

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CIVIL)
A.D. 2020**

CLAIM NO. AXAHCV 2020/0038

BETWEEN:

[1] MONICA ARRECHEA CUERO
[2] SONIA MARIA TORREZ MEDINA
[3] NELSEY LORENA LOPEZ VIVEROS
[4] CARMEN EDILIA BARCENAS CURPA
[5] FRANCIA NORIMAR COREA NAVARRO
[6] ANGELI CAROLINA MALAVE CENTENO
[7] RAYLENY MADELEY CASTRO TORREZ
[8] JINESKA MAYERLYN VASQUEZ BLANCO

Applicants

and

[1] THE CHIEF IMMIGRATION OFFICER
[2] THE SUPERINTENDENT OF PRISONS

Respondents

Appearances:

Mr. Patrick Thompson with him Ms. Lavan Hoyoung of Counsel for the Applicants
Mr. Ivor Greene, Senior Crown Counsel, Attorney General's Chambers of Counsel
for the Respondents

2020: August 31;
September 2.

Writ of Habeas Corpus ad subjiciendum – CPR 57 – Sections 11 Immigration and Passport Act – Prohibited immigrant – Removal Order – Illegal Entry – Plea of guilty to illegal entry – no conviction entered by magistrate – Magistrate deeming person prohibited immigrant pursuant to section 13 of Immigration and Passport Act and making removal order instead of entering conviction and sentencing offender – Whether magistrate competent to deem offender prohibited immigrant – Exercise of Chief Immigration Officer's discretion to permit prohibited immigrant to remain conditionally or unconditionally – Whether detention pending removal unreasonable – Whether detention unlawful – Whether prohibited immigrant entitled to release pending removal

JUDGMENT

- [1] **INNOCENT, J.:** The factual basis of the present application does not appear to be in dispute. On 8th May 2020, the applicants, Cuero, Medina, Curpa, and Navarro were arrested during a joint operation conducted by Immigration and Police authorities in relation to certain alleged offences under the Immigration and Passport Act.
- [2] On 23rd May 2020, the applicants, Torez, Blanco, Centeno and Viveros were arrested in a separate joint operation conducted by Immigration and Police authorities for alleged immigration offences.
- [3] It appears that all of the applicants arrived in Anguilla on dates and places not designated a port of entry and without having granted permission to enter and remain in Anguilla by an Immigration Officer.
- [4] The applicant Blanco had been granted conditional leave to remain in Anguilla as a prohibited immigrant. She was detained because of alleged breaches of the conditions upon which she was granted leave to remain in Anguilla.
- [5] On 12th May 2020 the applicants, Cuero, Medina, Curpa and Centeno, were taken before the Magistrate's Court and were remanded in custody at Her Majesty's Prison ('HMP'). The remand warrants were all returnable on 19th May 2020. It appears that at the time of their remand on 12th May 2020 none of the applicants had yet been charged with any offence. Also, it is unclear whether any of those applicants were brought before the Magistrate's Court on 19th May 2020 and further remanded in custody. No remand warrant dated 19th May 2020 has been presented to the court.
- [6] On 5th June 2020 the applicants, Cuero, Medina, Curpa and Centeno, were each charged with the offence of illegal entry contrary to section 13(1) of the Immigration and Passport Act.¹ On even date, each of the said applicants entered

¹ R.S.A. c.15

pleas of guilty to the offences charged. The presiding magistrate deemed the applicants prohibited immigrants and ordered their removal from Anguilla pursuant to section 11(1) of the Immigration and Passport Act. It does not appear that the presiding magistrate entered convictions in relation to the applicants on the substantive offence of illegal entry contrary to section 13(1) of the Immigration and Passport Act.

- [7] The Removal Order was in Form 8 and made pursuant to section 13 of the Immigration and Passport Act and dated 5th June 2020 and was signed by the presiding magistrate.
- [8] The third applicant, Viveros, was charged on 2nd June 2020 with the offence of illegal entry contrary to section 11(1) of the Immigration and Passport Act. She too entered a plea of guilty to the substantive offence; and she was ordered to be removed from Anguilla as appears by Removal Order in Form 8 and made pursuant to section 13 of the Immigration and Passport Act and dated 5th June 2020 and duly signed by the presiding magistrate
- [9] The applicants, Torrez and Blanco, were charged on separate complaints dated 27th May 2020 for the offences of illegal entry contrary to section 11(1) of the Immigration Act.
- [10] It appeared that applicants who were arrested on 23rd May 2020 appeared before the Magistrate's Court for the first time on 27th June 2020. The reason proffered for the delay in bringing those applicants before the Magistrate's Court earlier was that it was necessary to determine their COVID-19 status prior to bringing them before the court.²
- [11] The aforementioned applicants all entered pleas of guilty to the charge of illegal entry contrary to section 11(1) of the Immigration and Passport Act. Again, the presiding magistrate recorded no convictions for those applicants, but instead

² See: Affidavit of Laureen Bryan, Chief Immigration Officer, 26th August 2020 at para 11

deemed them prohibited immigrants and made a Removal Order with respect to them.

