



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2026 No: 41

BETWEEN:

ERNEST MCQUEEN

Applicant

And

THE ATTORNEY GENERAL OF BERMUDA

Respondent

JUDGMENT (REASONS)

Application for Stay of Deportation Order made against a Non-Bermudian pursuant to sections 106(1)(c) and 117 under Part VII of the Bermuda Immigration and Protection Act 1956- Procedural Guidance – Legal Principles on the grant of Interim Injunctive Relief – Principles relevant to a Stay Pending Appeal – The Law on Admitting Fresh Evidence in Criminal Proceedings – Inadmissible Hearsay Evidence in Criminal Proceedings

Dates of Hearing: Friday 13 February 2026

Date of Decision: Friday 13 February 2026

Date of Judgment: Monday 23 February 2026

For the Applicant: Mr. Ernest McQueen (Litigant in Person)

For the Respondent: Ms. Lauren Sadler-Best (Deputy Solicitor General)

Introduction:

1. This Court is concerned with an application by Mr. Ernest McQueen (the “Applicant” / Mr. McQueen”) for an interim stay of a deportation order (the “Deportation Order”) made by His Excellency the Governor, Mr. Andrew Murdoch, on 13 February 2026. The Deportation Order was expressly made pursuant to section 106(1)(c) of the Bermuda Immigration and Protection Act 1956 (the “Immigration Act”) on the grounds that the Governor considers it conducive to the public good to do so. The Deportation Order was also made on the advice of the Hon. Minister, Mr. Diallo Rabain, JP MP, acting under the general authority of the Cabinet of Ministers.
2. The application before this Court was for an interim order of stay pending the outcome of Mr. McQueen’s efforts to appeal against his criminal convictions of 10 November 2015 on two counts of sexual exploitation of a young person by a person in a position of trust contrary to section 182B(1)(a) of the Criminal Code. According to a Warrant of Commitment (the “Prison Warrant”) dated 27 January 2016, signed by the then Assistant Registrar, Mr. Peter Miller, the Applicant was sentenced to concurrent sentences of 15 years imprisonment for these two convictions. The Prison Warrant also specifies that an Order was made under section 70P of the Criminal Code for Mr. McQueen to serve at least half of his prison sentence prior to any entitlement to submit an application for release on license.
3. At the hearing before me, I heard the oral submissions of Mr. McQueen and the objections argued by the Deputy Solicitor General, Ms. Lauren Sadler-Best. At the close of the hearing, I refused Mr. McQueen’s application and informed the parties that I would provide these written reasons.

Deportation: The Legal Framework

4. The Governor of Bermuda is statutorily entitled to make a discretionary order for the deportation of a “a person charged” pursuant to sections 106 of the Immigration Act. The term “a person charged” is defined under section 103 which provides:

““person charged” means a person in respect of whom it is alleged that there are grounds for making a deportation order, and includes a person in respect of whom a deportation order has been made.”

5. For the purpose of section 106 “a person charged” is a person who is alleged to warrant deportation on grounds justifying the deportation order. Added to the definition given by section 103 is the wording “*includes a person in respect of whom a deportation order has*

been made.” The additional part of section 103 cannot sensibly be read into section 106. Otherwise, it would give way to a circular statement that the “*Governor may, if he thinks fit, make a deportation order in respect of*”... a “*person in respect of whom a deportation order has been made.*” It is apparent that those additional words are intended to apply to other sections under Part VII which arise under circumstances where a deportation order was made or is in force. That is clear from the statutory definition assigned to the term “deportation order” in the Interpretation section of the Immigration Act which provides:

“deportation order” means an order made or in force under Part VII requiring the person in respect of whom it is made to leave and remain out of Bermuda”

6. Section 106 provides:

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;*

(d) *or 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.”

7. Section 106(1)(a) and section 106(2) recognises the Court’s power to recommend the making of a deportation order. Section 107 empowers the Court to remand any such person who it recommends for deportation, pending the decision of the Governor. That being so, the remand period may not exceed a period of 28 days. It follows that a challenge or review of the decision to remand and or the terms of remand would take the form of a writ of habeas corpus. However, these particular provisions are not relevant to the present case.
8. In this case, the Governor exercised his discretionary power under section 106(1)(c), having considered it conducive to the public good to make a deportation order. Clearly, the Governor is possessed of a broad and unfettered discretionary power under section 106 alone. Notwithstanding, section 117 expressly confers a discretionary power on the Governor in respect of the Governor’s exercise of power or discharge of duty under Part VII of the Immigration Act where such powers or responsibilities under Part VII relate to the Governor’s remit under section 62 of the Bermuda Constitution. Section 117 provides:

Governor to act in his discretion in certain circumstances

Notwithstanding any provision of law to the contrary, where the Governor is of the opinion that the exercise of any power or the discharge of any duty conferred or imposed by or under this Part relates to matters for which he is responsible under section 62 of the Constitution (which includes, amongst others, matters of external affairs and internal security) the Governor may exercise such power or discharge such duty acting in his discretion.

9. So, section 117 allows the Governor to exercise his discretion where his Part VII responsibilities relate to his special responsibilities under section 62 of the Constitution. Such special responsibilities under section 62 of the Constitution involve external affairs; defence, including armed forces; internal security and the police.
10. Under section 115 the Minister responsible for immigration (or such other Minister assigned with responsibilities under the Immigration Act) is dutybound to make known to the Governor the identity of all persons who, in the Minister’s opinion, ought to be deported. Section 115 provides:
11. Pursuant to section 10, where the Governor acts in accordance with the advice of the Cabinet, the Governor’s decision shall be final and conclusive and need not be accompanied with stated reasons.

Finality of decisions by Governor and Cabinet

10 (1) *Save where otherwise expressly provided and without prejudice to any Parliamentary procedure under the Statutory Instruments Act 1977 applicable to the making of any statutory instrument under this Act, any determination, decision, direction or order come to, given or made in the exercise of any power conferred or the discharge of any duty imposed by or under this Act upon—*

(a) the Cabinet;

(b) the Governor, acting in accordance with the advice of the Cabinet; or

(c) the Governor, acting in his discretion in the discharge of his special responsibilities under the Constitution,

shall be final and conclusive and not subject to question or review by any court or tribunal whatsoever.

(2) It shall not be incumbent upon the Governor nor, upon any member of the Cabinet nor upon any public officer to give reasons to any person or authority whatsoever for any such determination, decision, direction or order as is mentioned in subsection (1).

12. Notwithstanding the strong statutory wording employed under section 10 to elevate the Governor’s decision-making to “*final and conclusive and not subject to question or review by any court or tribunal whatsoever*”, it has been long established that any such decision is still challengeable by way of judicial review.

13. The Bermuda Court of Appeal in *Davis & Davis v Governor and Minister for National Security* [2012] Bda LR 40 recognised the Court’s jurisdiction to review a deportation order. At para [8], Auld JA said:

“...Although the Act, in section 10, provides that the Governor's decision is final, it is still challengeable by way of judicial review...”.

14. At para [19], the Court’s jurisdictional powers were reinforced by Auld JA as follows:

“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.”

15. Under section 109(1) the intended deportee is entitled to be served with a copy of the deportation order made by the Governor and under section 109(2) a statutory duty is imposed on the immigration officer or police officer charged with serving the deportation

order to provide written notice to the intended deportee of his or her rights to sue out of a writ of habeas corpus. Section 109 provides:

“Service of deportation order, etc

109 (1) A deportation order shall be served upon the person to whom it is directed by any immigration officer or police officer.

