THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2022-00797

In the matter of the Constitution of the Republic of Trinidad and Tobago

AND

The application for redress by the Claimants 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 Minister of National Security to dismiss the appeal of the 1st Claimant and order her deportation in breach of her enshrined rights pursuant to Sections 4 (b) and 4 (c) of the Constitution of the Republic of Trinidad and Tobago

And in the matter of the Decision and/ or Action and/ or Conduct of the Minister of National Security to deprive the 1st, 2nd and 3rd Claimants' of their right to private and family life pursuant to part 4 (c) of the Constitution of the Republic of Trinidad and Tobago by the deportation of the 1st Claimant

BETWEEN

HANIESHA ALTHEA CAMPBELL

First Claimant

TIFFINY SCOTT
(A minor by her next of friend and Mother Haneisha Althea Campbell)

Second Claimant

JAHVARRY WAITHE
(A minor by her next of friend and Mother Haneisha Althea Campbell)

Third Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

1st Defendant

CHIEF IMMIGRATION OFFICER

2nd Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: May 29, 2024.

Appearances:

Claimants: F. Hove Masaisai and A. Pierre instructed by D. Tommy (Hove and Associates).

First and Second Defendants: S. Sukhram instructed by V. Jardine.

JUDGMENT

1. The second and third claimants are the children of the first claimant (Haniesha) who is subject to a deportation order made April 17, 2019. The claim is one seeking constitutional redress for the alleged wrongful actions of the defendants. The allegation is that Haniesha, a Jamaican citizen was deprived of certain rights guaranteed by the Constitution. As a consequence she seeks several declarations in relation to breach of her right to equality before the law, protection of the law, right to private and family life and a declaration that the defendants breached her right to such procedural provisions as are necessary for giving effects to those rights. She also asks that the deportation order be deemed null, void and of no effect, that the dismissal of her appeal by the Minister of National Security be deemed null void and of no effect and an injunction prohibiting her deportation to Jamaica. This is not a claim for Judicial Review, partially or otherwise.

2. **The claimant** first entered Trinidad and Tobago in 2010. The second claimant was born on September 28, 2013 to she and her then husband Colin Scott. That child is now 11 years old. The third claimant was born on December 14, 2019 out of her present relationship with Grevall White (national of Trinidad and Tobago) who has also sworn to an affidavit in support of her claim. That child is now 4 years old.

3. It is her evidence that she faced tremendous abuse for a year in her marriage which began on April 1, 2012. Her husband subsequently left the house and never returned. Although it had been her intention to apply of permanent residence (PR) during the time that she and her husband lived together she never did. By letter dated June 13, 2017 she wrote to the

Ministry of National Security making an application for PR. That letter was attached to her affidavit. It shows that she informed the Minister that she was born in Jamaica, was married to Colin Scott, gave birth to the second claimant and was eventually abandoned by her husband. While the letter did not state that Scott was a citizen of Trinidad and Tobago, it does say that the second claimant is a citizen of Trinidad and Tobago. This however does not lead to the sole inference that she is a citizen because of the fact that her father Colin is a citizen and there is no evidence before the court to support her assertion that he is. This however is not an issue for the court and the court is prepared to treat with the case on the presumption that he was in fact a citizen. She deposed that she received an acknowledgment of receipt of the letter and that that response advised her to leave the jurisdiction in order to regularize her status. She has not attached a copy of that letter of response to her affidavit in support.

4. After receiving advice from her lawyers in 2018, she left the jurisdiction. She did not give the precise date. Her Attorneys wrote the second defendant by letter of March 15, 2019 informing her that Haniesha had left the jurisdiction to regularize her immigration status having inadvertently overstayed her time after entry in 2010 having been unaware that that she had to regularize her status. This of course is wholly inconsistent with the sworn testimony of the first claimant that it was always her intention to apply for PR while her husband was living with her. The letter also set out that for the successful completion of the application process, Haniesha was required to possess an updated stamp in her passport so that the lawyers were asking that she be granted entry so as to complete the process. Haniesha however deposed in her affidavit that the said letter sent on her behalf asked for permission “to leave the country” and “re-enter Trinidad”. The letter says no such thing. In fact, it could say no such

thing if in fact she had actually already left the jurisdiction at the time the letter was written.

5. Without receiving a reply, one month later on April 16, 2019, she arrived at the Piarco International Airport and attempted to lawfully re-enter Trinidad and Tobago. She claims to have presented the following documents upon re-entry;

    i. A Police certificate from Jamaica showing no criminal record.

    ii. The letter from Hove and Associates Attorneys at Law requesting that she be allowed entry.

    iii. A valid return Ticket to Jamaica.

    iv. The particulars of a national to receive her into the country Mr. Grevall Waithe.

    v. Confirmation of where she will be staying by her sponsor.

    vi. Sufficient money to pay for the security bond.

    vii. Her marriage certificate (although husband is estranged).

    viii. The birth certificate of her daughter (second claimant).

    ix. Support from her sister in person who is pending residency through marriage to her husband of ten years Mrs. Amanda Francis.

x. Copies of telephone conversations on the evening of her re-entry between Ms. Trisha Masaisai from Hove and Associates and an immigration officer III by the name of Dwayne Nurse.

