

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No.: CV2019 – 00923

IN THE MATTER OF THE JUDICIAL REVIEW ACT, CHAPTER 7:08

AND

IN THE MATTER OF THE IMMIGRATION ACT CHAPTER 18:01

BETWEEN

LAWRENCE KWASI ZOGLI

Claimant

AND

THE CHIEF IMMIGRATION OFFICER

Defendant

Before the Honourable Madame Justice Margaret Y Mohammed

Date of Delivery 18 May 2020

Appearances

Mr. Jagdeo Singh, Mr Dinesh Rambally, Mr Kiel Taklalsingh instructed by Mr Stefan Ramkissoon Attorneys-at-law for the Claimant.

Ms Maria Belmar-Williams instructed by Mr Sean Julien and Ms Hillary Muddeen Attorneys at-law for the Defendant.

JUDGMENT

INTRODUCTION

1. One of the functions of the Defendant is to determine if a person should be permitted to enter Trinidad and Tobago when he/she arrives at a valid port of entry. In the exercise of this function, the Defendant is guided by the provisions of the Immigration Act¹. The

¹ Chapter 18:01

Defendant, as a public body also has a duty to discharge her functions by acting fairly, proportionately and in accordance with the principles of natural justice in treating with the person who seek to enter Trinidad and Tobago. More importantly, the Defendant has a duty to always be prepared to present reasons for any decision, which has been made in the exercise of this public function, in particular where the decision is to refuse permission and to issue a Rejection Order. In the instant action, the Court is called upon to examine the actions of the Defendant, which was taken on the 26 February 2019 where a Rejection Order was issued against the Claimant.

2. The Claimant is a Ghanaian national who has resided in the Bahamas for the last 23 years practising as a pharmacist. In 2017, he began a romantic relationship with Ms Jeanene James (“Ms James”) a national of Trinidad and Tobago whose permanent address in Trinidad and Tobago is #1, 7th Street, West Casselton, Trincity, Trinidad. Both the Claimant and Ms James have travelled to many countries without any immigration problems at respective ports of entries since the initiation of their relationship.
3. On the 26 February 2019, the Claimant arrived at the Piarco International Airport (“the airport”) where he was questioned and denied entry having been served with a Rejection Order (“the Rejection Order”). He was permitted to telephone Ms James where he informed her what had happened. He waited approximately 6 hours at the airport until immigration officials informed him that they were unable to make the necessary arrangements for his departure. They informed him that he would be detained at the “Airport Suite Hotel” (“the Hotel”) until said arrangement could be made. While at the Hotel, he remained under surveillance and/or under detention by immigration officials. He was subsequently informed that arrangements were made and he would be departing on the morning of 1 March 2019.
4. On the 28 February 2019 (“the Court Order”) the Claimant applied to the Court and received certain interim orders inter alia: (i) permission to make an application for leave

to apply for judicial review on or before 7 March 2019; (ii) directing the Defendant to allow him to remain in Trinidad and Tobago until the determination of the instant action or until further ordered; (iii) directing the Defendant to place him on an Order of Supervision and to report to the Defendant on such days and at such times as she shall reasonably determine (iv) and that the Claimant shall reside while under the Order of Supervision at the Hyatt Regency Trinidad, 1 Wrightson Road, Port of Spain.

5. Having obtained the interim relief, in the instant action, the Claimant seeks the following substantive orders:

- (i) A declaration that the decision of the Defendant to issue the Rejection Order to have him permanently depart Trinidad and Tobago is unlawful and/or illegal, and/or irrational, and/or procedurally improper null and void and of no effect.
- (ii) A declaration that the appellate process of the Defendant is unlawful in that it is unfair and/or constitutes an unfair appellate procedure and/or is procedurally improper.
- (iii) A declaration that the failure and/or refusal by the Defendant to specifically inform the Claimant of his right to Appeal against the Rejection Order pursuant to section 21 (1) (2) Immigration Act is unlawful and/or unfair.
- (iv) A declaration that the decision of the Defendant to deport and/or cause the permanent departure of the Claimant from Trinidad and Tobago was done in bad faith and is manifestly unfair.
- (v) A declaration that the decision of the Defendant to deport the Claimant to Bahamas on 1 March 2019 without reasons for the rejection and/or proper examination is unlawful and/or irrational and/or procedurally improper and/or unfair, null and void and of no effect.
- (vi) A declaration that the detention and/or continuing detention by the Defendant her servants and/or agents is unlawful and/or unreasonable and/or ultra vires and further constitutes an abuse of power.

- (vii) A declaration that the decision of the Defendant to issue the Rejection Order was based on an error of fact and/or an erroneous basis and/or an irrelevant consideration in that the Defendant based its decision on the assumption that the Claimant had a conviction for a criminal offence when in fact same was quashed on Appeal;
- (viii) An order of certiorari to remove into this Honourable Court and quash the Rejection Order which has caused the Claimant to be deported and/or permanently removed from Trinidad and Tobago.
- (ix) An order of certiorari to remove into this Honourable Court and quash the decision of the Defendant to order the departure and/or permanent removal of the Claimant.

BACKGROUND FACTS

6. The Claimant's position was set out in his affidavit filed on the 6 May 2019 ("the Claimant's affidavit"). According to the Claimant in 2017, he began a romantic relationship with Ms Ms James whom he met in the Bahamas. They have travelled to many different countries without any problems with immigration. On the 26 February 2019, he visited Trinidad for the purpose of meeting Ms James' parents for the first time, which he made clear to the Defendant and/or her agents and/or servants.
7. Upon his arrival at the airport on 26 February 2019 from the Bahamas, the immigration officer informed him that his name showed up on their border control system as being 'flagged' and requested him to accompany her to a room within the airport. At the said "interrogation room" the immigration officer informed him that a name search revealed that he was charged for attempted human trafficking in the Republic of Cuba. The Claimant confirmed to the said immigration officer that he was charged, convicted and sentenced to 13 years as a result of that offence in 2005 but that decision was subsequently appealed and the conviction was quashed in or around 2009.