(2) In every case where a deportation order is served in accordance with subsection (1), it shall be the duty of the immigration officer or police officer serving the order to inform in writing the person upon whom the order is served of his right to sue out a writ of habeas corpus.”

16. Criminal liability arises under sections 110 and 112 of the Immigration Act against any person who does not comply with a deportation order.

The Procedural Issues:

17. The application before this Court was not brought by way of judicial review proceedings. In fact, in bringing the application before this Court, Mr. McQueen failed to file an originating document of any kind. Instead, he filed the following documents:

- (i) An affidavit sworn on 10 February 2026 in his own name entitled "*AFFIDAVIT OF ERNEST MCQUEEN IN SUPPORT OF URGENT APPLICATION FOR INTERIM STAY OF DEPORTATION EX PARTE*" together with an exhibit headed "IN THE COURT OF APPEAL FOR BERMUDA Criminal Jurisdiction No Of 2015..." and entitled "*NOTICE OF MOTION FOR LEAVE TO APPEAL AND TO ADMIT FRESH EVIDENCE*" dated 3 February 2026;
- (ii) An affidavit sworn by Mr. Carlton Peart under the heading "*IN THE COURT OF APPEAL FOR BERMUDA Criminal Appeal No. 18 of 2015*" sworn on 26 January 2026;
- (iii) An affidavit sworn by Mr. Craig Abraham under the heading "*IN THE COURT OF APPEAL FOR BERMUDA Criminal Appeal No. 18 of 2015*" sworn on 26 January 2026;
- (iv) A letter dated 3 February 2026 from Mr. McQueen addressed to the Minister for Immigration, the Hon. Jason Hayward, JP MP.;
- (v) A print-out headed "BERMUDA DEPT OF CORRECTIONS Release Dates"; and

- (vi) A letter dated 13 February 2019 from Compliance Manager, Mr. Ron-Michael E. Davis, of the Department of Immigration addressed to Mr. McQueen.
18. It is unclear whether the above items listed at (iv)-(vi) were intended to be included as exhibits to Mr. McQueen's affidavit or whether they were filed as independent documents. Whichever the case, no concerns as to the authenticity of the documents were raised by the Deputy Solicitor General.
19. At the request of this Court, the Deputy Solicitor General promptly filed the following documents following the hearing of the application:
- (i) The Deportation Order;
 - (ii) A letter dated 15 November 2018 from Compliance Manager, Mr. Ron-Michael E. Davis, of the Department of Immigration addressed to Mr. McQueen and
 - (iii) The Prison Warrant.
20. Ms. Sadler-Best correctly submitted that Mr. McQueen ought to have commenced these proceedings by way of an application for leave to file for judicial review. In these proceedings, Mr. McQueen ought to have filed a leave application in the standard format, i.e. Form 86A pursuant to Order 53 of the Rules of the Supreme Court ("RSC"). Had he done so, it would have been open to him to seek injunctive relief by way of an order of certiorari or prohibition quashing the Governor's decision to make the Deportation Order. It would have also been incumbent on Mr. McQueen to plead the grounds on which such relief was sought and provide a statement of the relevant facts. Additionally, Mr. McQueen, had he proceeded by way of an application for leave to commence judicial review proceedings, would have been required under RSC O. 53/3(2)(b) to file a verifying affidavit in support of his Form 86A.
21. Notwithstanding these procedural delinquencies, I permitted Mr. McQueen to proceed and to present his application informally. Mr. McQueen was unrepresented by Counsel and was facing the imminent execution of the Deportation Order set to take effect on Wednesday 18 February 2026, i.e. allowing for only two working days following the hearing. Further, the basis for his application was not unclear to this Court.

The Substance of the Application

22. Mr McQueen did not assert grounds relating to procedural unfairness, irrationality or inherent unreasonableness (*Wednesbury* principle) as the premise for his pursuit of relief. Instead, the underpinnings of his application were relatively straight forward. Mr. McQueen's position is that he was wrongly convicted in 2015 and that he is now armed

with fresh evidence to prove that he was wrongly convicted. At paragraphs [3]-[12] of Mr. McQueen's evidence he stated:

“... ”

1. ...
2. ...
3. *On 24 January 2026, I filed a criminal appeal in the Court of Appeal for Bermuda challenging my conviction on the basis of fresh evidence. That appeal is live and pending.*
4. *The appeal is based on fresh evidence that was not available at the time of my trial. In particular three separate individuals have independently come forward to state that one of the principal prosecution witnesses in my trial has confessed to them that he lied under oath and fabricated the allegations made against me.*
5. *The individuals above are willing to provide statements and affidavits, and their evidence has been relied upon in support of my appeal. I am advised that this evidence goes directly to the integrity and safety of the conviction.*
6. *I am advised, and I understand, that appeals based on fresh evidence may require further procedural steps, including directions from the Court of Appeal, the filing of affidavits, and possibly the attendance of witnesses.*
7. *If I am deported while my criminal appeal remains pending, my ability to participate effectively in the appellate process will be materially impaired. In particular:*
 - A. *my ability to communicate with the Court and give timely instructions will be significantly hindered;*
 - B. *my ability to attend hearings in person, if required, will be compromised;*
 - C. *my ability to assist in the proper presentation of the fresh evidence will be reduced.*
8. *Deportation at this stage would therefore cause serious and potentially irreversible prejudice, especially if my appeal is ultimately successful.*
9. *I do not seek, by this ex parte application, a determination of the merits of the Minister's immigration decision. I seek only temporary, interim relief to preserve the status quo so that my criminal appeal can be determined fairly and effectively by the Court of Appeal.*

10. I make this application urgently and in good faith because the scheduled date of deportation is imminent. If removal occurs before the Court can consider this matter, the prejudice to me cannot adequately be remedied.

11. I can confirm that I am willing to return to Court on notice at the earliest opportunity if the Court so directs, and I undertake to comply with any directions the Court may give.

12. For these reasons, I respectfully ask this Honourable Court to grant an interim stay of deportation pending the determination of my criminal appeal.”

23. On the evidence sworn by Mr. Carlton Peart, it was said that the victim of the sexual exploitation confessed to having lied about Mr. McQueen having committed the criminal acts. Mr. Peart stated that he was in company with the victim when visiting Mr. McQueen at Westgate Correctional Facility. According to Mr. Peart’s 26 January 2026 affidavit, the victim, while seated in the visiting room with Mr. McQueen, Mr. Peart and another person, said that he had been coerced by another person to fabricate the allegations which founded Mr. McQueen’s criminal convictions.

24. In Mr. Craig Abraham’s evidence, a similar narrative of the victim’s confession of coercion is told. However, this is said to have occurred on a different occasion in conversation between Mr. Abraham and the victim alone.

Correspondence with the Minister and Department of Immigration

25. In a 15 November 2018 letter (the “November 2018 letter”) to Mr. McQueen, the Department of Immigration’s Compliance Manager, Mr. Ron-Michael E. Davis, referred to previous letters of 7 June and 5 July 2018. Those letters served as notice to Mr. McQueen of the Minister’s intention to exercise his rights under section 6.1 of the Work Permit Policy to revoke Mr. McQueen’s Extension of Spousal Employment Rights and to recommend deportation to the Governor by reason of the sexual exploitation convictions and the 15-year sentences imposed for those convictions.

