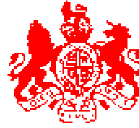

The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 3 of 2012

Between:

WILLSTON EZEKIEL DAVIS
&
TERRY-ANNE DAVIS

Appellants

-v-

THE GOVERNOR & THE MINISTER FOR NATIONAL SECURITY

Respondents

Before: **Zacca, President**
Ward, J.A.
Auld, J.A.

Appearances: Mr. Peter Sanderson for the Appellants
Ms Maryellen Goodwin for the Respondents

Date of Hearing: **14 June 2012**
Date of Judgment: **21 June 2012**

Judgement

AULD JA:

Introduction

1. Mr. and Mrs. Davis appeal against the order of Kawaley J, as he then was, on 30th March 2012 dismissing their challenge by way of judicial review of a recommendation by the Minister for National Security for, and an order by the Governor of, deportation against Mr. Davis.

2. Before turning to the facts material to the claims of Mr and Mrs Davis, we summarise three of the statutory tools available to the Bermuda Government for control of immigration and residence contained in the *Bermuda Immigration and Protection Act 1956* (the *1956 Act),* each of which figures in their appeal.

3. The first, looking at the issues chronologically is the one-time entitlement of Mr Davis, a Jamaican to the rights of a "special status husband" acquired in September 1997, on and on account of, his marriage to Mrs Davis, a Bermudian, under the regime governing immigration and residence in Part IV of the *1956 Act.* Such status was and is provided for in section 27A of the *Act,* namely that the husband of a Bermudian wife is "allowed to land and to remain or reside in Bermuda as if he were deemed to possess Bermudian status, but subject to a number of conditions stipulated in sub-section (2), all of which he apparently satisfied at the time. These were and are that:

1) his wife is ordinarily resident or domiciled in Bermuda;
2) he is not in contravention of any provision of Part V of the Act (which concerns the regulation of engagement of in gainful occupation in Bermuda);
3) he has no conviction involving, in the Minister's opinion, moral turpitude;
4) he is, to the satisfaction of the Minister, of good character and previous good conduct; and
5) to the satisfaction of the Minister, he and his wife are not estranged.

4. Section 27A does not create machinery for grant of specific permission to enter and reside in Bermuda, as does the general principle for grant of such permission in section 25 of the *1956 Act.* Section 27A clothes a non-Bermudian man married to a Bermudian woman, with Bermudian status, automatically allowing him to enter and reside here, but only if and only so long as all those conditions are satisfied. Failure to maintain compliance with any of them determines that special status, putting him into the general category of non-Bermudian men who are required under the general provisions of section 25 to seek specific permission of a Minister if they wish to land and/or remain here. Section 27A(4) provides:

> *"If a condition specified in subsection (2) is not fulfilled in relation to a special status husband, his landing or remaining or residing in Bermuda shall be deemed to be, or, as the case may require, to become, unlawful except with the specific permission of the Minister."*

5. Of a piece with the deemed section 27A special husband status is the absence of any express provision in the *Act* for challenging automatic lapse of the status on non-compliance with all or any of the section 27A(2) conditions, by way of appeal to the Immigration Appeal Tribunal or otherwise,. There is no need for an appellate remedy. Reinstatement of the privileges flowing from such status may be obtained by seeking and obtaining specific permission of the Minister pursuant to section 25, a decision no doubt turning normally on whether or the extent to which the applicant has brought himself back into full compliance.

6. The second category is the general one provided by section 25, which sets out a general principle rendering unlawful without specific permission of the Minister entry to and residence in Bermuda of persons other than, so far as material, Bermudians, *bona fide* visitors or permanent residents, As indicated, refusal of such specific permission is challengeable by appeal to an Immigration Appeal Tribunal, by reference to section 25(2) itself and within the framework provided by section 124(1):

> *"where a person is aggrieved by any decision of the Minister in respect of which an appeal is expressly allowed by any provision of this Act ..."* [the Court's emphasis]

Another such express power of appeal is provided in section 34(4) of the *Act* in respect of a revocation by the Minister under section 34(1) of "any permission to land, remain or reside ... granted ... in accordance with" Part IV, but, as above indicated, not so expressly provided in relation to lapse of a Part 1V, section 27A special husband status.