8. The Claimant also explained to the said immigration officer that he was wrongfully accused of this offence and that he had appealed so that his good name could have been cleared. He further explained that he attained a degree in pharmacy in 1995 from the University of Camaguey in Cuba and that he could not allow a wrongful conviction to stand against his name and tarnish his reputation.
9. According to the Claimant, he further explained to the said immigration officer that after his release in 2009, he moved to Nassau, Bahamas and resumed his practice as a pharmacist and he had founded a firm in 1997, KZ Pharmaceuticals situate in Nassau, Bahamas. He even attempted to show to the said immigration officer, the company's website (kzpharmaceuticals.com) which depicted his profile as a recognised pharmacist and/or partner in the said pharmaceutical business. Despite this information being produced, the said immigration officer indicated that she was not interested in that information.
10. The Claimant deposed that the said immigration officer then informed him that having consulted with her seniors, she was issuing the Rejection Order for his immediate deportation. He stated that he was not informed that the said immigration officer was considering issuing the Rejection Order neither was he given an opportunity to comment upon the findings of the said immigration officer.
11. The Claimant stated that he pleaded with the said immigration officer for permission to telephone Ms James to either inform her of what was going on and/or to retrieve documents to support his case. He tried handing the said immigration officer his relevant documentations explaining the circumstances around his conviction in 2005 however she refused to check them and she said, "the decision is already made, you need to leave. You blacklisted which means you not coming back Trinidad again." The said immigration officer also stated, "I do not care. I don't want to hear you. You will leave immediately."

12. According to the Claimant, the said immigration officer issued the Rejection Order with his name, which at the time was undated and unsigned. The said officer informed him that he would only be able to contact Ms James if he signed the Rejection Order. He signed the Rejection Order because the actions of the said immigration officer caused him to believe that he did not have a choice. He stated that prior to signing the Rejection Order, he was not given the opportunity to consider it, it was not explained to him and he was not allowed to seek legal advice on it. The Claimant deposed that after signing the Rejection Order he was allowed to telephone Ms James.
13. The Claimant stated that he waited approximately 6 hours at the airport until immigration officials informed him that they were unable to make the necessary arrangements for his departure. They also informed him that he would be detained at the Hotel until arrangements could be made. He stated that while he remained at the Hotel he was under surveillance and/or under detention by immigration officials. He was subsequently informed that arrangements were made and he would be departing on the morning of 1 March 2019 but he was not informed of any details of the flight.
14. The Claimant also stated that he was not informed of his right to appeal the Rejection Order in accordance with the provisions of section 21(2) of the Immigration Act² (“the Immigration Act”).
15. The Defendant’s position was set out in affidavits of Latchmin Ramnarine-Mohammed Immigration Officer I (Ag.) (“the Mohammed Affidavit”); Lilowtee Maharaj-Hosein Immigration Officer II (“the Hosein Affidavit”); and Derek Craigwell Deputy Chief Immigration Officer (Ag.) (“the Craigwell Affidavit”).
16. The Mohammed Affidavit stated that on 26 February 2019, the Claimant arrived at the airport on Caribbean Airlines flight BW415 from Nassau, Bahamas at 19:40 hrs. Prior to

² Chapter 18:01

the Claimant's arrival, information was received from the Joint Regional Communications Centre (the JRCC) which is a body set up by CARICOM to, inter alia, monitor advanced passenger information (API) and to forward any information on persons of interest to the receiving country. The information received indicated that the Claimant was convicted of human trafficking in 2005 and that he also attempted to traffic 30 Chinese nationals into Cuba for which he was charged and served a sentence of 5 years imprisonment.

17. The Mohammed Affidavit deposed that upon his arrival, the Claimant came to the immigration booth in which Ms Mohammed was situated and she carried out an extensive interview with him. The Claimant declared that he was in Trinidad on vacation for 7 days, which would be spent with his girlfriend, an American citizen Ms James who he said was born in Trinidad and Tobago and that they intended to stay at the Hyatt Regency Hotel. He had a return ticket for 3 March 2019 on BW414 at 730hrs. He also had in his possession the sum of USD\$2000.00. The Claimant informed her that Ms James was due to arrive that night from the United States of America. He also indicated that he had been communicating with Ms James via social media. She was unable to recall the Claimant informing her that he was in Trinidad to visit Ms James' parents.

18. According to the Mohammed Affidavit, while the Claimant was at the immigration booth, he was asked whether he had ever been in prison to which he responded, "Yes, a very long time ago." She then asked him what he did to end up in prison, to which he responded that he was visiting his daughter for the first time and his then girlfriend in Cuba sometime in 2005, having been a frequent visitor to Cuba on account of his girlfriend. On his passport, the Claimant had several stamped entries into Cuba, 2 February 2017, 27 August 2017, and 7 October 2017. The Claimant stated he was talking to a group of Chinese nationals about tourist matters, such as where to find stuff in Cuba. The Claimant informed her that the Cuban authorities were monitoring him at that time and when he left the Chinese nationals for his girlfriend's home in Cuba, he was stopped and arrested. The Claimant indicated he did not have any knowledge of the reason for his

arrest, that he was kept in isolation and that he could not speak to anyone, including his girlfriend.

19. The Mohammed Affidavit deposed that the Claimant further indicated that he was charged and convicted by the Cuban authorities without an opportunity to present his case. He stated that he served 5 years in prison in Cuba and at some point during his imprisonment, he discovered that he had been incarcerated for human trafficking. The Claimant also indicated that he did not have the opportunity to appeal and as a consequence, he had to serve the 5-year sentence. He said he did not think that the information regarding his imprisonment would surface since he already served his sentence.
20. According to the Mohammed Affidavit, the Claimant specifically informed her that he never appealed his decision in Cuba and he never stated that he could not “allow a wrongful conviction to stand against his name and tarnish his reputation.” The deponent of the Mohammed Affidavit denied that she took the Claimant to any room to be interviewed or interrogated. She deposed that after she finished interviewing the Claimant, she asked him to sit at the back of the hall so that she could confer with her seniors in relation to the findings from her interview with him. The deponent also denied that she told the Claimant that she was not interested in the information that he has a Pharmaceutical Company in Nassau.
21. The Mohammed Affidavit also stated that immigration officer Mohammed referred the Claimant’s matter to the Immigration Officer II on duty, Ms Lilowtee Maharaj-Hosein whom she spoke with by telephone. According to the Mohammed Affidavit, Mrs Hosein advised her that the Claimant should be refused entry due to his conviction. Mrs Hosein told her that she had already spoken to the Claimant and she informed him that he is being refused entry because of his conviction. Mrs Hosein then instructed Ms Mohammed, to do the necessary paperwork.

