

CONSTITUTIONAL COURT OF SEYCHELLES

Reportable

[2019] SCCC 3

CP 01/2018

In the matter between:

ALEXANDER GEERS

(rep. by Anthony Derjacques)

Petitioner

and

GOVERNMENT OF SEYCHELLES

1st Respondent

MINISTER FOR HOME AFFAIRS &

2nd Respondent

LOCAL GOVERNMENT

THE ATTORNEY GENERAL

3rd Respondent

(rep. by Ananth Subramaniam and Georges Thachett)

Neutral Citation: *Geers v Government of Seychelles & Ors* (CP01/2018) [2018] SCCC 3 (31 May 2019)

Before: Burhan, André, Nunkoo JJ

Summary: Whether or not the Government of Seychelles (1st Respondent), Minister for Home Affairs the Respondents have individually and/or collectively failed, refused or neglected to make regulations in terms of the Misuse of Drugs Acts 2016 (MODA 2016), and whether this failure violates the Petitioner's Charter Rights, including the right to a fair trial (Article 19); the Right to Dignity (Article 16), the right to participate in government (Article 24), and the right to health (Article 29). Duty to pass regulations is created by the enabling legislation, and has not been discharged. Failure to pass regulations does not violate the Constitution.

Heard: 20 March 2019

Delivered: 31 May 2019

ORDER

- a. The second respondent has a statutory duty to make and issue regulations under s 4 and 54(1)(a) of the Misuse of Drugs Act;
- b. The Petitioner has failed to establish that the failure to make and issue regulations under the provisions in (a) constitutes a violation of the Charter;
- c. The second respondent is ordered to issue regulations within 24 months, which regulations will have prospective effect.

JUDGMENT

BURHAN J (NUNKOO J concurring)

- [1] This case raises constitutional questions regarding whether or not the Government of Seychelles (1st Respondent), Minister for Home Affairs and Local Government (2nd Respondent) and the Attorney General (3rd Respondent) – collectively referred to as “the Respondents” - have individually and/or collectively failed, refused or neglected to make regulations in terms of the Misuse of Drugs Acts 2016 (MODA 2016), and whether this failure violates the Petitioner’s Charter Rights, including the right to a fair trial (Article 19); the Right to Dignity (Article 16), the right to participate in government (Article 24), and the right to health (Article 29).
- [2] The Petitioner in his amended petition dated 29 January 2018 seeks the following relief namely that the Constitutional Court:

- (1) *Declare that the 1st Respondent 's refusal or failure to make regulations under the Misuse of Drugs Act 2016 to regulate the possession, use , sale , supply prescription or other dealing in, or the manufacture or importation or exportation of any controlled drug for medical or scientific purposes is a contravention of the Constitution.*
- (2) *Issue a writ of mandamus against the 2nd Respondent ordering her to immediately make regulations under the Misuse of Drugs Act 2016 to regulate the possession, use sale, supply, prescription or other dealing in or the manufacture or importation or exportation of any controlled drug for medical or scientific purposes.*
- (3) *Order the 2nd Respondent to give the said regulation retrospective effect to apply from the 1st of June 2016 when the Misuse of Drugs Act came into operation for the reasons provided herein before.*
- (4) *Issue a writ of certiorari to curtail the trial in Criminal Side N0 27 of 2017 in Republic v Alexander Geers & Ors.*

[3] The Petitioner at paragraph 22 of the petition specifies the articles of the Constitution contravened and refers to articles 16, 18, 19, 24 and 29.

[4] Article 16 of the Constitution read as follows:

Every person has a right to be treated with dignity worthy of a human being and not to be subjected to torture, cruel, inhuman or degrading treatment or punishment.

[5] Article 18 of the Constitution deals with the right to liberty and security of the person.

[6] Article 19 (7) of the Constitution reads as follows:

Any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority the case shall be given a fair hearing within a reasonable time.

[7] Article 24 deals with the right to participate in government: Article 24 provides:

(1) Subject to this Constitution, every citizen of Seychelles who has attained the age of eighteen years has a right-

- a. to take part in the conduct of public affairs either directly or through freely chosen representatives;*
- b. to be registered as a voter for the purpose of and to vote by secret ballot at public elections which shall be by universal and equal suffrage;*
- c. to be elected to public office; and*
- d. to participate, on general terms of equality, in public service.*

(2) The exercise of the rights under clause (1) may be regulated by a law necessary in a democratic society.

[8] Article 29 of the Constitution reads as follows:

(1) The State recognises the right of every citizen to protection of health and to the enjoyment of the attainable standard of physical and mental health and with a view to ensuring the effective exercise of this right the State undertakes –

- a) To take steps to provide for free primary health care in State institutions for all its citizens*
- b) To take appropriate measure to prevent, treat and control epidemic, endemic and other diseases*
- c) To take steps to reduce infant mortality and promote the healthy development of the child;*
- d) To promote individual responsibility in health matters;*
- e) To allow, subject to such supervision and conditions as are necessary in a democratic society, for the establishment of private medical services.*

[9] By way of summary, the Petitioner also seeks a writ of mandamus against the 2nd Respondent as a Constitutional remedy ordering her to immediately make regulations under the MODA 2016 to regulate the possession, use, sale, supply, prescription or other dealing in, or the manufacture or importation of, any controlled drug for medical or scientific purposes and that the 2nd Respondent, be ordered to give the regulations retrospective effect; to apply from the 1st June 2016 when the MODA 2016 came into

operation. He further seeks that a writ of certiorari be ordered to curtail and stop the trial in Criminal Side No. 27 of 2017, in *Republic v/s Alexander Geers & Ors.*

[10] The Respondents on their part have, by way of their reply of the 26th February 2018, raised three objections against the above Petition, as follows:

- (i) *Firstly, that the Petition is infructuous in law, in that the Regulations for medical use of controlled drugs in accordance with section 4 of the MODA 2016 are already in place in view of section 55(3) of the MODA 2016 hence the Petition being infructuous and only to be dismissed; and*
- (ii) *Secondly, that the Petitioner has no locus standi to file the Petition, in that there is no violation or likely contravention of any of the Constitutional rights of the Petitioner under the MODA 2016; and that there is no prima facie case of any alleged violation of the Constitutional rights as alleged by the Petitioner and further that the Petitioner does not enjoy any guaranteed/vested right within the framework of the Constitution to pray for mandatory relief from Court without any actual violation of any rights guaranteed in the Constitution.*
- (iii) *Thirdly, the nature of the relief prayed for by the Petitioner is beyond the jurisdiction of the Court as it falls especially under the policy decision of the Executive as well as legislative functions of the State. And further, it is respectfully averred that the reliefs sought by the Petitioner is not sustainable under the principle of separation of powers and granting of any reliefs prayed for by the Petitioner would amount to intrusion into the powers and functions of other organs of the State or invalidating the scheme of constitution with reference to judicial powers; and that the Respondents dependent on the ruling on the plea in limine litis reserves the right to file defence on the merits and should the plea in limine succeed in their favour, moves for dismissal of the petition and compensatory costs.“*

[11] In support of the above argument relating to the purported upsetting of the principle of separation of powers the Respondents made reference to the following cases: (*Republic v*

Albert Geers & Ors (2018) SCSC 39), (*Khanaiya Lal Sethia & Or v Union of India & Anor of the 4th August 1997; Academy of Nutrition Improvement and others v/s Union of India Writ no 80 of 2006 Ruling*), and (*Centre for Health Human Rights and Development (CEHURD) and Ors v/s Attorney General (Constitutional Petition No. 16 of 2011) Ruling of the 5th June 2012*). It is also the contention of Learned Counsel for the Respondents that this constitutional petition was deliberately filed by the Petitioner after he was charged in the Supreme Court in case CS27/2017, in order to delay and derail the proceedings against him in the said case.

- [12] By its ruling dated 18 September 2018, this Court dismissed the preliminary objections of the Respondents and even though invited by Learned Counsel for the Respondents when making his final submission that the ruling be revisited, this Court is of the view that the necessity to do so does not arise.
- [13] Thereafter the case proceeded and both parties made their final submissions.

Petitioner's Submissions

- [14] Learned Counsel, on behalf of the Petitioner, Mr. Derjacques did not wish to elaborate on the arguments of Learned Counsel Mr. Elizabeth had already made in the case of *Ralph Volcere v Ministry of Home affairs & Ors SCCC No 10/2017* made in respect of articles 15, 16 and 29 of the Constitution. He concentrated on Article 19(7) of the Constitution. It was his contention that the failure of the 1st Respondent to bring in regulations under section 4(1) and (2) of MODA 2016 had affected the rights of the Petitioner to a fair trial as provided for in article 19 (7) of the Constitution.
- [15] In support of this contention Mr. Derjacques referred to many documents in order to prove that long before the filing of the case against the Petitioner CS 27/2017 in which his client was charged under MODA 2016 in the Supreme Court, the Petitioner had always been a supporter and promoter of cannabis for medical purposes and was conducting scientific research on cannabis. He further submitted that the Petitioner had frequent communications and correspondences with CARE and the entire Drugs and Alcohol Abuse Council.

[16] Mr. Derjacques further submitted that the Petitioner organised and held seminars to promote cannabis as a medicine, at the Drugs and Alcohol Council and the Ministry of Health which was well attended by senior civil servants and medical staff and the media. He further submitted that the Petitioner had participated in a public debate on the medical use and scientific research of cannabis on television with the SBC, including interviews in the media. He contends that during the past several years, he has been well known to the Respondents as an established proponent of the medical use of cannabis and for his scientific research on cannabis.

Based on the aforementioned facts, Mr. Derjacques submits that as the operation of section 4 of MODA 2016, envisages that should it be proven that the said drugs were for medical or scientific purpose it amounts to a defence in law. Therefore having seriously researched and studied the medical and scientific purpose of cannabis, the Petitioner contends that his right to a fair trial namely a proper defence are in great and immediate peril, as by the conduct and continuation of the said trial in the absence of regulations pertaining to section 4 of MODA 2016, the Petitioner may be convicted and sentenced to several years of imprisonment.

[17] Mr. Derjacques also referred to the South African case of Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton (CCT108/17) [2018] ZACC 30 and stated where there was an infringement of a Constitutional right to privacy, the Court had declared that the Petitioner could not be prosecuted. It warrants mention however, that the right to privacy was not argued before this court.

[18] Counsel for the Petitioner contended that considering all the genuine research done by his client, the Petitioner should have been afforded the protection under section 4(1) and (2) of MODA 2016 and therefore the regulations once enacted, should have retrospective effect as the Petitioner had a genuine defence in respect of the trial he faces. He left the issue of the regulations having retrospective effect in the hands of this Court.

