THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2016-04426

BETWEEN

ISIOMA LOVETH EZE

Claimant

AND

THE CHIEF IMMIGRATION OFFICER

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendants

Before The Hon. Madam Justice C. Gobin

Appearances:
Mr. Matthew G.W. Gayle for the Claimant
Mr. Roshan Ramcharitar instructed by Ms. Svetlana Dass for the Defendants

REASONS

Background

1. On 9th October 2014, the claimant, Ms. Loveth Eze a 27 year old Nigerian national arrived as a first time visitor to this country on a COPA airlines flight. She was granted permission to remain until 29th October 2014. It was an express condition of the permission that she would not seek employment.

2. Just about one week after her arrival, on the 17th October 2014, she married a man named Keron Riley. She did not leave Trinidad when she was supposed to. By 30th November 2014, mere weeks after the marriage, she had separated from her husband. She ended up

living with a family on their farm and working there. She gave several reasons for her failure to seek an extension, but these were unconvincing.

3. Ms. Loveth Eze overstayed until 14th November 2015, when she attempted to return to Nigeria via London, on a Caribbean Airlines Flight. There would have been no problem with her exit except for the fact that Ms. Loveth had no proper in transit visa to allow her to land in the U.K. She checked in at Piarco and cleared security, but was later approached by an Immigration Officer.

4. The issue of her having no landing visa for the U.K. was brought to her attention. When she was further interviewed by the officers, it became clear she had overstayed her permitted time in Trinidad and she admitted that she had been employed on the farm in breach of the condition of her visa. She was subsequently arrested and taken to the Immigration Detention Centre (IDC) where she was detained. She was not advised of her right to an attorney upon her arrest.

5. Five weeks later, the Chief Immigration Officer (CIO), by order dated 21st December 2015 declared that Ms. Eze ceased to be a permitted entrant with effect from 30th October 2015. The claimant attended a Special Inquiry on 6th January 2016. She asked for and was granted voluntary departure by 20th January 2016. For the next eleven months or so she failed to procure a return ticket.

6. Ms. Loveth Eze remained in custody until 13th December 2016, when she left via COPA Airlines for Lagos. More than one year had passed since she had first attempted to return

home. Prior to her departure she filed two claims in the High Court. The first was an application on 14th November 2016 (CV 04090-2016) for a Writ of Habeas Corpus.

7. On the return of the Writ, **Donaldson-Honeywell J**, dismissed the application. She found that there was a sufficient basis in law for the claimant's detention. Mere days before the return before the judge, immigration officials re-opened the claimant's Special Inquiry, listing it for hearing on the day following the Court hearing. At the close of the Special Inquiry, the deportation order was made. As fate would have it, Ms. Loveth was able to get a ticket to return home on 13th December 2016.

8. The claimant filed this Constitutional Motion before she left. I was at first reluctant to revisit the issue of the lawfulness of the detention but I was persuaded by her Counsel that the outcome of the habeas corpus proceedings before **Donaldson-Honeywell J** did not prevent me from considering whether the actions of the CIO which had resulted in the detention of the claimant for over one year, had contravened her fundamental rights as claimed, and whether such breaches, could consequently affect the lawfulness even of periods of her detention.

The claim

9. The claimant essentially claimed that she had been deprived of the following rights guaranteed under the Constitution: -

    (1) The right to legal representation and advice (S 5 (2) (c) (ii)**)**

    (2) The right to be brought promptly before an appropriate judicial authority (Special Inquiry). This complaint related to two points in time, the first following her arrest on 14th November 2015 to 6th January 2016 and the second following her failure to depart voluntarily on 20th January 2016 by re-

opening the special inquiry several months later on 14th November 2016.

(3) Protection of the right to liberty;

(4) Denial of procedural provisions to afford protection of her Constitution rights.

10. After I had read the affidavit evidence of Ms. Loveth and that of Immigration Officer IV, Mr. Harricoo and considered the Counsel's submissions I found in the claimant's favour on all but part of ground (2) above, which had to do with the period of delay in bringing her before the Special Inquiry officer.