22. After receiving the advice from Mrs Hosein, Ms Mohammed called and informed the Claimant that he has been refused entry and that he has a right to appeal the decision. She also informed the Claimant that his entry has been refused due to his conviction for human trafficking and the Claimant stated that he thought it was unfair. She then gave the Claimant the Rejection Order to be signed and he complied. She informed the Claimant of his right to appeal the Rejection Order and that the appeal process is clearly recorded on the face of the Rejection Order, which the Claimant signed. She explained to the Claimant the nature of the Rejection Order and that it did not prohibit him from seeking legal advice. She did not tell the Claimant that she was “issuing a rejection order for his immediate deportation.”
23. The Mohammed Affidavit also stated that the Claimant never requested permission to call Ms James and she did not tell him that he would only be granted permission to contact Ms James if he signed the Rejection Order issued to him. She denied that the Claimant presented or attempted to present any documents demonstrating the circumstances around his conviction or appeal to her. She denied that she told the Claimant that “the decision is already made, you need to leave” and that “I do not care. I don’t want to hear you. You will leave immediately.”
24. According to the Mohammed Affidavit, Ms Mohammed told the Claimant to have a seat at the back of the arrival area and she then went to the Caribbean Airlines counter and served them with two Notices of Deportation (“the Notices of Deportation”). The Notices of Deportation were signed and Caribbean Airlines retained the original and a signed copy was returned to her. According to the Mohammed Affidavit, she was unaware of the length of time that the Claimant waited in the airport since she passed him over to the airline officials to arrange his departure. However, she indicated that she was aware that Caribbean Airlines only had flights to Nassau 3 times per week: Tuesdays, Fridays and Sundays by direct flights and as the Claimant arrived on a Tuesday, the next available flight would have been on Friday 1 March 2019.

25. The Hosein Affidavit stated that on 26 February 2019, she saw the JRCC hit which indicated that the Claimant was charged for the offence of human trafficking. Immigration officer Ms Mohammed indicated to her that she was dealing with a person of interest and she was shown where the person of interest was standing. She then walked to the Claimant who was standing near the booth, beyond the red line and she told him that she was an Immigration Officer II. She asked the Claimant to come with her to a quieter area in the arrival hall, which was not an interrogation room. She asked him standard questions such as the purpose of his visit in Trinidad; how long he intended to stay; his occupation and his return information.

26. According to the Hosein Affidavit, the Claimant was calm and cooperative. He told her he was visiting his girlfriend; he was a pharmacist in Bahamas and he had a lot of businesses. He did not show her the pharmacy's website, nor did he show her any business card to that effect. She informed him that based on the information that they had received, he was named as a person of interest for his involvement in a human trafficking incident. He responded that it was something that happened to him in Cuba. He also said that it had been following him since it happened. He told her he was incarcerated for 5 years and that he was in the wrong place at the wrong time and that he was released with the assistance of the Nigerian Government. He did not tell her that he appealed his conviction and that the conviction was quashed. She was unable to indicate if he stated that he could not allow a wrongful conviction to stand against his name and tarnish his reputation.

27. Ms Hosein then asked the Claimant to have a seat and she told him she was going to her supervisor with the information. She then hold her supervisor Ms Cheryl Ann-Joseph ("Ms Joseph") the information she received from the interview she conducted with the Claimant. Based on this information, Ms Joseph made the decision to issue the Rejection Order. She told the Claimant that based on the immigration laws in Trinidad and Tobago, he was not being allowed entry on that day as he was convicted of human trafficking and admitted to it. She did not indicate to him that he could never return. She then walked

him back to immigration officer Mohammed and told him that she was leaving him in the care of the latter who will prepare paper work and place him in the care of the airline, which was the end of her interaction with the Claimant.

28. The Craigwell Affidavit deposed that he is responsible for the immigration matters at the airport. On 1 March 2019, he received a call at his home at approximately 3:00am from Mr Raymond Roberts, the Assistant Registrar and Deputy Marshal of the Supreme Court of Trinidad and Tobago wherein he was informed that he was attempting to contact the Defendant with respect to the Court Order. Mr Roberts then informed him that the Court Order allowed the Claimant to remain in Trinidad and Tobago under an Order of Supervision pending the determination of his application for judicial review.
29. Mr Roberts then asked him for his email address and the telephone call ended. Shortly thereafter, he received an email from Mr Roberts, which contained an attached copy of the Court Order. After reading the Court Order, he instructed the Senior Immigration Officer at the airport, Mr Jason Rampaul to place the Claimant on an Order of Supervision and to report to the Immigration Head Office at 8:00am that morning by which time the Defendant would have been served with the Court Order. He then called Mr Roberts to inform him of his action with respect to the placement for the Claimant on an Order of Supervision.
30. On 1 March 2019, on or around 8:00am, the Claimant along with an attorney at law arrived at his office and there they waited for the arrival of the Defendant, who arrived within or around an hour and she was served with the Court Order. The Defendant then instructed the Claimant and his attorney to report to the Immigration Division, Piarco International Airport so that a Special Inquiry could be commenced and the Claimant would be placed on another Order of Supervision. The Claimant and his attorney at law then left to report to the Senior Immigration Officer at the airport as they were instructed

to do. After the Claimant was placed on the Order of Supervision on 1 March 2019, he was free to leave the immigration arrival hall.

THE ISSUES

31. The main substantive relief, which the Claimant seeks, is to quash the Rejection Order. In order to obtain this main substantive relief he must succeed in one or all of the following issues:
 - (a) Did the Defendant act fairly and in accordance with the principles of natural justice before the decision was made to issue the Rejection Order?
 - (b) Did the Defendant act disproportionately by issuing the Rejection Order?
 - (c) Did the Defendant breach the principle of transparency and accountability by failing to publish or promulgate a policy to be used in the exercise of her discretion under section 21 (1) of the Immigration Act?

