REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2019-03304

IN THE MATTER OF AN APPLICATION UNDER SECTION 1 (1) OF THE CONSTITUTION

BETWEEN

O'NEIL WILLIAMS

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD & TOBAGO

THE CHIEF IMMIGRATION OFFICER

Defendants

Before the Honourable Madam Justice Margaret Y. Mohammed

Date of Delivery August 30, 2019

APPEARANCES

Mr Peter Carter instructed by Ms Shanice Ramdhan Attorneys at Law for the Claimant.

Ms Linda Khan instructed by Ms Andella Ramroop Attorneys at-Law for the Defendants.

RULING ON INTERIM RELIEF

1. The Claimant is a Jamaican national against whom a Deportation Order was made on the 10 November 2017 ("the Deportation Order"). He is also detainee at the Immigration Detention Centre ("the IDC") and he is due to be deported. On the 15 August 2019 he sought interim relief ("the application for interim relief") to stay the Deportation Order until the hearing and determination of a claim for constitutional relief under section 14 (1) of the Constitution of Trinidad and Tobago[1] ("the proposed constitutional motion"). He also seeks an interim order directing the Second Defendant to release him on an Order of Supervision until the hearing and determination of the proposed constitutional motion.

2. An affidavit[2] ("the Smart Affidavit") in support of the application for interim relief was sworn to by one Simone Smart. The Smart Affidavit did not depose the relationship of the deponent to the Claimant and there was no explanation set out for the failure of the Claimant to swear to any affidavit in support. I will refer to the material aspects of the Smart Affidavit later in the Ruling.

3. The proposed constitutional motion was filed as exhibit "S.S.3" to the Smart Affidavit. In the proposed constitutional motion the Claimant seeks the following reliefs:

    "1. A declaration that the Deportation Order issued by the second Defendant against the Claimant on the 10th November 2017 was made without, or in excess of jurisdiction, and was ultra vires, unconstitutional and illegal;

[1] Chapter 1
[2] Filed on the 15 August 2019

2. A declaration that the Deportation Order issued by the Second Defendant against the Claimant on 10th November, 2017 infringed his right to the protection of the law;
3. A declaration that the Deportation Order issued by the Second Defendant against the Claimant on the 10th November 2017 infringed on his right to the freedom of movement;
4. Damages for breaches of the Claimant's rights as guaranteed by sections 4(a), (b) and (g) of the Constitution."

The Grounds in the application for interim relief

4. The grounds in the application for interim relief can be summarized as follows. The Claimant is a CARICOM national and a citizen of Jamaica who arrived in Trinidad and Tobago on 28 December 2010 at the Piarco International Airport. He was granted a six-month stay as a visitor and he has resided in Trinidad and Tobago since the 28 December 2010. He was been charged on four occasions for criminal offences. His first charge ("the first charge") in March 2011 was for the offence of possession of marijuana for the purpose of trafficking. He was charged with two other persons. On 3 December 2015 the first charge was dismissed against him and his co-accused.

5. The Claimant's second charge was on 15 February 2014 ("the second charge"). He was arrested and charged for possession of cocaine for the purpose of trafficking. The preliminary enquiry for the second charge and a related forgery charge ("the fourth charge") was completed on 29 November 2018 when he was committed to stand trial at the next sitting of the Assizes. He was granted bail by the Magistrate upon committal in the sum of $300,000.00 to be approved by the Clerk of the Peace or in the

alternative, a cash bond in the sum of $25,000.00. The cash security was paid on 31 January 2019.

6. The Claimant was charged for possession of cocaine for the purpose of trafficking in 20 September 2014 ("the third charge"). On 22 September 2014 he was convicted in the Tunapuna Magistrate's Court and sentenced to a term of 3 years imprisonment with hard labour. On the said 22 September 2014 he signed a notice of appeal against conviction. On 22 March 2018 his appeal against conviction was allowed by the Court of Appeal. There was no re-trial for the third charge as the Claimant had served his sentence at the time of the appeal.

7. Prior to the proposed constitutional motion, the Claimant brought 3 previous proceedings against the Defendants. The first was an application for leave to file judicial review proceedings ("the 2017 judicial review matter"). The 2017 judicial review matter was filed on 24 October 2017 and was withdrawn in November 2017.

8. The Claimant filed an application for writ of habeas corpus on 12 November 2018 ("the 2018 habeas corpus application"). The 2018 habeas application was withdrawn on 5 December 2018 because the Claimant had been committed to stand trial and was remanded at the Maximum Security Prison on bail. His detention was therefore no longer at the hands of the Second Defendant.

9. The third action against the Defendant was an application for leave to file judicial review proceedings made on 6 March 2019 ("the 2019 judicial review matter") which in summary seeks to challenge the validity of:

i. The order of detention issued on 1 December 2018;
ii. The decision to detain the Claimant on 1 February 2019 and thereafter until 7 February 2019;
iii. The decision to require the payment of a security deposit to secure the Claimant's release;
iv. The Commissioner of Prisons' decision to detain the Claimant on 31 January 2019.

10. The 2019 judicial review matter is still pending since the Defendants have resisted the leave being granted and the decision is scheduled for the 7 October 2019.

11. The Claimant is of impecunious means and intends to file a hybrid judicial review claim and constitutional motion once leave is granted in the 2019 judicial review matter to save costs, as was done in the case Christopher Odikagbue v Chief Immigration CV2016-02258.

12. The Claimant is represented in the 2019 judicial review matter pro bono and he would be seriously prejudiced in his ability to successfully advance a claim in the 2019 judicial review matter if he is deported because should leave be granted since he will be required to file his claim within fourteen (14) days. His ability to do so is seriously compromised if he is out of the jurisdiction.

13. The Deportation Order was issued against the Claimant for the following reasons.
i. The Claimant is not a citizen nor a resident of Trinidad and Tobago.

ii. The Claimant is a person described under Section 9 (4) (b) (c) and (e) of the Immigration Act[3] ("the Immigration Act").

iii. The Claimant is now a member of the prohibited class of persons, being a person described in Sections 8(1) (d) and (k) of the Immigration Act.

14. The Deportation Order is unlawful, illegal, ultra vires and a breach of the Claimant's rights as protected by section 4(a), (b) and (g) of the Constitution for the following reasons.

i. It was issued as a result of the Claimant's cocaine trafficking conviction in September 2015 ie in the third charge. It was unreasonable and unlawful and a breach of the Claimant's right to protection of law for the Minister of National Security ("the Minister") to issue the Deportation Order while the Claimant's appeal against conviction was pending.

ii. That conviction having been quashed by the Court, the Deportation Order was therefore made upon a material error of fact.

iii. The Claimant does not fall into the prohibited class of section 9(4) of the Immigration Act.

iv. The Deportation Order was issued in breach of the principles of natural justice and therefore infringed his right to due process.

15. The Claimant has pending criminal charges for which he is yet to be indicted. Deportation of the Claimant before his charges are determined would interfere with his rights to a fair trial.

[3] Chapter 18:01

16. The Second Defendant, by failing to consult the Director of Public Prosecutions before issuing the Deportation Order acted unlawfully unreasonably and illegally.