- [12] The Removal Orders were signed by the Governor on 5th June 2020. The Removal Orders signed by the Governor were not presented to the court on the present application by either of the parties.
- [13] After the application herein was filed, it appeared that the applicants were relocated from HMP to The Valley Police Station where they continued to be detained. The affidavit of Mr. Paul Morrison, the Commissioner of Police, sets out the conditions in which the applicants are presently detained.³ Inasmuch as the Commissioner's affidavit attempts to point out that the circumstances of the applicants' detention has been significantly ameliorated in light of their relocation, it does not change the fact that the applicants continue to be detained, and for all intents and purposes, involuntarily so. The present proceedings concern the lawfulness of the applicants' detention and not necessarily an inquiry into the conditions of that detention.
- [14] All of the applicants contended that the length of their continued detention awaiting removal from Anguilla is unreasonable; and that their continued detention awaiting removal from Anguilla is unlawful. In the premises, they claim that they are entitled to be released forthwith, subject to terms and conditions.
- [15] The applicants also alleged that there has been no information forthcoming from the respondents, in particular the first-named respondent, the Chief Immigration Officer, regarding efforts made to have the applicants removed from Anguilla. In the circumstances, the applicants alleged that their continued detention, being of a prolonged and indefinite duration, is unreasonable and therefore unlawful.
- [16] By extension, the applicants contended that the Chief Immigration has a discretion pursuant to section 22 of the Immigration and Passport Act, which she had

³ See: Affidavit of Paul Morrison, Commissioner of Police, 26th August 2020 at paras 2-6

exercised unreasonably or failed to exercise at all, by refusing to grant the conditional release of the applicants.

[17] In addition, the applicants contend that the duration of their detention pending removal is unreasonable in light of the powers conferred on the Governor by section 9 of the Immigration and Passport Act with respect to their conditional release.

[18] The relevant authorities have proffered the following reasons for the applicants' continued detention. That the Immigration Department has sought to secure flights for the applicants' removal but have been unable to do so. This is particularly the case as air traffic to the regions from which the applicants hail are severely restricted in light of the proliferation of COVID-19 cases in Latin America. The affidavit of Ms. Kim Cutler, Deputy Head of the Governor's Office, Anguilla, speaks to efforts made to effect the applicants' removal from the territory.⁴ The Chief Immigration Officer's reasons for the delay in removing the applicants from the territory are contained in her affidavit.⁵

[19] As the court sees it, the following issues arise for the purpose of determining whether the continued detention of the applicants is unlawful:

- (1) Whether the presiding magistrate erred and acted ultra vires the Immigration and Passport Act when she purported to deem the applicants prohibited immigrants pursuant to section 10 of the Immigration and Passport Act.
- (2) Whether the decision of the Chief Immigration Officer to continue to detain the applicants pending their removal from Anguilla an unreasonable exercise of her discretion under sections 9 and 22 of the Immigration and Passport Act.

⁴ At paras 3-14

⁵ At para 12

These issues will be resolved within the context of the Immigration and Passport Act. Therefore, much will depend on the interpretation of the relevant provisions of the Immigration and Passport Act.

[20] Section 13 of the Immigration and Passport Act provides:

“(1) No person shall enter Anguilla by sea or by air, except at a port of entry.

(2) A person entering Anguilla by sea shall not disembark without the consent of an immigration officer, and the master of the vessel shall not allow any person to disembark without such consent and may use all reasonable and proper means, including the use of force, if necessary, to secure the detention of any such person on board the vessel until such consent may be given.

(3) A person entering Anguilla by air shall forthwith present himself to an immigration officer.

(4) Every person entering Anguilla shall, if required by an immigration officer—

- (a) make and sign the prescribed declaration; and
- (b) submit to be examined by a medical officer.