6. She attached receipts to her evidence that shows money gram transfers to her from Waithe on April 8 and 13, 2019 in total amounting to the transfer of $2,800 TTD.

7. She was issued with a rejection order at 11:15 p.m. and it is her testimony that the Special Enquiry Officer informed her that its issuance was based on the fact that her husband was unable to produce himself and it was unclear to the interviewing officer whether there was a custody battle between she and her husband. A copy of the rejection order was attached to her evidence and it sets out in standard form that she was rejected under sections 20 and 21 of the Immigration Act Chap 18:01 (the Act) but gives no other particulars. It is her evidence that she immediately appealed the rejection order and requested legal representation. At 12:25 a.m. her Attorney arrived at the airport. The Special Inquiry (SI) was however not held until the evening of April 17, 2019 by which time another Attorney from the firm had appeared to attend the Special Inquiry. At the end of those proceedings a deportation order was issued to her on the basis that she belonged to a prohibited class in that she was a person who was likely to become a charge on public funds pursuant to section 8(1)(h) of the Act.

8. It was also her evidence that during the SI her Attorney informed the officer that there were two persons outside to support her, namely her sister referred to above as well as Waithe. However, they were not called into the enquiry to be questioned or to give evidence.

9. Her Attorney at law lodged an appeal to the Minister of National Security on April 18, 2019. Some two years later on February 22, 2022 the appeal was dismissed and Haniesha was informed that she was required to purchase a return ticket by March 8, 2022. It is her case that she was not at the time or since, given an opportunity to make submissions to the Immigration Advisory Committee (IAC) which was established pursuant to section 27 (5) of the Act.

10. She ended by setting out that the second claimant attends primary school and that she Haniesha works on weekends at a food truck making $480.00 per weekend or $1,920.00 per month. Further that Waithe assists with expenses with whom she sells seasoning during the week. She makes approximately $3,500.00 per month from that job. The court notes that there is no supporting documentary evidence in this regard.

11. **Grevall Waithe** is a retiree citizen who has known Haniesha since 2012 and has been in a relationship with her since 2016. He confirmed that he is the father of the third claimant and that Haniesha is the primary caretaker for the child. He deposed that Haniesha is well looked after as he pays her food, clothing, bills and other necessities from his pension as well as the money he earns from selling seasoning. His evidence quite interestingly is that the earnings from the seasoning sales are $3,500.00 per month. So that it appeared to the court that Haniesha appeared to mislead the court by saying that sum was her earnings.

12. He testified that on April 16, 2019, he was waiting at the airport for the claimant upon her return. He was however never interviewed by anyone from the Immigration Department or National Security regarding his capacity to financially support his family. The court notes that at no time

did he state that on the day of the Special Enquiry namely on April 17, 2019, he was present and waiting at the airport to be interviewed as was stated by Haniesha.

13. **Sheldon Walker,** Immigration Officer IV of 20 years experience in the field, deposed to an affidavit on behalf of the Chief Immigration Officer. He was at the material time attached to Piarco Port of entry and acted in the role of Special Inquiry Officer. The officer in charge of the Port is the Special Inquiry Officer. One of his duties was that of conducting special inquiries and determining whether to admit or deny those attempting to enter through the port. The Special Enquiry Officer is also empowered to determine if the proposed entrant should be deported. He was also the supervisor of the Immigration Officers stationed there and was charged with associated administrative duties. The records of the second defendant show the facts to be somewhat different to what has been deposed to by Haniesha.

14. For starters, Haniesha first arrived in Trinidad and Tobago on May 6, 2009 and was refused entry. It is after this that she returned on December 26, 2010 and was permitted entry until June 25, 2011 for some six months. She neither sought nor obtained an extension. She however left Trinidad on March 18, 2019, some three days after her lawyers had written to the Immigration as set out above in which they stated that she had in fact left the jurisdiction. The date on which she left was not disclosed by Haniesha in her affidavit in support and it also follows that at the time her lawyers said that she had left the country that was not true. The evidence of Walker exhibits the Border Management System Passenger Report which the court accepts as a true record of the movement of Haniesha.

15. The witness confirmed the decision to issue the rejection on April 16, 2019, the fact of appeal and that he was the Special Inquiry officer who conducted the SI. He also set out the process of the SI. But to get there in the first place an Immigration Officer I must first decide that the individual has breached the Act and refer the matter to an Immigration Officer II. If he sees merit in the issue then he in turn refers it to an Immigration Officer III who then makes a determination as to admittance or rejection. In other words, this was the process in the case of Haniesha before her case reached the SI. Walker received the Notice of Inquiry on April 17, 2019 together with a copy of the rejection order and a rejection report dated April 16, 2019 from Bajnath-White IO 1 addressed to the CIO together with other documents. That report was exhibited to his affidavit. He also received a bundle of documents including a return ticket, birth certificate of the second claimant, marriage certificate, confirmation of where Haniesha would be staying. He could not recall receiving a police certificate, the letter from her Attorney or any of the other documents set out in her evidence above.

