THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2017-04548

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO

AND

THE APPLICATION FOR REDRESS BY THE APPLICANTS PURSUANT TO SECTION 14 OF THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO FOR THE CONTRAVENTION OF SECTIONS 4 AND 5 OF THE SAID CONSTITUTION IN RELATION TO THE APPLICATION

AND

IN THE MATTER OF THE DECISION AND/OR ACTION AND/OR CONDUCT OF THE CHIEF IMMIGRATION OFFICER TO ISSUE AN ORDER OF DEPORTATION AND THE DECISION OF THE MINISTER OF NATIONAL SECURITY TO UPHOLD THE DECISION

BETWEEN

CLINTON IDAEHO

1st Claimant

NATALIE BAILEY

2nd Claimant

AND

ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

1st Defendant

CHIEF IMMIGRATION OFFICER

2nd Defendant

Appearances:

Claimant: Farai Hove Masaisai instructed by Issa Jones

Defendant: Andrew Lamont instructed by Kezia Redhead

Before The Honourable Mr. Justice Devindra Rampersad

Date of delivery: November 1, 2018

JUDGMENT

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Introduction

1. By fixed date claim form filed on 15 December 2017 the claimants allege that there have been infringements of their fundamental rights by the defendants as a result of (i) the first claimant's arrest and subsequent detention for 52 days; (ii) the procedure adopted in the execution of a Special Inquiry held pursuant to the Immigration Act Chap. 18:01 (the Act) and (iii) a deportation order made against the first claimant that was subsequently upheld by the Minister of National Security.

2. The court looked at the evidence before it and found that there were infringements to the first claimant's constitutional rights. The first claimant's detention was illegal and he ought to have been informed of his right to legal representation upon being arrested and when the Special Inquiry was reconvened on 14 August 2014 before another Special Inquiry Officer. The court was however not minded to grant the second claimant the relief sought given that the deportation order was flawed and, in any event, had not been executed. This approach was in line with the position adopted by the Board in the case of ***Naidike & Ors v The Attorney General of Trinidad and Tobago*** [2004] UKPC 49.[1]

Background

3. The evidence in this matter is contained in the following affidavits:

   3.1. Affidavit of the first claimant in support of the constitutional motion filed on 12 December 2017;

   3.2. Affidavit in response of Marsha Wharton filed on 2 March 2018;[2]

   3.3. Affidavit in response of Alan Sookram filed on 2 March 2018;[3]

   3.4. Affidavit in reply of the first claimant filed on 5 April 2018; and

   3.5. Affidavit in reply of the second defendant also filed on 5 April 2018.

4. There were no notices filed for cross-examination of any of the deponents.

[1] Articulated at paras 62-63 of that judgment and discussed below
[2] and annexed as "M.B.1" to the affidavit of Michelle Benjamin filed 2 March 2018
[3] and annexed as "M.B.2" to the affidavit of Michelle Benjamin filed 2 March 2018

5. Based on the affidavit evidence, the following undisputed facts arise:

5.1. The first claimant is a citizen of Nigeria. The second claimant is a citizen of Trinidad and Tobago. The claimants were married on 20 January 2013.

5.2. The claimants visited the Immigration Department at Frederick Street on 11 March 2014 at which time the first claimant was arrested. He was provided with reasons for his arrest and detention dated 11 March 2014 which indicated that information coming to the Immigration Department alleged that he was a person other than a citizen of Trinidad and Tobago who came into Trinidad and Tobago at any place other than a port of entry and eluded examination or inquiry under the Act.[4]

5.3. The first claimant was eventually transferred to the detention centre in Aripo where he was detained until 2 May 2014.

5.4. On 1 April 2014, approximately three weeks after his arrest and pursuant to section 22 of the Act he was ordered to appear before a Special Inquiry Officer at the Immigration Detention Centre, Aripo on 4 April 2014.

5.5. The Special Inquiry was conducted on 4 April 2014 by Mr. Allan Sookram. The transcript of that hearing is purportedly annexed as "M.W.1" to the affidavit of Marsha Wharton. The Inquiry was adjourned and the first claimant further detained until 2 May 2014.

5.6. The then Minister of National Security authorized the release of the first claimant on an Order of Supervision, in the care of the second claimant, pending the conclusion of the Immigration Proceedings against him. That authorization came only after correspondence was sent to the then Minister by attorney at law representing the claimants' interest requesting that the first claimant be released. The first claimant was released on 2 May 2014. As a condition of his release the first claimant is required to report fortnightly to Immigration officials, they being the custodian of his passport.

5.7. The Special Inquiry resumed on 14 August 2014 before another Special Inquiry Officer, Kenny Seenath. The first claimant pleaded guilty and was informed that a deportation order will be issued against him.

5.8. The claimants then proceeded to fill out the prescribed form to appeal the order of deportation. The claimants have alleged that they were not informed that the first claimant could indicate on the form that he wanted

[4] See "C.I.*5*" which is an offence pursuant to section 22(1)(i)/22(2) of the Act

to make representations to the Minister of National Security in accordance with Regulation 30(4)(b) in the hearing of his appeal. The evidence of Mr. Sookram in that regard indicates that the form did in fact indicate that the first claimant wished to make representations to the Minister.[5]

5.9. A report was prepared and ultimately forwarded to the Minister of National Security. By letter dated 7 November 2017 the first claimant received notice that the Minister of National Security had dismissed his appeal against the deportation order. The Dismissal of Appeal was dated 29 September 2017.