26. In the November 2018 letter Mr. Davis also referred to Mr. McQueen’s earlier letter of 13 June 2018 which was sent in reply to the initial 7 June letter. Mr. McQueen’s 13 June letter was sent in protest of the prospect of his deportation. The 5 July letter from Mr. Davis was sent in the form of confirmation that the Minister considered the points argued in Mr. McQueen’s 13 June letter but nevertheless intended to proceed with the recommendation for deportation. The letter concluded as follows:

“The Minister has balanced the competing interests, and has, after careful consideration, decided to revoke your Extension of Spousal Employment Rights (ESER) pursuant to

Section 6.1 of the Work Permit policy and section 34(1) of the Act in the interest of public safety and the safety of the children in question.

To the above end, please be advised that it is the intention of the Minister of National Security to make a recommendation to the Governor to have you deported from Bermuda at the expiration of your term of incarceration. At that time, the Minister may take the opportunity to review this matter further should there be any new developments.”

27. Mr. McQueen subsequently repleaded his case to the Minister/Department of Immigration by letter dated 4 January 2019, as is evident from Mr. Davis’ reply letter dated 13 February 2019. In that February 2019 reply, Mr. Davis stated that the Minister’s decision had not changed.
28. On 3 February 2026, Mr. McQueen wrote to the current Minister for Immigration, the Hon. Minister Mr. Jason Hayward, JP MP. In that letter, Mr. McQueen pleaded his case in precisely the same terms outlined in his affidavit before this Court seeking a stay of the Deportation Order pending appeal.

Legal Analysis and Application of Facts

Stay of Execution of a Court Order or Court Proceedings

29. As I see it, an Order of stay is appropriate where the Court seeks to stay execution of its own Orders or proceedings. In this case, the Deportation Order is a decision of the Governor’s making, not that of the Court. Thus, the only appropriate relief available to Mr. McQueen to pursue in these circumstances was interim injunctive relief on an application for leave to file a Notice of Motion to commence proceedings by way of judicial review.
30. Notwithstanding, I considered (rather than approached) the merits of Mr. McQueen’s application on the basis of an application for a stay pending appeal. Through those lenses, Ms. Sadler-Best invited me refer to Eder J’s quote of the claimants’ summary of the applicable principles in the English High Court decision in *Otkritie International Investment Management Limited & Ors v Urumov (asak George Urumov) & Ors* [204] EWHC 755 (Comm) at paragraph 22. Those principles were quoted by Snowden J (now Snowden LJ) in *Aabar Block SARL v Maud* [2016] EWHC 1319 (Ch) which was later quoted by the Bermuda Court of Appeal in *HSBC v New Ocean Energy Holdings Limited* [2021] CA (Bda) 21 Civ at paragraph [26]:

“1. First, unless the appeal court or the lower court orders otherwise, an appeal shall not operate as a stay of any order or decision of the lower court: CPR 52.7.

2. Second, the correct starting point is that a successful claimant is not to be prevented from enforcing his judgment even though an appeal is pending: *Winchester Cigarette Machinery Ltd v Payne And Another* unreported 10 December 1993 per Ralph Gibson LJ.

3. Third, as stated in *DEFRA v Georgina Downs* [2009] EWCA Civ 257 at paragraphs 8 to 9, per Sullivan LJ (emphasis supplied):

‘A stay is the exception rather than the rule, solid grounds have to be put forward by the party seeking a stay and, if such grounds are established, then the court will undertake a balancing exercise, weighing the risks of injustice to each side if a stay is or is not granted.

It is fair to say that those reasons are normally of some form of irremediable harm if no stay is granted because, for example, the appellant will be deported to a country where he alleges he will suffer persecution or torture or because a threatened strike will occur or because some other form of damage which will be done which is irremediable ...’

4. Fourth, the sorts of questions to be asked when undertaking the “balancing exercise” are set out in *Hammond Suddard Solicitors v Agrichem International Holdings Ltd.* [2001] EWCA Civ 2065 at paragraph 22 per Clarke LJ (emphasis supplied):

‘By CPR rule 52.7, unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused, what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks the respondent will be unable to enforce the judgment? On the other hand if a stay is refused and the appeal succeeds and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?’

5. Finally, the normal rule is for no stay to be granted, but where the justice of that approach is in doubt, the answer may depend on the perceived strength of the appeal: *Leicester Circuits Ltd v Coates Brothers* [2002] EWCA Civ 474 at paragraph 13, per Potter LJ.”

Legal Principles on Interim Injunctive Relief

31. The Court’s statutory authority for the granting of injunctive relief is rooted in section 18 and section 19(c) of the Supreme Court Act 1905. Under those provisions the Court is assigned broad discretionary powers to grant interim injunctive relief on any terms it considers just or convenient. Section 19(c) states as follows:

“an injunction may be granted ... by an interlocutory order of the court in all cases in which it appears to the Court to be just and convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the court thinks just...”

The American Cyanamid Test

32. The House of Lords decision in *American Cyanamid v. Ethicon* [1975] 1 All ER 505 is regularly cited as the leading authority for the test on interim injunctive relief. It has long been established on those principles that an applicant must show that:

- (i) the evidence before the Court discloses that there is a serious issue to be tried in the substantive action;
- (ii) damages would be an inadequate remedy for the respondent’s breach of the applicant’s legal rights (meaning irreparable harm would be suffered without the grant of injunctive relief);
- (iii) the balance of convenience lays in favour of the injunction being granted; and
- (iv) it is just and convenient in all circumstances to grant the injunctive relief sought.

33. The *American Cyanamid* test is not exhaustive. However, it is a helpful guide applicable to interim injunctive relief of both a prohibitory and mandatory nature, notwithstanding the history of judicial division as to the extent of its applicability to the latter. There is also a history of real controversy arising out of the House of Lords’ unanimous endorsement of Lord Diplock’s statements of the law as to the meaning of the ‘serious issue to be tried’ test. While the constraints of time did not afford the Deputy Solicitor-General any realistic opportunity to consider many of the authorities outlined further below, I deemed it necessary to further examine the “serious issue to be tried” test as Mr. McQueen was unrepresented by Counsel and the law on this point had a pivotal effect on Mr. McQueen’s application.

Historical Controversy between the two concepts: ‘Serious Issue to be Tried’ and ‘Prima Facie’ Assessment of the Merits of the Case

34. In a very broad manner of speaking, the *American Cyanamid* case displaced the “*prima facie*” test previously applied by the Courts. In the following passages of the House of Lords’ judgment, Lord Diplock spoke strongly against the practice of judges assessing the merits of untested evidence as a means of deciding whether it was open to them to grant interim injunctive relief. Condemning the 50% test of success, Lord Diplock promoted the ‘serious question to be tried’ test which only requires the Court to be satisfied that the question for trial in the substantive action is not one which is frivolous or vexatious.

35. Lord Diplock said at [406]-[407]:

“In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination. The purpose sought to be achieved by giving to the court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical rule forbidding its exercise if upon that incomplete untested evidence the court evaluated the chances of the plaintiff’s ultimate success in the action at 50 per cent or less, but permitting its exercise if the court evaluated his chances at more than 50 per cent.

...

Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as “a probability,” “a prima facie case,” or “a strong prima facie case” in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious: in other words, that there is a serious question to be tried.

It is no part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial.”