Respondent's submissions

- [19] Learned Counsel for the Respondents Ananth Subramaniam submitted that according to the prayer of the Petitioner, the only request was that regulations be made there was no specific request that cannabis be included in the regulations. It was his contention that the regulations made under the repealed Act MODA 1990 under section 44(1) would suffice as it widely covers the medicinal purpose of the controlled drug. He submitted there was no time limit prescribed in the new Act for any new regulations to be made. He also referred to section 32 of the Interpretation of General Clauses Act about the possibility of regulations under the repealed Act been saved. He further submitted that it was the Government who would decide what the regulations should be and submitted further that the Petitioner has failed to demonstrate how and when his right to fair hearing has been affected. He also referred to the case of *V.K Nasaw v Home Secretary of Union of India* where it was held: “No court can give any direction to any legislature or executive to make any amendment or any new regulation”.

Findings of the Court

- [20] At the very outset, we wish to state that we are of the view that articles 16, 18 and 24 have no relevance to the case before us.
- [21] This Court finds that the violations of rights asserted by the Petitioner is speculative and premature. The arguments presented assumes that regulations, if passed, will provide for the legalisation of the distribution and use of cannabis. The power to make regulations under the new Act does exist as discussed further on in the judgment. Presently the regulations in place do not provide for this, and the power to make new regulations under MODA 2016 have not been exercised by the 2nd Respondent. Therefore, until such time that new regulations are passed, the content and scope of which are to be determined by the 2nd Respondent, the Court is not able to make a determination on this.
- [22] The Petitioner has failed to demonstrate that absence of regulations violates his right to dignity, right to health care, right to freedom of person and liberty, right to a fair trial and that right to participate in government have been violated. At best, he has presented

evidence as to why, if regulations are passed, cannabis could be considered for inclusion. However, this is for the 2nd Respondent to determine.

[23] It is not sufficient for a Petitioner to allege a violation of multiple rights without substantiation. Each violation must be cogently argued and submissions must be evidence based. We also note in passing that when engaging in constitutional litigation, petitioners should be cautious of casting their net too wide in identifying rights violations.

[24] The Court also finds that the Petitioner's argument regarding Article 19 (7) (right to a fair trial) can also not be sustained. The Petitioner is not a medical expert nor a scientist, but a strong proponent for the medical benefits of cannabis. However, the law in its present form makes it clear that cannabis cannot be manufactured or sold for medical purposes, and such conduct is a criminal offence. The law is clear and unambiguous in its present form, and the possibility of regulation cannot be used to ground a defence, and the failure to regulate does not deny the Petitioner a valid legal defence. Further the saved regulations under MODA 1990 in place at present do not encourage or approve same.

[25] We do note that the Petitioner's reliance on Article 24 (right to participate in government) is misplaced. Article 24 features in most modern Constitutions around the world, and numerous international instruments. It is a broad right that speaks to public participation in and access to government. It speaks to the right to vote, and civic engagement in public affairs. In this instance it cannot be said that the Petitioner's right to participate in government has been infringed. Nothing has stopped the Petitioner from engaging with the State on this issue. The fact that regulations have not been passed and therefore cannot be engaged with, does not negate the right to participate and engage on this issue with publicly elected officials.

[26] Further it cannot be said that the 2nd Respondent has not made any regulations when specified to do so, as it is our considered view that even though the new regulations have not yet been made by the 2nd Respondent, the saving of the previous regulations under the old Act, saves the Minister from being held responsible for any contravention of the Charter rights.

[27] In respect of the contention of the Respondents that the Petitioner's constitutional challenge is to delay criminal proceedings, we observe on perusal of the numerous documents that the Petitioner had produced that his research into the medical purposes of cannabis was long before he was charged in the Supreme Court. It is also apparent that he had gone public expressing his views on the research carried on by him in respect of same. We are therefore satisfied that this constitutional petition was not deliberately filed by the Petitioner after he was charged in the Supreme Court in case CS27/2017, in order to delay and derail the proceedings against him in the said case.

[28] This Court therefore limits its enquiry to whether or not MODA 2016 requires the Second Respondent to make regulations. The relevant provisions in MODA 2016 dealing with the need to control drugs being used for medical and scientific purposes and the provisions dealing with regulations as contained therein are discussed below. It would be pertinent at this stage to set out the relevant provisions of MODA 2016 prior to analysing the arguments of the Petitioner.

[29] Section 3(1) of MODA 2016 reads as follows:

3. (1) *Controlled drugs and preparations thereof shall be classified in the First Schedule to this Act according to the degree of control to which they should be subject, as follows –*
 - a) *Class A: Drugs that are subject to special measures of control in view of the particular harms that their non-medical or non-scientific use can cause, including those classified in Schedule IV of the 1961 Convention and in Schedule I of the 1971 Convention;*
 - b) *Class B: Drugs having a medical and/or scientific use which should be subject to control in view of the harms that their non-medical or non-scientific use can cause, including those classified in Schedule II of the 1971 Convention, and in Schedule II and Schedule I of the 1961 Convention, except the drugs included in its Schedule IV;*
 - c) *Class C: Drugs having a medical and/or scientific use which should be subject to control in view of the harms that their non-medical or non-scientific*

use can cause, but of a less substantial degree than Schedule II drugs, including those preparations classified in Schedule III of the 1961 Convention and in Schedule III and Schedule IV of the 1971 Convention.

[30] A reading of this section clearly indicates the need to control drugs being used for medical and scientific purposes in view of the harms that their non-medical and/or non-scientific use can cause and this section read together with section 54(1) of MODA 2016, empowers the Minister in consultation with the Minister responsible for health to make regulations for carrying into effect the objectives and purposes of this Act. It is to be specifically mentioned that section 54(1) and 54 (2)(a) refers to regulations being made for the *authorising for possession, use, sale, supply, prescription or other dealing in, or the manufacture or importation or exportation of, any controlled drug for medical or scientific purposes;*

[31] For better understanding we set out section 54 (1) and 54 (2) (a) of MODA 2016 which reads as follows:

54. (1) The Minister may, in consultation with the Minister responsible for health, make regulations for carrying into effect the objectives and purposed of this Act.

(2) Without prejudice to the generality of subsection (1), regulations may provide for –

a) authorising for possession, use, sale, supply, prescription or other dealing in, or the manufacture or importation or exportation of, any controlled drug medical or scientific purposes;

[32] Having thus considered the aforementioned sections in MODA 2016, we are satisfied that there is a need to control drugs being used for medical and scientific purposes in view of the harms that their non-medical and/or non- scientific use can cause and the burden and

duty is cast on the Minister in consultation with the Minister for Health to ensure that these objectives are carried out by making the necessary regulations.

[33] Section 4 of MODA 2016 reads as follows:

4. (1)A controlled drug may be manufactured, imported or exported, and dealt with in the Seychelles for medical or scientific purposes in accordance with regulations made under this Act.

(2)In any proceedings under this Act a person claiming to have acted pursuant to a provision of this Act or to regulations made under subsection (1) shall bear the burden of proving that fact.

[34] It is apparent on a reading of this section that the intention of the Legislature was to permit the manufacture, import or export, and dealing with of controlled drugs in the Act would be permitted in Seychelles for medical or scientific purposes *only* in accordance with regulations made under this Act (MODA 2016).

[35] Further we interpret section 4(1) as requiring and mandating new regulations to be drafted in accordance with the statutory scheme of MODA 2016. We observe that section 4(1) of the MODA 2016 provides that, “*a controlled drug may be manufactured, imported or exported, and dealt with in Seychelles for medical or scientific purposes in accordance with regulations made under this Act” (emphasis ours). Unfortunately no regulations have been made under the new Act up to date. The only regulations in existence are those referred to in the saving provision contained in section 55(3) of MODA 2016 which provide that the regulations enacted under the repealed Misuse of Drugs Act 1990 (MODA 1990) i.e. the regulations of the 22nd of May 1995 enacted under section 44(1) of MODA 1990, remain in force.*

[36] It is clear from the wording of section 4(1) of MODA 2016 that the section refers specifically for new regulations to be made under the new MODA 2016, in accordance

and with due consideration to the new provisions of law contained within the new Act and not found under the old Act MODA 1990.

[37] It is to be further observed that section 44(1)(a) of the MODA 1990 i.e. the section under which the above regulations were enacted, differs in its wording from the pertinent provisions of the new Act, namely section 54 (1) and (2) (a), in one crucial aspect:

[38] Section 44 (1) (a) of the MODA 1990 reads as follows:

“The Minister may make regulations for carrying into effect the purposes and provisions of this Act and, without limiting the generality of the foregoing, may make regulations-

(a) authorizing the possession, sale, supply, prescription or other dealing in, or the manufacture or importation or exportation of, a controlled drug and prescribing the circumstances and conditions under which the controlled drug may be possessed, sold, supplied, prescribed or otherwise dealt with or manufactured or imported or exported”

[39] Section 54(1) and (2)(a) of the MODA 2016 on the other hand reads:

“(1) The Minister may, in consultation with the Minister responsible for health, make regulations for carrying into effect the objectives and purposes of this Act.

(2)Without prejudice to the generality of subsections (1), regulations may provide for –

(a) authorizing the possession, use, sale, supply, prescription or other dealing in, or the manufacture or importation or exportation of, any controlled drug for medical or scientific purposes” (emphasis ours).

[40] The addendum “*for medical or scientific purposes*” is contained only in the new and not in the old Act. This clearly indicates that there has been a material change in the law, and that the factors that ought to be considered by the Minister when enacting the said regulations under the new Act are different than the ones that had to be considered under

the old Act, a notion which is further substantiated by the fact that under the new Act the Minister of Health ought to be consulted.

[41] Lastly it is our view that the saving provision contained in section 55(3) of the MODA 2016 with respect to regulations passed under the previous Act was only intended to provide an interim solution to prevent gaps in the law until regulations made under the new Act come into force, and was never intended to be of a permanent nature. Section 55 (3) of the *MODA 2016*, explicitly states that the regulations made under the previous Act, “shall continue in operation until amended or repealed under this Act” (*emphasis ours*), thereby clearly indicating the intended temporary nature of the operation of the old regulations under the old Act until regulations were amended or repealed under the new Act.