6. By consent, on 1 February 2018 the court extended the first claimant's order of supervision for the duration of these proceedings and stayed the deportation order relating to the first claimant and dated 14 August 2014 until the determination of this matter.

The alleged constitutional breaches

7. By this action the claimants allege breaches of their fundamental rights in that it is asserted:

7.1. The first claimant's fundamental right to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of the law as enshrined by section 4(a) of the Constitution was infringed by his detention for 52 days;

7.2. The first claimant was denied the right to equality before the law and the protection of the law guaranteed by section 4(b) of the Constitution by the second defendant's failure to conduct a Special Inquiry promptly and when same was conducted, in failing to execute same in accordance with the Immigration Regulations pursuant to the Act;

7.3. The first claimant's right to his private and family life as guaranteed by section 4(c) of the Constitution was infringed because of his arrest and detention.

7.4. The claimants' right to privacy and family life as guaranteed by section 4(c) of the Constitution was infringed as a result of the decision of the Minister

[5] See para 9 of the Affidavit of Mr. Sookram

of National Security to uphold the deportation order without any consideration of the impact on the family life of the claimants;

7.5. The first claimant was denied the right to equality of treatment as guaranteed to him by section 4(d) of the Constitution of Trinidad and Tobago as a result of the failure to inform the claimants of the right to make written representation to the Minister of National Security;

7.6. The first claimant's rights as enshrined in paragraphs 5(2)(c)(i)-(iii) were infringed in that he was denied (i) the right to be informed promptly and with sufficient particularity of the reason for his arrest or detention; (ii) the right to retain and instruct without delay a legal adviser of his own choice and to hold communication with him; and (iii) the right to be brought promptly before an appropriate judicial authority;

7.7. The first claimant's right to a fair hearing guaranteed to him be section 5(2)(e) of the Constitution was infringed by the Special Inquiry Officer (i) failing to inform him of his right to an attorney at law at the Special Inquiry; (ii) failing to consider the claimants' request to make a voluntary departure from the country; (iii) failing to inform the first claimant of his right to make written representations to the Minister of National Security to appeal his decision; and (iv) placing a mark indicating that the claimant did not wish to make representations to the Minister;

7.8. The first claimant was denied a Special Inquiry as provided for by the Immigration Regulations and so the issuing of the order of deportation was made illegally and as such deprived the first claimant of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms in contravention of section 5(2)(h) of the Constitution.

8. The claim in relation to the second claimant was limited to the alleged infringement of her right to privacy and family life as a result of the decision of the Minister of National Security to uphold the deportation order allegedly without any consideration of the impact on the family life of the claimants.

The law

9. The first claimant was arrested pursuant to section 22 of the Act which states:

> *22. (1) Where he has knowledge thereof, any public officer shall send a written report to the Minister in respect of paragraphs (a) to (c) and to the Chief Immigration Officer in respect of paragraphs (d) to (i), with full particulars concerning—*
>
> *…*
>
> > *(i) any person other than a citizen of Trinidad and Tobago who either before or after the commencement of this Act came into Trinidad and Tobago at any place other than a port of entry or has eluded examination or inquiry under this Act.*
>
> *(2) Every person who is found upon an inquiry duly held by a Special Inquiry Officer to be a person described in subsection (1) is subject to deportation.*

10. As a result of the evidence received by the Immigration Department the first claimant was arrested by Immigration Officers acting in accordance with the authority granted to them by section 15 of the Act which states:

> *15. Every police officer and every immigration officer may, without the issue of a warrant, order or direction for arrest or detention, arrest and detain for an inquiry or for deportation, any person who upon reasonable grounds is suspected of being a person referred to in section 9(4) or section 22(1)(i), and the Chief Immigration Officer may order the release of any such person.*

11. Section 15 of the Act has been the subject of judicial interpretation in the case of ***Naidike & Ors v The Attorney General of Trinidad and Tobago*** [2004] UKPC 49 where, at paragraphs 45 to 50, Lord Brown analyzed the relevant sections and came to the conclusion that unless the immigrant's detention is required for an inquiry to be held forthwith or for his removal to be effected pursuant to a deportation order already in force, there seems no sound reason for the power to be exercised. Those paragraphs read:

> *[45] The argument about s 15 (and more particularly the question whether s 15 permits a person to be arrested and detained 'for deportation' without there being a deportation order already in force) requires consideration also of the two surrounding sections, ss 14(1) and 16:*
>
> > *'14. – (1) The Minister may issue a warrant for the arrest of any person in respect of whom an examination or inquiry is to be held or a deportation order has been made under this Act, and may order the release of any such person.*

'16. Any person in respect of whom an inquiry is to be held, or an examination … has been deferred … or a deportation or rejection order has been made, may be detained pending inquiry, examination, appeal or deportation …'

[46] Both sides point to the contrast between ss 14 and 16, both of which speak of an inquiry 'to be held' or a deportation order which 'has been made', and s 15, which refers to arrest and detention 'for an inquiry or for deportation', and each side submits that this supports its contended-for construction of s 15. Mr Guthrie argues that, whereas ss 14 and 16 clearly require an existing deportation order, s 15 requires only that such an order be in contemplation. Mr Knox's rival submission is that s 15 in effect uses shorthand to achieve the same result as ss 14 and 16: by the same token that arrest and detention 'for an inquiry' must necessarily refer to an inquiry yet 'to be held', so too arrest and detention 'for deportation' should be understood to refer to deportation pursuant to an order already made (as, indeed, the second limb of Dr Naidike's detention order (see para [10] above) expressly asserted).

