IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2011: No. 448

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

AND IN THE MATTER OF A DECISION BY THE GOVERNOR MADE ON OR ABOUT 23RD AUGUST 2010

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

WILLSTON EZEKIEL DAVIS

First Applicant

-and-

TERRY-ANNE DAVIS

Second Applicant

-v-

THE GOVERNOR

First Respondent

-and-

THE MINISTER FOR NATIONAL SECURITY

Second Respondent

JUDGMENT

(In Court)

Date of Hearing: March 19-20, 2012
Date of Judgment: March 30, 2012

Mr. Peter Sanderson, Wakefield Quin, for the Applicants
Ms. Maryellen Goodwin, Attorney-General's Chambers, for the Respondents

Introductory

1. The 1st Applicant is a male Jamaican national who married the 2nd Applicant, a female Bermudian on or about September 13, 1997, having taken up residence in contemplation of his marriage a few months earlier. The Applicants have 13 year old twins.

2. On or about August 2, 2005, the 1st Applicant was convicted of supplying a controlled drug (cocaine) and sentenced to 12 years imprisonment. Prior to his release in 2011, he was told by the Department of Immigration that deportation was contemplated and he was invited to make representations. The Department investigated the family status of the Applicants and received a report from the Department of Child and Family Services. On or about August 11, 2010, Acting Minister Walter Roban recommended that the 1st Applicant should be deported upon completion of his sentence in the public interest. A deportation order was signed by the Acting Deputy Governor on August 23, 2010 ("the Deportation Order") and served on the 1st Applicant under cover of a letter dated October 5, 2011 at the Prison Farm, shortly before his release.

3. The Applicants applied on November 24, 2011 for leave to seek judicial review pursuant to Order 53 of the Rules of the Supreme Court. No hearing was requested so the Chief Justice considered leave on the papers filed. He refused leave on November 25, 2011 on the grounds that the construction of section 27A of the Bermuda Immigration and Protection Act ("the Act") relied upon was "*misconceived*". The main legal complaint was that the Minister had erred in construing the provisions of the Act as entitling him to proceed to deportation without expressly revoking the Applicant's section 27A spousal rights.

4. The Applicants renewed their application for leave in open Court before me on November 29, 2011 and Mr. Sanderson orally expanded upon the written grounds of the application. I granted leave, stating in my Reasons delivered the following day that the application raised "*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.*"

5. On March 1, 2012, the Applicants were given leave to amend their Relief and Grounds. The original main grounds of complaint were that:

    (a) at all material times the 1st Applicant's right to remain in Bermuda pursuant to section 27A of the Act was subsisting and continued to subsist until it was

revoked by the Minister under section 34 of the Act giving rise to a right of appeal;

(b) the deportation process was legally flawed because either no revocation occurred or any revocation was invalid because the 1st Applicant was not notified of his appeal rights as required by law;

(c) the Deportation Order and the recommendation upon which it was based were *ultra vires* because the 1st Applicant was entitled to be treated as if he were deemed to possess and enjoy Bermudian Status and was not liable to deportation;

(d) the impugned decisions were vitiated by procedural unfairness;

(e) the impugned decisions were vitiated by reason of being disproportionate and/or irrational (the irrationality argument, sensibly, was not seriously pursued at the hearing).

6. The amendments added essentially two refinements to these grounds. Firstly, it was further complained that (1) before the Deportation Order was made, permission to reside ought to have been revoked, alternatively (2) when the 1st Applicant made representations in response to the deportation warning letter, the Minister ought to have construed such representations as an application for permission to reside and refused that implied application in writing giving notice to the 1st Applicant of his appeal rights. Secondly, various grounds were amended to make explicit reference to the family of the Applicants and/or their children's equivalent rights.

7. The relief sought, as amended, an order of certiorari quashing not just the Deportation Order, but the recommendation upon which it was based as well. Additionally, a declaration was sought to the effect that the Minister was required, before making any deportation recommendation, to refuse or revoke permission to remain in Bermuda.

8. The Applicants' case inviting the Court, in effect, to postpone (and possibly avoid) the break-up of a family unit was presented by Mr. Sanderson with both legal skill and oratorical passion. Ms. Goodwin for the Respondents deployed rigorous analysis and cold logic with considerable force in an attempt to defuse the emotional charge in the Applicants' case. However, it was noteworthy that the Respondents' counsel was more willing to invoke the truism applicable even to cases involving important legal issues: that each case turns on its facts.