[42] The extended application of the regulation from the 22nd May 1995 enacted under the previous Act does not suffice to fulfil the statutory duty provided for in section 4(1) of the MODA 2016 to enact new regulations regarding the manufacturing, import and export of controlled drugs for medical and scientific purposes. It appears that no visible effort has been made by the Ministers concerned up to now (May 2019) to address their mind to the new provisions of MODA 2016 to bring in such necessary new regulations.

[43] We would next deal with the submission of Learned Counsel for the Respondent where he specified in detail that the relief prayed for is not sustainable under the principle of separation of powers and granting of any of the reliefs prayed for by the Petitioner would amount to intrusion into the powers and functions of other organs of the State or invalidating the scheme of the Constitution with reference to judicial powers.

[44] In *Public Utilities Corporation v Elisa* (20 of 2009) [2011] SCCA 8 (29 April 2011) the Court held that;

“[47] The fact of the matter is, however, there are limits up to which, under the Separation of Powers, the Courts could go. It cannot with by the stroke of a judicial pen repeal and replace an Act of Parliament, unless it is inconsistent with a particular provision of the Constitution. Laws passed by Parliament may be

restrictively or generously interpreted to meet the justice of the case but they cannot be repealed and replaced by the Judiciary.

[49] It is our view that we should not in our fledgling democracy proceed with haste in the matter but with circumspection having regard to the separation of powers.”

[45] We therefore agree that Court must be mindful of the separation of powers in this matter, and our decision gives the necessary and constitutional deference to the Executive and Legislative branches of government in accordance with Constitution and Seychellois jurisprudence.

[46] In this instant case all this Court has done is what it is empowered to do, interpret the law and in doing so and having concluded that the law indicates that MODA 2016 requires new regulations to be enacted, it cannot be said that this has resulted in the Judiciary intruding into the powers of the Executive and Legislature. The manner which the Executive regulates the use of scheduled drugs for scientific and medicinal purposes is beyond the expertise and jurisdiction of this Court. Our inquiry is therefore limited to whether an obligation exists to make regulations, which we have found it to, and whether that obligation has been discharged, which it has not. In reviewing the conduct of the different branches of government for constitutional and legal compliance, the Court is able to evaluate both positive conduct and, as in this case, the absence of conduct in this regard.

[47] The South African Constitutional Court in the case of *Minister for Environmental Affairs & Ano v Aquarius Platinum SA Pty Ltd & Ors [2016] ZACC 4*. in considering the failure of a Minister to make regulations made the following observations in instances where legislation places a mandatory obligation on the Executive:

[41] The Minister was the functionary mandated to make the regulations within three months from the date of publication. This she failed to do and there is no explanation for the failure, despite the fact that she was cited as a party to the proceedings. It may well be that she has a plausible explanation for her failure but we simply do not know because she chose not to furnish it. For now it is fair to infer from her failure to give an explanation that she has none. Otherwise she

would have provided one if she had it. More so because the matter raises a serious dereliction of duty on her part.

[42] The Minister's failure to make regulations here has serious implications to upholding the Constitution and the rule of law. Her omission undermined not only the legislative process authorised by the Constitution but also thwarted the operation of legislation in the making of which she had participated...

[43] Every Minister carries an obligation to uphold the Constitution as well as to respect and promote the rights in the Bill of Rights. One of them is everyone's right to an environment that is not harmful to their health or wellbeing and also the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures. The Environmental Amendment Act is a legislative measure the Minister was duty-bound to enforce. Here the omission had quite the opposite effect. From September 2014 when the Act came into force to July 2015 when she published the regulations, a lacuna was created which may have had catastrophic consequences."

[48] This case indicates the severity of a failure to pass regulations, and illustrates how far a Court can go in considering that failure. It also reminds us of the constitutional element that the requirement to pass regulations may entail, and the important role Ministers have in ensuring legislation is given effect to.

[49] When the Legislature enacts laws regarding the use and misuse of drugs, and when the Minister is regulating the lawful use of those drugs, there is an implication for certain acts and activities that would no longer be considered illegal, provided that the previously criminalised conduct relates to scientific or medical purposes. However, the Petitioner's argument that the obligation to make regulations that could potentially allow for the sale of controlled drugs for medicinal purposes is premature and speculative. Any regulations that decriminalise the use of certain drugs and conduct will have implications for other laws, and the Minister will have to be mindful of the criminal law amendments that would need to follow.

[50] Therefore, for the purposes of this judgment, this case is somewhat different as that in the quotation above as there was no distinct time limit set for the passing of regulations by

law and because the efficacy of the MODA 2016 is not dependent on the passing of the regulations as the previous regulations had been saved. Therefore it cannot be said that such a lacunae referred to in the above case exists in our law.

[51] It is our considered view that even though the new regulations have not yet been made by the 2nd Respondent, the saving of the previous regulations under the old Act, saves the Minister from being held responsible for any contravention of the Charter rights.

[52] The experiences in other jurisdictions as borne out in the report of the International Narcotic's Control Board demonstrates the complexities, the technical and time-consuming nature of regulating this area, broad and competing public policy considerations and other factors that render this process an important but challenging task. The Court however, cannot dictate how this task should be undertaken, and neither can the Petitioner.

[53] Having thus interpreted the law and the need for regulations under the new MODA 2016, we leave it to the Ministers concerned to determine the nature, content and scope of the new regulations on the basis that they act reasonably, in good faith, rationally and within the parameters of the Constitution. If a citizen is of the view that the new regulations are unconstitutional once enacted, they are free to seek the intervention of this Court.

[54] For the aforementioned reasons Learned Counsel for the Respondent's contention that granting the relief of the petitioner has resulted in the Judiciary intruding into the powers of the Executive and Legislature bears absolutely no merit and is accordingly dismissed.

[55] Therefore, although we find that the Second Respondent has a positive obligation to pass regulations under the MODA 2016 within a reasonable time, we do not find that the failure has amounted to a violation of any constitutional provisions. We would strongly urge the 2nd Respondent to take note that the continuation of the reliance on the previous regulations cannot go on indefinitely, it has a statutory duty to pass regulations under the new MODA 2016 and should apply its efforts to this.

[56] Therefore we order as follows:

- d. The second respondent has a statutory duty to make and issue regulations under s 4 and 54(1)(a) of the Misuse of Drugs Act;
- e. The Petitioner has failed to establish that the failure to make and issue regulations under the provisions in (a) constitutes a violation of the Charter;
- f. The second respondent is ordered to issue regulations within 24 months, which regulations will have prospective effect.

Signed, dated and delivered at Ile du Port on 31 May 2019

M Burhan J

S Nunkoo J

ANDRE J

Introduction

[57] I have read the judgment of Burhan J. I agree with his findings and the order to the extent that he finds that the 2nd respondent is required in law to make regulations under MODA 2016. However, I do not agree with the finding that no rights were violated in this instance. I say so for the following reasons.

[58] This Judgment arises out of Constitutional Petition No. 01/2018 of 25 January 2018, filed by Mr Alexander Geers (the Petitioner) against the Attorney General representing the Government of Seychelles (first Respondent), the Minister for Home Affairs and Local Government (second Respondent) and the Attorney General (third Respondent). It

concerns the alleged failure by the Government to make regulations under the Misuse of Drugs Act 2016 (MODA 2016) to regulate, inter alia, the possession and supply of certain controlled drugs for medical or scientific purposes. The Petitioner claims that this alleged failure has resulted in criminal charges against him for possession with the intent to traffic of cannabis in contravention of s 9(1) of MODA 2016.¹

[59] The Petitioner seeks several prayers. First, he seeks a declaration that the first Respondent's refusal or failure to make regulations under MODA 2016 to regulate the possession, use, sale, supply, prescription or other dealing in, or the manufacture or importation or exportation of controlled drugs for medical or scientific purposes, is a contravention of his rights in the Constitution of the Republic of Seychelles, 1993.

[60] He claims that it contravenes Articles 16 of the Constitution which guarantees every person a right to dignity; Article 18 of the Constitution which affords every person a right to liberty and security of the person; Article 19 of the Constitution which guarantees every accused person a right to a fair and public hearing; Article 24 of the Constitution which grants every citizen of Seychelles who has attained the age of eighteen years, a right to, inter alia, take part in the conduct of public affairs; and finally, Article 29 which recognises the right of every citizen to protection of health and to the enjoyment of the attainable standard of physical and mental health.

[61] The second prayer is a writ of mandamus against the second Respondent ordering her to immediately make regulations under MODA 2016, to regulate any controlled drug for medical or scientific purposes.² Third, an order that the second Respondent give the regulations retrospective effect, with effect from 1 June 2016 when MODA 2016 came into operation. Finally, he seeks a writ of certiorari to curtail and stop his criminal trial flowing from the possession of cannabis charge.³

¹ This section reads: 9(1) A person who possesses a controlled drug, whether lawfully or not, with intent to traffic in contravention of this Act commits an act of trafficking and is liable on conviction to the penalty specified for an offence under s 7(1). 9(2) where a person is charged with an offence under this section and the Court is of the opinion that the person is not of that offence but is guilty of an offence under s 8, the court may convict the person of the offence under s 8 even though the person was not charged with that offence.

² For the possession, use, sale, supply, prescription or other dealing in, or the manufacture or importation thereof.

³In Criminal Side No. 27 of 2017 in the Republic v/s Alexander Geers & Ors (the Geers case).

Litigation background

- [62] On 13 June 2017, the Petitioner, Mr Alexander Geers, a Seychellois national and hotel manager, was charged with possession of cannabis with the intent to traffic, in contravention of s 9(1) of MODA 2016. He was found in possession of nearly 4kgs of cannabis materials. The criminal trial against him is pending before the Supreme Court.
- [63] Following his indictment, the Petitioner filed the present Petition, alleging that the Respondents had failed to comply with the statutory duty to make regulations for inter alia, the possession and use of cannabis for medical or scientific purposes. He claimed that he had, over the last few years, and with the knowledge of the Respondents, lobbied for the legitimisation of cannabis for research, scientific and medical purposes. He further alleged that he held seminars, with the help of the Respondents, at the Drugs and Alcohol Council and Ministry of Health which were attended by medical practitioners, senior civil servants and the media, and also had an insert on television which was viewed publicly – with the respondents’ knowledge – canvassing for legitimisation.
- [64] He stated that when MODA 2016 was enacted, he carried out research in cannabis for scientific and medical purposes at a house in Bel Ombre. He was aware of several countries where cannabis had been legalised, for medical and scientific purposes and recreational use. He was also aware of health benefits it contained for severe chronic diseases like cancer, and had spoken with cancer patients in the country who had expressed the desire to try cannabis to help manage their illness. And that although many Seychellois already used this as treatment, some terminally ill patients were suffering because they lacked access to legitimate use of cannabis. In his view, the Respondents’ failure to regulate is depriving terminally ill Seychellois access to this treatment.
- [65] This failure also infringed his constitutionally protected rights, especially Articles 16, 18, 19 and 24. He claimed that had the Respondents regulated activity as mandated in the

Act, his rights would have been protected. And he would not have been charged criminally. In light of this, it was necessary for the court to grant his requested orders.