11. Ms. Loveth was informed of the date of the Special Inquiry on 28th December 2015 and a hearing was fixed for 6th January 2016. I do not consider the delay between 21st December 2015 to 6th January 2016 for the convening of the Special Inquiry to be so long as to support the claim for contravention of the claimant's fundamental right to be brought promptly before an appropriate judicial authority. I have taken notice of the time of the year and the fact that there were public holidays in the intervening period, and of the fact that administrative arrangements would have had to have been made. I turn to the other grounds.

Breach of the right to Legal Representation

12. The Constitution provides for the right to legal advice and representation.

> ***5.*** *(1) Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared.*

> *(2) Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not—*
> *(c) deprive a person who has been arrested or detained—*
> *(ii) of the right to retain and instruct without delay a legal adviser of his own choice and to hold communication with him;*

In addition to the constitutional right in this regard **S.24 of the Immigration Act** provides -

> ***24.*** *(2) The person concerned shall be entitled to conduct his case in person or by counsel or solicitor, or may be assisted in conducting his case at the hearing by any other person with leave of the Special Inquiry Officer (which leave shall not be unreasonably withheld).*

13. The claimant's case was that it was not until sometime in October 2016, some 11 months after she had been arrested and detained and the Special Inquiry long concluded that she was informed that she could seek legal advice. This information came not from the Authorities but from a former detainee, during a visit. She thereafter contacted Counsel, Mr. Gayle, who took up her case.

14. The respondent's evidence in response to this serious allegation is to be found at paragraphs (10) and (11) of Mr. Harricoo's affidavit filed on 27th October 2017.

He said: -

> (10) On 21st December, 2015, the Chief Immigration Officer also ordered that a Special Inquiry be held in relation to the Claimant to determine whether she should be deported from Trinidad and Tobago. The Special Inquiry was scheduled for the 6th January, 2016. The Claimant was served with and signed a copy of the order to show cause and notice of hearing in deportation proceedings under

section 22 of the Act on the 28th December, 2015. The officer who served this document informed the Claimant of her right to have representation by counsel or a friend at the inquiry.

(11) The Special Inquiry was held on 6th January, 2016. On the day of the inquiry, the Claimant was again asked by the Special Inquiry Officer, Mr. Sookram, whether she wished to be represented by an attorney-at-law or other person and she said no to these questions. When asked if she wished to proceed she said yes.

15. For a start, Mr. Harricoo's response did not even contain an averment that the claimant was informed of her right to Counsel upon her arrest at the airport. The claimant's evidence on that score was therefore uncontroverted. State Counsel, Mr. Ramcharitar helpfully referred me to the case ***Rajesh Ramsaran v. AG, PC 18 of 2004*** in which the JCPC pronounced a simple rule that **"on any occasion when persons are arrested or detained they are entitled to the constitutional protection specified in S 5 (2) (c)".** The rule clearly applied in this case and the breach alleged by Ms. Loveth Eze was established with no denial by the Respondent. I respectfully suggest for the avoidance of disputes on this issue in the future the show cause notice should simply include information as to the rights of the immigrant including the right to Counsel. And the serving officer should point it out and have the immigrant endorse it.

16. As to the right to Counsel at the Special Inquiry, the evidence of Mr. Harricoo fell woefully short of what was required to meet the serious allegation made by the claimant. The bald statements were inadmissible as to the truth of them, but in the absence of a written record, I was not prepared to accord them any weight. The officer who allegedly

served the "notice to show cause" and who allegedly informed the claimant of her constitutional right was not identified.

17. The absence of a record of the proceedings, or indeed of evidence of Mr. Sookram himself has led me to draw inferences adverse to the Respondent's case. The officer's response unfortunately gave the impression, and I hope I am wrong on this, that compliance with the regulations on how Special Inquiries ought to be conducted has not been rigorously maintained.

18. The Immigration Rules Chapter 18:01 (S.24) and (S.25) specifically provide for the right to be represented by Counsel at the Special Inquiry and details the process for the Inquiry. The procedure mandated by the regulations forms part of the due process that is the right of illegal immigrants. It clearly contemplates the minuting of the proceedings and certification by the presiding officer and the "stenographer" or person recording the proceedings. Disputes as to what transpired and whether the immigrant was advised of the right to Counsel could very easily be avoided by presentation of the certified minute. The failure to produce a proper record in this case did not impress me. I found the claimant was at no stage informed of her right to legal representation. Another breach of her Constitutional rights was established.

