IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. 2006 HCV02093

BETWEEN	REUBEN HERNANDEZ	CLAIMANT
AND	THE ATTORNEY GENERAL	DEFENDANT

Mrs. Jacqueline Samuels-Brown for Claimant.

Mrs. Simone Mayhew instructed by Director of State Proceedings for Defendant.

Heard: 14th and 31st July 2006 and 18th September 2006

Aliens Act – Deportation Order, Administrative/Executive decision, whether reviewable

Campbell J

(1) On 13th June 2006, a Fixed Date Claim Form was filed, seeking that a Writ of Habeas Corpus be directed to bring up the Claimant, Reuben Hernandez, a Colombian national, for such further Orders as the Court may direct. On that same date, the Claimant, through his attorneys, filed Notices for Court Orders, seeking the following Orders.

1. (a) that he be released from custody pending the final order herein and or pending the completion of the proceedings now pending before the Resident Magistrate for the parish of St. James in relation to the charge of Unlawful Possession of Property brought against him on information no. 11906 of 2006.

(b) A stay of the Order for deportation made herein pending the completion of the applicant's trial on information no. 11906 of 2006 charging him within Unlawful Possession of Property.

(c) Leave be granted to apply for judicial review namely;

(1) Writ or Order of Certorari to remove into the Supreme Court and to quash the Order of Deportation made by the Minister of Security dated May 1, 2006.

(2) A writ or Order of Prohibition preventing any further proceedings or steps pursuant to the order of Deportation aforesaid;

(d) Such other relief as this Honourable Court seems just.

(2) The grounds on which the Applicant is seeking the Orders are as follows:

(a) That the deportation Order made in relation to the Applicant is being contested by the Claimant/Applicant.

(b) That the Applicant is obliged to remain in the jurisdiction to face the charges brought against him and which are now pending in the Resident Magistrate Court for the parish of St. James.

(c) That the Applicant has been offered bail in respect to the said charges and prior to his arrest pursuant to the deportation order had faithfully abided by the terms of his bail.

(d) That the Applicant having been charged with a criminal offence is entitled to a fair trial with a view to clearing his name and recovering any relevant property unless the charge is otherwise conclusively disposed of.

(e) Should a stay not be granted it would render any decision of the Court herein in favour of the Applicant, Reuben Hernandez nugatory and the Applicant will accordingly be prejudiced.

(3) The Applicant filed an affidavit in support of his application, in which he stated that he had been residing in Jamaica since September 2003. He has been issued a work permit which allows him to work with Waddada Football Club in Montego Bay. He claims to having been kidnapped and held for a period of 20 weeks in his native Columbia, as a result he has chosen to live in Jamaica. He claims that he along with his family are legitimate business people and it is the funds from these business operations to which he has access. He claims never to have been convicted of any offence, neither here nor in Columbia. However, on 20th June 2005, he was arrested and charged for unlawful possession of US$335,000.00, he was acquitted.

(4) On the 8th March 2006 a police party returned to his home. A search warrant was presented to search for guns and drugs. No guns or drugs were found. A search was effected of the same safe in which the $335,000.00 had previously been found. Monies were found. He said he told them it was part of the same money that they had taken from him on the first occasion. Taken before the Court, he was bailed on 14th March 2006 and had adhered to the conditions imposed by the Court.

(5) However, the police again returned to his home on the 10th May 2006, and effected another search of the Applicant's home. This time nothing was

found. Despite this, he states "I was taken to the police station where I was informed that I was to be deported."

(6) The Applicant's case is two-pronged. Firstly, there is a challenge raised to his detention which he claims his without charge, no reason being given, and is unlawful. This challenge is by way of Habeas Corpus.

Secondly, he seeks the leave of the Court to apply for judicial review to quash the Minister's decision of the 1st May 2006 ordering the Claimant deported from Jamaica.

Claimant's Case

Unlawful Detention

(7) Counsel for the Claimant, argues that Section 15(6) of the Aliens Act provides that, the Minister may order the deportation of an Alien if the Minister deems it conducive to the public good. Section 15(4) provides that where a deportation order is made, the Minister may direct that the alien be detained in such manner as the Minister may direct. Counsel contended that Ministerial direction ought to be exhibited, so that the Court can ascertain if the detention was in accordance with those directions. Even if the detention was in accordance with the Minister's order, if the detainee is not given the legal and factual basis at the time the detention occurs, the detention will be unlawful.