9. It is to the largely uncontested factual background that one must first turn in order to decide precisely what legalities are engaged by the present case. The evidence filed by the Applicants in reply makes it clear that they only join issue with the conclusions reached by the Minister and/or the Department about the quality and extent of the family relationship relied upon by them herein. While portions of their Affidavits were, strictly read, irrelevant and more than a mere reply, I would err on the side of admitting the

evidence having regard to the breadth of the family law rights relied upon under international law, if not Bermuda domestic law. No prejudice to the Respondents and/or the interests of justice appears to me to arise in any event from adopting such a course.

Factual findings: the 1st Applicant's immigration status in Bermuda

10. The Respondents' evidence was contained in the First Affidavit of Dr. Danette W. Ming. The crucial facts relating to the 1st Applicant's immigration status which are deposed to without any or any material contradiction are as follows:

    (a) by letter dated September 15, 1997, the Chief Immigration Officer confirmed to the 1st Applicant his section 27A rights and required him to report any relevant changes in his status to the Department;

    (b) on or about January 8, 2002 the 1st Applicant was arrested in connection with an unidentified matter. He was interviewed by an officer from the Department and admitted that he had been separated from his wife for seven months. He was verbally told that he must regularise his immigration position;

    (c) on December 3, 2002, the 1st Applicant supported by the 2nd Applicant applied for a Letter for Employment and Travel from the Department, implicitly acknowledging that his 27A rights as evidenced by the September 15, 1997 letter had lapsed;

    (d) on or about February 3, 2003 as a result of interviewing the Applicants, the Department concluded that they were still married but not living together and that the Applicant was working;

    (e) on or about February 14, 2003 the 1st Applicant (who is not literate) was verbally informed that he must cease working and apply for permission to reside and seek employment in Bermuda. This position and the refusal of his application for a spousal rights letter was confirmed by letter dated April 4, 2003;

    (f) on June 5, 2003, the 1st Applicant supplied a sizeable quantity of crack cocaine to the girlfriend he was cohabiting with on the premises of a child-care centre. He was arrested on or about June 9, 2003 and convicted upon the verdict of a jury on or about August 2, 2005 and sentenced to 12 years imprisonment on or about October 14, 2005 after social inquiry reports had been prepared.

    (g) The Department of Immigration later concluded based on Police Records that he was working (without Immigration permission) at the time of his arrest;

    (h) on June 9, 2008, the 1st Applicant was delivered a letter notifying him that he would be deported at the end of his sentence and inviting him to make any representations as to why such an order should not be made against him;

(i) on or about June 27, 2008, the 1st Applicant signed a letter addressed to the Minister asking for the opportunity to stay in Bermuda in order to fulfil his obligations as a father and husband;

(j) the Department of Immigration requested the Department of Child and Family Services ("DCF") to investigate the relationship between the 1st Applicant and the children of his marriage. DCF reported on March 4, 2010 that it "*appeared*" that the 1st Applicant "*was a devoted father and hard working person up until the time he made extremely poor life's decision* [sic] *which has led to his present circumstances*". A supplementary report dated March 17, 2010 based on further input from the children's school and the 2nd Applicant confirmed the closeness of his relationship with his children and his wife's willingness to give him a second chance;

(k) on or about August 11, 2010 the Acting Minister agreed with the advice of the Chief Immigration Officer that the 1st Applicant should be deported in the public interest. The Deportation Order was signed on or about August 23, 2010 and served on or about October 5, 2011 shortly before the 1st Applicant was due to be released;

(l) on November 9, 2011, the Acting Chief Immigration Officer prepared a "*second look*" memorandum advising the Minister to proceed with deportation in light of the serious nature of the offence of which the 1st Applicant had been convicted, notwithstanding the 2nd Applicant's desire that he remain to be a spouse and father to their children. The Minister agreed with this advice the following day.

Legal findings: once a foreign husband acquires section 27A rights can such rights only be lost by revocation under section 34, thus triggering statutory appeal rights?

Statutory framework

11. The starting point for any analysis of the proper approach to construing the rights conferred upon foreign husbands of Bermudian women is an appreciation of the fact that:

(a) foreign husbands (unlike foreign wives) do not belong to Bermuda and are not protected from deportation by the provisions of section 11 of the Bermuda Constitution;

(b) freedom from discrimination on the grounds of gender is not constitutionally protected by section 12 of the Constitution; and

(c) the right to family life (protected by article 8 of the European Convention on Human Rights-"ECHR") is not a fundamental right guaranteed by Part I of the Bermuda Constitution.

12. Ms. Goodwin rightly pointed out that the rights conferred on foreign husbands of Bermudian women by section 27A amounted to a considerable gift having regard to the status such persons previously enjoyed. This is because under section 25 of the Act, only persons who possess Bermudian status, are special category persons[1] or *bona fide* visitors can enter Bermuda without the specific permission of the Minister. With effect from July 9, 1987, the following new section was inserted into the Act:

"**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."

