REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **CV2017-02148**

BETWEEN

IN THE MATTER OF THE HABEAS CORPUS ACT, CHAPTER 8:01

IN THE MATTER OF AN APPLICATION OF HENRY OBUMNEME EKWEDIKE

FOR THE ISSUE OF A WRIT OF HABEAS CORPUS AD SUBJICIENDUM AGAINST THE CHIEF IMMIGRATION OFFICER

BETWEEN

HENRY OBUMNEME EKWEDIKE

Applicant

AND

THE CHIEF IMMIGRATION OFFICER

1st Respondent

THE ATTORNEY GENERAL
(added with consent of State Counsel for 1st Respondent) 2nd Respondent

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Before the Hon. Madam Justice C. Gobin

Appearances:
Mr. Ramnanan instructed by Mr. Ricky Pandohee/Scoons for the Applicant
Mr. Duncan Byam instructed by Mr. Brent James for the Respondent

JUDGMENT

Background to the proceedings

1. On 12th April 2017, Mr. Henry Ekwedike a national of the Republic of Nigeria, attended the Port of Spain Extension Unit of the Immigration Division, Ministry of National Security. Certain events transpired as a result of which he was moved to the Enforcement

unit and finally taken to the Immigration Detention Centre Heights, Aripo, Arima. He has been detained since that time.

2. On 12th June 2017, I granted leave to issue a writ of Habeas Corpus to the Chief Immigration Officer (CIO). In return to the writ three (3) affidavits were filed by Ms. Candace Flanders-King of the Enforcement Unit, Ms. Lydia Ram Ramnanansingh, Immigration Officer III, and Ms. Radica Gajadhar, Immigration Officer II both of the extension Unit. The officers explained the events which led to Mr. Ekwedike's detention and they pointed to the authority under which they had acted. In this application for habeas corpus it is for the Court to determine whether there is justification in law for Mr. Ekwedike's detention, in other words whether the officers had the power which they purported to exercise.

Ouster

3. Two issues which were raised in the course of submissions can very quickly be disposed of. The first has to do with the effect of S. 30 of the Immigration Act Ch18:01 which provides: -

> **30. Subject to section 31 (3) no Court has jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or Order of the Minister, the Chief Immigration Officer, a Special Inquiry Officer or an immigration officer had, made or given under the authority of and in accordance with this Act relating to the detention or deportation of any person, upon any ground whatsoever, unless such person is a citizen of Trinidad and Tobago or is a resident.**

It is accepted by the State that S 30 of the Immigration Act (the Act) is to be read against well-established ***Anisminic*** principles. The Court is entitled to go behind the face of decisions and orders made by officials to see whether they have acted within their powers and not ultra vires.

Habeas Corpus/Judicial review

4. Secondly, insofar as there might have been a question as to the appropriateness of habeas corpus as opposed to judicial review proceedings, I find that either process should be equally available to a person who challenges his/her unlawful detention. I have considered the submissions which were invited on this point and am persuaded that the correct approach and one which I adopt is that which can be drawn from the following extract from H.R. Wade's article, Habeas Corpus and Judicial Review **[LQR Vol. 113 – Jan 1977].** After reviewing and analysing several authorities including ***Muboyayi, Cheblak, Armah and Khawaja,*** Professor Wade concluded: -

> **The message from these authorities is surely clear. All the accepted grounds for judicial review, i.e. for claiming that some administrative act or decision is unlawful, ought to be equally available on habeas corpus if they affect the prisoner's right to his liberty. Instead of making the expansion of judicial review into a pretext for restricting the right to habeas corpus, the grounds for seeking both remedies should expand in parallel, since exactly the same principle of legality is in issue in both. Whether there is an "underlying administrative decision" is quite irrelevant. The question is whether the prisoner's detention is lawful or unlawful. The prisoner ought to be able to rely on any ground, which, if made good, would entitle him to his release. To this he is entitled as of right, as has been clear law for centuries. To bar him from any part of this right, and to tell him to start separate proceedings where relief is**

merely discretionary, cannot be justifiable. In the well known words of Lord Shaw of Dunfermline,