17. The Claimant's passport is currently lodged with the Clerk of the Peace of the Arima Magistrates Court as a condition of his Bail Order.

18. The Second Defendant acted in bad faith since she failed to indicate to the Claimant that she was going to execute the Deportation Order particularly after having placed the Claimant on an Order of Supervision on 7 February 2019.

19. The Second Defendant has also acted in bad faith having told Counsel for the Claimant through her agents and or servants that no deportation would take place for another two weeks.

20. The actions of the Second Defendant to change the time-frame for deportation from two weeks as indicated by an order dated 14 August 2019 to within 24 hours indicated 8 hours later can be inferred to be as a direct result of the enquiries from the Claimant's attorneys at law and their attendance on the Claimant at the IDC to take instructions.

21. Damages would not be an appropriate remedy for the following reasons:
    i. Damages would be difficult to quantify for the hardship caused to the Claimant due to his deportation;
    ii. The Claimant upon his return to his country of nationality, Jamaica, would be processed as a deportee person which, even if the Deportation Order is subsequently quashed, he would still suffer the social stigma of being a deportee;

iii. The Claimant's deportation would adversely affect property rights of a third party, namely his bailor in his pending criminal charges;

iv. If the Deportation Order is unlawful, an order declaring its invalidity would changes his status in this country from an illegal immigrant to a permitted entrant. This change of status cannot be compensated by damages.

22. The balance of convenience lies in keeping the status quo, that is, with the Claimant continuing to reside in Trinidad and Tobago. The balance of convenience also lies with the Claimant being released as he has both reporting condition to the Immigration Division as well as bail reporting conditions.

23. The Second Defendant has adequate security for costs for the Claimant should the Deportation Order be unlawful as the Claimant had a security deposit of $10,000.00 paid on his behalf to secure his release.

The Defendants position

24. The Defendants opposed the granting of the interim reliefs sought on the basis namely: (a) there is no serious issue to be tried since the proposed constitutional motion is frivolous and an abuse of process; and (b) the balance of justice lies in favour of the Defendants. In support of their position they relied on the affidavit of Mr Gewan Harricoo[4]("the Haricoo Affidavit") an Immigration Officer IV attached to the Enforcement Section, Immigration Division of Trinidad and Tobago. I will refer to the material details in the Harricoo Affidavit later in the Ruling.

[4] Filed on the 16 August 2019

The law and principles for injunctive relief

25. The granting of an interlocutory injunction is a matter of discretion and depends on the facts of the case which consists of the untested affidavit evidence presented. The applicable principles were set out by Lord Diplock in the landmark case of **American Cyanamid Co v Ethicon Limited[5].** When an application for an interlocutory injunction is made, in the exercise of the court's discretion, the initial question which falls for consideration is: (a) whether there is a serious issue to be tried. If the answer to that question is yes, then a further question arises: (b) would damages be an adequate remedy for the party injured by the Court's grant of, or failure to grant, an injunction? If there is doubt as to whether damages would not be an adequate remedy: (c) where does the balance of convenience lie?

26. In the local case of **Venture Production (Trinidad) Limited v Atlantic LNG Company of Trinidad and Tobago[6]** Archie J (as he then was) cited the principles in **American Cyanamid** at paragraph 17 of his judgment and stated as follows:

> *"The law in Trinidad and Tobago has been established by the decisions of the Court of Appeal in Jetpak Services Limited v. BWIA International Airways Ltd (1998) 55 W.I.R. 362 and East Coast Drilling v. Petrotrin (2000) 58 W.I.R. 351. The plaintiff must first establish that there is a serious issue to be tried. It used to be thought that the inquiry then proceeded sequentially through a consideration of whether the plaintiff could be adequately compensated by an award of damages; whether the defendant would be able to pay; whether, if the plaintiff ultimately fails, the defendant would be adequately compensated under the plaintiffs undertaking; whether the plaintiff would be in a*

[5] [1975] AC 396
[6] HCA 1947 of 2003,

position to pay and finally an assessment of the balance of convenience. See American Cyanamid v. Ethicon Limited [1975] A.C. 396."

[18] The new approach requires a simultaneous consideration of all relevant factors and a degree of interplay between various factors. The plaintiff is not necessarily denied relief by the consideration of any single factor in isolation. The question, which must be posed, is where does the balance of justice lie?

[19] An assessment of the balance of justice requires a comparative assessment of (i) the quantum of the risk involved in granting or refusing the injunction; and (ii) the severity of the consequences that will flow from following either course. East Coast Drilling, op. cit, page 368, per de la Bastide, C.J." (emphasis supplied).

27. In considering whether or not to grant an interlocutory injunction, the Court has to consider the purpose for which the injunction is sought(Diplock LJ in **American Cyanamid** at page 406).

28. In **Jetpak Services Ltd v BWIA**[7]**,** de la Bastide C.J. held that focusing exclusively on whether damages were adequate and quantifiable, was too narrow an approach in determining whether to grant an injunction. He held at page 368:

"It is a truism that facts are infinitely variable, and it is dangerous to prescribe or apply a single formula for determining whether an interlocutory injunction should be granted in all cases, unless it is expressed in very broad terms. I would consider the rule that an injunction ought never to be granted if damages can provide an adequate remedy to be one which is too narrow to be applicable in

[7] [1995] 55 WIR 362

every case. It is more obviously so if by 'damages' is meant the damages which are legally recoverable in the action, and if by 'adequate' is meant quantifiable."

29. According to de la Bastide C.J., the real question for the Court is "Wherein lies the greater risk of injustice in granting or in refusing the injunction?" To arrive at an answer to this question the Court is required to make an assessment of the merits of the Claimant's case and his chances of succeeding at the trial.

Reasons and analysis

30. The object of the injunction requested by the Claimant is to prevent the Second Defendant from deporting him pursuant to the Deportation Order and for him to be released on an Order of Supervision pending the determination of the criminal trial arising from the second charge and the fourth charge; the 2019 judicial review matter and the proposed constitutional motion.

Is there a serious issue to be tried?

31. It was submitted on behalf of the Claimant that there is a serious issue to be tried in the proposed constitutional motion and that the Claimant has a realistic prospect of success. Counsel argued that the Claimant's proposed constitutional motion challenges two aspects of the Deportation Order. Firstly Counsel submitted that at the time the Minister issued the Deportation Order the Claimant was not an inmate of a prison or reformatory in accordance with section 9(4) (c) of the Immigration Act.

32. Secondly, Counsel stated that at the time the Minister issued the Deportation Order he failed to take into account the Claimant's constitutional rights under sections 4(a), (b) and (g).

33. In particular, Counsel argued that the Claimant had a legitimate expectation to be place before a Special Enquiry under the Immigration Act before the Deportation Order was issued. Counsel also submitted that the Minister failed to consider the Claimant's right to freedom of movement if he is deported to Jamaica since it infringes his right as a CARICOM national's right of freedom of movement if he wants to return to Trinidad. In support Counsel for the Claimant relied on the learning in the UK Supreme Court judgment of **R (on an application of Kiarie) v Secretary of State for the Home Department; R (on the application of Byndloss) v Secretary of State for the Home Department[8].**

34. It was contended by Counsel for the Defendants that the proposed constitutional motion is frivolous and that it is an abuse of process.