16. The report of April 16, 2019 contained most of what has been set out before in relation to the travel of Haniesha. She also told the officer that her marriage had broken down irretrievably and she did not know the whereabouts of her husband for about four years to date. She told her that Waithe had been providing for she and her daughter during the period that she was in Trinidad. She stated that she had three other children, two with her mother (the court can only infer this to mean in Jamaica) and a third who was living with the biological father. The report does not say that she stated who the father was. This does not make much sense in the view of the court as it is highly implausible that she would not tell Immigration that Waithe is the father of her child as she had already mentioned him to them

and his name is on the birth certificate. The report goes on to say that she could not give definitive details of her permanent employment or business elsewhere or of her intention to return to such employment (inferentially in Jamaica).

17. The matter was referred to the IO 2 S. Lookoor who conducted a secondary interview. At that interview Haniesha told the officer about her sister who at the time had a pending PR application on the grounds of marriage but Immigration could not verify this. Furthermore, there was no one at the airport to receive her and she was unable to provide a contact for her spouse.

18. The Senior IO N. Campbell was then consulted and decided that to refuse entry for the reason set out earlier. She was informed of her right to appeal the order which she did and the SI was scheduled.

The special inquiry

19. The purpose of the SI is to allow the subject of the rejection to provide reasons as to why he should not be refused entry. Walker denied having told Haniesha that her rejection was based on the fact that her husband was unable to produce himself and it was unclear to the interviewing officer whether there was a custody battle between she and her husband as his conclusion was correctly set out in the minutes as being she was not a citizen or resident and fell into the prohibited class set out above. Because of the logistics of the airport he could only accommodate two persons apart from himself and the recording officer. The persons present were therefore Haniesha, her lawyer Mr. Issa Jones, the recorder Lisa Sandiford and the deponent. At the inquiry, Haniesha did in fact indicate

that there were other persons at the airport who were in support of her however due to security access arrangements those persons could not be brought into the SI area. Walker also formed the view that the lawyer Jones would be sufficient to assist Haniesha.

20. Walker enquired of her marital status, children, financial situation and she indicated that her main reason for re-entry was to apply for PR. Walker formed the view that based on the fact of estrangement from her husband, her application for PR on the ground of marriage would not have been entertained as the spouse is required to be present when the application is made. The spouse is required to swear on affidavit that he is in support of the application. Further, Haniesha could not demonstrate that she had access to a continuous source of income. In fact, she only had some $2,100.00 with her for her stay and she stated that she had never worked in Trinidad and Tobago so that it was likely that she would become a charge on public funds.

21. The deportation order was made and she was allowed entry on a Supervision Order pending her Appeal to the Minister. These Supervision Orders were renewed from time to time until the decision to dismiss the appeal by the Minister.

22. Walker was never informed that Haniesha's sister was outside and that Waithe was her current partner and father of her son. She in fact had stated that Waithe was her friend and the godfather of her daughter. Walker accepted that and he was shown the receipts by Jones but reasoned that they did not demonstrate any obligation to Waithe's part to support Haniesha.

23. The minutes of the interview are attached to the affidavit of Walker and it shows amongst other matters that Haniesha informed Walker that her blood relative namely her sister Amanda Francis was within the territory. That she Haniesha lived at 6 Thavenot Street, Tacarigua and that her sister Amanda also lived at that address. She informed Walker that she was in possession of a Police Certificate from Jamaica showing that she had a clean record. Further that from the time her husband left her in 2014, Waithe has been supporting her financially. Waithe lives in Maraval and not with her. She informed Walker that Waithe will be supporting her financially if she was granted entry and that he Waithe is the one who hired the law firm of Hove and Associates and that he was outside "right now". Jones informed Walker that Amanda is a resident and is married to a Trinidadian. That Amanda had been through the same procedure of applying for PR so that if Waithe decided to no longer finance her, Amanda would assist.

Cross examination

24. Although cross examination is a somewhat exceptional event in constitutional claims, the court permitted limited cross examination of this witness. He testified in answer to the Attorney that he did not send anyone outside of the room where the inquiry was being conducted to find either Waithe or the sister of Haniesha for the reasons that firstly, he was not given any information that the sister was present. Secondly, he had been informed that Waithe was present but he did not send for him as he was of the view that the lawyer's presence was sufficient. He accepted that Haniesha had told him that Waithe was the one paying for her legal representation. He reiterated that his main reason for rejection was that in his view she was likely to become a burden on public funds. He was concerned also as to who was going to support her financially while her

application was pending. He stated that he accepted everything that the lawyer had said to him about the sister.

25. **Nataki Atiba-Dilchan** is the Permanent Secretary (PS) of the Ministry of National Security (MNS). At the time of deposing to the affidavit there existed an Immigration Advisory Committee (IAC) which is a standing committee established by the Cabinet in 2017 in accordance with section 27(5) of the Act. Its purpose is advising the Minister of National Security as to the performance of his functions and the exercise of his powers with regard to appeals made from Deportation Orders as a mechanism to reduce the processing time of appeals. Appeals are sent to the IAC to proffer recommendations to the Minister who issues his decision after due consideration. However, it is possible for the Minister to determine an appeal without a recommendation of the IAC pursuant to his powers under section 27 of the Act.