The Detention

19. Almost fourteen years ago in October 2004, the Judicial Committee delivered judgment in the case of **Robert Naidike v. AG (PC No.10 of 2003)**. It settled the position in relation to the unlawfulness of the period of detention between arrest and the issuance of the minister's notice of withdrawal of a visitor's permit for a prohibited immigrant.

In that judgement their Lordships' at paragraph 48 indicated the difficulty they had with certain sections of the Act including section 15. They stated:

> **"The regrettable fact is that section 15 (and, indeed, certain other sections in this part of the Act) contain a number of puzzling features. The Board in the end is driven to the view that the intended scope of section 15 is uncertain and that this uncertainty must be resolved in favour of the liberty of the individual. The governing principle is that a person's physical liberty should not be curtailed or interfered with except under clear authority of law. As McCullough J succinctly put it in *R v Hallstrom, ex parte W (No.2) [1986] QB 1090, 1104:***
>
> > **"There is … a canon of construction that Parliament is presumed not to enact legislation which interferes with the liberty of the subject without making it clear that this was its intention."**

20. The claimant's position regarding this period of her detention is therefore well settled. Her detention from the date of the arrest 15th November 2016 to 21st December 2016 i.e. the date of the ministerial order was unlawful. So long as the legislation remains un-amended, the uncertainty identified in the judgement will persist.

Detention Pending Voluntary Departure

21. On 6th January 2016 at the Special Inquiry, Ms. Loveth Eze requested and was granted voluntary departure on condition that she left this country by 20th January 2016. In the result she was only able to procure a ticket on 9th December 2016 one day after a deportation order was eventually made.

22. In these proceedings Counsel for the claimant argued that after a reasonable opportunity had been afforded to allow for that voluntary departure, at some date beyond 20th January 2016 which has not been precisely identified, Ms. Loveth Eze's detention became unlawful. As I understand the contention, since the detention is lawful only so long as it is imposed to facilitate deportation or removal, it must have ceased to be so, once it became apparent that Ms. Loveth Eze could not get her return ticket.

23. The Authority's position on this issue as set out in Mr. Harricoo's evidence in paragraphs 15 to 18. It is that the claimant was given until 20th January, then until 13th February further requests were made. He stated,

> "**She neglected to provide the necessary arrangements for her to depart Trinidad and Tobago. In circumstances where voluntary departure is granted, the onus is on the individual to provide a ticket for his or her departure, not the State".**

24. Essentially the response to the complaint was that the period of the detention following 20th January 2016 to 9th December 2016 was protracted only because the claimant was being indulged and accommodated by the CIO. Deportation was being staved off for her benefit.

25. The claimant detailed her efforts to satisfy the condition even after she missed her first departure deadline. Her evidence showed that they continued through October 2016, when the second of two payments toward the purchase of yet another ticket (out of five) was made. Very early on, she made contact with the Nigerian Embassy and spoke with someone about her situation, but she was told they could not help. The claimant's family and friends were at all times trying desperately to assist in getting her out of Trinidad.

They faced several challenges including their own government restrictions on foreign exchange. Sadly, they fell prey to fraudsters and lost money. Ms. Loveth Eze was generally kept informed as to what they were doing because save for the period – May to August 2017 when she was sent to the Women's Prisons, she was allowed contact even with her family in Nigeria and with friends in Trinidad.

26. While I have not actually seen this claimant I have concluded from the tenor of her affidavit and other evidence, that Ms. Loveth Eze would have been prepared to endure even her difficult circumstances and the conditions of her detention so long as she felt she could eventually leave voluntarily rather than have a deportation order and the dreaded stamp imposed on her passport. The efforts of her family to raise money even in the face of many obstacles, had continued until a last installment arrived in October 2016. Even when Counsel eventually wrote on her behalf on 3rd November 2016, there was no request for a reconvening of the Special Inquiry or for accelerated deportation.