32. There were two other issues which arose from the other reliefs sought by the Claimant namely:
 - (a) Whether the effect of the Rejection Order was to permanently remove the Claimant in Trinidad and Tobago?
 - (b) Is the Claimant entitled to the declaration on the appellate process?

FAIRNESS OF THE DECISION TO ISSUE THE REJECTION ORDER.

33. The Claimant contended that the immigration officer who made the decision to issue the Rejection Order, namely Ms Joseph did not act fairly since she failed to give him an opportunity to be heard before she made the decision to issue the Rejection Order. The Claimant also contended that the system used by the Defendant where other immigration officers made the representations on behalf of the Claimant to the decision maker, Ms

Joseph does not satisfy the tenets of procedural fairness as set out by Lord Mustill in **R v Secretary of State for the Home Department ex p. Doody**³.

34. Counsel for the Claimant also argued that the failure by the Defendant to place before this Court any evidence and/ or reasons by the decision maker Ms Joseph, is a breach of the Defendant's duty of candour, co-operation and forthrightness and an adverse inference should be made against the lawfulness of the Defendant's decision to issue the Rejection Order.
35. It was submitted on behalf of the Defendant that, Ms Joseph acted fairly as the Claimant was permitted to provide explanations concerning his conviction for human trafficking in Cuba to the immigration officers Mohammed and Hosein before the decision was made to issue the Rejection Order.
36. The Defendant also argued that she did not breach her duty of candour with the Court in the instant matter by failing to file any evidence of the decision-maker Ms Joseph as the evidence of the matters which Ms Joseph considered before she made the decision to issue the Rejection Order was set out in the Mohammed Affidavit and the Hosein Affidavit.
37. It was common ground that section 20 of the Judicial Review Act⁴ ("the JRA") imposes a duty on a public body, in the instant case, the Defendant, to act fairly and in accordance with the principles of natural justice in the exercise of her function. Section 20 of the JRA states:

"An inferior Court, tribunal, public body, public authority or a person acting in the exercise of a public duty or function in accordance with any law shall exercise that

³ [1994] 1 AC 531

⁴ Chapter 7:08

duty or perform that function in accordance with the principles of natural justice or in a fair manner”

38. Both parties relied on the requirements of procedural fairness summarized by Lord Mustill in **R v Secretary of State for the Home Department, ex p. Doody**⁵ where he stated:

“From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.”

39. The role of the Court was explained by Lord Reed in the UK Supreme Court decision of **R (Osborn) v Parole Board**⁶ at paragraph 65 which stated:

⁵ Supra at page 560

⁶ [2013] UKSC 61

“The court must determine for itself whether a fair procedure was followed (Gillies v Secretary of State for Work and Pensions [2006] UKHL 2; 2006 SC (HL) 71; [2006] 1 WLR 781, para 6 per Lord Hope of Craighead). Its function is not merely to review the reasonableness of the decision-maker’s judgment of what fairness required”
(Emphasis added)

40. In **Osborn** Lord Reed noted at paragraphs 68 to 71 that fairness serves the twin purposes of ensuring that decisions are of a better quality, promote the Rule of Law and ensure that persons affected by decisions do not feel a sense of injustice.
41. What fairness requires in a particular case is a question of law on which the court is the final arbiter. The relevant test is whether the procedure complied with the requirements of fairness, as they apply in the particular circumstances of the case. If the procedure did not comply with the requirements of fairness, the decision will not be saved by the fact that the decision-maker may have had rational reasons for adopting the procedure.⁷ As the duty to act fairly imposes obligations on decision –makers, when courts consider the requirements of fairness in a particular case they are primarily concerned with the actions or omissions of the decision-maker and they are not usually concerned with the unfairness arising out of the actions or omissions of others⁸.
42. I have concluded that there are three main reasons the Defendant has failed to act fairly before the decision was made to issue the Rejection Order.
43. First, there was no evidence from the decision maker, Ms Joseph, before the Court on the matters, which she took into account before she made the decision to issue the Rejection Order. This failure by the Defendant to provide evidence of the decision maker was addressed by the author in the text of **Judicial Remedies in Public Law**⁹ where he stated:

⁷ Paragraph 5.29 Judicial Review Principles and Procedures by Auburn, Moffett and Sharland.

⁸ Paragraph 5.31 Judicial Review Principles and Procedures by Auburn, Moffett and Sharland

⁹ 5th ed, Lewis at paragraph 9-07

“The courts generally recognize that there is an obligation on a public authority to make candid disclosure to the court of its decision-making process, laying before it the relevant facts and the reasoning for the decision challenged. The Court of Appeal has indicated that judicial review is unlike civil litigation and once permission has been granted the defendant should provide sufficient information to enable the court to determine whether the actions complained of were lawful. Sir John Donaldson M.R expressed the view that the defendant was under “a duty to make full and fair disclosure” once permission was granted. Purchas LJ expressed his view more circumspectly, stating that the defendant “... should set out fully what they did and why so far as is necessary fully and fairly to meet the challenge” made by the claimant.” (Emphasis added).

44. The Defendant’s duty of candour in judicial review proceedings was set out in great detail by Lord Donaldson MR in **R v Lancashire County Council ex p Huddleston**¹⁰ where he stated:

“Notwithstanding that the courts have for centuries exercised a limited supervisory jurisdiction by means of the prerogative writs, the wider remedy of judicial review and the evolution of what is, in effect, a specialist administrative or public law court is a post-war development. This development has created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration. With very few exceptions, all public authorities conscientiously seek to discharge their duties strictly in accordance with public law and in general they succeed. But it must be recognised that complete success by all authorities at all times is a quite unattainable goal.