35. Counsel for the Defendants submitted that the Claimant's right to the protection of the law and his right of freedom of movement have not been breached by the Minister's issuing of the Deportation Order. Counsel stated that if the Claimant is deported he can apply under section 10 (1) of the Immigration Act for the Minister to permit his entry into Trinidad for him to be present at the criminal trial. Counsel argued that the facts in the case of **Kiarie** can be distinguished from the instant.

36. Counsel also argued that in the public law matters namely the 2019 judicial review matter and the proposed constitutional motion, cross examination

[8] (2017) UKSC 42

is only permitted in exceptional circumstances and that if this is permitted the Claimant can use electronic means such as video conferencing to facilitate this.

37. Counsel for the Defendants further submitted that the proposed constitutional motion is an abuse of process since the Deportation Order was issued since 2017 and that the Claimant had several opportunities between 2017 and 2019 to challenge the validity of the Deportation Order but he failed to do so.

38. Counsel for the Defendants also further submitted that even if the Claimant is not a prohibited person under section 9(4) (c) of the Immigration Act, he is still facing charges for the offence of trafficking cocaine (ie under the first charge) so he is in the prohibited class of persons under sections 8(1)(k) and section 9(4) (e) of the Immigration Act.

39. Section 4 (a), (b) and (g) of the Constitution provides:

> "4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human right and freedoms, namely:
>
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;
>
> (b) the right of the individual to equality before the law and the protection of the law;…
>
> (g) freedom of movement;"

40. The Deportation Order issued on the 10 November 2017 stated 3 reasons for the Claimant to be detained and deported to Jamaica namely: (a) the Claimant is neither a citizen nor a resident of Trinidad and Tobago; (b) the Claimant is a person described under Section 9(4) (b), (c) and (e) of the Immigration Act; (c) the Claimant is now a member of the prohibited class of persons, being a person described in Sections 8(1)(d) and (k) of the Immigration Act.

41. Section 9(4) (b), (c) and (e) of the Immigration Act provides:

> "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-
>
> ….
>
> (b) has been convicted of an offence and sentenced to a term of imprisonment for one or more years;
>
> (c) has become an inmate of any prison or reformatory;
>
> ….
>
> (e) has, since his admission to Trinidad and Tobago become a person who would, if he were applying for admission to Trinidad and Tobago would be refused admission by reason of his being a member of a prohibited class other than the prohibited classes described in section 8(1),(a),(b),(c) and (p).
>
> The Minister may at any time declare that such person has ceased to be a permitted entrant and such person shall thereupon cease to be a permitted entrant."

42. Section 8(1)(d) and (k) of the Immigration Act states:

> "8 (1) Except as provided in subsection (2), entry into Trinidad and Tobago of the persons described in this subsection

other than citizens and, subject to section 7(2), residents, is prohibited namely-

….

(d) persons who have been convicted of or admit having committed any crime, which if committed in Trinidad and Tobago would be punishable with imprisonment of one or more years;

(k) person who are engaged or at any time have been engaged or are suspected on reasonable grounds of being likely to engage in any unlawful giving, using, inducing other persons to use, distributing, selling offering, or exposing for sale, buying, trading or trafficking in any drug."

Abuse of process

43. In **Attorney General of Trinidad and Tobago v Ravi Doodnath Jaipaul**[9] Moosai J.A. stated that "bona fide rights under the Constitution ought not to be discouraged" but "frivolous, vexatious or contrived invocations of the facility of constitutional redress are certainly to be repelled" [**Observer Publications Ltd v Matthew [2001] UKPC 11 [53]**][10].

44. Lord Diplock in **Khemraj Harikissoon v The Attorney General of Trinidad and Tobago**[11] at page 349 stated that:

"The right to apply to the High Court under section 6 of the Constitution for redress when any human right is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the

[9] Civ App No 35 of 2011

[10] Attorney General of Trinidad and Tobago v Ravi Doodnath Jaipaul Civ App. No. 35 of 2011, pages 26, paragraph 59.

[11] [1979] 31 WIR 348

normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."

45. Subsequently in **Thakur Jaroo v The Attorney General of Trinidad and Tobago**[12] at paragraph 14 the Privy Council noted:

> "[14] The Court of Appeal also rejected the appellant's argument under s 4(a). But Hosein JA, in a judgment with which de la Bastide CJ and Ibrahim JA agreed, raised the question for the first time whether the constitutional route which the appellant had chosen for his application was appropriate. The question which he posed was whether proceedings under the Constitution ought really to be invoked in matters where there is an obvious available recourse under the common law. He referred to Lord Diplock's observation in Harrikissoon v A-G (1979) 31 WIR 348 at 349 that the mere allegation of constitutional breach was insufficient to entitle the applicant to invoke the jurisdiction of the court under what is now s 14(1) of the Constitution if it was apparent that the allegation was frivolous or vexatious or an abuse of the process of the Page 25 of 31 court as being made

[12] [2002] UKPC 5

solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy. He said that in his opinion the appellant's motion was inescapably doomed to failure on the merits. But he also said that it connoted a resort to proceedings under the Constitution which lacked bona fides and was so clearly inappropriate as to constitute an abuse of process."

46. At paragraph 39 of the Court continued:

"Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of the process to resort to it…."

47. The Privy Council in **Johnatty v The Attorney General of Trinidad and Tobago**[13] found that the availability of alternative remedies was fatal to the appellant's argument that he should have been allowed to seek a constitutional remedy. Lord Hope of Craighead had this to say at paragraph 21:

"The fact that these alternative remedies were available is fatal to the appellant's argument that he ought to have been allowed to seek a constitutional remedy. In Harrikissoon v Attorney General of Trinidad and Tobago [1980] AC 265, 268 Lord Diplock warned against the misuse of the right to apply for constitutional redress when other

[13] [2008] UKPC 55

procedures were available. He said that its value would be seriously diminished if it was allowed to be used as a general substitute for the normal procedures for invoking judicial control of administrative action. This warning has been repeated many times. In Hinds v Attorney General of Barbados [2001] UKPC 56; [2002] 1 AC 854 Lord Bingham of Cornhill said that it remained pertinent. In Jaroo v Attorney General of Trinidad and Tobago [2002] UKPC 5; [2002] 1 AC 871, para 39 Lord Hope of Craighead said that before he resorts to this procedure the applicant must consider the true nature of the right that was allegedly contravened and whether, having regard to all the circumstances of the case, some other procedure might not more conveniently be invoked. In Attorney General of Trinidad and Tobago v Ramanoop [2005] UKPC 15; [2006] 1 AC 328, para 25 Lord Nicholls of Birkenhead said that where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take such a course.

48. However, in **The Attorney General v Ramanoop**[14] the Privy Council noted that instances where a parallel remedy exists *only in exceptional circumstances,* one could still seek constitutional relief. Lord Nicholls had this to say:

> "25 In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek

[14] [2006] 1 AC 328

constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.

26 That said, their Lordships hasten to add that the need for the courts to be vigilant in preventing abuse of constitutional proceedings is not intended to deter citizens from seeking constitutional redress where, acting in good faith, they believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them. Frivolous, vexatious or contrived invocations of the facility of constitutional redress are to be repelled. But "bona fide resort to rights under the Constitution ought not to be discouraged": Lord Steyn in Ahnee v Director of Public Prosecutions [1999] 2 AC 294, 307, and see Lord Cooke of Thorndon in Observer Publications Ltd v Matthew (2001) 58 WIR 188, 206.

