



# **In The Supreme Court of Bermuda**

**CIVIL JURISDICTION**

**2011: 448**

**IN THE MATTER OF ORDER 53 OF THE RULES OF THE SUPREME COURT OF  
BERMUDA**

**AND IN THE MATTER OF A DECISION BY THE GOVERNOR MADE ON OR  
ABOUT 23<sup>RD</sup> AUGUST 2010**

**AND IN THE MATTER OF A DECISION MADE BY THE MINISTER FOR NATIONAL  
SECURITY IN OR ABOUT JULY 2010**

**BETWEEN:**

**WILLSTON EZEKIEL DAVIS**

**First Applicant**

**-and-**

**TERRY-ANNE DAVIS**

**Second Applicant**

**-v-**

**THE GOVERNOR**

**First Respondent**

**-and-**

**THE MINISTER FOR NATIONAL SECURITY**

**Second Respondent**

**REASONS FOR RULING ON RENEWED LEAVE APPLICATION**

**(In Court)**

Date of Hearing: November 29, 2011

Date of Ruling: November 30, 2011

Mr. Peter Sanderson, Wakefield Quin, for the Applicants

## **Background**

1. On November 24, 2011, the Applicants applied for leave to seek judicial review of the decisions of the Minister to recommend deportation and the decision of the Governor to make a deportation order respectively. As no hearing was requested, the application was considered by the Chief Justice on the papers and he refused leave on November 25, 2011. The application for leave was renewed, by application dated November 28, 2011, before me pursuant to Order 53 rule 3(4).
2. The evidence suggests that on June 9, 2008, the First Applicant was advised (by letter dated June 8, 2008) that the Minister proposed to recommend a deportation order. This order would take effect when the First Applicant had completed the 12 year sentence of imprisonment imposed by this Court on June 5, 2003 for supplying a controlled drug, namely cocaine. The June 8, 2008 letter invited representations which the First Applicant's wife, the Second Applicant, deposes she sent, without receiving any response. On August 23, 2010, the Acting Deputy Governor, on behalf of His Excellency and upon the Minister's<sup>1</sup> advice, ordered the First Applicant to be deported pursuant to section 106 of the Bermuda Immigration and Protection Act 1956 ("the Deportation Order" and "the Act", respectively). The Deportation Order was served on the First Applicant under cover of a letter dated October 5, 2011.
3. The grounds of the application were essentially as follows:
  - “(1) the Respondents breached procedural fairness by failing to give reasons for the decision and/or failing to demonstrate that the representations made had been taken into account;
  - (2) the deportation decision is irrational or disproportionate;
  - (3) the First Applicant's right to remain in Bermuda as a spouse had not been revoked, so the deportation order was ultra vires section 11 of the Constitution and section 104 of the Act.
4. The Chief Justice refused leave on the grounds that the application was misconceived in that on a proper construction of section 27A of the Act, he lost his spousal right to remain in Bermuda having been convicted of an offence of “moral turpitude”.
5. Based on a review of the application papers, I was also minded to refuse leave at the commencement of the renewed leave application. However, having heard Mr. Sanderson's oral elaboration of the construction of section 27A of the Act his clients

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<sup>1</sup> The decision was made by the predecessor of the present Minister.

relied upon, I was persuaded that the threshold for leave was sufficiently met even if the prospects for success were not obviously strong. Leave was granted and a stay of the deportation ordered<sup>2</sup>. I indicated I would circulate reasons for my decision today without scheduling a formal hearing to hand them down.

**Legal findings: the construction of section 27A of the Act**

6. The Chief Justice found that section 27A clearly provides that the husband's right to remain in Bermuda automatically falls away if he breaches any of the conditions subject to which the right is acquired. Section 27A provides as follows:

***“Special provisions relating to landing etc of husbands of Bermudians***

*27A (1) Notwithstanding anything in section 25 and without prejudice to anything in section 60, but subject to subsection (4), the husband of a wife who possesses Bermudian status (a "special status husband") shall be allowed to land and to remain or reside in Bermuda as if he were deemed to possess Bermudian status, if the conditions specified in subsection (2) are fulfilled in relation to him.*

*(2) The conditions to be fulfilled in relation to a special status husband are as follows —*

*(a) his wife must be ordinarily resident, or be domiciled, in Bermuda;*

*(b) he must not contravene any provision of Part V;*

*(c) he must not have a relevant conviction recorded against him;*

*(d) the Minister must be satisfied that the special status husband is a person of good character and previous good conduct;*

*(e) the Minister must be satisfied that the special status husband and his wife are not estranged.*

*(3) In relation to a special status husband "relevant conviction" in subsection (2)(c) means a conviction, whether in Bermuda or elsewhere, of an offence which, in the Minister's opinion, shows moral turpitude on the special status husband's part.*

*(4) 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.”*

7. The Applicants' counsel submitted that it was at least arguable that where it was proposed to deport a person to whom section 27A at one time applied on the grounds that it no longer applied by reason of a breach of any of the subsection (2) conditions, section

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<sup>2</sup> In granting the stay, I made it clear that this Court had no intention of indirectly causing the release of the First Applicant in Bermuda pending the hearing of this application, unless such a course was chosen by the Minister.

