REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2017-01623

BETWEEN

FRANCISCO JAVIER POLANCO VALERIO
JOHAN RODOLFO CUSTODIO SANTANA **Claimant**

AND

THE CHIEF IMMIGRATION OFFICER
THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO **Defendant**

Before the Honourable Madam Justice Margaret Y Mohammed

Dated the 8th June 2017

APPEARANCES
Mr. Matthew Gayle Attorney at law for the Claimants.
Mr. D Neil Byam, Ms Ronnelle Hinds instructed by Ms Ryanka Ragbir Attorneys at law for the Defendants.

RULING

1. On the 5th May 2017 ("the order") I granted the Claimants permission to apply for judicial review of the following decisions:

"(1) The decision by Gewan Harricoo to resile from the initial position communicated to the Applicants that they would be free to leave the jurisdiction at their pleasure following their release from police custody on 28th April 2017;

(2) The decision to prevent the Applicants from departing from the jurisdiction;

(3) The decision to arrest and detain the Applicants for [sic] "has become an inmate of any prison or reformatory";

(4) The decision to arrest and detain the Applicants' passports;

(5) The decision not to/the failure to inform the Applicants of when the Chief Immigration Officer intends to permit their departure from the jurisdiction;

(6) The failure to promptly process the Applicants and permit their departure from the jurisdiction."

2. In essence the Claimants were challenging the Chief Immigration Officer's decision to arrest and detain their passports; to prevent them from departing Trinidad and Tobago; and to process them so that they can depart the jurisdiction. They were also challenging a decision by Mr Haricoo where he allegedly changed his position as communicated to the Claimants that they would be free to leave the jurisdiction at their pleasure following their release from police custody on 28th April 2017.

3. On the 12th May 2017 ("the Defendants application to set aside") the Defendants applied to set aside the order. On the 17th May 2017 the Defendants filed a Notice to strike out ("the Defendants application to strike out") paragraphs 5 and 6 of the affidavit of Robin Montano ("the Montano affidavit") which was filed in support of the Claimants leave application ("the Claimants' leave application"). On the same day, the Claimants filed a Notice ("the Claimants application to cross examine") to cross

examine Mr Gewan Haricoo with respects to paragraphs 5, 7 and 8 of his affidavit filed on the 10th May 2017 ("the Haricoo affidavit").

The Claimants' leave application

4. In the Claimants' leave application they sought the following substantive reliefs:

> "1. A Declaration that the revoking of the initial position communicated to the Applicants that they would be free to leave the jurisdiction at their pleasure following their release from police custody on 28th April, 2017 is illegal and/or irrational and/or procedurally improper and/or in breach of the principles of national justice and/or amounts to an irregular or improper exercise of discretion and/or is an abuse of power and/or is in breach of legitimate expectation.
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> 2. A Declaration that the decision to arrest and detain the Applicants is illegal and/or irrational and/or procedurally improper and/or in breach of the principles of national justice and/or amounts to an irregular or improper exercise of discretion and/or is an abuse of power and/or is in breach of legitimate expectation.
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> 3. A Declaration that the decision to prevent the Applicants from departing the jurisdiction is illegal and/or irrational and/or procedurally improper and/or in breach of the principles of national justice and/or amounts to an irregular or improper exercise of discretion and/or is an abuse of power and/or is in breach of legitimate expectation.
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> 4. A Declaration that the decision to prevent the Applicants from departing the jurisdiction is unconstitutional in that it denies their right to freedom of movement afforded to them by section 4 (g) of the Constitution of the Republic of Trinidad and Tobago.
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> 5. A Declaration that the decision to determine that the Applicants' are persons to whom section 9(4) (c) of the Immigration Act Chap 18:01 is unconstitutional in that it abrogates the Applicants' right to presumption of innocence, the right to procedural fairness and the right to be protected against arbitrary detention and exile as provided by sections

5(2)(f)(i), 5(2)(e), 5(2) (a) and 5 (2) (h) of the Constitution of Trinidad and Tobago.

6. A Declaration that the decision to determine that the Applicants' are persons to whom section 9(4) (c) of the Immigration Act Chap 18:01 applies is illegal and/or irrational and/or procedurally improper and/or breach of the principles of national justice and/or amounts to an irregular or improper exercise of discretion and/or is an abuse of power and/or is in breach of legitimate expectation.
7. A Declaration that the decision to arrest and continue to detain the Applicants' passports is illegal and/or irrational and or procedurally improper and/or in breach of the principles of national justice and/or amounts to an irregular or improper exercise of discretion and/or is an abuse of power and/or is in breach of legitimate expectation.
8. The decision not to/the failure to inform the Applicants of when the Chief Immigration Officer intends to permit their departure from the jurisdiction, whether by holding a Special Inquiry or otherwise is unconstitutional in that it denies the Applicants' the right to procedural fairness as enshrined in section 5(2) (h) of the Constitution of Trinidad and Tobago.
9. The decision not to/ the failure to inform the Applicants of when the Chief Immigration Officer intends to permit their departure from the jurisdiction, whether by holding a Special Inquiry or otherwise is illegal and/or irrational and/or procedurally improper and/or in breach of the principles of national justice and/or amounts to an irregular or improper exercise of discretion and/or is an abuse or power and/or is in breach of legitimate expectation.
10. An Order Mandamus compelling the Chief Immigration Officer to order the unconditional release of the Applicants'.
11. An Order Mandamus compelling the Chief Immigration Officer to order the unconditional release of the Applicant's Passports.
12. An Order Mandamus compelling the Chief Immigration Officer to order that no officer, agent or assign of the Immigration Division intervene or seek to prevent the Applicants' Departure from the jurisdiction.