[47] Mr Knox points also to the contrast between s 14's requirement for a ministerial arrest warrant and the very wide power accorded by s 15 to 'every police officer and every immigration officer' to arrest without warrant anyone reasonably suspected of having ceased to be a permitted entrant. It would seem strange were the s 14 power of arrest to arise only once the deportation order has been made and yet the much wider power under s 15 be available for the arrest and detention of someone against whom no deportation order has been made. Against that, it may be argued that, were this limb of s 15 to be available only against those in respect of whom the officer reasonably suspected a s 9(5) deportation order to be already in force, it could easily have said so.

[48] The regrettable fact is that s 15 (and, indeed, certain other sections in this Part of the Act) contains a number of puzzling features. The Board in the end is driven to the view that the intended scope of s 15 is uncertain and that this uncertainty must be resolved in favour of the liberty of the individual. The governing principle is that a person's physical liberty should not be curtailed or interfered with except under clear authority of law. As McCullough J succinctly put it in R v Hallstrom, ex parte W (No 2) [1986] QB 1090 at 1104:

'There is … a canon of construction that Parliament is presumed not to enact legislation which interferes with the liberty of the subject without making it clear that this was its intention.'

[49] True it is, as the majority decision of the House of Lords in Wills v Bowley [1983] 1 AC 57 illustrates, that there are limits to this presumption. The legislation there was construed by the majority in such a way as not

unduly to narrow the police's powers of arrest. Proper consideration should be had to the maintenance of public order and other aspects of the public interest and powers conferred by Parliament should not lightly be rendered ineffective. The tension was well explained by Lord Wilberforce in R v Inland Revenue Commissioners, ex parte Rossminster Ltd [1980] AC 952 at 997 and 998:

> *'The courts have the duty to supervise, I would say critically, even jealously, the legality of any purported exercise of these powers [powers of entry conferred on the Revenue]. They are the guardians of the citizen's right to privacy. But they must do this in the context of the times, ie of increasing parliamentary intervention, and of the modern power of judicial review. … [While] the courts may look critically at legislation which impairs the rights of citizens and should resolve any doubt in interpretation in their favour, it is no part of their duty, or power, to restrict or impede the working of legislation, even of unpopular legislation; to do so would be to weaken rather than to advance the democratic process.'*

[50] Nothing in the present case suggests that the public interest would be served or the democratic process advanced by giving a wide rather than narrow interpretation to s 15. Quite the contrary; ***unless the immigrant's detention is required for an inquiry to be held forthwith or for his removal to be effected pursuant to a deportation order already in force, there seems no sound reason for the power to be exercised****.*

[Emphasis added]

12. The distinction highlighted by counsel for the defendants is noted in that the Privy Council in ***Naidike*** found the appellant's arrest and detention to be unlawful primarily because the power of arrest in that instance only arose if a ministerial declaration had been made under section 9(4) of the Act and no such declaration was required to be made in these proceedings. However, it is this court's respectful view that Lord Brown's articulation of the limits of the power of detention pursuant to section 15 of the Act carries no qualification or restriction and his justified concerns as to the unauthorized deprivation of the liberty of the person and the purport of the section apply generally. No rationale or justification for the detention was proffered in any event[6]

13. As such, whereas there is the general power of arrest, detention is only warranted if required for an inquiry to be held **forthwith** (or within a reasonable time) or for removal to be effected pursuant to a deportation order already in force. The

[6] See ***Chandrawatee Ramsingh v The Attorney General of Trinidad and Tobago*** [2012] UKPC 16

court's adoption of this rationale is bolstered upon the further consideration of section 17(1) of the Act which reads:

> *17. (1) Subject to any order or direction to the contrary by the Minister, a person taken into custody or detained may be granted conditional release or an order of supervision in the prescribed form under such conditions, respecting the time and place at which he will report for examination, inquiry, deportation or rejection on payment of a security deposit or other conditions, as may be satisfactory, to the Chief Immigration Officer.*

In the court's opinion, this section contemplates a situation where there is no deportation order and a Special Inquiry cannot be held within a reasonable time.