[1] This term is defined in section 59 of and the First Schedule to the Act.

Analysis

13. Mr. Sanderson's case on behalf of the Applicants was that the effect of section 27A(4), read in the context of the statutory scheme as a whole, was that where a foreign husband acquired section 27A rights but a condition of enjoying such rights was not fulfilled, such rights did not lapse until the Minister revoked such rights under section 34. It must be said from the outset that if one gives section 27A(4) a straightforward natural and ordinary meaning and does not look beyond the four corners of the subsection itself, the meaning contended for by the Applicants is almost impossible to adopt.

14. The statute appears to clearly signify, as the Respondents contend, that where a condition of the right to enter and remain and reside in Bermuda under section 27A(2) is not fulfilled, the relevant rights lapse by operation of law and the husband in question is required to seek specific permission to enter and/or remain and reside in Bermuda from the Minister.

15. Section 34 itself provides as follows:

> "***Revocation of permission to land, etc***
> *34. (1) Subject to this section, the Minister may, by an order in writing served upon the person to whom it relates, revoke any permission to land, remain or reside which has been granted to that person in accordance with this Part either forthwith or as from a day to be specified in the order; and thereupon, notwithstanding any other provision of this Part, that permission shall cease to have effect forthwith or on the day so specified as the case may be.*
>
> *(2)Before the Minister makes any order under subsection (1) against any person, he shall cause a notification in writing to be served upon that person that he proposes to make such an order in his case at the expiration of fourteen days or such longer period as may be specified in the notification; and shall inform that person of the grounds upon which the Minister proposes to make the order and shall invite him within that period to submit in writing to the Minister any reason which he wishes to advance why such an order should not be made in his case.*
>
> *(3)The Minister shall not make any order under subsection (1) until the expiration of the period specified in the respective notification served under subsection (2) and the Minister shall, where reasons are submitted to him in accordance with subsection (2), take those reasons into consideration when he decides whether or not the order should be made.*
>
> *(4) Any person aggrieved by any decision of the Minister to make an order under subsection (1) against him may, subject to section 124, appeal to the Immigration Appeal Tribunal against such decision.*"

16. Mr. Sanderson submitted that the power conferred on the Minister by section 34(1) to *"revoke any permission to land, remain or reside which has been granted to that person in accordance with this Part*" extended to section 27A rights. The difficulty with this argument is that it required a construction of section 27A which equated the rights conferred by section 27A to permission to land (etc.) for the purposes of section 25, which provides as follows:

> "***Declaration of general principle regarding restriction on entry of persons into Bermuda, and subsequent residence, etc., therein***
> *25(1) Without prejudice to any of the succeeding provisions of this Part, or to any provision of any other Part, it is hereby declared that it is unlawful for any person other than a person—*
>
> *(a) who possesses Bermudian status; or*
> *(b) who is for the time being a special category person; or*
> *(c) who is, bona fide, a visitor to Bermuda; or*
> *(d) who is a permanent resident;*
>
> *to land in, or having landed, to remain or reside in, Bermuda, without in each case specific permission (with or without the imposition of conditions or limitations) being given by or on behalf of the Minister; and, as respects any special category person or a bona fide visitor or a person who is a permanent resident, such landing, remaining or residence shall be unlawful unless he conforms to any requirements imposed by this Part:*
>
> *Provided that the Minister, in his discretion, may dispense with the requirements imposed by the foregoing provisions of this subsection.*
>
> *(2) Any person who is aggrieved by any decision of the Minister with respect to a refusal to grant any permission under subsection (1) or with respect to any condition or limitation imposed under subsection (1) may, subject to section 124, appeal to the Immigration Appeal Tribunal against such decision.*
>
> *(3)Section 27 and section 30 have effect respectively with respect to the special status, as respects entitlement to land in Bermuda, or to remain or reside therein, of wives and dependent children of persons who possess Bermudian status, and of wives and dependent children of special category persons.*
>
> *(4)The provisions of this Part shall be construed subject to Article III of the Agreement regarding the Status of Forces of Parties to the North Atlantic Treaty, London, 19 June 1951, as applied to Bermuda and the Visiting Forces Act (Application to Bermuda) Order 2001.*"

17. Ms. Goodwin advanced one core submission which I found to be compelling in refuting the contention that the acquisition of section 27A spousal status accrues through the grant of permission under section 25(1). She contended that section 27A operated by way of exception to section 25(1). This contention must be right for the following reasons:

    (a) section 27A(1) itself begins with the words "*Notwithstanding anything in section 25*". These words clearly signify a legislative intention to qualify the terms and effect of section 25;

    (b) section 27A provides that a husband entitled to the rights conferred by the section "*shall be allowed to land and to remain or reside in Bermuda as if he were deemed to possess Bermudian status*". This is wholly inconsistent with the concept of permission granted under section 25(1) to land in Bermuda to persons who are, *inter alia*, <u>not</u> Bermudians. Bermudians do not require permission under section 25(1) at all.