[66] The Respondents raised preliminary objections to the Petition. They submitted that the Petition was infructuous as regulations for medical use were already in place, second, that Petitioner lacked locus standi to bring the Petition, lastly, that the relief prayed for was beyond the court's jurisdiction, as it fell under policy decisions of the executive and the legislative function of the state. It also violated the principle of separation of powers.

[67] All three preliminary objections were dismissed in a comprehensive ruling on 18th September 2018. With regards to the first one, the court reasoned that the wording in MODA 2016 was different to that in the 1990 Act. The distinction was sufficient to allow the Petitioner an opportunity to enlighten the court about the need for new regulations under MODA 2016. The second objection, of locus standi, was rejected on the ground that the Petitioner had a personal interest in the matter, since he brought the Petition on his own behalf for alleged breach of his fundamental rights. In so far as the last objection was concerned, the court found that the objection was premature, and that the prayer sought were within the parameters of Section 46 (5) of the Constitution.

[68] Following the ruling, the Respondents delivered their response to the merits of the Petition. They denied that no regulations were in place. In their view, the regulations for medical use of controlled drugs envisaged in Section 4 of MODA 2016 were already in place, because of the saving provisions of Section 55(3) of MODA. There is no need for new regulations under MODA 2016.

[69] They claimed that they had no knowledge of the Petitioner's alleged canvassing for legitimisation of cannabis for medical and scientific use. In their view, even if this was accepted as accurate, this did not place any obligations on the Respondents, and the Petitioner was still bound to the legal framework of MODA 2016. The Petitioner was found in possession of 4kgs of cannabis, in contravention of MODA. The Petitioner was not licenced or authorised under MODA.

- [70] Further, the Respondents claimed that they had not neglected or failed to make regulations. Instead, the Petitioner had failed to look at the legislation scheme under Section 4 of MODA. There are already regulations in place for the possession, sale, prescription or other dealings in relation to controlled drugs. The existent of the regulation also provides for the use of controlled drugs for medical purposes as scheduled therein. The Government decides, as per policy, which controlled drugs to include in the schedule, which requires detailed research and resources. The decision cannot be made on the whim of certain individuals.
- [71] The Respondents also rejected the Petitioner's claim that the use of cannabis may be good for chronic illnesses, stating that there was research and data showing that its use may lead to drug addiction. Sufficiently adequate means are available to patients with chronic illnesses at present. The fact that other countries have opted to legalise this was irrelevant, as Seychelles had its own special demographics.
- [72] They denied the allegation that many Seychellois use cannabis for medical use, claiming that there were no licensed persons in the country to provide such treatment, since this was illegal.
- [73] In so far as the allegations concerning terminally ill patients was concerned, the Respondents denied that their conduct constituted deprivation of medical treatment. Adequate treatment is available. Further, the Constitution does not allow individuals to choose their choice of medical treatment and does not mandate the Respondents to provide a choice of treatment.
- [74] The Respondents denied that the Petitioner's rights, including the right to a fair trial had been breached. In their view, Article 19 listed several elements. The Petitioner has not stated specifically which elements of the right have been violated. The Petitioner's claim that the regulations had not been made is not a defence, and he cannot claim an anticipatory right.
- [75] Even if no regulation had been made, such a decision falls within policy decisions of government, especially the executive. The grant of relief sought to usurp the power of the

executive is against the separation of powers rule, and the Constitution. The relief sought is void.

Submissions

- [76] Both Learned Counsels filed detailed written submissions with supportive case law, and documents. Due consideration has been given to the contents thereof.
- [77] The Petitioner submitted that by operation of Section 4 (1) (2) of MODA 2016, it is envisaged that should it be proven that the cannabis was for scientific purpose, this was a defence in law. His right to a fair trial as enshrined in Article 19 of the Constitution would be infringed by the continuation of the criminal case against him in the absence of the regulations envisaged in Section 4 of MODA 2016. The Respondents' failure to regulate this could lead to his imprisonment for several years. Had they complied with MODA 2016 and passed the pertinent regulations, he would have had a valid defence.
- [78] He submits that continuation of the criminal case against him in light of the Respondents' failure to regulate, violates his constitutional right to a fair hearing; Article 16 of the Constitution referring to dignity and the prohibition on degrading punishment; Article 18 which ensures his right to liberty which may only be restricted in accordance with fair procedures established by law; Article 24, his right to take part in the conduct of public affairs; and Article 29 which ensures every citizen protection of health and to the enjoyment of the highest standard of physical and mental health.
- [79] At the hearing of the matter, Learned Counsel for the Petitioner Mr. A. Derjacques made submissions concerning the Petitioner's alleged activities in support of the legitimisation of cannabis for medical and scientific purposes. He highlighted to the Court a bundle of documents, more particularly, one entitled "Correspondence Timeline", which seeks to show that even before the filing of the Geers case, the Petitioner always canvassed for cannabis for medical purposes and was conducting scientific purposes (research) of cannabis. This had been set out in the Petition, where the Petitioner alleged that he had regular and frequent communications and correspondences with, CARE (represented by Mrs Sarah Rene), Vice President Meriton, former President, James Michel, Dr,

Atsyaor (representative of WHO), Mr Shelton Jolicoeur, Attorney at law, Mr Galen Bresson (former MNA), Mr. Antoine Onezime (former CEO SBC), Minister Mitzy Larue, Minister of Health, Mr. Liam Quin (Deputy CEO of NDEA), Mrs Yvana Theresine (Director of Drugs and Alcohol Abuse Council), and the entire Drugs and Alcohol Abuse Council.

[80] Learned Counsel further submitted that the Petitioner as averred at paragraph 12 of the Petition, that he organised and held seminars to promote cannabis as a medicine, at the Drugs and Alcohol Council and the Ministry of Health which was well attended by senior civil servants and medical staff and the media. That he participated in public debate on the medical use and scientific research of cannabis on television with the SBC including interviews in the Seychelles Nation and Today's news journals. He contended that the Petitioner was well known to the Respondents and an established proponent of the medical use of cannabis and scientific research on cannabis and that the bundle of documents produced corroborates each and every particular of his correspondences with the Government of Seychelles and Public Authorities.

[81] Finally, Learned Counsel submitted that the Petitioner was, in the Petitioner's view, a scientist who was possessed the cannabis for research purposes and helping medically ill patients. This justified his possession thereof, and necessitates the regulations. He should thus be granted his prayers, including the order for retroactivity and curtailing the pending criminal proceedings against him.

[82] On their part, the Respondents made the following submissions. Sections 4 (1) and 55 (1) of MODA 2016 was, in their view, similar to the corresponding provision of Section 44 (1) of the repealed 1990 Act. This repealed Act had a regulation, Statutory Instrument dated 22nd May 1995, which had been passed in accordance with Section 44 (1). This regulation enables and authorizes the possession, supply, prescription or other dealing in, or the manufacture or importation or exportation of, controlled drug and prescribing the circumstances and prescribes conditions under which the controlled drug may be possessed, sold, supplied, or otherwise dealt with or manufactured or imported or exported and also the usage of controlled drugs for medical services.

- [83] They submitted that Section 55 (1) of MODA 2016 had both repeal and saving authority. The saving effect meant that anything duly done or suffered under it did not affect the operation of MODA 2016. They argued therefore that the regulations made under subsection (d) of Section 55, the saving clause, rendered the regulations made under the Section 44 of the 1990 Act operative, until they get amended or repealed under the MODA 2016. Accordingly, there was no need for new Regulations under Section 4 (1) of MODA 2016 as claimed by the Petitioner.
- [84] They say that the saving provision dispels claims of any violation and or likely contravention of any of the Petitioner's constitutional rights. As a result, the Petitioner is not entitled to relief sought.
- [85] Further, the Petitioner has misconstrued MODA 2016. Section 4 of MODA does not specify cannabis as a controlled drug which ought to be regulated. The provision is general, and does not specify any particular controlled drug. The provision also does not set out the time or manner in which the regulations ought to be made by the Minister. It is within the Minister's discretion to make these, or to amend the extant regulations, in accordance with Government policy. The legislature enacted MODA 2016, and saved the existing regulations under the repealed 1990 Act, which included regulations for medical or research purposes of the specified controlled drugs. The specified drugs have been scheduled. These regulations serve the purpose for which they had been enacted, and need not be amended. If such need arose, it would be within the discretion of the executive.
- [86] In relation to the Petitioner's claim that he canvassed for, and conducted research in the medical use of cannabis, the Respondents submit that the Petitioner did not present any evidence of qualifications and expertise to conduct such research at his home. The question whether he was engaged in research of criminal activity has to be left in the hands of the trial judge in the criminal matter. There is nothing prohibiting the petitioner from adducing evidence in that regard. Thus, the Petitioner cannot claim a breach of his right to a fair hearing. Section 42 of MODA 2016 allows possession for personal use, and

Section 42(2) permits the raise of any defence. He may raise defences in the criminal trial, and cannot use the Constitutional Court as the forum to test his defence.

[87] In so far as the retrospective effect of the regulation is concerned, they submit that there is no provision in the Constitution which provides for the retrospective application of laws. Article 19(4) prohibits *ex post facto* laws. If the regulation is to be made with retrospective effect, then any past breaches may give rise to penal consequences. Further, s 25(2) of the Interpretation and General Provisions Act 1976 and Art 2 of the Civil Code of Seychelles do not permit retroactivity of legislation. The South African judgment relied upon by the Petitioner, *Minister of Justice and Constitutional Development and Others v Prince*,⁴ also opted against retrospectivity, and the court suspended the order of invalidity to allow Parliament to remedy the constitutional defect, and to prevent disruption in the criminal justice system.

[88] In relation to the Petitioner's complaint about his health rights, the Respondents submitted that the Constitution did not guarantee particular courses of treatment, thus, the Petitioner was not entitled to conduct unauthorised research for treatment as a matter of right. Medical treatment with cannabis is foreign to the medical system, and there is no authentic scientific data available locally to prescribe this. The Petitioner's documents relied upon to substantiate his views are inconclusive. The judiciary is not the appropriate forum to decide on the scientific use of controlled drugs. The fact that a few countries allow use of cannabis for any purpose does not mean that Seychelles must follow suit. These jurisdictions have their own contexts, and the jurisprudential basis of their decisions distinguishable.