36. Lord Diplock’s above statement of the law against the “prima facie test” was said to have encountered real criticism and confusion. Later that same year, in 1975, Lord Denning, the Master of the Rolls of the English Court of Appeal, in *Fellowes & Son v Fisher* [1975] 2 ALL ER 829 said:

“The American Cyanamid case was only reported a little while ago, but we have already had two cases in which its effect has been canvassed in this Court. It has perplexed the profession. It has been criticised in the Law Journal. So much that Counsel have appealed to us for guidance....

...

The difficulty has arisen because some of the statements made in the House appear to undermine all we had previously understood. I will first state our previous understanding and then make the contrast.

4 THE MAKING OF A PRIMA FACIE CASE

Previously the understanding of the profession was that, in order to get an interlocutory injunction, the plaintiff had to make out a prima facie case. This was regarded as a simple matter of justice. After all the plaintiff was seeking to stop the defendant doing something – and to stop him before the matter had ever been tried. The plaintiff was asserting that the defendant was about to break a contract with him or to do some injury

to his property or to commit some other wrong towards him. in order to invoke the aid of the Court, it was thought that the plaintiff ought at least to show a prima facie case, that is, a case which he had good chance of winning at the trial. If he succeeded in doing this, the Court would go on to consider whether, on the balance of convenience; it was better to grant an injunction or not."

37. Lord Denning then provided an outline of numerous cases and quotes from both the Court of Appeal and the House of Lords spanning the preceding century in which the *prima facie* / strong *prima facie* / probability test was applied as the merit threshold for granting interim injunctive relief prior to the *American Cyanamid* case. Pointing directly to the previous position taken by the House of Lords, Lord Denning said:

"... The dearest and fullest statement of the principle was made in 1965 in the House of Lords Itself in Stratford v. Lindley (1965) A.C. 269, when the House, after considering many conflicting affidavits and hearing five days of argument, reversed this Court on the very point that a prima facie case had been established: and they granted an interlocutory Injunction. Lord Upjohn said (at page 338):-

"The principles which ought to guide your Lordships seem to me clear. An appellant seeking an interlocutory injunction must establish a prima facie case of some breach of duty by the respondent towards him. He may even obtain a quia timet injunction in case of a threatened injury, but I need not consider that further because a prima facie case of an actual breach has been established. He must further establish that the respondents are threatening and intending to repeat that breach of duty, but in a case such as this it may readily be inferred and I do so in this case. This being so, an injunction may be granted If it is just and convenient to do so, the remedy being purely discretionary. The balance of convenience in these cases is always of great Importance."

Lord Reid and Lord Radcliffe agreed with the principles stated by Lord Upjohn (see page 325), and Lord Pearson and Lord Donovan applied the same test. "The question is whether the plaintiffs have made out a prima facie case": see page 331, 342. In 1970 in the case of Cavendish House (Cheltenham) Ltd. v. Cavendish-Woodhouse Ltd. (1970) R.P.C. 234, Lord Justice Harman at page 235 said: "Therefore you start off with a prima facie case. That, of course, is the essential prelude to the granting of interlocutory relief."

38. If it is at all unclear from the above passages whether Lord Denning was critical of Lord Diplock's disposal of the *prima facie* test in the *American Cyanamid* case, by which the English Court of Appeal was bound, reference need only be made to Lord Denning's continuing passages, having first quoted Lord Diplock's statement:

"By way of contrast, I now refer to what the House of Lords said in the American Cyanamid case. They refer at page 322 to the "supposed rule" that the plaintiff must establish a prima facie case and then went on to say that the House "should take this opportunity of declaring that there is no such rule. The use of such expressions

as "a probability", "a prima facie case", or "a strong prima facie case" (in the context of a discretionary power to grant an interlocutory injunction) leads to confusion as to the object sought to be achieved by this form of temporary relief. The Court no doubt must be satisfied that the claim is not frivolous or vexatious: in other words, that there is a serious question to be tried. It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claim of either party may ultimately depend, nor to decide difficult questions of law which call for detailed argument and mature consideration. These are matters to be dealt with at the trial."

I find it impossible to reconcile this statement with the statements in the House ten years ago in Stratford v. Lindley. Yet the house did not even mention Stratford v. Lindley. I do not like to suggest that this was per incuriam. When I last made so bold as to make such a suggestion in Broome v. Cassells it was regarded as a piece of lese majesty. The House of Lords never does anything per incuriam. So what are we to do with two statements of principle by the House which are not reconcilable the one with the other?"

39. Notwithstanding, in *Fellowes & Son v Fisher* Lord Denning, perhaps propitiating the mounting critical analysis of Lord Diplock's reconstruction, identified a reconciliatory approach to the conflicting tests. He said:

"Where then is the reconciliation to be found? Only in this: the House did say at page 324 that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases". That sentence points the way. These individual cases are numerous and important. They are all cases where it is urgent and imperative to come to a decision. The affidavits may be conflicting. The questions of law may be difficult and call for detailed consideration. Nevertheless, the need for immediate decision is such that the Court has to make an estimate of the relative strength of each party's case. If the plaintiff makes out a prima facie case, the Court may grant an injunction. If it is a weak case, or is met by strong defence, the Court may refuse an Injunction. Sometimes it means that the Court virtually decides the case at that stage. At other times it gives the parties such good guidance that the case is settled. At any rate, in ninety-nine cases out of one hundred, the matter goes no further.

....

There is yet another way out. The House did say (at page 326) that "If the extent of the uncompensatable disadvantages to each party would not differ widely, it may not be improper to take into account, in tipping the balance, the relative strength of each party's case." There are many cases in which either party could suffer great disadvantages which could not be adequately compensated in damages. In all these it is permissible to consider the relative strength of each party's case.

In my opinion this is one of those "individual cases in which the Courts should go by the principles stated by the House of Lords" [in] Stratford v. Lindley rather than those stated by them in American Cyanamid Co. ..."

40. Following the 1975 decision in *Fellowes & Son v Fisher*, the English Court of Appeal was again, in 1975, tasked with another appeal in respect of an application for interim injunctive relief and was thereby called upon to apply the principles laid down by Lord Diplock in the *American Cyanamid* case. In *Hubbard v Pitt* [1975] 3 ALL ER Lord Denning again saw fit to assess the strength of the competing evidence, expressly exempting the application of the case from the *American Cyanamid* ruling on the basis of the presence of special factors unique to the case. Lord Denning explained this as follows:

“The plaintiffs placed much reliance on the recent decision of the House of Lords in the American Cyanamid Case (1975) 2 W.L.R. 316. It was suggested that it had revolutionised our approach to interlocutory injunctions: and that henceforward we were not to consider the strength of each party's case, but only the balance of convenience. And that in general the balance of convenience was to maintain the status quo. That would mean, in this case, and most cases, granting an interlocutory injunction.

There has since been another case in this Court differently constituted in which again the same point was made. It is Fellowes & Son v. Fisher about a covenant in restraint of trade. I have tried there to reconcile the authorities. I will not repeat it again here. All [I] in [sic] would say is that I think this case does not come within the ruling in the American Cyanamid case. In the first place this is one of the "individual" cases in which there are special factors to be taken into consideration. So much so that the Court should assess the relative strength of each party's case before deciding whether to grant an injunction. The plaintiffs should not be granted an interlocutory injunction unless they can make out a prim[a] facie case. In the second place there are "uncompensatable disadvantages" which are so evenly balanced that it is appropriate to have regard to the strength of each party's case.”

