**[2015] JMCA Civ 50**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 83/2013**

**BEFORE: THE HON MR JUSTICE PANTON P**
**THE HON MISS JUSTICE PHILLIPS JA**
**THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)**

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| **BETWEEN** | **SHURENDY ADELSON QUANT** | **APPELLANT** |
| **AND** | **THE MINISTER OF NATIONAL SECURITY** | **1ST RESPONDENT** |
| **AND** | **THE ATTORNEY GENERAL OF JAMAICA** | **2ND RESPONDENT** |

**Written submissions filed by Carolyn Reid and Company for the appellant**

**Written submissions filed by Hylton Powell for the 1st respondent**

**9 October 2015**

**PROCEDURAL APPEAL**

**(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)**

**PANTON P**

[1] I have read the reasons for judgment that have been written by my learned colleague Sinclair-Haynes J (Ag) in this matter. I agree with her reasoning and conclusion and wish only to add that if the Honourable Minister has been correctly quoted, I am very surprised that he does not know that a Resident Magistrate may properly sit and dispose of matters on days other than those that have been gazetted. That is why, for example, a visitor from a cruise ship who is robbed of

valuables on a Saturday may give evidence on that very day before a magistrate while the ship is still in port, if the culprit has been caught. In any event, someone who has been given leave to proceed against the state with a matter of this nature relating to his liberty, ought not to be taxed with the responsibility of providing security for costs.

**PHILLIPS JA**

[2] I have read in draft the judgment of my sister Sinclair-Haynes JA (Ag) and agree with her reasoning and conclusion. I have nothing to add.

**SINCLAIR-HAYNES JA (AG)**

[3] This is an appeal by Shurendy Quant, the appellant, from the decision of Marsh J, ordering him to provide the sum of JMD$1,596,000.00 to the Minister of National Security, the 1st respondent, as security for costs for the prosecution of his claim. By order of the 1st respondent dated 5 April 2013, the appellant, a national of Curacao, was deported from Jamaica on 11 April 2013. At the time of his deportation there was a consent order agreed by counsel for all parties staying his deportation until the hearing of his application.

**Background and evidence for the appellant**

[4] The following information has been culled from Mr Quant's fixed date claim form, application for judicial review, particulars of claim and affidavits. At the time of his deportation, the appellant had been visiting Jamaica for over 10 years. On each of those visits he remained for three months. He had entered the island in

November 2012. On that visit however, he was only permitted to remain for one month. Of that fact, he was unaware until his permission to remain expired.

[5] In February 2013, he applied for and was granted an extension to cover the period he had overstayed. He was further permitted to remain until 7 March 2013. It is his evidence that he left the island before the expiration of the period he was allowed to remain and returned on 8 March 2013. He exhibited his immigration form which states that he was allowed to remain until 5 June 2013.

[6] On 3 April 2013, he was a passenger in a chartered taxi in which it was alleged that a quarter pound of ganja was found. The driver of the vehicle acknowledged ownership and was charged. The other two occupants were released but Mr Quant was taken into custody in Ocho Rios. Whilst in custody, he was taken to his home which was searched. Nothing illegal was found. The police took possession of US$10,000.000, JMD$83,000.00 and G$100.00 from his house.

[7] He was taken to the Narcotics Division in Kingston. A question and answer was scheduled to be conducted by Detective Inspector Mullings. His attorneys-at-law were present. They were however informed by Inspector Mullings that he had no questions for him. They sought from the inspector the reason for his detention and were told that the inspector had been informed that the appellant had overstayed the period he was permitted. The inspector requested his passport and a copy was faxed to him. The appellant's attorney-at-law inquired about his release but the inspector refused to answer and ended the meeting. Mr Quant was not released.

[8] The appellant says he was detained without lawful justification or charge. He was not told the reason for his detention nor whether he would be charged, released or taken before the court. The appellant's evidence is that his attorney, Mr Cameron inquired of Inspector Mullings whether he would be released or taken to court. The inspector however told him he had other things to do and ended the meeting.

[9] A writ of *habeas corpus* was applied for before the Resident Magistrate on Saturday, 6 April 2013. The learned Resident Magistrate inquired from the officer the reason for his detention. She adjourned the matter to Monday, 8 April 2013 because of the insufficiency of the material which was before her. At the adjourned hearing, Detective Inspector Johnson presented the court with two orders which were signed by the 1st respondent on 5 April 2013, for the appellant's deportation.