27. That she would have avoided deportation to the bitter end is confirmed even in the transcript of the habeas corpus proceedings on 23rd November 2017 (p. 14 of 25) in this exchange between **Donaldson-Honeywell J** and Counsel: -

> **Judge:** **So certainly perhaps what has been made clear by these proceedings is that she would like to be deported rather than have the voluntary procedure.**
>
> **Mr. Gayle:** **No my lady those are not my instructions.**

28. On 24th November 2016, one day after Counsel confirmed from the record above in the Habeas Corpus matter that the claimant did not want to abandon the voluntary departure procedure – the request for her to make further efforts to leave voluntarily was repeated at the Special Inquiry. The claimant referred to it in her affidavit filed herein.

> **"After hearing submissions from my attorney and my explanation Mr. Chooyang (the Special Inquiry Officer) indicated that he was willing to adjourn the Special Inquiry until 9:00 a.m. on 30th November 2016 for me to be able to purchase a ticket for my return to travel to Nigeria and present the said ticket to him, provided that ticket had me returning by 4th December 2016"** (Paragraph 37 dated the 8th and filed on the 9th December 2016**).**

29. She was indeed allowed the opportunity to make yet another attempt. Unfortunately as it turned out, there was yet another problem with the ticket which was purchased as a result. No further extension was granted.

30. Even after the deportation order was made and a ticket purchased for a flight on 13th December 2016, the claimant stated in the affidavit in these proceeding how her future prospects were going to be affected by it.

> **49. I was extremely anxious to avoid having an Order of Deportation made against me. I have ambitions of studying in the United States of America, where my brother currently lives. He had made arrangements for me to secure a student visa for that purpose, on my return to Nigeria. I am now fearful, that because I have been ordered deported, I no longer have any prospect of pursuing further students outside my country. I believe, on the basis of above, that officers of the Immigration Division maliciously sought to prevent my being granted a further voluntary departure, and in any event**

> **through their actions even if not malicious have caused me to lose this important opportunity to further my studies.**
>
> **50. I am extremely distressed, embarrassed and traumatized by the way I have been treated by the Defendants while in their custody and by the fact that an Order of Deportation has now been made against me. I believe this experience will affect me in a negative way for the rest of my life both in practical and physiological terms.**

31. This explained the claimant's unrelenting efforts and her willingness it seems to have avoided deportation at all costs. The acquiescence from this desperate and uninformed, unrepresented claimant did not relieve the respondent of the obligations to afford her the protection which was due under the law and the Constitution. The CIO in the circumstances, was not justified in simply keeping her there.

32. The fact that removal of the claimant was agreed to be effected by way of voluntary departure did not permit the Respondent to detain Ms. Loveth Eze for an unspecified length of time until she could manage to produce a ticket. **The Hardial Singh** principles enunciated by ***Lord Wolf in R. v Governor of Durham Prison exparte Singh 1984 1 All ER 983*** are equally applicable in a case of voluntary departure especially once it becomes clear that the illegal immigrant even with the best efforts simply cannot arrange departure within a reasonable time.

33. In his Judgment in **CV 2016-02258 Christopher Odikagbue v. Chief Immigration Officer** – **Kokaram J**, considered the principles and the adoption of them by the Privy Council in the case of **Tan Te Lam v. Superintendent of Tai A. Chau** detention centre. The PC 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 …"**

34. The CIO has put forward no facts to justify the protracted period of detention save that the authority was accommodating the claimant in accordance with policy. In the circumstances of this case I do not think a period of detention was reasonable. I am inclined to believe that were it not for the intervention of Counsel, Ms. Loveth Eze may well have been deprived of her liberty for an even longer period. The coincidence of the timing of the attorney's intervention and the re-opening of the inquiry has not escaped me. I rejected the evidence of Mr. Harricoo of communications and decisions regarding the claimant's position between 25th October and 15th November 2016. Supporting documents, the letter he referred to and the response were not produced in evidence.

Procedural Provisions

35. I turn to the procedural provisions which on the evidence before me I have concluded may not have been given any consideration by the Authority in its dealings with the Claimant. Our Immigration Act contains several provisions which serve to avail

prohibited immigrants even when they are declared to be such, of processes which are designed to protect their human rights without changing their status. I have already referred to the right to Counsel upon arrest and detention at the airport and at the Special Inquiry.