> **"To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand."**

No Detention or Deportation Order

5. I return to the issue of the legality of Mr. Ekwedike detention. The first point of significance is that Mr. Ekwedike is not the subject of a deportation order nor of a detention order. The Respondent relies on the fact that he was issued a rejection order and on his alleged breach of a supervision order made pursuant to S 17 (2) of the Act. The CIO says that the breach of the supervision order permitted the officers to take him into custody on 12th April 2017, without more. Before I examine that provision I should set out Mr. Ekwedike's history since his arrival in Trinidad and Tobago because it is relevant to his status and to a determination of the level of treatment to which he was entitled.

Mr. Ekwedike's history in Trinidad and Tobago

6. Mr. Ekwedike, unlawfully entered Trinidad through Moruga sometime in 2008. He married a citizen of this country on 4th June 2008. Following the marriage, Mr. Ekwedike and his wife lived together at Homeland Gardens Enterprise, Chaguanas. He met other nationals of his home country who had attained permanent resident status here. He was told by them that since he was married to a Trinidadian citizen he was entitled to apply to become a permanent resident.

7. Upon receiving that news Mr. Ekwedike and his wife visited the offices of Ministry of National Security and received advice from an employee. He was told that his illegal entry notwithstanding, all he needed to do was to travel out, to leave Trinidad even for another Caribbean country, and to re-enter at a proper port. Mr. Ekwedike did just that. He flew to Guyana, I assume on his Nigerian passport, and entered through Piarco. On landing he was examined by an Immigration Officer. He was allowed to enter legally on a visitor's visa. No question was raised about how he first came to Trinidad. He could have been declared a prohibited immigrant and denied entry but he was not.

8. In 2009 in company with his wife, Mr. Ekwedike returned to the Ministry of National Security and they filled out the application for resident status (under S 6 (1) of the Immigration Act Ch:18:01 on the ground that his spouse was a citizen of Trinidad and Tobago. He has remained in the country since, extending his stay from time to time. Generally he attended his appointments with the Ministry and the Extension Division. As far as he was concerned he was complying with the law.

9. From time to time Mr. Ekwedike attended the Immigration Division for his extension of stay appointments. The endorsements at the back of his extension application form which was produced by the Respondent confirm that appointments were rescheduled on several occasions to accommodate him. The applicant was generously allowed time to have his Nigerian passport renewed and several opportunities were afforded to secure a bond well after the original expired in or about 2015.

10. Mr. Ekwedike was not an immigrant in hiding. He was not keeping himself under the radar. Far from it, Mr. Ekwedike was the beneficiary of a S. 10 permit issued by the Minister of National Security under the Act. By letter dated 19th May 2011 he was granted permission to remain and work in Trinidad and Tobago for a period of one year. On 15th March 2012, the Minister granted him a further exemption permitting him to work without a work permit for a further period of one year from 5th March 2012. He was clearly a "permitted entrant". One might argue that the Minister's permit elevated his status even above that of the ordinary visitor who is allowed in at a port by an Immigration officer.

11. As for his application for permanent residence, Mr. Ekwedike said he attended a couple interviews with his wife. He admitted they had had some matrimonial problems and cohabitation had ceased sometime in 2016. But the marriage is subsisting. The Respondent produced letters which were sent to Mr. Ekwedike for interviews over the period 2012 to 2013. The letters do not differ from each other significantly. Officer Lydia Ram Ramnansingh stated that there was no record of the Applicant's wife attending with him after 17th June 2015 for an extension of his stay. There is no evidence that Mr. Ekwedike's application for permanent residence was determined or denied. I believe it remains pending.