26. The IAC sat on September 15, 2021 and considered the appeal. The IAC found no substantial evidence to support the appeal. The deponent was of the view that the Act does not require persons to appear before the IAC. Persons are free to submit representations or supporting evidence in writing to the IAC or the Minister anytime after they have appealed. All said representations are considered by the IAC. To that end the letter dated April 18, 2019 addressed to the Minister by the Attorneys for Haniesha together with its annexures were considered by the IAC. That letter appears to set out in full all the facts relied on by Haniesha, the history of the proceedings, attaches supporting documents and presents legal arguments.

ISSUES

Was the right of the First Claimant under section 4(b) of the Constitution namely the right to equality before the law and the protection of the law breached in relation to representation at the IAC.

27. In determining this issue, the role and function of the IAC must be examined. The relevant parts of Section 27 of the Act reads;

> *(3) All appeals from deportation orders may be reviewed and decided upon by the Minister, and subject to sections 30 and 31, the decision of the Minister shall be final and conclusive and shall not be questioned in any Court of law.*
>
> *(4) The Minister may--*
>
> > *(a) consider all matters pertaining to a case under appeal;*
> > *(b) allow or dismiss any appeal; or*
> > *(c) quash a decision of a Special Inquiry Officer that has the effect of bringing a person into a prohibited class and substitute the opinion of the Minister for such decision.*
>
> *(5) The Minister may in any case where he thinks fit appoint an Advisory Committee consisting of such persons as he considers fit for the purpose of advising him as to the performance of his functions and the exercise of his powers under this section.*
>
> *(6) The Minister may in any case where he considers it fit to do so, cancel any deportation order whether made by him or not.*

28. It is pellucid that the statutory purpose of the IAC is that of advising the Minister as to the performance of his functions and also advising him on the exercise of his powers under the section, namely his powers on appeal. In that regard the Minister is free to reject any recommendation provided to him by the IAC as the statute empowers him to decide the appeal in his own deliberate judgment. Where he accepts the advice of the IAC, the decision equally becomes his decision by way of his own deliberate judgment. The section does place a statutory duty on the Minister to accept the advice of the IAC. In fact, the ordinary and natural meaning of the section appears to be that the Minister is empowered to act in his own deliberate judgment without the advice of an IAC as the IAC is statutorily engaged only in cases where the Minister thinks it fit. The fact that the IAC has therefore been established as a standing committee by the Cabinet cannot derogate from the powers conferred on the Minister by section 27.

29. In this case however, on the evidence it appears that the IAC was in fact engaged to consider and advise the Minister on the appeal. So that the issue must be viewed from that perspective. It cannot be reasonably argued that the fact that the Minister is empowered in any event to make a decision on the appeal without the input of the IAC or reject the advice of the IAC is sufficient grounds for bypassing the impact that the failure of the IAC to hear from Haniesha may have had on her rights. The accepted fact in the evidence is that notwithstanding the Ministerial power and remit, the IAC was in fact engaged in the process and did in fact advise the Minister who on the face of the evidence accepted the advice in this case. There is no evidence from the Minister that says otherwise.

30. It is clear on the evidence that save for the information gathered initially from the Immigration Department it was before the IAC and so was the

letter under the hand of Hove and Associates addressed to the Minister dated April 18, 2019. That letter set out the history of the proceedings, the law and all facts in support of the position of Haniesha which was the same as that presented in these proceedings. It complains that at the SI, Walker was informed that there were two persons outside of the room in support of Haniesha, namely her sister and her financial supporter (God Father to her daughter and her partner) but no evidence was taken from these persons. The letter also had attached to it all supporting documents.

31. This court accepts that the fullness of the exercise of the right must necessarily involve an enquiry as to whether the persons in support as was pointed out time and time again were in fact capable and willing to lend financial support to Haniesha. The denial of the opportunity to present such information in full is a denial of the section 4(b) right. The issue is whether there was such a denial in the circumstances of this case in a real sense. Equally, it is clear that the information before the IAC was the very same information before the Immigration officers so that the question remains as to the effect of not speaking personally to the two persons and whether this deprived Haniesha of the right.

32. The first observation in that regard is that in cross examination, Walker testified that he believed everything that the lawyer had stated to him about the sister. However, despite this he was of the view that this was not a guarantee that the sister would continue to support her in the circumstances of the case. The second observation is that he also accepted by that Waithe was Haniesha's financier. This is so as he testified that that fact was taken into consideration. He stated that it would have some weight but would have been more credible if it was from her spouse. Of course, there is no rational basis for this reasoning as the bonds of

marriage are not to be equated with financial support except where a court order exists making it so. So that this was merely a matter of general speculation and personal opinion.

33. The report to the CIO, which was ultimately transmitted to the Minister and the IAC dated April 16, 2019, set out that when questioned about her financial well-being during the period she stayed in Trinidad, she replied that her friend Waithe had been providing for she and her daughter. That she could not give definite details of permanent employment and of her intention to return to such employment, that she claimed to have a sister who also had a pending PR application on the grounds of marriage but that this could not be verified. It was therefore clear from the report that one of the pivotal issues was that of her maintenance in Trinidad should Waithe either refuse or be unable to continue to fulfil his commitment. It had been made clear in that report that the IO was unable to verify the information in relation to the sister, Amanda.