27 Over the years admonitions against the misuse of constitutional proceedings have been repeated: Chokolingo v Attorney General of Trinidad and Tobago [1981] 1 WLR 106, 111-112, and Attorney General of Trinidad and Tobago v McLeod [1984] 1 WLR 522, 530. These warnings were reiterated more recently by Lord Bingham of Cornhill in Hinds v Attorney General of Barbados [2002] 1 AC 854, 870, para 24.

28 Despite these warnings, abuse of the court's jurisdiction to grant constitutional relief has been "unrelenting" until brought to a

"sudden and welcome halt" by the decision of the Board in Jaroo v Attorney General of Trinidad and Tobago [2002] 1 AC 871: see Hamel-Smith JA in Attorney General of Trinidad and Tobago v George 8 April 2003. The explanation for the continuing misuse of this jurisdiction seems to be that proceedings brought by way of originating motion for constitutional relief are less costly and lead to a speedier hearing than proceedings brought by way of writ.

29 From an applicant's point of view this reason for seeking constitutional relief is eminently understandable. But this reason does not in itself furnish a sufficient ground for invoking the constitutional jurisdiction. In the ordinary course it does not constitute a reason why the parallel remedy at law is to be regarded as inadequate. Proceedings brought by way of constitutional motion solely for this reason are a misuse of the section 14 jurisdiction."[15]

49. The current position as enunciated in **Ramanoop** is that where a parallel remedy exist, only in exceptional circumstances one can seek constitutional relief.

50. This is the first hurdle which the Claimant has to cross in proceeding with the proposed constitutional motion. The other hurdle is delay in now seeking constitutional relief.

51. Ventour J in **Smith v the Commissioner of Police and the Attorney General of Trinidad and Tobago**[16] at page 419h stated that: "when one is aggrieved

[15] The Attorney General v Ramanoop [2006] 1 AC 328, pages 337-338
[16] (1997) 51 WIR 409

as a result of a violation of one's fundamental rights, one should seek redress before the court with utmost expedition. In matters of this nature the court has a duty to help those who are vigilant and who do not slumber on their right. More importantly, if there is any delay in bringing the motion, the Applicant is under an obligation to explain the delay."

52. In **Smith** the Court held that the filing of the motion twenty-two months after the incident gives rise to a delay which has not been satisfactorily explained so as to justify the Court's discretionary powers being exercised in favour of the Applicant. That motion was also dismissed.

53. Later in **Durity v Attorney General of Trinidad and Tobago**[17]the Privy Council made it clear there must not only be a reason for the delay but the delay in seeking constitutional relief can work against the Claimant if the complaint was susceptible to adequate redress if it was made in a timely manner (Paragraph 35 of Lord Nicholls of Birkenhead.).

54. Kokaram J in **Matthew Kenrick James v The Attorney General of Trinidad and Tobago**[18] stated at paragraph 19:

> "Section 14 of the Constitution is quite open ended and clear words are required in the Constitution if any time limit is to be imposed on citizens who seek redress under the Constitution. However equally our Courts have repeatedly underscored the value and importance of approaching the Court for constitutional relief in a timely manner. Complaints of breach of constitutional rights are of a fundamental nature, one which calls upon the Court to exercise a jurisdiction under the Constitution our fundamental law. It is described as an exceptional remedy and one of last resort. A Claimant cannot however idly sleep

[17] [2002]UKPC 20
[18] CV2013-01916

on his constitutional rights nor be guilty of laches. In cases where there has been delay in moving the Court there must be an explanation for this delay in seeking to enforce ones right to constitutional relief."

55. Before the Claimant's proposed constitutional motion can get out of the starting blocks there are two preliminary hurdles which he would be required to cross. The issue of abuse of process as raised by the Defendants and that of the delay in seeking constitutional relief. The law on both the abuse of process and on delay are settled.

56. In determining whether there is a serious issue to be tried in the proposed constitutional motion the Court must be persuaded that the Claimant can cross these 2 preliminary hurdles.

57. It was not in dispute that the Claimant was aware of the Deportation Order on the same day it was made. At the time the Deportation Order was issued the Claimant had the 2017 judicial review matter pending and on the 1 December 2017 he instructed his attorneys at law to withdraw it. There was no order made in the 2017 judicial review matter with respect to the Deportation Order. On the 12 November 2018, about 1 year after the Deportation Order was made, the Claimant filed the 2018 habeas corpus application which he withdrew on the 5 December 2018. Again no order was made with respect to the validity of the Deportation Order. On the 6 March 2019 the Claimant filed the 2019 judicial review matter. He did not seek any relief with respect to the setting aside of the Deportation Order. The proposed constitutional motion was annexed to the instant application which was filed on the 15 August 2019.

58. In my opinion, the Defendants position that the proposed constitutional motion is an abuse of process by the Claimant is much stronger than the Claimant's argument. Based on the Claimant's own time line it is clear that the Claimant knew about the Deportation Order since 2017. He had access to legal advice since 2017. He approached the Courts on 3 occasions for various reliefs but none concerned the validity of the Deportation Order. Further, there was no explanation by the Claimant for his delay in seeking constitutional relief at least 2 years after he became aware of the Deportation Order. Even if the Claimant relied on his impecuniosity as a reason for his delay, I do not accept that this is a valid reason since he retained an attorney at law on 2 occasions before the 2019 judicial review matter to pursue relief before the Court.

59. I have not been persuaded that the Claimant can cross the preliminary hurdles of abuse of process and delay in now seeking the substantive relief in the proposed constitutional motion.

The merits of the proposed constitutional motion.

60. Paragraphs 4, 5 , 6 and 7 of the Harricoo Affidavit stated that :

> "4. With respect to the application for the writ of habeas corpus on 12th November 2018, the Applicant in that matter raised the same issue with respect to the unlawfulness of the Deportation Order. I deposed to an affidavit in that matter. At paragraph 4 of that affidavit I explained the reasons the Deportation Order was lawful and valid. Hereto attached and exhibited and marked **"G.H 2"** is a copy of the affidavit to which I deposed.
>
> 5. I am aware that the Applicant appealed his cocaine trafficking conviction and that he was successful in that appeal. I am also aware that the Court was minded to order a retrial of the matter

due to a procedural error by the Magistrate however since the Applicant had already served his time a re-trial was not ordered. Hereto attached and exhibited and marked **"G.H 3"** is a copy of the court transcript.

6. Before the Applicant's appeal was determined he was detained as an inmate with respect to the forgery charges. I am therefore informed by Counsel and verily believe that since there has been no errors of procedure shown with respect to the issuance of the Deportation Order there can be no infringement of the applicant's rights.

7. The Minister can issue a deportation order while a person is serving sentence however pursuant to Section 29(5) of the Act the Order cannot be executed until that person has completed his term of imprisonment."

61. It appeared to me from the aforesaid paragraphs that the Defendants position was that at the time the Deportation Order was issued the Claimant fell within section 9(4) (b)of the Immigration Act since he was serving a sentence for the third charge.