41. Approximately two years later, in 1997, the House of Lords’ decision in *NWL Ltd v Woods* [1979] 3 ALL ER 614 was reported. In *NWL Ltd v Woods* the House of Lords was sitting on appeal against the Court of Appeal’s discharge of an interim injunction granted by Donaldson J in respect of a trade dispute involving the threat of industrial action. In that case, the grant of the interlocutory injunction was statutorily restricted by section 17(2) of the Trade Union and Labour Relations Act 1974 which provided:

“17. Restriction on grant of ex parte injunctions and interdicts

(1) ...[notice requirements]

(2) It is hereby declared for the avoidance of doubt that where an application is made to a court, pending the trial of an action, for an interlocutory injunction and the party against whom the injunction is sought claims that he acted in contemplation or furtherance of a trade dispute, the court shall, in exercising its discretion whether or not to grant the injunction, have regard to the likelihood of that party's succeeding at the trial of the action in establishing the matter or matters which would, under any provision of section 13, 14(2) or (15) above, afford a defence to the action.”

42. As was the baseline analysis given by Lord Diplock, the English Legislator, in enacting section 17(2), commissioned a judicial assessment of the merits of the substantive claim because the grant or refusal of an interim injunction would, in such kinds of labour disputes, effectively serve to dispose of the action in favour of the party who achieves success on the application. Having outlined the limited application of section 17(2), Lord Diplock's view was that this was not inconsistent with the *American Cyanamid* principles as those principles do not bar the Court from giving full weight to all the practical realities which will arise on the grant or refusal of interim injunctive relief. Lord Diplock explained:

“Subsection (2) of section 17 which is said to be passed "for the avoidance of doubt" and does not apply to Scotland, appears to me to be intended as a reminder addressed by Parliament to English judges, that where industrial action is threatened that is prima facie tortious because it induces a breach of contract they should, in exercising their discretion whether or not to grant an interlocutory injunction, put into the balance of convenience in favour of the defendant those countervailing practical realities and, in particular, that the grant of an injunction is tantamount to giving final judgment against the defendant.

The subsection, it is to be noted, does not expressly enjoin the judge to have regard to the likelihood of success in establishing any other defence than a statutory immunity created by the Act although there may well be other defences to alleged wrongful inducement of breach of contract, such as denial of inducement or that what was sought to be induced would not constitute a breach, or justification of the inducement on other grounds than the existence of a trade dispute. So the subsection is selective; it applies to one only out of several possible defences and, consequently, only to those actions which, since they are connected with trade disputes, involve the practical realities which I have mentioned.

*My Lords, when properly understood, there is in my view nothing in the decision of this House in *American Cyanamid Co. v. Ethicon Ltd* [1975] A.C. 396 to suggest that in considering whether or not to grant an interlocutory injunction the judge ought not to give full weight to all the practical realities of the situation to which the injunction will apply. *American Cyanamid v. Ethicon* which enjoins the judge upon an application for an interlocutory injunction to direct his attention to the balance of convenience as soon as he has satisfied himself that there is a serious question to be tried, was not dealing with a case in which the grant or refusal of an injunction at that stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial. By the time the trial came on the industrial dispute, if there were one, in furtherance of which the acts sought to be restrained were threatened or done, would be likely to have been settled and it would not be in the employer's interest to exacerbate relations with his workmen by continuing the proceedings against the individual defendants none of whom would be capable financially of meeting a substantial claim for damages. Nor, if an interlocutory injunction had been granted against them, would it be worthwhile for the individual defendants to take steps to obtain a final judgment in their*

favour, since any damages that they could claim in respect of personal pecuniary loss caused to them by the grant of the injunction and which they could recover under the employer's undertaking on damages, would be very small.

*Cases of this kind are exceptional, but when they do occur they bring into the balance of convenience an important additional element. In assessing whether what is compendiously called the balance of convenience lies in granting or refusing interlocutory injunctions in actions between parties of undoubted solvency the judge is engaged in weighing the respective risks that injustice may result from his deciding one way rather than the other at a stage when the evidence is incomplete. On the one hand there is the risk that if the interlocutory injunction is refused but the plaintiff succeeds in establishing at the trial his legal right for the protection of which the injunction had been sought he may in the meantime have suffered harm and inconvenience for which an award of money can provide no adequate recompense. On the other hand there is the risk that if the interlocutory injunction is granted but the plaintiff fails at the trial, the defendant may in the meantime have suffered harm and inconvenience which is similarly irrecompensable. The nature and degree of harm and inconvenience that are likely to be sustained in these two events by the defendant and the plaintiff respectively in consequence of the grant or the refusal of the injunction are generally sufficiently disproportionate to bring down, by themselves, the balance on one side or the other; and this is what I understand to be the thrust of the decision of this House in *American Cyanamid v. Ethicon*. Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.*

The characteristics of the type of action to which section 17 applies have already been discussed. They are unique; and, whether it was strictly necessary to do so or not, it was clearly prudent of the draftsman of the section to state expressly that in considering whether or not to grant an interlocutory injunction the court should have regard to the likelihood of the defendant's succeeding in establishing that what he did or threatened was done or threatened in contemplation or furtherance of a trade dispute.”

43. In 2004 the House of Lords, at this point constituted by Lords Nicholls, Woolf, Hoffmann, Scott and Baroness Hale, delivered the decision in *Cream Holdings Ltd and Others v Banerjee and another* [2004] 4 ALL ER 617. *Cream Holdings Ltd v Banerjee* was an appeal from the Court of Appeal where Lloyd J's granting of an interlocutory judgment had been upheld. In that case, the grant of interim injunctive relief was again restricted by English statute. The House of Lords was concerned with the convention right of freedom of expression under section 12 of the Human Rights Act 1998. Section

12(3), similar to section 17(2) of the Trade Union and Labour Relations Act 1974, created a condition for the grant of interim injunctive relief by imposing a merit-based “likely” test on the prospects of success in the underlying action. Section 12(3), as quoted by Lord Nicholls, provided:

“No such relief [which might affect the exercise of the Convention right to freedom of expression] is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.”

44. For factual context, the plaintiffs (termed “the Cream group of companies” which I refer to as “Cream”) sought an interlocutory injunction against (i) Ms. Banerjee, (its former employee who had been dismissed), and (ii) a publishing company (the “Echo”). The purpose of the relief was to restrain those defendants taking any steps towards publishing what Cream considered to be its confidential information given to Ms. Banerjee in the course of her employment.
45. The House of Lords, with much focus, considered the meaning of “likely” under section 12(3). Lloyd J found that likely meant “a real prospect of success” rather than “more likely than not” and all Lord Justices of Appeal, namely Simon Brown, Sedley and Arden LJ, were said to have agreed with that construction. Having applied that test, the judge found that Cream was likely to succeed at trial and his decision was upheld by a majority decision of the Court of Appeal.
46. In the leading and unanimously agreed decision of the House of Lords, Lord Nicholls held at paras [17]-[18] and [22]-[23]:

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Take a case such as the present: an application is made to the court for an interlocutory injunction to restrain publication of allegedly confidential or private information until trial. The judge needs an opportunity to read and consider the evidence and submissions of both parties. Until then the judge will often not be in a position to decide whether on balance of probability the applicant will succeed in obtaining a permanent injunction at the trial. In the nature of things this will take time, however speedily the proceedings are arranged and conducted. The courts are remarkably adept at hearing urgent applications very speedily, but inevitably there will often be a lapse of some time in resolving such an application, whether measured in hours or longer in a complex case.