34 was engaged as the right to remain had to be formally revoked triggering the appeal right provisions. The requirements of that section had clearly not been followed.

8. This argument seemed somewhat improbable in light of the deeming provisions of section 27A(4) of the Act, not to mention the express evidential presumption under section 114(c) that a deportation order has been validly made. However, the proposition that Parliament cannot have intended to empower the deportation without any right of appeal of a male spouse because, in the Minister's view, he was no longer of good character (for instance), could not be dismissed out of hand. This was particularly the case in light of the protection afforded under international law to family life in the deportation context by the European Convention on Human Rights, to which counsel also referred for the first time before me in oral argument. How section 27A falls to be interpreted has to take into account not just the deportation ground relied upon in the present case, but the full range of circumstances under which section 27A rights may be lost. Under the Convention, it appears to be settled law that (a) foreign spouses may not be deported by virtue of their criminal conviction for serious offences without regard being had to the impact of the deportation decision on their local family, and (b) immigration laws cannot discriminate in their treatment of foreign spouses on gender grounds.
9. Section 27A, it seemed to me, was open to the following potential constructions as regards the right to deport a non-Bermudian husband who is determined to have lost the right to remain in Bermuda by virtue of non-compliance with one or more of the section 27A(2) conditions:
  - (a) The right to remain in Bermuda is automatically extinguished by breaching the conditions upon which the spouse's residential rights were granted. As long as notice of a proposed deportation order is given, the Minister need not revoke permission to reside under section 34 of the Act. By virtue of section 27(4), the onus is on the deportee to apply for fresh permission to reside. On any such application by a foreign spouse facing deportation, the Minister is required to have regard to the family life protections of article 8 of the European Convention on Human Rights ("ECHR"), because any statutory discretion must be exercised as far as possible in a manner which conforms to international human rights obligations applicable to Bermuda;
  - (b) Section 27A is construed as suggested in (a). However, Parliament must be deemed as having expressly excluded any need to have regard to the right to family life in respect of foreign male spouses. Accordingly, the Minister has an unfettered discretion as to whether or not to consider and if so how to determine any fresh application to reside in Bermuda made by a person liable to deportation;
  - (c) Section 27A is to be construed, as the Applicant contends, in the following manner. Before deporting a foreign male spouse who has *prima facie* lost his section 27A status, the Minister must pursuant to section 34 revoke the

spouse's right to continue to reside in Bermuda, engaging the appeal rights contained in that section of the Act.

10. Although the construction contended for by the Applicant is not at first blush the most compelling one, and was only really developed orally before me in response to the Chief Justice's reasons for refusing leave at the first stage, I considered that leave could not properly be refused. I applied the following test for granting leave upon which counsel relied:

*"If on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of judicial discretion, to give him leave to apply for that relief."*<sup>3</sup>

### Summary

11. The naked gender discrimination against foreign male spouses (and their Bermudian wives) in the Act is constitutional because gender discrimination is not prohibited by the Bermuda Constitution. It appears that foreign wives and minor children of Bermudians who commit the most heinous offences cannot be deported because they belong to Bermuda under section 11 of the Constitution and are expressly protected from deportation by section 104 of the Act. These provisions on their face appear to be inconsistent with the equal treatment provisions of article 14 of ECHR as read with the family protection rights under article 8 ECHR. As these international treaty provisions form no part of Bermuda domestic law and Parliament's intention to treat foreign spouses differentially based on gender is unambiguously clear, the most plausible construction to be placed upon section 27A is that once a person is lawfully established to have breached one of the section 27A conditions, the right to remain lapses by operation of law and the foreign male spouse must seek fresh permission to remain or reside in Bermuda. The position may well be that persons in the position of the Applicants have no remedy under Bermuda domestic law and their only remedy is to petition the European Court of Human Rights.
12. But in my judgment the ECHR dimension together with the bare construction of section 27A question does, albeit narrowly, generate an arguable interpretative conundrum. Is section 27A of the Act to be construed in a way which extinguishes altogether the article 8 ECHR rights of both the foreign spouse (who breaches a condition of his right to reside) and his Bermudian wife and children, or merely in a manner which impairs such rights to the minimum extent possible? This was an important point of statutory interpretation which ought to be judicially determined to enable the Governor and the Minister to exercise their deportation powers in future similar cases with confidence and clarity and in a manner which will not (or not legitimately) be subject to legal challenge under Bermuda domestic law.

Dated this 30<sup>th</sup> day of November, 2011

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KAWALEY J

<sup>3</sup> Lord Diplock in *IRC-v-National Federation of Self-Employed and Small Business Ltd.*[1981] 2 All ER 93 at 106.