62. With respect to the application of section 9(4) (c) of the Immigration Act, Counsel for the Claimant submitted that at the time the Deportation Order was issued the Claimant was not an inmate or reformatory as prescribed by the section.

63. This was not addressed by Defendants in the Harricoo Affidavit nor in the Defendants oral submissions. However, Counsel for the Defendants argued that since the Claimant has been committed to stand trial for the

second charge of trafficking of cocaine the Claimant still falls within section 8(1) (k) of the Immigration Act.

64. In **Francisco Javier Polanco Valerio and anor v the Attorney General of Trinidad and Tobago**[19] one of the issues which the Court had to consider was whether the Immigration officers' application of section 9(4) of the Immigration Act was unconstitutional. In **Francisco Valerio** the Claimants has entered Trinidad and Tobago legally on the 8 January 2016 and they were permitted to remain in the jurisdiction until the 8 March 2016. On the 14 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 3 March 2017 namely, possession of a firearm and ammunition. Despite several attempts having been made, they were unable to secure bail and they were held awaiting trial. They were tried summarily and on the 27 April 2017 all charges against them were dismissed. On the charges being dismissed, the Inspector in Charge at the Siparia Magistrates Court and Process branch submitted to the Court that he had been informed by the Immigration Division that there was Order of Detention in force in relation to the Claimants and they returned to custody.

65. 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 where they spent the night. On the 28 April 2017, the Claimants' attorney, enquired when the Claimants would be permitted to leave the country. He was informed that they would

[19] CV2017-01766 delivered on 17 April 2018

be able to collect their passports and depart within an agreeable timeframe to both the Claimants and the Immigration Division.

66. The Claimants went to the Immigration Division in San Fernando on the 1 May 2017 with their attorney at law. The First Claimant was interrogated by an Immigration Officer and he was informed that he would have to be detained because his wife needed to attend. After some discussion between the Immigration Officers and the Claimants Attorney at law, the Claimants were told that they could return the following day and they would be released if their wives attended together with their identification documents and their marriage certificates.

67. On the 2 May 2017, the Claimants attended the Immigration Division shortly after 1pm. They were each instructed to pay a bond of $4,000.00 which they did. They were then placed on a further Order of Supervision by Immigration Officer which required them to return to the Immigration Division on the 3 May 2017 at 8am, which they did. On the 3 May 2017, they were each further interrogated as to the whereabouts of their wives and they were then presented them with a document entitled “Reason for Arrest and Detention.” Shortly thereafter, they were placed on a further “Order of Supervision” demanding that they return on the 10 May 2017.

68. Both Claimants indicated that their wives were reluctant to get involved with the Immigration officials and authorities in general. The Claimants also indicated that they were willing to immediately leave the country. They felt aggrieved that, through no fault of their own, they were forced to stay beyond their assigned latest departure date and were being penalized for doing so. They were fearful that they were at risk of deportation. They claim that they were being retried by the Immigration Division for offences which a criminal court had dismissed.

69. Between the 29 April 2017 and the 3 May 2017, the Claimants Attorney at law tried to ascertain from the Immigration Authorities when the Claimants would have been permitted to leave and/or when a Special Inquiry would be held in relation to them. The Claimants Attorney at law was advised by the Immigration Authorities that there was no likely time frame for the Special Inquiry which was scheduled for the 3 May 2017.

70. It was argued by Counsel for the Claimants that the Immigration Division's application of section 9(4)(c) of the Immigration Act to the Claimants was unconstitutional since at the time the Claimants were placed on the supervision order they were not convicted of any criminal offences in Trinidad and Tobago and the Immigration Authorities interpreted and applied section 9(4) (c) in a manner which offended the principle of the presumption of innocence.

71. Counsel for the Defendant submitted that there could not have been a mistake to make the declaration under section 9 (4) because the Claimants admitted that they were in Trinidad and Tobago beyond the time that they were permitted and one of the orders they asked for was an order mandamus that they be allowed to leave.

72. I concluded that a literal interpretation of section 9(4) (c) includes a person who has been convicted of an offence for a period of less than 1 year; a person who is on remand awaiting trial; or a person who may be detained at an institution such as the Youth Training Centre (YTC) or the St Ann's Psychiatric Hospital. Therefore, section 9(4) (c) permitted the Minister to make the declaration under this provision even where the person is awaiting trial and he is presumed to be innocent. As pre-existing law, this provision is also validated by the section 6 of the Republic of Trinidad and

Tobago Constitution Act. However, there was no evidence of a declaration from the Minister which stated that the Claimants had ceased to be permitted entrants when they were arrested. Therefore, in the absence of the declaration from the Minister that the Claimants were no longer permitted entrants, the Immigration Authorities acted unconstitutionally in its application of section 9(4) (c) when they arrested the Claimants.

73. In the instant case, the Minister declared that the Claimant was no longer a permitted entrant on the 10 November 2017. At this time the Claimant had not been committed to stand trial for the second and fourth charges. However he had been convicted and he was serving his sentence for the third charge for which he was successful on appeal on the 22 March 2018. Therefore at the time the Deportation Order was issued by the Minister the Claimant was an inmate of a prison or reformatory even if he had a pending appeal.

74. However, even if my application of the facts is incorrect, the Claimant still falls within section 8(1) (k) of the Immigration Act since his committal for trial of the second charge means that there was reasonable grounds for suspecting that he was engaged in the trafficking of a drug.

75. I turn now to the Claimant's contention that the Deportation Order is in breach of section 4(a),and (b) of the Constitution namely his right to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law; and the right of the individual to equality before the law and the protection of the law.

76. There was no evidence at this stage of the proceedings how the Claimant's right to enjoyment of property and not to be deprived thereof except by

due process of the law has been infringed. At best is paragraphs 8 and 10 of the Smart Affidavit which states:

> "8. Prior to the Applicant's arrest and detention on 13th August 2019, the Applicant had been released on a supervision order upon payment of a security deposit in the sum of Ten Thousand Dollars ($10,000) which I paid. A true copy of the receipt for payment of the security deposit in the sum of Ten Thousand Dollars ($10,000) is now shown to me and hereto annexed and marked **"S.S.1"….**
>
> 10. I had borrowed all that I could afford at the time the Application for Leave for Judicial Review was filed, to pay the bail bond in the sum on Twenty Five Thousand Dollars ($25,000.00) and the landing deposit requested by the first intended Respondent in the sum of Ten Thousand Dollars ($10,000.00). The intended Respondent in the sum of Ten Thousand Dollars ($10,000.00)."

77. The Defendants addressed this at paragraph 17 of the Harricoo Affidavit which states:

> "17. I have read the grounds on which the Applicant relies for his request for interim relief. With respect to that part which says that the Applicant's deportation would adversely affect property rights of his bailor in the pending criminal matter I would like to say that the Immigration Division can inform the bailor of the Applicant's deportation. I am informed by Counsel and verily believe that the bailor in those circumstances can make an application to the Court and request a withdrawal of his or her commitment."