[10] That was the first occasion the appellant was being made aware of a deportation order. Prior to that, he had never been informed of any such order, nor had he been served with a copy of the order. His attorneys-at-law requested copies of the order but the officer refused to provide him with either a copy or the orginal. The court's intervention was sought to have the officer provide his attorneys with a copy of the order. The officer informed the court that there was no narcotics investigation against the appellant. The learned magistrate, having become aware of the deportation order, adjourned the matter to 11 April 2013.

[11] On 9 April 2013, the appellant's attorneys-at-law filed an *habeas corpus* application and an application for judicial review of the minister's order in the Supreme Court. An application for an interim order staying the deportation order

was also filed on his behalf. Cole-Smith J heard the applications on the same day. The learned judge ordered that the applications be served on the Attorney General and the Director of Public Prosecutions.

[12] The matter was adjourned to 10 April 2013. On that day, attorneys from the Attorney General's chambers (who represented the minister), the Director of Public Prosecutions' office and the appellant's attorneys attended before the learned judge. The attorneys consented to an order staying the 1st respondent's order until the application for judicial review of the deportation order was determined. The learned judge adjourned the applications for leave for judicial review and *habeas corpus* to 12 April 2013.

[13] The appellant's attorneys attended the Gun Court Remand Centre on 10 April 2013 to serve the judge's order. The gate was locked. One of his attorneys informed the sentry of the judge's order and that he desired to serve same on the officer in charge. He refused them entry. Sergeant Morgan, with whom his attorney had interacted concerning the said matter, was seen eating in a parked vehicle. His attorney spoke to him. The sentry however told them that he would not allow them on the premises. His attorney read the contents to the sentry but to no avail.

[14] The following day, on 11 April 2013, his attorneys headed to the Resident Magistrate's Court with the consent order staying the 1st respondent's order for deportation. The order was presented to the learned Senior Resident Magistrate, Ms. Pusey. At about 3:00 pm of that afternoon, the appellant's partner and his attorney-at-law attended the Gun Court Remand Centre. They were informed by the sergeant in charge that the appellant had been taken to the Narcotics Division for

questioning, whereupon they headed to the Narcotics Division and spoke with Detective Superintendent Swearing. He informed them that the appellant had been deported in accordance with the 1st respondent's deportation order. The hearing of the appellant's applications for *habeas corpus* and leave for judicial review had been set for 12 April 2013.

[15] On 11 April 2013, the day that the appellant was deported and the day before the hearing of the appellant's application challenging the deportation order, the 1st respondent attended a public forum lecture and allegedly made the following statements:

> " i. 'There was a clear national security interest here, an alleged narcotic king pin [sic] wanted internationally … Interpol arrest warrant etc'.
>
> ii. 'Court was convened on Saturday afternoon to hear a habeas corpus writ for this individual. Now to me that seems very unusual, highly puzzling, but there is no … but I can tell you this … it was very strange to the police officers as well. There is no formal system of querying this type of behavior or handling complaints.'"

Prior to those public pronouncements, the appellant had never been informed that he was viewed as a narcotics kingpin and that there was an Interpol warrant for him, nor was he given a reason for his deportation.

**Evidence for the 1st respondent**

[16] Ms Althea Jarrett, counsel on behalf of the 1st respondent, deposed that on 9 April 2013, at approximately 7:00 pm, she received an email from Mr Cameron which had been sent at 5:58 pm to the Solicitor General and was copied to her. The email

informed the Solicitor General that he had appeared before Cole-Smith J the same date and had made the following applications:

(a) Application for Habeas Corpus; and

(b) Application for Leave for Judicial Review, interim relief for a stay of the deportation order that was made by the 1st Defendant pending the completion of the matter.

[17] He informed her that the applications were adjourned for an *inter partes* hearing on 10 April 2013 (the following morning). The applications and two affidavits were electronically attached to the said email. She attended court the following morning, that is, 10 April 2013 and informed the court that she was unable to proceed because she did not have any instructions from the respondents. She consented to a stay of the deportation order until the determination of the application for judicial review. Consequently, the learned judge stayed the deportation order and the application for leave for judicial review was adjourned to 12 April 2013 for *inter partes* hearing.

[18] Immediately upon her return to her office she attempted to contact the Acting Commissioner of Police to inform him that the deportation order was stayed. She however was not able to speak to him and so she informed Senior Superintendent of Police (SSP) Karl Bowen. She advised him of the urgent need for instructions as the matter was adjourned to the following day. He advised her to send the documents electronically to him and Assistant Commissioner of Police (ACP) Nelson.