18. In my judgment it requires linguistic contortionism on a scale which is not permitted by the canons of statutory construction to conclude that the 1st Applicant acquired permission to land, reside or remain in Bermuda under section 25(1) of the Act. Accordingly, the only basis on which the Applicants can tenably complain that the Minister was required to revoke the 1st Applicant's right to remain in Bermuda pursuant to section 34 of the Act (thus triggering statutory appeal rights) is by reference to the terms of section 27A itself. These provisions must be construed as operating to confer on the 1st Applicant permission from the Minister to land, remain and reside in Bermuda, permission which is capable of being revoked under section 34 (again triggering statutory appeal rights).

19. It does not require extreme intellectual exertion to conclude that section 27A creates rights which are materially distinguishable from the grant of permission to land, remain and reside to persons who do not enjoy such rights. The section provides that, as long as the specified conditions are met, qualifying foreign husbands are entitled to be treated as if they "*were deemed to possess Bermudian status*". Furthermore, subsection (4) provides :

    "*(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.*"

20. The plain words of section 27A(4) in stating that if section 27A rights lapse "*specific permission of the Minister is required* " constitute the first reference in the section to any form of "permission". 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.

Conclusion

21. In summary, the 1st Applicant's rights were capable of being lost by operation of law and did not require any revocation on the Minister's part. This construction of section 27A may seem ultimately obvious; but the Applicants' counsel did accurately identify how this result may create practical difficulties which will have to be ironed out on a case by case basis. 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.

Findings: had the 1st Applicant's section 27A rights been lost by the time the impugned decisions were made?

22. Ms. Goodwin properly conceded that unfairness could result if the Minister were to take enforcement action against a foreign spouse whose section 27A status had lapsed by operation of law without signifying to the person concerned that the Minister took the view that this had occurred.

23. On the facts of the present case, it is clear beyond sensible argument that the Minister notified the 1st Applicant both orally and in writing in January 2002 and April 2003 respectively, that he required permission to remain in Bermuda. More significantly still, it is clear that by applying for a new letter evidencing his spousal rights under section 27A of the Act in December 2002, the 1st Applicant accepted that the requisite conditions under section 27A were no longer fulfilled. The 1st Applicant did not challenge the Minister's second determination that he no longer was 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.

24. Against this background, Mr. Sanderson had the temerity to submit that if the Applicants were in fact reconciled at the time of the 1st Applicant's trial in 2005, he was enjoying his section 27A rights at that point. Further, even after his conviction, the basis of the Deportation Order appeared to presuppose (by reference to section 106(4) of the Act) that the 1st Applicant was lawfully in Bermuda at that time, his conviction notwithstanding.

25. Dealing firstly with the contention that the Applicants' alleged reconciliation at the time of the 2005 trial meant that the section 27A(2) conditions were fulfilled in relation the 1st Applicant, this argument must be dismissed out of hand, having regard to the facts of the present case. Absurd results would flow from construing section 27A as operating so as to permit foreign husbands who have remained in Bermuda with the full knowledge that they have lost their original right to remain to be able to unilaterally revive their section 27A rights. Although the statute makes no express provision as to how section 27A rights

once lost can be regained, the section would be completely unworkable if one does not imply a requirement for a section 27A applicant who has lost his section 27A rights to obtain confirmation from the Minister that his original immigration status has been restored. That the latter interpretation is wholly consistent with common sense, not to mention the policy and structure of the Act as a whole, is most powerfully illustrated by the fact that the 1st Applicant himself sought such confirmation in December 2002 having been advised that the Minister had determined that his section 27A status had lapsed.