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What is to happen meanwhile? Confidentiality, once breached, is lost for ever. Parliament cannot have intended that, whatever the circumstances, section 12(3) would preclude a judge from making a restraining order for the period needed for him to form a view on whether on balance of probability the claim would succeed at trial. That would be absurd. In the present case the Echo agreed not to publish any further article pending the hearing of Cream's application for interim relief. But it would

be absurd if, had the Echo not done so, the court would have been powerless to preserve the confidentiality of the information until Cream's application had been heard. Similarly, if a judge refuses to grant an interlocutory injunction preserving confidentiality until trial the court ought not to be powerless to grant interim relief pending the hearing of an interlocutory appeal against the judge's order.

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In my view section 12(3) calls for a similar approach. Section 12(3) makes the likelihood of success at the trial an essential element in the court's consideration of whether to make an interim order. But in order to achieve the necessary flexibility the degree of likelihood of success at the trial needed to satisfy section 12(3) must depend on the circumstances. There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success 'sufficiently favourable', the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include those mentioned above: where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal.

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This interpretation achieves the purpose underlying section 12(3). Despite its apparent circularity, this interpretation emphasises the importance of the applicant's prospects of success as a factor to be taken into account when the court is deciding whether to make an interim restraint order. It provides, as is only sensible, that the weight to be given to this factor will depend on the circumstances. By this means the general approach outlined above does not accord inappropriate weight to the Convention right of freedom of expression as compared with the right to respect for private life or other Convention rights. This approach gives effect to the parliamentary intention that courts should have particular regard to the importance of the right to freedom of expression and at the same time it is sufficiently flexible in its application to give effect to countervailing Convention rights. In other words, this interpretation of section 12(3) is Convention-compliant."

The Reality of the Court's Approach to Granting Interim Injunctive Relief

47. In this case the Court's powers to grant interim injunctive relief are not expressly restricted by statute in a manner similar to section 12(3) of the Human Rights Act 1998 or to section 17(2) of the Trade Union and Labour Relations Act 1974. However, a principle of clear practicality emerges on those provisions: where the grant or refusal of interim injunctive relief proves dispositive of any application for final injunctive relief, the Court will likely be required to perform a more in-depth analysis of the merits of the substantive question rather than merely satisfying itself that the issued to be tried is neither frivolous nor vexatious.
48. That is consistent with the *American Cyanamid* principles as Lord Diplock's expressly stated view was that the *American Cyanamid* case was never decided in such a way to stop the Court from giving full weight to all the practical realities arising on the grant or refusal of interim injunctive relief. That is also consistent with the separate position taken by Lord Denning in the English Court of Appeal decisions where he sought to reconcile a merit-based analysis of the substantive claim with the *American Cyanamid* principles. Lord Denning approached cases requiring a decision (of dispositive effect) on an urgent and imperative basis as cases constituting special factors, thereby warranting an exemption from the *American Cyanamid* principles. Lord Denning recognised that the Court, in such cases, will be dutybound to make an estimate of the relative strength of each party's case and in so doing, the Court may grant the injunctive relief where the *prima facie* test is established, even if it means virtually deciding the whole case at that stage.
49. The Court's ultimate aim is to ensure that justice is served in the end. If a defendant can be adequately compensated by an award in damages, then the Court will likely preserve the status quo by granting interim injunctive relief, so long as the question to be tried in the substantive action is a serious one. However, if one party and or others will suffer irreparable harm if an interlocutory injunction is refused or imposed by the Court, then the Court will necessarily take a closer look at the merits of the underlying action, as best it can in the circumstances of the application being made urgently. The purpose of that exercise is not to shortcut the trial but to assist the Court in making an Order which is balanced and likely to cause the least irreparable prejudice to the one party or the other. Such an approach yields to the analysis approved by the Privy Council in *National Commercial Bank Jamaica Ltd v Olint Corporation Ltd* [2009] UKPC 16 where, at paragraphs [16]-[20], Lord Hoffman said:

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The second feature is the basis upon which Jones J decided to refuse an interlocutory injunction and the Court of Appeal decided to grant one. It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have

consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in American Cyanamid Co v Ethicon Ltd [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

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In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irreparable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irreparable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the American Cyanamid case [1975] AC 396, 408:

"It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."

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Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases.

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There is however no reason to suppose that in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irreparable prejudice to one party or the other: see Lord Jauncey in R v Secretary of State for Transport, ex parte Factortame Ltd (No 2) [1991] 1 AC 603, 682-683. What is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irreparable prejudice than in cases in which a defendant is merely prevented from

taking or continuing with some course of action: see Films Rover International Ltd v Cannon Film Sales Ltd [1987] 1 WLR 670, 680. But this is no more than a generalisation. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irreparable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in Shepherd Homes Ltd v Sandham [1971] Ch 340, 351, "a high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted."

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For these reasons, arguments over whether the injunction should be classified as prohibitive or mandatory are barren... .."

Prospects of Success on the Substantive Issue to be tried

50. Mr. McQueen's application for interim injunctive relief is entirely footed on his prospects of success on appeal against his conviction. His position is that the Deportation Order will prove unfounded if, in the end, the Court of Appeal finds that he was wrongly convicted.
51. The Deputy Solicitor-General, however, pointed out that Mr. McQueen had not yet established any right to appeal his 2015 convictions and that it was unlikely that he would be able to obtain leave on the grounds of fresh evidence adduced as the proposed evidence would be wholly inadmissible on the grounds of hearsay.
52. Mr. McQueen's recent efforts to commence appeal proceedings coincided with the near approach of his prison release date and the execution of the Deportation Order. In deciding the application, I put aside all reasonable suspicion capable of arising on the timing of Mr. McQueen's discovery or gathering of fresh evidence. Instead, I considered the quality of the evidence itself and the governing legal principles on adducing fresh evidence on a criminal appeal.
53. I shall first outline the legal principles governing the rules on fresh evidence before I come to assess the proposed evidence in this case.

The Law on Admitting Fresh Evidence on Appeal in Criminal Proceedings

54. Section 8(2) of the Court of Appeal Act 1964 expressly empowers the Court of Appeal to receive and consider fresh evidence to the same extent as the law permits the Supreme Court to do so in the exercise of its appellate jurisdiction. It provides:

“The powers of the Court of Appeal to admit additional evidence shall correspond to the power of the Supreme Court to admit fresh evidence in the exercise of its appellate jurisdiction in a civil or criminal cause, as the case may be.”

55. Section 16 of the Criminal Appeal Act 1952 (the “Bermuda Criminal Appeal Act”) is the statutory source of the Supreme Court’s powers to admit evidence on appeal which was not called or adduced at the trial of first instance. The test prescribed by section 16(2) for the admission of fresh evidence is a fairness and reasonableness test. So, where it appears to the Court that in the interest of justice it is reasonable to consider the fresh evidence in question, the Court will do so pursuant to section 16(2). Section 16 provides:

Hearing of appeals

16 (1) *Subject to this section, the hearing of an appeal by the Supreme Court shall be by way of argument—*

(a) upon the record of the proceedings taken before the court of summary jurisdiction contained in the documents transmitted to the Registrar in accordance with section 13(2)(a); or

(b) where a case is stated by the court of summary jurisdiction in accordance with the terms of an order made under section 15(1)(b), then upon the case so stated.