(5) Any person, other than a person to whom section 5 applies, who contravenes or fails or refuses to comply with any of the provisions of this section shall be deemed to be a prohibited immigrant and may be dealt with as such.”

[21] Section 10 of the Immigration and Passport Act confers on the Chief Immigration Officer the right to decide that a person is a prohibited immigrant for the purposes of the Immigration and Passport Act. Section 10 of the Immigration and Passport Act provides that:

“Where the Chief Immigration Officer decides that a person is a prohibited immigrant, the Chief Immigration Officer may in his discretion—

(a) within 15 days after the arrival of such person in Anguilla order him to leave Anguilla within a specified period, and, if the Chief Immigration Officer sees fit, by a specified vessel; or

(b) cause him to be arrested and brought before the Magistrate for an order for his removal.”

[22] Section 31 of the Immigration and Passport Act sets out the procedure to be followed where an Immigration Officer detains, restricts or arrests any person as a prohibited immigrant. The section also grants a person who has been arrested and detained as a prohibited immigrant the right to appeal to a magistrate.

Section 31 provides:

“(1) Whenever leave to enter Anguilla is withheld by an immigration officer or whenever any person is detained, restricted or arrested as a prohibited immigrant, notice of that fact and the grounds of refusal, detention, restriction or arrest shall be given to such person in the prescribed form, and, if such notice is given within 7 days of the arrival of any immigrant, the immigration officer giving such notice shall also give notice to the master, agent or owner of the vessel by which the immigrant arrived of the same matters in respect of the immigrant and that a notice has been given to the immigrant in respect of those matters.

(2) Except as provided in this section, every immigrant to whom a notice has been given under this section may appeal to the Magistrate by giving notice of appeal to the Magistrate and to the Chief Immigration Officer within 7 days of the decision appealed against.

(3) An appeal shall lie from any decision of the Magistrate to the Court of Appeal.”

[23] Section 11 of the Immigration and Passport Act sets out the procedure to be followed in order to obtain the removal from Anguilla of a person held to be a prohibited immigrant pursuant to section 10 of the Immigration and Passport Act; and confers certain powers on a Magistrate regarding the removal and detention of such a person. Section 11 provides:

“(1) If any person is held to be a prohibited immigrant, the Magistrate may, subject to the provisions of this Act and the terms of any permit granted under this Act, on the application of an immigration officer or any person authorised in writing by the Chief Immigration Officer for the purpose of making such application, order the immigrant to be removed from Anguilla and in the meantime to be detained in custody.”

[24] Having read the aforementioned provisions of the Immigration and Passport Act, the court is of the considered view that the Magistrate exceeded her authority when she deemed the applicants prohibited immigrants. The power to deem a person a prohibited immigrant is one that is within the province of the Chief Immigration Officer or an Immigration Officer, as the case may be. The

Immigration and Passport Act confers no such power on a Magistrate. Therefore, the court finds that the Magistrate had exceeded her authority by so doing.

[25] In addition, it has not been made to appear to the court whether the procedure contemplated by section 31 of the Immigration and Passport Act had been observed in the case of any of the applicants. The failure to observe the procedure set out in section 31 would have resulted in the applicants being deprived of their right to be heard and the dictates of procedural fairness encapsulated in section 31 of the Immigration and Passport Act. Assuming that this is indeed the case, then the entire procedure adopted in the case of the applicants would have been flawed, and thereby the entire process of their arrest and detention would be rendered unlawful and/or in breach of natural justice.

[26] The court is fortified in its position by the decision in **Hatcher v Critchlow**⁶ which concerned the provisions of sections 8, 29 and 36 of the Immigration Ordinance Cap. 76 of the Laws of Saint Lucia⁷ which employed similar language as relevant provisions of the Immigration and Passport Act examined in the present judgment.

[27] In **Hatcher v Critchlow**, the appellant pleaded guilty to a charge on 6 November 1969, that she, having arrived in the state by air, disembarked without the consent of the Air Immigration Officer contrary to s 36(1)(b) of the Immigration Ordinance, Cap 76. At the trial the learned magistrate, without entering a conviction, reprimanded and discharged her and made a deportation order. On the same day, the magistrate signed an order for the removal of the appellant from the state and described her as a prohibited immigrant. The appellant appealed against the removal order, and in the notice of appeal she stated: that the magistrate's decision with respect to the removal order was erroneous in point of law. As regards the removal order it was argued by counsel for the appellant that the

⁶ (1969) 14 WIR 426

⁷ *8 (1) No person shall enter the colony by sea or by air except at a port of entry under this Ordinance.