26. The Applicants' counsel also sought to rely upon an interesting argument based on the terms of section 106(4) of the Act coupled with the fact that the June 8, 2008 "natural justice letter" afforded the 1st Applicant an opportunity to make representations in respect of his proposed deportation within 14 days. Section 106 provides as follows:

> "***Power of Governor to make deportation order***
> *106(1).The Governor may, if he thinks fit, make a deportation order in respect of a person charged—*
>
> *(a) who is a convicted person in respect of whom the court, certifying to the Governor that he has been convicted, recommends that a deportation order should be made in his case, either in addition to or in lieu of dealing with him in any other way in which the court had power to deal with him; or*
> *(b) who is a destitute person; or*
> *(c) who is a person in respect of whom the Governor considers it conducive to the public good to make a deportation order; or*
> *(d) who is a person whose presence in Bermuda is unlawful by reason of a contravention of any provision of this Act.*
>
> *(2)Where any case in which a court of summary jurisdiction has made a recommendation for the making of a deportation order is brought by way of appeal before the Supreme Court, and the Supreme Court certifies to the Governor that it does not concur in the recommendation then such recommendation shall be of no effect, but without prejudice to the power of the Governor to make a deportation order under subsection (1)(b), (c) or (d).*
>
> *(3)A deportation order made under this section may be made subject to any condition which the Governor may think proper.*
>
> ***(4)Before the Minister makes any recommendation to the Governor under subsection (1)(c) in respect of a person charged whose presence in Bermuda is lawful, he shall cause a notification in writing to be served upon the person charged that he proposes to make such a recommendation in his case at the expiration of fourteen days or such longer period as may be specified.***" [emphasis added]

27. The Minister in the present case made a recommendation for deportation under section 106(1)(c) and gave the 1st Applicant a notice which conformed to section 106(4). The Applicants' counsel invites the Court to infer from this, the abundance of direct evidence to the contrary notwithstanding, that the Minister in fact considered in June 2008 that the Applicant's presence in Bermuda at the time of his conviction and/or sentence was lawful and that he continued to enjoy his section 27A rights. Ms. Goodwin submitted that the evidence clearly shows that the June 9, 2008 letter was merely written in order to comply with the rules of natural justice despite the absence of any positive statutory duty to do so. I agree.

28. I find that when the impugned decisions in relation to the Deportation Order were made, the 1st Applicant had lost his section 27A rights. No need to consider the very arguable *ultra vires* argument (that the Governor had no power to deport a person whose section 27A rights were subsisting) arises.

Legal findings: the relevance of the right to family life under article 8 of ECHR and/or the common law and whether the Minister ought to have construed the Applicants' representations against the proposed deportation order as an application for specific permission to remain, the refusal of which would have triggered a right of appeal?

Applicable legal principles

29. The Applicants' alternative grounds for quashing the impugned decisions depended heavily on the proposition that the Minister ought not to have decided to recommend deportation without making a decision to revoke or refuse permission to remain and reside so that his judgment could be reviewed on the merits by means of an appeal to an independent tribunal. This was the only proportional response and/or procedurally fair way to respond to the 1st Applicant's representations against deportation.

30. Ms. Goodwin poured scorn on these submissions, which she characterised as an argument for what Bermuda law ought to be rather than an accurate assessment of what the applicable legal principles presently are. It cannot be denied that the arguments advanced by the Applicants' counsel would have had far greater weight in England & Wales, where the ECHR has been incorporated into domestic law, or before the European Court of Human Rights. Under Bermuda law not only is the right to family life not constitutionally protected. Differential treatment of foreign wives (who belong to Bermuda under section 11 of the Constitution) and foreign husbands is permissible, because gender discrimination is not included in section 12 of the Constitution as a prohibited ground of discrimination either.

31. Despite this, Mr. Sanderson was in my judgment correct in general terms to contend that because ECHR has been extended to Bermuda by the United Kingdom Government and its terms apply to Bermuda at the public international law level, litigants in Bermuda have a legitimate expectation that the rights protected by the Convention will be adhered to by the Executive in Bermuda. He relied on the following powerful *dicta* from the

concurring judgment of Baroness Hale of Richmond in *Naidike & Others-v-Attorney-General of Trinidad and Tobago* [2004] UKPC 49:

> "72.*The Convention itself has not been incorporated into the domestic law of Trinidad and Tobago, although its spirit is reflected in numerous specific laws relating to children. That is also the position in Australia and Nelson JA in the Court of Appeal drew attention to the well-known decision of the High Court of Australia in Minister for Immigration and Ethnic Affairs v Teoh (1994) 128 ALR 353. This concerned the decision to deport a Malaysian citizen who had married an Australian and had three children by her but had also been convicted of some serious drug dealing. The majority held that Australia's accession to the Convention gave rise to a legitimate expectation that administrative decision-makers would act in accordance with the Convention and treat the best interests of the children of a potential deportee as a primary consideration. If the official proposed to act in a way which did not accord with that principle, procedural fairness required him to give the children notice and an adequate opportunity of presenting their case...*
>
> *75.If this is the position reached in Australia, where there is no constitutional guarantee of the right to respect for private and family life, one would expect it also to be the position in Trinidad and Tobago, where there is. 'Respect' brings with it an expectation that these matters will at least be taken into account by the decision-making state. It does not lead to the conclusion that no foreign parent of a citizen child can ever be deported. Lucky JA was understandably concerned that this could be subject to "convenient abuse". But there is a substantial body of case law under the comparable provision in article 8 of the European Convention on Human Rights, where the right of the state to exclude or deport non-citizens conflicts with the right to respect for family life with citizen family members who have the right to remain: see, for example the discussion by Lord Bingham of Cornhill in R (Ullah) v Special Adjudicator; R (Do) v Immigration Appeal Tribunal [2004] UKHL 26, [2004] 3 WLR 23 and by Baroness Hale of Richmond in R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27, [2004] 3 WLR 58. 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.*"

32. The latter observations were made in relation to the rights of children under the United Nations Convention on the Rights of the Child 1989, but the approval (in paragraph 72)

of the Australian approach where the fundamental right in question was not incorporated into domestic law applies with equal force to the impact of article 8 ECHR on Bermuda law. The observations of Baroness Hale in paragraph 75 of the above cited case as to the impact of article 8 at the public international law level or in countries such as Trinidad and Tobago where the right to family life is constitutionally protected have no direct relevance to the Bermudian legal landscape. In short, public law rights such as the doctrine of legitimate expectation only exist to the extent that the public law rights contended for are consistent with the relevant statutory context, and they operate in a flexible manner shaped by the distinctive facts of each case. The Respondents' counsel aptly relied upon the following dictum of Ground CJ in *Simmons-v-Attorney-General* [2005] Bda LR 2 at page 6:

> "*However, I think it important to state that, in interpreting and applying any legislation (including the Constitution), the Bermuda Courts can and should strive to give effect to the ECHR and other internationally established human rights norms, and that includes respect for family life. That does not, however, allow me to strike down, ignore or override the clear terms of the Immigration Act.*"

33. Mr. Sanderson also submitted that the right to family life was recognised by the common law, citing dicta by Lord Bingham and Lord Cooke in *R (Daly)-v- Secretary of State for the Home Department* [2001] 2 AC 532. I do not find very persuasive general pronouncements about the extent to which fundamental rights protected by the ECHR or entrenched in Commonwealth constitutions are analogous to common law rights. The status of rights which are incorporated into domestic law by way of constitutional entrenchment or ordinary legislation is fundamentally different to fundamental rights which are solely protected by international treaty or the common law. In the former case, there is a positive domestic law duty to give effect to the fundamental rights in question; in the latter case, the fundamental rights are presumed not to have been ousted by Parliament and (where the statutory context permits) may give rise to a legitimate expectation that regard will be paid to the rights in the exercise of any statutory discretion.

34. The doctrine of proportionality arises most directly under Bermudian law when considering whether legislation or administrative action is "reasonably required" for the purposes of the permitted public policy grounds for interfering with certain fundamental constitutional rights. The doctrine may also be invoked indirectly when considering whether a decision-maker exercising a statutory discretion which engages fundamental rights protected by an international convention such as the ECHR has met the legitimate expectation of the citizen that the Government would adhere to its international legal obligations when dealing with his case. The doctrine cannot be deployed in circumstances where no constitutional fundamental rights are engaged and Parliament has expressly created a statutory framework which excludes the asserted appeal rights in circumstances said to conflict with rights which exist purely as a matter of public international law.

35. The Applicants' counsel was most ambitious in complaining that the impugned decisions were vitiated by procedural unfairness. On the facts as I have found them to be, the 1st Applicant was unlawfully in Bermuda at the time of his arrest and subsequent incarceration. He had no right to receive 14 days notice of the Deportation Order. Nevertheless he was given three years prior notice of the proposed recommendation and the reasons for it and fourteen days to make representations. When the Minister received his representations (representations from his wife may have gone astray), the Department of Child and Family Services was engaged to investigate the status of the 1st Applicant's relationships with his wife and children.

36. Mr. Sanderson astutely avoided these inconvenient truths and focussed instead on what accordingly was a highly abstract argument that Parliament must have intended the Act to operate in such a manner that appeal rights would be triggered whenever a deportation order was made in respect of a person who had previously enjoyed section 27A rights. This assumes that the Act is in some way ambiguous as to whether appeal rights arise in respect of a loss of section 27A rights and/or deportation under section 106, which it is not.