¹⁰ [1986] 2 All ER 941 at page 945

Errors will occur despite the best of endeavours. The courts, for their part, must and do respect the fact that it is not for them to intervene in the administrative field, unless there is a reason to inquire whether a particular authority has been successful in its endeavours. The courts must and do recognise that, where errors have, or are alleged to have, occurred, it by no means follows that the authority is to be criticised. In proceedings for judicial review, the applicant no doubt has an axe to grind. This should not be true of the authority. The analogy is not exact, but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain fully what they have done and why they have done it, but are not partisan in their own defence, so should be the public authorities. It is not discreditable to get it wrong. What is discreditable is a reluctance to explain fully what has occurred and why".(Emphasis added)

45. While there are factual matters in dispute between the parties of the nature of the conversation between the Claimant and immigration officers Mohammed and Hosein, their collective evidence was that the person who made the decision was Ms Joseph. However, there was no evidence presented by the Defendant from Ms Joseph to fully explain her reasons for making the decision to issue the Rejection Order. There was also no explanation provided by the Defendant to the Court for the failure to file any evidence on behalf of the decision maker Ms Joseph.
46. In my opinion the Defendant's submission that she did not fail in her duty of candour with the Court as she provided the evidence of immigration officers Mohammed and Hosein who indicated the matters which was within the consideration by Ms Joseph before she made the decision to issue the Rejection Order is absolutely without merit. The evidence of immigration officers Mohammed and Hosein, at best, is their subjective position on the information they provided to Ms Joseph. However, in the absence of any evidence from Ms Joseph, the Court will be speculating that these matters were considered by Ms Joseph *before* she took the decision to issue the Rejection Order.

47. In my opinion, the failure by the Defendant to submit any evidence from Ms Joseph without any explanation to the Court is a sufficient basis for me to make the adverse inference that the decision maker, Ms Joseph acted unfairly in arriving at her decision to issue the Rejection Order.

48. Second, there was no evidence from the Defendant that the decision maker, Ms Joseph afforded the Claimant the opportunity to be heard before she made the decision to issue the Rejection Order. Paragraph 6.04 of the text **Judicial Review Principles and Procedures** by Auburn, Moffett and Sharland described one of the core requirements of fairness as:

“At the core of the duty to act fairly, and the minimum requirement of fairness, is the need to ensure that a person affected by a decision has an effective opportunity to make representations before it is taken, so that he or she has the chance to influence it. This is sometimes described as the ‘right to be heard’. However, fairness does not always require an oral hearing. For that reason the right is more appropriately characterised as a right ‘to make representations’.

49. At paragraph 6.67 the learned authors continued:

If, however, an individual’s representations are duly submitted to the decision-maker, but the decision-maker fails to have regard to them, whether deliberately or through inadvertence, that is almost certain to amount to a breach of the requirements of fairness, and to a breach of the decision-maker’s duty to take into account relevant considerations.”

50. The Defendant’s evidence as set out in the Mohammed Affidavit and the Hosein Affidavit is that immigration officers Mohammed and Hosein interviewed and or spoke with the Claimant and then they relayed the information to Ms Joseph who then made the decision to issue the Rejection Order. It was therefore not in dispute that the Claimant did not speak to Ms Joseph at any time prior to the decision of Ms Joseph to issue the Rejection

Order. The procedure which was adopted was that the two Immigration officers were the persons who made the representations on behalf of the Claimant. Based on the undisputed evidence, that the Claimant did not have any audience with Ms Joseph prior to the decision to issue the Rejection Order, in my opinion this is cogent evidence that the test of fairness as set out by Lord Mustill in **ex p Doody** was not complied with as the Claimant was not given an opportunity to be heard by Ms Joseph before she made the decision to issue the Rejection Order.

51. Third, there was no evidence that the Claimant was informed of the gist of the case against him *before* Ms Joseph made the decision to issue the Rejection Order. The Defendant's evidence from the Mohammed Affidavit and the Hosein Affidavit was that Ms Joseph had no interaction with the Claimant. Immigration officer Mohammed has disputed the Claimant's allegation that she told him that the decision was made already, he had to leave and he was not coming back to Trinidad. Immigration officer Mohammed's evidence was that after she conducted the interview with the Claimant she referred the matter to immigration officer Hosein from whom she received certain advice. According to immigration officer Mohammed, she informed the Claimant that he was refused entry due to his conviction for human trafficking and that he had a right to appeal that decision. While the Claimant has disputed this version of immigration officer Mohammed's evidence, based on her evidence, the nature of the questioning she conducted with the Claimant was an interview. Even if immigration officer Mohammed's account is accurate, this still does not assist the Defendant's case as immigration officer Mohammed did not inform the Claimant the gist of the allegations against him which the decision maker was considering *before* the decision was made to issue the Rejection Order.
52. Further, the evidence of immigration officer Hosein also failed to assist the Defendant's case that the procedure used by the Defendant was fair. Immigration officer Hosein's evidence was that she too conducted an interview with the Claimant where she pointed

out that he was named as a person of interest based on his involvement in a human trafficking incident. According to immigration officer Hosein, after the Claimant provided his response she asked him to have a seat and told him that she was going to her supervisor with the information. Immigration officer Hosein stated at paragraph 9 of the Hosein Affidavit that:

“I then asked him to have a seat. At this point in time he would not have known that he was being rejected as I had to speak with my supervisor in relation to the information I had received. I told him I was going to my supervisor with the information.”

53. Based on immigration officer Hosein’s evidence she too did not provide the Claimant with a gist of the case against him before she went to her supervisor, Ms Joseph.

PROPORTIONALITY OF ISSUING THE REJECTION ORDER

54. The Claimant contended that the decision by Ms Joseph to issue the Rejection Order was disproportionate as its effect meant that the Claimant would be, and has been, subjected to detention and deportation thereby infringing his constitutional right to liberty. Counsel for the Claimant also argued that the decision maker ought to have adopted a more proportionate approach in treating with the Claimant as his rights to freedom of movement and liberty had been engaged by the Defendant’s (Ms Joseph’s) discretion and/or decision. In particular, the Claimant contended that there were other options which were open to the Defendant and the failure to either appreciate, consider or weigh these alternative approaches breached the principles of proportionality thereby resulting in oppressive, harmful and disproportional prejudice to the Claimant and the decision-maker’s failure to consider the other options available to her meant that she acted unreasonably and/or irrationally. In this regard, the Claimant relied on the principles of proportionality as set out in the local High Court judgment of **Sanctuary Workers’ Union**

et al v Minister of Labour and Small Enterprise Development¹¹ and Dale Makoosingh v His Worship Mr Aden Stroud¹².

