

**THE EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. SKBHCV2021/0196

In the matter of the Constitution of Saint
Christopher and Nevis Chapter 1.01

AND

In the matter of an Application for an
Administrative Order pursuant to Part 56
of the Eastern Caribbean Supreme Court
Civil Procedure Rule 2000 as amended

AND

In the matter of Saint Christopher and
Nevis Citizenship Act Chapter 1.05

BETWEEN:

[1] **KHALED AWAD**
[2] **WALID AWAD**

Claimants

and

[1] **THE MINISTER OF NATIONAL SECURITY
OF ST. CHRISTOPHER AND NEVIS**
[2] **THE ATTORNEY GENERAL OF
SAINT CHRISTOPHER AND NEVIS**

Defendants

Appearances:

Mr. Tim Prudhoe and with him Mr. Vieoence Prentice for the Claimants.
Mrs. Simone Bullen-Thompson, Solicitor General, and with her Ms. Sasha Lloyd for
the Defendants.

2022: October 3; 28;
November 17

Judicial Review - Passports and Travel Documents Act – Minister deactivating passports – Whether in so doing the Minister of National Security acted unlawfully, in breach of procedural fairness and contrary to law – Whether actions of the Minister acted contrary to Passports and Travel Documents Act – Whether the actions of the Minister contrary to the rights guaranteed under the Constitution of St. Christopher and Nevis (“the Constitution”) – Whether the claimants are entitled to recover damages for the unlawful acts alleged given rise to the claim for relief under the Constitution or otherwise – Whether damages recoverable for loss of business – Whether vindictory damages recoverable

JUDGMENT

- [1] **WALLACE, J. (Ag):** These proceedings for judicial review were brought by the claimants for the following reliefs:
- (i) An Order quashing the decision of the 1st defendant to "disable" the claimants' St. Christopher and Nevis passports.
 - (ii) An Order that the 1st defendant retract its Press Release published 14th September 2021 notifying that it had "disabled" the claimants' passports.
 - (iii) Damages for interruption of business and reputational impact.

Background

- [2] The claimants are citizens of St. Christopher and Nevis, having obtained citizenship in 2014 and in 2015 by virtue of the Saint Christopher and Nevis Citizenship Act. Subsequent to their registration as citizens, the 1st claimant and the 2nd claimant were issued St. Christopher and Nevis passports in 2014, with validity to 10th August 2024, and 2nd November, 2025 (“Original Passports”), respectively.
- [3] On or about the 14th September 2021 the 1st defendant, purported to have “disabled” the claimants’ Original Passports and caused to be published a press release (the “Press Release”), indicating the Ministry of National Security’s action and that it would seek to obtain information from the United Arab Emirates (the “UAE”) about

the matter. This was done without any prior communication with or notification to the claimants.

- [4] The basis of the Press Release appears to have been as a result of an article in the Gulf News ("the Gulf News Article") and a Ministerial Resolution.
- [5] Since October 2021 the claimants sought to engage the defendants by making several offers to explain the issues that may be of concern to the defendants in relation to the claimants which may have led to the UAE's actions. These include a detailed account of the 1st claimant's treatment at the hands of the UAE authorities, two (2) "clean" police records certificates for him in respect of the UAE in the period 2016 and 2017 and explanation of his involvement with money transfers.
- [6] With no responses to several pieces of correspondence to the defendants, the claimants commenced these proceedings on 28th December 2021 having obtained leave to do so by Ward J, on the 26th November, 2021.
- [7] It should be noted that in February 2022, in return for further time to consider their position and considering the ill-health and consequential need of the 2nd claimant to travel (for medical treatment), the defendants issued to the claimants new St. Christopher and Nevis passports with different numbers and (shorter) expiration dates than the Original Passports. The 1st claimant's new passport expires on 16th February 2023 and the 2nd claimant's new passport expires on the 6th February 2024 (hereinafter "the New Passports"). During the course of the hearing of 28th October 2022, it was disclosed to the court, and subsequent affidavit evidence confirmed, that the New Passports were cancelled by the 1st defendant on or about the 12th October 2022.

Claimants evidence

- [8] The first claimant filed several affidavits in support of the claim and deposed that:

- (a) The claimants, who are Art Dealers, are Syrian born individuals who were both registered as St. Christopher and Nevis citizens pursuant to certificates of registration issued on the 18th July 2014 in relation to the 1st claimant, and 24th September 2015 in relation to the 2nd claimant.
- (b) On 14th September 2021 the Ministry of National Security issued a Press Release announcing that it had "disabled" the claimants' passports on account of news reports that the Government of the UAE had named them on a terrorist watch list.
- (c) No reasons, whether formal or otherwise, were given to the claimants for the "disabling" of their passports. The claimants were also not given notice or an opportunity to address the allegations in the Press Release prior to the said "disabling".
- (d) The Press Release (and the steps to "disable" the respective passports) appears to have been prompted by the Gulf News Article late in the evening the day before the Press Release was published (that is, on 13th September 2021).
- (e) The claimants acknowledged that the contents of the Gulf News Article were concerning, and they have always been ready, willing and able to provide the 1st defendant with a detailed explanation with reference to supporting documentation as to why he should reject the implication in the Gulf News Article that the claimants were terrorists or are affiliated with them.
- (f) By letter dated 17th October 2021 from the claimants' counsel to Permanent Secretary Osmond Petty in the Ministry of National Security and UAE's Consul General/Ambassador, Justin Hawley, the claimants sought reinstatement of their respective passports and an opportunity to present their version of events leading to the publication of the Gulf News Article. A further such request was made on 28th October 2021. The only response the claimants received was that the correspondence has been "sent for legal opinion".
- (g) As Art Dealers, the claimants travel to various cities around the world vending art and attending art auctions. During the period they were without their passports, their business suffered as they were unable to attend several auctions and thereby unable to examine art on sale themselves which prevented them from making any purchase at all.

- (h) In February 2022, the defendants issued to the claimants' new passports ("New Passports") with different numbers and (shorter) expiration dates than the Original Passports on "compassionate grounds". The 1st claimant's New Passport had an expiration date of 16th February 2023 and the 2nd claimant's New Passport had an expiration date of the 6th February 2024.
- (i) Subsequent to the hearing on 3rd October 2022, counsel for the claimants wrote to counsel for the defendants enquiring about the renewal of the New Passport of the 1st claimant which was due to expire in February 2023. On the 12th October 2022, correspondence was received from Mr. Petty that the New Passports were in fact cancelled on the basis of change in administration as a result of the August 2022 national elections and the previous "reasons" given for the deactivation/disabling of the Original Passports were still applicable .
- (i) The claimants deponed that as citizens of St. Christopher and Nevis, they believe their lives have been left "on hold" as a result of the decision to deactivate/disable/suspend/cancel their Original Passports and also of the lack of apparent appropriate speed with which the defendants have worked towards a concluded position.
- (j) In the premises, they ask that the relief sought in the claim be granted as prayed.

Defendants evidence

[9] Mr. Osmond Petty, filed several affidavits in response to the claim and deposed as follows:

- (a) The Government of St. Christopher and Nevis (the "Government") received information that the Cabinet of the UAE issued Ministerial Resolution 83 of 2021 which placed the claimants on UAE's Terror List.
- (b) As a result of the information received, on 14th September 2021, the 1st defendant disabled/deactivated the claimants' Original Passports. The Government issued a Press Release indicating the action taken and that it would seek to obtain information from the UAE about the matter.

- (c) The Government has diplomatic relations with the UAE and through the Diplomatic Channels sought information from the UAE in relation to the claimants' case. The Government of the UAE responded by Diplomatic Note dated December 29th, 2021, indicating that the claimants are accused of money-laundering and terrorist financing through their company 'Antique House' and that an *in-absentia* ruling had been rendered against them to send them to prison for ten years and for them to be deported from the UAE after completing the prison period and settling the judicial fees, and to fine their company and confiscate the frozen monies collected from the crime attributed to them.
- (d) The claimants' names are indeed found at lines 141 and 142 of page 3 of the Terror List.
- (e) By letter dated January 19th, 2022, Mr. Petty wrote to the claimants' attorney outlining the reasons for the decision to deactivate/disable the claimants' passports and invited them to make any representations they wished to make for consideration by the 1st defendant.
- (f) The 1st defendant gave favourable consideration on humanitarian and compassionate grounds to the grant of a passport to the 2nd claimant for the purpose of traveling to the United Kingdom for medical treatment. To this end on February 7th, 2022 the 2nd claimant was issued a new St. Christopher and Nevis passport valid from 7th February 2022 to 6th February 2024 to facilitate his travel to the United Kingdom for urgent medical treatment. The 1st claimant was also granted a new passport valid from 17th February 2022 to 16th February 2023. The understanding was that the Government would use the time to seek information concerning the claimant's matter from the UAE.
- (g) Further information has been sought from the UAE concerning the 1st claimant's detention and claimants' convictions but to date no further information has been provided by the UAE.
- (h) In response to counsel for the claimants' enquiry on the 6th October 2022 about the renewal of the New Passport of the 1st claimant whose passport was due to expire in February 2024, the 1st defendant "considered the

matter anew” and revoked the claimants’ New Passports for the reasons stated in correspondence dated 12th October 2022.

- (i) In light of the above, the claim of the claimants should be dismissed.

Issues

[10] The main issues that arise for the court to resolve are:

- (a) Whether the 1st defendant actions are amenable to judicial review.
- (b) Whether the 1st defendant had the power to “disable/deactivate” the claimants’ passports and if so, was the power lawfully exercised.
- (c) Whether the “disable/deactivate” of the claimants’ passport violated any of the guaranteed rights of the claimants under the Constitution.
- (d) What are the reliefs, if any, to which the claimants are entitled?

