii) the disclosure of such data is necessary for the purpose of obtaining legal advice; or

(iv) the disclosure is otherwise necessary for the purpose of establishing, exercising or defending legal rights"

The above survey of the legal exemptions makes it manifestly clear that the personal data of individuals such as the plaintiff can be readily accessed in a large number of situations. What is even more alarming is the relatively low threshold prescribed for obtaining access to personal data. A striking illustration of that is the enactment in section 52 (iii) (*supra)* whereby access may be obtained merely by invoking that the disclosure of the data is necessary for the purpose of obtaining legal advice.

What is even more objectionable is the absence of any safeguard by way of judicial control to monitor the access to personal data. The only instance where a Court Order is mentioned is under section 52 (i) (*supra)* and here too the basis upon which a Court Order may be granted is not set out at all.

It is a fundamental principle of the rule of law that there can be no interference with the legal or constitutional rights of a citizen except on recognized permissible grounds which require judicial control and sanction. This fundamental principle is well anchored in our legal traditions and framework. By way of illustration, we may refer to the need for a Court or a Judge's Order under the Banking Act, the Prevention of Corruption Act, the Financial and Anti Money Laundering Act and the Information and Communication Technology Act.

In view of what we have stated above, it is inconceivable that there can be such uncontrolled access to personal data in the absence of the vital safeguards afforded by judicial control. The potential for misuse or abuse of the exercise of the powers granted under the law would be significantly disproportionate to the legitimate aim which the defendants have claimed in order to justify the retention and storage of personal data under the Data Protection Act.

For all the reasons given above, we conclude that the plaintiff has been able to establish that the retention and storage of personal data under the Data Protection Act is not reasonably justifiable in a democratic society.

Conclusion

In view of our findings earlier in this judgment, we declare that:-

(1) the plaintiff has not established any breach of sections 1, 2, 4, 5, 7, 13, 15, 16 and 45 of the Constitution;

(2) the law which enforces the compulsory taking and recording of finger prints of a citizen of Mauritius for the purposes of his national identity card discloses an interference with the plaintiff's right against the search of his person guaranteed under section 9(1) of the Constitution**;**

(3) that law which enforces the compulsory taking and recording of fingerprints for the purposes of a national identity card constitutes a permissible derogation, in the interests of public order, under section 9(2) of the Constitution;

(4) the plaintiff has failed to establish that the compulsory taking of fingerprints for their insertion in the national identity card is not reasonably justifiable in a democratic society;

(5) the law providing for the storage and retention of fingerprints and other personal biometric data regarding the identity of a person constitutes a permissible derogation, in the interests of public order, under section 9 (2) of the Constitution**;**

(6) the provisions in the National Identity Card Act and the Data Protection Act for the storage and retention of fingerprints and other personal biometric data collected for the purpose of the biometric identity card of a citizen of Mauritius are unconstitutional.

The plaint with summons is otherwise dismissed. As plaintiff has been partly successful and in view of the importance of the constitutional issues raised, we make no order as to costs.

E. Balancy
Senior Puisne Judge

A.F. Chui Yew Cheong
Judge

A. A.Caunhye
Judge

29th May 2015

Judgment delivered by Hon. E. Balancy, Senior Puisne Judge

For Applicant :	**Me. Attorney K Bokhoreee** **Me. S. Teeluckdharry, of Counsel** **Me E. Mooneeapillay, of Counsel**
For Respondents :	**State Counsel**