14. The Immigration Regulations outline the procedure to be followed by Special Inquiry Officers and provide at regulation 25 that:

> *25. (1) An inquiry shall be conducted in the presence of the person concerned whenever practicable.*
>
> *(2) At the commencement of an inquiry where the person concerned is present and is not represented by an Attorney-at-law, or by a relative or friend, the presiding officer shall—*
>
> > *(a) inform the person concerned of his right to retain, instruct and be represented by an Attorney-at-law or by a relative or friend at the inquiry at no expense to the Government of Trinidad and Tobago; …..*

15. Upon a deportation order being made by the Special Inquiry Officer that officer is required to inform the person of his right to appeal[7] and the Minister may allow the appeal, dismiss it, quash the decision of the Special Inquiry Officer or reopen the Inquiry.[8] Where there is a notice of appeal, pursuant to regulations 30(4) and (5), the notice of appeal shall indicate whether the appellant wishes to make any representation and the appellant may submit written representations within seven days of the service of the notice of appeal. There is no statutory obligation placed on the Minister to request representations.

16. In the case of ***Naidike***, the detainee's daughter was also added to the claim and the Privy Council was asked to consider whether there was an infringement of her right to respect for family life as a result of (i) an alleged failure to properly take into account her interests before a deportation order was made against her father

[7] See regulation 25(13)(b)
[8] See regulations 26 and 27

and (ii) her father's unlawful arrest and detention. In disposing of these issues, Lord Brown stated at paragraph 63:

> *"[63] The first issue now appears to their lordships academic. Plainly there will be cases when careful regard will need to be had to the interests of family members (and not least those of a child who is a national of the host country, before the family is separated, or the child is effectively forced to leave) as a result of a deportation order. Given, however, their lordships' conclusion that* ***this deportation order was in any event unlawful on other grounds, and given further that, as events have transpired, it was never in fact executed but instead subsequently revoked, this seems an inappropriate case in which to explore the limits of this principle…"*** *Emphasis added*

17. In considering these issues Baroness Hale stated at paragraph 75:

> *".....The decision- maker has to balance the reason for the expulsion against the impact upon the other family members, including any alternative means of preserving family ties. The reason for deporting may be comparatively weak, while the impact on the rest of the family, either of being left behind or of being forced to leave their own country, may be severe. On the other hand, the reason for deporting may be very strong, or it may be entirely reasonable to expect the other family members to leave with the person deported."*

18. Baroness Hale was thus of the opinion that, in the appropriate case, the impact a Deportation Order would have on family members ought to be considered and balanced against the right of the State to exclude or deport non-citizens. In the case of ***Naidike***, there was no evidence of such a balancing act being conducted but His Lordship was reluctant to grant relief to the daughter and reasoned at paragraphs 77-80:

> *"…However, as the deportation order was never put into effect and Faith has remained throughout living with her father in the country of her birth, she has not in fact suffered any damage as a result of the failure to take her interests into account. To that extent the point is academic in her case. At this distance in time there would be little point in making a declaration that her rights under s 4(c) of the Constitution had been infringed, even if we were all of that view.*
>
> *[78] The second issue is more difficult because the State's actions undoubtedly had the effect of depriving Faith of her family life with her father, who had sole parental responsibility for her in Trinidad, for a period of over two months……*

[79] ……. An unlawful arrest is self-evidently not in accordance with the law. Does that then mean that the State has interfered without justification with Faith's right to respect for family life?

[80] As pointed out by Lord Brown of Eaton-under-Heywood (at para [64]), it is accepted in this case that the State's action was not aimed at Faith at all. Her separation from her father was the incidental effect of the State's actions against him. The case-law under art 8 of the European Convention (referred to in the authorities cited above) indicates that the rights of one family member may be infringed by action taken against another. But the action taken in those cases was the long-term decision to deport or expel in which all the relevant factors could be placed before the authorities and taken into account. This cannot be done before a decision to arrest without warrant. The police cannot be expected to discover what family members may be affected by the decision, let alone the information needed to balance the respective interests. The damage to the child's interests would be the same whether or not she was with her father when he was arrested; in fact it might have been worse if she had not been there, because at least the police officers knew that alternative arrangements had to be made for her. In those circumstances, ***I too would be reluctant to hold that the short-term arrest and detention of one family member, even if unlawful, necessarily involved a lack of respect for the private and family life of another.*** *The point must be left for fuller consideration in another case. In this case, there is no evidence that Faith was in fact harmed by these events, although I fully accept that a child may well be harmed by a traumatic separation from a primary carer." Emphasis added*

Analysis of the evidence

19. The evidence as relates the infringements complained of can be broken down into four main categories: the arrest, the detention, the Special Inquiry and the appeal.

The Arrest

20. Submissions on behalf of the first claimant asserted that he was arrested without cause. However, this goes against the evidence of the first claimant where at paragraph 7 of his principal affidavit he annexed the Reasons for Arrest and Detention dated 11 March 2014. Also, the first claimant has not denied that he pled guilty to the offence as charged. Further, it is the first claimant's evidence that his passport had not been stamped thus providing the basis for a conclusion that he may not have entered the country at a port of entry or that he eluded examination or inquiry under the Act.

The Detention

21. The only evidence in relation to the first claimant's detention came from him. The defendants have not put forward any explanation as to why the first claimant was detained for 52 days, the delay in holding a Special Inquiry or any particulars of his detention.

22. According to the first claimant, he was taken to Henry Street and questioned for hours upon being arrested. He deposed that during that time he was not afforded the opportunity of having representation. Thereafter, he was transferred and detained at the Detention Centre in Aripo.