Submissions

[11] Learned counsel for the claimants, Mr. Tim Prudhoe, submitted that the right to travel (and thus to a passport for doing so) has well established constitutional protection. While as St. Christopher and Nevis citizens the claimants’ rights to leave or enter the country is not dependent on the issuance of passports, in all practical respects, however, travel, other than in respect of St. Christopher and Nevis, is impossible in the absence of a passport. He relied on **Sawhney v Assistant Passport Officer, Government of India**¹ in arguing that this protection is found in section 5 of the Constitution and is similar in nature to the relevant article of the Indian Constitution in **Sawhney**.

[12] Mr. Prudhoe further contends that the claimants have the right under section 8 of the Constitution not to be deprived of their property and that the “disabling” of their passports is an unlawful interference with their property, inconsistent with section 8 of the Constitution.

¹ (1967) The Times 15.4.1967.

- [13] Mr. Prudhoe, relying on **XH v. SSHD; A v. SSHD**² and **R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett**³ submitted that cancellation of a passport is susceptible to judicial review.
- [14] Mr. Prudhoe argued that while the 1st defendant has a discretion under the Passports and Travel Documents Act to cancel an issued passport, there is no authority to “disable” or suspend a passport. Relying on the Antiguan case, **Lihua Tian v Ag of Antigua**⁴, he submitted that the defendants could only act pursuant to powers given to them by law and if they were going to take away, or take possession of citizenship documents, they had to point to a law that gave them such powers. Moreover, revocation of citizenship raised due process issues that could only be overridden in exceptional circumstances.
- [15] On the issue of procedural fairness, the claimants contended that no reasons were communicated to them for the disabling of their passports and that they were not afforded a hearing prior to the decision being made. Mr. Prudhoe submitted that these assertions of the claimants, which were not disputed by the evidence of the defendant’s witness, demonstrated that there has been a breach of procedural fairness.
- [16] On the issue of quantum of damages, Mr. Prudhoe submitted that the case of **Lihua Tian** is instructive and provides useful guidance on the incidence and amount of vindictory damages that the court should award.
- [17] The learned Solicitor General Mrs. Simone Bullen-Thompson, on behalf of the defendants, submitted that in relation to the status of passports, under the provisions of the Passports and Travel Documents Act the passports issued to the claimants are the property of the Crown and not the property of the claimants. Therefore, the factual circumstances of this case do not give rise to a claim for compulsory

² [2017] 2 WLR 1437

³ [1989] 2 WLR 224

⁴ ANUHCv2016/0039

acquisition of property. What the 1st defendant did in this case is to withdraw the passport, an act which the legislation empowers him to do.

[18] The learned Solicitor General further submitted that the freedom of movement protected by the Constitution does not extend to travel to foreign countries and therefore there is no infringement of the claimants' freedom of movement.

[19] Mrs. Bullen-Thompson argued that the claimants' citizenship is unaffected by the decision taken by the 1st defendant in relation to the claimants' passports and that there has been no disabling of the claimants' citizenship.

[20] The learned Solicitor General further submitted that as the evidence shows, the defendants relied on national security, security of the country's international partners, international comity and the public interest as reasons for the decision taken by the 1st defendant. Furthermore, "national security" is not limited to the physical defence of the state. It includes the security and defence of a state, including its citizens, economy, and institutions and tools which states use to foster, ensure and strengthen national security, such as diplomatic relations with other states.

[21] Mrs. Bullen-Thompson relied on **The Attorney General of Grenada v Muhammed Ehsan**⁵ to make the argument that national security requirements are recognised as bases on which procedural fairness may be displaced. She submitted that having regard to the serious nature of the information which came to the attention of the Government and all the circumstances of the case, including the number of countries which the St. Christopher and Nevis passport gives the claimants access to, the decision taken by the 1st defendant was justified. In any event, the defendants have not closed the door on the claimants and have indicated via the letter of the Permanent Secretary dated January 19th, 2022 that the claimants may make

⁵ GDAHCVAP2019/0020

representations and provide information in relation to their matter to the 1st defendant.

[22] Regarding failure to give reason, Mrs. Bullen-Thompson submitted that in all the facts and circumstances of this case, the court should find that the failure to formally communicate reasons at the time of the decision or shortly thereafter does not vitiate the decision made by the 1st defendant. The reason was evident from the issue of the Press Release that information was received that the claimants had been placed on the UAE's Terror List. For this reason, the additional information received from the UAE were all communicated in the Permanent Secretary's letter dated January 19th 2022, to the claimants' attorney. Therefore, at this stage the claimants are well aware of the reasons for the decision taken by the 1st defendant.

[23] Mrs. Bullen-Thompson conceded that the defendants used the words "deactivation" and "disable" to refer to the decision taken by the 1st defendant on September 14th, 2021 in relation to the passports issued to the claimants were not the language used in the Passports and Travel Documents Act. However, the Act provides that passports may be cancelled or withdrawn at any time by the Minister and section 3(3) of that Act indicates that a passport that is cancelled or withdrawn becomes void. It is in light of these provisions that the decision of the Minister must be examined.