34. But when all of the evidence is considered it is clear that no real attempt was made to verify the said information from Amanda despite the representation by her Attorney. In fact, it also appears that Walker had been of the view that even if the information had been verified by Amanda, this was not a guarantee that Amanda would continue to honour the responsibility. The difficulty with this assertion was that even marriage could not afford such a guarantee in any event.

35. Further, the high standard of guarantee appears to be inconsistent with the very provision of the Act namely section 8(1)(h) which defines the relevant prohibited class as being;

(h) persons who are likely to become charges on public funds.

36. By applying the high standard of a guarantee, the Immigration Department was essentially imposing a higher standard than that which is prescribed by the legislation. Further, the finding that the fact that the sister was not guaranteed to continue to maintain Haniesha is a generalization which could in theory and practice be applied to every scenario. It was therefore incumbent on the IO to enquire of the likelihood of Haniesha becoming a charge on the public funds by speaking with Amanda. Should such a conversation have taken place, certainly the officer would then have been in a position to determine where the balance of probability lay in relation to the financial upkeep of Haniesha. This is the essence of likelihood. In other words, the officer must be satisfied that on all the information before him it is more probable than not that the person will become a charge on public funds. If it is less probable then it is unlikely. The failure to therefore go further and speak to Amanda would have deprived the Immigration officers and by extension Haniesha of the right to the protection of the law as she was subject to a higher standard of inquiry and consideration than that which the law permits.

37. The same must of course carry to the IAC as they it had been provided with the very information in addition to which it had in its possession the letter from Hove. This ought to have been more than sufficient to put the IAC on enquiry as to the finding as to whether Haniesha was in fact likely to become a charge in the face of no interview or even a phone call having been made to her sister. Additionally, independent of the reasons provided by the CIO, the IAC was under a duty to advise the Minister in making a decision in his own deliberate judgment as to the merits of the application to remain in Trinidad. In order to give effect to section 8(1)(h)

such advice ought to have factored in information from Amanda but there was no such information before the IAC, added to which the IAC appeared to have accepted that there was no guarantee that Amanda would provide financial assistance to Haniesha in the event that Waithe stopped so doing. This is reasonable inference to be drawn in the face of no evidence having been provided by the IAC as to any other consideration outside that which was provided to it by the CIO. It is therefore clear that Haniesha would have equally been deprived of the full protection of the law as afforded by the section 4(b) right through the actions of the IAC and thus of the Minister.

Was the right of the First Claimant under section 5(2)(h) of the Constitution namely the right to such procedural provisions as are necessary for giving effect to the rights and freedoms enshrined by sections 4 and 5 of the Constitution breached.

38. Section **5(2)(h)** of the Constitution provides:

> *"5(2) Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not:*
>
> > *(h) deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms."*

39. Section 5(2)(h) is directed to Parliament so as to ensure no legislation, procedure and/or practice are adopted which will contravene the due process of the law. In ***The Attorney General of Trinidad and Tobago v***

Oswald Alleyne and ors[1], Bereaux JA, in delivering the judgment of the panel, explained that the right encapsulated in s5(2)(h) was an expansion of the rights set out in s4. His Lordship stated at paragraphs 50-52 as follows:

> *"[50] Section 5(2)(h) does not stand on its own as an individual fundamental right, it is directed at Parliament, which it prohibits from depriving a person of such procedural provisions as necessary to give effect and protection to their rights and freedoms under section 4 of the Constitution. But it is also a further and better particularisation of the rights set out in section 4; in this case, the due process provisions of section 4(a) and the right to the protection of the law in section 4(b)…*
>
> *[51] A failure by the Executive to provide procedural provisions will thus amount to a breach of the due process provision and the right to protection of the law. Attorney General of Trinidad and Tobago v Whiteman [1991] 2 WLR 1200 at 1204 provides helpful guidance on the interpretation of the provisions of section 5(2)(h). That was a case in which the respondent, having been arrested, was not informed of his right to communicate with a lawyer and the question which arose was whether, in order to make that right effective, there shall be provision for a procedure whereby he was informed of his right to counsel. It was held that while section 5(2)(c)(ii) conferred on the person arrested the right to communicate with a legal advisor, that right would be ineffective in certain circumstances unless there was provision for a procedure by which he was informed of it and section 5(2)(h) gave him the right*

[1] C.A.CIV.52/2003

to a procedural provision such as that provided by paragraph 8(b) of the Appendix B to the Judges Rules 1964 and the right to have that procedure followed.