23. The circumstances under which the first claimant was detained were not given but he gave details of emotional distress from being separated from his wife who was allegedly six weeks' pregnant at the time and who allegedly miscarried as a result of the hardship and depression she faced when they were separated. However, no medical evidence was provided to support the evidence that the second claimant was pregnant or that she had a miscarriage.

24. As noted earlier, the first claimant was only released upon a letter being sent to the then Minister of National Security by an attorney at law. The authorization for his release came merely two days after the letter was written to the Minister[9] with no explanation as to why the first claimant was still being detained or what were the circumstances considered for the approval of his release.

The Special Inquiry

25. The first claimant first received notice of the Special Inquiry on 1 April 2014, some three weeks after he was arrested. That Inquiry was held on 4 April 2014.

26. Mr. Sookram was the Special Inquiry Officer on 4 April 2014 and it is his evidence that the minutes of that Inquiry were recorded by Marsha Wharton and that same were read over and signed by him as being accurate. In the court's opinion, this procedure has a serious flaw especially in the context that it does not appear to have any statutory underpinning.

27. Given the consequences which can possibly flow from evidence provided at a Special Inquiry it ought to be the claimant who should have signed the minutes as being accurate. The first claimant, or any deponent, should be made to certify that that the information set out in those minutes were what he spoke of at the Inquiry rather than risk what has transpired in this matter with respect to the accusation

[9] The Minister's letter is dated 30 April and in it he acknowledged receipt of Ms. George's letter dated 28 April

that the information was extracted from information acquired when the first claimant was initially detained and which was contained in his personnel file.[10] That would have been in keeping with the established practice for example in the Magistrates Court where the written notes are signed by the defendant and even in the High Court civil arena in circumstances such as the cross-examination of debtors and cross examinations in company winding up proceedings. As it stands, Mr. Sookram's[11] attempt at legitimacy by adopting this procedure is a self-serving one and does not impress the court as to the success of its intent.

28. Nonetheless, Mr. Sookram's evidence as it relates to what transpired at that inquiry were supported by the minutes to the effect[12] that:

    28.1. The claimant pleaded not guilty to the offence;

    28.2. He was told that the law provided for him to be allowed the benefit of counsel and he indicated that he wanted to be represented by his consultant; and

    28.3. The Inquiry was adjourned to facilitate further investigations.

29. The first claimant did not challenge the entirety of the transcript of the Inquiry held on 4 April 2014 as he did in relation to that for the Inquiry held on 14 August 2014. Instead, it was asserted by the claimants that the transcript is inaccurate in that:

    29.1. The first claimant was never asked whether he wanted to be represented by counsel or what that meant;[13]

    29.2. The consultant that was present at the Inquiry was not retained by either claimant although the second claimant purportedly admitted that it was with her permission that the 'consultant' sat in on the inquiry;[14] and

    29.3. Mr. Sookram did not give a reason for the adjournment but simply stated that the Inquiry was adjourned.

30. It was not disputed that subsequent to that Inquiry the first claimant was detained but subsequently released as outlined above on 2 May 2014.

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[10] See para 3(a) of the first claimant's affidavit in reply filed on 5 April 2018

[11] And by extension, the second defendant's

[12] Those minutes were annexed to both the affidavit of Marsha Wharton and Mr. Sookram

[13] See para 2(b) of the first claimant's affidavit in response and para 2(c) of the second claimant's affidavit in response both filed on 5 April 2018

[14] See para 2(a) of the affidavit in reply filed by the second claimant

31. It is the evidence of the first claimant that he was contacted by telephone and informed of the Inquiry that took place on 14 August 2014. He could not identify who called him but indicated that the person told him not to retain an attorney but instead to attend with his wife. He attended and that Inquiry was conducted by Special Inquiry Officer Mr. Kenny Seenath. The minutes of the meeting is annexed to the affidavits of Ms. Wharton and also Mr. Sookram. However, the first claimant has challenged the accuracy of those minutes stating that the events on that day did not occur as recorded and further alleged that the answers may have been sourced from his initial interview upon being arrested.

32. Instead, the first claimant asserted, inter alia, that:

    32.1. Mr. Seenath only asked him three questions being his name, his wife's date of birth and when he entered the country; and

    32.2. Mr. Seenath indicated that because of the first claimant's entry he had to be deported at which time the second claimant indicated that they wanted a voluntary departure but was told it could not be given.[15]

33. Ordinarily, and as submitted by counsel for the defendants, the court ought to resolve conflicts of evidence having regard to contemporaneous documentation.[16] However, the court is not certain that what is before it can be considered as contemporaneous documents. The court is concerned with the evidential gap as relates the transcript especially in light of the fact that the claimants have challenged the contents of same. In the affidavit in support sworn to by Ms. Benjamin, a note to the Head Legal is found at AS4, and notes in 2015 that the minutes were not signed. However, both minutes now carry signatures apparently dated 2014. That discrepancy, though not highlighted by the claimants, was not explained in the evidence of Mr. Sookram or Ms. Wharton.