13. An Order Mandamus compelling the Chief Immigration Officer to direct that all Immigration proceedings against the Applicants be dismissed and/or discontinued.
14. An Order Mandamus compelling the Chief Immigration Officer to direct that all and any monies paid by way of deposit or otherwise to the Immigration Division by the Applicants be returned to them forthwith.
15. Alternatively, An Order Mandamus compelling the Chief Immigration Officer to direct that a Special Inquiry be held in relation to the Applicants within twenty four (24) hours of the Order of the Court.
16. Damages.
17. Such other orders, directions or writs as the Court considers just and as the circumstances warrant pursuant to section 8 of the Judicial Review Act.
18. Costs."

5. The Claimants also sought the following interim relief:

"(1) An Order that the Chief Immigration Officer return and/or Order the immediate return of the Applicants passports;

(2) An Order that the Chief Immigration Officer not prevent and/or Order that no Officer of the Immigration Division prevent the Applicants' immediate departure from the jurisdiction;

(3) An Order staying all Immigration Proceedings against the Applicants;

(4) An Order directing the Immigration Division to return the $4,000.00 paid by way of bond by each Applicant."

6. The grounds in the Claimants' leave application and the evidence in the Montano affidavit were more or less the same. The Claimants stated that they are both nationals of the Dominican Republic. They entered Trinidad and Tobago legally on the 8th January 2016 and they were permitted to remain in the jurisdiction until the 8th March 2016. On the 14th February 2016, both Claimants were married in Trinidad and Tobago to women they met online. They were arrested together in relation to a criminal offence on the 3rd March 2016 namely possession of a firearm and ammunition.

Despite several attempts having been made, they were unable to secure bail and were held awaiting trial. They were tried summarily in the Siparia First Magistrates Court before Her Worship A. Deonarinesingh, who on the 27th April 2017 dismissed all charges against them. On the charges being dismissed, the Inspector in Charge at the Siparia Magistrates Courts and Process branch submitted to the Court that he had been informed by Mrs. Hood of the San Fernando Immigration Division that there were Orders of Detention in force in relation to the Claimants and they returned to custody.

7. On the 27th April 2017, the Claimants were conveyed to the Arouca Maximum Security Prison. However upon arrival, they were denied admission on the grounds that no Order of Detention was in force in relation to them and thereafter they were returned to the Siparia Police Station.

8. On the 28th April, 2017, the Claimants were informed by the Inspector in charge of the Siparia Magistrates Courts and Process Branch that there was no order of detention in force in relation to them and they were duly released.

9. On the 28th April 2017, the Claimants Attorney-at-Law was informed by Immigration Officer IV, Gewan Harricoo that there was no Order of Detention in relation to either of them and he requested that they report to the San Fernando Immigration Division on Monday 1st May 2017, and that they would thereafter be permitted to leave the jurisdiction at their leisure.

10. On the 1st May 2017, the Claimants reported to the San Fernando Immigration Division, Investigations Unit, accompanied by their attorney at law Mr Gayle where they were each interrogated by Immigration Officer 1, Ramjit and Immigration Officer

Mrs Hood. While being interrogated by Officer Ramjit each Claimant was shown and observed a file in relation to himself which included his original passport, as well as copies thereof. Each file was also observed to contain an extract from the Magistrates Court showing that the matters against the Claimants had been dismissed on the 27th April 2017. The First Claimant was informed that he would be detained because his wife had not attended the interview with him . Up to that point, no one had told him that his wife needed to attend. After some discussions, Mrs Hood stated that the Claimants could return the following day and would be released only if their wives attended, together with their identity documents and marriage certificates.

11. Upon the conclusion of that interrogation, the Claimants were informed that they would not be permitted to leave the jurisdiction, and they were placed on an order of supervision and instructed to report to the San Fernando Immigration Division on the 2nd May 2017.

12. On the 2nd May 2017, both Claimants reported to the San Fernando Immigration Division, Investigations Unit. They were instructed to pay a bond of $4,000.00 and they did so. Upon arrival, the Claimants requested to be informed by Immigration Officer 1 Dana Dookan, who attended to them both, of when they would be permitted to depart from the jurisdiction to which they received no response. The Claimants were then placed on a further order of supervision/the terms of their order were altered and they were instructed to report to the San Fernando Immigration Division on the 3rd May 2017.