(2) No person arriving in the colony by sea or by air shall disembark without the consent of an immigration officer.

(4) Any person who contravenes or fails to comply with any of the provisions of subsection one or two of this section may be deemed a prohibited immigrant.

magistrate had no authority under section 36(1)(b) to make this order, and consequently he acted outside the power given by that section.

[28] The court held, allowing the appeal, that the right to deem a person a prohibited immigrant is vested by the Ordinance in (1) the Governor in Council; and (2) an Immigration Officer, and provision is made for a right of appeal to a magistrate where the decision is made by an Immigration Officer. Nowhere in the Ordinance is the power to deem a person a prohibited immigrant upon conviction for an offence vested in a magistrate. As the appellant had not been lawfully deemed a prohibited immigrant at the time the removal order was made, the removal order and the consequential order for detention in custody until deportation were invalid; and that both the magistrate's notes and the formal order drawn up indicate that he did not enter a conviction against the appellant or find her guilty in respect of the offence with which she was charged. It should be borne in mind that by section 1276 of the Criminal Code no person is liable to punishment except "after being duly convicted". A plea of guilty is not equivalent to a conviction. The court does not, however, make this a ground of its decision, for the power vested in the Governor in Council or an Immigration Officer, subject to proper procedures, to deem a person a prohibited immigrant for contravention of s 8 of the Ordinance, does not depend upon his conviction by a magistrate of an offence under s 36.

[29] Lewis CJ, delivering the judgment of the court in **Hatcher v Critchlow** said:

"In his reasons the learned magistrate stated that "I exercised my discretion to the effect that she was a prohibited immigrant". The magistrate seems to have erred in his recollection of the case, for neither the note made by him, nor the removal order, both made on the 6th, records that he purported to do so.

Even if he had done so, however, the removal order would have been void. For neither s 8 nor s 36 confers upon the magistrate power to deem any person a prohibited immigrant.

It is well established law, as the learned Attorney-General conceded, that a magistrate's court, being itself the creature of statute, can only exercise such powers as are conferred upon it by a statute. The Attorney-General, however, submitted that such a power is impliedly conferred upon the magistrate by ss 8 and 36. Section 8 does not create a summary offence

and makes no mention of the magistrate at all, and s 36, which creates the offence and prescribes what penalties the magistrate may impose upon conviction, does not confer, either expressly or by reference to s 8, a power to deem the offender a prohibited immigrant. This submission cannot be sustained.

The right to deem a person a prohibited immigrant is vested by the Ordinance in (1) the Governor in Council and (2) an immigration officer, and provision is made for a right of appeal to a magistrate where the decision is made by an immigration officer. Nowhere in the Ordinance is the power to deem a person a prohibited immigrant upon conviction for an offence vested in a magistrate.

As the appellant, at the time the removal order was made, had not been lawfully deemed a prohibited immigrant, the removal order and the consequential order for detention in custody until deportation, were invalid.

It may be as well to record that both the magistrate's notes and the formal order drawn up indicate that he did not enter a conviction against the appellant or find her guilty in respect of the offence with which she was charged.

Magistrates should bear in mind that by s 1276 of the Criminal Code no person is liable to punishment except "after being duly convicted". A plea of guilty is not equivalent to a conviction. We do not, however, make this a ground of our decision, for the power vested in the Governor in Council or an immigration officer, subject to proper procedures, to deem a person a prohibited immigrant for contravention of s 8 of the Ordinance, does not depend upon his conviction by the magistrate of an offence under s 36."

[30] It appears that on the facts of the present case, the presiding magistrate fell into similar error as the magistrate in **Hatcher v Critchlow**. For this reason, the court does not hesitate to find that the applicants, at the time that the removal orders were made, had not been lawfully deemed prohibited immigrants. Therefore, the removal orders and the consequential orders for detention in custody pending removal were invalid, void and of no effect.

[31] Clearly, the court's findings above would be sufficient to dispose of the matter in its entirety. However, for the sake of completeness the court will seek to examine the other complaints made by the applicants.

[32] Section 30 of the Immigration and Passport Act makes provision for the place and manner of detention of prohibited immigrants. The section provides:

“A person detained under this Act but not serving a sentence of imprisonment may be so detained either in the prison or in any other place appointed by regulation of the Minister for that purpose, but, if detained in the prison he shall be treated as a person awaiting trial.”