The Appeal

34. After being informed of the order of deportation the claimants filled out a Notice of Appeal. That is a form filled out by the appellant and on it there is the option which reads "*(b) I wish / do not wish to make representation in this matter".*

[15] Pursuant to section 24(5) of the Act, if the respondent in a deportation matter admits the factual allegations in the order to show cause and notice of hearing and is willing to leave Trinidad and Tobago voluntarily and at no expense to the Government of Trinidad and Tobago, he may make verbal application for voluntary departure before the Special Inquiry Officer and if the Special Inquiry Officer is satisfied that the case is genuine he may, instead of making a deportation order against such person, issue the prescribed form for his voluntary departure

[16] See ***Gillette Marina Ltd. v Port Authority of Trinidad and Tobago*** CV S-1747 of 2002 judgment delivered 31 July 2003 of Jamadar J as he then was

Presumably it is for the appellant to select an option and according to the evidence of Mr. Sookram, the form forwarded to the Minister had a line over the words "do not wish", the implication being that the first clamant wished to make representations.

35. Contrary to Mr. Sookram's evidence, the first claimant indicated that he was not informed by Mr. Seenath how to fill out the Notice of Appeal and further he did not underline any option as relates to the desire to make representations. Notwithstanding, the claimant gave evidence of following up with the status of his appeal between the period May 2014 to November 2017. He deposed that:

> *"24. I had three meetings in 2015 with Mr. Ramoutar advisor to the Minister of National Security to whom I submitted a letter requesting consideration for the appeal, I was never informed whether or not my letter was considered by the minister. I kept following up by attending the offices and making phone calls but after two weeks he stopped taking our calls and we could not get an appointment to see him.*
>
> *25. After repeated visits to the Ministry of National Security with my wife, I informed Immigration Officer Nabbie and Natinga who claimed to be the secretary to the Minister, of my intention of retaining an Attorney-at-Law and I was advised not to do so as it would make it more difficult for myself. Mr. Rarnoutar, the advisor to the Minister advised against it more strongly, because he said to me that my application was being looked at favorably by the Minister.*
>
> *26. I also made visits to the Member of Parliament for Tunapuna and the Office of the Prime Minister where letters for consideration for my appeal was sent from MP Esmond Forde and Sandra Jones, Permanent Secretary of the Office of the Prime Minister…..[17]"*

36. Those letters, together with character references on the first claimant's behalf, found their way into the report forwarded to the Minister of National Security in accordance with the procedure for so doing as outlined by Mr. Sookram at paragraphs 10 and 11 of his affidavit.

37. The Minister signed to his decision to dismiss the appeal on 29 September 2017 after having "*considered the proceedings of the Inquiry, the evidence and testimony presented therein, together with all material and representations submitted*"[18] to him. Thereafter a notice was sent to the first claimant dated 7 November 2017.

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[17] Copies of the letter from MP Esmond Forde and the supporting letter from the second claimant to the Prime Minister's Office together with the acknowledgment from the Prime Minister's Officer were attached

[18] See the Disposal of Appeal signed by the then Minister of National Security

Court's findings

38. What is clear is that:

38.1. The defendants have failed to put before the court pertinent evidence as pertains to the decisions under challenge;

38.2. The first claimant was informed of the reason for his arrest although there is no explanation for the lengthy detention;

38.3. There is no challenge to that part of the transcript evidence that the first claimant indicated that he would use Ms. Samaroo-Dookhan (Ms. Primus) as a consultant. The evidence is that she was given access to the hearing by the second claimant and the evidence of the first claimant is that "*Mr. Sookram failed to tell me that Ms. Primus was not counsel and could not have represented me".*[19] The inference there is that he was represented. The court therefore accepts that the claimant had some sort of representation at the Inquiry on 4 April 2014 by the person identifying herself to be a consultant;

38.4. The first claimant was however not advised of his right to legal representation upon the Inquiry being reopened despite the first claimant (i) being before another Inquiry Officer, with no evidence coming from that Officer of having apprised himself of the earlier proceedings; (ii) appearing without an attorney/consultant; and (iii) having pled guilty;

38.5. There is no evidence which explains the delay in the resolution of the appeal.

Submission and Analysis

39. Having regard to the forgoing the court accepts the submission of the defendants that the first claimant was lawfully arrested. However, in light of the interpretation set out by the Privy Council in ***Naidike*** supra, and in the absence of the first claimant being required to attend an inquiry forthwith or within a reasonable time or any reason put forward to justify his being held, his detention thereafter was contrary to law and was unconstitutional. In particular, the court does not accept that the time between the arrest and the holding of the first hearing of the Special Inquiry was done forthwith or within a reasonable time.

[19] See para 2(c) of the first claimant's affidavit in reply

40. Reference was made to the fact that the delay was due in part to the supposed need to conduct further investigations hence the adjournment of the Special Inquiry on 4 April 2014. However there is no evidence of there being any need for same or even that any further investigations were carried out. The defendants were entitled to detain the first claimant for a reasonable time with a view to holding an Inquiry or place him on a supervision order, as was eventually done. It is accepted that what is reasonable would be determined on an analysis of the circumstances[20] but the court lacks those circumstances in this instance. There is also no evidence to support the defendants' submission that the Special Inquiry was held within a time that was sufficiently prompt. The Inquiry was held some three weeks after the first claimant's arrest and detention. It was the duty of the defendants in this case to justify the first claimant's initial and continued detention and they have failed to do so[21]. Obviously, what is a reasonable time is a matter of circumstance but, having detained the first claimant, the burden is surely on the second defendant to justify the need to wait three weeks for a hearing and to then adjourn the hearing to an unknown date and then continue to detain him. The very act of adjourning the matter without a fixed date to which it was adjourned reeks of procedural impropriety as the court once again bears in mind the constitutional requirement not to deprive a person of his/her liberty without due process and due process cannot be exercised without certainty of information and dates, including dates for the adjourned hearing as in this case. Clearly, therefore, the detention was unconstitutional and the first defendant is entitled to damages.