55. The Defendant's position was that the decision maker did not act disproportionately by issuing the Rejection Order as section 21 of the Immigration Act empowers an immigration officer to use his discretion to determine whether a person who seeks to enter the jurisdiction is fit for admission in accordance with the Immigration Act and its Regulations, and if a person is not fit for admission, a Rejection Order may be issued. Counsel for the Defendant also submitted that the Claimant was a person who fell within a class of persons under section 8 of the Immigration Act who are prohibited from entering Trinidad and Tobago. Therefore an immigration officer may, in exercising his discretionary power under section 21(1)(a) of the Immigration Act, issue a Rejection Order against a person defined in the prohibited classes, as it would be contrary to the Immigration Act to grant such a person admission into Trinidad and Tobago. Counsel further argued that the reliance by the Claimant on the learning in **Sanctuary Workers** is superfluous as it failed to take into account the factual matrix, which the immigration officers had to deal with at the time in the instant matter.
56. In **Sanctuary Workers** the Court summarised the principles on proportionality at paragraphs 54 and 55 as :

“54. Where a decision, effected by a public authority, impacts upon a fundamental right, the decision maker must consider all the relevant criteria and adopt a proportional approach. Before such a decision is made, the decision maker should address the following questions:

- 1) Whether the objective of the measure is sufficiently important to justify the limitation of a protected right?

¹¹ CV 2019-01113

¹² CV 2018-00681

- 2) Does the factual matrix present several appropriate or applicable options?
- 3) Which option would occasion the least harm, prejudice or detriment, having regard to the ultimate objective of the decision to be made?
- 4) Will the contemplated decision impose disproportionate disadvantages upon the individual to whom the intended decision relates?

55. The decision maker should ultimately adopt a cautious and considered approach and should comprehensively and completely weigh all the relevant factors as well as the possible consequences which the decision may occasion, before the decision is made. The decision must be fair and must relate to a clearly defined objective. The objective should be characterised by a degree of importance which justifies its implementation notwithstanding the impact which will be occasioned to entrenched rights. When the Court is tasked with the mandate to review any decision which materially impacts upon a fundamental right, it should be guided by a merit based approach, as it must be robust in its defense of entrenched rights. Whenever such exceptional circumstances arise, the Court cannot stay within the traditional strictures imposed by the principle of “due deference’ and confine itself to considerations of Wednesbury reasonableness.”

57. In **Dale Makoonsingh** the Claimant was a police officer who failed to attend Court. He challenged the decision of a Magistrate to issue a warrant of arrest on the basis that this action was disproportionate and unreasonable particularly as there was a less draconian measure open to the Magistrate which was the issuing of a summons to attend Court. In quashing the warrant of arrest, the Court placed emphasis that the less intrusive measure of the summons ought to have been properly considered. At paragraph 82 of the judgment the Court stated:

“82. The recognition of the importance of the fundamental right of liberty and the right not to be deprived thereof through due process of law, similarly requires that the courts adopt a proportional approach when making a decision as to whether an individual ought to be deprived of his liberty. This approach must be viewed and

adopted in the context of all of the circumstances of the given case. In this case, there were two options available to the Magistrate, firstly he could have issued a summons for the claimant and secondly, he could have done as he did and issued a warrant. However, the judicial exercise of the discretion as to which option to elect must be founded upon the principles of proportionality. The judicial officer ought to consider whether the use of force to bring the witness before the court is to be preferred over the less rights intrusive option of deprivation of liberty. There must be a measured consideration of the all of the factors and the judicial officer must be in a position to justify his choice. It may well be that in certain circumstances it is proportionate to issue the warrant as opposed to issue a summons but those circumstances may well be in the exception." (Emphasis added)

58. At paragraph 84 of the judgment the Court concluded that:

84. While therefore, the Magistrate's decision has not met the test of unreasonableness in the Wednesbury sense in that the decision is so unreasonable that no reasonable authority could ever have come to it, the decision is irrational in that the Magistrate has failed to consider and satisfy himself of a material and highly relevant consideration and has therefore given too much weight to the matters he has considered in a manner that is disproportionate. The declaration sought by the claimant will therefore be made and the court finds it unnecessary to treat with the submissions on use of power for an improper purpose."

59. It was common ground that section 21 (1) of the Immigration Act gives an immigration officer the discretion to make the Rejection Order. It states:

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

(a) make an order for the rejection of such person; or

(b) cause such person to be detained pending the submission of a report to a Special Inquiry Officer.”

60. Section 8 (1) (d) of the Immigration Act provides that persons who have been convicted of or admit to having committed any crime, if committed in Trinidad and Tobago would be punishable with imprisonment for one or more years, fall into a class of person who are prohibited entry into the jurisdiction.

61. The evidence from immigration officer Mohammed and immigration officer Hosein was that the Claimant admitted that he served 5 years in prison in Cuba for the offence of human trafficking. There is some dispute between the parties about if the Claimant indicated that he had appealed his sentence.

62. The evidence of immigration officer Mohammed was that the Defendant knew that the immediate effect of the Rejection Order was that the Claimant would have been detained for a period of 3 days as she stated at paragraph 18 of the Mohammed Affidavit:

“I cannot speak to the length of time that the Claimant waited in the airport since I passed him over to the airline officials to arrange his departure. I can speak to the fact that Caribbean Airlines only goes to Nassau three (3) times per week: Tuesdays, Fridays and Sundays by direct flights. Due to the fact that the Claimant arrived on a Tuesday, the next available flight would have been on Friday 1st March 2019.”

63. In my opinion, the dispute of fact between the parties, if the Claimant had indicated that he had appealed his sentence in Cuba, is irrelevant as there was no evidence presented to this Court that Ms Joseph contemplated the other option open to her under section 21 (1) (b) of the Immigration Act. Indeed, if there was evidence presented to this Court of the matters which Ms Joseph considered *before* she made the decision then there may

be some merit in the Defendant's submission that she acted proportionately in issuing the Rejection Order as at the material time she considered him to be a person within the prohibited class of persons under section 8 (1) (d) of the Immigration Act.

64. The only conclusion which the Court can draw by this failure to present any evidence of the decision maker Ms Joseph is adverse in that she failed to consider the option under section 21 (1) (b) and by failing to do so she acted irrationally.