[52] The judgment of the Board was given by Lord Keith of Kinkel. At page 1204 he said:

> *"The language of a Constitution falls to be construed, not in a narrow and legalistic way, but broadly and purposively, so as to give effect to its spirit, and this is particularly true of those provisions which are concerned with the protection of human rights. In this case, the right conferred by section 5(2)(c)(ii) upon a person who has been arrested and detained, namely the right to communicate with a legal adviser, is capable in some situations of being of little value if the person is not informed of the right. Many persons might be quite ignorant that they had this constitutional right or, if they did know, might in the circumstances of their arrest be too confused to bring it to mind. Section 5(2)(h) is properly to be regarded as intended to deal with that kind of situation as well as other kinds of situation where some different constitutional rights might otherwise be at risk of not being given effect and protection. There are no grounds for giving a restricted meaning to the words "procedural provisions." A procedure is a way of going about things, and a provision is something which lays down what that way is to be. Given that there are some situations where the right to communicate with a legal adviser will not be effective if no provision exists for some procedure to be followed with a view to dealing with these situations, there is a clear*

necessity that such provision should be made. So section 5(2)(h) gives a right to such provision. Their Lordships further consider that, by necessary implication, there is a right to have the procedure followed through. A procedure which exists only on paper, and is not put into practice, does not give practical protection."

"Procedural provisions" therefore is to be construed broadly and purposively so as to give effect to the spirit and intention of the Constitution. Section 5(2)(h) gives a right to a procedure by which effect is given to the individual's rights and freedoms. The rights and freedoms set out in sections 4 and 5 are also manifested in statutes as rights and entitlements, as in this case."

40. Further, in ***Dominic Suraj and 4 others v Attorney General of Trinidad and Tobago, Satyanand Maharaj v Attorney General of Trinidad and Tobago***[2], the Privy Council stated at paragraph 61 that:

"61. Indeed, perhaps the clearest indication is drawn from section 5 itself. The structure of section 5 overall provides strong support for the Suratt approach to the interpretation of the rights in section 4. This is because section 5(2) sets out various aspects of the rights contained in section 4 which are made absolute in their effect, subject only to other provisions in the Chapter (ie sections 7 and 13) and to section 54. … Similarly, section 5(2)(h) creates an absolute right to have the protection of such procedural provisions as may be necessary for giving effect and protection to the rights in section 4, ie most obviously by guaranteeing the right to go to court to

[2] [2022] UKPC 26

enforce those rights. But the right of access to some form of legal redress is already inherent in the right to protection "by due process of law" (section 4(a)) and to "the protection of the law" (section 4(b)), so section 5(2)(h) would have been unnecessary if those rights were already absolute...".

41. The complaint of Haniesha is that when the IO informed her of the right to appeal the decision to the Minister, she ought also to have been informed of her right to appeal first to IAC and her right to make representations before them. In relation to the former, it is clear that there exists no right to appeal to the IAC and the remit of the IAC is clearly set out as being that of advising the Minister and nothing more. That point is therefore a non-starter. In relation to her entitlement to make representations before them if there exists such a right, in the circumstances of this case, the failure so to do was assuaged by the fact that the Attorney for Haniesha did in fact make such representations in writing as is set out in the letter of April 19, 2019. Clearly therefore there occurred no real or substantive breach of the said rights on the part of the IAC as the IAC did in fact consider the representations. This issue must be decided against the claimant.

OUSTER

42. In essence the defendants submit that by virtue of **section 30** of the Act, the court has no jurisdiction to quash the decision of the Minister and the issuance of the deportation order. Section 30 of the Immigration Act limits the court's jurisdiction to review the Minister's decision relating to the detention and deportation of any person upon any ground whatsoever, unless that person is a citizen of Trinidad and Tobago. The section reads;

30. Subject to section 31(3) no Court has jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or Order of the Minister, the Chief Immigration Officer, a Special Inquiry Officer or an immigration officer had, made or given under the authority of and in accordance with this Act relating to the detention or deportation of any person, upon any ground whatsoever, unless such person is a citizen of Trinidad and Tobago or is a resident.

43. In ***Beverley Burrowes and others v The Attorney General and Chief Immigration Officer***[3] Justice Dean-Armorer as she then was, dealt with the issue of the ouster clause in definitive manner at paragraphs 35 to 38 as follows;

36. The authorities on the effect of an ouster provision establish that a Court may inquire into the validity of the exercise of any power, but must limit its inquiry to ascertaining the existence and scope of the power and not consider the sufficiency of the ground on which it has been exercised. See Francisco Jose Martinez Centeno v. Chief Immigration Officer HCA No. 969 of 1981.

37. The Court also has the power to review decisions on the grounds of a breach of natural justice and of taking into account irrelevant factors. See Rajendra Ramlogan, Judicial Review in the Commonwealth Caribbean.

38. The Court therefore retains its jurisdiction, where the ground for review is directed at bias, procedural unfairness or lack of

[3] CV2016-01749

jurisdiction. Accordingly, there was no barrier to my considering these grounds, as canvassed by the Claimants.

44. According to de Smith, Woolf and Jowell on ***Judicial Review of Administrative Action*** **(5th edn, 1995)**, on the effect of **ouster clauses**, at pp 252-253;

> *Where a statute seeks to oust the jurisdiction of the courts to review the decisions of an inferior body, there is a compelling inference that parliament did not intend that body to be the final arbiter of its own powers. There is therefore a presumption that any error of law committed by that body is reviewable, whether or not the error is one of jurisdiction in the narrow sense.'*

45. Since the landmark case of ***Anisminic Ltd v Foreign Compensation Commission***[4] the courts have made it clear that they will not be deterred by the presence of such ouster clauses from inquiring into whether a body has performed its functions in contravention of fundamental rights guaranteed by the Constitution, and in particular the right to procedural fairness. As Lord Reid said on page 170, *'there are no degrees of nullity' …*

46. Lord Reid also noted at page 171 that there were two scenarios in which an administrative decision-maker would lose jurisdiction. The first was narrow and asked whether the legislature had empowered the administrative decision-maker to "enter on the inquiry in question". The second was wider: "…there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its

[4] [1969] 2 A.C. 147

decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive."