41. The court bore in mind the fact that the claimants failed to cross-examine Ms. Wharton who said that she was the recording secretary in both of the Special Inquiry procedures and that she took the minutes of those meetings. Obviously, she would have been in the best position to have been called to account for the matters allegedly recorded which the claimants allege were an untrue representation of what transpired at the hearings. By failing to do so, however, the court cannot resolve the conflict on the facts with respect to what transpired at these hearings in favour of the claimants. To the court's mind, it is not sufficient to say "*This is what I remember*" without dealing with the conflicting evidence of what Ms. Wharton says was a contemporaneous written record. Further, there was no suggestion of any discrepancy between the signed and unsigned versions of the minutes referred to in the notes mentioned above. There is no suggestion

[20] See ***Chandrawatee Ramsingh v The Attorney General of Trinidad and Tobago*** supra
[21] Ibid

that the two versions differed in content and the burden would have been on the claimants to establish that.

42. The evidential burden of establishing what happened at the Inquiry shifted from the defendant to the claimants upon the filing of the affidavits on behalf of the defendants. Having failed to take any steps to shake that evidence, the court has before it an unresolved conflict of fact and the legal burden was on the claimants to prove their case on a balance of probabilities which is not possible with the existing conflict.

43. Consequently, on the facts before the court, the court cannot resolve the factual matrix in relation to this issue as to what exactly transpired at the Inquiry in favour of the claimants.

44. As relates the issue of representation and a supposed failure of the Special Inquiry Officer to follow the regulations by not advising the first claimant of his right to legal counsel the court notes that the regulation obligates the officer to inform the claimant of such only in particular circumstances. That obligation only arises where the person is not represented. As noted above it is the court's observation that such a circumstance did not seemingly exist at the commencement of the Special Inquiry since the minutes refers to a "consultant" being present on behalf of the claimants.

45. On that account, the court must make known its discomfort with the evidence in that regard. This "consultant" who apparently appeared for the claimants was not retained by them. Of that, their evidence was untested and therefore unshaken. So who was this person? What was her locus? What was her qualification to be referred to as a "consultant"? Again, the unchallenged evidence is that the person interacted with Mr. Sookram and there is no evidence of that person taking instructions from the claimants. Therefore, the court has a serious concern as to whether this "consultant" was mere window dressing to add to the illusion of legitimacy endorsed by the Special Inquiry Officer in his signing off on the alleged minutes. As mentioned, this court can come to no such finding but can merely express its concern that someone who was not retained and who had no legal obligation or duty of care to represent the claimants can be considered to be the claimants' representative.

46. However, upon the Inquiry being reconvened there is no indication that the claimant was so represented or advised. The Inquiry having been recommenced before another officer and the claimants having been unrepresented, the first claimant ought to have been advised of his right to counsel especially in light of

the fact that he pled guilty. There was also no evidence to rebut the first claimant's assertion that he was not advised of his right to an attorney upon being arrested.

47. As relates the right to make representation, the Act outlines the process to be followed and the unchallenged evidence before the court is that those representations were in fact sent to the Minister. There was no statutory obligation for the Minister to invite the first claimant to make representation. Further, the form is self-explanatory and there was no evidence before this court that the claimants were unable to read or understand the English language.

48. The Minister's decision to uphold the order is well within his discretion and the case put forward by the claimants does not challenge the more than three years which the Minister took to make the decision. However, the court having found that the first claimant's constitutional rights were infringed by his detention and subsequent failure to inform him of his right to representation at the Second Inquiry, it follows then that the Special Inquiry was a nullity.

49. As relates the claim for relief by the second claimant, it is noted that (i) the decision of the Minister was well within his discretion; (ii) the unchallenged evidence is that the claimants' representations were forwarded to the Minister and that same was considered though it is not in evidence the extent to which a balancing exercise as contemplated by Baroness Hall was conducted; (iii) there is no medical evidence from the second claimant to substantiate her assertion of having been pregnant then having lost her baby as a result of her husband's detention and (iv) the deportation order had not been executed and, having regard to the findings of the court, it will not be executed. In those circumstances, and having regard to the dicta in ***Naidike***, the court will not grant to the second claimant the relief sought by her.