[33] There are three special features of section 30 which are deserving of mention in the present proceedings.

[34] Firstly, the section speaks to a person not serving a sentence of imprisonment. None of the applicants in the present case are serving sentences of imprisonment. As a matter of fact, the court has determined that the Magistrate did not enter convictions with respect to any of the applicants.

[35] Secondly, the section mandates that a person not serving a sentence of imprisonment may be detained in the prison or in any other place appointed by regulation of the Minister for that purpose. It appears that the applicants' present detention at the police station is not in conformity with any regulation made by the Minister pursuant to the Immigration and Passport Act. Their present detention at the police station, though arising out of sheer expediency, is inexcusable in that it is patently obvious that the conditions therein are not conducive to housing eight females at a time. Although the applicants' detention at the Police Headquarters in The Valley is not in contravention of the provisions of section 30 of the Immigration and Passport Act, thereby in and of itself rendering the current detention unlawful, the court is mindful of the inadequacy of this place of detention given the present circumstances. Mr. Greene has made the bold assertion that the police station is deemed to be a prison by the operation of section 1⁸ of the Prison Act⁹ and section 2(c)¹⁰ of the Prisons Regulations.¹¹ The court is not persuaded by this argument.

⁸ “prison” means gaol, and includes the airing ground or other ground or buildings occupied by prison officers and contiguous thereto and any other place which the Governor shall by regulation declare to be a prison;

⁹ R.S.A. c. P75

¹⁰ The following are designated as prisons for the purpose of the definition of “prison” in the Act— (c) the cells and premises in the Royal Anguilla Police Force Headquarters in The Valley.

¹¹ R.R.A P75

The court wishes to express its disappointment that Mr. Greene failed to direct the court to the provisions of section 1¹² of the Appointment of Place of Detention Regulations¹³ made pursuant to section 30 of the Immigration and Passport Act which designates Police Headquarters as a place of detention.

- [36] The court has adopted this posture purely on the basis that, the fact of the applicants' present detention at The Valley Police Station brings to the fore the unreasonableness of the applicants' continued detention. The court will examine this aspect of the case in depth later on in this judgment. In any event, section 30 of the Immigration and Passport Act speaks specifically to "the prison" as a designated place of detention by the Minister. To that extent, section 30 is specific; whereas section 2 of the Prison Regulations is stated in general terms.
- [37] Thirdly, the section contains the words "if detained in the prison he shall be treated as a person awaiting trial". One of the rights conferred on a person awaiting trial is the right to be brought before the court periodically for the purpose of determining the lawfulness of their continued detention. Therefore, the court is of the view that the applicants are entitled to the enjoyment of all the rights conferred on a prisoner awaiting trial. This is the case not just in relation to the conditions of the detention, but also with respect to the assurance that their constitutional rights are respected and that they will not be deprived of same. Therefore, it was incumbent on the relevant authority to ensure that the applicants' constitutional rights to liberty and freedom of movement was not curtailed otherwise than in conformity with the due process of law.
- [38] The applicants contend, that the duration of their continued and indefinite detention awaiting removal from Anguilla is unreasonable. The applicants rely on the decision in **R v Governor of Durham Prison ex parte Singh**¹⁴ for the proposition that a deportation order having been made in respect of the applicants,

¹² For the purposes of section 30 of the Immigration and Passport Act, the lock-up at the Police Headquarters, The Valley, Anguilla is appointed as a place of detention.

¹³ R.R.A. c. 15-1

¹⁴ [1984] 1 All ER 983

the Chief Immigration Officer's power under the Immigration and Passport Act, to detain them until their removal from Anguilla is subject to the following limitations:

- (i) the power may only be used for the purpose of detaining them pending their removal from Anguilla;
- (ii) the power is limited to a period which is reasonably necessary for that purpose, and
- (iii) the Chief Immigration Officer must exercise all reasonable expedition to ensure that steps are taken to secure their removal from Anguilla within a reasonable time. That in the circumstances of the present case, the Chief Immigration Officer should not have exercised the power at all since it must have appeared obvious to him that he is not going to be able, within a reasonable time, to operate the machinery provided under the Immigration and Passport Act for the removal of the applicants who are to be deported.

[39] In **ex parte Singh**, the applicant, who was detained in HM Prison at Durham pending his deportation from the United Kingdom pursuant to a deportation order made by the Secretary of State for the Home Department on 16 June 1983, applied for an order directing the issue of a writ of habeas corpus ad subjiciendum to the governor of the prison to secure the applicant's release.