The Issuance of the Rejection and Supervision Orders

12. The troubles which led to this habeas corpus application began when Mr. Ekwedike attended the Division on 29th March 2017. He claims the visit had to do with his application for permanent residence. The Respondent says it concerned his extension

application. At the end of the day it mattered not why he was there. He still had not managed to secure the bond. The Immigration Officer who interviewed him, Ms. Gajadhar, was prepared even then to facilitate a further rescheduling of his appointment to allow him to get the bond, although he had previously been granted three (3) extensions. But then she asked him some questions pertaining to the whereabouts of his wife. He answered she was working on a cruise ship. The officer did not believe him. She carried out some checks on their border control records and confirmed that the wife had never been issued a passport. Her concerns about the untruthfulness of the answers regarding the wife caused her to refer the matter to her supervisor, Ms. Olive Garcia, who gave her certain advice as to what she should do. In the words of Officer Gajadhar

> "Based on my conversation with Ms. Garcia I was advised to refuse the applicant with the extension and to serve him with a rejection order and place him under an order of supervision."

13. The Division simultaneously issued a rejection order under S 21 (1) and order of Supervision pursuant to S 17 (1) of the Act with a condition – that the applicant was to return to the Extension Section on 12th April 2017 at 10:00 a.m. with a return ticket to Nigeria. Mr. Ekwedike was handed the rejection order, the order of supervision and a receipt for his passport. He was allowed to leave the premises freely.

14. On 12th April 2017, the claimant returned to the Extension Division with his Counsel Mr. Scoon. He had not managed to procure a return ticket. The meeting between the

Immigration officers and Mr. Scoon was not productive and the latter was asked to leave. The officers then discussed the case. They considered the history of Mr. Ekwedike's matter, the several rescheduled extension appointments since 15th July 2015 and the several opportunities he had been afforded to secure funds for the security bond, the fact that there was no record of his wife attending with him on his extension interviews since 2015 and the fact that he had breached the supervision order by failing to produce a return ticket to Nigeria.

15. Ms. Candace Flanders-King of the enforcement unit was contacted. She was told that there was a man at the extension unit who needed to be sent to the Immigration Detention Centre. When Mr. Ekwedike was brought before her with his file, she noted the rejection order dated 29th March 2017. She sought clarification from Deputy CIO Jack and was told he "had breached the Supervision Order which he had been placed on in that he was supposed to return to the Extension Section on 12th April 2017 with a return ticket to Nigeria which he failed to do and instructed him to issue a detention order."

16. If a detention order was issued it has not been presented in these proceedings. But what is clear is that the officers believed that the breach of the supervision order justified the immediate detention of Mr. Ekwedike.

The Law /Order of Supervision

17. The jurisdiction to make a supervision order and the consequences of a breach are to be found at S. 17 of the Act. But it is useful to consider sections 16 and 17 together.

Sections 16 and 17 provides: -

> **16. Any person in respect of whom an inquiry is to be held, or an examination under section 18 has been deferred under section 20, or a deportation or rejection order has been made may be detained pending inquiry, examination, appeal or deportation at an immigration station or other place satisfactory to the Minister.**
>
> **17. (1) 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.**
>
> **(2) Where a person fails to comply with any of the conditions under which he is released from custody or detention he may without warrant be retaken into custody forthwith and any security deposit made as a condition of his release shall be forfeited and shall form part of the general revenue.**

18. Assuming for the moment that there was the jurisdiction to make a rejection order, it seems clear to me that an order of supervision with conditions can only be issued after someone has been arrested or detained pursuant to S 16. Mr. Ekwedike was not so arrested or detained on 29th March 2017 when he visited the Extension Division. Indeed he was never warned that detention was in anyone's contemplation.

19. The issuance of the supervision order was therefore ultra vires and illegal and as a result any alleged breach of a condition contained in it could not have triggered the default provision which permitted the "retaking into custody forthwith" of the claimant. Mr. Ekwedike's detention is therefore unlawful and he should be released forthwith.

20. While this is sufficient to determine this matter, I shall examine the other sections of the Act on which the officers relied to justify their treatment of Mr. Ekwedike.

The Rejection Order

21. On the issuance of the rejection order without identifying it, Ms. Gajadhar referred to her powers under **S 9 (3)** of the Act. It provides: -

> **9. (3) Every person who has a certificate under subsection (2) to enter Trinidad and Tobago and who wishes to remain for a longer period than that previously granted or to have the conditions attaching to his entry varied, shall notwithstanding that he is already in Trinidad and Tobago, submit to an examination under the provisions of this Act, and the immigration officer may extend or limit the period of his stay, vary the conditions attaching to his entry, or otherwise deal with him as if he were a person seeking entry into Trinidad and Tobago for the first time.**

22. As far as the officer was concerned the section permitted her to treat Mr. Ekwedike on his extension examination as if he were a person seeking entry into Trinidad for the first time. This meant that she could exercise this specific power under S 21 (1) (a) of the Act: -

> **21. (1) Where an immigration officer, after examination of a person seeking to enter into Trinidad and Tobago, is of opinion that it would or may be contrary to a provision of this Act or the Regulations to grant admission to such person into Trinidad and Tobago, he may either ----**
>
> **(a) make an order for the rejection of such person.**

23. The Act contains no definition of a rejection order or its effect. The scope of it only appears on **Form 29** which is prescribed under S. 47 of the regulations made under the Act.

"Form 29"

REPUBLIC OF TRINIDAD AND TOBAGO

IMMIGRATION REGULATIONS

REJECTION ORDER

……

You have this day appeared for examination before an Immigration Officer at this port and are hereby rejected under section 20 or section 21* of the Immigration Act.

You are hereby ordered to be detained under the provisions of the Immigration Act pending your removal from Trinidad and Tobago.

Date ……. …….

Immigration Officer

Port of Entry ……...

Service hereof acknowledged by ……at ……..…..a.m./p.m.

…….

Signature of Reject

24. What becomes apparent from the form is that a rejection order has the alarming effect of immediately depriving a person of his liberty. It permits immediate detention pending removal. I find it troubling that the power to detain appears to be derived from a form prescribed by regulations when the Act itself does not clearly or expressly provide for it.

25. In any case I have grave doubt that the power to deal with a person seeking an extension under S 9 (3) includes a power to issue a rejection order. If it were that the S 9 (3) provision was intended to expose an individual to loss of liberty as I understand it the law requires that it should state so clearly. It does not. A construction which allows for this would give immigration officers the power to make rejection orders in respect of persons who lawfully attend the Extension Division for examination. It would mean that such persons who are simply trying to observe our immigration laws and to comply with the directions of the authorities would have to do so on pain of summary arrest and detention. It only needs to be stated to be rejected in my view. While such a power may be obviously necessary for the effective discharge of their duty at ports of entry, it could hard be reasonably required for processing extension applications for permitted entrants. Indeed the form itself requires identification of a port of entry. This suggests that rejection orders may more appropriately be issued at ports of entry.

26. Further if I were to accept that S 9 (3) and in turn S 21 (1) gave the Respondent the power claimed it would mean that Mr. Ekwedike's status would be effectively reduced that of a first time entrant at a port who could simply be served a rejection order. Far from being a first time visitor, Mr. Ekwedike had acquired a different status. He was someone who was

allowed to enter on a visitor's visa over nine years ago, who has his permanent residence application pending, who had been granted a minister's permit at some point as well as permission to work without a permit for two years. To construe a provision that would allow him to be exposed to summary expulsion as a first time entrant would lead to an absurdity.

27. In ***PC Appeal No.10 of 2003 Robert Naidike and ors v. The AG, the JCPC*** made this remark:-

> **"True, there is no requirement to serve or otherwise publish the declaration but it appears to the Board unsurprising that an immigrant should only lose his status as a "permitted entrant" upon some clear and formal ministerial act. Section 9 (4) expressly provides that it is the declaration itself which "thereupon" results in the person ceasing to be a permitted entrant. Mr. Guthrie for his part is quite unable to explain why otherwise section 9 (4) should provide for a declaration (which is required too by section 22 (1) (f) – see paragraph 8 above). Were the powers under sections 9 (5) and 15 to be exercisable without such a declaration, indeed, there would be no point in ever making one.**

28. I understand this statement to support the proposition that Mr. Ekwedike's could only lose his status as a permitted entrant if a S 9 (4) declaration in the prescribed form was made by the Minister. His failure to provide the requisite bond may well have justified such a declaration, but until it was made by the Minister and followed by a deportation order, he could not be lawfully detained by the authorities.

29. In Mr. Ekwedike's case I find there was a further consideration which fortified his status. His Minister's permit was issued under S. 10 of the Act. It was for a stated period of one year but he was allowed by the Minister to work without a permit for a further period of one year.

30. S 10 (6) of the Act provides: -

> **(6) The Minister may, upon the cancellation or expiration of a permit, make a deportation order respecting the person concerned and such person shall have no right of appeal from the deportation order and shall be deported as soon as practicable.**

No such deportation order was made. The failure on the part of the Minister to make such an order combined with the failure to make S 9 (4) declaration only strengthens Mr. Ekwedike's case that he could not have automatically lost his status as a permitted entrant. In the circumstances the issuance of the rejection order by the CIO on 29th March 2017 was misconceived. Since it was flawed any consequential Supervision Order was equally unjustifiable.

Section 18

31. Officer Gajadhar alluded to her conclusion that Mr. Ekwedike's responses at the interview were untruthful. This factor was combined with the others, like his breach of the supervision order/failure to secure the bond to justify the issuance of the orders. While it is now academic in the light of my ruling above, and while I do not consider that this

provision was applicable to Mr. Ekwedike in any case, it is important to note what are the powers of immigration officers when someone fails to answer truthfully.

32. **S 18 provides under the heading: -**

> **EXAMINATION OF PERSONS SEEKING ADMISSION OR ENTRY**
>
> **18 (1) Every person seeking admission shall first appear before an immigration officer at a port of entry or at such other place as may be designated by an immigration officer in charge of the port of entry for examination as to whether he is or is not admissible.**
>
> **(2) Every person shall answer truthfully all questions put to him by an immigration officer at an examination and his failure to do so shall be forthwith reported by the immigration officer to a Special Inquiry Officer and shall be sufficient ground for deportation where so ordered by the Special Inquiry Officer.**

33. If the officer found his answers to be untruthful SS (2) indicates what steps were to be followed. There is no evidence that Mr. Ekwedike was reported to someone designated a Special Enquiry Officer and that that officer considered it warranted and ordered his deportation. The powers of the officers are circumscribed by the statute.

34. As long ago as in 1981 in his judgment in ***No.3092 of 1981 Francisco Jose Centeno v. Commission of Police and others,*** Mr. Justice K.C. Mc Millan made observation that the Immigration Act "appears to contain many pitfalls for the unwary". He was careful to

point out then that he was not suggesting that the authorities in that case had acted with any malice and I should state here that there has been no such allegation in this matter. The learned Judge went on to express his view that there was need even at that time for a critical examination with a view to possible revision of the Act to avoid what had happened. The call for amendment was more recently echoed by ***Kokaram J, in CV 02258 of 2016 Christopher Odikaqbue.***

35. Critically, in delivering judgment in ***Naidike v. Attorney General of Trinidad and Tobago*** [2004] UKPC 49 on 12th October 2004 their Lordships in the PC noted.

> **"The regrettable fact is that S 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 extended scope of S 15 is uncertain and this uncertainty must be resolved in favour of the liberty of the individual."**

The comments made by the Board in 2004 on S 15 of the Act are equally applicable to the sections of the Act which have been under consideration here. They contain features which are puzzling and quite troubling. So long as they remain unamended, the primacy of the right to liberty of the individual will continue to trump the efforts of immigration officials to maintain control and to do their jobs.

36. The time for modern legislative machinery which clearly defines the powers and functions of the Chief Immigration Officer and Immigration officers and which enables them to deal firmly, fairly and humanely with people is long overdue. The challenges posed by increased illegal immigration, human trafficking and a phenomenon which we may well

anticipate, of growing numbers of refugee arrivals, make it imperative in my humble view that those who are charged with the power and the responsibility to address the defects in the legislation do so sooner rather than later.

37. Order:

1. The Court orders the release of Mr. Henry Ekwedike forthwith.

2. By consent the Attorney General is added as a 2nd Respondent.

3. The Attorney General is to pay the Applicants costs to be assessed in default of agreement.

Dated the 11th August 2017

CAROL GOBIN

Judge