[24] Moreover, in relation to use of the terminology "deactivation" or "disablement", Mrs. Bullen-Thompson submitted that the latter assertion accords with advances in modern technology whereby documents take different forms, have different characteristics and their use can be impacted by instructions recorded in electronic systems without the need to physically touch the document.

[25] In relation to damages, the learned Solicitor General submitted that having regard to the circumstances of the case the defendants were not responsible for any loss of business, nor reputation suffered by the claimants.

Analysis and findings

- [26] The first issue for the court to resolve is whether the action of the 1st defendant is amenable to the court's review.
- [27] The defendants relied on national security, security of St. Christopher and Nevis international partners, international comity and the public interest as reasons for the decision taken by the 1st defendant⁶. The defendants further contended that based on the evidence presented in the Permanent Secretary's affidavits, the issue whether a matter of national security arises and the impact which it should have on the way the decision is arrived at, is a matter for the Government.
- [28] In **Council of Civil Service Unions and others v Minister for the Civil Service**⁷ the court 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. But if the decision is successfully challenged, on the ground that it has been reached by a process which is unfair, then the government is under an obligation to produce evidence that the decision was in fact based on grounds of national security.”
- [29] In **Attorney General of Grenada v Muhammed Ehsan**⁸ at paragraph 79, the Court of Appeal indicated that it is accepted, that national security requirements are recognised as bases on which procedural fairness may be displaced, as enunciated by Lord Diplock in **Council of Civil Service Unions and others v Minister for the Civil Service**⁹. However, when the challenge is based on allegations of breaches of fundamental rights such as due process ..., the court cannot do what the State has invited it to do and decline to interrogate the merits of the challenge merely on the basis that it is a matter of national security and therefore falls out with the purview

⁶ Affidavit of Permanent Secretary Osmond Petty, Paragraphs 6-10

⁷ [1984] 3 All ER 935 at 944

⁸ GDAHCVAP2019/0020

⁹ Supra note 7

of the court.

- [30] In **Clive Oliveira v The Attorney General and another**¹⁰ at paragraph 69, the court stated:

“National security issues are not wholly outside judicial review but the Court will confine itself to deciding whether the decision-maker, usually a minister, is acting in good faith within the language of the governing legislation, if any. The Court can also look at evidence to determine if the issue is genuinely one of national security. Beyond that the Court will accept the opinion of the State as to what national security requires and a claim of national security will normally suffice to exclude a right to be heard.” (Bold emphasis mine).

- [31] It is settled law that an executive decision made pursuant to a statutory provision is open to judicial review on three grounds: illegality, irrationality, and procedural irregularity. Therefore, in respect of the case at bar, even with the expanded definition of the term “*national security*” provided by the defendants to include “the economy, and institutions and diplomatic relations with other states”, there is still a requirement for procedural fairness and it is not sufficient to label an action as being in the nature of “national security” in order to escape the scrutiny of the court. There are several decided cases that have held that the issue of cancellation or revocation of a passport are justiciable.

- [32] I hasten to say that I am quite mindful of the fact that is not the decision that is to be reviewed. It is the process by which the decision was reached which is under scrutiny. This position was articulated in **Council of Civil Service Unions** case¹¹ where the court stated:

“The issue here is not whether the minister's instruction was proper or fair or justifiable on its merits. These matters are not for the courts to determine. The sole issue is whether the decision on which the instruction was based was reached by a process that was fair to the staff at GCHQ. As Lord Brightman said in *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 at 154, [1982] 1 WLR 1155 at 1173: 'Judicial review is concerned, not with the decision, but with the decision-making process.'”

¹⁰ [2009] ECSCJ No. 58

¹¹ *Supra*, note 7 at f

[33] Therefore, it is open to the court to determine whether there has been a breach of procedural fairness and this will be based on the particular facts and circumstances of the case.

[34] I will now address the issue of whether the 1st defendant had the power to “disable/deactivate” the claimants’ passports and if so, was the power lawfully exercised.

[35] The Press Release stated as follows:

“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 passports 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.

Saint 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 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.”

[36] The defendants used the words ““disable/deactivate” interchangeably to refer to the decision taken by the 1st defendant on September 14th, 2021 in relation to the Original Passports issued to the claimants. In fact, the term used in the Press Release was “disable”. 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. Section 3 of the Act provides for the issue, renewal, cancellation and withdrawal of passports as follows:

- “(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.”

[37] The Passport and Travel Documents Act does not define what it means to cancel or withdraw a passport. It only states the effect of these actions, that is, the passport becomes void. The Permanent Secretary, Mr. Petty, in his first affidavit at paragraph 10 (iii) to (vi), sought to explain the meaning and effect of deactivation/disabling of passports and is worth setting out the relevant sections.