Leave to Apply for Judicial Review

(8) In respect of leave to apply for judicial review, the Claimant contended that the Minister is obliged to give reasons to demonstrate that he acted within the parameters of the law. Further, the Minister's decision represents a quasi-judicial decision and is therefore reviewable. It was argued that, Minister's position is not dissimilar to a judge sitting alone who is obliged to set out the factual basis on which he invokes the provision of Section 15(6) (d) of the Aliens Act. If there are matters that ought not to be made public, that has to be brought to the attention of the Court. The Minister cannot be the sole determinant of "what is conducive to the public interest." The Minister is not the final arbiter.

Defendant's Case

(9) Counsel for the Attorney General contended that the Minister's decision is not reviewable, it being an executive decision. The Constitution recognises citizens, residents and aliens. S.16 (3) of the Constitution provides for the restrictions of the freedom of movement conferred by the section, on non-citizens by expulsion from Jamaica.

(10) Counsel for the Applicant further submitted that fundamental principles of common law and of constitutional law require that reasons be given to justify the detention, the Claimant ought to be told about them.

There is sharp distinction between an alien who enters the island illegally and a person who enters legally.

Analysis

(11) The Claimant entered the island pursuant to a work permit under the Foreign Nationals and Commonwealth Citizens Act. The currency of that permit is not an issue in these hearings. It is not denied that he is employed to a football club, based in Montego Bay, St. James. His entry to the island was legal. He has been charged with Illegal Possession of Currency and was taken from his home and has that matter pending before the Resident Magistrate Court in St. James.

(12) The power to deport an alien is a necessary right of a sovereign country. The exercise of this right should be consistent with the laws under which the power is exercised.

The Aliens Act, Section 15 (6) provides:

> "If the Minister deems it to be conducive to the public good to make a deportation order against the alien."

It is noteworthy that in all the previous instances enumerated in S.15 (6), setting out the circumstances in which a deportation order may be made, there is the need for certification by the Court in Section 15 (a) and Section 15 (b) of a conviction by the Court. Or on the certification by the Mayor of a Parish Council or the Commissioner of Police, that the alien has become a

charge on public funds. Both sections require procedure that are clearly open to challenge if these conditions are not met. An alien who is ordered deported because he has become a charge may dispute this claim and seek to establish that he has necessary means and was never a charge on the public purse.

(13) Section 15(6) of the Aliens Act is silent as to the reception of the principles of natural justice in the decision making process. What is however clear is that there is an issue that must be objectively determined. The issue for objective determination is whether the continued presence of Hernandez in Jamaica is against the interest of the Jamaican people. The decision to deport has to be arrived at not subjectively but on an objective assessment. In Brandt v Attorney General of Guyana, (1971) 17 WIR 448, in examining whether the Minister had validly invoked his power under the relevant law, Luckhoo, C, said at page 462, letter D:

> "That law does not bestow arbitrary and unfiltered discretion it must be exercised within the category of what is 'conducive to the public good.'"

(14) In Ex. P. Walsh and Johnson; Re Yates 37 C.L.R. 36. There the operation of the relevant enactment was made conditional on the Minister being satisfied that the person proposed to be dealt with was concerned in "acts" supposed to be detrimental to the welfare of the commonwealth.

Their Lordship said at p. 101:

> "But if the Minister must first find 'acts' and must afterwards base his deportation order on those same 'acts' (plus the recommendation or the failure to attend) ... in the name of common justice can it be denied that the accused is entitled to know with sufficient precision what those alleged 'acts' are, and know that they are the 'acts' which the Minister himself has found?"

And later at page 108:

> "By reason of the non-application of the statute to him, and if necessary, by reason of the failure to notify the 'acts' found by the Minister, Walsh is entitled to his liberty"

(15) Was there evidence on which the Minister could deem it to be conducive to the public good to make a deportation order against Hernandez. It was argued by the Attorney General's representative that the Minister need not give any reason for the order and his decision being an executive decision is not open to review. For some time, that was the attitude of the English courts. In The King v Inspector of Leman Street Police Station, ex. Parte Venicoff, (1920) 3 K.B. 578, where the Secretary of State was empowered under legislation that was verba ipppissima with section 15(6). It was contended for the Applicant that there was no power to make a deportation order without giving the person an opportunity of knowing the grounds on which the order was made, and or the evidence relied on to

support the order, and giving the alien a fair opportunity of meeting same.