[89] In addition, they contend that even if the regulations were not in place, the Petitioner still does not have any entitlement to the relief sought because this relief is beyond the jurisdiction of this Court. The making of the regulations are within the exclusive remit of

⁴Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton (CCT108/17) [2018] ZACC 30; 2018 (10) BCLR 1220 (CC); 2018 (6) SA 393 (CC); 2019 (1) SACR 14 (CC) (18 September 2018) paras 102-103.

the executive, because these are policy decisions, and also the legislative functions of the state.

[90] In their view, the relief sought is also unsustainable under the principle of separation of powers and granting it would amount to intrusion of powers of other organs of the State or invalidating the scheme of the constitution providing for separation of powers. They relied on the in lime ruling, as well as the Indian Supreme Court judgment of *Kanhaiya Lal Sethia & Anor vs Union of India & Anor* (1997) 6 SCC 573, and the Ugandan judgment, *Centre for Health, Human Rights and Development & 3 Others v. Attorney General* (2015), Constitutional Appeal No. 1 of 2013. These cases dealt with the court's ability to exercise review jurisdiction in policy matters, and held that generally speaking the courts do not in exercise of their power of judicial review, interfere in policy matters of the state, unless the policy so formulated either violates the mandate of the constitution or any statutory provision or is otherwise actuated by mala fides.

[91] The Respondents submit that enactment of the legislation is a matter to be considered by the government of the day taking into considerations the various impacts it would have on the society at large and also in consultation and recommendation of various stake holders. They find it unacceptable that the executive could, in this manner, be compelled to make a policy before proposing any enactment or amendment, since this is the exclusive jurisdiction of the executive/legislature.

[92] These submissions will be explored later. First, it is necessary to set out the legislative background of MODA.

Legislative background – MODA 2016 and the 1990 Act

[93] The legislative backdrop of this Petition is necessary to provide some context to the issues. On 1 June 2016, MODA 2016 became effective. Before this Act, provisions criminalising and legitimising certain forms of drug activity were contained in the Misuse

of Drugs Act 11 of 1990 (the 1990 Act). That Act underwent several amendments,⁵ until it was largely repealed by MODA 2016.

[94] One of the purposes of MODA 2016 is to ensure the availability of controlled drugs for legitimate medical and scientific use. The scientific purposes aspect is novel; prior to its repeal, the 1990 Act only regulated importation and other legitimate activity for medical purposes.

[95] Controlled drugs under MODA include Cannabinol, except where contained in cannabis or cannabis resin and Cannabinol derivatives.⁶ Section 4(1) of the Act provides that a controlled drug may be manufactured, imported or exported and dealt with in Seychelles for medical or scientific purposes – but, only in accordance with regulations made under the Act.

[96] The power to make the regulations envisaged in Section 4(1) is contained in Section 54 of MODA. Section 54(1) states that the Minister⁷ may, in consultation with the Minister responsible for health, make regulations to bring into effect the object and purpose of the Act. The regulations may provide for a wide range of factors, such as authorising the possession, use or other dealing of any controlled drug for medical or scientific purposes.⁸

[97] As mentioned, MODA largely repealed the 1990 Act. However, certain saving provisions were inserted in Section 55 of MODA. In terms of Section 55(3), statutory instruments made under the repealed 1990 Act ‘that are in operation immediately prior to the date on which [MODA] comes into operation’ continue until amended or repealed under [MODA].

[98] The Minister passed several statutory instruments under Section 44 of the 1990 Act. This section empowered the Minister to make various kinds of regulations, including regulations –

⁵ Until 2014, in terms of Act 3 of 2014.

⁶ This is provided for in the s 1 of MODA, read with the First Schedule – Controlled Drugs.

⁷The Minister for Home Affairs, who is the second respondent in casu.

⁸Section 54(2)(a) of the Act.

‘authorising the possession, sale, supply, prescription or other dealing in, or the manufacture or importation or exportation of, a controlled drug and prescribing the circumstances and conditions under which the controlled drug may be possessed, sold, supplied, prescribed or otherwise dealt with or manufactured or imported or exported’

[99] Like MODA, controlled drugs under the 1990 Act included Cannabinol, except where contained in cannabis or cannabis resin and Cannabinol derivatives.⁹

[100] The regulations passed in terms of Section 44 of the 1990 Act includes statutory instrument 53 of 1995, the Misuse of Drugs Regulations. This regulation regulate inter alia, the importation of certain specified controlled drugs by Government, by licensed persons or veterinary services, and by persons from other jurisdictions for medical purposes.¹⁰

[101] The relevant provision dealing with importation reads as follows:

‘Importation of controlled drugs

4. (1) *The Government, acting through its Ministry responsible for health, may import in raw form the specified controlled drugs morphine and cocaine and in finished dosage form any specified controlled drug and shall cause to be kept, in respect of each consignment of a specified controlled drug so imported, a register which shall specify -*

(a) the date of the arrival of the consignment in Seychelles;

(b) the form and quantity of the specified controlled drug and the trade name or brand, if any, under which the specified controlled drug is imported;

(c) the country from which the drug was imported;

(d) the name of the exporter in that country, and

(e) where an export certificate is required under an international convention for the export of the drug, the particulars of that certificate.

(2) The Division of the Ministry responsible for the provision of veterinary services or a person who is the holder of a licence to provide medical services or services as a veterinary surgeon may

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⁹See the First Schedule – Controlled Drugs of the 1990 Act.

¹⁰See s 4 of SI 53 of 1995 which deals with the importation of controlled drugs.

(a) with and subject to the prior written authorisation of the Ministry responsible for health -

(i) in the case of the holder of a licence to provide medical services, import in finished dosage form a controlled drug specified in Part 1 of the Schedule, other than diphenoxylate;

(ii) in the case of the Division of the Ministry responsible for the provision of veterinary services or the holder of a licence to provide services as a veterinary surgeon, import in finished dosage form the specified controlled drugs fentanyl and pethidine;

(b) import in finished dosage -

(i) in the case of the holder of a licence to provide medical services, the specified controlled drug diphenoxylate when contained in a medical preparation, a controlled drug specified in Part II of the Schedule, other than amphetamine, and a controlled drug specified in Part III of the Schedule;

(ii) in the case of the Division of the Ministry responsible for the provision of veterinary services or the holder of a licence to provide services as a veterinary surgeon, the specified controlled drug codeine, and

shall keep a register in a form acceptable to the Ministry responsible for health which shall give the particulars referred to in subregulation (1)(a) to (e).

(3) A person entering Seychelles may -

(a) where the person is in possession of a certificate for a controlled drug specified in Part 1 of the Schedule, other than fentanyl or cocaine, or the controlled drug amphetamine issued to that person by a medical practitioner in the country where the person comes from, import for the person's own consumption the controlled drug specified in the certificate in finished dosage form in an amount which constitutes a normal course of treatment;

(b) import for the person's own consumption in finished dosage form an amount which constitutes a normal course of treatment of a medical preparation containing the controlled drug diphenoxylate, a controlled drug specified in Part II of the Schedule, other than amphetamine or a controlled drug specified in Part III of the Schedule.

(4) A body or person authorised to import a specified controlled drug under subregulation (2) shall -

(a) keep the specified controlled drug in a safe and secure place satisfactory to the Ministry responsible for health;

(b) in the case of a controlled drug specified in Part I or Part III of the Schedule -

(i) retain each prescription or a copy thereof issued by the body or person or against which a specified controlled drug was dispensed or sold;

(ii) at the end of every three months beginning with the date of the coming into force of these Regulations or, where a person commences to provide medical services or services as a veterinary surgeon after the coming into force of these Regulations, beginning with the date the person commences to provide the services, submit to the Ministry responsible for health a return in respect of the controlled drug in a form acceptable to that Ministry;

(c) account to the Ministry responsible for health of the disposal, use or otherwise of a specified controlled drug imported under these Regulations and forthwith advise the Ministry responsible for health and the police of any loss, disappearance or theft of a specified controlled drug which was in the possession of that body or person.'

[102] The Schedule specified drugs under this regulation are divided into classes A, B and C. The following drugs are under Class A: (a) Cocaine; (b) Diphenoxylate; (c) Fentanyl; (d) Methadone; (e) Morphine; (f) Pethidine; and (g) Phenazocine. The following are in Class B: (h) Amphetamine; (i) Codeine; (j) Dihydrocodine; and (k) Pholcodeine. Class C has only one: (l) Flunitrazepam.

[103] It also contains provisions regulating the manufacture of specified controlled drugs by Government, the sale and disbursement of controlled drugs by Government, a person licensed to provide medical services, or a veterinary surgeon.¹¹

[104] The manufacturing provision reads:

'Manufacture of controlled drugs

5. (1) The Government may manufacture a specified controlled drug and any mixture or preparation containing a specified controlled drug.

(2) The Government shall cause to be kept proper record of any specified controlled drug or any mixture or preparation containing a specified controlled drug which it manufactures.

(3) A person who is employed by the Government for the purposes of subregulation (1) shall, while manufacturing a specified controlled drug or a mixture or preparation containing a specified controlled drug at the premises used by the Government for the purpose of manufacturing medicinal preparations, be presumed, subject to proof to the contrary, to be manufacturing the drug, mixture or preparation for the Government.'

¹¹See s 5 of the SI.

[105] The sale and disbursement provision states:

'Sale or dispensing of controlled drugs

6. (1) *The Government or a person employed by the Government for this purpose in the course of that employment or a person licensed to provide medical services or services as a veterinary surgeon in the course of the provision of these services may, where a specified controlled drug has been imported, purchased or, in the case of Government, manufactured in accordance with these Regulations, sell or dispense in finished dosage form -*

(a) to a person who is authorised to sell or dispense specified controlled drugs under this regulation, a specified controlled drug;

(b) to a person, other than a person referred to in paragraph (a), who -

(i) in the case of a specified controlled drug referred to in Part I or Part III of the Schedule, is in possession of a prescription for the drug issued by a medical practitioner or dentist registered as such under the laws of Seychelles or a veterinary surgeon licensed to provide services as such under the laws of Seychelles or employed by the Government;

(ii) in the case of any other specified controlled drug, other than amphetamine, requires the drug for treatment.

(2) A body or person authorised to sell or dispense a controlled drug under this regulation shall, in the case of a controlled drug specified in Part I or Part III of the Schedule, maintain a register in which shall be entered the name and address of the person to whom the drug was sold, the name including the brand or trade name and quantity of the drug sold, the date and time when the drug was sold.