13. On the 3rd May 2017, the Claimants both reported to the San Fernando Immigration Division. They were each interrogated as to the whereabouts of their wives by Immigration Officer Mrs Hood where they were arrested and detained by Officers of

the San Fernando Office of the Immigration Division. They were presented with a document entitled *"Reasons for Arrest and Detention"* which stated that they had (each) become *"an inmate of any prison or reformatory"*. Shortly, thereafter they were placed on a further Order of Supervision demanding that they return on the 10th May 2017 *"pending SI"*.

14. The Claimants stated that their wives are reluctant to get involved with Immigration Officials and that any attempts to compel them to do so will jeopardize their relationships and alienate their wives from them.

15. The Claimants then requested to be informed through Counsel, when they would be permitted to depart from the jurisdiction. Immigration Officer Mrs Hood informed them that it was not possible to say. The Claimants further asked if and when a Special Inquiry would be held in relation to them, to which Immigration Officer Mrs Hood informed them that it was not possible to say.

16. The Claimants stated that they have repeatedly requested to be allowed to depart from the jurisdiction and are they desirous of doing so immediately and that the officers of the Immigration Division have repeatedly refused to allow them to do so. Furthermore, the Claimants had repeatedly requested to be informed as to when the Immigration Division will complete their process with them and/or convene a special inquiry and/or permit them to depart from the jurisdiction and they have not been given an answer.

17. In considering whether to grant the Claimants permission to apply for judicial review I applied the test that a Court should grant permission to a Claimant to file for judicial review once it is satisfied that there is an arguable ground for judicial review having

a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy **(Sharma v Browne Antoine[1]).**

18. I made the order for the Claimants to apply for the aforesaid substantive reliefs based only on the Claimants evidence which was before me at the time. I was of the view there was conflicting information from the officers of the Immigration Department to the Claimants on whether they were free to leave the jurisdiction in circumstances where they were willing to depart the jurisdiction and they were not asking to be permitted to stay; they were placed on a Supervision Order on the 1st May 2017 pending the Special Inquiry and there was no information from the 29th April 2017 up to the institution of the instant action on the 5th May 2017 when the Claimants would be permitted to depart the jurisdiction and/or when a Special Inquiry would be held.

19. At the hearing of the Defendants application to set aside, Counsel for the Defendants indicated to the Court that they were no longer pursuing the Defendant's application to strike out and that he would address paragraphs 5 and 6 of the Montano affidavit in his submissions. He also stated that he was not relying on the Haricoo affidavit. Having indicated this position the Claimants application to cross examine was moot.

The Defendants application to set aside

20. The Defendants applied to set aside the order on the basis that on the 10th May 2017, the First Defendant declared that the Claimants ceased to be permitted entrants in Trinidad and Tobago under section 9(4) of the **Immigration Act[2]** with effect from the 4th March 2016. The First Defendant also ordered a Special Inquiry to be held to

[1] [2006] UKPC 57
[2] Chapter 18:01

determine whether each Claimant is a person other than a citizen of Trinidad and Tobago or a resident and is a person described in paragraph (g) of subsection (1) of section 22 of the **Immigration Act**. The Special Inquiry was scheduled to be held on 18th May 2017 but was postponed pending the outcome of the Defendants application to set aside. As such the Claimants have an alternative remedy available to them, namely the Special Inquiry, which will allow for the Claimants' passports to be released to them and that under section 9 of the **Judicial Review Act**[3] the Court ought not grant leave to an applicant for Judicial Review of a decision where any other written law provides an alternative procedure to question, review or appeal that decision.

21. At the hearing, Counsel for the Defendants argued three reasons for the Court to set aside the order. He submitted that the Claimants failed to comply with rule 56.4(11) Civil Proceedings Rules ("the CPR"); paragraphs 5 and 6 of the Montano affidavit contained information provided by attorney at law for the Claimants, Mr Gayle which was in violation of **Rule 35 of the Legal Profession Act**[4] and as such they Claimants ought not to have been permitted to rely on those paragraphs and most importantly there was material non-disclosure of several relevant provisions of the **Immigration Act**, in particular section 15 which deals with Special Inquiries, section 27 which deals with the procedure for appeals from the decision of the Special Inquiry Officer, and the exclusion clause at section 30 which oust the jurisdiction of the Court from interfering with any Immigration Proceedings for person who are not residents or citizens of Trinidad and Tobago. He submitted that the decision of Mr Haricoo which the Claimants complained about is irrelevant since Mr Haricoo is not the First Defendant neither is he the Special inquiry Officer.

[3] Chapter 7:08
[4] Chapter 90:03

22. Counsel for the Defendants also asked the Court to take judicial notice that the Claimants have subsequent to the institution of the instant proceedings, filed a Fixed Date Claim on the 15th May 2015 (CV 2017-01766) seeking to strike down section 9(4)(c) of the **Immigration Act** ("the constitutional action") as being inconsistent with the Constitution or alternatively it should be read in conformity with the Constitution of Trinidad and Tobago.