[40] In **ex parte Singh**, Lord Wolf stated:

"Since 20 July 1983 the applicant has been detained under the power contained in para 2(3) of Sch 3 to the Immigration Act 1971. Although the power which is given to the Secretary of State in para 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Second, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend on the circumstances of the particular case. What is more, if there is a situation which it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable

period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention.”

[41] In the present proceedings, the applicants have clearly adopted the reasoning of Lord Wolf in **ex parte Singh**.

[42] The applicants have also relied on the decision in **Christopher Odikagbue v Chief Immigration Officer and Another**.¹⁵ The claimant in that case sought administrative remedies pursuant to CPR 56. He has claimed declaratory reliefs: that the failure to release him on an order for supervision or to hold an inquiry under the Immigration Act was unreasonable and an excess of jurisdiction and that his detention has given rise to breaches of his fundamental human rights under sections 4(a) and 4(b) of the Constitution: the right to liberty and not to be deprived thereof except by due process and the protection of the law.

[43] The issues that fell for determination in the above-cited case can be crystallized in the following terms: (a) whether the power to detain was lawfully exercised by the First Defendant; (b) whether the power to detain under sections 14 or 15 of the Immigration Act is subject to an implied limitation that it be for such period that is reasonably necessary to effect the purpose of convening a special inquiry or deportation; (c) whether the failure to release Mr. Odikagbue under an order of supervision under section 16 of the Immigration Act is an unlawful or unreasonable exercise of power; (d) whether the said detention and/or failure to release under an order of supervision is a breach of “due process” or protection of the law.

[44] The main complaint raised in **Odikagbue** was that the inordinate delay of his detention for 19th April 2015 and the failure to release him on conditional order under section 17 of the Immigration Act. The court held:

“What is clear however, having regard to the power to grant a conditional release, is that where it is apparent that an inquiry cannot be held within a reasonable period of time the immigrant ought to be released pursuant to section 17 of the Immigration Act on conditions unless there is good reason to do otherwise. This raises an equally important question which was inadequately addressed by the Defendant on the evidence. What

¹⁵ Claim No. CV2016-02258 (Republic of Trinidad & Tobago High Court) 9th February 2017

considerations can be legitimately taken into account in the exercise of the discretion under section 17 in the grant of a supervision order?”

- [45] The court also made the following observations, which the court in the present case finds extremely poignant:

“In *Tan Te Lam* the Privy Council had cause to apply the “*Hardial Singh Principles*”. In that case a large number of migrants from Vietnam had arrived without permission from Hong Kong by boat. They were refused refugee status and detained under section 13D(1) of the Immigration Ordinance. The migrants contended in their habeas corpus application that since the Vietnamese Government had a policy of refusing to accept them then their detention was not reasonable pending “repatriation”. The Privy Council held: “...where a statute had given the executive power to detain persons pending their removal from the country it was to be implied, unless the statute provided otherwise, that the power could only be exercised during such period as was reasonably necessary to effect removal **and that if it became apparent that removal was not going to be possible within a reasonable time, further detention was not authorized**; that the questions as to what constituted a reasonable period and whether there was sufficient prospect of the persons being removed within it were matters for the court to determine, with the burden being on the executive to prove on the balance of probabilities the facts necessary to justify the conclusion that the persons were being detained pending removal...”

- [46] Ultimately, the court held:

“For the reasons set out in this judgment I have made the declarations that the detention of Mr. Odikagbue was for a period of time that was not reasonably necessary to effect the conducting of an inquiry and a breach of his constitutional rights under section 4(a) of the Constitution. I also declare that the failure to order his release under supervision under section 17 of the Immigration Act was unreasonable and an excess of jurisdiction. I have directed the First Defendant to convene an inquiry within 7 days failing which Mr. Odikagbue is to be released under section 17 of the Immigration Act.”

- [47] The court is further fortified in its findings by the decision in **Smart Duah v The Superintendent of Prisons and Others**¹⁶ where the principles enunciated in **ex parte Singh** and **Hatcher v Critchlow** were ably set out by D’Auvergne J. in the circumstances of that case.