7. It follows, as Kawaley J observed in paragraph 17 of his judgment, that the section 27A special husband status, as a deemed Bermudian status:

> *"... is wholly inconsistent with the concept of permission granted under section 25(1) to land [or remain] in Bermuda to persons who are, inter alia, not Bermudians. Bermudians do not require permission under section 25(1) at all."*

8. The third category is deportation of a non-Bermudian under Part VII of the *1956 Act* by discretionary order of the Governor, pursuant to sections 106 and 117 on the recommendation of the Minister pursuant to section 115. Although the *Act,* in section 10, provides that the Governor's decision is final, it is still challengeable by way of judicial review.

The Facts

9. Mr and Mrs Davis's marriage in 1997 led quickly to the birth of twin daughters, but their relationship did not for long satisfy all of the section 27A conditions. In early 2002 the Immigration Department learned that they had separated in mid 2001, effectively denying Mr Davis of his special status under section 27A entitling him to remain in Bermuda, and he was so informed. He seemingly sought to do so towards the end of 2002 by written application to the Department under section 60 of the *1956 Act* for the right to become employed in Bermuda. Investigation revealed that he and Mrs Davis were still not living together. In February 2003 the

Department informed him orally that he required specific permission from the Minister to continue to reside and to work in Bermuda, and followed it by a letter of 4th April 2003 to the same effect, making plain that if he wished such specific permission he would have to apply for it. Neither Mr nor Mrs Davis challenged the Minister's stance and Mr. Davis made no such application.

10. Two or three months later, in June 2003, Mr Davis was found to be cohabiting with a girl-friend, by whom he had fathered a child, in a child-care centre, and was arrested and charged with unlawfully supplying her with crack-cocaine. Two years later, in August 2005, he was convicted of that offence and sentenced to 12 years' imprisonment. He had not in the meantime sought specific permission from the Minister to remain in Bermuda pursuant to section 25 or any other provision of the *1956 Act.*

11. There followed, during the course of Mr Davis's service of his sentence, a letter from the Department of 9th June 2008 notifying him of the Minister's proposal to recommend to the Governor his deportation to Jamaica on his release. In the letter he was invited to make any written representations he wished against the making of such an order. Mr. Davis, by letter to the Minister of 27th June 2008, made written such representations, maintaining that he and Mrs. Davis had become reconciled before his conviction and that he wished to meet his obligations to her as a husband and to their children as a father.

12. The Minister did not reply to that request. But he clearly responded to it by seeking departmental reports on the state of Mr. and Mrs. Davis's marriage and his relationship with their children. Those reports were in the main favourable to Mr Davis, but did not, in the Minister's view, overcome the information before him of their sporadic cohabitation before his imprisonment and of the solely financial nature of her interest in him. In the light of that information, which it took the relevant Departments some 20 or more months to provide, and having regard to the seriousness of the offence of which Mr. Davis had been convicted, the Minister recommended to the Governor in August 2010 that he should be deported. The Governor so ordered on 23rd August 2010. On service of the order on Mr. Davis on 5th October 2011 shortly before his release from prison, the Minister informed him by letter of his right to challenge it by way of *habeas corpus.*

The Judge's Ruling

13. Mr. and Mrs. Davis sought and obtained leave to challenge the Minister's recommendation for deportation and the order itself by way of judicial review, and the matter came before Kawaley J towards the end of March of this year. On the hearing, their counsel, Mr Peter Sanderson, made a number of submissions, all directed at the proposition that Mr. Davis's entitlement to reside in Bermuda as a special status husband under section 27A of the *Act* had never been lawfully revoked because he had been unlawfully deprived of a formal process of appeal or other means of challenge to his loss in early 2002 or, at the latest, early 2003 of that status. More particularly, he maintained that:

1) there should have been an express revocation of his entitlement as a special status husband to remain and reside in Bermuda before the making of the deportation order; and