TRANSPARENCY AND ACCOUNTABILITY OF DISCRETION UNDER SECTION 21 (1) IMMIGRATION ACT

65. It was submitted on behalf of the Claimant that the Defendant breached the principles of transparency and accountability by failing to promulgate a policy or criterion to be used with respect to how she proposes to exercise her discretion under section 21 (1) of the Immigration Act to reject persons who may fall within the prohibited class of persons under section 8. Counsel also argued that section 21 (1) of the Immigration Act bestows a discretion on an immigration officer to either issue a rejection order or to detain a person pending a special enquiry. Counsel argued that where a statute gives an immigration officer such discretion pursuant to the principles of accountability and transparency there is a duty on the Defendant to publish and /or promulgate a policy with respect to how the power to admit persons into Trinidad and Tobago can be accessed despite an entrant having a conviction. As such, the failure by the Defendant to publish or promulgate any policy on how she proposes to exercise her discretion, particularly when it concerns the exercise of detention and rejection power must mean that the Defendant's exercise of power in the instant case was unlawful. Counsel relied on the learning of Lord Dyson in the UK Supreme Court decision in **R (Lumba) v Secretary of State for the Home Department**¹³.

¹³ [2011]UKSC 12

66. The Defendant's position was that the issuance of the Rejection Order against the Claimant aligns with the objective of the Immigration Act by controlling the admission of a person of a prohibited class into Trinidad and Tobago with the legitimate aim of enforcing the immigration laws to promote national security.
67. Section 8 of the Immigration Act sets out the different classes of persons whom are expressly prohibited from being permitted entry into Trinidad and Tobago. Under section 8 (1) (d) one of the expressly prohibited is any person who has been convicted of an offence and he has admitted to a crime which carries a sentence of one or more years' imprisonment in Trinidad and Tobago.
68. In **R (Lumba)**, the UK Supreme Court considered a situation where the Home Office had applied an unpublished policy, which involved a presumption against releasing certain categories of individuals from immigration detention contrary to a published policy, which stated that the opposite presumption would be applied. The Court of Appeal had held that there was no general rule of law that a policy must be published or, if it is not, that the policy can be categorised as unlawful for that reason alone and held that the only legal difficulty that arose from the non-publication of the applicable policy was the fact that the Secretary of State acted inconsistently with her published policy.
69. The Supreme Court held that the Court of Appeal was wrong. The Supreme Court held that the rule of law calls for a transparent statement by the executive of the circumstances in which it will exercise statutory discretions, particulars where they are broad discretions affecting important rights of individuals. Lord Dyson who gave the leading judgment expressly endorsed the statement in **R (Salih) v Secretary of State for the Home Department**¹⁴ that for a public body to withhold information about its policy as to how a statutory power will be exercised is, in general, inconsistent with the constitutional imperative that the law be open and accessible. This is particularly so where the policy in

¹⁴ [2003] EWHC 2273 Admin

effect defines the scope of an entitlement, where the subject matter of the relevant decision is important to the individual. The Supreme Court also held that the fact an individual has a right to have his or her case considered pursuant to a lawful policy gives rise to a correlative right to know what that policy is so that he can make meaningful representations in relation to it or challenge a decision taken pursuant to it.

70. Lord Dyson in commenting upon the policies of the Immigration Department to detain, stated as follows:

“The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. Just as arrest and surveillance powers need to be transparently identified through codes of practice and immigration powers need to be transparently identified through the immigration rules, so too the immigration detention powers need to be transparently identified through formulated policy statements.”¹⁵
(Emphasis added)

71. Lord Phillips stated at paragraph 302 that not only was the Minister required to have a policy but that the policy be published.

“I agree with Lord Dyson that, under principles of public law, it was necessary for the Secretary of State to have policies in relation to the exercise of her powers of detention of immigrants and that those policies had to be published. This necessity springs from the standards of administration that public law requires and by the requirement of article 5 that detention should be lawful and not arbitrary. Decisions as to the detention of immigrants had to be taken by a very large number of officials, in relation to tens of thousands of immigrants. Unless there were uniformly applied practices, decisions would be inconsistent

¹⁵ [2011]UKSC 12 at page 23

and arbitrary. Established principles of public law, also require that the Secretary of State's policies should be published. Immigrants needed to be able to ascertain her policies in order to know whether or not the decisions that affected them were open to challenge." (Emphasis added)

72. While I accept that the facts in **R (Lumba)** can be distinguished from that in the instant, I am of the opinion that there are general principles of law expounded in **R (Lumba)** which are applicable to the instant case. It seems to me that the general rule post **R (Lumba)** is where there are broad discretions affecting important rights of individuals bestowed by statute on a public body the rule of law calls for a transparent statement on the circumstances in which the public body will exercise the statutory discretion.
73. In the instant case, it was not in dispute that section 21(1) of the Immigration Act bestows a discretion on an immigration officer to either issue a rejection notice or detain a person pending a special enquiry. On the face of the section, both options have the effect of depriving the person of his liberty. Option (a) appears to be more intrusive as its effect is immediate removal from the jurisdiction as opposed to the less intrusive option (b) where the person is given a second bite of the cherry at the special enquiry.
74. Where there is such a choice it is not sufficient as the Defendant contended that the actions of the immigration officer under section 21 (1) are in accordance with the objectives of the Immigration Act and the preservation of national security. In my opinion, the rule of law calls for a "transparent statement" by the Defendant of the circumstances in which an immigration officer will exercise his discretion under section 21 (1) (a) or 21(1) (b). In the instant case, there was no evidence that such transparent statement by the Defendant exists. In those circumstances, the Defendant has run afoul of her duty to promulgate such criterion to be used when the discretion under section 21 (1) is to be exercised.