[38] Mr. Petty stated:

- “(iii) The terms ‘deactivation’ or ‘disabling’ of passports is used by the Ministry of National Security to refer to the action taken by the Minister of National Security to prevent persons identified as terrorists or as having committed serious crimes from using the St. Kitts and Nevis passport to travel globally thereby causing reputational damage to the Citizenship by Investment Programme and the National Security interest of the St. Kitts and Nevis.
- (iv) When a decision is taken to deactivate a passport the first steps taken are to update the Border Management System to indicate that the passport cannot be used for travel and to alert the Police Strategic Intelligence Unit to inform Interpol that the passport cannot be used for travel. This means that the particular passport in issue cannot be used by the holder of the passport for travel.
- (v) Deactivation of a passport does not necessarily mean that the person is no longer eligible to hold a passport, as the Minister of National Security may, after consideration of the matter, issue another passport to the person.
- (v) 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.

- (vi) In this case deactivation of the passports means that Khaled and Walid Awad are unable to use the passports to travel. Khaled Awad and Walid Awad remain citizens of St. Kitts and Nevis and no action has been taken to disable their citizenship or deprive them of their citizenship.” In this case following the deactivation/disabling of the Claimants passports the Claimants were issued new passports.”

[39] The effect of the action by the 1st defendant, as explained by Mr. Petty, is that the passports can no longer be used and new passports would have to be issued. By the acts described by the Permanent Secretary, in particular the notification that the passport cannot be used for travel, which is communicated to Interpol, the Government of St. Christopher and Nevis is signifying that the claimants are no longer allowed to present their passports for the purpose of making a request to another state to travel into their jurisdiction or within their jurisdiction. The state of St. Christopher and Nevis can be seen to have withdrawn its request to foreign states in relation to the claimants travel in their territory. In other words, “deactivation” or “disablement” means that the passports were in fact “cancelled”.

[40] I am not persuaded that the terms “deactive”, “withdraw” or “cancel” are synonyms 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 *deactivation/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.

[41] Even if I am wrong on this and one accepts that the effect of *deactivation/disabling/cancelation* are one and the same, following on my earlier finding that the decision is still susceptible to review to ensure that the constitutional

or other rights of the claimants have not been infringed and that procedural fairness was followed, I will now examine the process and the alleged breaches of rights being asserted by the claimants.

- [42] The claimants have asserted that by the defendants' actions several of their constitutional rights as citizens of Saint Christopher and Nevis were violated, namely, the right to personal liberty, the protection from deprivation of property and protection of freedom of movement. In **Attorney General of Grenada v Ehsan**¹², Blenman JA stated:

“It has consistently been the approach of the courts, when the constitutionality of actions taken by state officials is brought into question, to determine first whether or not the legislation that confers power on those state officials is constitutional”.

- [43] In his submissions, Mr. Prudhoe stated that while a citizen of St. Christopher and Nevis may not require a passport to enter or leave the Federation, in all practical respects, however, travel to other jurisdictions outside of St. Christopher and Nevis is impossible in the absence of a passport. In that regard, the right to travel (and thus to a passport for doing so) has well established constitutional protection. He relied on **Sawhney v Assistant Passport Officer, Government of India**¹³ in arguing that this protection is found in section 5 of the Constitution which is similar in nature to the relevant article of the Indian Constitution .

- [44] The court in **Sawhney**, as reported, found that a person resident in India has a fundamental right to travel abroad and the refusal by the government to issue him a passport is a denial of the right to personal liberty and equality before the law guaranteed by the Constitution of India. The report goes on to say that the majority allowed the petition and quashed the decision recalling the passport. The court held that the right to travel outside of the country was an integral part of the express

¹² (2020) 98 WIR 335 at paragraph [80]

¹³ (1967) The Times 15.4.1967.

guarantee contained in the Constitution that no person shall be deprived of his personal liberty except according to procedure established by law.

[45] Section 5 of the Constitution provides a list of legitimate exceptions to the overriding protection to personal liberty. Mr. Prudhoe submitted that none of these exceptions applied to the case at bar.

[46] While I am sympathetic to the view that given the importance of having a passport in order to travel abroad, particularly in the citizenship by investment environment, without the benefit of the full analysis of the Indian court in **Sawhney**, I am reluctant to rely on that case, as reported, as authority for the proposition put forward on behalf of the claimants that the right to have a passport has constitutional protection under section 5 of the Constitution.

[47] Moreover, as Mrs. Bullen-Thompson submitted in her oral arguments, this was not one of the grounds set out by the claimants in their Fixed Date Claim. I find favour in her contention that the court should not follow **Sawhney** as the court was not provided with a full and complete copy of the decision and so neither the court nor counsel for the defendants have had the benefit of reading the decision in its entirety.

[48] With respect to the claimants' argument that they were also effectively and functionally deprived of their property by being unable to use their passports, section 8 of the Constitution outlines provisions for protection from deprivation of property as follows:

“ (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsory acquired, except for a public purpose and by or under the provisions of a law that prescribes the principles on which and the manner in which compensation therefor is to be determined and given.

