In The Supreme Court of Bermuda

CIVIL JURISDICTION
2015: No. 82

IN THE MATTER OF SECTION 15 OF THE BERMUDA CONSTITUTION ORDER 1968

AND IN THE MATTER OF THE PAROLE BOARD ACT 1979

AND IN THE MATTER OF THE BERMUDA IMMIGRATION AND PROTECTION ACT 1956

AND IN MATTER OF THE LEGALITY OF THE LAW RELATING TO FOREIGN HUSBANDS OF BERMUDIAN WOMEN, THEIR DEPORTATION AND ASSOCIATED PROCESSES

AND IN THE MATTER OF THE REFUSAL OF THE PAROLE BOARD TO RELEASE THE PLAINTIFF ON LICENSE UPON REACHING, OR AFTER, HIS PAROLE DATE

BETWEEN:

LEIGHTON GRIFFITHS

Applicant

-v-

(1) THE ATTORNEY-GENERAL OF BERMUDA

(2) THE CHAIRMAN OF THE PAROLE BOARD

(3) THE MINISTER OF NATIONAL SECURITY

(4) THE MINISTER FOR HOME AFFAIRS

Respondents

JUDGMENT

(in Court)[1]

[1] The Judgment was circulated without a hearing to save costs and to enable counsel to prepare to address the relief aspects of the Originating Summons.

Date of hearing: July 10, 2015[2]

Date of Judgment: August 13, 2015

Mr. Eugene Johnston, J2 Chambers, for the Applicant
Ms. Shakira Dill, Deputy Solicitor-General, for the Respondents

Introductory

1. The Applicant, a Jamaican national, seeks various forms of relief under an Originating Summons issued on February 26, 2015. The Summons was issued under section 15 of the Bermuda Constitution.

2. He married a Bermudian on April 7, 2001. He is also the father of a Bermudian daughter born in 2006. On July 12, 2007, he was convicted of offences under the Misuse of Drugs Act 1972 and sentenced to a term of 14 years imprisonment. This sentence was reduced to one of 12 years imprisonment by the Court of Appeal on March 12, 2008. He was not released on parole after serving one-third of his sentence or at any time thereafter, and has been threatened with deportation when he completes his sentence. It is alleged that will have served two-thirds of his sentence on or about July 2015.

3. The Applicant alleges that his constitutional rights have been infringed in the following respects:

    (a) the denial of parole is said to have contravened his rights under sections 5(1), 7(1) and/or 12(2) of the Constitution;

    (b) the discretion conferred upon the 4th Respondent by section 27A(2)(c) and (d) and section 27A(4) of the Bermuda Immigration and Protection Act 1956 ("BIPA") to strip a special status husband of that status when he is convicted of a relevant offence is said to be inconsistent with section 5(1) and/or section 6(1), (2), (4), (8) and/or (9) of the Constitution, with the result that any deportation would be unconstitutional.

Factual findings: the Applicant's eligibility for parole

4. The Applicant made various attempts to obtain release on parole commencing in 2009 when his wife wrote the Minister in this regard. In a letter dated June 29, 2009, the Minister advised in part as follows:

[2] Although judgment was reserved on this date, the Respondents were given [ ] days to file supplementary submissions (which were filed on July 20, 2015).

"*With regard to parole- he would be eligible for such, but…as a foreign national he would be ineligible to be granted parole. It is also unlikely that he will be allowed to stay in Bermuda when he is released.*"

5. His wife wrote the Parole Board expressing the need for financial support. The mother of his child swore an affidavit testifying to the strength of the bond between father and daughter, his incarceration for most of the child's life notwithstanding. On October 4, 2011, lawyer Graveney Bannister wrote the Commissioner of Prisons advising that the Applicant was a skilled mechanic and had offers of employment for whenever he was released. The Parole Board Annual Report 2012 states as follows:

"***Foreign nationals***

As at December 2012, there were 10 foreign nationals incarcerated in Bermuda's Correctional facilities; the majority of which are for drug committing offences. The Board interviews all incarcerated persons (foreign and local) before their Parole Eligibility Date (PED); however, if parole in the Bermuda community is not available to a foreign national, the Board's ability to grant parole is limited.

In 2010, as a result of a Supreme Court Judicial Review, foreign nationals incarcerated in Bermuda were given the same consideration for parole in Bermuda as locals.

As an Overseas Territory, Bermuda's foreign affairs are managed by the Government of the United Kingdom; as such, it is our position that the UK legislative solution to foreign nationals should be adopted in Bermuda."

6. Mr. Ashfield Devent JP, Chairman of the Parole Board, swore an Affidavit in response to the present proceedings. He deposes that the Applicant applied for parole on January 29, 2011, was seen by the Board on May 16, 2011 and had his application deferred pending confirmation of his Immigration status. His application was supported by materials which showed that:

(a) he had caused no problems as an inmate and never failed a drugs test;

(b) he was assessed as suitable for parole by the Department of Court Services;

(c) he had available accommodation with his wife and an offer of employment with a painting contractor.

7. However, as a result of the Board's receipt of a letter from the Immigration Department dated August 10, 2011 advising that the Applicant no longer had permission to reside in Bermuda, he was not granted parole. Release on license to Jamaica was not an option because no reciprocal arrangements exist between Bermuda and Jamaica. Mr. Devent attributed the absence of such arrangements to the policy position adopted by the Jamaican as opposed to the Bermudian authorities.

8. Mr. Devent was corroborated in this regard by the Commissioner of Prisons, Lieutenant Colonel Lamb, who also swore an Affidavit on behalf of the 4th Defendant. The Commissioner also deposed that the Applicant lost some of his privileges in January 2012, apparently after he was denied parole. He stated that work release was also not possible due to the Applicant's Immigration status although, should that change, he would consider him without hesitation. The Commissioner explained that as of April 27, 2015, there were 15 foreign nationals serving sentences in Bermuda.

9. The evidence clearly establishes that the Applicant was qualified for parole in all respects save for the fact that, as a convicted foreign national, he had no unrestricted right to work in Bermuda. As far as dates are concerned, the Applicant was:

    (a) eligible for parole on July 11, 2011;

    (b) his earliest release date was July 10, 2015; and

    (c) his latest release date is July 10, 2019.

Factual Findings: the Applicant's Immigration status

10. Dr. Danette Ming, Chief Immigration Officer, swore an Affidavit on behalf of the 4th Respondent. She explained that she wrote to the 2nd Respondent on August 5, 2011 advising that the Applicant was "*likely to be deported from Bermuda upon parole*". This communication meant that the Minister proposed to recommend to the Governor that a deportation order be made. The basis for this position was that the Minister considered that the Applicant's status as a special category husband had lapsed because of his conviction.

11. The Chief Immigration Officer further deposed that the Minister has not yet decided on whether or not to recommend deportation in the Applicant's case. The Applicant was given an opportunity to make representations as to why he should not be deported by letter dated March 24, 2014. The Applicant responded by letter dated April 1, 2014. The Minister (the 4th Respondent) has not yet carried out the family assessment which forms part of his decision-making process. This process aims to "*proportionately balance his* [i.e. the Applicant's] *circumstances and the Bermudian public interest.*"

12. By the date of the hearing, the 2nd Respondent had still not decided whether or not to recommend the Applicant's deportation.

Findings: the administrative and legislative approach to parole for foreign nationals in the UK and the British Overseas Territories

13. Ms. Dill assisted the Court by preparing supplementary submissions to elucidate how the obvious challenges of parole arrangements for foreign nationals was being dealt with in comparable jurisdictions. Those submissions support the following conclusions.

United Kingdom

14. The Criminal Justice Act 2003 introduced the Early Removal Scheme ("ERS") for foreign nationals. This scheme is described in a February 1, 2013 National Offender Management Service policy instruction document.

15. The UK legislative scheme ordinarily entitles all fixed term prisoners to be released after serving half of their sentences. The ERS is an alternative to parole for foreign prisoners (assuming they are liable to be removed from the country upon their release) who must be considered for early release on a date no more than 270 days before their standard release date i.e. after having served half their sentence.

16. There is also a Tariff-Expired Removal Scheme under which foreign prisoners can be released immediately after serving the minimum tariff fixed by the sentencing court for them to serve before their deportation.

17. The UK legislative framework allows courts to recommend deportation at the time of sentence. In practice, deportation appears to be the usual course for persons sentenced to more than 4 years imprisonment, irrespective of family ties. The Immigration Rules permit a person liable to deportation to apply for revocation of the order on the grounds that their family rights under Article 8 of the European Convention would be infringed by deportation.

18. In summary, foreign prisoners who are subject to deportation from the UK are entitled to be released earlier than those prisoners who have access to parole because they will be released back into UK communities. Sentencing courts are also empowered to recommend deportation and take the likelihood of deportation into account as part of the sentencing process.

Cayman Islands

19. The Cayman Islands presently has a very limited parole system, but in 2014 its Legislature passed the Conditional Release Law. When it is brought into force, this Law will by its terms apply to all prisoners, irrespective of nationality. However, the statute appears to contemplate that those prisoners liable to be deported will be removed from the jurisdiction in any event.

20. In summary, it appears that the Cayman Islands are, like Bermuda, grappling with the problem of equal treatment for foreign prisoners but have yet to implement a coherent policy.

The British Virgin Islands (BVI)

21. BVI has only recently established its Parole Board under the Parole Board Act 2009. Parole is available generally after one-half of the relevant sentence has been served. However, section 15 (5) of the Act crucially provides:

> "*(5) The Governor may, in consultation with the Minister, release a non-belonger prisoner on parole on condition that the prisoner is deported from the Territory and remains outside the Territory.*"

22. This statutory provision seems designed to ensure equality of treatment in respect of all prisoners irrespective of place of origin. While belongers may well be subject to longer supervision and a risk of recall, non-belongers receive the additional 'penalty' of being removed from BVI altogether.

23. It appears that BVI has taken legislative steps to ensure that foreign prisoners can both theoretically and practically be released on parole at the same stage as prisoners who belong to BVI.

Findings: the Bermuda administrative and legislative scheme for parole and foreign nationals in outline

Legislative framework for parole

24. The Bermuda legislative framework does not, as far as theoretical entitlement to parole, distinguish between those prisoners who are expected to be released in Bermuda because they are Bermudian or otherwise have the right to reside in Bermuda and those prisoners who are expected to return to their countries of origin. The central statutory provision is found in the Prisons Act 1979. It is clear that the supervisory aspects of parole contemplate release on license within Bermuda only, however. It is arguable at least that by necessary implication the regime established by

section 12 of the Act is only in practical terms accessible by those with an unrestricted right to reside in Bermuda. Section 12 provides as follows:

"***Release on licence; fixed term***

12 (1) Without prejudice to sections 13 and 14, but subject to subsection (2) the Parole Board, having given due consideration to any recommendation made by the Commissioner of Prisons, may, in respect of any prisoner direct that instead of the prisoner being granted remission of his adjudged term of imprisonment under section 10, such prisoner shall, at any time on or after having completed one-third of his adjudged term of imprisonment, be released on licence under this section, but the provisions of this section are subject to section 70P of the Criminal Code.

(2) Subsection (1) shall not apply to a prisoner serving a term of imprisonment for life (other than a term of imprisonment imposed by a court martial) or a prisoner who has been sentenced to be detained during Her Majesty's pleasure.

(3) A prisoner eligible for release on licence under this section shall be considered, in the first instance, three months prior to the due date on which he first becomes so eligible, and thereafter at such intervals as may be deemed appropriate by the Parole Board.

(4) A person released on licence under this section shall until the expiration of his adjudged term of imprisonment be under the supervision of a probation officer or of such society or person as may be specified in the licence and shall comply with such other requirements as may be so specified; except that the Parole Board may at any time modify or cancel any such requirements.

(5) If before the expiration of his adjudged term of imprisonment the Parole Board is satisfied that a person released has failed to comply with any requirement for the time being specified in the licence, the Parole Board may by order recall him to a prison; and thereupon he shall be liable to be detained in a prison until the expiration of his adjudged term of imprisonment and, if at large, shall be deemed to be unlawfully at large.

(5A) Where the Parole Board has recalled a prisoner to a prison for failure to comply with any requirements specified in the licence, the prisoner shall be entitled to appear and be heard in person before the

Parole Board, before a final decision is made on whether he will be recalled to prison.

(6) The Parole Board may release on licence a prisoner recalled to and detained in a prison under subsection (5) at any time before the expiration of his adjudged term of imprisonment; and subsections (3) and (4) shall apply in the case of a person released under this subsection as they apply in the case of a person released under subsection (1).

(7) Notwithstanding anything in this section, where the unexpired part of the adjudged term of imprisonment of a person released under subsection (1) is less than six months, subsections (3), (4) and (5) shall apply to him subject to the following modifications—

(a) the period for which he is under supervision under subsection (4), and is liable to recall under subsection (5), shall be a period of six months from the date of his release under subsection (1);

(b) if he is recalled under subsection (5) the period for which he may be detained thereunder shall be whichever is the shorter of the following periods—

(i) the remainder of such period of six months; or

(ii) the part of the adjudged term of imprisonment which was unexpired on the date of his release under subsection (1), reduced by any time during which he has been so detained since that date, and he may be released on licence under subsection (6) at any time before the expiration of that period.

(8) For the purposes of this section—

(a) a person ordered to be committed to prison—

(i) in default of payment of a sum adjudged to be paid on a conviction or of the amount of a recognizance; or

(ii) by reason of any refusal or inability to enter into a recognizance,

shall be treated as having been sentenced to a term of imprisonment for the term for which he is so committed; and

(b) consecutive terms of imprisonment shall be treated as one term."

25. Another provision explicitly contemplates foreign prisoners, and that is section 14A:

"***Transfer to or from Bermuda; release on licence***

14A (1) Where the Minister is satisfied that reciprocal provisions have been made by the law of any of the countries listed in the Schedule (in this section referred to as "the listed countries") for the release of prisoners on licence or parole (whatever nomenclature is used) and for their supervision after having been released and until the adjudged term of imprisonment expires, the Minister may—

(a) transfer from a prison in Bermuda, a prisoner who is a citizen or permanent resident of any of the listed countries, and who is eligible for release on licence or parole under section 12, 13 or 14;

(b) arrange for the conveyance of the prisoner by as direct a route as possible to the listed country of which he is a citizen or permanent resident;

(c) receive on transfer from any such country by a similar route as in paragraph (b), a person possessing Bermudian status serving a term of imprisonment in that country who is eligible for release on parole or licence under the applicable provisions of its law.

(2) A prisoner who is transferred to Bermuda under this section shall be subject to the provisions of this Act relating to his supervision while on licence or parole, recall to prison or revocation of his licence or parole and shall, for such purposes, be deemed to have been released on licence by the Minister upon the date when he landed in Bermuda pursuant to the transfer.

(3) The Minister may, by order, add to or remove from the Schedule, the name of any country.

(4) Section 6 of the Statutory Instruments Act 1977 shall not apply to an order made under this section."

26. In *Cashman-v-The Parole Board* [2010] Bda LR 45, I made the following findings in respect the geographical scope of the parole regime established by the provisions reproduced above:

> "*23. I find that there is no or no real doubt about the meaning of section 12 in terms of its geographical sphere of operation. It unambiguously applies to prisoners released on license in Bermuda. No need to consider whether section 12 of the Prisons Act 1979 contravenes any provisions of the Bermuda Constitution arises for determination in the context of the present application for judicial review.*"

27. In *Cashman,* I dismissed the application for judicial review made by a foreign applicant who complained of being denied access to parole under section 12 of the Prisons Act 1979. Mr. Johnston in the course of argument in the present case described *Cashman* as the "appetizer" for the main course the present case served up. In that case I commented:

> "17. *The present application only gets off the ground at all because it is difficult to resist the instinctive judicial reaction that there is something inherently unfair about a scenario under which foreign nationals from countries which do not have reciprocal legislation meeting the requirements of section 14A who would otherwise qualify for release on license must serve 'longer' sentences than Bermudian prisoners or prisoners from section 14A compliant countries…*
>
> *46. Mr. Johnston for the Applicant has raised arguable questions as to whether or not the differential treatment afforded to foreign prisoners who cannot be released on parole to their home countries under section 14A of the 1979 Act contravene the Applicants rights under section 5 and/or section 12 of the Constitution. Substantive relief for any contravention of such rights is only potentially available by way of an application under section 15 of the Constitution, not by way of a judicial distortion of the unambiguous provisions of section 12 as read with section 14A of the Prisons Act.* "

28. Another statutory provision relating to parole merits mention at this juncture. Section 70P of the Criminal Code provides as follows:

> "*(1) Subject to section 70N, where no minimum period of imprisonment is provided before a person can apply for his release on licence a person must serve at least one-third of the term of imprisonment before any application for his release on licence may be entertained or granted by the Parole Board in the absence of an order made under subsection (3).*
>
> *(2)Subsection (1) applies where the sentence was imposed before, on or after the date on which this section comes into operation.*

(3)Notwithstanding subsection (1), where an offender receives a sentence of imprisonment for two years or more on conviction on indictment, the court, may, if satisfied, having regard to—

(a) the circumstances of the commission of the offence;

(b) and the character and circumstances of the offender,

that the expression of society's denunciation of the offence or the objective of specific or general deterrence so requires, order that the portion of the sentence that must be served before the offender may be released on licence is one-half of the sentence or 10 years, whichever is less."

29. The judicial power to override the usual rule that parole is available after 1/3rd of a sentence is served was not deployed in the Applicant's case. However, the existence of the power demonstrates that the general sentencing regime is designed to enable the Court to impose a custodial sentence of knowing that either (a) the offender will be eligible for parole after having serving 1/3rd of his sentence, or (b) (where a term of two or more years is imposed) such longer term as the court may direct. These provisions are effectively rendered nugatory in the case of a foreign national who will not in reality ever become eligible for parole.

Administrative regime for parole

30. The Bermuda administrative regime reflects the legislative regime. Unless a foreign national either (a) has the right to reside and work in Bermuda when he applies for parole, or (b) comes from a country where reciprocal arrangements for the return of prisoners on license are actually in place, he will not be considered for release on license even if he is able to meet the other eligibility requirements.

Legislative and administrative regime for deportation

31. The legal and administrative approach to deportation in Bermuda is a related area of concern. It is relevant to the questions of whether sentencing courts in practice have regard to the fact that an offender is likely to be ineligible for parole and the extent to which, either in legal or practical terms, the duration of a foreign national's sentence is to any material extent determined by the Executive branch of Government rather than the Judicial branch.

32. In the course of argument English case law was referred to which suggested that recommendations of deportation are routinely made by the courts in that jurisdiction, as an integral part of the sentencing process. It was common ground that this is not the practice in Bermuda's criminal courts. It is important to note, therefore, although this provision was not referred to in the course of argument, that the Bermudian courts do

possess the power to recommend deportation when passing sentence, albeit that the deportation power is vested in the Governor. Section 106 of BIPA provides so far as is relevant as follows:

> "*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;…*"

33. It is legally possible, therefore, for the Bermudian courts to impose a sentence on a foreign national coupled with a recommendation of deportation in circumstances where it is known that the offender is or is likely to be ineligible for parole and, accordingly, to take that consideration into account. However, as a practical matter, current sentencing practice appears to be to sentence all offenders based on the circumstances of the offence and other circumstances of the offender.

34. In any event, as I observed in the course of the hearing, the notion of courts imposing differing tariffs based on national origin is not from a judicial perspective an obviously attractive prospect.

Summary

35. The Bermuda legislative and administrative scheme for parole in relation to foreign nationals who have no right to reside in Bermuda and no means of being paroled to their country of origin seems less than satisfactory for two main reasons:

    (1) such prisoners have no prospect of being released until they have served 2/3^{rds} of their sentence, while those for whom parole is available may be released (albeit subject to potential recall) after having served only 1/3rd of their sentences;

    (2) the only possibility of such foreign nationals obtaining earlier release depends on whether or not the Bermudian Executive decides to propose to the Legislature some form of early release scheme designed to give foreign nationals who are ineligible for parole (in Bermuda or in their country of origin) parity of treatment.

36. Against this background, the five specific constitutional complaints advanced by the Applicant can now be considered. I summarily dismissed the Respondents'

preliminary objections that the present application was an abuse of process because I considered it obvious that the Applicant did not have alternative means of redress.

37. I had already decided in *Cashman* [2010] Bda LR 45 that the legislative scheme could not be challenged by way of judicial review and that it was arguable that the inability of foreign nationals to obtain parole contravened section 5 and/or section 12 of the Bermuda Constitution.

Findings on Complaint 1: the nature of the Applicant's detention after his parole eligibility date changed and became contrary to section 5(1) of the Constitution occurred ("the Conversion Argument")

38. It was submitted that the Applicant was sentenced on the basis of the principles enshrined in section 53 of the Criminal Code and, because no order specifying a minimum period of detention to be served was imposed by the Court, the sentence was also based on the assumption that he would be eligible for parole having served 1/3rd of his sentence. When the Parole Board declined to grant him parole on the basis of his Immigration status and nationality, the effect of this was "*to mix up sections 5(1)(a) and 5(1)(h) of the Constitution…to convert a criminal sentence of imprisonment into a means of holding a person in consequence of deportation proceedings*" (Applicant's Skeleton Argument, paragraph 45).

39. Section 5(1) of the Constitution provides as follows:

> "(1)*No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases:*
>
> *(a) in execution of the sentence or order of a court, whether established for Bermuda or some other country, in respect of a criminal offence of which he has been convicted or in consequence of his unfitness to plead to a criminal charge;*
>
> *(b) in execution of the order of a court punishing him for contempt of that court or of another court or tribunal;*
>
> *(c) in execution of the order of a court made in order to secure the fulfilment of any obligation imposed upon him by law;*
>
> *(d) for the purpose of bringing him before a court in execution of the order of a court;*
>
> *(e) upon reasonable suspicion that he has committed, is committing, or is about to commit, a criminal offence;*

(f) in the case of a person who has not attained the age of twenty-one years, under the order of a court or with the consent of his parent or guardian, for the purpose of his education or welfare;

(g) for the purpose of preventing the spread of an infectious or contagious disease or in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;

(h) for the purpose of preventing the unlawful entry of that person into Bermuda or for the purpose of effecting the expulsion, extradition or other lawful removal from Bermuda of that person or the taking of proceedings relating thereto."

40. The Conversion Argument is based on the premise that the Applicant's detention past his parole eligibility date is not as a result of his sentence at all but, rather, because the Executive intends to deport him. This argument is flawed because it ignores the fact that the sentencing process takes place in a legislative framework which contemplates the possibility (or not) of parole. Ms. Dill cited eminent persuasive authority which undermined this argument in clear terms, referring the Court to two passages in the House of Lords decision in *Regina (Giles)-v-Parole Board* [2004] 1 AC 1. That was a case where the applicant sought a declaration that his continued incarceration after becoming eligible for parole where his continued detention was not necessary to protect the public would be arbitrary, and in contravention of his rights under article 5(4) of the European Convention on Human Rights ("ECHR").

41. Section 5(1)(a) of the Constitution is clearly derived from Article 5(1)(a) of ECHR, but article 5(4) (the right to have the legality of one's detention speedily determined by "*a court*") has no corresponding provision in our own section 5. The same broad principles would seem to apply where the detention is based on a sentence imposed for a crime, namely that the sentence should be imposed by the Judiciary rather than determined by the Executive. The first passage in *Giles* which I was referred to was the following dicta of Lord Bingham (at 20-21), to which she supplied the emphasis provided below:

> "*10. That brings one back to consideration of the core rights which article 5(4), read with article 5(1), is framed to protect. <u>Its primary target is deprivation of liberty which is arbitrary, or directed or controlled by the executive.</u> In the present case there was nothing arbitrary about the sentence, which was announced and explained in open court and upheld by the Court of Appeal when refusing leave to appeal against sentence. Since the first*

offence involved what the sentencing judge described as 'a savage attack' and the appellant had threatened further violence against his first victim, the term imposed does not appear in any way excessive. The sentence left nothing to the executive, since the Parole Board, whose duty it is to consider release at the halfway stage of the sentence, is accepted to be a judicial body. Again, May LJ put the point succinctly in paragraph 19 of his judgment:

> *'Although the sentence is longer than it otherwise would have been because the sentencing judge is of the opinion that it is necessary to protect the public from serious harm from the offender, (i) the length of the sentence is, and is intended to be, determined by the judge at the time of sentence; (ii) it is not intended to be reviewed, other than on appeal; and (iii) in particular, it is not intended to confer on the executive the responsibility for determining when the public interest permits the prisoner's release."*'

42. In the second passage upon which Ms. Dill relied from the same case, again supplying her emphasis below, Lord Hope (at page 30) opined as follows:

> "*40. The important point that arises from these two decisions*[3] *for present purposes is that a distinction is drawn between detention for a period whose length is embodied in the sentence of the court on the one hand and the transfer of decisions about the prisoner's release or re-detention to the executive. The first requirement that must be satisfied is that according to article 5(1) the detention must be "lawful". That is to say, it must be in accordance with domestic law and not arbitrary. The review under article 5(4) must then be wide enough to bear on the conditions which are essential for a determination of this issue. Where the decision about the length of the period of detention is made by a court at the close of judicial proceedings, the requirements of article 5(1) are satisfied and the supervision required by article 5(4) is incorporated in the decision itself. That is the principle which was established in De Wilde, Ooms and Versyp. But where the responsibility for decisions about the length of the period of detention is passed by the court to the executive, the lawfulness of the detention requires a process which enables the basis for it to be reviewed judicially at reasonable intervals. This is because there is a risk that the link between continued detention and the original justification for it will be lost as conditions change with the passage of time. If this happens there is a risk that decisions which are taken by the executive will be arbitrary. That risk is absent where the length of the period of detention is fixed as part of its original decision by the court.* "

43. While both of these statements are made in the context of rejecting a different legal complaint, in my judgment it is an analogous complaint. Because Mr. Johnston's

[3] *Van Droogenbroeck-v-Belgium* (1982) 4 EHRR 443 and *E-v-Norway* (1990) 17 EHRR 30.

central thesis is that the Applicant's detention was 'converted' from a sentence fixed by the Court to detention the duration of which was determined by the Executive, once the Applicant passed the point where he was legally eligible for parole. This analysis is based on the same construction of the legislative scheme relating to parole which this court rejected in *Cashman* five years ago. The true legal position is that the Applicant (like any foreign national who does not have an unrestricted right to reside and work in Bermuda) when sentenced knew or ought to have known that:

(a) parole would only be available to him if section 14A arrangements were in place between Bermuda and his country of origin (Jamaica); and

(b) that his earliest date of release was the date when he had completed 2/3rds of the sentence imposed by the Court, based entirely on the sentencing process as read with section 10(1) of the Prison Act 1979.

44. Ms. Dill also referred the Court to the recent UK Supreme Court decision of *R (Whiston)-v-Secretary of State for Justice* [2014] 4 All ER 251, which approved the earlier House of Lords decision in *Giles*. *Whiston* added the further gloss that when a prisoner is released on parole and recalled by the authorities, he continues to serve the original sentence imposed by the Court, as he does when on conditional release. Again, the question then was a different one. Did article 5(4) require the recalled prisoner to have a court determine the legality of the post-recall period of detention. However, Ms. Dill aptly extracted a more subtle point from this case, namely that even a prisoner released on parole is still serving the sentence imposed by the Court. This undermined to the point of collapse the logical foundation for the Applicant's contention that the nature of his detention fundamentally changed when he became eligible for parole.

45. The Respondents' counsel also referred to local authority which supported the view that the sentencing court has no duty to take into account the likelihood of parole. While these judicial pronouncements are not responsive to the Applicant's section 12 (discrimination) complaints, they do support the conclusion that the mere inability of a prisoner to obtain parole does not make his sentence arbitrary or subject impermissible control by the Executive. If this is the legal position when a prisoner has a possibility of securing early release, it must apply with equal or even greater force when he does not have that uncertain prospect.

46. As Evans JA recently opined in *Caines-v-R* [2015] Bda LR 6[4]:

[4] Mr. Johnston referred the Court to a similar dictum by Scott Baker JA (as he then was) in *Simpson-v-The Queen* [2014] Bda LR 110 at paragraph 18.

"*3. As a general rule, the sentencing judge is not concerned with the fact that spent in custody by the prisoner will be significantly less than the period of the sentence, if the Parole Board orders his early release…By a kind of modern legal fiction, the sentence of imprisonment is deemed to continue until the end of its terms, notwithstanding that the offender is released from custody on license before the term is complete.*"

47. Accordingly, I find that the length of the Applicant's detention was neither arbitrary nor disconnected from the sentence imposed by the Court. This head of constitutional complaint fails.

Findings: the Suitability, Deportation and Fairness Arguments

The Suitability Argument

48. This complaint argues that depriving the Applicant of the ability to obtain parole violates his rights under section 5(1)(a) of the Constitution. Reliance is placed on *In re Corey* [2014] 1 AC 516 (UKSC). This argument presupposes that Parliament has afforded the prisoner an opportunity to obtain parole. As far as prisoners who lack the unrestricted right to reside and work in Bermuda are concerned, there is no positive legal right to obtain parole. No authority was cited for the far broader and more improbable proposition that a failure to make statutory provision for parole offended section 5(1) of the Constitution.

49. This head of constitutional complaint is summarily dismissed.

The Deportation Argument

50. It is contended that if the Court finds that the Applicant has been detained for deportation purposes, those purposes are not in process and the Applicant's rights under section 5(1)(h) have been infringed. As regards the detention period up to the date of the hearing to July 10, 2015, which was all that was addressed in evidence and in argument, I find that the sentence was the predominant reason for the Applicant's detention. As Ms. Dill pointed out, this argument is not supported by the evidence.

51. It is however arguable that since July 10, 2015, the Applicant's detention has primarily been with a view to the Executive deciding whether or not he ought to be deported. It does not follow that such detention would be any more arbitrary. This discrete issue was, to my mind, neither fully argued nor addressed in evidence. I would grant liberty to the Applicant to apply, if necessary, to fully argue this narrow legal and factual issue.

52. At this stage, I make no finding as to whether or not the post-hearing period of detention (i.e. the period after the Applicant's earliest complete release date of July 10, 2015) constitutes a contravention of his rights under section 5(1) of the Constitution. It is hoped that the Court's findings in relation to the 'Discrimination Argument' will make this unnecessary.

53. The pleaded complaint that the Applicant's constitutional rights were infringed by the removal of his section 27A of BIPA special status husband rights was not really developed in argument. He lost those rights by operation of law when he was convicted of a serious offence under the Misuse of Drugs Act 1973. For the avoidance of doubt this complaint is also summarily dismissed.

The Fairness Argument

54. Mr. Johnston summarises this argument in the Applicant's Skeleton Argument thus:

> "*58. The Fairness Argument is that the executive branch of government encroached upon the constitutional role of the judiciary, and therefore rendered Griffiths' continuing detention unconstitutional. It is submitted that the government did this in two, alternative, ways:*
>
> > *58.1 First, by denying Griffiths the ability to argue to the sentencing judge how Griffiths' nationality affected the proportionality of his sentence; and*
> >
> > *58.2 Second, by making a decision pursuant to section 27A, which was akin to an order made under section 7P of the 1907 Act, without first, applying similar procedural protections.*"

55. This is a collateral attack on the sentencing decision made on or about July 10, 2007. There is no evidence to support the bald assertion that "the government" prevented the Applicant from being able to address the issue of his nationality at the sentencing hearing. On the face of it the Applicant implicitly elected not to raise these issues and to hope for the best. It was or ought to have been obvious that the Applicant had either lost by operation of law or was at risk of losing by operation of law his special status husband rights. There is no evidence to suggest that he sought an adjournment to clarify whether or not he was at risk of deportation and was refused. Indeed, the Applicant filed an appeal against sentence and so had more than six months to consider on what grounds to attack the sentence imposed by the trial judge.

56. Unfairness is not a freestanding head of constitutional relief. It does constitute a freestanding basis for challenging the legality of administrative decision-making, a remedy which the Applicant elected not to pursue.

57. This limb of the Applicant's constitutional complaints, as formulated above as an attack on the fairness of the sentencing hearing and/or as a complaint which could have been pursued through judicial review, must be summarily refused on the grounds that the proviso to section 15 of the Constitution provides that this Court "*shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law*".

58. On the other hand, this Court cannot ignore the issue of fairness in its broader ambit altogether. It must be acknowledged that the Applicant's status would not necessarily have been crystal clear when he was sentenced in or about July 2007. It seems clear that the sentencing Court did not recommend deportation. There is no suggestion that the matter of deportation is customarily considered at all by the courts at the sentencing stage. The evidence in this case suggests that it is considered by the Executive at the end of the prisoner's sentence rather than at the beginning. Whether this approach (on the part of both the Executive and the Judiciary) is really satisfactory is an issue which cannot properly be determined in the course of the present proceedings at is collateral to the issues falling for determination. It also raises primarily policy considerations which are not suitable to be determined in the context of judicial decision-making.

59. It seems clear that the 4th Respondent did not communicate his view that that the Respondent's rights as a 'special status spouse' had lapsed until August 5, 2011 once the Applicant had applied for parole. As noted above, the technical legal position must be that the Applicant must be deemed to have known that his special status lapsed by operation of law. However, this view of the law was only formally clarified by this Court in *Davis and Davis-v-The Governor of Bermuda and the Minister for National Security* [2012] SC (Bda) 22 Civ (30 March 2012), and affirmed by the Court of Appeal in June 2012 in *Davis and Davis-v-The Governor of Bermuda and the Minister of National Security* [2012] Bda LR 40.

60. In my judgment it is in general terms unfair that (a) throughout the first third of the Applicant's sentence his Immigration position was unclear, and that (b) his deportation status remained unclear until the date of the hearing of the present Originating Summons, which happened to be his earliest release date. However these considerations would best fall to be taken into account as a dimension of the Applicant's strongest argument, the Discrimination Argument, to which full and careful attention must now be given.

Findings: has the application of the legislative scheme for parole with respect to the Applicant discriminated against him on the grounds of his national origin (the 'Discrimination Argument')?

The submissions

61. Mr. Johnston began his compelling submissions on discrimination by referring to the relevant provisions of section 12 of the Constitution adding the emphasis set out below:

> "*(1) Subject to the provisions of subsections (4), (5) and (8) of this section, no law shall make any provision which is discriminatory either of itself or in its effect.*
>
> *(2) Subject to the provisions of subsections (6), (8) and (9) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.*
>
> *(3) In this section, the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject, or are accorded privileges or advantages which are not accorded to persons of another such description.*
>
> *(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision—*
> *...*
>
> *(b) with respect to the entry into or exclusion from, or the employment, engaging in any business or profession, movement or residence within, Bermuda of persons who do not belong to Bermuda for the purposes of section II of this Constitution*
>
> *...*
>
> *(c) whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.*
>
> *... (6) Subsection (2) of this section shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in subsection (4) or (5) of this section.*
>
> *...*

(8) 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 whereby persons or any such description as is mentioned in subsection (3) or this section may be subjected to any restriction on the rights and freedoms guaranteed by section 7, 8, 9, 10 and 11 of this Constitution, being such a restriction as it authorised by section 7(2)(a), 8(5), 9(2), 10(2) or 11(2)(a), as the case may be."

62. He next submitted:

"*66. It is undeniable that the Bermudian parole regime discriminates against foreign nationals on the basis of their "place or origin." And it is equally undeniable that this discrimination is instigated by the executive branch of government. Immigration restrictions are the cause of concern. As such, what Lord Bingham says in R (Clift) v Home Secretary (at §35) is notable. At §38, Lord Bingham continued with this:*

'Whatever the position in the past, the differential treatment of determinate sentence prisoners liable to removal seems to me to be, now, an indefensible anomaly, for very much the same reasons as in the case of Mr Clift. The decision in question is not a political decision, appropriate to be made by a minister. It is no longer capable of rational justification.""

63. Finally and most incisively Mr Johnston, appreciating that differential treatment based on Immigration status was constitutionally permitted, submitted as follows:

"*68. It should be noted that section 12 of the Constitution does not simply demand that like persons be treated alike. It equally demands that persons who are sufficiently dissimilar should be treated differently. This position may be gleaned from DH v Czech Republic. The result of that is this: It may be that foreign nationals should be made subject to entirely different parole regime than Bermudians. For instance, a foreign national may be offered no parole, but release from incarceration at the halfway point (rather than at the two-thirds point as applies to Bermudians).*"

64. The last suggestion was a particularly astute one because it would subsequently find support in the BVI legislative scheme only placed before the Court by the Respondents' counsel by way of supplementary submissions. Ms. Dill however had no coherent response to the Discrimination Argument, save to make the uncontentious submission that section 12 permitted discrimination in favour of Bermudians in employment related matters.

What is prohibited by section 12 of the Constitution which is relevant to the Discrimination Argument

65. Section 12 prohibits discrimination on various specified grounds (including "place of origin") and in two main forms. The principal forms of discrimination are legislative discrimination and discrimination through the actions of public authorities:

    (a) **Legislative discrimination**: section 12(1) provides that "*no law shall make any provision which is discriminatory either of itself or in its effect.*" Save as is permitted by section 12 itself, legislation may not discriminate either directly or indirectly. Section 12(4) (b) exempts from the prohibition in subsection (1) laws "*with respect to the entry into or exclusion from, or the employment, engaging in any business or profession, movement or residence within, Bermuda of persons who do not belong to Bermuda for the purposes of section II of this Constitution*". So complaint cannot be made about the mere fact that parole is not available to persons who do not have a constitutional right to reside and work in Bermuda, as the Applicant pragmatically conceded. The only other potential exemption category is laws falling under subsection (4) (d), which the Respondents did not dare invoke:

> "*whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.";*

    (b) **Discrimination through the actions of public authorities**: this form of discrimination is closely connected with indirect discrimination through legislation. It seeks to prohibit public authorities from applying laws which are non-discriminatory on their face in a manner which has a discriminatory effect. Section 12(2) formulates the following prohibition: "*no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.*" The same potential exemptions which apply to discriminatory laws apply to discriminatory actions by public authorities. It is generally recognised that courts are public authorities and it cannot be doubted that all of the Respondents are public authorities when executing their statutory functions.

66. What is discrimination for the purposes of section 12? It means differential treatment (on grounds of e.g. place of origin) "*whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description*

are not made subject, or are accorded privileges or advantages which are not accorded to persons of another such description".

Has the Applicant been discriminated against in breach of his constitutional rights under section 12?

67. The Applicant's complaints can, against this background, be restated as follows:

    (a) it is conceded that making release on license a privilege or advantage only available to persons whom belong to Bermuda is constitutionally protected discrimination by virtue of section 12(4)(b);

    (b) the fact that persons who belong to Bermuda or persons who come from countries which are willing to accept their nationals on license are given the advantage of gaining their conditional release after serving 1/3rd of their sentence and the Applicant is not:

        (i)discriminates against him as a person of Jamaican origin; and

        (ii) is not a protected form of discrimination.

68. For the purposes of this analysis, it is obvious, it matters not that persons released on parole are still serving a sentence imposed by the Court. There is clearly differential treatment involving prisoners originating from Bermuda, persons originating from countries which accept prisoners released early conditionally (e.g. the UK) and persons who have no access to the privilege or advantage of any form of early release at all simply because:

    (a) like the Applicant, they come from a country (Jamaica) which does not in practice accept foreign nationals released early on license; and

    (b) the Executive has failed to take steps to create an alternative early release regime to mitigate the discriminatory consequences flowing from the unavailability to such nationals of a parole-based early release scheme.

69. No authority is required to confidently reach this conclusion in the present factual and legal matrix. However, the following *dicta* of Lord Bingham in *R (Clift)-v- Home Secretary* [2007] 1AC 484 at 494, to which Mr. Johnston referred in the course of argument, provide fortifying support:

    "*18. A number of grounds (economy and the need to relieve over-crowding in prisons) have doubtless been relied on when introducing pre-release schemes from determinate sentences such as those under consideration here. But one*

such consideration is recognition that neither the public interest nor the interest of the offender is well served by continuing to detain a prisoner until the end of his publicly pronounced sentence; that in some cases those interests will be best served by releasing the prisoner at the earlier, discretionary, stage; and that in those cases prisoners should regain their freedom (even if subject to restrictions) because there is judged to be no continuing interest in depriving them of it. I accordingly find that the right to seek early release, where domestic law provides for such a right, is clearly within the ambit of article 5, and differential treatment of one prisoner as compared with another, otherwise than on the merits of their respective cases, gives rise to a potential complaint under article 14

19. This is a conclusion I would unhesitatingly reach even if there were no Strasbourg authority on the point. But the Strasbourg institutions have consistently recognised the possibility of a claim under article 14, in relation to article 5, where a parole scheme is operated in an objectionably discriminatory manner." [Emphasis added]

70. The effect of the present legislative scheme as it is applied by the Respondents is blatantly discriminatory in contravention of section 12 (1) of the Constitution. Whether this discrimination also engages the prohibition on arbitrary detentions under section 5(1) and the fair hearing requirements of section 6 as well need not be decided. In the Bermudian constitutional context no need to consider the interaction between section 12 (discrimination) and under fundamental rights provisions such as section 5(liberty) arises. Article 14 of the ECHR, in contrast, prohibits discrimination in relation to the fundamental rights and freedoms protected by the Convention[5]. Section 12's prohibition on discrimination is a freestanding fundamental right.

71. For completeness I should briefly explain why it seems to me the Respondents would not have been able to rely upon the protection afforded by section 12 (4)(d) for differential treatment had they sought to do so. Exempted from the prohibition on discrimination are laws making provision:

"*…whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society."*

[5] Article 14 provides: *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*"

72. This provision appears designed to permit general legislation in the public interest which necessarily discriminates to some extent. For example:

    (a) legislation which recognises professional qualifications from some countries but not others;

    (b) legislation implementing United Nations sanctions in relation to transactions with persons and entities from designated countries;

    (c) reciprocal enforcement of judgment legislation;

    (d) legislation or policies implementing differential visa requirements;

    (e) health legislation or policies responding to outbreaks of infectious diseases in particular countries;

    (f) legislation implementing variety of treaties e.g. extradition and or tax information exchange agreements.

73. The sentencing and penal process, which engages multiple fundamental rights, primarily the right to liberty (section 5) and fair trial rights (section 6), is an area which demands heightened levels of scrutiny for fairness and equality of treatment. This is why even if the Bermudian parole scheme is not unconstitutional on its face for providing parole to some nationals and not others, it cannot be reasonably justifiable in a democratic society to have such stark differences of treatment as the Applicant has experienced, with no rational justification. As Baroness Hale observed in *R (Clift)-v- Home Secretary* [2007] 1AC 484 at 505:

    "*62. In this case, it is plain, and now accepted by the Secretary of State, that a different parole regime for foreigners who are liable to deportation from that applicable to citizens or others with the right to remain here, falls within the grounds proscribed by article 14 and thus (subject to the ambit issue) requires objective justification. The same would surely apply to a difference in treatment based on race, sex or the colour of one's hair. But a difference in treatment based on the seriousness of the offence would fall outside those grounds. The real reason for the distinction is not a personal characteristic of the offender but what the offender has done.*"

74. The present parole regime as applied to nationals who cannot access any form of release before they have served their full sentence (less one-third remission) is not a coherent or rational one: it is discrimination by default or by omission. It appears to

be the case that other countries Bermuda has close legal ties with have yet to devise and/or fully implement ideal or 'model' legislative solutions. But that is only a mitigating factor, not an answer to the Discrimination Argument.

75. The significance of the failure of the Executive to take meaningful steps to remove the causes of differential treatment in terms of its impact on the Applicant cannot be ignored. It is a notorious fact that prisoners place considerable importance on clarity surrounding their release dates. The sanctity of the duration of a prisoner's sentence being determined by reference to the sentence imposed by the Court is implicitly based in part on this consideration. Because of uncertainties surrounding the Applicant's special husband status and his eligibility for parole combined with the delay in making a decision on the deportation process, his ability to understand the effect of his sentence on the likely duration of his detention was undermined in the following respects:

    (a) his ineligibility for parole based on his Immigration status was only clarified after he had made an application having served a third of his 12 year sentence;

    (b) his earliest release date has been rendered uncertain as at the date of the standard release date (which happened to be the date of the hearing of the present application).

76. All of this has occurred because of his place of origin and has contravened his rights under section 12 of the Bermuda Constitution.

77. Apart from these additional uncertainties which are peculiar to him, and merely add insult to injury, he was in any event discriminated against to a material extent simply because as a Jamaican he had no prospect of early conditional release. It speaks volumes that the United Kingdom adopted an early release scheme for foreign prisoners as long ago as 2003, and that BVI has adopted a somewhat similar scheme as of 2009. These schemes may not produce parity of treatment in any way which can be mathematically verified, but they do achieve a rough and ready form of justice in that foreign nationals who cannot access parole are given some alternative privilege instead. They demonstrate that practical steps can be taken to mitigate the blatantly discriminatory effects on periods of actual detention which flow from the admitted difficulties in affording all prisoners equal access to parole.

78. Even if I had been required to find that section 12(4)(d) potentially applied to protect the impugned differential treatment from constitutional condemnation, it could not in my judgment have been respectably argued that the way in which the present Applicant has been treated is reasonably justifiable in a democratic society. Further and in any event, no evidence was adduced by the Respondents which demonstrated the existence of any objective justification for the discriminatory treatment.

Conclusion

79. The provisions of the Prisons Act 1979 relating to parole as applied to the Applicant as a Jamaican national who presently has no opportunity to apply for any form of early release discriminate against him on the grounds of his place of origin in contravention of his rights under section 12 of the Bermuda Constitution. The Applicant's contention that it is no longer open to the 4th Respondent to recommend his deportation because the circumstances in which he lost of his special spouse status was unconstitutional is summarily rejected.

80. The Applicant's complaints about a contravention of his rights under section 5 of the Constitution are also dismissed as regards to the period up to the date of the hearing, but are otherwise adjourned generally with liberty to restore. I will hear counsel on a date to be fixed by the Registrar in relation to the Applicant's prayer for relief and costs, if so required.

Dated this 13th day of August, 2015 _____
IAN R.C. KAWALEY CJ