78. In my opinion there was no evidence that the Claimant has been deprived of his property without due process since a third party , Ms Small provided

the cash security as his bail bond and in any event there is relief available to her for the security to be released to her if the Claimant is deported

79. Counsel for the Claimant had argued that the Claimant had a legitimate expectation that he would be heard in Special Enquiry before the Minister issued the Deportation Order. Counsel also admitted that this was not included in the draft Constitutional motion.

80. If I understood the Claimant's position correctly, his argument is that his right to be deprived of his liberty by the Deportation Order was in breach of his right to be afforded due process and protection of the law as set out by the provisions in the Immigration Act which govern the Special Enquiry.

81. In **Francisco Javier Polanco Valerio and Anor** the main issue I considered was whether section 9(4) of the Immigration Act was unconstitutional.

82. I concluded that the section 9(4) of the Immigration Act contravenes section 4 of the Constitution which states that a person is not to be deprive of his liberty without due process. However, since it was existing law at the time of the proclamation of the Constitution of the Republic of Trinidad and Tobago Act, it was validated as a pre-existing law.

83. The rationale for this finding was set out at paragraphs 22, 23 and24 of the judgment which stated:

> "22 Where a person has remained in Trinidad and Tobago and he has not obtained an extension from the Immigration Division, under section 14, the Minister who is responsible for Immigration may issue a warrant for the arrest of that person in respect of whom an examination or inquiry is to be held or a deportation order has been made.

23 However, if the person was declared by the Minister under section 9(4) as losing his permitted entrant status the person can be arrested pursuant to section 15 of the Immigration Act. In **Naidike and ors v The Attorney General of Trinidad and Tobago [2004] UKPC 49** the Privy Council ("the Board") provided clarity on the interpretation of sections 9(4) and 15. The Board held that the intended scope of section 15 is uncertain and that any uncertainty must be resolved in favour of the liberty of the individual. The Board concluded that the power to arrest under section 15 was only bestowed *after* a person has been declared by the Minister to no longer be a permitted entrant.

24 After the declaration by the Minister under section 9(4) of the Immigration Act the Minister is empowered under subsection 5 to make a deportation order against the person who has no right of appeal and who shall be deported as soon as possible. The conjoint effect of sections 9 (4), 9(5) and 15 of the Immigration Act, effectively, is that a person who has been declared by the Minister as no longer being a permitted entrant and who the Minister makes a deportation order under subsection 5, is deprived of due process since there is no avenue to appeal such deportation order which contravenes section 4 of the Constitution. However, the Immigration Act was passed on the 1st July 1976, one month before the proclamation of the Constitution of the Republic of Trinidad Tobago Act on the 1st August 1976 and section 6 of the latter validates section 9(4) as a pre-existing law."

84. Therefore, the Claimant's position that his right under section 4(a) and (b) of the Constitution was breached since he was deprived a hearing before the Special Enquiry and before the Deportation Order is without merit.

85. I turn now to the merits of the Claimant's submissions that the Deportation Order breaches the Claimant's right under section 4(g) of the Constitution since it impacts on his ability to return to Trinidad for his criminal trial, the 2019 judicial review matter and the proposed constitutional motion.

86. Paragraph 8, 9 and 11 of the Harricoo Affidavit addressed this concern by stating:

> "8. Should the Applicant be deported prior to the hearing of his criminal trial the Applicant can apply to the Minister of National Security to lift his deportation order thereby granting him permission to return to Trinidad and Tobago to stand trial. Pursuant to section 10(1) of the Act, the Minister may issue a written permit authorising any person to enter Trinidad and Tobago or, being in Trinidad and Tobago, to remain therein. The applicant therefore has the option of making an application under section 10(1) to re-enter in Trinidad and Tobago pending the hearing of his trial. Therefore, any deportation of the applicant before the determination of his criminal charges would not interfere with his right to a fair trial.
>
> 9. I am aware that the Applicant has a pending civil action for judicial review for which leave is still to be decided. I am informed by counsel and verily believe that the Applicant in that matter failed to challenge the validity of the Deportation Order and the Respondent has made preliminary objections to

the Applicant's challenge to the detention orders issued pursuant to the Deportation Order as an abuse of the Court's process since these were issues which could have be previously raised by the Applicant in the two previous proceedings on 24th October, 2017 and 12th November, 2018. I am further informed by Counsel and verily believe that the applicant in the third proceedings on 6th March 2019 also failed to challenge the Deportation Order. The Court in the judicial review matter has not rendered its decision in the Defendant's preliminary application. Hereto attached and exhibited and marked **"G.H 4"** is a copy of the **CV 2019-00959 O'Neil Williams vs the Chief Immigration Officer, The Commissioner of Prisons and The Attorney General of Trinidad and Tobago**.

……

11. With respect to the continuation of the Applicant's civil action for judicial review I am informed by counsel and verily believe in the event leave is granted the Court has a discretion to permit the affidavit filed pursuant to the leave to stand as the affidavit evidence in the substantive matter. I am further informed by Counsel and verily believe that there have been circumstances where the Court has continued proceedings where persons have been deported. I have been informed by counsel and verily believe that in the case of **CV 2019 -00949 Kennedy Nna Leckwachi vs The Attorney General** the claimant was deported. I am further informed and verily believe that in the *Kennedy Nna* matter the applicant filed an injunction to stop his deportation pending the determination of his matter. The Court however allowed the deportation since it was of the view that any evidence could be presented to the Court via

video link. I am further informed by counsel and verily believe that this matter is ongoing as such no judgment has been provided. Again, in the case of **CV 2016-04426 Isiona Leveth Eze v Chief Immigration Officer and The Attorney General of Trinidad and Tobago** the Court also permitted deportation of the claimant during the proceedings.

87. In **Kiarie** the issue which the Court had to determine was whether a certificate issued under the UK Nationality, Immigration and Asylum Act 2002 s.94B requiring a person who was bringing a human rights challenge to his deportation to pursue his appeal from abroad, would give rise to a breach of that person's rights under ECHR art.8 as an out-of-country appeal would not be effective.

88. The appellants had appealed against a decision that certificates issued by the respondent Secretary of State under the Nationality, Immigration and Asylum Act 2002 s.94B were lawful. The first appellant had Kenyan nationality. He was 23 and had lived in the UK with his parents and siblings since the age of three. In 2004, he was granted indefinite leave to remain. In 2014, following his conviction for serious drug offences, he was served with notice of deportation. The second appellant was a Jamaican national. He was 36 and had lived in the UK since the age of 21. In 2006, he was granted indefinite leave to remain. He had a wife and four children who lived in the UK. He also had other children by different women who lived in the UK. In 2014, following his conviction for a serious drug offence, he was served with notice of deportation.

89. In deciding to make deportation orders against the appellants, the Secretary of State rejected their claims that deportation would breach

their right to respect for their private and family lives under ECHR art.8. The appellants had a right of appeal to the First-tier Tribunal against the rejection of their claims and they proposed to exercise it. However, when making the deportation orders, the Secretary of State issued certificates under s.94B, the effect of which was that they could bring their appeals only after they had returned to Kenya and Jamaica. A certificate under s.94B was of a human rights claim which was not clearly unfounded, in other words one which was arguable.