[19] After her conversation with SSP Bowen, at 11:40 am she emailed the Commissioner of Police and copied ACP Nelson and SSP Bowen informing them of

the consent order and the urgent need for instructions because the hearing of the application for judicial review was set for hearing on 12 April 2013. She attached to the email the two notices of application and the affidavits in support. The commissioner responded to her e-mail via e-mail at 1:27 pm the same day.

[20] He informed her that he had passed her email to Senior Superintendent of Police Warren Clarke who was the head of Trans Narcotic Division, with instructions to contact her immediately. He did not contact her in spite of her numerous efforts to contact him. Consequently, at 2:11 pm she again e-mailed the commissioner.

[21] SSP Warren Clarke telephoned her at 3:01 pm the following day and informed her that Mr Quant had been deported at 11:00 am that morning. She expressed surprise that Mr Quant was deported without informing her in light of the order of the court staying the deportation order. SSP Warren Clarke claimed he was unaware of the said order. It is Ms Jarrett's evidence that she had not communicated with the 1st respondent about the matter.

**The claim**

[22] Mr Quant claims that his deportation was unlawful. Consequently, he instituted proceedings against the 1st respondent and the Attorney General. The contents of his fixed date claim form are set out below:

> "The 1st Defendant be committed to prison for:
>
> a. Breaching the Consent Order staying the Deportation of the Claimant herein, made by the Honourable Justice Cole-Smith of the Supreme Court of Jamaica on the 10th day of April 2012;

b. Contemptuous acts committed outside the court on the 11th and 12th day [sic] of April 2013 which interfered with the administration of justice, in particular unlawfully removing the Claimant from Jamaica and refusing to account to the Court for the reasons for his detention or his whereabouts;

c. Making pronouncements on the 11th day of April 2013 at the Norman Manley Lecture, a public forum, about the said matter herein that was under consideration by the Honourable Justice Cole Smith, which tended to and/or was calculated to interfere with the administration and/or course of justice.

<u>Particulars of pronouncements</u>

i. 'There was a clear national security interest here, an alleged narcotic king pin [sic] wanted internationally … Interpol arrest warrant etc.'

ii. 'Court was convened on Saturday afternoon to hear a habeas corpus writ for this individual. Now to me that seems very unusual, highly puzzling, but there is no … but I can tell you this … it was very strange to the police officers as well. There is no formal system of querying this type of behavior or handling complaints.'

2. Such further or other Order be made as the Court thinks just.

3. An Order dispensing with service of the Order of the Honourable Justice Cole-Smith made on the 10th day of April 2013.

4. That the costs of this application be paid by the Defendants.

The grounds upon which the Claimant seeks the Orders are as follows:

a) The several instances of contempt allegedly took place while the matter with Claim No. 2013 HCV 02182 was under consideration by a Judge of the Supreme Court, the Honourable Justice Cole-Smith, namely a Habeas Corpus application and leave to apply for Judicial Review of the Order of Deportation made by the 1st Defendant.

In regards [sic] to ground 1a);

b) Section 53.1(ii) of the Civil Procedure Rules provides for the power of the court to commit a person to prison for failure to comply with an order requiring that person not to do an act.

c) Every man, whatever his rank or condition is subject to the ordinary law and amenable to the jurisdiction of ordinary tribunals. When the Court speaks, its orders must be obeyed.

d) On the 11th day of April 2013 the 1st Defendant failed to comply with and knowingly breached the Consent Order staying the Deportation of the Claimant herein, issued by the Honourable Justice Cole-Smith of the Supreme Court of Jamaica made on the 10th day of April 2012 by having the Claimant herein removed from Jamaica against his will.

e) The 1st Defendant had notice of the terms of the order made by the Honourable Justice Cole-Smith as his legal representative was present in court and consented to the Order, further the 2nd Defendant, the legal representative of the 1st Defendant, in accordance with her legal obligations advised the 1st Defendant.

f) The Defendants consented to the Stay of the Deportation Order to avoid the Court releasing the Claimant on the Habeas Corpus Application as there was no reason lawful or otherwise to have him detained in custody.

g) Rule 53.7(3)(c) provides that where appropriate the Court can dispense with service.

h) Rule 53.5(2)(a) provides that the Court may make a committal order if it [sic] satisfied that the person against whom the order is to be enforced has had notice of the terms of the order by (b) being notified of the terms of the order by telephone or otherwise.

i) Rule 53.5 provides for an order for committal to be made in the absence of service of the order upon which the committal is grounded.