Conclusions

50. Permanent residency and subsequent citizenship is not a right but is a privilege given to persons who meet the guidelines and policies set down by the appropriate governmental ministry. That is a decision for the relevant department, not this court. But the Constitution extends its shade to persons who may make such an application. That is clear when one considers the words of the Constitution which do not restrict its enshrined rights to citizens but extends it to individuals which, necessarily, would include persons who may not be citizens or permanent residents. In this case, all of the actions relating to alleged breaches of

the provisions of the law have dire consequences which include detention and deportation. Therefore, there must be strict proof and adherence to procedure and to the Constitution and the rights set out therein. In this case, there was no such strict adherence as discussed above. In particular, the first claimant was detained unlawfully for fifty-two days without any consideration being given to some sort of conditional release or supervision order until May 2014. Obviously, the Special Inquiry Officer, had a hearing been held immediately, would have had the discretion whether or not to make a deportation order or to accept a voluntary departure request which, according to the claimants was made and rejected. In doing so, that Officer would have had to have heard the first claimant's full circumstances including information as to his current living situation and arrangement including his ties with the second claimant and the second claimant's daughter and extended family. No reasons were given for the decision purportedly made in the hearing which the first claimant says was not graced by any legal representative on his behalf.

51. In all of these circumstances, and bearing the facts set out above in mind, the court will therefore now go through the reliefs sought by the claimants seriatim to determine what, if any, they are entitled to.

52. The first claim is for an order that the second defendant's detention and arrest of the first claimant was illegal, unlawful, harsh, oppressive and unconstitutional and infringed the right of the first claimant personal liberty and security of person as entrenched in section 4 (a) of the Constitution. As determined above, the court is not minded to make such an order in relation to the arrest but, clearly, his detention was illegal, unlawful, harsh, oppressive and unconstitutional and infringed upon his rights under section 4(a). To the court's mind, the second defendant had the very real option of reviewing the first claimant's detention at the earliest possible stage to grant a supervision order or some other type of conditional release especially since there was no Deportation Order or imminent inquiry. However, no such consideration was given to the first claimant or his circumstances or his history in the country and or his relationship with the second claimant at such an early stage. It was not until the intervention of the Minister that such consideration was given despite the utterances in ***Naidike***. Therefore, the court will make an order in the terms set out above in relation to the first claimant's detention.

53. The second claim made is for a declaration or order that the Special Inquiry held on 4 April 2014 and completed on 14 August 2014 was unconstitutional, null and void. In that regard, the court does not have the required evidence to make such

a declaration or order in relation to the first hearing of the Inquiry. However, it is clear that the adjourned hearing of the Inquiry on 14 August 2014 was not properly constituted in light of the failure to advise the first claimant of his right to legal representation. The court will therefore have no hesitation in holding that that second Inquiry was in fact unconstitutional, null and void resulting, therefore, in a grant of the relief requested in this regard and also in relation to the remaining reliefs that the decision of the Special Inquiry Officer dated 14 August 2014 was unconstitutional, null and void.

54. Since the decision was unconstitutional, null and void, the resulting decision of the Minister of National Security to uphold that decision cannot stand.

55. As a result, the first claimant is entitled to damages for wrongful detention, including aggravated and exemplary damages for the infringement of his constitutional rights. The first claimant would also be entitled to compensatory damages and the vindicatory damages, if applicable, for the breach of his constitutional rights. All of these damages will be assessed by a master in chambers on a date to be fixed.

56. Since the Special Inquiry has been found to be unconstitutional, any decision arising there from would also be unconstitutional including the order for the first claimant's deportation and that order would therefore be struck down.

Order

57. In the circumstances, the court declares that:

    57.1. The detention of the first claimant for the period 12 March to 2 May 2014 was illegal, unlawful, harsh, oppressive and unconstitutional and infringed the right of the first claimant to personal liberty and security of person as entrenched in section 4(a) of the Constitution; and

    57.2. The first claimant was denied the right to equality before the law and the protection of the law guaranteed by section 4(b) of the Constitution by the second defendant's failure to conduct a Special Inquiry promptly;

    57.3. The first claimant's right to his private and family life as guaranteed by section 4(c) of the Constitution was infringed because of his detention.

    57.4. The first claimant's rights as enshrined in paragraphs 5(2)(c)(i)-(iii) were infringed in that he was denied (i) the right to retain and instruct without

delay a legal adviser of his own choice and to hold communication with him;

57.5. The first claimant's right to a fair hearing guaranteed to him be section 5(2)(e) of the Constitution was infringed by the Special Inquiry Officer failing to inform him of his right to an attorney at law at the Special Inquiry held on 14 August 2014;

57.6. Therefore, the special Inquiry held on 4 April 2014 and completed on 14 August 2014 was null and void;

57.7. The decision of the Minister of National Security made on 29 September 2017 to uphold the deportation order against the first claimant is also null and void.

58. The deportation order made against the first claimant and dated 14 August 2014 is set aside. Obviously, this does not prevent the defendants from following the correct procedure if they wanted to have that done again.

59. The defendants are to pay the first claimant damages for wrongful detention, including aggravated, exemplary and punitive damages for infringement of the first claimant's fundamental rights as guaranteed to him by the Constitution.

60. Damages are to be assessed by a Master in Chambers on a date to be fixed.

61. The first claimant would be entitled to costs to be quantified as Part 67.12 before the Assistant Registrar in chambers. The second claimant would not be entitled to her costs and, in relation to her claim, her claim is dismissed with no order as to costs.

/s/ D. Rampersad J.

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