90. The UK Supreme Court allowed the appeals on the basis that the certificates represented a potential interference with the appellants' rights under art.8. Deportation pursuant to them would interfere with their right to respect for their private or family lives established in the UK and, in particular, with the aspect of their rights which required that any challenge to a threatened breach of their rights should be effective.

91. The UK court found that the burden fell on the Secretary of State to establish that the interference was justified and, in particular, that it was proportionate. Among other things, she had to show that deportation in advance of an appeal struck a fair balance between the rights of appellants and the interests of the community. The Secretary of State had failed to do that. There were several obstacles in the way of pursuing an effective appeal from abroad. The first related to legal representation. It was far from clear that legal aid would be available. The appellant might well have to represent himself. Even if he secured legal representation, he and his lawyer would face formidable difficulties in giving and receiving instructions both before and during the hearing. Second, he would be prevented from giving oral evidence about matters such as rehabilitation and the quality of his relationships with others living in the UK, in particular

any child, partner or other family member. In many cases, an arguable appeal against deportation was unlikely to be effective unless there was a facility for the appellant to give live evidence to the tribunal. An appellant might be able to give evidence on screen, but there were a number of financial and logistical barriers to his doing so. Third, the appellant would probably face insurmountable difficulties in obtaining supporting professional evidence, for example evidence from the relevant probation officer as to the risk of reoffending, evidence from a consultant forensic psychiatrist about the level of risk and evidence from an independent social worker about the quality and importance of the appellant's relationships with family members.

92. In my opinion, the facts in the instant case are distinguishable from that in **Kiarie** for the following reasons.

93. First, the option available to Claimant under section 10 of the Immigration Act negates his argument on the restriction of movement with respect to the criminal trial.

94. Second, it was submitted by Counsel for the Claimant that if the Claimant is deported he would be in breach of section 30 of the Indictable Offences (Preliminary Enquiry) Act[20]. It is not in dispute that upon being committed to stand trial for the second and fourth charges, the Claimant was granted bail in the sum of $300,000.00 to be approved by the Clerk of the Peace or in the alternative, a cash bond in the sum of $25,000.00 and that the cash security was paid on 31 January 2019.

95. Section 30 of the Indictable Offences (Preliminary Enquiry) Act provides:

[20] Chapter 12:01

"30 (1) If an accused person who is committed for trial is granted bail, the recognisance of bail shall be taken in writing either from the accused person and one or more sureties or from the accused person alone, in the discretion of the Magistrate, according to the Bail Act, and shall be signed by the accused person and his surety or sureties, if any.

(2) The condition of such recognisance shall be that the accused person shall personally appear before the Court at any time from the date of the recognisance, to answer to any indictment that may be filed against him in the Court, and that he will not depart the Court without leave of the Court, and that he will accept service of any such indictment at some place to be named in such condition.

(3) The recognisance may be in the form set out in Form 2 in the Second Schedule."

96. The purpose of bail is to ensure that a person who has been charged with an offence attends Court to face the charges. In my opinion if the Claimant is deported he would not run afoul of the condition of his bail since he would not have voluntarily left the jurisdiction. In any event based on paragraph 10 of the Harricoo Affidavit, the servants and or agents of the Second Defendant can inform the office of the DPP who would have initiation the prosecution of the Claimant for the said charge of the reason the Claimant is not in the jurisdiction.

97. Third, the reliefs sought in the 2019 judicial review matter are as follows: Against the Chief Immigration Officer ("the CIO") (a) a declaration that the Order of Deportation dated the 1 December 2018 is unlawful; (b) to quash the decision of the CIO to detain the Claimant on the 1 February 2019 until

the 7 February 2019; (c) a declaration that the decision by the CIO to detain the Claimant on the 1 February 2019 to 7 February 2019 was unlawful, ultra vires and unreasonable; (d) to quash the decision of the CIP to require payment of a security deposit to secure the Claimant's release; and (e) a declaration that the imposition of a security deposit by the CIO was unlawful.

98. Against the Commissioner of Prisons the Claimant sought a declaration that the decision by the said Commissioner to detain the Claimant from the 31 January 2019 to 1 February 2019 was unlawful. The Claimant also seeks costs against the CIO, the Commissioner of Prisons and the Attorney General of Trinidad and Tobago.

99. There is no relief sought in the 2019 judicial review matter with respect to the Deportation Order and as such that matter has no relevance on the interim relief sought in the instant application.

100. Fourth, if the Claimant is able to obtain permission to pursue the relief sought in the 2019 judicial review matter he would not be prejudiced if he is not physically present since Rule 25.1(k) Civil Proceedings Rules gives the Court the discretion to allow litigants to make appropriate use of technology such as videoconferencing and skype to be present during the hearing of the civil matters. It must be noted that in **Kiarie** the Claimants were being deported from the UK to Kenya and Jamaica respectively, a much longer distance that in the instant case where the Claimant is being deported from Trinidad and Tobago to Jamaica. In any event cross examination in public law matters is only permitted in exceptional circumstances and if such is permitted videoconferencing or skype can be utilized.

101. Further, if the Claimant requires to file any further affidavits in the 2019 judicial review matter of the proposed constitutional motion with the present state of technology the said affidavits can be scanned and emailed to the Claimant who can have it notarized and transmitted by registered post to his Attorney at law.

102. I accept that the Defendants have not advanced any evidence to demonstrate that the Claimant would be able to access and afford the costs of videoconferencing or skype facilities. In my opinion, even in the absence of that evidence the Court can still deport the Claimant and order that the Defendants bear the costs of those facilities, if necessary, at the appropriate time in the hearing of the 2019 judicial review matter if the Claimant wishes to avail himself of those facilities. In my opinion at the appropriate time such arrangements can be made by the attorneys at law of the Claimants and Defendants in the 2019 judicial review matter with the co-operation of the Claimant.

103. With respect to the hearing of the proposed constitutional motion upon which the application for interim relief is premised, similar arrangements can also be made for the filing of affidavits and the videoconferencing or skype facilities as for the 2019 judicial review matter.

104. I have therefore concluded that there is no serious issue to be tried in the proposed constitutional motion since the Claimant has failed to provide satisfactory evidence that it is not an abuse of propose and there are good reasons for the delay in seeking such reliefs.

105. I have also concluded that there was no evidence that the Claimant would be deprived of his freedom of movement without due process in breach of

section 4(g) of the Constitution. The Claimant has also at this stage failed to persuade me that if he is deported there would be a breach of section 4(a) and (b) of the Constitution and that he would not receive a fair trial in the criminal matter, the 2019 judicial review matter and the proposed constitutional motion. Further the Claimant was not deprived his liberty without due process by the failure by the Minister to invoke the Special Enquiry process before the Deportation Order was issued. Section 9(4) (c) of the Immigration Act permitted the Minister to make the declaration under this provision even where the person is awaiting trial and he is presumed to be innocent. Section 9(4) of the Immigration Act contravenes section 4 of the Constitution which states that a person is not to be deprive of his liberty without due process. However, since it was existing law at the time of the proclamation of the Constitution of the Republic of Trinidad and Tobago Constitution Act it was validated as a pre-existing law.

Where does the greater risk of injustice lie?

106. In my opinion, the greater risk of injustice lie with granting the interim relief sought for the following reasons.

107. First, as set out aforesaid, there is no prejudice to be suffered by the Claimant in the continued hearing of the criminal matter, the 2019 judicial review matter and the proposed constitutional motion if the Claimant is deported.