(3) Except in the case of an emergency, a person authorised to sell or dispense a specified controlled drug under this regulation shall not sell or dispense a specified controlled drug, other than the specified controlled drug codeine, pholcodine or dihydrocodeine when contained in a medical preparation, to a person who is less than 18 years.

[106] Further, it regulates possession of certain controlled drugs for medical purposes.¹²

'Possession

7. (1) *A person employed by the Ministry responsible for health as a medical practitioner, dentist, pharmacist or veterinary surgeon or to perform a function which requires the person to handle or have in the person's custody at any time in the course of the person's employment a specified controlled drug or a substance containing a specified controlled drug may, in the course of the performance of the person's employment and for and in connection with the person's functions, have in the person's possession a specified controlled drug.*

¹²See 7 of the SI.

(2) A person who is the holder of a licence to provide medical services or services as a veterinary surgeon may, for or in connection with the provision of those services and where the specified controlled drug has been imported or purchased in accordance with these Regulations, have in that person's possession a specified controlled drug in finished dosage form.

(3) A person who is undergoing medical treatment may -

(a) where another person who -

(i) is licensed to provide medical services; or

(ii) is employed by the Ministry responsible for health and is authorised in the course of that person's employment to prescribe or dispense specified controlled drugs,

has prescribed or dispensed a controlled drug specified in Part I or Part III of the Schedule or the controlled drug amphetamine to the first-mentioned person;

(b) where a controlled drug specified in Part I or Part III of the Schedule or the controlled drug amphetamine has been lawfully prescribed and dispensed to the first-mentioned person in connection with the treatment of that person in a place outside Seychelles,

have in that person's possession an amount, which constitutes a normal course of treatment, of a controlled drug, in finished dosage form, specified in Part I or Part III of the Schedule or the controlled drug amphetamine.

(4) A person may, for medicinal purposes, have in the person's possession an amount which constitutes a normal course of treatment of a controlled drug, in finished dosage form, specified in Part II of the Schedule

[107] These provisions in the regulation legitimise certain activities pertaining to specified controlled drugs for medical purposes. These activities include importation, manufacturing, sale and dispensing as well as possession. The controlled drugs to which they relate are those specified in the schedule to the regulation in Classes A, B and C, only to the extent set out in the regulations. The activities only relate to medical use, and limit these to the specified groups of persons identified in the regulation. These include, in certain instances, the Government, medical and ministry of health officials, dentist, pharmacist, veterinary surgeon and persons from other jurisdictions. Only a few restricted specified controlled drugs may be imported, and only by a limited group of persons. Similarly, only a few itemised specified controlled drugs may be manufactured and by Government. The sale and dispensing of some specified controlled drugs is also only

restricted to some drugs, and by some specified classes of persons, and restricts exist regarding the sale and dispensing of these drugs. Similarly, possession of certain specified controlled drugs is also restricted.

[108] Clearly, the regulation restricts legitimate activities in relation to only specified controlled drugs, and only to the extent provided for. In all instances, only for medical use; no provision is made for scientific use or research. Authority for these activities is severely limited. It is not a free for all. And cannabis does not form part of the specified controlled drugs under the regulation.

[109] The second, and last regulation passed in terms of s 44, is statutory instrument 9 of 2001. This SI sets up the Centre Mont Royal as an approved institution for the treatment and rehabilitation of substance dependant persons.

[110] These are the only statutory instruments promulgated in terms of that provision.¹³ The two regulations have been ‘saved’ by Section 55 of MODA, and are thus incorporated into the MODA 2016 framework.

[111] Despite Section 54 of MODA granting the Minister power to pass regulations for medical or scientific activity, no regulations have been passed. As mentioned, statutory instrument 53 of 1995 regulates legitimate activities of controlled for medical purposes only. There is no regulation that deals with legitimate activity for scientific purposes, as this is a novel aspect which has been added in the MODA framework. Further, cannabis is not a specified controlled drug for purposes of the regulation.

[112] With this background, we turn to consider the submissions of the parties. Particularly, whether the respondents were required to regulate, and whether the alleged inaction by constitutes an infringement to Article 16 (right to dignity), Article 29 (right to health), Articles 18 (right to liberty) and 19 (right to fair and public hearing) of the Constitution.

Legal analysis

¹³ See <https://seylli.org/statutory-instruments-force-10-may-2016> accessed on 27 May 2019.

- [113] The first question that has to be considered is whether Section 54 of MODA 2016 requires the making of regulations, or whether the regulations made under Section 44 of the 1990 Act suffice, as submitted by the respondents.
- [114] As mentioned, Section 54(1) of MODA states that the Minister may, in consultation with the Minister responsible for health, make regulations to bring into effect the object and purpose of the Act. The use of the word ‘may’ in the provision, which generally connotes a discretion, was not impugned during these proceedings. It will thus not be considered an issue for purposes of this judgment. The main question thus arising in this instance, is whether the Respondents’ view that the regulations under the 1990 Act is sufficient.
- [115] In the preceding section above which sets out the legislative backdrop, a detailed analysis has been made of the ambit of the regulations under the 1990 Act. This assessment reveals, inter alia, that the provisions in the regulation legitimise certain activities pertaining to specified controlled drugs only for medical purposes. That the controlled drugs to which they relate are those specified in the schedule to the regulation in Classes A, B and C, only to the extent set out in the regulations. Only specified groups of persons identified in the regulation may legitimately conduct activities in relation to particular specified controlled drugs. These include, in certain instances, the Government, medical and ministry of health officials, dentist, pharmacist, veterinary surgeon and persons from other jurisdictions. Possession of certain specified controlled drugs is also restricted. The regulation restricts legitimate activities in relation to only specified controlled drugs, and only to the extent provided for. In all instances, only for medical use; no provision is made for scientific use or research. Authority for these activities is severely limited. It is not a free for all. And cannabis does not form part of the specified controlled drugs under the regulation.
- [116] One of the purposes of MODA 2016 is to ensure the availability of controlled drugs for legitimate medical and scientific use. And Section 4(1) provides that regulations may be made for certain activity relating to controlled drugs. In terms of Section 54(1), these regulations are made in consultation with the Minister for health, and are intended to carry into effect the purpose and object of the Act. Despite the saving provisions in

Section 55, especially Section 55(3), it appears that the respondents have to issue regulations in terms of Section 54, to bring into effect the new objectives of MODA 2016. This includes the objective in MODA to ensure the availability of controlled drugs for scientific use – which is a novel aspect. The regulation under the 1990 Act only covers medical use, and in the circumstances provided in the regulation. The respondent’s submission that the regulation under the 1990 Act deals sufficiently with the requirement to regulate is thus misplaced.

[117] The implication of this finding is that the Respondents have failed to regulate for scientific purposes, and have to issue regulations to accommodate this new element that has been brought in by MODA 2016.

[118] Despite this finding however, the court may not impose upon the Respondents the ambit of such regulations, or their content. For instance, the court may not provide input on which controlled drug should be regulated and how, who should be authorised legitimate use and under what conditions. The Court would be entering the policy and legislative fray if it were to direct these conditions.

[119] Further, the Court cannot ignore the rest of the provisions of MODA 2016, which inter alia, criminalise activities relating to some controlled drugs, including cannabis. These provisions have not been impugned in this Petition, and remain on the statute books. Any regulation that flows from MODA 2016, have to be done within the parameters of these provisions.

[120] We turn to consider the Petitioner’s claim that the failure to regulate has caused an infringement of the rights listed.

The right to dignity, Article 16 of the Constitution

[121] The right to the protection of human dignity under Article 16 of the Constitution is very wide in its scope. It reads: “every person has a right to be treated with dignity worthy of a human being and not to be subjected to torture, cruel, inhuman or degrading treatment or punishment.”

[122] At the heart of the right to the protection of dignity is the assumption that each human being has incalculable human worth, regardless of circumstances, and should be treated accordingly. Dignity in humans involves the earning or the expectation of personal respect or of esteem. As Dodan J stated in *Ponoo v Attorney-General* (5 of 2010) [2010] SCCC 4 (16 November 2010):

‘Human dignity is something that is inherently a person’s God-given inalienable right that deserves to be protected and promoted by the Government and the community. Human dignity is in itself enshrined as the cornerstone of society from the very beginning of civilization. Thus all social institutions, governments, states, laws, human rights and respect for persons originate in the dignity of man or his personhood. It is even said that dignity is the foundation, the cause and end of all social institutions. Thus all social institutions, governments, states, laws, human rights and respect for persons originate from the concept of dignity of man or his personhood.’¹⁴

[123] Our Constitution allows reference to foreign law in order to interpret the rights that are in our constitution, thus the view of the Canadian Court should be taken into account. The Canadian Supreme Court described the right to human dignity as follows in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 para 53:

“Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon person traits or circumstances which do not relate to individual need, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities and merits of different individuals taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalised, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within ... society.”

[124] Noting the wide scope of the right to the protection of dignity as provided under Article 16 of our Constitution, which includes the right not to be subjected to torture, cruel, inhuman or degrading treatment or punishment. This Court has looked at what constitutes

¹⁴ See also *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998) para 133 where Sach J said that the right to dignity entails that every human has the same moral worth.

inhuman and degrading punishment within the context of mandatory minimum sentences in *Ponoo v Attorney-General* *ibid*. It accepted the interpretation and meaning of what could amount to torture, cruel, inhuman or degrading treatment by the European Court of Human Rights in *Saadi v. Italy*, Application No. 37201/06, 28 February 2008 where the court said that:

‘134. According to the Court's settled case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, Price v. the United Kingdom, no.. 33394/96, § 24, ECHR 2001-VII; Mouisel v. France, no. 67263/01, § 37, ECHR 2002-IX; and Jalloh v. Germany [GC], no. 54810/00, § 67, 11 July 2006).

135. In order for a punishment or treatment associated with it to be “inhuman” or “degrading”, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see Labita v. Italy [GC], no. 26772/95, § 120, ECHR 2000-IV).

136. In order to determine whether any particular form of ill-treatment should be qualified as torture, regard must be had to the distinction drawn in Article 3 between this notion and that of inhuman or degrading treatment. This distinction would appear to have been embodied in the Convention to allow the special stigma of “torture” to attach only to deliberate inhuman treatment causing very serious and cruel suffering (see Aydin v. Turkey, judgment of 25 September 1997, Reports 1997-VI, § 82, and Selmouni, cited above, § 96).’