37. I accept Ms. Goodwin's submission that as far as article 8 of ECHR is concerned, the rights of an alien facing deportation do not constitute civil rights and obligations so as to engage article 6 of ECHR: *RB Algeria-v- Secretary of State* [2009] UKHL 10 (per Lord Hoffman at 171 to 175). However, in a passage upon which the Applicants' counsel relied, Lord Hoffman made it clear (at paragraphs 177-178) that some "*independent scrutiny*" of the decision of the Executive might be required, albeit not necessarily a judicial tribunal[2]. The requirements of "*independent scrutiny*" are now surely adequately met by the establishment in 2011 via section 13A of the Act of an Immigration Appeal Tribunal whose members are appointed by the Minister. However, it is impossible to see how the Parliamentary decision to exclude access to such a Tribunal in relation to matters arising under section 27A and/or 106 can be amenable to judicial review unless constitutionally protected fundamental rights are engaged.

38. If fundamental fair hearing rights under the ECHR are not engaged by challenges made to state conduct alleged to constitute a violation of other articles of the ECHR where those rights are directly enforceable, the standards of fairness which must be adhered to in the context of decision-making which does not engage fundamental rights protected by local statutory law can hardly be higher. Moreover, while section 11(1) of the Constitution protects freedom of movement, section 11(2) provides without qualification:

> "*(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—*

[2] These subtleties were not considered by me in Re Haynes [2008] Bda LR 75 when I queried whether the Cabinet Appeal Tribunal complied with section 6(8) of the Constitution in "independence" terms.

> … (d) *for the imposition of restrictions on the movement or residence within Bermuda of any person who does not belong to Bermuda or the exclusion or expulsion therefrom of any such person…"*

39. This constitutional provision confirms that the proportionality doctrine has no application in the deportation context and that a person in the position of the 1st Applicant who does not "*belong to Bermuda*" for section 11 purposes (and is not entitled to be treated as if he did by virtue of section 27A of the 1956 Act) has no enhanced constitutional protection which impacts on the management by the Executive of the deportation process.

Findings: proportionality doctrine does not apply

40. Thus the doctrine of proportionality applies when considering the extent to which legislatures may impose permitted limitations on fundamental rights, be they constitutionally protected (e.g. *De Freitas-v- Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing* (1998) 53 WIR 131) or protected by the ECHR as incorporated into United Kingdom law (e.g. *Huang-v-Secretary of State for the Home Department* [2007] AC 167 at 187) or operating at the public international law level (e.g. *Beldjoudi-v-France*, A 234 A, European Court of Human Rights Judgment dated March 26, 1992). None of the cases relied upon by the Applicants' counsel appeared to me to support the application of the proportionality doctrine beyond the parameters of the aforesaid legal contexts.

41. Nevertheless, I do find in the alternative that, to the extent the Minister was exercising a statutory discretion in deciding to recommend the Deportation Order which the Governor duly made, the Applicants (and their children) may fairly be said to have had a legitimate expectation that their family law rights under article 8 of ECHR and/or the common law (as reinforced by local family law legislation) would be taken into account. Unsurprisingly, no complaint was expressly made that the Respondents had failed to take such rights into account; and the pleaded irrationality complaint was sensibly not pursued in the end.

42. While the Applicants quibbled with the conclusions reached by the Minister, the incontrovertible evidence shows that the Minister took considerable care to assess the quality of the relationship between the 1st Applicant, his wife and their children before making the impugned deportation recommendation. It is not open to this Court to review the merits of that assessment.

Findings: procedural unfairness

43. Did the Applicants have a legitimate expectation that the Minister would afford the 1st Applicant appeal rights which did not arise under either section 27A or section 106 of the Act by characterising representations made in response to the deportation 'natural justice letter as an application actually made by the 1st Applicant in order to afford him appeal rights? The answer to this question is so obviously negative that. Again, it is unsurprising

that the Applicants' counsel did not seek to invoke the legitimate expectation doctrine in support of this head of complaint.

44. Did the public law requirements of procedural fairness require the Minister to handle the deportation in such a way as to confer on the 1st Applicant appeal rights which the statutory regime neither expressly nor impliedly contemplated? This question must also be answered in the negative. Neither section 27A nor section 106 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. As Lord Bridge opined in *Lloyd-v-McMahon* [1987] AC 625 at 702H:

> "*…what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework within which it operates.*"

45. These findings ought not to be taken to suggest that, in other factual contexts, a person claiming section 27A rights would not be able to successfully challenge the deportation process on the grounds of procedural unfairness. It must be remembered that the facts of the present case are as favourable to the Minister as can be imagined.