(2) Every person having an interest in or right over property that is compulsorily taken possession of or whose interest in or right over any

property is compulsorily acquired shall have a right of direct access to the High Court for—

- (a) the determination of his or her interest or right, the legality of the taking of possession or acquisition of the property, interest or right and the amount of any compensation to which he or she is entitled; and
- (b) the purpose of enforcing his or her right to prompt payment of that compensation:

Provided that, if the legislature so provides in relation to any matter referred to in paragraph (a), the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the interest in or right over the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter.”

[49] The court was asked to consider the case of **Lihua Tian v Ag of Antigua**¹⁴ as authority for the proposition that a passport may be deemed “property” that is capable of constitutional protection. In **Lihua Tian**, the Antiguan authorities retained the claimants’ passports without any allegations of wrongdoing on the part the claimants after they were release from custody on successful *habeas corpus* applications. The court found that the Immigration and Passport Act did not authorise the retention of the passports in the way in which the defendants sought to retain them.

[50] In my view, section 3(2) of the Passports and Travel Documents Act is conclusive that the passports issued to the claimants are the property of the Crown and not the property of the claimants. I therefore do not agree with the claimants’ assertion that they have the right under section 8 of the Constitution not to be deprived of their property and that the “disabling” of their Original Passports is an unlawful interference with their property. The issue to my mind is whether the 1st defendant arrived at the decision in a way that was fair in all the circumstances.

[51] I will now address the issue of freedom of movement under the Constitution.

¹⁴ Supra, note 4

[52] The claimants have acquired their citizenship by investing in St. Christopher and Nevis. They reside outside of St. Christopher and Nevis. They assert however, that they are art dealers and that they travel to conduct business¹⁵. As stated earlier, it is not possible in modern society to travel abroad without the possession of a valid passport. Therefore, they contend, a withdrawal or “disabling”/“deactivating”, or cancelling a passport has the consequence of prohibiting foreign travel and is therefore a restriction on their right to freedom of movement and is inconsistent with section 14 of the Constitution.

[53] Section 14 of the Constitution provides for the protection of freedom of movement as follows:

- “(1) A person shall not be deprived of his or her freedom of movement, that is to say, the right to move freely throughout Saint Christopher and Nevis, the right to reside in any part of Saint Christopher and Nevis, the right to enter Saint Christopher and Nevis, the right to leave Saint Christopher and Nevis and immunity from expulsion from Saint Christopher and Nevis.
- (2) Any restriction on a person’s freedom of movement that is involved in his or her lawful detention shall not be held to be inconsistent with or in contravention of subsection (1).
- (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) to the extent that the law in question makes provision-
 - (a) for the imposition of restrictions on the movement or residence within Saint Christopher and Nevis of any person or on any person’s right to leave Saint Christopher and Nevis that are reasonably required in the interests of defence, public safety or public order;
 - (b) for the imposition of restrictions on the movement or residence within Saint Christopher and Nevis or on the right to leave Saint Christopher and Nevis of persons generally or any class of persons in the interests of defence, public safety, public order, public morality or public health and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society;

¹⁵ Paragraph 6 of the second affidavit of 1st claimant

- (c) for the imposition of restrictions, by order of a court, on the movement or residence within Saint Christopher and Nevis of any person or on any person's right to leave Saint Christopher and Nevis either in consequence of his or her having been found guilty of a criminal offence under any law or for the purpose of ensuring that he or she appears before a court at a later date for trial of such a criminal offence or for proceedings preliminary to trial or for proceedings relating to his or her extradition or lawful removal from Saint Christopher and Nevis;
 - (d) for the imposition of restrictions on the freedom of movement of any person who is not a citizen;
 - (e) for the imposition of restrictions on the acquisition or use by any person of land or other property in Saint Christopher and Nevis;
 - (f) for the imposition of restrictions upon the movement or residence within Saint Christopher or on the right to leave Saint Christopher and Nevis of any public officer that are reasonably required for the proper performance of his or her functions;
 - (g) for the removal of a person from Saint Christopher and Nevis to be tried or punished in some other country for a criminal offence under the law of that other country or to undergo imprisonment in some other country in execution of the sentence of a court in respect of a criminal offence under a law of which he or she has been convicted; or
 - (h) for the imposition of restrictions on the right of any person to leave Saint Christopher and Nevis that are reasonably required in order to secure the fulfilment of any obligations imposed on that person by law;
- and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

[54] The claimants relied on **XH v. SSHD; A v. SSHD**¹⁶. In that case the English Court of Appeal confirmed that cancellation of a (British) passport engaged European Union rights of free of movement and that the Home Secretary had a duty to act fairly. The cancellation was based on suspected terrorist activity. Unlike in **XH v.**

¹⁶ Supra, note 2

SSHD; A v. SSHD, in the case at bar there was no offer of a single-use travel document if needed.