23. Counsel for the Claimants submitted that at the hearing on the 18th May 2017 Counsel for the Defendants agreed to extend the time for filing of the Fixed Date Claim to the 25th May 2017 and that the Defendants are also guilty of material non-disclosure. He also argued that there are three heads of reliefs which the Claimants seek in the substantive claim namely legitimate expectation based on the promises made by Immigration Officer Haricoo; the need for a Special Inquiry since at the time of the Claimants leave application and the order the Special Inquiry was not set up; the irrationality of the decisions to arrest the Claimants and detain their passports and the unconstitutionality of the application of section 9(4) of the **Immigration Act** to the Claimants.

24. In **Sharma v Browne Antoine** the Privy Council stated that the test for setting aside leave to move for judicial review is a power which the Court should exercise *"very sparingly"* and only where the *"leave is one that plainly should not have been granted"*. More recently in this jurisdiction Jamadar JA **Devant Maharaj v National Energy Commission**[5] described the test as: *"The jurisdiction to set aside leave for good cause and where the initial granting of leave is subsequently recognized as being clearly erroneous."*

[5] Cv App 115 of 2011

Non-compliance with Rule 56.4 (11)

25. Rule 56.4(11) CPR provides that the leave to file for judicial review is conditional on the applicant making a claim for judicial review within 14 days. In the order, the Court granted the Claimants permission to make a claim for judicial review by filing a Fixed Date Claim Form within 14 days from the 5th May 2017 for the substantive reliefs set out aforesaid. According to the Court records the time for filing the Fixed Date Claim was extended by consent to the 25th May 2017 which was one week after the hearing of the 18th May 2017. I therefore do not agree with the argument by Counsel for the Defendants that the proceedings are a nullity.

Paragraphs 5 and 6 of the Montano affidavit

26. Paragraphs 5 and 6 of the Montano affidavit state:

> "5. Mr Gayle informs me that on the 28th April 2017, while enquiring as to when his client's would be permitted to depart the jurisdiction, he was informed by Mr Geewan Haricoo, IOIV that they would be able to " collect their passports" and depart from the jurisdiction within an agreeable timeframe to both the Applicants and the Immigration Division. Mr Gayle made a contemporaneous summary note of the conversation and other conversations he had while tried to establish the whereabouts of the Applicants that morning, a true copy of this note from his notebook is now shown to me and hereto attached and ,marked "RM1".
>
> 6. Mr Gayle informs me that between the 29th April 2017 and the Wednesday the 3rd May 2017, he has been corresponding with Mr Gewan Haricoo, who is Ms Hood's direct superior in relation to when the Applicants would be permitted to depart the jurisdiction and /or when a Special Inquiry will be held in relation to them. Mr Haricoo has thus far declined to response. Now shown to me and hereto attached

and marked "RM2" is a true copy of the whatspp conversation between Mr Gayle and Mr Haricoo."

27. Rule 31.3 (3) CPR sets out the requirements which an affidavit must comply with. It states:

> "(1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.
>
> (2) However, an affidavit may contain statements of information and belief:-
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> (a) where any of these Rules so allows; and
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> (b) where it is for use in an application for summary judgment, provided that the source of such information and the ground of such belief is stated in the affidavit.
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> (3) The court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit.
>
> (4) No affidavit containing any alteration may be used in evidence unless all such alterations have been initialed by the person before whom the affidavit was sworn."

28. In short, an affidavit is supposed to contain facts which are within the deponent's own knowledge and belief and where it is not, it must set out the source of the information and belief or it would be hearsay. Statements based on information and belief are permissible in proceedings which were interlocutory in nature.

29. The Montano affidavit was sworn to by Mr Robin Montano who stated that he is an attorney at law of some 44 years standing and that he was duly authorized to make it on behalf of the Claimants. He said that he was so authorized since neither of the Claimants is able to speak English, the cost of an interpreter would be prohibitive for the purpose and would risk delaying and/or denying them substantive justice in this

matter, as the Claimants could not afford it. He also stated that in his view the Claimants' leave application was urgent and the translation service would not have been able to return the document with sufficient expediency to permit them to make the Claimants leave application. Mr Montano deposed that both the Claimants were in his office on the 5th May 2017 and assisted in the preparation of the Montano affidavit. Also present was the Commissioner of Affidavit Mr Colin Johnson and the Claimants attorney at law Mr Matthew Gayle. Mr Montano then stated that he speaks Spanish fluently since he has been married to a Venezuelan national for 20 years and that the information in paragraph 4 of the Montano affidavit was based on instructions given to him in Spanish.

30. Rule 35 of the **Legal Profession Act** provides:

> "(1) An Attorney-at-Law should not appear as a witness for his own client except as to merely formal matters or where such appearance is essential to the ends of justice.
>
> (2) If an Attorney-at-law is a necessary witness for his client with respect to matters other than such as are merely formal, he should entrust the conduct of the case to another Attorney-at-law of his client's choice."