In regards [sic] to ground 2b)

j) Part 53.9(1) provides for the exercise of the power of the court to punish for contempt.

k) The due administration of justice requires that the Claimant should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes and his legal rights and liabilities;

l) The 1st Defendant unlawfully removed the Claimant from Jamaica.

m) The 1st Defendant by removing the Claimant from Jamaica prevented him from accessing or attending the Resident Magistrate Court and the Supreme Court for the purpose:

   i. of having his legal right to liberty of the person determined pursuant to the Habeas Corpus application that was properly before the Courts.

   ii. Instituting proceedings against the 1st Defendant, challenging his Deportation Order.

n) The refusal to provide information to the Court through the state Attorneys in disobedience of the Habeas Corpus application and failing to instruct the Director of State Proceedings for the reasons for deportation was calculated to frustrate the Habeas Corpus application and buy time to remove the Claimant against his will and in breach of the Stay of Execution.

o) The acts of forcefully removing the Claimant from Jamaica, in breach of a stay of the deportation order, to a place unknown and failing to account for the body or the whereabouts of the Claimant to the Honourable Justice Cole-Smith on the 12th day of April 2013 when the Habeas Corpus application came up for hearing constitute an 'enforced disappearance of persons' as contemplated in Art 7(1)(i) of the Rome Statute of the International Criminal Court – and thus a 'crime against humanity to which Statute Jamaica is a signatory.

p) The need for service does not arise in these circumstances.

In regards [sic] to ground 2c)

q) 53.9(1) provides for the exercise of the power of the court to punish for contempt.

r) All persons should be able to rely upon obtaining in the courts a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it.

s) The 1st Defendant made pronouncements on the same day he defied the stay of deportation order, the 11th day of April 2013, at the Norman Manley Lecture, a public forum covered by the electronic and print media, about the said matter herein that was under consideration by the Honourable Justice Cole-Smith, that tended to and/or was calculated to interfere with the course of justice.

t) The pronouncements formed part of a presentation about crime and corruption and identified the judicial system in particular the Office of the Director of Public Prosecutions, Resident Magistrates and Judges, as the weakest link in the law enforcement process.

u) The words of the 1st Defendant assumed an overtone of official quality and authority that lent them weight beyond those of an ordinary citizen given the fact that the 1st Defendant is the

Minister of National Security which position enjoys significant power and authority.

v) The 1st Defendant [sic] presentation targeted among other [sic] members of the Judiciary and the public and private bar and interfered with the course of justice as the pronouncements tended to or was calculated:

  i. to intimidate the Attorneys representing the Claimant herein.

  ii. to bring pressure to bear upon the State Attorneys who had conduct of the matter,

  iii. to bring pressure to bear upon the Judge who was scheduled to hear the Application for Habeas Corpus and leave for Judicial Review the following day, the 12th day of April 2013.

w) The 1st Defendant scandalized the Resident Magistrates Court by bringing into question the propriety of the Resident Magistrates Court sitting on a Saturday to hear a Habeas Corpus Application.

Particulars of inference

  i. The Court administration and/or the Judge were unduly influenced through some corrupt act by the Claimant to open the Court to hear the application on a Saturday.

  ii. The Claimant herein and or his Attorneys-at-law unduly influenced the Court administration and/or the Judge by engaging in a corrupt act to have the Court opened on a Saturday.

x) The 1st Defendant by questioning the propriety of the RM Court opening on a Saturday and by inference inferred that the Court's function was likely to undermine public confidence in the

administration of justice as the Court was unlikely to make an unbiased decision."

## The application for security for costs

[23] On 15 July 2013, the 1st respondent applied for security for costs. The application was heard at the case management conference. The grounds for which are hereunder stated:

> "1. Rule 24(1) of the Civil Procedure Rules, 2002 ('the CPR') provides that a defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant's costs of the proceeding.
>
> 2. Rule 24.3(a) of the CPR provides that the court may make an order for security for costs under rule 24.2 against a claimant only if it is satisfied having regard to all the circumstances of the case, that it is just to make such an order, and that the claimant is ordinarily resident out of the jurisdiction.
>
> 3. The Claimant is ordinarily resident outside the jurisdiction, and having regard to all the circumstances of the case, it is just to make the order."

[24] The application was supported by an affidavit of the 1st respondent's attorney, Sundiata Gibbs. He deposed that the appellant was a visitor to Jamaica and ordinarily resident outside of the jurisdiction. It is not known whether the appellant has assets in Jamaica. The 1st respondent was fearful that if he succeeds, he would be unable to enforce any order for costs made in his favour against the appellant.

[25] There was also an application by the appellant to strike out certain paragraphs of Mr Gibbs' affidavit. The submissions which were made on behalf of the appellant

did not find favour with the learned judge who consequently dismissed his applications and ordered the appellant to give security for costs in the sum of JMD$1,596,000.00, failing which his claim would be struck out. From those orders the appellant filed notice and grounds of appeal.

