

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2022/0015

BETWEEN:

[1] MINISTER OF NATIONAL SECURITY OF SAINT CHRISTOPHER AND NEVIS

[2] ATTORNEY GENERAL OF SAINT CHRISTOPHER AND NEVIS

Appellants

and

[1] KHALED AWAD

[2] WALID AWAD

Respondents

Before:

The Hon. Mde. Gertel Thom

The Hon. Mde. Vicki Ann Ellis

The Hon. Mde. Esco Henry

Justice of Appeal

Justice of Appeal

Justice of Appeal [Ag.]

Appearances:

Ms. Simone Bullen-Thompson, Solicitor General for the Appellants

Mr. Tim Prudhoe for the Respondents

2023: September 22.

Civil appeal – Disabling/Deactivation of passports – Section 3(2) of the Passports and Travel Documents Act Cap 6.04 – Whether the learned judge erred in finding that the decision of the 1st appellant to disable the passports of the respondents was ultra vires the Passports and Travel Documents Act – Statutory interpretation – Procedural fairness – Right to reasons – Right to be heard – Whether the learned judge erred in finding that the 1st appellant was in breach of procedural fairness in its decision to disable the passports of the respondents – Whether the learned judge erred in finding that the respondents were entitled to compensation in the form of damages for the unlawful deprivation of their passport – Whether the learned judge erred in finding the appellants liable to compensate the respondents for consequential loss in the form of special damages for loss of business – Whether the appellants were in breach of section 5 of the Constitution of St. Kitts and Nevis

REASONS FOR DECISION

- [1] **THOM JA:** On 19th September 2023, the Court heard the appeal of The Minister of National Security of Saint Christopher and Nevis and The Attorney General of Saint Christopher and Nevis (“the appellants”) against the judgment of the learned judge dated 17th November 2022 as well as the counter-appeal brought by Khaled Awad and Walid Awad (“the respondents”). The Court was of the unanimous view that the appeal should be allowed, the orders of the learned judge as set out in paragraph 80 of the judgment be set aside, save and except sub-paragraph 80(vi) and that the counter-appeal filed by the respondents be dismissed. The Court also promised to provide, at a later date, written reasons for its decision. We now do so.

Background

- [2] The respondents are citizens of Saint Christopher and Nevis (or St. Kitts and Nevis) having obtained citizenship by virtue of the **Saint Christopher and Nevis Citizenship Act**.¹ The 1st respondent Khalid Awad was issued a St. Kitts and Nevis passport on 11th August 2014 with the date of expiry being 10th August 2024 and the 2nd respondent Walid Awad was issued a St. Kitts and Nevis passport on 3rd November 2015 with the date of expiry being 2nd November 2025. These passports shall be hereinafter referred to as “the Original Passports”.
- [3] The Government of St. Kitts and Nevis received information via diplomatic channels that the respondents had by virtue of United Arab Emirates (“UAE”) Cabinet Ministerial Resolution 83 of 2021, been placed on a “terror list”. This information had also been reported in a newspaper published in the UAE.² On 14th September 2021, the Embassy of St. Kitts and Nevis in the UAE (the “Embassy”), wrote to the UAE’s Ministry of Foreign Affairs and International Cooperation that it had become aware that the respondents were placed on a “terror list” and requested that the UAE share

¹ Cap. 1.05, Revised Laws of Saint Christopher and Nevis 2017.

² Affidavit of Osmond Petty, page 242, para 10 of Hearing Bundle Volume 1.

pertinent information on the respondents to facilitate St. Kitts and Nevis' investigation of the matter.³

- [4] The 1st appellant, acting on the initial information received, issued a press release dated 14th September 2021 on 15th September 2021 ("Press Release") stating that it had taken the decision to "disable the passports" of the respondents on account of them being named on a terror watch list in the UAE.
- [5] Subsequent to the 1st appellant's disabling of the respondents' passports, and publishing the Press Release, counsel for the respondents, Mr. Tim Prudhoe, wrote letters dated 17th October 2021, 28th October 2021 and 4th November 2021 to the 1st appellant, indicating the respondents' willingness and availability to "provide a detailed explanation with reference to supporting documentation as to why it was proper and appropriate to reject the contents of the [terror] list as it related to [the respondents]." ⁴ The letters also requested that the respondents' passports be reinstated. However, the respondents had by November 2021 received no response from the 1st appellant and commenced judicial review proceedings on 28th December 2021 having obtained leave to do so on 26th November 2021.
- [6] On 29th December 2021, the Embassy received information from the UAE's Ministry of Foreign Affairs and International Cooperation that the respondents were accused of money laundering and terrorism financing through their company and that an absentia ruling had been rendered against them which imposed a sentence of 10 years imprisonment, deportation from the UAE upon their release from prison and the payment of judicial fees and fines.
- [7] The 1st appellant having received this information communicated to the respondents by letter dated 19th January 2022 that the "deactivation" of the respondents' passports meant that the respondents were unable to use the Original Passports to travel internationally. The 1st appellant also communicated

³ Hearing Bundle Volume 1 at page 251.

⁴ Hearing Bundle Volume 1 at page 93.

that it had sought and obtained further information from the UAE that the respondents were accused of money laundering and terrorism financing and that the Government of St. Kitts and Nevis as a responsible member of the international community had a responsibility to prevent St. Kitts and Nevis passports from being used by individuals labelled as terrorists.

- [8] On 25th January 2022, counsel for the respondents in reply, requested that the 1st appellant inter alia confirm the legal basis for the “deactivation” of the Original Passports and informed the 1st appellant that the 2nd respondent was seriously ill and as a result of the “deactivation” of his passport stranded in Turkey and unable to travel to the United Kingdom to seek urgent medical treatment.
- [9] On 8th February 2022, the 2nd appellant wrote to counsel for the respondents stating that the 1st appellant agreed to afford the 2nd respondent a passport on compassionate grounds for a period of 2 years to be able to travel to the UK to seek medical attention. The 2nd respondent’s new passport was issued on 7th February 2022 with its expiry date being 6th February 2024. The 1st respondent was also issued a passport on 17th February 2022, with an expiry date of 16th February 2023. These passports are hereinafter referred to as “the New Passports”.

The Court Below

- [10] The respondents challenged the 1st appellant’s decision to disable/deactivate their passports on the grounds, inter alia, that there was no power under the **Passports and Travel Documents Act**⁵ to suspend a passport, that the “disabling” of their passports was a restriction on their right to freedom of movement and unlawful interference with their property inconsistent with sections 8 and 14 of the Constitution, and that contrary to the principles of natural justice the decision of the 1st appellant was taken without notice or giving of reasons and without a hearing.

⁵ Cap 6.04, Revised Laws of Saint Christopher and Nevis 2017.

[11] On 17th November 2022, the learned judge rendered her decision finding inter alia that the 1st appellant had no power to “disable” or “deactivate” the passports of the respondents and that the appellants’ failure to formally communicate reasons to the claimants at the time the decision was made or shortly thereafter was a breach of the rules of natural justice and procedural fairness, notwithstanding that the purported reason for the decision made by the 1st appellant stated in the Press Release. She dismissed the claims in relation to sections 4 and 8 of the Constitution and made the following orders which are outlined in paragraph 80 of her judgment:

- (i) A declaration is granted that the decision of the 1st appellant to disable the passports of the respondents was ultra vires the Passports and Travel Documents Act, and is therefore null, void, and of no legal effect.
- (ii) a declaration is granted that the decision of the 1st appellant to disable/cancel/withdraw the passports of the respondents without providing an opportunity to them to make representations with respect to the allegations that informed the decision of the 1st appellant is in breach of the principles of natural justice as it lacked procedural fairness and is accordingly unlawful.
- (iii) A declaration that any and all actions taken pursuant to the decision of the 1st appellant to disable/cancel/withdraw the respondents’ passports are null, void and of no legal effect.
- (iv) An order of certiorari quashing the decision to disable/cancel/withdraw the respondents’ passports is granted.
- (v) The respondents are each awarded damages as compensation for the loss of the use of their passports and consequential loss of business as a result of the action of the 1st appellant in such sums as may be assessed.

- (vi) Costs is awarded to the respondents to be assessed if not agreed within 21 days of today's date.

Grounds of Appeal

[12] Dissatisfied with the judgment, the appellants appealed relying on 4 grounds of appeal. These grounds can be condensed into four issues, namely: (i) whether the learned judge erred in finding that the decision of the 1st appellant to disable the passports of the respondents was ultra vires the **Passports and Travel Documents Act**; (ii) whether the learned judge erred in finding that the 1st appellant was in breach of procedural fairness in its decision to disable the passports of the respondents; (iii) whether the learned judge erred in finding that the respondents were entitled to compensation in the form of damages for the unlawful deprivation of their passport; and (iv) whether the learned judge erred in finding the appellants liable to compensate the respondents for consequential loss in the form of special damages for loss of business.

[13] The respondents also filed a counter notice of appeal, seeking the following orders in addition to the orders at paragraph 80 of the judgment: (i) a declaration that the disabling of their Original Passports on 14th September, 2021, was in breach of section 5 of the Constitution; (ii) that the 1st appellant's continuing refusal to give effect to the order in terms of working passports for both of the respondents gives rise to exemplary and/or aggravated damages; and that (iii) the 1st appellant shall issue a passport forthwith to each of the respondents.

Issue 1 - Whether the learned judge erred in finding that the decision of the 1st appellant to disable the passports of the respondents was ultra vires the Passports and Travel Documents Act.

[14] On this issue the learned judge in the court below found at paragraph 36 of her judgment as follows: "The Passports and Travel Documents Act empowers the Minister to cancel an issued passport. However, it provides no authority to disable or deactivate a passport. This is not the language

used in the Act.” The learned judge stated at paragraph 40 of her judgment that:

“I am not persuaded that the terms “deactivate”, “withdraw” or “cancel” are synonymous and therefore can be used interchangeably when referring to a decision that was made in relation to the Original Passports. In my view, if the Minister is purporting to act under power given to him by the Passport and Travel Documents Act, then he must act within the limits of the enabling legislation. There is no evidence before me from the 1st defendant, as the decision maker, that he made a mistake when he used the term “disable” instead of “cancel”. There should be no need to ask, the question as to what deactivate/disabling means and whether it is synonymous with the terms cancelling or withdrawing which are the terms specified in the enabling legislation. I find that the Minister had no power to disable or deactivate the passports of the claimants.”

Appellants’ Submissions

- [15] Counsel for the appellants, the Solicitor General, Mrs. Bullen-Thompson submitted that the learned judge erred in finding that the decision of the 1st appellant to “disable” the passports of the respondents was ultra vires the **Passports and Travel Documents Act**, and is therefore null, void, and of no legal effect, in so far as she misinterpreted the provisions of the **Passport and Travel Documents Act** and also failed to take proper and/or sufficient account of the evidence of Permanent Secretary, Osmond Petty as to the meaning and effect of the “disabling/deactivation” of the passports.
- [16] The learned Solicitor General in advancing her arguments, acknowledged that sections 3(2) and (3) of the **Passports and Travel Documents Act** empowers the 1st appellant at any time to “cancel” or “withdraw” a passport and that such a passport shall become void. She further acknowledged that the **Passport and Travel Documents Act** does not define the meaning of the words “cancel” or “withdraw” but only states the effect of these actions, that is, the passport becomes void. Mrs. Bullen-Thompson also acknowledged and accepted that the 1st appellant did not use the words “cancel” or withdraw”, the language used in the **Passports and Travel**

Documents Act, in the Press Release and/or communications to the respondents, instead using the words “disable” and “deactivate”. However, she argued that the use of the words “disable” and “deactivate” in reference to the decision by the 1st appellant in relation to the respondents’ passports was immaterial. The Solicitor General submitted that when one looks at the plain and ordinary meaning of the words “disable”, and “deactivate”, and “withdraw” and “cancel” as used in the **Passports and Travel Documents Act**, they convey that what is intended is, that the passports can no longer be used for travel, the passports are void, and that new passports may be issued at a later date to facilitate travel. The Solicitor General stated that this was particularly evidenced when the respondents were issued the New Passports following the disabling of the Original Passports.

- [17] The Solicitor General referred this Court to the affidavits of Permanent Secretary Osmond Petty where he stated that deactivation of a passport does not necessarily mean that the person is no longer eligible to hold a passport, as the 1st appellant may, after consideration of the matter, issue another passport to the person and that when a passport is deactivated efforts are made through appropriate diplomatic channels to ascertain more information in relation to the nature of the allegations and/or charges or conviction against the citizen and no action has been taken to disable their citizenship or deprive them of their citizenship. Counsel for the appellants argued that had the learned judge placed sufficient weight on this evidence, looking not only at the nature of the language used, but also the nature and effect of the implementation of the decision of the 1st appellant, it is apparent that the decision of the 1st appellant fell squarely within the power afforded to it under section 3 of the **Passports and Travel Documents Act**. Therefore, the decision of the 1st appellant was not ultra vires the **Passport and Travel Documents Act** and this ground of appeal should be allowed. Learned Counsel relied on the case of **Elmoalis Ltd. v Attorney General of Anguilla**.⁶

⁶ AXAHC VAP2019/0002 (delivered 21st May 2021, unreported).

Respondents' Submissions

- [18] Counsel for the respondents Mr. Prudhoe, submitted that the learned judge was correct in her finding that the 1st appellant acted ultra vires the **Passports and Travel Documents Act** in its decision to “disable/deactivate” the Original Passports. He submitted that her findings were well-founded, and that there was no basis for the appellate court to interfere with the findings of the court below.
- [19] Mr. Prudhoe argued in his oral submissions that the appellants’ attempt to challenge the judge’s decision by relying on dictionary definitions of the terms “disable” and “deactivation” in an effort to equate them with “withdraw” and “cancel” proved futile, particularly given the absence of any substantive evidence from the 1st appellant to this effect. He argued that while there is evidence of the Permanent Secretary Osmond Petty this evidence was of lesser value as Mr. Petty was not the decision maker and he could only attempt to construe and reinterpret the words “disable” and “deactivate” as falling within section 3(2) of the **Passports and Travel Documents Act**. Mr. Prudhoe argued that this was not sufficient and that the evidence of the Minister of National Security, the person who made the decision was what was required.
- [20] Mr. Prudhoe also submitted that when one looks at the language used, if one was to take the view that the Court is dealing with solely a question of law and not one of mixed law and fact, there is nothing to support the argument that “disable” and “deactivate” as used by the 1st appellant in the Press Release and in its communications to the respondents, fits within the powers under section 3(2) of the **Passports and Travel Documents Act**. The decision by the 1st appellant was therefore ultra vires and consequently, the decision of the learned judge, should not be interfered with.

Discussion

- [21] To determine whether a public authority acted ultra vires the power accorded to it, the court is required to construe the content and scope of the instrument/legislation

conferring the power upon the public authority. In “deactivating/disabling” the passports the Minister purported to exercise the power granted to him pursuant to section 3 of the **Passports and Travel Documents Act**.

[22] Section 3 of the **Passports and Travel Documents Act** provides:

“3. (1) The Minister may, in his or her discretion, issue passports in Saint Christopher and Nevis to citizens of Saint Christopher and Nevis.

(2) **Passports shall remain the property of the government and may be cancelled or withdrawn at any time by the Minister.**

(3) A passport so cancelled or withdrawn shall become void.

(4) The Minister may in his or her discretion, renew passports and grant visas on travel documents requiring visas to Saint Christopher and Nevis.

(5) Any renewal of a passport issued, or any visa granted pursuant to subsection (4) may be cancelled by the Minister.

(6) A cancellation of any renewal of a passport issued or any visa granted shall render the renewal or visa void.” (emphasis added)

[23] Section 3(2) of the **Passports and Travel Documents Act** empowers the Minister, in this case the 1st appellant to cancel or withdraw a Saint Kitts and Nevis passport and upon doing so the cancelled or withdrawn passport is to be considered void. As submitted by counsel for the appellant there is no definition given or ascribed to the words “cancelled” or “withdrawn” within the Act itself. As a result of the Act’s silence on these definitions, the Court must engage in an exercise of statutory interpretation.

[24] The United Kingdom Supreme Court in **UBER BV and Others v Aslam and others**⁷ stated the modern approach to statutory interpretation as follows:

“The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose. In *UBS AG v Revenue and Customs Comrs. Deutsche Bank Group Services (UK) Ltd v Revenue and Customs Comrs* (2016) UKSC 13, ...Lord Reed (with whom the other Justices of the Supreme Court agreed) explained how this approach requires the facts to be analyzed in the light of the statutory provision being applied so that if for example, a fact is of no relevance to

⁷ [2021] 4AER 209.

the application of the statute construed in the light of its purpose, it can be disregarded, Lord Reed cited the pithy statement of Ribeiro PJ in *Collector of Stamps Revenue v Arrowtown Assets Ltd*[2003] HKCFA 46,...: The ultimate question is whether the relevant statutory provisions, construed purposively were intended to apply to the transaction viewed realistically”

[25] Section 3 in effect outlines the powers of the Minister in relation to the issue, renewal and withdrawal of passports to citizens of St. Kitts and Nevis. Section 3 gives the Minister a discretion to issue a passport to citizens and to renew such passports. All passports so issued remain- the property of the Government of St. Kitts and Nevis and the Minister is empowered to cancel or withdraw the passport at any time. Where a passport is cancelled or withdrawn the passport becomes void.

[26] In section 3 the words “cancel” and “withdraw” are used interchangeably, with the effect being the same, that the passports became void and cannot be used for travel or for any other purpose. There is no dispute between the parties that the effect of the deactivation/disabling of the respondents’ passports was that the respondents could no longer use the passports to travel to another country. The effect of withdraw or cancel is the same as the effect of deactivate or disable. The Permanent Secretary Mr. Osmond Petty’s affidavit evidence that the passports having been deactivated/disabled meant that the respondents could no longer use the passport was not contradicted. Indeed, the respondents were granted new passports for a limited period to facilitate travel to the United Kingdom. Mr. Prudhoe’s contention is that the evidence should have come from the Minister. The evidence having come from Mr. Petty was of lesser probative value. This submission is unmeritorious. Permanent Secretaries are appointed in accordance with the Constitution. Section 61 of the Constitution of St. Kitts and Nevis specifically empowers Permanent Secretaries to exercise general direction and control over the Ministry. Barring any significant contradiction, a Permanent Secretary’s evidence in relation to the affairs of the Ministry would be very persuasive.

[27] The deactivation/disabling had the same effect as if the passports were cancelled or withdrawn. The passports became void. The effect of the Minister's decision was to make the passports issued to the respondents void. The effect of the passports being "disabled/deactivated" meant that the passport could not be used for the purpose of travel or any other purpose. In our view that was a power which the Minister had pursuant to section 3. He could cause a passport that was issued to become void. The fact that in doing so the Minister did not state that the passport was "cancelled" or "withdrawn" is of no moment. A similar approach was adopted by the English Court of Appeal in **Regina (XH) v Secretary of State for the Home Department**⁸ where the letter of the Secretary of State to XH stated that his passport was "cancelled" instead of "withdrawn" as stated in the Ministerial Statement which outlines the policy for the grant and withdrawal of passports, the Court stated: "Withdrawal of a passport as mentioned in the Ministerial Statement is the same as cancellation of a passport which is the expression used in the letter from the Secretary of State to XH dated 29 April 2014 and 3 May 2016..."

[28] In our view, the learned judge applied too narrow an interpretation to section 3(2) in finding that deactivating/disabling was not synonymous with "cancel" or "withdraw" and therefore the Minister acted ultra vires the **Passports and Travel Documents Act**. In so doing the learned judge erred.

Issue 2 - Whether the learned judge erred in finding that the 1st appellant was in breach of procedural fairness in its decision to disable the passports of the respondents.

[29] The Learned judge relying on the decision of this Court in **The Attorney-General of Grenada v Muhammed Ehsan**,⁹ stated the applicable principle as follows:

"...quite apart from the constitutional requirements, basic procedural fairness requires that a person be heard before his or her rights can be impacted. The affected person must be given a fair opportunity

⁸ (2018) QB 355.

⁹ GDAHCVAP2019/0020 (27th November 2020, unreported) at para 61.

not only to be told of the reasons for the decisions but to correct or contradict them. There are obvious exceptions which are countenanced by the law but these must be very rare.”

[30] Having so stated, the learned judge made the following finding at paragraph 64:

“To my mind the failure to formally communicate reasons to the claimants at the time the decision was made or shortly thereafter is a breach of the rules of natural justice and procedural fairness, notwithstanding that the purported reason for the decision made by the 1st defendant was evident from the issue of the Press Release. The Press Release did not provide a context or explanation. Even if it can be said that the claimants were aware that they had legal issues in the UAE and therefore have assumed that those must have formed the basis of the decision, the 1st defendant was still required to formally provide them with the reasons and equally important, an opportunity to be heard.”

Appellants’ Submissions

[31] The learned Solicitor General submitted that the learned judge erred in finding that the decision of the 1st appellant to disable the Original Passports was made in breach of natural justice as it lacked procedural fairness.

[32] The Solicitor General submitted that the facts of this case raise issues that concern national security, the security of St. Kitts and Nevis’ international partners, international comity and the public interest. She submitted that the Government of St. Kitts and Nevis was obligated to act to prevent the passport from being used by individuals, labeled by terrorists by a friendly nation until such time as the underlying facts and circumstances are made clear and it was on this basis of national security, that procedural fairness was displaced. Learned counsel drew the Court’s attention to **The Attorney General of Grenada v Muhammed Ehsan**¹⁰ a judgment of this Court which accepted, Lord Diplock’s dicta in **Council of Civil Service Unions and others v Minister for the Civil Service**,¹¹ which stated that national security requirements are recognised as bases on which procedural fairness may be displaced.

¹⁰ GDAHCVAP2019/0020 (delivered 27th November 2020, unreported).

¹¹ [1984] 3 All ER 935.

[33] The Solicitor General argued that the right to be heard is not an absolute right that must be made available in all circumstances and that the circumstances in this case, where the 1st appellant had to act immediately upon the receipt of information that the respondents were placed on a terror list in the UAE, an issue of national security arose and it necessitated that the right to be heard had to be displaced. The Solicitor General also argued that the conventional approach is that there is no general duty to give reasons. However, the law recognises that in some cases fairness requires that the person affected by a decision should be provided with reasons for the decision. In this case, the 1st appellant did provide the respondents with reasons for its decision to disable/deactivate the Original Passports. These reasons the learned Solicitor General submitted were contained in the Press Release which stated that the Original Passports were disabled/deactivated as a result of the respondents being listed on a terror list in the UAE. While the learned Solicitor General accepted that no further reasons were given to the respondents for the 1st appellant's decision until January 2022, she submitted the evidence shows that this was as a result of the 1st appellant awaiting a response from the UAE in relation to the circumstances resulting in the respondents being listed on the terror list. These further details being the proceedings which resulted in the respondents' convictions in the UAE were then communicated to the respondents who were not ignorant of the proceedings in the UAE against them.

Respondents' Submissions

[34] Counsel for the respondents also acknowledged that for national security concerns to justify the cancellation of passports there must be a genuine, present and sufficiently serious threat to a vital national interest. The mere invocation of national security by the appellant does not absolve the need for procedural fairness in decision-making.

[35] Mr. Prudhoe further argued that the lack of evidence supporting the assertion of a national security threat becomes glaring when considering that the decision to cancel passports was made without proper communication until January 2021. The

absence of a valid basis in law, undermined the appellants' position and the cases upon which the appellants relied were not applicable, as those cases typically involved extreme situations where the level of risk is both undisputed and obvious, a far cry from the circumstances at hand.

Discussion

[36] The submissions are centered on whether sufficient reasons were given to the respondents before the passports were deactivated/disabled and whether the respondents should have been given an opportunity to make representations before their passports were deactivated/disabled.

[37] There are numerous cases which highlight that national security can displace procedural fairness. In **Council of Civil Service Unions and others v Minister for the Civil Service (CCSU)**,¹² Lord Diplock stated the following:

“Although where the government sought to rely on reasons of national security to justify a decision or action the courts would not accept a mere assertion to that effect but would require evidence that the decision or action was taken for reasons of national security, the question whether the decision or action was in fact necessitated by the requirements of national security was non-justiciable since the executive was the sole judge of what national security required and alone had access to the information that enabled the judgment to be made as to what was required.”

[38] Lord Diplock also stated:

“The decision on whether the requirements of national security outweigh the duty of fairness in any particular case is for the government and not for the courts; the government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security.”¹³

[39] The same approach has been adopted in cases such as **R (XH) v Secretary of State of the Home Department; and Secretary of State v Rehman** that the court will generally accept the opinion of the State as to what national security

¹² [1984] 3 All ER 935.

¹³ Ibid at 944.

requires. In **R (XH) v Secretary of State** Lord Hoffman opined: “The question of whether something is in the interest of national security is not a question of law. It is a matter of judgment and policy. Whether something is or is not in the interest of national security are not a matter for judicial decision. They are entrusted to the executive.”

[40] National security interests are not only limited to the particular State. As a consequence of globalisation, national security can extend to the international community at large¹⁴ due to international law obligations and duties. In this case, St. Kitts and Nevis is a country which actively participates in the international community and is a signatory to treaties that touch and concern national security such as the **International Convention for the Suppression of the Financing of Terrorism**.¹⁵ As such its national security obligations could extend beyond its borders.

[41] The evidence before the court below and before this Court is that the 1st appellant through diplomatic channels received information that the respondents were on a terror list in the UAE. Acting on this information, the 1st appellant then made the decision on 14th September 2021 to “disable” the passports of the respondents and a “Press Release” was issued stating:

“By: Ministry of National Security, Press Release 14th September 2021 the Ministry of National security of St Kitts and Nevis has taken action to disable the passports of two (2) citizens, KHALID AWAD and WALID AWAD on account of news report that the government of the United Arab Emirates has named them on a recent terrorist watch list. The passport were issued in 2014 and 2015.

Meanwhile our Ministry of Finance and Foreign Affairs is actively engaging the government of the United Arab Emirates to ascertain the details relating to the inclusion of these two persons on the watch list. These details will inform further action by the Government of Saint Kitts and Nevis.

St Kitts and Nevis continues to be fully committed in its support of all efforts to eradicate terrorist activities in all its forms globally. As a responsible

¹⁴ *Secretary of State v Rehman* [2002] 1 All ER 122.

¹⁵ Adopted by Resolution 54/109 of 9 December 1999.

member of the international community, Saint Kitts and Nevis will continue to cooperate with every country and entity to suppress terrorist activities. The Government of the United Arab Emirates can be assured of the fullest cooperation of the Government of Saint Kitts and Nevis.”

[42] It is not in dispute that it is in the interest of national security to disrupt the ability of those engaging in terrorism related activity or serious or organised criminal activity to travel. The dispute centers on whether the respondents should have been given a hearing before the passports were deactivated/disabled.

[43] In **Regina (XH) v Secretary of State for the Home Department** the court addressed similar arguments as submitted by the respondents and stated as follows:

“[114]. A similar argument was rejected by the Court of Appeal in *ex parte Everett* - see O'Connor LJ at p818C-E (see also p819E-F): But the judge came to the conclusion that the fair application of the policy required that if a passport was refused because a warrant was outstanding against the applicant, inquiry had to be made of the applicant before refusing a passport, as to whether he had anything to say. In my judgment the judge fell into error in concluding that that was required for the fair exercise of his discretion. It seems to me that the Secretary of State, in the fair exercise of his discretion, was entitled to refuse the passport but to give his reason for so doing, and the fair giving of the reason, if the reason be that there is a warrant for the applicant's arrest outstanding, was to tell him when the warrant was issued and what offence was charged. Once he has done that he has all but discharged his duty, but he should, when notifying the applicant that that was the reason for refusing the passport, tell him that if there were any exceptional grounds which might call for the issue of a passport, he would consider them.

[115] Further, there are obvious concerns in a national security context that the exercise of the Royal Prerogative to cancel or withdraw a passport could be undermined by the provision of advance warning of the potential exercise of the power. Such concerns militate strongly against the existence of a general duty to afford an opportunity to make representations prior to the exercise of the Royal Prerogative.” (emphasis added)

[44] While the right to be heard is normally enjoyed, in these circumstances where there are obvious concerns for national security such as where a person is placed on a terror watch list by another member of the international community, the provision

of advance warning to the respondents that the passports would be disabled could have undermined the State's exercise of power. In the interest of national security, such concerns militate strongly against the general duty to afford an opportunity to make representations prior to the exercise of the power by the Minister.

- [45] In relation to the right to reasons, we are of the view that the 1st appellant gave reasons for its decision, those reasons being contained in the Press Release dated 14th September 2021 and issued on 15th September 2021, and the 1st appellant's letter to the respondents on 19th January 2022. While the Court notes that the 19th January 2022 letter was issued some four months after the Press Release, there is evidence that the Embassy promptly sought additional information from the UAE on 14th September 2021 and that this additional information was received on 29th December 2021. While this information may not have been communicated to the respondents immediately, the delay was not inordinate and the respondents were well aware of their conviction. Considering the totality of the circumstances, we are of the view that the 1st appellant did not breach the respondents' right to procedural fairness. Accordingly, the learned judge erred in her determination of this issue.

Issues 3 and 4

Damages

- [46] Both counsel for the appellants and the respondents provided fulsome and helpful written and oral submissions on issues 3 and 4 which have all been considered by the Court. The Court having found that the 1st appellant did not act ultra vires, but rather within the powers conferred on him under section 3(2) of the **Passports Act** and that the 1st appellant had not breached the respondents' right to procedural fairness, consequently finds that the respondents were not entitled to compensation in the form of damages for deprivation of the use of their passports and consequential loss in the form of special damages for loss of business. The learned judge also erred in her findings on these issues.

Counter Appeal – Breach of Section 5 of the Constitution, Enforcement of the Orders of the Court Below and Damages

Section 5 of the Constitution

- [47] The respondents contended that the appellants acted in breach of section 5 of the Constitution in deactivating/disabling the passports. The appellants submitted in response that no claim was made in relation to section 5 in the court below, rather the claim was in relation to breach of sections 8 and 14 of the Constitution and should therefore be dismissed in view of this court's decision in **David Brandt v Director of Public Prosecutions**¹⁶ where this Court stated:

” The proper place for the appellant to seek redress for these alleged breaches of the Constitution is in the High Court...The recent Privy Council decision in *Hunte and Khan v The State* also settled the point that this Court does not have original jurisdiction to hear applications for breaches of the Constitution.”

- [48] We agree with the submission of the learned Solicitor General. No claim was made in relation to section 5 of the Constitution in the Court below. The learned judge dismissed the claims in relation to sections 8 and 14 and there was no counter appeal in relation to that aspect of her decision.

Damages and Enforcement

- [49] The respondents also sought exemplary and/or aggravated damages for the appellants' failure to give effect to paragraph 80(iv) of the judgment and for a passport to be issued to each respondent. In view of our decision that the appeal be allowed and the orders of the learned judge be set aside save for paragraph 80(vi), this ground falls away.

Disposition

- [50] The disposition of this case is as follows:
- i. The appeal is allowed.

¹⁶ MNIMCRAP2017/0001 (delivered 6th November 2017, unreported) at para 19.

- ii. The orders of the learned judge as set out in paragraph 80 of the judgment are set aside, save and except sub-paragraph 80(vi).
- iii. There is no order as to costs.
- iv. The counter-notice of appeal is dismissed with no order as to costs.

I concur.
Vicki Ann Ellis
Justice of Appeal

I concur.
Esco Henry
Justice of Appeal [Ag.]

By the Court

Deputy Chief Registrar