36. But perhaps the most important provision which protects the immigrant following detention is **S.17 (1)** which provides: -

> **"Subject to any order or direction to the contrary by the Minister, a person taken into custody or detained may be granted conditional release or an order of supervision in the prescribed form under such conditions, respecting the time and place at which he will report for examination, inquiry, deportation or rejection on payment of a security deposit or other conditions, as may be satisfactory, to the Chief Immigration Officer."**

37. S.17 (1) vests in the CIO an important discretion, the availability of the exercise of which mitigates the oppressive effect of arrest and prolonged detention for immigrants awaiting deportation. This is a provision which protects the rights of the illegal immigrant to liberty without changing her status. While the doctrine of the separation of powers will not allow a Court to interfere with the proper exercise of the discretion, the CIO must satisfy the Court that she has actively considered the claimant's case. In other words, if the CIO believes that there is good reason to refuse a grant of conditional release a Court would not interfere with such a refusal. If on the other hand, no consideration has been given to S.17, then the benefit and protection it affords it would have been rendered meaningless.

38. In this case there has been no evidence from the CIO that any consideration was given to a conditional release. In his affidavit Mr. Harricoo alluded to the availability of conditional release if "an individual" requested it. He said that there was no record of the claimant having made such a request. The immigrant who is arrested and facing detention cannot be presumed to know the law. Even in the absence of legal representation, the CIO is under an obligation to inform of the existence of the procedural provisions which are available. It is not good enough to assert that the immigrant did not ask or to speculate as Mr. Harricoo appeared to be attempting to do, that she may not have qualified.

39. The approach of the Authority on this aspect of this case demonstrated a lack of appreciation of the importance of this safeguard against contravention of the claimant's rights under the Constitution. The onus was on the State to ensure that the procedural protections were afforded.

40. Finally S.26 of the Act provides for the re-opening of the Special Inquiry. This provision protects against protracted periods of detention. It was eventually invoked by the Respondent on 21st November 2016 and the inquiry reconvened on 24th November 2016. By this time the claimant had accessed legal Counsel and the Habeas Corpus application had been filed and in fact dismissed. The chronology of events especially in the absence of credible evidence to support Mr. Harricoo's account of how the matter was re-opened, suggests to me as I have said before that it all had to do with the intervention of counsel. If this is all it took to prompt the CIO into action, then it only confirms the unreasonableness of the delay in the process.

41. The Court is aware that these are challenging times for the authorities and all who seek to protect and control our borders, but the law is clear. The Constitution protects the fundamental rights of human beings even when they run afoul of our immigration laws.

42. It is not for me to speculate as to whether there would have been any change in the claimant's circumstances had these procedural provisions, i.e. legal advice, a consideration of conditional release or a more prompt re opening of the special inquiry been made available to her. While the denials did not render the period of the detention from 20th January 2016 to 9th December 2016 unlawful per se, I found that as a result of them the claimant was entitled to the declaratory reliefs sought and an award of compensation.

43. The Court declares that

> (1) The detention of the Claimant between 15th November 2015 to 21st December 2015 contravened her right not to be deprived her liberty except by due process of law;
>
> (2) Claimant is granted a declaration that the actions of the Defendant in detaining the claimant without informing her of her right to legal representation and advice contravened her fundamental right to legal representation advice afforded by S 5 (2) (c) (ii);
>
> (3) Claimant is granted a declaration that by reason of the omission/failure of the Defendant to consider the grant of conditional release pending deportation and the failure to re-open the Claimant's Special Inquiry within a reasonable time following her failure to procure her voluntary departure by 20th January 2016 the claimant has been denied and deprived of the necessary procedural provisions to give effect to her rights;

(4) Damages for breach of her constitutional right assessed in sum of $65,000.00 to include uplift for the failure to inform of right to legal Counsel / denial of procedural provisions and for three (3) month period spent at Women's Prison during which time the evidence is uncontroverted the claimant was deprived of contact with her family.

(5) The Defendant is to pay the costs of the claim assessed in the sum of ($20,000.00) twenty thousand dollars.

(6) The registrar is to release to the claimant's attorney security for costs in the sum of $15,000.00 deposited pursuant to order dated 14th July 2017.

Dated this 11th day of May 2018

Carol Gobin
Judge