2) failure by the Minister to treat Mr Davis's letter of 27th June 2008 in response to the Minister's 9th June 2008 notification of his proposal to recommend deportation, as a formal application under section 34(1) against revocation of his right to remain in Bermuda, thereby unlawfully depriving him of an opportunity to appeal such revocation, a right which he maintained was expressly provided by section 34(4) of the Act, which provides:

> *"(4) Any person aggrieved by any decision of the Minister to make an order under subsection (1) against him may, subject to section 124 [see paragraph 5 above], appeal to the Immigration Appeal Tribunal against such decision."*

14. Kawaley J rejected that argument. He rightly held that the right of appeal for which section 34(4) provided applied to Part IV, including section 25(1) requiring specific permission to land, remain or reside in Bermuda, but did not apply to the provision in section 27A for special status husbands, because section 27A(1) and (4) expressly excluded any such application. See paragraphs 4 and 5 above. This is how the Judge put the matter in paragraphs 20, 21 and 23 of his judgment:

> *"20. ... The scheme of the Act is that where permission is initially granted, such permission may be revoked. It is noteworthy that section 27A is drafted in a way which does not require the Minister to grant permission and does not empower the Minister to revoke permission. Rather, it sets out criteria which foreign spouses must meet so as to qualify for the rights conferred by the section and proceeds to provide, in effect, that such rights lapse if any of the requirements cease to be met in any particular case. The determining factor as to whether or not section 27A continues to apply is the conduct of the foreign husband and/or his Bermudian wife rather than the exercise of any statutory discretion on the Minister's part.*
>
> *21. ... Mr. Davis's rights were capable of being lost by operation of law and did not require any revocation on the Minister's part. .... Firstly, there is the need to clarify when section 27A rights have been lost; secondly, there is the fact that where the loss of rights is in dispute, the Minister's assessment that section 27A no longer applies is not appealable.*
>
> ...
>
> *23. ... it is clear ... that the Minister notified ... [Mr. Davis] both orally and in writing in January 2002 and April 2003 respectively, that he required permission to remain in Bermuda. ... by applying for a new letter evidencing spousal rights under section 27A of the Act in December 2002, ... [Mr. Davis] accepted that the requisite conditions under section 27A were no longer fulfilled. ... [Mr. Davis] did not challenge the Minister's second determination that he was no longer eligible for section 27A status*

> *communicated to him in April 2003. It appears that he continued to work illegally and then proceeded to commit a serious drugs offence."*

The Submissions and Conclusion on Appeal

15. Mr Peter Sanderson for, Mr. and Mrs Davis, does not attempt to challenge the Judge's ruling as a matter of statutory construction. He seeks, however, to overcome it by recourse to principles of proportionality and fairness. He maintains that the Minister had nevertheless discretion to treat Mr. Davis as if he were a person who had been formally refused permission to remain and reside in Bermuda under section 25 of the *1956 Act* and in consequence was entitled to challenge the refusal by way of appeal to the Immigration Appeal Tribunal. Such notional refusal could, he submitted, have taken the form of a letter from the Minister rejecting Mr Davis's representations to him in his letter of 27th June 2008 against his notified intention to recommend deportation. His challenge to the Minister's recommendation and the Governor's order for his deportation was not of any unfairness by them in their conduct of the deportation process itself, but of disproportionality in a denial of his public law rights to procedural fairness, namely a right of appeal to some independent appellate body of his right to remain in Bermuda.

16. As Ms Maryellen Goodwin, for the Governor and the Minister, has pointed out, the relief claimed by Mr. and Mrs. Davis and the grounds of this appeal are directed, not at a failure by the Minister to consider reinstatement of Mr. Davis's section 27A special husband status, as a possible route to a right of appeal. It is plain from the wording of section 124(1) and the absence of any express provision for appeal in section 27A that there is no possibility of challenge by way of appeal in respect of lapse of that status on account of failure to fulfil any of the conditions in section 27A (2). The only remedy open to Mr Davis in the circumstances would have been to seek "specific permission" of the Minister to remain under section 25 as indicated in section 27A(4). As Kawaley J rightly found in paragraphs 22 to 28 of his judgment, on the evidence before him Mr Davis never did that. He had lost his section 27A status long before the impugned decisions in relation to the deportation order were made.