The merits of the Applicants' case under article 8 of the European Convention on Human Rights

46. Although the Applicants' case has failed under Bermuda domestic law, it is entirely possible that their complaints might gain greater traction at the international human rights level. In this regard it is a credit to Bermuda that the Applicants (or the 1st Applicant) was able to obtain legal aid in order to mount such a vigorous challenge to his deportation through the present proceedings.

47. Because the Respondents quite rightly did not address the merits of the impugned decisions which it is not open to this Court to review under Order 53 of the Court's Rules, no realistic assessment can be made of the viability of the Applicants' complaints that their article 8 rights have been infringed. What is important to note, to explain why the present proceedings were permitted by me to proceed beyond the leave stage, is that it is not blindingly obvious <u>from an ECHR perspective</u> that the Applicants' dissatisfaction with the merits of the deportation decision is frivolous. Such a view from the domestic law perspective is somewhat surprising.

48. But Mr. Sanderson cited European Court of Human Rights case law which demonstrated that it may be a breach of the right to family life to deport a foreign husband who has been convicted of serious criminality and whose marital relationship has at one time fallen apart. For instance in *Sezen-v- The Netherlands*, Application 50252/99, Judgment dated January 31, 2006, a deportation order was quashed in circumstances where the European Court found the applicant and his wife were (contrary to the national authorities' findings) no longer estranged and despite the fact that he had been convicted of organised criminal activities and possessing 52kg of heroin.

49. Until the European Court of Human Rights has considered a case relating to Bermuda, it is impossible to more than guess whether or not a greater margin or appreciation might be afforded to Bermuda's immigration authorities operating within Bermuda's distinctive geographical and demographic environment than has been afforded to European metropolitan territories in this area of the law[3]. And in any conflict between international human rights obligations (which are not incorporated into domestic law) and unambiguous provisions of domestic statutory law, domestic statutory law trumps all in the domestic court domain.

Conclusion

50. Section 27A of the Bermuda Immigration and Protection Act 1956 confers rights on the foreign husbands of Bermudian wives which vest and lapse by operation of law. This interpretation of the statute, while inevitable, is not without its complications as the Applicants' counsel's submissions elucidated and the Respondents' counsel conceded. As a practical matter it will invariably be necessary, as occurred in the present case, for the Minister to both (a) signify his agreement that a husband's section 27A status has vested and (b) notify a husband that he takes the view that such status has been lost.

51. While the scope for judicial review may exist where the loss of section 27A rights is contested, in the present case the 1st Applicant acknowledged that his section 27A status had lapsed as far back as December 2002. Having regard to what happened after that (his working without permission and his commission of a serious criminal offence), it was not fairly open to this Court to find that his section 27A status had been revived without the Minister's assent. This would be an absurd result and while there may be room for much argument as to precisely how spousal paradise lost can validly be regained under section 27A, it is impossible to construe the section as operating in such a way as to allow immigration law breakers to confer on themselves the right to remain in Bermuda.

52. The central complaints made by the Applicants were that the Minister acted disproportionately and in a procedurally unfair manner in making the recommendation upon which the Deportation Order was based without affording them an opportunity to appeal, in order to give full effect to their article 8 of the ECHR rights. These complaints

[3] As article 14 of the ECHR prohibits discrimination on the grounds of sex, the 2nd Applicant could conceivably complain that section 11(5)(c) of the Bermuda Constitution as read with section 27A of the 1956 Act discriminates against her as a woman in that wives of Bermudians are protected from deportation in a far more generous way than foreign husbands.

founder on the reefs which demarcate the boundaries between international treaty obligations and Bermuda's domestic law regime. As the right to family life is not protected by the Bermuda Constitution, Parliament is competent to override international treaty obligations provided that it plainly expresses the intention of doing so.

53. The 1956 Act clearly and explicitly excludes appeals in respect of decisions made pursuant to sections 27A (spousal rights) and 106 (deportation). Accordingly, an entitlement to an appeal in respect of administrative action taken pursuant to these sections of the Act cannot arise by implication. The Minister, upon learning that the 1st Applicant opposed deportation on the grounds of his family connections conducted an investigation into these connections; accordingly it could not be suggested that the authorities failed to take into account relevant considerations and ignored article 8 altogether.

54. Although the merits of the Respondents' decisions might be subject to review under the European Convention of Human Rights, the decisions are unassailable under existing Bermuda domestic law.

55. For the above reasons the Applicants' application for judicial review of the Minister's recommendation that the 1st Applicant be deported and the Governor's Deportation Order is dismissed. I will hear counsel as to costs if necessary, but the appropriate order appears to be in view of the fact that the Applicants are legally aided to make no order as to costs.

Dated this 30th day of March, 2012, _____
KAWALEY J