[125] The Petitioner has alleged that his right to be protected against cruel and degrading punishment has been contravened, because of the failure by the Respondents to pass regulations. He has not clearly stated how this is so, and has not particularised this in any detail. This places court in a position where it needs to speculate how this right might be implicated. A concise statement of the material facts as envisaged in s 5 (1) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules, 1994, has to provide sufficient details concerning the alleged breach of a right. Apart from listing this right, he has not set out how it has allegedly been infringed. So this court cannot come to his aid.

[126] The failure by the Respondents to issue regulations under Section 54 of MODA 2016 does not automatically result in the possibility of inhumane punishment. The provision is general, and does not require the making of regulations for all controlled drugs. There has been no breach of Article 16.

The right to liberty and security of the person, Article 18 of the Constitution

[127] This article affords everyone the right to liberty and security of the person. This right may be restricted, but this restriction has to be in accordance with a fair procedure. Further, in terms of Article 18(2)(b) the restriction, in accordance with fair procedures established by law, of the right shall not be treated as an infringement of clause (1) in the event of an arrest or detention on reasonable suspicion of having committed or of being about to commit an offence for the purposes of investigation or preventing the commission of the offence and of producing, if necessary, the offender before a competent court.

[128] Similar to the former claim of a breach to his dignity, the Petitioner has merely alluded to his right to not to have his freedom restricted. There may be a link between his right to liberty and the failure to regulate, since the continuation of the criminal trial could lead to his incarceration. But to hold that there is an infringement of his right would be to presuppose that the respondents failed to regulate for this particular controlled drug – ie, cannabis.

Right to a fair and public hearing, Article 19

[129] Article 19 ensures fair trial rights. Article 19 (7) provides that any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial, and where proceedings for such a determination are instituted by any person before such a court or other authority the case shall be given a fair hearing within a reasonable time.

[130] The Petitioner has stated that his right to a fair hearing has been violated by the failure to regulate. The Petitioner has not set out how this is so. It is not clear how this failure to regulate has led to a breach of the Petitioner's right to a fair hearing. The Petitioner has

averred, in his affidavit, that had the respondents complied and issued the regulations, he would have had an additional defence and lawful protection. Against, the Petitioner seeks to put the court in a position where it would have to engage in guesswork.

[131] The court has no way of telling whether such regulations would have included cannabis as a controlled drug, who may have been authorised and under what circumstances. Thus, it cannot be said that the Petitioner would have had an additional defence. This claim must thus fail.

Right to participate in Government, Article 24

[132] This provision guarantees all citizens over 18 years of age, subject to the Constitution, the right to inter alia, take part in the conduct of public affairs either directly or through freely chosen representatives. This provision mirrors Articles 21 and 25 of the Universal Declaration of Human Rights (UDHR) 1948 and of the United Nations Covenant on Civil and Political Rights (ICCPR) 1966, respectively, which recognise the rights of all citizens to take part in the government of their country directly or through freely chosen representatives.

[133] The Petitioner has claimed that the failure to make regulations has breached his right to take part in public affairs. Citizens may take part in public affairs either directly or through their chosen representatives. The Petitioner has not clarified whether his right has been breached to directly partake in public affairs, and if so, how. Or whether he had been deprived his right to representative participation. Since the regulations have not been done, how has the Petitioner's right to participate in their making been infringed?

[134] The answer to the above may be found in Section 4 and 54 of MODA 2016, which authorise a delegation of the power to make the regulation to the Minister and the Minister for health.

[135] Section 54 (1) provides that:

“The Minister may, in consultation with the Minister responsible for health, make regulations for carrying into effect the objectives and purposes of this Act.”

[136] This provision clearly grants the Minister of Home Affairs and Local Government a discretion over making regulations as it is requested by the Petitioner. This delegation has not been challenged. Delegation of authority is a common feature of government. In *Intershore Consult (Pty) Ltd v Govinden* (CS 127/2010) [2013] SCSC 79 (06 November 2013), the Supreme Court said that this with regards to delegation:

‘It is thus evident the Act empowers the Attorney-General - the Central Authority - to delegate all the powers (including the power obviously, to swear an affidavit) conferred on him by the Act to State Counselor any other public officer. Article 76 of our Constitution also states that the power of the Attorney-General may be exercised by the Attorney-General in person or subordinate officers acting with the general or special instructions of the Attorney-General. This delegated power as I see it, includes the power to carry out all functions incidental thereto such as swearing an affidavit etc to institute and conduct any proceeding under the Act.’

[137] In the South African case of *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995), the Constitutional Court highlighted that delegating subordinate regulatory authority was not only constitutionally permissible, but was necessary for effective governance. However, the Court cautioned that there were limitations on the legislative authority that Parliament could delegate. The court was asked to address the constitutionality of section 16 A of the local Government Transition Act 209 Of 1993. The section in question allowed the President to amend the Act itself by proclamation. In a majority judgment, the court held that this delegation of legislative power went beyond constitutionally acceptable limits (at 30):

“In a modern state detailed provisions are often required for the purposes of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our constitution parliament can pass legislation delegating such legislative functions to other

bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made and assigning plenary legislative power to another body, including, as section A does to amend the Act under which the assignment is made.”

[138] Since the *Executive Council* case allows the possibility that parliament can delegate the power to amend legislation. The question thus in this context is whether there are limitations to such a delegation and whether limitations also apply to secondary legislation as regulations. The case raised two important questions about the limits parliament must place on delegations of such kind: (a) parliament must provide clear criteria for the exercise of the delegated power; and (b) delegation must contain safeguards against the abuse of the delegated power.

[139] In the present context, the question therefore is whether the power to make regulations has been delegated in a manner which is vague and or unclear as to what the proper scope of the power given to the Minister is has not been challenged.

[140] As correctly submitted by the Respondents, there are legitimate reasons why Parliament delegated this authority to the Minister. The delegation is out of the appreciation of the technical expertise of the executive arm of government, to carry out/commission research and develop evidence based policies on the legitimate activities of certain controlled drugs. The delegation is general, and is not limited to any particular controlled drug. Section 67 (3) of the Interpretation and General Provisions Act, 1976 states that where an Act confers power on an authority to make a statutory instrument for any general purpose and for any special purposes, the enumeration of the special purposes does not derogate from the generality of the powers conferred with reference to the general purpose.

[141] Despite this delegation, it is arguable that since the statutory instrument, if passed, could have been laid before the National Assembly, this could have provided the Petitioner an opportunity to contribute to this through his duly elected representatives.¹⁵ This may have

¹⁵ See s 63 of the Interpretation and General Provisions Act, 1976.

provided the Petitioner the opportunity to influence the content of the regulations in so far as scientific research is concerned.

[142] On the evidence presented, the Petitioner had publicly canvassed for the legitimisation of cannabis for medical and scientific purposes. The Respondents deny knowledge of this. It is unclear to what extent the Petitioner attempted to lobby for regulations utilising legislative steps. Nevertheless, the onus was on the respondents to make regulations for scientific activity. Their failure to do so did infringe on the Petitioner's right to participate in public affairs.

The right to health care, Article 29

[143] In terms of this provision, the State recognises the right of every citizen to protection of health and to the enjoyment of the attainable standard of physical and mental health. The Petitioner has alleged breach of this right by the respondents.

[144] In support of this, he claims that since MODA 2016 was passed, he has carried out research on cannabis for scientific and medical purposes in Bel Ombre. He claims that his findings show that the controlled drug holds certain health benefits for chronic illnesses and for terminally ill patients. In his view, failure to regulate and allow his scientific research, contravenes his rights and the rights of those who may benefit. The Respondents deny that he is a scientist, and his allegation that there exist health benefits. In their view, the literature is inconclusive and in the context of Seychelles, would require local data.

[145] The correct ambit of the right to health has yet to be determined in Seychelles. Since it has not been raised frontally, as the Petitioner does not seek to impugn government for his own health, or have in support of his claim, persons whose right to health are affected, it would be best not interpreted in these circumstances.¹⁶ But the question arises whether the State's recognition of a right to health encompasses the Petitioner's right to do

¹⁶ See for instance *Ah-Man v Government of Seychelles and Others* (1/2002) (of) [2003] SCCC 1 (05 May 2003) where the court refused the petitioner's attempt to 'champion' the rights by seeking blanket relief to end the widely utilised pattern of detaining and searching a vast majority of Seychellois citizens travelling abroad through the Seychelles International Airport.

research in the field of cannabis for medical and scientific purposes. In order for the court to be in any position to assess this question, it would have had to at least show that (a) that the Petitioner is a person qualified in these fields (b) the Petitioner has supporting evidence showing that cannabis use in patients is necessary for their health (c) these persons support his application. These are but some of the factors that may establish some link between the Petitioners's claimed studies, and the State's recognition of the right to health of others. This has not been shown. Accordingly, it is accepted that the right to health of others may include the right by another to do medical research in a field, but the Petitioner has not shown how his own claimed expertise links with the State's recognition of the health of others.

Summary of Findings

[146] Having considered the question whether the Petitioner's rights have been infringed, the findings on this aspect may be summarised as follows.

[147] The failure by the Respondents to issue regulations under s 54 of MODA 2016 does not automatically result in the possibility of inhumane punishment. The provision is general, and does not require the making of regulations for all controlled drugs. There has been no breach of Article 16. In respect of Art 18, his right to liberty, the Petitioner has merely alluded to his right to not to have his freedom restricted. There may be a link between his right to liberty and the failure to regulate, since the continuation of the criminal trial could lead to his incarceration. But to hold that there is an infringement of his right would be to presuppose that the Respondents failed to regulate for this particular controlled drug – i.e., cannabis.

[148] The Petitioner has stated that his right to a fair hearing in Art 19(7) has been violated by the failure to regulate. The court has no way of telling whether such regulations would have included cannabis as a controlled drug, who may have been authorised and under what circumstances. Thus, it cannot be said that the Petitioner would have had an additional defence. This claim must thus fail. In so far as Art 24 is concerned, on the evidence presented, the Petitioner had publicly canvassed for the legitimisation of

cannabis for medical and scientific purposes. The Respondents deny knowledge of this. It is unclear to what extent the Petitioner attempted to lobby for regulations utilising legislative steps. Nevertheless, the onus was on the Respondents to make regulations for scientific activity. Their failure to do so did infringe on the Petitioner's right to participate in public affairs.