31. In **Hosein's Construction v 3G Technologies**[6] the issue the Court had to determine was whether an instructing attorney at law can give evidence whilst remaining as the attorney at law on record for the defendant in those proceedings. Kokaram J at paragraph 4 of the judgment stated that:

> "the Code of Ethics sets out the standard of the practice of law in this jurisdiction. A Court must be careful to demand no less of a standard of the attorney so as to preserve the honour and dignity of the profession and the proper administration of justice. As a matter of public policy the court cannot

[6] CV 2008-00560

countenance a lesser standard relating to practice than those which the attorneys have set themselves for the regulation of their profession."

32. Kokaram J found that it was objectionable for the instructing attorney at law to give evidence whilst remaining an attorney at law on record for the defendant to those proceedings. Accordingly, he held that as there was a breach of **Rule 35 of Part A of the Code of Ethics**, and the witness statement had to be withdrawn or the attorney at law had to withdraw from acting for the defendant while she was a witness in the matter.

33. In **The Matter Of An Application For A Writ Of Habeas Corpus Between Yeshivia Hayon, Tehila Hayon, Yehodit Nechama Soleimani, Miriam Soleimani, ShiraHayon and Moshe Yochanan (All Minors), Ester Hayon, AzarHayon, Avrohom Dinkel v The Chief Immigration Office and The Attorney General of Trinidad and Tobago**[7] Kokaram J once more pointed out that it is a basic elementary principle that an attorney at law who appears as advocate attorney on the filing forms cannot give evidence on the same matter in which he so appears. The Judge further noted that where the evidence of the attorney at law in the form of an affidavit was material to an application filed by his clients and the attorney's evidence on the said affidavit did not merely deal with formal matters, it was a breach of the attorney's code of ethics for him to act as advocate in those circumstances.

34. Paragraphs 5 and 6 of the Montano affidavit set out information he was told to by Mr Gayle, the instructing and advocate attorney at law for the Claimants.. These were not matters within the knowledge of the Claimants since the source of the information for these matters was Mr Gayle. However, notably absent was an explanation from Mr

[7] CV 2014-00759

Montano why Mr Gayle was unable to depose to these material facts given that Mr Montano had stated that Mr Gayle was present in his office when the Montano affidavit was being prepared. This evidence was material to the Claimants leave application as it did not merely deal with formal matters. Although, it appears to be Mr Montano's evidence, it was not. In substance it was the evidence of Mr Gayle, who is the instructing and advocate attorney at law on record for the Claimants where the evidence concerned material conversations between he and Mr Haricoo on the issue of whether the Claimants could have obtained their passports, could depart the jurisdiction and when or if a Special Inquiry would be held. In my opinion, it was a breach of **Rule 35 of the Code of Ethics of the Legal Profession Act** for Mr Gayle to appear for the Claimants and to also be a witness of such material facts.

Material Non-Disclosure

35. In Michael Fordham's **Judicial Review Handbook**[8] at paragraph 10.3 the author stated that in judicial review Claimants always have an important duty to make full and frank disclosure to the Court of material facts, and any procedural hurdles eg ouster, alternative remedy, delay). The matters requiring disclosure include facts and documents, legal principles and authorities, statutory ouster and alternative remedy[9].

36. The reasons for the Claimant having such a duty is because an order obtained ex parte is in its nature provisional and the consequences for failing to bring to the Court's attention materials facts and documents, legal principles, statutory ouster and alternative remedy entitles a Court on an inter partes hearing to examine the matters which were not disclosed to ensure that the Claimant who obtained the order did not

[8] 4th ed
[9] At para10.3.3

obtain an advantage improperly obtained by his non-disclosure and to serve as a deterrent from doing so.

37. Balcombe LJ in **Brink's MAT Ltd v Elcombe**[10] explained the reasons for discharging an injunction obtained ex parte where there was material non-disclosure as:

> "It will deprive the wrongdoer of an advantage improperly obtained… . But it will also serve as a deterrent to ensure that persons who make ex parte application realise that they have this duty of disclosure and of the consequences (which may include liability in costs) if they fail in that duty."

38. In order to determine if an order obtained ex parte should be set aside on the basis on material non-disclosure, the learning in **R v Jockey Club Licensing Committee ex p Wright**[11] referring to **Brinks Mat Ltd v Elcombe**[12] is instructive:

> "In *Brink's Mat Ltd v Elcombe* [1988] 1W.L.R. 1350, the Court of Appeal had been concerned with nondisclosure on the making of a Mareva injunction but the principles there laid down were relevant in the present case. These included:
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> (a) The duty to make a full and frank disclosure of all the material facts, see *R. v Kensing on Income Tax Commissioners, ex p. Princess Edmond de Polignac* [1917] 1K.B. 486.
>
> (b) The material facts were those which it was material for the judge to know and materiality was to be decided by the court and not by the assessment of the applicant or his legal advisers, see, in particular, *Thermas Ltd v Schott Industrial Glass Ltd* [1981] F.S.R. 289.
>
> (c) The applicant must make proper inquiries before making the application, see *Bank Mellat v Nikpour* [1985] F.S.R. 87. The duty of disclosure therefore applied not only to material facts known to the applicant but also to any additional facts which he would have known had he made such inquiries.
>
> (d) The extent of the inquiries which would be held to be proper, and therefore necessary, must depend on all the circumstances of the case including the

[10] [1988] 3 All ER 189 at page 193
[11] 1991 C.O.D. 306
[12] [1988] 1 WLR 1350

nature of the case, the order for which the applicant contended, the degree of legitimate urgency and the time available for the making of inquiries.