¹⁶ Suit No. 973 of 1999 (Saint Lucia) 7th March 2000

- [48] The provisions of the Immigration and Passport Act that are relevant to the question of the exercise of the Chief Immigration Officer's discretion and the reasonableness of the decision to continue the indefinite detention of the applicants are set out below.
- [49] Section 9 of the Immigration and Passport Act confers power on the Governor, or by his direction the Chief Immigration Officer, may permit a prohibited immigrant, except an immigrant to whom section 12(4) applies, permission to remain in Anguilla either conditionally or unconditionally. The section also allows an Immigration Officer to permit a prohibited immigrant to remain in Anguilla for temporary purposes.¹⁷ At the material time the applicants were not persons to whom section 12(4) applied.
- [50] Section 22(1) of the Immigration and Passport Act is particularly relevant to the exercise of the Chief Immigration Officer's discretion in granting a prohibited immigrant a permit to remain in Anguilla for so long as he may consider necessary where the a prohibited immigrant is ordered to leave Anguilla. Section 22(1) reads:
- “Whenever— (a) a prohibited immigrant has delivered a notice of appeal; (b) a prohibited immigrant is ordered to leave Anguilla; (c) security is required to be given in respect of an immigrant; or (d) the Chief Immigration Officer postpones deciding whether a person is or is not a prohibited immigrant; the Chief Immigration Officer may grant a permit for the immigrant to remain in Anguilla for so long as he may consider necessary.”
- [51] Section 22(2) is of particular relevance to the case of the applicant Jineska Mayerlyn Vasquez Blanco. The wording of this section points inexorably to the conclusion that the proper procedure was not followed by the Chief Immigration Officer or any Immigration Officer in relation to her. Section 22(2) provides:
- “(2) Instead of granting a permit under subsection (1), or on revocation or expiration of a permit, the Chief Immigration Officer may cause the

¹⁷ 9. (1) Notwithstanding anything to the contrary contained in this Act, the Governor or by his direction the Chief Immigration Officer may grant a permit for a prohibited immigrant (other than an immigrant to whom section 12(4) applies) to enter and remain in Anguilla either unconditionally or subject to such conditions, whether prescribed or not, as the Governor may think expedient. (2) An immigration officer may grant a permit for a prohibited immigrant to remain in Anguilla for temporary purposes in accordance with the provisions of this Act.

immigrant to be arrested and brought before the Magistrate who may either order a permit to be granted, restored or renewed and the immigrant to be released, or order the immigrant to be detained in custody until the matter is disposed of or until an opportunity occurs for him to leave Anguilla, as the case may require.”

[52] By letter dated 13th July 2020, the applicants’ solicitor wrote to the Chief Immigration Officer alluding to the discretion that the Chief Immigration Officer had by virtue of section 22 of the Immigration and Passport Act, and pointing out that the repatriation of the applicants was a near virtual impossibility in light of the COVID-19 travel restrictions.¹⁸

[53] The applicant’s solicitor wrote to the Chief Immigration Officer by letter dated 23rd July 2020 requesting information regarding the steps taken to effect the applicants’ repatriation. The letter also sets out the legal basis for the contention that the indefinite detention of the applicants was unreasonable and provided the reasons therefor.¹⁹ This letter further implored the Chief Immigration Officer to exercise the discretion that he had by virtue of section 22 of the Immigration and Passport Act.

[54] The Attorney General responded to the applicants’ solicitor’s letters aforesaid, by letter dated 27th July 2020, in the following terms:

“You would appreciate that the current restrictions in place for most countries has impacted travel. However, every effort is being made by HE The Governor, through diplomatic channels to have the detainees returned to their native lands. While we continue to use the diplomatic channels to have the detainees returned to their native lands, we are committed to ensuring that they are reasonably comfortable which is consistent with Anguilla’s human rights obligations.”²⁰

[55] The applicants contend, that in considering whether the period of detention necessary to secure their removal, the court should pay regard to the following factors: (i) the length of the detention; (ii) the nature of the obstacles preventing removal; (iii) the diligence, speed and effectiveness of the steps taken to overcome those obstacles; (iv) the conditions of the detention; (v) the effect of the

¹⁸ Exhibit B1

¹⁹ Exhibit B2

²⁰ Exhibit H

detention on the detainees and their family; (vi) the risk that if the detainees are released on bail they will abscond or commit criminal offences.

[56] It is patently obvious to the court that the travel restrictions imposed as a result of the COVID-19 pandemic is an almost insurmountable hurdle that impedes the applicants' repatriation. However, the court is also mindful of the fact that this ought to have been a consideration that the relevant authority should have borne in mind when exercising their discretion whether or not to permit the applicants to remain in Anguilla conditionally pending their removal. In any event, this point is now academic since the court has already found that the removal orders were invalid.