THE EFFECT OF THE REJECTION ORDER – TO PERMANENTLY REMOVE FROM TRINIDAD AND TOBAGO

75. Counsel for the Defendant submitted that the Claimant is incorrect in seeking declarations that the decision to issue the Rejection Order was made 'to cause the permanent departure of the Claimant from Trinidad and Tobago'. Counsel for the Defendant argued that the Claimant may lawfully request entry into the jurisdiction under section 29(8) of the Immigration Act, and as such, it would be better to express the Claimant's removal from the jurisdiction as indefinite rather than permanent.
76. Section 29(8) states that the Minister (in the instant case National Security) can grant a person who was removed pursuant to a Rejection Order, permission to enter the jurisdiction. The Claimant sought reliefs that the decision to issue the Rejection Order was to permanently remove him from Trinidad and Tobago. The effect of the Rejection Order is that the person who is the subject of it, is removed from Trinidad and Tobago. However, there is nothing in section 21 of the Immigration Act, which speaks about the person's removal being permanent. In the absence of any expressed provision, there is merit in the submission by the Defendant on this issue.

DECLARATIONS ON THE APPELLATE PROCESS

77. In the Claimant's Fixed Date Claim, he sought declarations that (a) the appellate process of the Defendant is unlawful in that it is unfair and/or procedurally improper and (b) that the failure and/or refusal by the Defendant to specifically inform the Claimant of his right to Appeal against the Rejection Order pursuant to section 21 (1) (2) of the Immigration Act is unlawful and/or unfair.
78. The declaration sought under (a) was not addressed by the Claimant in the written submissions. I formed the view that the Claimant was not pursuing this relief and for this reasons I have not addressed it.

79. With respect to the declaration sought under (b), from the evidence, there was dispute of fact whether the Immigration Officers informed the Claimant of his right to appeal the Rejection Order which was issued against him.
80. The sequence of events, which the Claimant deposed to in the Claimant's affidavit, was that upon his arrival he was asked specific questions by immigration officers which he provided detailed answers and explanations. The Claimant stated that after he provided his answers, the immigration officer informed him that having consulted with her seniors she was issuing the Rejection Order for immediate deportation. He pleaded with the immigration officer to telephone Ms James, his girlfriend. He was presented with an undated and unsigned copy of the Rejection Order and told that he would only be allowed to contact Ms James if he signed it, which he hesitantly signed. He was then permitted to telephone Ms James where he informed her what had transpired. He was kept at the airport for approximately 6 hours and then transferred to the Airport Suite Hotel where he was kept under surveillance by the immigration officials. He was then told that arrangements would be made for him to be deported in the early morning on the 1 March 2019.
81. The Claimant deposed at paragraph 14 of the Claimant's Affidavit that :
- "At no material time was I specifically advised of my right to appeal the said Rejection Order in accordance with the provisions of section 21 (2) of the Immigration Act."
82. According to the Defendant's evidence, immigration officer Mohammed informed the Claimant that he was refused entry after she received this advice from immigration officer Hosein. The Mohammed Affidavit stated at paragraphs 13 and 14 that after she received certain advice from immigration officer Hosein, she informed the Claimant that he had been refused entry and she indicated to him that he had a right to appeal that decision.

She also stated that after she gave the Claimant the Rejection Order to sign and he complied she informed him of his right to appeal the Rejection Order, she explained to him the nature of the Rejection Order and she did not prohibit him from seeking advice.

83. The Hosein Affidavit deposed that after immigration officer Hosein was informed by her supervisor Ms Joseph that that the decision was made to issue the Rejection Order she informed him that he was not being permitted entry.

84. Cross examination in judicial review matters is rare as disputed questions of fact do not normally arise in judicial review cases, but they can of course arise and they may be crucial¹⁶. Questions of fact are usually for the Defendant body and sometimes it is more appropriate where there are disputes of fact to transfer the factual disputes out of the realm of the judicial review action. However, Carnwath LJ in **Trim v North Dorset District Council**¹⁷ suggested the appropriate approach as :

“The need to resolve disputes does not often arise, because of the nature of most judicial review proceedings. But, when it does, it does not create any particular conceptual or procedural problems. The permission stage gives the court full control of the proceedings. It may give any necessary directions for the attendance of witnesses and cross examination.”

85. In the instant case, both parties were aware after the Defendant’s affidavits were filed that one of the factual disputes was whether the Claimant was informed about his right to appeal the decision to issue the Rejection Order since both parties account are diametrically opposite. However neither party sought permission from the Court to cross examine any of the deponents on this material issue. In the absence of cross examination the approach by the Court on whether to make findings of fact on the affidavit evidence

¹⁶ Nolan LJ in R v Secretary of State for the Department of Environment, ex p London Borough of Islington (1991)[1997] JR 121, 128

¹⁷ [2011]1WLR 1901 at paragraph 24

has been varied (See paragraph 17.3.7 **Judicial Review Handbook Michael Fordham 6th** edition).

86. It was submitted on behalf of the Defendant that the Court is to determine the weight of the evidence as there was no cross examination of the parties in this matter and as a result of the failure by the Claimant to file a reply to the Affidavits filed by the Defendant, the Defendant's evidence is uncontested.
87. Even in the absence of any affidavit in reply by the Claimant, I do not agree with the Defendant's submission that her evidence on this issue is uncontested. In my opinion due to the serious nature of the allegation made by the Claimant, in the absence of the evidence being tested in cross examination, I am unable to make a determination since on the evidence each party's version is equally plausible. For these reasons, I do not grant the reliefs sought in this regard.

ORDER

88. It is declared that the decision of the Defendant to issue the Rejection Order on the 26 February 2019 to have the Claimant removed indefinitely from Trinidad and Tobago was unlawful, illegal, irrational, procedurally improper, null and void and of no effect.
89. It is declared that the decision of the Defendant to deport and/or cause the indefinite departure of the Claimant from Trinidad and Tobago was manifestly unfair.
90. It is declared that the decision of the Defendant to deport the Claimant to Bahamas on 1 March 2019 without reasons for the rejection and/or proper examination was unlawful, irrational, procedurally improper, unfair, null and void and of no effect.
91. The decision by the Defendant to issue the Rejection Order on the 26 February 2019 is quashed as it was procedurally improper, null and void and of no effect.

92. It is declared that the detention of the Claimant by the Defendant, her servants and/or agents for the period 26 February 2019 to 1 March 2019 was unlawful.
93. The Defendant to pay the Claimant's costs to be assessed by the Registrar in default of agreement.

Margaret Y Mohammed

Judge