The Earl of Reading C.J. at page 78 said:

> "I have no doubt that it is not for us to pronounce whether the making of the order is or is not conducive to the public good. Parliament has expressly empowered the Secretary of State as an executive officer to make these orders and to impose no conditions....
>
> I therefore came to the conclusion that the Home Secretary is not a judicial officer for this purpose, but an executive officer bound to act for the public good, and it is left to his judgment whether upon the facts before him it is desirable that he should make a deportation order."

Avory, J said;

> "I am of the same opinion. The applicant can succeed only if he can show that the order for his deportation was made without jurisdiction ..... indeed the phrase itself. If he (the home Secretary) deems it to be conducive to the public good is not consistent with the idea of an inquiry and a controversy between the parties."

The case stood as sound authority, for the proposition *that the alien was not entitled to be heard before the making of the order*, because in certain cases, it would defeat the purpose of the Order. Thus in Brandt v A.G of Guyana (1971), (Supra) Luckhoo, C, after maintaining that the case had stood the test of time, felt obliged to adhere to that principle (see p 459, letter c).

(16) The debate as to whether the Minister's decision was reviewable turned on the point as to whether (as was claimed in this case by the Crown) the decision was an executive/administrative decision and therefore not amenable to judicial review, or was it quasi-judicial and therefore amenable. The question arose in a case from New Zealand Chandra v Minister of Immigration [1978] 2 NZLR 559, where the Supreme Court was considering an application by an alien for permanent residence. It was contended on behalf of the Minister of Immigration that the Court had an inherent jurisdiction to strike out the action, if it was found that the Court had no jurisdiction. Counsel for the Minister contended that the discretion of the Minister to grant or refuse an application of the Immigration Act was not reviewable, as a "statutory power" for purposes of the judicial review legislation, or alternatively, the nature of the Minister's decision is not open to review by the Court. The Act, defined, "a statutory power of decision" to mean;

> (a) power or right conferred under any act, to make a decision affecting the rights, powers, privileges, immunities, duties, or liabilities of any person; or
>
> (b) the eligibility of any person to receive or continue to receive a benefit or licence whether he is legally entitled to it or not.

(17) In considering the question whether the Minister's decision was reviewable. The judgement, In Chandra (Supra), noted that until the decision

in Board of Education v Rice (1911) AC 179, the Court did not maintain any procedural restrictions on persons or bodies that were categorized in an administrative function. However after RE HK (An Infant) 1967 2QBD, the categorization rendered by that decision, was described by Barker J, at page 564 (paragraph 50) of his judgment in Chandra as follows:

> "The traditional conceptual approach to administrative law, demonstrated by the relief sought in RE Hk case, saw the categorization of functions into either administrative or judicial. Persons exercising judicial functions had to apply natural justice, whilst those exercising administrative functions had to act in good faith. Other decisions of high authority in England such as R v Gaming Board for Great Britain, ex parte Benaim (1970) 2 QBD 417, shows an identification of the concept of fairness with the concept of natural justice, an identification made possible by the abandonment of the categorization approach."

(18) In considering the question whether the Minister's decision was administrative, the Supreme Court in Chandra preferred submissions that the old concept of the Royal prerogative to keep foreigners at bay has been superseded by the modern transportation and the mass population movements of the 20th century, over what the Court described as the "somewhat xenophobic" view of the English Court of Appeal in Schmidt v Secretary of State for Home Affairs (1969) 2 Ch 149, on which Counsel for the Minister of Immigration had relied.