- [55] I find that section 14 of the Constitution clearly sets out the parameters of the right to freedom of movement. It is the right to move freely throughout St. Christopher and Nevis, the right to reside in any part of Saint Christopher and Nevis, the right to enter and leave Saint Christopher and Nevis and immunity from expulsion from Saint Christopher and Nevis. The right which the Constitution protects is the right of movement *vis a vis* the territory of St. Christopher and Nevis.
- [56] In the circumstances, I am not convinced that the case at bar is a fit and proper one for constitutional relief as it relates to freedom of movement.
- [57] However, that is not the end of the matter. The administrative claim is still relevant. The claimants have asserted that they were given no reason for the *de-activation/disablement/cancelation* of their passports and, moreover, despite their best efforts, it was over three months after the action and only due to commencement of this action that they were provided with what purports to be the reason for the 1st defendant's action. Further, they were not given any opportunity to make representations in relation to the said actions.
- [58] It is a well-established legal principle that, 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 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 rare¹⁷.

¹⁷ Attorney General of Grenada v Ehsan - (2020) 98 WIR 335

[59] In **R. v. SSF&CA, ex parte Everett**¹⁸ a British passport holder living in Spain was refused a passport when he applied to the British Embassy in Spain for one. He was refused the passport because there was a warrant in existence in Britain for his arrest and it was the Secretary of State's policy not to issue a passport to persons who were wanted by the police on suspicion of a serious crime. The details of the warrant were not provided to him. The applicant applied for judicial review by way of an order of *certiorari* to quash the refusal on the ground, *inter alia*, that the particulars of the warrant had not been made available to him. The court held:

*“Although a decision by the Secretary of State to refuse to issue a passport involved the exercise of prerogative power, the High Court had jurisdiction to review such a decision and to inquire whether a passport had been wrongly refused. Accordingly, although the Secretary of State's policy of not issuing passports abroad to persons against whom there were warrants of arrest outstanding in the United Kingdom was a valid policy, **nevertheless when a passport was refused on that ground the Secretary of State was required to give the reason for the refusal, to provide the applicant with the particulars of the warrant and to inform him that if there were exceptional reasons (e.g. compassionate grounds) why the policy should not be applied they would be taken into account.** However, since the applicant had not suffered any injustice because he had known by the date of the hearing everything which he should have been told by the Secretary of State, and since there were no exceptional reasons in his case, there were no grounds for granting relief. The appeal would therefore be allowed.” (My emphasis).*

[60] In the case at bar, the defendants have countered the claimants' assertion by providing the relevant context and reasons for the deactivation/disabling of the claimants' passports.¹⁹

[61] The claimants do not deny that they have been placed on the UAE's Terror List. However, the defendants have not provided a forum for the claimants to make representations in respect of what, to the date of hearing of the matter, is a decision based entirely on a newspaper article and one UAE Ministerial Paper. The uncontroverted evidence that was presented was that there was no communication

¹⁸Supra, note 3

¹⁹ Paragraphs 6 -10 of Osmond Petty's affidavit.

to either claimants. They learnt of the 1st defendant's action when they saw the Press Release and inferred that they could not use their Original Passports again.

[62] The efforts by the claimants to find out what had happened and what could be done to reassure the Government of St. Christopher and Nevis of the true position in relation to the claimants were ignored. It was only after the commencement of these proceedings, by letter dated January 19th, 2022, the Permanent Secretary wrote to the claimants' attorney outlining the some of the reasons for the disabling of the passports and added the steps which the Government had taken to obtain further information from the UAE.

[63] The defendants submitted that the claimants had sufficient information and would have been apprised of the reasons for the decision even before September of 2021. However, the evidence that I have accepted is that some reasons were in fact only given to the claimants in Mr. Petty's letter of January 2022. It is also clear from the evidence that the 1st defendant was still awaiting information even after he made the decision. To date, there is no evidence that the additional information has been received from the UAE.

[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.

[65] Mrs. Bullen-Thompson urged the court to follow **SSF&CA, ex parte Everett** where the court in that case found that the Secretary of State was obliged to give reasons

for his decision but found that the applicant had suffered no injustice because he had known by the date of hearing everything he should have been told by the Secretary of State. I find the facts of the case at bar to be distinguishable in that procedural fairness includes an opportunity to be heard and the right to representation even after the decision is made.

[66] Mrs. Bullen Thompson submitted that while the defendants are adamant that based on the case law and the facts, that the claimants were not entitled to a hearing prior to the 1st defendant making the decision in relation to their passports the defendants have not closed the door on the claimants and continue to await additional information from the UAE, which to date, has not materialised.

[67] Notwithstanding this assertion by Mrs. Bullen-Thompson, on the 12th October 2022, after the above submissions were made to the court and while this decision was pending, the 1st defendant (albeit a new minister) proceeded to cancel the claimants' New Passports. This specific decision/action is not presently before the court for consideration and this court cannot and will not make any finding in relation to it. However, those facts are relevant to these proceedings only to the extent that they may affect quantum of damages given that the claimants are currently without passports.

[68] The authorities are very clear as to how these matters are to be approached. In **XH v. SSHD; A v. SSHD** there was a demonstrated "genuine, present and sufficiently serious threat to a vital national interest" ...to justify cancellation of the passport. That case demonstrates that cancellation is susceptible to judicial review as does **R. v. SSF&CA, ex parte Everett**.