17. Ms Goodwin submitted that the principle of proportionality cannot be used to challenge the validity of the deportation process by inventing a procedural requirement or process for some other form of challenge for which the *1956 Act* does not provide - or a right of appeal that its draftsman has expressly decided to exclude.

18. Kawaley J was of the same view, as the following passage in paragraph 44 of his judgment makes clear and with which this Court agrees:

> *"Did the public law requirements of procedural fairness require the Minister to handle the deportation in such a way as to confer on ... [Mr. Davis] appeal rights which the statutory regime neither expressly nor impliedly contemplated? The question must ... be answered in the negative. Neither section 27A nor section 106 [power of the Governor to make a deportation order] provide for appeal rights. Section 124(1) of the Act unambiguously confers a right of appeal where a person is aggrieved by*

any decision of the Minister in respect of which an appeal is expressly allowed by any provision of this Act. Where the statutory scheme expressly creates rights of appeal for certain categories of decision and omits to do so for others, the Court cannot confer by implication on the Executive an obligation to create appeal rights in respect of excluded categories of decision. That would represent the usurpation by the Judiciary of the constitutional function of the Legislature. ....”

19. The relief sought and appeal are, therefore necessarily, directed only at the Minister's recommendation for, and the Governor's order of, deportation, both of which are challengeable only by a writ of *habeas corpus* or judicial review as in these proceedings.

20. It is clear that the Minister and the Governor acted in accordance with the relevant provisions of the 1956 *Act* as to deportation in the circumstances of the case and with the rules of natural justice governing the Minister's consideration of the effect of such an order on Mr. Davis and his family life and the other members of his family. It is clear too from the undisputed evidence of the Acting Chief Immigration Officer, Dr Danette W. Ming that they did so in reliance, in particular, on:

1) the Department of Immigration's notification of 9 June 2008 to Mr. Davis of the Minister's proposal to recommend deportation;

2) Mr. Davis's written representations of 27th June 2008 against that proposal, and

3) the ensuing documentation showing thorough examination by the Department of his family circumstances relevant to the formulation of the recommendation and the making of the order - and a proper balancing of those circumstances and the Bermudian public interest.

21. In the light of the constraints of the statutory framework of the *1956 Act*, the pleaded focus of the relief claimed – namely in relation to the deportation – and the Judge's findings of fact, there is no factual or legal basis upon which Mr Sanderson, can "pursue", as he puts it, the appeal on the ground of proportionality. The statutory courses open to the Minister and the Governor at the deportation stage did not permit an examination of proportionality and balancing of interests referable to a potential but unmade application of Mr Davis for specific ministerial permission to remain in Bermuda. Having examined the authorities and arguments on proportionality relied upon by Mr Sanderson, we consider it sufficient to say that they are irrelevant in the context of the legal constraints and facts of this case. The doctrine of proportionality cannot in the circumstances be applied for the purpose suggested by Mr Sanderson, namely to require the Minister first to refuse formally a notional application by Mr Davis to remain and reside in Bermuda before considering whether to recommend his deportation so as thereby to afford him a right of appeal expressly excluded by the *1956 Act*.

22. In any event, whatever the level of intensity of review called for here, under the banner of proportionality or otherwise, there can be no reasonable complaint about the Minister's or the Governor's over-all handling of the matter. We agree with the Judge's finding and conclusion

in paragraph 42 of his judgment that the incontrovertible evidence showed that the Minister took considerable care to assess the quality of the relationship between Mr. Davis, his wife and their children and all the other relevant circumstances before making the impugned deportation recommendation. His assessment is not therefore open to review on its merits or as to process.

23. For all those reasons, the Court dismisses the appeal

Signed

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Auld, JA

Signed

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Zacca, JA

Signed

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Ward, JA