47. In ***Attorney-General v Lopinot Limestone Ltd***[5] Bernard JA referred to the ***Anisminic*** case stating at 336 and 337:

> *…no distinction was drawn between the effect of the rule nemo judex in causa sua and the rule audi alteram partem. In other words, as I understand it, all proceedings which are in breach of any limb of the rules of natural justice go to the jurisdiction and render the decisions nullities and are therefore void and of no effect.*

48. In ***Divungula v Chief Immigration Officer and another***,[6] the High Court of Barbados considered a similar section to Section 30 of our Immigration Act. Section 2C of the Immigration Act, Cap 190 of the Laws of Barbados states;

> *No court has jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding or decision of the Committee'; and '23(1) No court has jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Minister or an immigration officer had,*

[5] (1983) 34 WIR 299
[6] [2016] 3 LRC 409

made or given under the authority of this Act relating to—(a) the refusal of permission to any person to enter Barbados or the removal of that person from Barbados; or (b) the detention or deportation of any person, upon any ground whatsoever unless that person is a citizen or a permanent resident'.

49. Gibson CJ held that the applicant did not show that the Minister or the Chief Immigration Officer acted beyond his or her jurisdiction in detaining him for deportation, and has therefore not established any reason why this court should not apply the ouster clause in section 23(1) of the Act.

50. The court also relied on the decision of ***Sowatilall v Fraser*** [7] a case arising out of what was then British Guiana (now Guyana) rather than the ***Anisminic*** case. Gibson CJ stated the following:

[35] In Sowatilall, the appellant was a member of the Co-operative Society, the second respondent. The appellant had been allocated certain lots of land, Nos 12, 13 and 14 by the society. He alleged in his statement of claim that the allotment was to be subject to a survey and that it was agreed that there should be an adjustment and shifting of the boundaries if the survey showed this to be required. After the survey, the society ordered him to quit lot 14 and to accept lot 11 in exchange. He refused and the dispute was referred to the Commissioner of Cooperative Development who determined that the appellant had to do as the society required.

[7] (1960) 3 WIR 70

[36] The appellant then brought an action for a declaration setting aside the decision of the Commissioner and for an injunction to safeguard his occupation of lot 14. He alleged in his pleadings that the Commissioner had failed to give him an opportunity to hear all the appellant's witnesses and to present his whole case; and that further, the re-allocation of the lots was contrary to the rules of the society. Section 49(4) of the Co-operative Societies Ordinance provided that the Commissioner's decision 'shall be final and shall not be called in question in any civil court'. The trial judge came to the conclusion that s 49(4) excluded the jurisdiction of the Supreme Court to review the decision of the Commissioner. The appellant appealed to the Federal Supreme Court.

[37] Hallinan CJ, commenting on Racecourse Betting Control Board v Secretary for Air [1944] 1 All ER 60, [1944] Ch 114, a decision relied on by the trial judge, as well as the later decision of R v Northumberland Compensation Appeal Tribunal, ex p Shaw [1951] 1 All ER 268, [1951] 1 KB 711, observed ((1960) 3 WIR 70 at 73) that:

> *'Lord Greene MR and Goddard LJ, were careful to make it clear that, although the statute declared the decision of the tribunal to be final, certiorari would lie if the tribunal acted in excess of its jurisdiction. Certiorari can be granted on three other grounds besides excess of jurisdiction, namely, breach of the rules of natural justice, error of law on the face of the record, and fraud or collusion.'*

[39] The judgment of Lewis J was in accord with that of the Chief Justice. His Lordship 'consider[ed] that the words in s 49 give finality

to the Commissioner's decision provided he has acted within the limits of his jurisdiction, as defined by the Ordinance and the Regulations and in accordance with the rules of the society' ((1960) 3 WIR 70 at 77). Lewis J then explained (at 77–78), why the matter was to be remitted for further proceedings:

> *'In the instant case the allegations are that the plaintiff was not allowed to present his case fully, and that the decision violated the rules of the society. As reg 66 requires that proceedings before the Commissioner should be conducted in the same manner, as nearly as possible, as proceedings before a court of law, a breach of this provision, if substantial, would, in my view, make the proceedings so irregular as to affect the jurisdiction of the Commissioner. Such a breach may result from a refusal, before the close of the proceedings, to hear witnesses produced by one of the parties. So, too, a registered society has no power to act contrary to its rules and the Commissioner, in arriving at his decision, is equally bound by these rules. A decision purporting to affirm an act of the society which was ultra vires would, in my judgment, itself be ultra vires and beyond the competence of the Commissioner. In either of these cases the court has the power to declare the decision void and to set it aside.'*