[149] As regards the alleged contravention of his right to health care, the ambit of the right to health has yet to be determined in Seychelles. It has not been raised frontally, as the Petitioner does not seek to impugn government for his own health. Thus, it would be best not interpreted in these circumstances.¹⁷ But the question arises whether the right to health encompasses the Petitioner's claim to do research in the field of cannabis for medical and scientific purposes. In these circumstances, it is accepted that the right to health of others may include the right by another to do medical or scientific research in a field, but the Petitioner has not shown how his own claimed expertise links with the State's recognition of the health of others.

[150] The findings on the duty to regulate may be summarised as follows. This Court having duly considered the illustrated points of law in line with the submissions of both the Petitioner and the Respondents on the above issue finds as follows.

[151] Upon a very careful scrutiny of the relevant provisions in MODA 2016 finds that Section 4 (1) of MODA 2016 which provides that, "a controlled drug may be manufactured, imported or exported, and dealt with in Seychelles for medical or scientific purposes in accordance with regulations made under this Act" has not been complied with. (own emphasis.)

[152] Although Section 55 (3) of MODA 2016 provides that regulations enacted under the repealed 1990 Act, such as the Regulation of the 22nd May 1995 enacted under Section 44 (1) of the repealed 1990 Act remains in force, this regulation is only limited to medical

¹⁷ See for instance *Ah-Man v Government of Seychelles and Others* (1/2002) (of) [2003] SCCC 1 (05 May 2003) where the court refused the petitioner's attempt to 'champion' the rights by seeking blanket relief to end the widely utilised pattern of detaining and searching a vast majority of Seychellois citizens travelling abroad through the Seychelles International Airport.

purposes. It does not provide for scientific purposes, which is a new aspect introduced in MODA 2016.

[153] It is clear from the wording of Section 4 (1) of MODA 2016 that the section envisages new regulations to be made under MODA 2016, in accordance and with due consideration to the new provisions of law contained within the new Act, which are many.

[154] The saving provision contained in Section 55 (3) of MODA 2016 with respect to regulations passed under the previous act was only intended to provide an interim solution to prevent gaps in the law until regulations were made under the new Act. They could not have been intended to be of a permanent nature. Section 55 (3) of MODA 2016 states that the regulations made under the previous Act, “shall continue in operation *until amended or repealed under this Act*” (own emphasis). This clearly indicates the temporary nature of the operation of the old regulations.

[155] Section 44 (1)(a) of the 1990 Act, i.e. the section under which the regulations were enacted, differs in its wording from the pertinent provisions of the new Act, namely section 54 (1) and 54 (2)(a), in one crucial aspect. Section 44 (1)(a) of the 1990 Act reads as follows:

“The Minister may make regulations for carrying into effect the purposes and provisions of this Act and, without limiting the generality of the foregoing, may make regulations (a) authorizing the possession, sale, supply, prescription or other dealing in, or the manufacture or importation or exportation of, a controlled drug and prescribing the circumstances and conditions under which the controlled drug may be possessed, sold, supplied, prescribed or otherwise dealt with or manufactured or imported or exported”

[156] Section 54 (1) read with 54 (2)(a) of MODA 2016 on the other hand reads:

*“54(1) The Minister may, in consultation with the Minister responsible for health, make regulations for carrying into effect the objectives and purposes of this Act.
(2) Without prejudice to the generality of subsections (1), regulations may provide for (a) authorizing the possession, use, sale, supply, prescription or other dealing*

in, or the manufacture or importation or exportation of, any controlled drug for medical or scientific purposes". (own emphasis)

[157] This requirement of “*medical or scientific purposes*” is contained only in the new and not in the old Act. This shows that there has been a material change in the law, and that the factors that ought to be considered by the Ministry when enacting said regulations under the new act are different than the ones that had to be considered under the old act. This is further substantiated by the fact that under MODA 2016, the Ministry of Health must be consulted when regulations are made.

[158] In light of this, the conclusion is reached that the extended application of the Regulations from the 22nd May 1995 enacted under the 1990 Act does not fulfil the statutory duty provided for in Section 4 (1) of MODA 2016 to enact new Regulations regarding the manufacturing, import and export of controlled drugs for medical or scientific purposes. The second respondent has a statutory obligation to pass new regulations.

What remedies can the Court issue?

[159] This raises the question whether the court can issue an order to the Minister of Home Affairs and Local Government directing him or her to issue the regulations. The power of the court on this issue derives from Article 46 (5) of our Constitution. This section reads:

‘(5) Upon hearing of an application under clause (1) the Constitutional Court may-

(a) declare any act or omission which is the subject of the application to be a contravention of the Charter;

(b) declare any law or the provision of any law which contravenes the Charter void;

(c) make such declaration or order, issue such writ and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Charter and disposing of all the issues relating to the application;

(d) award any damages for the purpose of compensating the person concerned for any damages suffered;

(e) make such additional order under this Constitution or as may be prescribed by law.’

- [160] This article provides the court with wide powers to carve out an appropriate order. This includes the power to make an order giving directions that are appropriate to enforce the Charter and to dispose of the issues. While the court is mindful of its duty not to overstep or enter the executive fray, the Constitution enjoins the court to ensure that appropriate relief is given to litigants whose rights have been infringed. The respondents have raised concerns over the former, i.e. the judiciary entering policy issues, and this concern is legitimate, taking into account the guiding principles of separation of power. The court's powers, as laid out in s 46(5), enjoins the court to make appropriate orders. These take into account the parameters of what constitutes appropriate orders, and the court is mindful of its obligations in this regard. However, the principle of separation of powers incorporates the notion that the judiciary has the obligation to check, within the court's powers, other branches of government when called upon to do so.
- [161] The Constitutional Court of South Africa has strongly rejected the contention by the other branches of government that there may be cases in which the separation of powers principle requires the Court ipso facto not to give directions to the executive. This was the government's stance in *Mohamed and Another v President of the Republic of South Africa and Others* (CCT 17/01) [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) (28 May 2001) a case in which a foreign national had been illegally arrested and extradited to the US without any assurance from the US government that it would not impose or carry out the death penalty on him if convicted.
- [162] Furthermore, in *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (5 July 2002) the South African Constitutional Court directed the executive to develop a policy for the provision of anti-retroviral treatment.
- [163] The South African Constitutional Court reconciled the conflicting principles of separation of powers and the need for an effective remedy by granting interim relief to the successful litigant pending the rectification of the defective legislation.

[164] This Court is empowered to give orders to the organs and individuals of the Executive if the conclusion is that they have failed to carry out their statutory duty of issuing regulations where these are required. In this instance, the court is empowered to direct the Minister of Home Affairs and local Government to issue the regulations. However, the court cannot give directions about the substance or content of the regulations. This is to be determined by the Minister.

[165] Thus, the second Respondent is directed to make the necessary regulations as prayed for in prayer 1 of the Petition, for the purpose of enforcing the stated provisions of MODA 2016.

Retrospective application of an order of invalidity

[166] We now turn to the question as to retroactivity of the said regulation. As rightly pointed out by the Petitioner, Section 4 (1) of MODA 2016 was assented to on 15 April 2016 and the then Minister for Home Affairs issued the commencement notice on 30 May 2016.

[167] It is trite that an Act has prospective effect. Retrospectivity may be permissible where legislation is declared unconstitutional. The main question that has to be discussed in this context is whether retrospective application is in the interest of justice. In that light, the South African Constitutional Court held in *S v Bhulwana, S v Gwadiso* (CCT12/95, CCT11/95) [1995] ZACC 11; 1996 (1) SA 388; 1995 (12) BCLR 1579 (29 November 1995) that:

“It is only when the interests of good government outweigh the interests of the individual litigants that the court will not grant relief to successful litigants the litigants before the court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants ... [but the court should] be circumspect in exercising [its power in this regard].”

[168] In *S v Ntsele* (CCT25/97) [1997] ZACC 14; 1997 (11) BCLR 1543 (14 October 1997), the South African Constitutional Court stated against this backdrop that “the interest of individuals must be weighed against the interest of avoiding dislocation to the

administration of justice and the desirability of a smooth transition from the old to the new’ and the interest of avoiding the dislocation and inconvenience of undoing transactions, decision or actions taken under [the] statute”.

[169] With regards to criminal defendants (as is the case with the Petitioner), the Constitutional court concluded in *Bhulwana* that ‘no one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing a man shall tentatively go to jail today, but tomorrow and everyday thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.’

[170] The South African Constitutional generally invalidates the statute so that it no longer applies from the date of the order.

[171] This can also be seen in recent cases like *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening)*; *National Director of Public Prosecutions and Others v Rubin*; *National Director of Public Prosecutions and Others v Acton* (CCT108/17) [2018] ZACC 30; 2018 (10) BCLR 1220 (CC); 2018 (6) SA 393 (CC); 2019 (1) SACR 14 (CC) (18 September 2018) para 102, where the South African Court rejected any retrospective effect of the order ‘because it could have a disruptive effect on, and, cause uncertainty in, our criminal justice system.’

[172] In light of our order requiring the Minister to make the regulations, and the criminal nature of the proceedings ongoing against the Petitioner in the criminal case against the Petitioner (*Geers case*) we are mindful of the disruptive effect on, and, cause of uncertainty in our criminal justice system.

[173] Thus, this Court must refuse the prayer for retroactivity. This means that the order sought quashing the criminal proceedings must also fail.

[174] The court has found that there was a failure and an obligation to pass regulations under MODA 2019. But the court appreciates the nature and extent of the delegation of legislative power under s 54 (1) of MODA 2016. The Court can thus not interfere with the contents of the regulation, which is clearly within the precincts of the executive. It

cannot dictate the extent of the regulations; it cannot prescribe which controlled drugs should form part of the regulations. This is the terrain of the second respondent and the Minister of Health.

[175] It should be mentioned in passing that while the court notes the Petitioner's claims regarding the benefits of cannabis, and the literature which he has relied on, and the move towards legalisation of certain use of cannabis in some countries, the court does not have the authority, in these circumstances, to dictate to the executive how best to regulate controlled drugs like cannabis.

Final Determination

[176] For all the reasons which I partially concur with the judgment of Burhan J, however I am also of the position that a constitutional violation has occurred. I would therefore have granted the following:

[177] The second respondent has a statutory duty to make and issue regulations under Section 4 and 54(1)(a) of the Misuse of Drugs Act;

- (a) The failure to make and issue regulations under the provisions in (a) constitutes an infringement to the petitioner's right to participate in Government as envisaged in Section 24 of the Constitution;
- (b) The second respondent is ordered to issue regulations within 24 months, which regulations will have prospective effect.

Signed, dated and delivered at Ile du Port on 31 May 2019

S Andre J