(2) If in connection with the hearing of any appeal, upon the application of the appellant, or (subject as hereinafter in this subsection provided) of the respondent or any person made an additional party to the appeal, it is made to appear to the Supreme Court that in the interest of justice it is reasonable to do so, the Court shall supplement the procedure mentioned in subsection (1) by any or all of the following means, that is to say,—

(a) by ordering or allowing any person who was or would have been a compellable witness in the proceedings before the court of summary jurisdiction to give evidence at the hearing of the appeal, whether or not that person gave evidence before the court of summary jurisdiction;

(b) by allowing any person (including, where an appeal is brought under section 3 or section 4, the appellant) who was or would have been a competent but not a compellable witness in the proceedings before the court of summary jurisdiction to give evidence at

the hearing of the appeal, whether or not that person gave evidence before the court of summary jurisdiction;

(c) upon the application of the appellant, the appellant being a convicted person appealing under section 3, by allowing the husband or wife of the appellant to give evidence (where the evidence of the husband or wife could not, by reason of the Evidence Act 1905 [title 8 item 10], have been given before the court of summary jurisdiction except upon such an application) at the hearing of the appeal, whether or not the husband or wife of the appellant gave evidence before the court of summary jurisdiction;

(d) by ordering or allowing the introduction in evidence at the hearing of the appeal of affidavits relating to facts which were not in evidence before the court of summary jurisdiction;

(e) by ordering or allowing the production and the examination at the hearing of the appeal of any document, exhibit, article or thing, whether or not it was in evidence in the proceedings before the court of summary jurisdiction;

(f) where any question arising out of the appeal involves the prolonged examination of documents or accounts or involves any scientific examination or the examination of any locality which cannot conveniently be conducted before the Court, by ordering the reference of that question to a special commissioner appointed by the Court for enquiry and report, and by examining the report of any commissioner so appointed, whether or not the report relates to facts which were not in evidence before the court of summary jurisdiction.

(3) The Supreme Court may of its own motion supplement the procedure mentioned in subsection (1) by any or all of the means referred to in subsection (2)(a), (d), (e) and (f).

56. The powers conferred on the Court to admit fresh evidence under section 16(2) are similar to the statutory powers of the Court of Appeal in England under section 23(1) of the Criminal Appeal Act 1968 (the “English Criminal Appeal Act”). Broadly similar to the test imposed by section 16(2), an English Court of Appeal may order the production of or receive fresh evidence where the Court thinks it ‘*necessary or expedient in the interests of justice*’. While it is so that neither the term “necessary” nor “expedient” appears in section 16(2), the appellate Courts of both Bermuda and England are bound by the concept of fairness, meaning what is required in the interests of justice.

57. Section 23(2) of the English Criminal Appeal Act lists four factors which the appellate Court must have regard to. Those factors are as follows:

(a) whether the evidence appears to the Court to be capable of belief;

- (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
- (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
- (d) whether there is reasonable explanation for the failure to adduce the evidence in those proceedings.

58. As to the construction of section 23(1)-(2), Archbold 2004 at para 7-211 provides the following commentary:

“... .. The existence or otherwise of a reasonable explanation for not calling the evidence at trial is, however, but one factor to be taken into account of in deciding whether it is necessary or expedient in the interests of justice to receive the evidence: R v Cairns [200] Crim L.R. 473, CA. Evidence may be received even though none of the conditions in subsection (2) are satisfied: R. v. Sale, The Times, June 16, 2000, CA.

In R. v McLoughlin [2000] 3 Archbold News 1, CA, it was held that if the evidence to which the application relates complies with paragraphs (a) to (d) of section 23(2), the court should then consider the evidence without hearing the witness(es), and if having considered it, it thinks the conviction unsafe, it should quash the conviction and, if appropriate, order a retrial. This, however, runs together what is a clearly defined two-stage process. The matters set out in section 23(2) are to be taken into account in deciding whether to receive the evidence. If the decision is taken that the evidence should be received, then the witness must be called (unless the evidence is agreed). Evidence which appears to be capable of belief (s.23(2)(a)) may lose all credibility as a result of cross-examination. McLoughlin was disapproved in Sale, ante, where it was said that the Court would sometimes find it necessary to hear evidence de bene esse to determine whether it was capable of belief or whether or not it afford a ground of appeal....”

59. Laws LJ’s impugned statement in the *McLoughlin* decision was quoted by Rose LJ, the then Vice President of the English Court of Appeal, in *R v Sales* [2000] EWCA Cr App R 431 who explained, by reference to three categories of evidence, the circumstances under which it would be appropriate for an appellate Court to receive and hear evidence from a witness *de bene esse*. In short, Rose LJ recognised that it would likely be unnecessary to do so where the evidence is plainly capable or incapable of belief. However, where the evidence is “possibly capable of belief”, Rose LJ pointed out that it may be necessary to hear and consider the evidence *de bene esse*. The purpose of that is not to opine on how the jury would have adjudged the witness’ evidence but to form a view on whether the evidence is in fact capable of belief.

60. At paras [22]-[23] and [25]-28] Rose LJ said:

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Secondly, it can only be in a very rare case that this Court will receive fresh evidence to advance a defence which was not only not advanced at trial but is completely different from the defence relied on at trial. It is equally rare for this Court to receive evidence from an appellant who chose not to give evidence before the jury.

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*The reason is obvious, the public interest is best served by, generally, requiring prosecution and defence alike to present their case fully at trial and not by amendment years later. Accordingly, by reference to the terms of section 23(1) of the Act, it will be very rare indeed for this Court to think it necessary or expedient, in the interests of justice, to allow evidence to be called by a defendant, to put forward a new defence (see for example *R v Silcot*, unreported Court of Appeal (Criminal Division) transcript 13th December 1988, at page 8C). *R v Richardson*, unreported Court of Appeal (Criminal Division) transcripts of 1st February 1991 and 9th May 1991, provides such a rare example. Apparently credible expert and lay evidence casting doubt on the time of the deceased's death was admitted because it might effect the safety of the verdict. In that case it actually led to the verdict being quashed, notwithstanding that the defendant, on appeal, advanced a completely different defence to the admittedly dishonest defence which he had advanced at trial.*

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*Thirdly, the Court's attention has been drawn to *R v McLoughlin* unreported, Court of Appeal (Criminal Division) transcript 30th November 1999, with regard to the proper approach by this Court when considering whether to receive evidence under section 23(2). In that case, no doubt appropriately, the Court, without hearing from the witnesses, received statements of fresh evidence which appeared capable of belief. However, in the course of giving the judgment of the Court Laws LJ said at paragraph 17:*

"It seemed to us in principle that it is this Court's duty to decide whether to receive any evidence by reference to the matters set out in subsection (2), without the assistance of hearing the evidence live itself."

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No authority is cited.

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*In our judgment, this approach is not only novel, (see the comment in *Archbold News* 13th April 2000) it is contrary to the breadth of the wording of the subsection which is not limited in the way suggested. It is also contrary to the widespread practice of many constitutions of this Court, well established over several years (see for example *R v**

Cairns, Court of Appeal (Criminal Division) transcript 24th February 2000, R v PT, Court of Appeal (Criminal Division) transcript 18th April 2000). Proffered fresh evidence in written form is likely to be in one of three categories: plainly capable of belief; plainly incapable of belief, and possibly capable of belief. Without hearing the witness, evidence in the first category will usually be received and evidence in the second category will usually not be received. In relation to evidence in the third category, it may be necessary for this Court to hear the witness de bene esse in order to determine whether the evidence is capable of belief. That course is frequently followed in this Court. It was a course which we followed in this appeal, in relation to the evidence of the appellant himself and the three witnesses called in support of his appeal to whom we have referred.