(19) In Chandra v Minister of Immigration (Supra), the Court relied on and quoted with approval, dicta by Woodehouse J. in the case of Pagliara v Attorney General [1974] 1 NZLR 476, which was also concerned with the reviewability of the Minister's decision on application by a student to extend his permit to remain in the country. At page 569:

> "It would be an unusual situation to say the least if a statutory power conferred upon the minister could be exercised by him unfairly and yet leave the courts persuaded that the decision was incapable of review. Similar considerations apply of course to statutory powers that have been applied or exercised for some ulterior or capricious purpose. So that the wise and even unfettered discretion claimed on the Minister's behalf by Mr. Graham would need to be read expect subject to certain qualifications"

Application of the rules of natural justice

(20) In Durayappah v Fernando (1967) 2 AC 337; the Privy Council laid down principles to be applied where the wording of a statute is neutral, as in this case, to determine whether the power was amenable to judicial review, Lord UpJohn at page 349 said:

> "In their Lordships' opinion, there are three matters which must always be borne in mind when considering whether the principle must be applied or not. These three matters are; first, what is the nature of the property, the office status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasion is the person claiming to be entitled to exercise the measure

> of control entitled to intervene. Thirdly, when a right to intervene is approved, what sanctions in fact is the latter entitled to impose upon the other. It is only upon a consideration of all these matters that the application of the principle can properly be determined"

(21) The first Durayappah factor contemplates an examination of the status of the applicant. Hernandez has a work permit, additionally, has a criminal case pending before the Court. As have been pointed out, there is no complaint in relation to the terms of that permit. It is not being said that he is not employed to the football club. He is still exposed to a criminal charge. He has never been convicted of any offence, on the occasion of the second visit to his home, nothing was found. Would he legitimately expect that if he were to be deported that the Minister would await the outcome of the criminal case, or failing which provide him with the reasons that would precipitate his departure ahead of the continuation of the criminal trial against him.

(22) The second factor for examination prescribed by their Lordships in Durayappah is the circumstances of the ministerial intervention. The Minister had intervened after the Court had become seized of the matter for which Mr. Hernandez may be deported. Mr. Hernandez in not dissimilar circumstances was acquitted by the criminal courts and proffers as his defence that the same money for which he has already been acquitted

constitutes the subject of this latter charge. His plea is one of autrefois acquit. The Minister has not indicated that although he deems Hernandez expulsion from Jamaica as been conducive to the public good, that they are national security concerns or national emergency concerns in respect of him. It is therefore in those circumstances impermissible for the Minister to order the deportation of Hernandez without allowing Mr. Hernandez an opportunity which would allow the Minister to say whether he proceeds on good grounds or not, or whether his information was correct or false.

(23) The third Durayappah consideration, the sanctions that may be applied by the Minister is immediate deportation. The Minister's deportation order will also bring to an abrupt end his contract of employment with the Waddada Football Club. Mr. Hernandez will still have a charge of unlawful possession on the books against him without being able to answer. His affidavit shows that he is married and has lived here for the past two years. His deportation will therefore adversely affect an innocent third party, his wife.

(24) The principles of natural justice, although applicable to administrative acts, will not concern policy decisions. The policy directive is characterised by its general approach, it covers large classes of people. Natural justice principles will only apply where the decision is subjective and aimed at the

individual. Jacobs J; in Salemi v Minister for Immigration and Ethnic Affairs (1977) 51 ALJR 538, said at page 560.

> "Though the principles of natural justice extend to executive or administrative acts, it is necessary to bear in mind that the kind of act here referred to is the act which directly affects the person (or corporation) individually and not simply as a member of the public or a class of the public. An executive or administrative decision of the latter kind is truly a "policy" or "political" decision and is not subject to judicial review."

Applying those principles, it is clear that the ministerial order affects Mr. Hernandez individually.

(25) Having examined the Aliens Act, the status of the Applicant, the circumstances of the material intervention and the nature of the decision, having determined that the decision affects the Applicant individually and not as a member of a clause, I am of the view that when the Minister makes an order pursuant to Section 15 (6) of the Aliens Act, he is to act fairly, it is incumbent on the Minister to supply the Applicant with the reasons for his expulsion, and to allow him an opportunity of making representations in writing, thereafter to inquire into and decide according to the rules of Natural Justice.

The second point; was the detention in the circumstances of the deportation order lawful in the absence of a reason for the detention. A

person who is arrested without a warrant must be informed of the ground of the arrest. Every person is entitled to his freedom and is only bound to submit if he knows why it is claimed to impose restraint upon him. See Christie v Leachinsky 147 AC 573, at 373.

I find that the detention of the Claimant was unlawful, the fact he may have been detained pursuant to an order of deportation, does not absolve the arresting officer of stating the reasons for his detention. I find that no such reasons were given. The Claimant is to be released forthwith, leave is granted to apply for judicial review. Leave to appeal granted. No order as to costs.