108. Second, it is not in the public's interest to grant the interim reliefs. The Defendants relied on paragraphs 10 and 15 of Harricoo Affidavit to demonstrate the impact of the application for interim relief in the instant matter on other pending matters.

109. Paragraphs 10 and 15 stated:

"10. I directed that a meeting be held with the Director of Public Prosecutions (D.P.P) on 5th February 2019 with respect to the deportation of persons who have pending matters before the criminal courts. I am informed by Legal Officer Mr. Abdul Mohammed that the Acting D.P.P. attended that meeting and agreed to present her views on the issue and revert to the Immigration Division. I am also aware of the decision of the High Court in the case of **Cv 2019-00888 Troy Thomas vs The Chief Immigration Officer** where The Honourable Mr. Justice V. Kokaram provided guidance to the Immigration Division on the detention of illegal immigrants who are the subject of unexecuted orders of deportation but who are awaiting the conclusion of pending criminal proceedings. In that matter the Court determined that any considerations of pending criminal trials cannot form the basis for a detention to effect a deportation. The decision to pursue the execution of the Deportation Order at this time was made with due consideration paid to the judgment of the Honourable Justice Kokaram in the matter of **Troy Thomas.** Hereto attached and exhibited and marked **"G.H 5"** is the decision in the High Court matter **CV 2019-00888 Troy Thomas vs The Chief Immigration Officer**.

….

15. Any decision of the Court in the Applicant's favour would undoubtedly have a direct effect on the ability of the Immigration Division to not only deport the Applicant but also other persons who have pending criminal matters and who are presently detained for repatriation pursuant to a valid Deportation Order. In the circumstances I am informed by

counsel and verily believe that damages would not be an adequate remedy if the Court decides to grant the injunction."

110. In the text **Judicial Remedies in Public Law** [21] at paragraph 8-032 under the heading " Balance of convenience: the wider public interest" the authors stated that:

> "More significantly the public interest frequently cannot be measured in terms of financial consequences. The public body will have taken the decision or adopted the measure in the exercise of powers which it is meant to use for the public good. The courts must take into account that wider public interest in deciding whether to grant interim relief. The courts will be placed in the difficult position of trying to place a value on the public interest and balancing that against the financial or other consequences suffered by the individual."

111. Similar sentiments were echoed by the authors of **De Smith's Judicial Review**[22] at paragraph 18-015 where it is stated:

> "Other factors that may be taken into account in determining the balance of convenience include the importance of upholding the law of the land and the duty placed on certain authorities to enforce the law in the public interest"

112. More recently, the Court of Appeal in this jurisdiction reiterated the importance of considering the public's interest in determining if to grant interim relief in public law matters in **Tobago Regional Health Authority and anor v Dr Victor Wheeler and ors**[23]**.** At paragraph 13 the Court stated:

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[21] 5th ed

[22] 8th ed

[23] Civ Appeal T 134 of 2016 . Decision delivered on the 31 July 2018

> "(v) In cases in which a party is a public authority performing duties to the public, the balance of convenience must be looked at more widely and must take into account the interest of the public in general to whom these duties are owed.

113. The public interest in the context of this case means the Second Defendant's ability to comply and enforce the law in the public's interest. I accept that the Defendants have provided no details of the number of persons who the Second Defendant is considering deporting where there are valid Deportation Orders and who may have similar circumstances as the Claimant. In my opinion, the lack of details does not negate the fact that the ruling in the instant matter would impact on the Second Defendant's ability to comply and enforce the law in the public's interest. The Second Defendant also has to take into account the impact of the Claimant remaining in Trinidad and Tobago on public safety and the public purse.

114. The Claimant placed no evidence before the Court to demonstrate that if he is not deported under a valid Deportation Order that this would not impact on the Second Defendant's duties under the Immigration Act. He has also not placed any evidence that if he is not deported he will not continue to be a burden on the public purse.

115. In my opinion if the Claimant is not deported it would adversely impact the Second Defendant's efforts to take steps to deport persons against whom there are valid Deportation Orders and there is a high probability that such persons who are detained at the IDC would continue to be a burden on the public purse.

116. Third, damages is an adequate remedy to the Claimant. It was submitted on behalf of the Claimant that if he is deported the loss he will suffer cannot be compensated by damages. The Claimant also relied on paragraph 13 of the Smart Affidavit which stated:

> "13. I verily believe that the Applicant has a real prospect of success in his Constitutional Motion that here is greater prejudice to the Applicant if the Deportation Order is executed and he is deported tomorrow at 8:00 a.m. I verily believe that the balance of justice favours the Applicant and that damages would not be an adequate remedy."

117. The Defendants disagreed. They relied on paragraphs 13 and 16 of the Harricoo Affidavit which stated that:

> "13. In the instant matter the Applicant was detained for the execution of the Deportation Order since funds were allocated by the Ministry of National Security for same. Once detained, an Immigration Officer of the Enforcement Unit contacted a travel agency to book a flight for the repatriation of the applicant who was carded to be escorted by two officers as a precautionary measure. Due to overbooking during the vacation season no flights to repatriate the applicant were available for Wednesday the 14th August 2019. The travel agency further indicated that the next availability for escorted repatriation would be after the **3rd September 2019**. Only on the evening of the 14th August 2019 did the travel agency used by the Division return word of an available booking for the morning of the 15th August 2019. The intended departure time for said flight was at 7:50 am on board Caribbean Airlines flight no. BW 0458. This availability however was only for a single seat and not for the three (3) seats required for the applicant

to be escorted. This information was put to the Chief Immigration Officer who granted her consent for the applicant to be repatriated un-escorted on the morning of the 15th August 2019 to avoid any lengthy period of delay and detention. The ticket for said flight was booked at the cost of **$3,640.00 TTD**.

….

16. I am further informed by counsel and verily believe that should the Applicant be deported and he is subsequently successful in his claim damages can be adequately quantified by the Court for the vindication of any rights which are deemed to have been infringed."

118. Damages is not a major factor to be considered in granting interim relief in public law matters. However even if it was, apart from the broad and general statement in the Smart Affidavit, there was no other evidence to indicate how damages would not be an adequate relief if the Claimant is successful in his pursuit of the breach of his constitutional rights under sections 4(a), (b) and (g). Indeed in addition to the declarations which the Claimant seeks for the breach of his constitutional rights, the Claimant also seeks damages for the said breach. In my opinion if damages was not an appropriate remedy for the alleged breach of the Claimant's rights under section 4(a), 9(b) and (g) of the Constitution then he would not be seeking to pursue damages as a relief. Therefore, the position adopted by the Claimant is that any damages which he is awarded if he is successful would be adequate compensation for the alleged breach.

119. Last, the merits of the proposed constitutional claim is relatively weak when compared to the Defendants position. I have already examined this in great detail under the serious issue to be tried.

Order

120. The Claimant's application for interim relief filed on the 15 August 2019 is refused.

121. I will hear the parties on costs.

122. The Claimant is directed to file the constitutional motion in the substantive matter within 14 days from the date of this order.

Margaret Y Mohammed

Judge