Conclusion

[69] Considering the evidence before the court, the legal principles applicable to this area of law, I find that the 1st defendant failed to discharge his duty to act fairly and to provide an opportunity to the claimants to answer the accusations that they were

“notoriously undesirable or dangerous”²⁰. What has in fact occurred, according to the evidence, is that defendants have been left waiting on the UAE to provide adequate information in relation to its determination it made regarding the claimants.

[70] In his evidence on behalf of the defendants, Mr. Petty deposed that it is important in a citizenship by investment jurisdiction that St. Christopher and Nevis be taken seriously and therefore they must act quickly in collaborating with overseas partner jurisdictions. However, to my mind the argument of the claimants that when you acquire citizenship, by whatever means, you should be accorded the same fair treatment and entitlement to due process is equally important and an even more powerful argument. The claimants have a right to be heard. I am not satisfied that they have been afforded a fair hearing. In my view the defendants have breached the rules of procedural fairness.

[71] A court has considerable discretion as to whether a claimant is entitled to the remedy he seeks, or to any remedy at all even when it has been established that a public body has erred in making a decision affecting him.

[72] Having made the determination above, the court is of the view that the claimants are entitled to some reliefs. The claimants sought reliefs in the form of (1) the quashing of the disablement (2) retraction of the Press Release and (3) damages for the claimants’ losses in terms of deprivation of passports, loss of business, and (4) costs.

[73] On the issue of whether an order quashing of the decision of the 1st defendant would be appropriate, Mrs. Bullen-Thompson, relying on **R v Metropolitan Borough of Sefton ex parte Healiss and Naidike and Others v Attorney General**²¹, submitted that when one looks at the effect of the 1st defendant’s action in that the Original Passports are now void and new passports are in play, it is clear that a

²⁰ Fransman’s British Nationality Law, 3rd edition. Page 775

²¹ [2004] UKPC 49

declaratory order, as opposed to a quashing order, may be more appropriate in the circumstances. Mr. Prudhoe, on the other hand submitted that there is no reason that the court cannot quash the 1st defendant's decision and also give declaratory order.

[74] With respect to damages, Mr. Prudhoe submitted that the recent case of **Lihua Tian**²², is instructive in relation to quantum of damages in similar circumstances as the case at bar. He asserted that the sum of \$56,000.00 for each of the claimants' loss of passport and loss of freedom of movement would be appropriate in the circumstances, given that the claimants did everything to avoid these proceedings. On the question of special or compensatory damages for the value of lost business, the court has been invited to consider adjourning the matter to the Master for further evidence.

[75] The defendants on the other hand maintained that the claimants' inability to travel for the period of time before the issue of the New Passports in February 2022 would not have prevented them from carrying on their business as they could have utilized online auctions to conduct their business, based on the evidence. The defendants further submitted that they are not responsible for any loss suffered by the claimants due to interruption of business. Additionally, with respect to loss of reputation, the claimants were already in the public domain when the Government's Press Release was issued. Therefore, the defendants are not responsible for any loss of reputation suffered by the claimants and the claimants are not entitled to damages in this regard.

[76] Save for the period of February to early October 2022, the claimants have been without the use of their Original Passports since September 2021. The 1st claimant's Original Passport would have expired on 10th August 2024 and the 2nd claimant's Original Passport would have expired on the 2nd November 2025. In my judgment

²² Supra

the claimants are entitled to compensation in the form of damages for the unlawful deprivation of their passports.

[77] On the issue of special damages for loss of business, I find that the defendants are liable to compensate the claimants for consequential loss in the form of damages. However, the claimants have not specifically pleaded the particulars of loss nor presented evidence.

[78] Based on the evidence presented I am not satisfied that the claimants have suffered any loss of reputation. Information that the claimants were on the UAE's terrorist list, for whatever reasons, was already in the public domain before the Press Release. I therefore make no finding of liability by the defendants for loss of reputation.

[79] Additionally, I find that the circumstances of this case do not justify any award of vindictory damages.

[80] For the reasons stated above I shall grant the following reliefs to the claimants:

- (i) A declaration is granted that the decision of the 1st defendant to disable the passports of the claimants 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 defendant to disable/cancel/withdraw the passports of claimants without providing an opportunity to them to make representation with respect to the allegations that informed the decision of the 1st defendant 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 defendant to disable/cancel/withdraw the claimants' passports are null, void and of no legal effect.
- (iv) An order of certiorari quashing the decision to disable/cancel/withdraw the claimants' passports is granted.

- (v) The claimants 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 defendant in such sums as may be assessed.
 - (vi) No order is made for retraction of the Press Release.
 - (vii) Costs is awarded to the claimants to be assessed if not agreed within 21 days of today's date.
- [81] The court gratefully acknowledges the assistance of all learned counsel in the matter.

Yvette Wallace
High Court Judge (Ag)

By the Court

Registrar