[57] The posture adopted by the Chief Immigration Officer was seemingly to let the court decide the question of the lawfulness of the applicants' detention. This is also apparent in the affidavit filed by Ms. Cutler. The court applauds the efforts made by the relevant authorities to secure the applicants' repatriation. However, the court also notes that to detain the applicants at a time when it is clearly patently obvious that travel restrictions would have impeded the applicants' repatriation rendered the decision to detain them indefinitely, unreasonable in the circumstances.

[58] There is no evidence placed before the court to suggest that the Chief Immigration Officer or the officer who revoked Ms. Blanco's permit to remain in Anguilla, considered the provisions of section 22(2) of the Immigration and Passport Act. It does not appear from the record that the Magistrate considered the provisions of section 22(2) either.

[59] Of even greater significance is the obvious failure to adhere to the procedure set out in section 22(2) of the Immigration and Passport Act. It appears that the Magistrate did not advert her mind to the provisions of section 22(2) and thereby failed to exercise a discretion that she had in the case of the applicant Blanco. In the circumstances, the Magistrate's decision to order the removal of the applicant Blanco and her detention pending such removal may properly be regarded as

arbitrary or an arbitrary exercise of her powers under section 11 of the Immigration and Passport Act.

- [60] The court will not endeavor in this judgment to highlight the obvious infringement of the applicants' constitutional rights. However, this is not intended in any form to downplay the significance of that infringement. This aspect of the case was not advanced forcefully by the applicants.

Conclusions

- [61] Having made the aforementioned findings, the court wishes to echo the sentiments of Kokaram J. in **Odikagbue** with the hopeful expectation that the message contained therein will be appropriately telegraphed to the parties concerned. His Lordship made the following observation which the court in this instance finds quite attractive:

“As long ago as 1981 Justice McMillan commented in *Francisco Centeno v Chief Immigration Officer No. 3092 A of 1981* that the Immigration Act “appears to contain many pitfalls for the unwary unless its provisions are clearly understood and observed, and I do not wish to be understood as indicating in this judgment that the immigration authorities have acted with any malice”. Thirty six years, later I make the same observation. The Immigration Act provides no warrant for the unreasonable detention of persons who are to be the subject of special inquiries. The deportation mechanism is not designed to be a holding bay ad infinitum. If the approach to convening the special inquiry as suggested by counsel in this case is that it is being conducted without haste such a laissez faire approach cannot be at the expense of the continued detention of Mr. Odikagbue. The purpose of the Immigration Act can only be achieved if the immigration authorities dutifully, lawfully and expeditiously operationalize the machinery of deportation. To do otherwise would expose them as in this case and unnecessarily so to public law challenges where the rights of the subject are jealously guarded against abuses of power.”²¹

²¹ At para 60

[62] In the circumstances, the court holds that the removal order issued by the Magistrate was a nullity and therefore void. It follows, that the consequent detention of the applicants was also unlawful. The court also finds, for the reasons stated herein, that the continued and indefinite detention of the applicants pending their removal from Anguilla was unreasonable in all the circumstances of the case.

[63] It is left entirely up to the Chief Immigration Officer to decide whether the machinery of the Immigration and Passport Act will again be triggered to effect the removal of the applicants from Anguilla in accordance with the guidance provided by the court in this judgment.

Order

[64] CPR 57.6 confers on the court the power to make such orders as are just. Having regard to the court's findings herein, the court makes the following orders as the justice of the case requires.

[65] In making what the court believes is the appropriate order, the court has considered that it is not the function of the court to determine the immigration status of any individual. That function falls squarely within the province of the Chief Immigration Officer and the Governor. The court is hopeful, that given the tenor of the present judgment, that the immigration authorities will take the necessary action that is in keeping with the court's findings herein to regularize the applicants' presence in Anguilla, either conditionally or unconditionally until their repatriation is achieved.

[66] In the circumstances, the court's order is as follows:

1. That the applicants shall be released from detention forthwith pending their removal from Anguilla.
2. The Passports and all other travel documents belonging to the applicants shall be kept in the possession of the Chief Immigration Officer until such time as the applicants' removal from Anguilla can be effected.

3. Costs is awarded to the applicants to be assessed if not agreed within 21 days of the date of this order.

Shawn Innocent
High Court Judge

By the Court

Registrar