(e) Where material non-disclosure was established the court would be "astute to ensure that a plaintiff who obtains [*ex parte* relief] without full disclosure is deprived of any advantage he may have derived by that breach of duty" *per* Donaldson L.J. in *Bank Mellat v Nikpour*

(f) Whether the fact not disclosed was of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depended on the importance of the fact to the issues which were to be decided by the judge on the application. Finally, the court had a discretion and it was not for every omission that an *ex parte* order would be automatically discharged."

39. It was submitted on behalf of Counsel for the Defendants that the substantive relief which the Claimants are seeking in the instant action is to be able to leave the jurisdiction by avoiding the provisions of the **Immigration Act** for a Special Inquiry. In any event the First Defendant has scheduled the Special Inquiry. He argued that the Claimants obtained an unfair advantage in obtaining the order since they failed to disclose to the Court that under section 9 of the **Judicial Review Act** that there was an alternative procedure under the **Immigration Act** for being able to leave voluntarily and that sections 27, 30 and 31 ousts the jurisdiction of the Court where the officers of the Immigration Department have acted properly.

40. On the other hand Counsel for the Claimants submitted that the Defendants have made material non-disclosure; at the time of the Claimants' leave application and the order there was no date fixed for the Special Inquiry so this was not an alternative remedy available to the Claimants and that the ouster clauses in the **Immigration Act** were not applicable since the Immigration Officers acted outside of their powers of whether section 9(4) of the **Immigration Act** properly applied to the Claimants.

41. In **R v Secretary for State for the Home Department ex p. Li Bin Shi**[13] the Court set aside the grant of leave to file for judicial review on the basis that there was material non-disclosure of the relevant legal principles before the judge who granted the order since the applicant's attorney at law did not refer the judge to two authorities. The Court stated that *"Counsel should not expect even experienced judges to be seized of all the relevant principles and authorities and should always identify to the court the leading authority for any proposition on which they rely and any countervailing authorities."*

Non-disclosure of alternative remedy

42. The Claimants stated in the Claimants leave application, in response to the question, "*Whether an alternative form of redress exists and if so why judicial review is more appropriate or why the alternative has not been pursued"*, that *"No alternative form of redress exists"*.

43. Section 9 of the **Judicial Review Act** expressly provides that the Court shall not grant leave to an application for judicial review of a decision where any other written law provides an alternative procedure to question, review or appeal that decision save in exceptional circumstances. In **Judicial Review Principles and Procedure**, the authors at paragraphs 26.89 to 28.91 discussed the reasons for judicial review as a last resort as:

> "Because judicial review is a remedy of last resort, where an adequate alternative remedy is available the court will usually refuse permission to apply for judicial review, unless there are exceptional circumstances justifying the claim proceeding. The availability of an adequate alternative remedy is a matter that is relevant to the exercise of the court's discretion to grant permission to apply for judicial review; it does not go to the court's jurisdiction to entertain a claim for judicial review.

[13] [1995] C.O.D 135

There is a twofold rationale for the requirement that a claimant should usually exhaust any adequate alternative remedy before, or instead of, making a claim for judicial review. First, it is not for the courts to usurp another body that is charged with resolving challenges to or complaints about decisions of public bodies, particularly where that other body has specialist expertise in the relevant field. Secondly, judicial review is intended to be a speedy procedure and, given the limited judicial resources available, this necessarily requires limiting the number of claims considered by the courts. This second element of the rationale should, however, be treated with caution: claimants should not be denied access to the courts simply because the court's resources are inadequate, particularly if Convention rights are in issue."

44. Therefore the basis for abandoning a remedy created by statute, in the instant case the **Immigration Act**, can only be justified by exceptional circumstances.

45. Section 9(4) (c) and (f) of the **Immigration Act** provides that:

"Where a permitted entrant is in the opinion of the Minister a person described in section 8(1),(k),(l),(m) or (n) or a person who-
(c) has become an inmate of any prison or reformatory;….
(f) was admitted or deemed to have been admitted to Trinidad and Tobago under subsection (1) and remains therein after the expiration of the certificate issued to him under subsection (2) or under section 50(2);"

46. Section 22 of the **Immigration Act** provides that any person who being a permitted entrant has been declared by the Minister to have ceased to be a permitted entrant under section 9(4) can have Immigration Proceedings in the form of a Special Inquiry be issued against them. Section 23 empowers the First Defendant to cause a Special Inquiry to be held with respect to whom a report has been made under section 22. Section 24 sets out the nature of the Special Inquiry. Section 24 (5)

makes provisions for the voluntary departure from Trinidad and Tobago where there are deportation proceedings in certain circumstances. Section 24 states:

> "24. (1) An inquiry by a Special Inquiry Officer shall be separate and apart from the public and in the presence of the person concerned wherever practicable, but the person concerned shall, on request, be entitled to a public hearing.
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> (2) The person concerned shall be entitled to conduct his case in person or by an Attorney-at-law, 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).
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> (3) The Special Inquiry Officer may, at the hearing, receive and base his decision upon evidence considered credible or trustworthy by him in the circumstances of each case.
>
> (4) Where an inquiry relates to a person seeking admission to Trinidad and Tobago, the burden of proving that he is not prohibited from admission to Trinidad and Tobago rests upon him.
>
> (5) If the respondent in a deportation matter admits the factual allegations in the order to show cause and notice of hearing and is willing to leave Trinidad and Tobago voluntarily and at no expense to the Government of Trinidad and Tobago, he may make verbal application for voluntary departure before the Special Inquiry Officer and if the Special Inquiry Officer is satisfied that the case is genuine he may, instead of making a deportation order against such person issue the prescribed from for his voluntary departure."

47. Section 25 sets out the various decisions the Special Inquiry Officer can make namely he can admit or let the person come into or remain in Trinidad and Tobago as the case may be or may make an order for deportation.

48. I agree with Counsel for the Defendants that the Claimants grievance against a decision by Mr Haricoo is irrelevant since he is not the First Defendant neither is he

the Special Inquiry Officer. The question is whether the Special Enquiry was an adequate alternative remedy to address the reliefs which the Claimants have sought namely the immediate return of their passports and for them to be permitted to leave this jurisdiction. In my opinion it is.

49. The Claimants and their attorney at law were aware by the 1st May 2017 that they were subject to proceedings under the **Immigration Act** since the Claimants signed the Order for Supervision on that day and they were released into the care of their attorney at law. I accept that at the time of the Claimants' leave application was made and the order was granted, there was no Special Inquiry but by the 10th May 2017, the Notice for the Special Inquiry was given and if the Claimants wished to voluntarily leave at their own expense which was set out in the Montano affidavit then they had an alternative remedy under section 24 (5) of the **Immigration Act** to pursue this relief. In my opinion the process invoked by the Notice for the Special Inquiry will effectively deal with the reliefs which the Claimants have sought.

50. For the aforesaid reasons, I am of the opinion that the Claimants have failed to demonstrate that there were exceptional circumstances to abandon the alternative remedies they seek. Further, the Claimants failure to disclose to the Court that they had an alternative remedy under section 24 of **Immigration Act** was material non-disclosure.

Non-disclosure of ouster provisions

51. There is also a duty on a Claimant to point out the existence of an ouster clause in any application for leave to file for judicial review. In **R v Cornwall County Council, ex p**

Huntington[14] the Court set aside the order of leave to apply for judicial review since there was a relevant clause ousting the jurisdiction of the Court. Brooke J held that it was incumbent on practitioners applying for leave to seek judicial review to draw to the attention of the court to any relevant clause ousting the Court's jurisdiction and to explain why they contend that it does not bar the application[15].

52. In **Cornwall,** the country council made a public right of way order pursuant to section 53(2)(b) of the Wildlife and Countryside Act 1981 in respect of a way over the applicants' farm. Under the procedure set out in Schedule 15 to the 1981 Act the authority had to give notice of the making of the order, the Secretary of State had to hold an inquiry or hearing if there were objections and, by paragraph ii, the authority had to publish notice of the Secretary of State's confirmation after receiving notice of his decision to confirm an order. Paragraph 12 provided that any person aggrieved by an order which had taken effect and who desired to question its validity could within 42 days from the date of publication of the notice under para II make an application to the High Court, while para 12(3) provided that 'Except as provided by [para 12], the validity of an order shall not be questioned in any legal proceedings whatsoever'. The applicants, who had objected to the order and were awaiting a public local inquiry, applied for leave to apply for judicial review by way of an order of certiorari to quash the right of way order on the grounds that in deciding to make the order the council had acted outside the statutory powers conferred on it by Parliament. Following the grant of leave to the applicants ex parte, the council applied to have the grant of leave set aside, contending that the jurisdiction of the court to grant judicial review on general grounds had been ousted by para 12 (3) of Sch 15 to the 1981 Act.

[14] [1992] 567
[15] Supra at page 576 at f, g

53. The Court held that:

> "Where a statute contained a standard form of preclusive clause prescribing an opportunity for challenge on specified grounds together with the period within which that challenge could be made and proscribing any challenge outside that period, questions as to the invalidity of actions taken under the statute could only be raised on the specified grounds in the prescribed time and manner and the jurisdiction of the court was excluded in the interest of certainty in respect of any other challenged irrespective of whether the body whose decision was sought to be impugned was quasi-judicial or administrative and whether or not the decision sought to be impugned was fundamentally invalid. It followed that the court had no jurisdiction to grant judicial review of the right of way and the grant of leave to apply for judicial review would accordingly be set aside."[16]

54. There are two sections in the **Immigration Act** which oust the jurisdiction of the Court namely sections 27 and 30. Neither of these sections was brought to the Court's attention before the order was made. Section 27 provides for appeals of a deportation order as follows:

> "27. (1) No appeal may be taken from a deportation order in respect of any person who is ordered deported as a member of a prohibited class described in section 8(1)*(a)*, *(b)* or *(c)* where the decision is based upon a certificate of the examining medical officer, or as a person described in section 8(1)*(j)* and *(k).*
>
> (2) Except in the case of a deportation order against persons referred to in section 50(5), an appeal may be taken by the person concerned from a deportation order if the appellant within twenty-four hours serves a notice of appeal in the prescribed from upon an immigration officer or upon the person who served the deportation order.
>
> (3) All appeal from deportation orders may be reviewed and decided upon by the Minister, and subject to sections 30 and 31, the decision of the

[16] [1992] 3 All ER at page 566

Minister shall be final and conclusive and shall not be questioned in any Court of law.

(4) The Minister may-

(a) consider all matters pertaining to a case under appeal;

(b) allow or dismiss any appeal; or

(c) quash a decision of a Special Inquiry Officer that has the effect of bringing a person into a prohibited class and substitute the opinion of the Minister for such decision.

(5) The Minister may in any case where he thinks fit appoint an Advisory Committee consisting of such person as he considers fit for the purpose of advising him as to the performance of his functions and the exercise of his powers under this section.

(6) The Minister may in any case where he considers it fit to do so, cancel any deportation order whether made by him or not."

55. Section 27 does not give the Court the jurisdiction to deal with appeals of orders for deportation.

56. Section 30 is a specific ouster provision since it states that:

"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."

57. Section 31 only gives the right of appeal to citizens of Trinidad and Tobago. It states:

"31 (1) Subject to the provisions of subsection (2) , an appeal shall lie to a Judge of the High Court and then to the Court of Appeal against any rejection Order or deportation Order of the Minister, a special inquiry Officer, or an immigration officer with respect to any person who claims to be a citizen or

resident of Trinidad and Tobago or any declaration as to loss of resident status under section 7 (4).

(2) Notwithstanding the provisions of subsection (1), there shall be no appeal by a person referred to in section 8(1) (l), (m), (o), or (q).

(3) A person to whom section 50(5) applies may appeal to a Judge of the High Court, whose decision thereon may be final, on the ground that there is a reasonable excuse for his failure to apply for permission to become a resident in accordance with section 50(1) or , where his application is refused because the Minister considers that such person was not ordinarily resident in Trinidad and Tobago for a period of five years from the commencement of this Act, he may appeal on the ground that he was so ordinarily resident.

(4) Rules of Court may be made by the Rules Committee under section 77 of the Supreme Court of Judicature Act for regulating and prescribing the procedure on appeal from the decision of the person making the rejection order or deportation order or any other matter in respect of which an appeal may lie under this section to a Judge of the High Court and therefrom to the Court of Appeal."

58. It was clear from section 31 that Parliament intended to only exclude the jurisdiction of the Court in matters concerning persons who are not citizens or residents and in the interest of certainty on this category of persons were excluded from the ouster provisions.

59. Where there is an ouster provision in the statute the onus was on the Claimants to identify the error of law made by the Defendants. The Claimants have not challenged the jurisdiction of the Chief Immigration Officer or the Special inquiry Officer. According to the Montano affidavit, the Claimants are citizens of the Dominican Republic; at the time of the Claimants' leave application they knew they were placed under an order of supervision on the 1st May 2017 which was extended for various periods of time. The attorney at law for the Claimants was also aware that they were placed under an order of supervision since they were released in his care. In my

opinion at least by the 1st May 2017 both the Claimants and their attorney at law were aware that the Claimants were subject to proceedings under the **Immigration Act** and therefore the failure to disclose section 30 of the **Immigration Act** to the Court when they made the Claimants leave application on the 5th May 2017 was a material non-disclosure since it went to the jurisdiction of the Court to make the order.

Conclusion

60. The order of the 5th May 2017 is set aside. In my opinion the Claimants failure to disclose material provisions of the **Immigration Act** to the Court in the Claimants' leave application namely sections 27 and 30 which ousts the jurisdiction of the Court, and sections 22, 24 and 25 which provide the Claimants with an alternative remedy in the **Immigration Act** for the Claimants to obtain their passports, and to be permitted to leave the jurisdiction by the Special Inquiry process resulted in the Claimants obtaining a material benefit. In my opinion the decisions which the Claimants seek to review save and except that of Mr Haricoo can be addressed by the Special Inquiry process. Further, any decision by Mr Haricoo is irrelevant since based on the Claimants own evidence he is neither the First Defendant nor the Special Inquiry Officer.

Order

61. The permission to file for judicial review as granted in the order of the 5th May 2017 is set aside.

62. I will hear the parties on costs.

63. The Court notes that Counsel for the Defendants indicated during the hearing of the Defendants application to set aside, that the Special Inquiry could have been held on the 6th June 2017 or if the Claimants are prepared to waive the 24 hours' notice it can be held on the 5th June 2017. The First Defendant is advised to act with dispatch in convening and completing the Special Inquiry.

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Margaret Y Mohammed

Judge