51. In ***The Attorney General of Trinidad and Tobago v Desalination Company of Trinidad and Tobago***[8] one of the issues for the Court of Appeal was *whether DESALCOTT was debarred by sections 23(6) and 23(7) of the IRA*

[8] Civil Appeal No. P284 of 2015/ No. P287 of 2015

from challenging the Board's decision by way of judicial review. It was held that DESALCOTT was not debarred by sections 23(6) and 23(7) of the IRA from challenging the Board's decision by way of judicial review despite the wide wording of the ouster clauses. des Vignes JA stated at para. 29;

> *…However, as stated before in this judgment at paragraph 17, any decision taken by the Board in breach of the rules of natural justice is reviewable by the Courts in spite of the ouster clauses contained in sections 23(6) and 23(7) of the IRA. The Judicial Review Handbook 6th Edition by Michael Fordham at paragraph 60:2 at page 625 states that:*
>
> > *"Natural Justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case."*

52. In ***Singh and another v The Chief Immigration Officer***[9] my brother Ramcharan J having examined the effect of **Section 30** held that the court can examine and rule on whether the authority acted ultra vires, whether there was a breach of natural justice (fairness of the process) and whether the authority took into account irrelevant factors when coming to a decision. At para. 76 His Lordship opined;

> *76. The Court can examine and rule on whether the authority acted ultra vires, whether there was a breach of natural justice (fairness of the process) and whether the authority took into account*

[9] CV2020-01238

irrelevant factors when coming to a decision. With respect to the grounds upon which the Claimants were deported, the Court cannot rule on the merits but rather the process it took to get there.

53. In ***Regina (Privacy International) v Investigatory Powers Tribunal***,[10] the Supreme Court held that it should remain ultimately a matter for the court to determine the extent to which such a clause should be upheld, having regard to its purpose and statutory context, and the nature and importance of the legal issue in question. Lord Carnwath stated at para. 144;

> *…I see a strong case for holding that, consistently with the rule of law, binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law. In all cases, regardless of the words used, it should remain ultimately a matter for the court to determine the extent to which such a clause should be upheld, having regard to its purpose and statutory context, and the nature and importance of the legal issue in question; and to determine the level of scrutiny required by the rule of law*.

54. The plethora of cases demonstrate that the point is a well settled one in this jurisdiction. So long as the court is called upon to determine whether the Minister acted ultra vires of his power, breached the principles of natural justice, took into account irrelevant considerations or failed to take into account relevant factors, the ouster clause cannot apply as those challenges are quintessential jurisdictional challenges at their core. The

[10] [2020] A.C. 491

position is no different in this case. The finding of the court supra is that the Minister, as advised by the IAC would have operated outside of its jurisdiction by making a fundamental error of law in that it fell into the error of applying a higher threshold or standard than that set out in the Act there by denying the claimant the protection of the law and that further, it did so in the face of failure to make sufficient enquiry from Amanda. The court therefore does not agree with the submission of the defendants in that regard.

55. In light of the court's finding as to what it considers to have been a fundamental error in relation to the protection of the law and the consequences that would have obviously attended it, it is in the view of the court necessary to determine the other issues raised by the claimants as the issue dealt with supra is the gravamen of the complaint.

56. Before making its order, the court thinks it fit to add that it is perhaps wise that Immigration Officers charged with making the determination on issues such as the ones presented in this case take the opportunity to make the relevant enquires especially in the case where persons are available who may potentially assuage their justified concerns. Simply enquires such as making a telephone call or as in this case inviting the persons of whom Haniesha spoke to come into the restricted area to be interviewed may have gone a long way in assisting in the determination of the issue in a fair manner. In this case the evidence is replete with information that both supporting persons were either available at the airport or could have easily been contacted. Additionally, the standard of satisfaction required on the part of the officer is a matter to which attention must be paid. Nothing in life is guaranteed and indeed the law does not set such an impossible standard but speaks in terms of likelihood. But to assess likelihood one

must avail oneself of all of the relevant information. Only then can the full extent of the law be satisfied.

Disposition

57. The order of the court is as follows;

I. It is declared that the right of the First Claimant under section 4(b) of the Constitution to the protection of the law was breached by not being afforded the opportunity to have her witness Amanda Francis interviewed by the Special Inquiry or other officer or by the Immigration Advisory Committee (IAC) and by the application of a higher standard of consideration as to whether she fell within the category of persons prohibited under section 8(1)(h) of the Immigration Act Chap 18:01.

II. The deportation order issued on April 17, 2019 is set aside and it is declared that dismissal of the appeal by the Minister of National Security is null and void and of no effect.

III. The claims of the second and third claimants under sections 4(b) and 4(c) of the constitution and that of the first claimant under section 4(c) of the Constitution are stayed to be determined if in the court's view it becomes necessary to determine same or if so ordered.

IV. For the avoidance of doubt, the defendants are prohibited from removing the first claimant from the jurisdiction on the authority of the said deportation order which has been set aside.

V. Damages are to be assessed by a Master on a date to be fixed by the Court Office.

VI. The defendants shall pay to the first claimant 50% of the costs of the claim to be assessed by a Registrar in default of agreement, the other aspects of the claim having been stayed in the manner set out above.

Ricky Rahim

Judge