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We add that, in some cases, it may be necessary for this Court to hear apparently credible evidence in order to determine whether it affords a ground for allowing the appeal. This may be so where fresh expert evidence is proffered (see, for example, R v Jones [1997] 1 Cr App R 86) but it may also be necessary in relation to lay evidence, particularly conflicting lay evidence (see, for example R v Callaghan 88 Cr App R 40).”

61. While the Bermuda Criminal Appeal Act does not specify any guiding factors for the Court’s regard when exercising its discretion to receive and consider fresh evidence, there is no reason to doubt that the Bermuda Court of Appeal will take into account the four factors listed under section 23(2) of the English Criminal Appeal Act. It is also clear in my view that the Bermuda Court of Appeal’s approach to deciding whether to hear and consider evidence *de bene esse* will accord with the formula set out by Rose LJ in *R v Sales*. (See *Devon Hewey v R* [2022] UKPC 12 where the Privy Council considered *de benne esse* fresh evidence in the form of GSR expert reports).
62. As previously recognised by this Court in *Raymond Charlton v Fiona Miller (Police Sergeant)* [2022] SC (Bda) 99 app there is established binding legal principle on the Court’s approach to the admission of fresh evidence. In *Raymond Charlton v Fiona Miller*, I quoted from Lord Brown’s majority judgment from the Privy Council in *Dial and another v State of Trinidad and Tobago* [2005] UKPC 4 at [31]. That passage was quoted by me at [32] as follows:

“In the Board’s view the law is now clearly established and can be simply stated as follows. Where fresh evidence is adduced on a criminal appeal it is for the Court of Appeal, assuming always that it accepts it, to evaluate its importance in the context of the remainder of the evidence in the case. If the Court concludes that the fresh evidence raises no reasonable doubt as to the guilt of the accused it will dismiss the appeal. The primary question is for the Court itself and is not what effect the fresh evidence would have had on the mind of the jury. That said, if the Court regards the case as a difficult one, it may find it helpful to test its view “by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict” (Pendleton at p83, para 19).

The guiding principle nevertheless remains that stated by Viscount Dilhorne in Stafford (at p906) and affirmed by the House in Pendleton:

“While ... the Court of Appeal and this House may find it a convenient approach to consider what a jury might have done if they had heard the fresh evidence, the ultimate responsibility rests with them and them alone for deciding the question [whether or not the verdict is unsafe].”

Assessment of the Proposed Fresh Evidence

63. Ms. Sadler-Best submitted that the fresh evidence outlined before me is bound to encounter strong and meritorious inadmissibility objections on the grounds of hearsay. On that principal basis, she argued that an application for leave to appeal would surely fail.
64. In my judgment the hearsay evidence in this case of statements purportedly heard to be said by the victim of the serious sexual assaults is plainly inadmissible. These statements did not qualify under any of the common law hearsay exceptions such as the rules relating to statements admissible as part of the *res gestae* or those relating to evidence of reputation or character.

Final Analysis and Reasons for Refusal to Grant Relief Sought

65. Notwithstanding Mr. McQueen’s failure to bring this application before the Court in the form of an application for leave to file for judicial review, I considered the application on the basis of it being a request for interim injunctive relief in the context of judicial review proceedings.
66. In this case, Mr. McQueen sought to suspend the Deportation Order, the effect of which would be to allow him to enjoy his prison release privileges and to reintegrate into the domain of the general public. However, Mr. McQueen, having been convicted of two counts of very serious acts of criminal conduct, namely sexual exploitation of a child by a person in a position of trust, is the subject of the Deportation Order because he is a person in respect of whom the Governor considers it conducive to the public good to make a deportation order.
67. In evaluating the presence of any risk of irremediable harm in the event of granting the order sought by Mr. McQueen, I had regard Ms. Sadler-Best’s summary of the 15 November 2018 letter from Mr. Davis in his role as Compliance Manager of the Department of Immigration. Having now had the benefit of reviewing that correspondence, I find that the following passage lifted from the said letter illustrates a real risk of irremediable harm to the general public:

“The Minister has considered the serious nature of your previous conviction, that if unlawful carnal knowledge with a minor, the similarly serious nature of the crime with which you are now convicted, the identity of the most recent complainant and that complainant’s familial relationship to you. The Minister has balanced the competing interests, and has, after careful consideration, decided to revoke your Extension Spouse’s Employment Rights (ESER) pursuant to Section 6.1 of the Work Permit policy an section 34(1) of the Act in the interest of public safety and the safety of the children in question.

To the above end, please be advised that it is the intention of the Minister of National Security to make a recommendation to the Governor to have you deported from Bermuda at the expiration of your term of incarceration...”

68. Clearly the risk of injuncting the Deportation Order pending a possible appeal is that Mr. McQueen, while enjoying his liberty, may cause further criminal harm to a member of the Bermuda public. Should Mr. McQueen cause further harm of any nature similar to the previous acts for which he has been held criminally responsible, that in my judgment would constitute irremediable harm incapable of being compensated by way of damages.
69. Because I found that there was a real risk of irremediable harm occasioned by a stay or temporary injunction against the Deportation Order, it would not have been appropriate to grant temporary injunctive relief based merely on the ‘serious question to be tried’ test. In the full circumstances of this case, it was necessary for me to look more closely at Mr. McQueen’s prospects of success in securing a final injunction against the Deportation Order. Mr. McQueen’s prospects of success in so doing were hinged entirely on his ambitions to have the 2015 convictions quashed on the basis of the proposed fresh evidence. Having found that the proposed fresh evidence would be excluded on the grounds of inadmissible hearsay, I found that his prospects of success on appeal were hopeless.
70. It was also necessary for this Court to balance the prejudice which would be suffered by Mr. McQueen in the event of the Court’s refusal to grant interim injunctive relief against the risk of irremediable harm to the members of the Bermuda public. Mr. McQueen’s expressed concern was that he would not be properly positioned to prosecute an appeal against his convictions from outside of Bermuda. While it would obviously be more convenient to him to carry out those steps within the jurisdiction, I saw no reason why he would be prevented from fully pursuing his efforts to appeal from Jamaica, his country of nationality. In this era of litigation, parties are able to appear before the Court by way of video link and are able to communicate with the registry by way of email. In the end, I found that the inconvenience of pursuing an appeal from outside of Bermuda was far less than the criminal harm any child or young person might suffer at the hands of a freed Mr. McQueen, who may fairly be characterised as a prolific sex offender.
71. Had this Court approached Mr. McQueen’s application as a stay of execution of a Court Order, which it did not, it would have been equally necessary for the Court to perform

such a balancing exercise, give strong consideration to the irremediable harm which might likely be suffered by others as a result of granting the stay. On any such application, the same result would have been reached.

Conclusion

72. For all of these reasons I refused Mr. McQueen's application and the Deportation Order set to have been executed last week, on Wednesday 18 February 2026, was not disturbed by any Order of this Court.

73. I make no order as to costs, unless the Deputy Solicitor General, wishing to be heard on the issue of costs, files a form 31 TC in the next 21 days.

Monday 23 February 2026



**HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT**