

**IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2022/0347

BETWEEN:

[1] **NICOLE SANGSTER**
[2] **LEVITICIOUS ROBERT GRANT (a minor)**
Represented by 1st Applicant

Applicants

-and-

[1] **THE CHIEF IMMIGRATION OFFICER**
[2] **THE ATTORNEY GENERAL**

Respondents

Appearances:

Mr. Wendel Alexander for the Applicant

Ms. Rose-Anne Kim for the Respondents

2023: January 24;
March 1.

JUDGMENT

[1] **BYER J.:** By Fixed date claim form (FDCF) filed the 12th September 2022, the applicants sought the following relief:

- (1) A declaration that the Applicant's prevention and or attempted prevention of her right to family life by the first Respondent is unconstitutional and or unlawful, null and void;
- (2) A declaration that the first Respondent breached sections 3, 5 and 8 of the Antigua and Barbuda Constitutional Order, Cap 23;

- (3) A declaration that to deny the Applicant's right to be heard was in breach of natural justice and unlawful, null and void.
- (4) A declaration that in light of all that has happened, the first Respondent acted unreasonably, unfairly and without proper regard to the personal circumstances of the Applicant case.
- (5) A declaration that the first Respondent fettered her discretion when deciding that the Applicant and her son were prohibited immigrants;
- (6) A declaration that the first Respondent failed to take into account all relevant factors in coming to her decision to deem the Applicant and her minor son prohibited immigrants;
- (7) A declaration that the first Respondent breached the Applicant's right to liberty and freedom of movement by ordering her to report to the Immigration Department three times weekly in circumstances that are unlawful, arbitrary and unreasonable;
- (8) A declaration that the Applicant has a legitimate expectation to be allowed to [stay] in Antigua and Barbuda;
- (9) A declaration, that in light of all that has happened, the first Respondent acted in contravention of the Applicant as a mother of her 8-year-old son and in contravention of the Children (Care and Adoption) Act 2015;
- (10) A declaration that the first Respondent's decision that the Applicants are prohibited immigrants are unlawful, null and void;
- (11) A declaration, that the Respondent's failure to have the first Applicant application for amnesty duly considered was unlawful, arbitrary, discriminatory, null and void;
- (12) An interim order restraining the first Respondent, her agents, or servants from removing or deporting the applicants from the State of Antigua and Barbuda or from making any application to respect of such process, until the determination of these proceedings;
- (13) An Order directing the first Respondent, her servants, or agents to properly consider the first Applicant's amnesty application;
- (14) An order, directing the first Respondent, her servants, or agents to properly consider the applicants applications to remain in Antigua and Barbuda in light of all the circumstances of the case;

- (15) Damages, inclusive of aggravated and exemplary damages;
- (16) Assessed cost in accordance with Part 65 of the Civil Procedure Rules 2000;
- (17) Such further and or other Order(s) as the court may deem just.

[2] The said FDCF was supported by an affidavit by the first applicant, there was a response filed by the first respondent by way of affidavit of Hanson Buckley and there was an affidavit in reply by the first applicant.

[3] At the case management of the matter on the 15th December 2022(an order that is yet to be filed by the applicant) the applicant, upon being questioned by the court withdrew its relief sought at paragraphs 12, 13 and 14 of the FDCF and the first respondent undertook not to take any steps to deport the applicants until the trial and determination of the matter.

[4] In order to understand the background to this matter and the circumstances that led to the decision of the first respondent to seek the voluntary departure of the applicants as prohibited immigrants the chronology of events spanning from 2017 to 2022 is a necessary exercise.

Chronology of events

- (i) In August 2017, the first applicant arrives into the State and indicates to the immigration authorities at the airport that she is coming to visit her mother one Gwendolyn White who has resided here for over thirty years.¹ The first applicant was given six months to remain, that is until in or about February 2018. The first applicant remained until that time and then returned to Jamaica.
- (ii) In August 2018, the first applicant returned to the State accompanied by her son the second applicant. Her indication upon entry was that she was coming to visit her boyfriend / fiancé one Vincent Matthew a Dominican national who as an OECS national had an indefinite period of stay in the State.

¹ At the trial of the matter on the 24th January 2023, the first applicant on cross examination admitted that in fact at the time of her arrival her mother was already deceased and the person she was visiting was not her mother

- (iii) Shortly after the arrival of the applicants,² the second applicant was placed into school however they were both given until February 2019 to remain in the State.
- (iv) In January 2019, the first applicant made her first application for an extension of time to stay in the State. From the interview records produced by the first respondent the said Vincent Mathew appears to have been interviewed as to his intention and willingness to continue to support the presence of the applicants in his care.
- (v) This application for an extension to stay was denied by the Immigration department on the basis that the first applicant did “not have a continuous source of income without the need to engage in employment in Antigua and Barbuda and her son Levitious (sic) Grant is in need of a notarized legal documentation for him to be granted a further extension.”³ The first applicant signed accepting the correspondence which stated that she understood that she had been denied the extension and she would be required to leave the State by the 9th February 2019
- (vi) In disobedience of the directive, the first applicant remained in the State until 2020. At that time at the height of the Covid- 19 pandemic and when the ports of entry and exit were closed to a large extent, the applicant applied once again for an extension. The second applicant was enrolled in school at this time as well. Dual applications were made at this time. One was for the second applicant to attend school for the 2020/2021 academic year. This was denied. ⁴ The other application was by the first applicant for an extension of stay which was granted and she was given a month’s extension to remain on island, being required to leave by 7th August 2020⁵.
- (vii) On the 14th August 2020, after the time had already expired for the applicants to leave the State the first applicant made another application for an extension of time to remain in the

² No time period is attached to this as there were no records provided to the school by the first applicant or the first respondent.

³ Letter to the first applicant dated the 10/1/19 at page 46 TB. At trial of the matter the first applicant on cross examination told the court that she had received the extension but that the second applicant had not and that she would have to leave in February 2019

⁴ The first applicant was to apply to the Ministry of Education to obtain permission for the second applicant to attend school. This permission was denied by the Director of Education as seen by letter at page 45 of the TB.

⁵ Letter dated the 8/7/2020 at page 47 TB.

State. The first applicant in the interview record ⁶ admitted that she was not working and that the second applicant had been accepted to start school in September 2020. The extension was once again denied.

- (viii) Sometime after the denial of this extension, the first applicant obtained fraudulent entry stamps in the passports of the second applicant and herself as having entered into the State in January 2020.
- (ix) Without having knowledge of the acts by the applicant to obtain the fraudulent stamps, the first applicant was arrested by the immigration department in November 2020 for having remained in the State without a valid permit. The applicant pleaded guilty in 2021 and paid a fine. The applicants still did not leave.
- (x) The Cabinet of Antigua and Barbuda in February 2022 announced a program of amnesty to allow persons who had been resident lawfully in Antigua for at least four years to be eligible for residency. The first applicant made an application for herself and the second applicant to be considered for amnesty, it was denied.
- (xi) In April 2022, the first applicant received a recommendation from the Minister responsible for Immigration the Honourable Chet Greene which sought the reconsideration of the decision by the first respondent to have the applicants leave.
- (xii) There was no repeal of the decision requiring the applicants to leave and in August 2022, the first respondent having deemed the applicants prohibited immigrants sought their voluntary removal from the State by September 2022.
- (xiii) On the 12th September 2022 this matter was filed and the applicants have sought the intervention of the court in the manner as set out in their reliefs as filed.

[5] In order for this court to therefore render a decision, I intend to deal with each declaration as sought as set out in the FDCF as filed.

[6] However before I embark on this exercise, I however wish to state categorically that the court has found the first applicant a most blatant stranger to the truth. From the manner in which she dealt with the Immigration Department, to the evidence laid before this court, on both chief

⁶ Page 48 and 49 TB

and on cross examination, this court places no value on what has been said by the first applicant as to even resembling the truth. It was therefore with great consternation that this court noted, that counsel for the applicants was emboldened to state that “it is virtually trite that upon arrival at the VC Bird International Airport that all or part of the intention of a visitor may not be revealed for fear of not being allowed to be landed and given permission to remain or extend their permit to remain.”

- [7] If this is a position that is to be countenanced by the court as an excuse for the continuous array of falsehoods that the first applicant has admitted to in the trial of this matter, then this court would be forced to consider emotive arguments as opposed to whether under the law the applicants are entitled to the relief as sought. This is not and cannot be the position and as such the determination of the court in this matter can only be assisted by the evidence led on behalf of the first respondent and the documentary evidence before the court.

A declaration that the applicant's prevention and or attempted prevention of her right to family life by the first respondent is unconstitutional and or unlawful, null and void.

- [8] In the skeleton arguments filed by counsel for the applicants there was no attempt to assist the court to determine how this fundamental right had been affected by the decision of the first respondent in seeking voluntary removal, but the court can only surmise that this complaint must arise in terms of the statements by the first applicant (whose evidence this court has already ruled is manifestly unreliable) that she lives and is cared for by one mysterious individual by the name of Vincent Matthew.

- [9] Indeed at trial of the matter, when the first applicant was asked the whereabouts of Mr. Matthew as this matter was now on for trial, the court took note of the offhand response of the first applicant that he was at work.

- [10] As identified by counsel for the respondents, in order for there to be considered an interference in the right to family life, there must be a genuine family life in existence. Under

the provisions of the Constitution and in particular section 3 (c) every person in Antigua and Barbuda is entitled to the fundamental right of protection of his family life.

[11] The evidence on this matter is that in 2018 when the applicants entered the State the reason advanced was to visit the boyfriend of the first applicant. This romantic partner next and last appearance was in 2019 when he was also interviewed for the first application for an extension made by the first applicant. There has been no other evidence as to the extent of this relationship, there has been no supporting evidence by the alleged romantic partner and there has not even been any physical support by this partner to the first applicant in the currency of these proceedings. There is no evidence what this romantic partner's view is in relation to this application or his relationship with the second applicant. Indeed, even the first applicant's evidence makes no mention of the nature of that relationship and the extent to which these parties have established a family.

[12] Indeed Ellis J (as she then was) in the case of **Peter Grey and ors v The Attorney General of the Virgin Islands and ors** ⁷ at paragraph 26 thereof , in considering whether relationships between step children and step parents would meet the criteria of having established a family life agreed with the European courts who considered and emphasized that the issue to be resolved in this regard was what was the social rather than the biological reality of a situation in determining whether family life exists – provided “that the child is sufficiently integrated and that close personal ties can be demonstrated then step family ties could in the court's judgment fall within section [3] of the Constitution.”

[13] There is no evidence before this court upon which it can make any such finding as between the applicants and the romantic partner Mr. Matthew. Indeed, the court is of the opinion that the bald bare statements of the first applicant whose credibility is doubtful does not establish that there is any family life as between the applicants and Mr. Matthew. As my sister Henry J stated in the case of **Terrence Everald Givens and anr v The Attorney General and ors**⁸ “ ...it is the love, trust, confidence, mutual dependence and unconstrained social

⁷ Consolidated claim BVIHCV 2016/0037 and BVIHCV 2016/0050

⁸ ANUHCV2013/540 at paragraph 37 thereof

intercourse which are the essence of family life that the Constitution and Human Rights conventions seek to protect.”

- [14] In this court’s mind the applicants have not made out their relief as sought and the declaration that the actions of the first respondent amount to an interference to the right of family life is refused.

A Declaration that the first respondent breached sections 3, 5 (8 was removed at trial) and 10 of the Antigua and Barbuda Constitution Order Cap 23

A Declaration that the first respondent breached the applicant’s right to liberty and freedom of movement by ordering her to report to the Immigration Department three time weekly in circumstances that are unlawful, arbitrary and unreasonable.

- [15] This court has already dealt with the complaint that hinges on the provisions of section 3. Therefore, it will only deal with the complaint regarding sections 5 and 10 of the constitution.

- [16] Section 5 of the Constitution provides for protection against the deprivation of personal liberty save as except by lawful means and sets out a myriad of instances where that is permissible. Section 8 on the other hand speaks of an individual not being deprived of their right to move throughout Antigua and Barbuda except in very specific circumstances.

- [17] In the pleadings of the applicants it was very unclear to the court exactly which sub section or sections of section 5 and 8 they complained of having been contravened by the actions of the first respondent and the Immigration Department.

- [18] When consideration is given to the evidence of the first applicant the only indication that there is to the complaint of the contravention of these sections is at paragraph 17 of her affidavit in support⁹. At that paragraph the first applicant giving the events that led to the conviction and fine for remaining in 2021 had this to say “[p]ending my hearing, I received bail, which included a requirement to sign in at the Immigration Department three times weekly. I

⁹ Filed 12/9/2022 at page 15 TB.

pleaded guilty to the charge of Remaining and was convicted on 12th November 2021. The Magistrate ordered me to pay a \$2500 fine, which I did. Despite the conclusion of the case, I was told by the Immigration Department that I still had to sign in at the department three times weekly and that I would be arrested if I did not. Therefore, to this date I am forced to sign in three times weekly at the Immigration Department for reasons unknown to me.”

[19] This is further fleshed out in the skeleton arguments of the counsel for the applicants where he also stated that the requirement of the first applicant to sign into the immigration department three times a week was not only burdensome but contravened her fundamental right to move freely through- out Antigua and that her restriction of movement, it was inferred from the arguments on her behalf ,when she had been taken into custody to answer the charge of remaining , amounted to a breach of her rights as identified.

[20] Counsel for the respondents however made it clear that not only had the first applicant not laid any evidence before the court as to the allegations that showed any attempt to contravene her fundamental rights, they also stated that the fact that she was required to sign, as a prohibited immigrant who would warrant monitoring, could not amount to a deprivation in any regard as suggested.

[21] This court must agree with counsel for the respondent in this regard. In order for the applicant, to lay their case before the court to be answered and adjudicated upon, the onus is on the applicant to plead with particularity what they are seeking and not leave it to the court to infer and deduce.

[22] The provisions of section 5 and 8 are extensive sections which have a myriad of exceptions before they can be considered contravened. It was therefore for the applicant’s pleadings to “...not only allege but provide cogent evidence that the stated constitutional provisions have been ...contravened in relation to [them] by the decisions.... of the defendants”¹⁰. This position was also reiterated in the case of **Macadeen Ameerally and Aubrey Bentham v Attorney General and ors** ¹¹ where the court considered that it was not sufficient in the

¹⁰ Paragraph 9 per Ellis J (as she then was) in **Andre Penn v The Director of Public Prosecutions of the Virgin Islands** BVIHCV 2013/166B.

¹¹ 1978 25 WIR 272

drafting of an indictment, a consideration that is likewise applicable to pleadings to merely have a “naïve expedient merely alleging such a violation.”¹²

[23] Having therefore said all of this and considering the allegations of the applicant this court finds that one, not only has the applicant failed to address with any cogent evidence the particularity of the extent of the alleged contravention of sections 5 and 8 but that two, the fact that the first applicant was taken into custody for the contravention of the law at the time of her arrest is not a contravention of her constitutional right and further the fact that she was required to sign in as a means of monitoring as an individual who remains on island as a prohibited immigrant does not show that there was any stricture on her freedom of movement as alleged. Neither in this court’s view was such a decision arbitrary or unreasonable given the nature of the interactions that the applicant had had with the Immigration department up until her conviction in 2021.

[24] This court therefore declines to make the declaration as sought in relation to there having been any breach of section 5 and 8 constitutional rights. The court also declines to make a declaration that the requirement to sign in was unlawful, arbitrary, or unreasonable.

A Declaration that to deny the Applicant’s right to be heard was in breach of natural justice and unlawful, null and void.

A Declaration that the first names respondent fettered her discretion when deciding that the applicant and her son were prohibited immigrants.

A Declaration that the first respondent failed to take into account all relevant factors in coming to her decision to deem the applicant and her minor son prohibited immigrants.

A Declaration that the first respondent’s decision that the applicants are prohibited immigrants [is] unlawful, null and void.

¹² Ibid at page 282 per Crane C

[25] Once again when this court peruses the pleadings of the applicants the nature of this complaint was not apparent on their face which action of the first respondent is the genesis of this complaint with regard to the breach of natural justice.

[26] However through extrapolation it appears that this complaint is in relation to the alleged failure by the first respondent to give the first applicant a right to be heard before the decision was made to deem the applicants' prohibited immigrants.

[27] In order for the court to consider whether there was indeed a breach by the first respondent of the applicant's right to be heard, it must first contextualize what is this right in practical terms. Lord Denning in **Kanda v Government of Malaya**¹³ had this to say about this right, "if the right to be heard is to be real right which is worth anything it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statement have been made affecting him; and then he must be given a fair opportunity to correct or contradict them."

[28] Indeed the learned author of the text Commonwealth Caribbean Administrative Law¹⁴ stated it this way, "essentially procedural fairness involves elementary principles that ensure that before a right or privilege is taken away from a person or any sanction is otherwise applied to him or her the process takes place in an open and transparent manner. It is also called fair play in action and embraces the means by which a public authority in dealing with members of the public should ensure that procedural rules are put in place so that persons affected will not be disadvantaged."

[29] In the case at bar, the power that was wielded by the first respondent was the deeming of the applicants as prohibited immigrants. The applicants complain that they should have had an opportunity to be heard before such a decision was made by the first respondent.

[30] As a corollary to that argument the applicants also argued that the first respondent in any event had no proper grounds to firstly deem the second applicant a minor child a prohibited immigrant as he "cannot be responsible for being a person associated with unlawful conduct" and that secondly the nature of the offence for which the second applicant was charged and

¹³ [1962] AC 322

¹⁴ Eddy Ventose. At page 310

convicted was not one which afforded the first respondent the power to deem her a prohibited immigrant.

[31] In response the respondents state simply, there was no discretion reposed in the first respondent when she undertook the action. The Immigration Act (the Act)¹⁵ mandates that once a particular individual meets the criteria set out in the Act there is a mandatory step that must be taken whereby an individual is then classified as a prohibited immigrant. In those circumstances there is therefore no provision for the individual so affected to be heard or for the first respondent whose duty it is to issue such classification to be governed by a discretionary power. As the Act provides, once there has been even an association with unlawful conduct for which that person can identified, then that person must be deemed a prohibited immigrant.

[32] When this court considers the Act and the parameters of the wording, it clearly states that a prohibited immigrant means “a person whose entry and landing into Antigua and Barbuda is prohibited under section 15 and 19.”¹⁶

[33] Then when we turn to section 15, that section is entitled “Entry and landing of certain persons prohibited.” In this section there are a list of individuals who are “subject to this Act the entry or landing of ...into Antigua and Barbuda prohibited if the person belongs to any of the following categories -....

- (1) if the person not being a citizen of Antigua and Barbuda who-
- (2) from information and advice that in the opinion of the Cabinet is reliable information or advice is deemed by Order of the Cabinet by reason of conviction of a serious offence to be an undesirable resident or visitor to Antigua and Barbuda or
- (3) falls or is determined to be within any of the classes or descriptions or persons specified in Schedule 5” (my emphasis added)

[34] Section 19 deals with the **Minister** having the discretion to prohibit the entry into Antigua and Barbuda any person other than a citizen of Antigua and Barbuda.

¹⁵ 6/2014

¹⁶ “Interpretation” section 2 of the Act

[35] Then finally Schedule 5 speaks to who are the prohibited immigrants and stated there clearly a list of persons who fall to be considered prohibited immigrants, and at section 2 thereof are persons who become convicted of committing a serious offence or have been associated with unlawful conduct. Further at section 13 there is also a clear inclusion of prohibited immigrants being dependents of prohibited immigrants who are not citizens of Antigua and Barbuda.

[36] So when this court therefore looks at the language of the empowering statutory framework, this court must be reminded that "...it is true that the words used even in their literal sense are the primary and ordinarily the most reliable source of interpreting the meaning of any writing: be it statute, contract or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary but to remember that statutes always have some purpose or object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning." ¹⁷

[37] Thus as was so eloquently stated in the words of the court in the case of **Stock v Frank Jones (Tipton) Ltd** ¹⁸ "words and phrases of the English Language have an extraordinary range of meaning, this has been a rich resource in English poetry ... but it has concomitant disadvantages in English law (which seeks unambiguous precision, with the aim that every citizen shall know, as exactly as possible, where he stands under the law). The first way ... of eliminating legally irrelevant meanings is to look to the statutory objective. This is the well-known canon of construction ... which goes by the name of "the rule in *Heydon's Case*" ... (Nowadays we speak of the "purposive" or "functional" construction of a statute). But it is essential to bear in mind what the court is doing. It is not declaring "Parliament has said X: but it obviously meant Y; so, we will take Y as the effect of the statute." Nor is it declaring "Parliament has said X, having situation A in mind: but if Parliament had had our own forensic situation, B, in mind, the legislative objective indicates that it would have said Y, so we will take Y as the effect of the statute as regards B." What the court is declaring is "Parliament has used words which are capable of meaning either X or Y: although X may be the primary, natural and ordinary meaning of the words, the purpose of the provision shows that the

¹⁷ **Cabell v Markham** per Hand J quoted in Bennion on Statutory Interpretation (8th ed) Chapter 11: Purposive Construction

¹⁸ 1978 1 WLR 231

secondary sense, Y, should be given to the words.” ... The final task of the construction is still, as always, to ascertain the meaning of what the draftsman has said, rather than to ascertain what the draftsman meant to say. But if the draftsmanship is correct these should coincide. So, if the words are capable of more than one meaning it is a perfectly legitimate intermediate step in construction to choose between potential meanings by various tests (statutory, objective, anomaly, etc.) which throw light on what the draftsman meant to say.”¹⁹

[38] Therefore once the purposive interpretation is applied to the Act and the court is satisfied that there is no ambiguity in the language or that the reading of section 2 of Schedule 5 is to be read as conjointly, it is clear that any person who is associated with unlawful conduct , serious or not is deemed a prohibited immigrant.

[39] Indeed as harsh as that outcome may appear and which is the nub of the argument for the applicant this court is also of the view that there is no discretion in the first respondent and the determination of being a prohibited immigrant falls immediately upon the finding of an association to unlawful conduct.

[40] It cannot be disputed (and in fact the first applicant so admits) that the first applicant was arrested and charged with an offence, ²⁰ that offence is unlawful conduct, and by so doing she falls within the clear categories as provided and so does the second applicant being her dependent.

[41] Additionally in light of the wording of section 13 of Schedule 5, the first respondent in fact had no option or discretion but to consider and classify the second applicant as a prohibited immigrant he is being a dependent of the first applicant who also is captured by that classification.

[42] As empathetic as the court may be to the emotive argument of the counsel for the applicants as what may appear as the innate unfairness to have the second applicant ,a child of tender years , to bear the finding, it is in this court’s mind, the risk that the first applicant took in coming to the State, bringing her child and disobeying the law of the land.

¹⁹ **Stock v Frank Jones (Tipton) Ltd** [1978] 1 WLR 231

²⁰ Pursuant to section 17(9) and 68 of the Act

[43] Additionally, there being no process by which the nomenclature was assigned to the applicants, it being simply by application of the law for the failure to adhere to the law of the land in relation to remaining here when they legally could not, in this court's mind there is therefore no failure to adhere to a process by which the first applicant could be heard. The act of the applicants and the consequential repercussions including the application of the designation did not require any hearing and as such I find that there was no breach of natural justice in this regard. I also find that there was no discretion in the first respondent in undertaking the clear parameters of her duty, she therefore did not fetter any discretion and finally the determination that the applicants should be considered prohibited immigrants having been by way of the law, there was no unreasonableness or unlawfulness on the part of the first respondent. This court therefore declines to make the declarations sought in this regard.

A Declaration that in light of all that has happened the first respondent acted unreasonably, unfairly and without proper regard to the personal circumstances of the applicant's case.

[44] For the risk of now sounding like a resounding broken record, once again the applicant has laid a dearth of information and evidence before the court as to what this relief is truly seeking and to what action the complaint is geared towards.

[45] Not even the skeleton arguments of the applicants assisted the court in narrowing down this complaint and in what way the first respondent disregarded documented personal circumstances of the applicant.

[46] The credibility of the first applicant being in this court's mind nonexistent and there having been no documentary evidence as to any of the allegations of abuse, murder, mayhem and intrigue made by the applicant, this court is not in a position to make any finding in this regard as against the first respondent.

[47] The court declines to make the declaration as sought.

A Declaration that the Applicant has a legitimate expectation to be allowed to remain in Antigua and Barbuda

[48] The applicant's position in relation to this relief is set out in paragraph 12 of the skeleton arguments filed on their behalf. ²¹ In light of the foregoing, it is respectfully submitted that the Applicants have not established that their rights to family life to have been breached and therefore is not entitled to the relief sought.

[49] In response counsel for the respondents made it clear that the applicants had not adduced any evidence to substantiate such a claim in that there was no evidence to show what promise had been made by the respondents to the applicants or how the respondents have reneged on any such promise. On this basis, they argued that the applicant is not entitled to the relief as claimed.

[50] The concept of legitimate expectation has been described as "thorny issue" by the author of the text **Commonwealth Caribbean Administrative Law** ²² but even in saying so, it is clear that there is a requirement for there to be certain evidence led that amounts to the nature and extent of the promise, which should be clear, unambiguous and unqualified.

[51] Indeed Baptiste JA in the case of **Patricia Yvette Harding v The Attorney General of Anguilla** ²³ undertook a lengthy consideration of what amounted to legitimate expectation and considered the difference between procedural legitimate expectation and substantive legitimate expectation.

[52] In considering these two, the learned Justice of Appeal recognized that procedural legitimate expectation arises where a public authority has provided an unequivocal assurance whether by means of an expressed promise or established practice that it will give notice or embark upon a consultation before it changes an existing substantive policy. Substantive legitimate expectation on the other hand arises where the court allows a claim to enforce the continued

²¹ Filed 20/1/2023

²² Supra page 194

²³ AXAHCVP 2013/0003

enjoyment of the content- the substance- of an existing practice or policy in the face of the decision maker's ambition to change or abolish it. ²⁴

[53] Not having the position of the applicants in this matter , when the court considers either of the limbs to which legitimate expectation applies, the one thing that is clear is that "...the claimant's right will only be found established when there is a clear, unambiguous representation upon which it was reasonable for him to rely"²⁵ or that a "...lawful promise or practice"²⁶ has arisen.

[54] In the case at bar, there is no evidence by the applicants to show where any such representation (to found procedural legitimate expectation) or a practice (to found substantive legitimate expectation) was made by the respondents to the applicant and the first applicant in particular. At no time did she aver that there was an undertaking that the first respondent would not make her prohibited immigrant, that her application for amnesty would be approved or that after her overstaying in the State for more than two years after her last extension to stay that the applicants would be or could be afforded any right to remain.

[55] I therefore find that the applicants have also not made out this claim and the declaration sought is declined.

A Declaration that in light of all that has happened the first respondent acted in contravention of the Applicant as a mother of her 8-year-old son in contravention of the Children (Care and Adoption) Act 2015

[56] In reading the pleadings of the applicants, once again the specificity of this pleading was sorely missing and it was only in the skeleton arguments of the applicants that the court was able to glean that this relief was made in relation to the decision to deem the second

²⁴ **R (Bhatt Murphy) v The Independent Assessor** [2008] EWCA Civ 755

²⁵ **R v Devon CC Ex P Baker** [1995] 1 All ER 73

²⁶ **Regina v North and East Devon Health Authority Ex P Coughlan** [2001] QB 213

applicant a prohibited immigrant and the decision to have the applicants voluntarily removed from the State.

[57] This court cannot state it enough that the function of pleadings is to lay the case that the applicant is relying on and the case to which the respondent must answer before the court. Pleadings are therefore to be specific and fulsome and not simply a cursory exercise that is then dealt with in submissions.

[58] There are no allegations contained in the pleadings of the applicants on this point but for the purpose of the record this court considers the argument raised in relation to this relief sought as one that should detain the court briefly.

[59] It is clear to the court that under the Children (Care and Adoption) Act 2015 the primary purpose of the statute was to ensure that the best interests of the child is given paramount consideration in all matters relating to a child.²⁷ Of course in the context of the statute this was primarily related to matters that involved adoption, status of children and even child protection orders where needed. Indeed, this court does not accept that the statute was to be invoked out of the context and purpose for which it was passed. However, it has long been accepted that the common law provision of the child's welfare being paramount must guide a court in making any orders or considerations where a child is concerned.

[60] Although that may be the position for a court, this court is unsure whether that same undertaking is required of all decision makers where the rights of a child arise.

[61] In the case of **Robert Perekenbena Naidike and ors v The Attorney General of Trinidad and Tobago** ²⁸ the Privy Council and in particular Baroness Hale of Richmond considered the actions of the state of Trinidad and Tobago to deport the non-citizen father of a minor child who was in that case a citizen having been born in Trinidad. In that regard, Baroness Hale considered that even where a state may not be a signatory to the Convention on the Rights of the child, she found that decision makers should still act in accordance with the spirit of the Convention and agreed with the finding of the court in the Australian case of **Minister for Immigration and Ethnic Affairs v Teoh** ²⁹ that even without there has been

²⁷ Section 3(1)

²⁸ 2004 UKPC 49

²⁹ (1994) 128 ALR 353

an accession to the Convention that given the "...special vulnerability of children particularly where the breakup of the family unit is or may be involved and because of their expectation that a civilized society would be alert to its responsibilities to children who are or may be in need or protection."³⁰

[62] Although this court agrees that this would indeed arise where there is a child who is a citizen of the state and who would be separated due to the deportation or removal of the non-citizen parent, in this court's view there would be different considerations where the child has been brought into the state, there is no evidence of the child being part of a familial unit and the child then being exposed to the vagaries of its parent consistently acting in contravention of the law.

[63] At his age this court is of the opinion that, his best interest is served with being with his mother, the only person he has in this jurisdiction from all the evidence before the court. This does not at all mean that the court is not empathetic to the plight of this child but it is satisfied that the first respondent having clearly dealt with the first applicant and her inability to follow the rule of law, the second applicant's attendance at school also from all reports also being contrary to the rule of law, that the first respondent did not contravene the law in relation to children (specified or not) and did not without more fail to consider the best interest of the child. This declaration is also declined.

A Declaration that the first respondent's failure to have the first applicant's application for amnesty duly considered was unlawful, arbitrary, discriminatory, unconstitutional, null and void.

[65] The sole portion of evidence that spoke to and referred to the application for amnesty by the first applicant is contained in the affidavit of the first applicant filed on the 12th September 2022. At paragraph 21 thereof she had this to say "After the government announced its amnesty program this year, I went to the Immigration Department several times and I was

³⁰ Ibid per Gaudron J at page 375-376

denied an opportunity to benefit from the government's policy. I kept being told to come back even though I qualified for residency under the amnesty. The amnesty was announced by the Prime Minister Hon. Gaston Browne in his budget speech on 3rd February 2022 and was initially set to run from 1st March 2022 to 30th April 2022. It was eventually extended to 30th June 2022. During the budget debate, Minister for Immigration Hon. E.P. Chet Green explained that under the amnesty, "Applicants who have resided in our country for a continuous period of four (4) years but who have not yet completed seven years will be granted residency under the Amnesty. Those persons with seven years or more in residency will be cleared for citizenship."

[66] The skeleton arguments of the applicants did not further advance the pleadings and the respondent's response to this relief was that there was no need to consider the application of the applicants as they had not met the criteria for amnesty, they have fallen short of the four year period.

[67] When this court considers the policy that emanated from a Cabinet decision of the 9th February 2022, it clearly stated that "Cabinet also agreed that persons residing lawfully for at least 4 years shall be eligible for residency and those residing for at least 7 years shall be eligible for citizenship."³¹

[68] Therefore, in order to take advantage of this program the applicant had to meet two limbs. One that she had been residing in the State lawfully and two that she had done so for a period of four years.

[69] At no time can it be considered that the first applicant was in the State lawfully after 2020 at the latest, even though her right to stay had expired previous to the grant in 2020. Nevertheless, the latest she can say she was in the State with permission was when she was granted the month's permit from July to August 2020.

³¹ Cabinet decision presented to the court at the close of the proceedings.

[70] Previous to that, she could only have been considered from her initial stay in 2018 – she not having stayed outside of the state for a period in excess of six months ³² to the final extension in 2020 as the lawful period of residence.

[71] Thus in this court's mind, any period subsequent to the final extension and certainly trial, conviction and then request for voluntary departure, cannot be properly considered in the computation of time as lawful residence.

[72] Additionally by mere mathematical calculation, that single lawful period could not amount to the four years as required by the policy and nowhere in that policy could there have been inferred in the powers of the first respondent any discretion to consider someone who had not met the criteria, even if partially. In this court's mind this was an all or nothing provision that an applicant either met or they did not meet.

[73] In this court's mind the first applicant clearly did not meet the requirements and as such there was no failure to duly consider her application, she simply did not qualify.

[74] That being said, the court declines to make this declaration as sought.

[75] The case of the applicants is therefore dismissed in its entirety.

[76] The respondent on the filing of their response and in submissions have asked for costs if the court was to find against the applicant and in normal circumstances this court may have considered doing so in light of the manner in which this application was brought and its procedural shortcomings, but in awarding costs against the applicant, this court would be of the view that it would setting a precedent preventing non-citizens aggrieved by the State from seeking remedial assistance.

[77] I am therefore of the opinion that there will be no order as to costs.

Order of the court

³² In the evidence of the witness for the first respondent Hanson Buckley at trial, that in order to calculate time for the period of continuous residency, any period less than six months outside of the State does not break the accumulation of time.

(1) The originating motion as filed is dismissed in its entirety with no order as to costs.

P. Nicola Byer

High Court Judge

By the Court

Registrar