> " The following findings of law and fact are challenged:
>
> a. The learned judge in ordering security for costs erred in law when he failed and/or refused to consider the circumstances of the case in deciding whether it was just to make the order for security for costs and in effect failed to consider whether it was just to so do any at all.
>
> b. The learned judge erred in fact when he found that the Claimant was ordinarily resident outside of the jurisdiction and that he has satisfied the condition of 24(3)(a).
>
> c. The learned judge erred in fact when he found that the Claimant had no assets in this jurisdiction from which security for costs could be paid should the 1st Defendant succeed in his claim.
>
> d. The learned judge erred in fact when he found that there was no proof that the Claimant was possessed of funds which could have satisfied the security of costs.
>
> e. The Judge erred in fact when he found that there was no evidence from the Claimant that the grant of the order for security for costs if made against him would stymie his efforts at continuing his claim.
>
> f. The learned judge was wrong in law when he found that there was nothing adduced by the Claimant in the application to have paragraphs 6 and 7 of Sundiata Gibbs Affidavit struck out."

3. **The Gounds of Appeal are:**

In relation to the law and facts being challenged found at 2(a)(e)

1. It would not be just in the circumstances of the case to grant an order for security for costs:

   a. Given the substantial allegation being laid against the 1st Defendant being that of contempt for:

      i. breach of an order of this Honourable court order that resulted in the unlawful deportation of the claimant, and

      ii. acts committed outside the court on the 11th and 12th day of April 2013 which interfered with the administration of justice, in particular unlawfully removing the Claimant from Jamaica and refusing to account to the Court for the reasons for his detention or his whereabouts;

      iii. for making pronouncements on the 11th day of April 2013 at the Norman Manley Lecture, a public forum, about the said matter herein that was under consideration by the Honourable Justice Cole Smith, which tended to and/or was calculated to interfere with the administration and/or course of justice.

      The 1st Defendant has not sought or attempted to deny any of the allegations made therein.

   b. Given the complaint of the unlawful nature of his detention assumedly under the

authority of the 1st Defendant and being deprived of accessing the court to have his right vindicated.

c. Given the complaint of the illegal extradition under the guise of a deportation this has further frustrated the efforts of the Claimant to access the court to have his rights vindicated.

d. The circumstances of his detention in Jamiaca coupled with the nature of his incarceration in a foreign country that is not his homeland and lack of freedom of movement makes it physically and practically impossible to conduct any financial transaction to facilitate the payment of the required security costs. The impact of this is further preventing him from accessing the Court to pursue his legal rights and remedies. In the circumstances it would not be just for the court to make an order for security for costs that has further frustrated the Claimants [sic] efforts in accessing the court consistent with the actions of the 1st Defendant.

e. This situation in which the Claimant's attempts to seize the competent jurisdictions to air his grievances being systematically frustrated runs counter to the guarantees of Article 16 of the Character of Rights.

f. The Claimant is seeking to have vindicated his right to a fair hearing, right to liberty and right to freedom of movement which creates a constitutional flavour to the application and as such in accordance with the intent of section [sic] 56 of the Civil Procedure Rules ought not to be entitled to costs.

g. The Court ought properly [sic] vindicate the rule of law and its authority.

**In relation to the law and facts being challenged found at 2(b)**

2. The Claimant has adopted voluntarily residence in Jamaica as part of the regular order of his life for the time being, and to that extent has set up a business in Jamaica and has a fixed abode which the police have investigated and has been regularly in Jamaica for 3 months intervals for the past 10 years.

**In relation to the law and facts being challenged found at 2(c) & (d)**

3. The Claimant has assets in Jamaica in the form of shares in the company Stretlaw Media Limited and was also allegedly found to be in possession of cash in excess of US$10,000.00.

**In relation to the law and facts being challenged found at 2 (f)**

4. The 1st Defendant's Attorney who was lawfully sworn in this judicial proceeding, being informed by the 1st Defendant willfully made a statement material in this application; *'The Claimant has not indicated that the Defendant is not aware that the Claimant has any assets in the Jurisdiction'.*

   which he knew to be false and/or did not believe to be true as the Affidavit of Shurendy Quant which he relied upon categorically stated that the Claimant had shares in a Jamaican company which without more qualifies as being assets in the jurisdiction.

5. The false material assertion was intended to mislead the court and prejudice the Claimants [sic] hearing and in those circumstances the paragraphs are oppressive and an abuse and ought to be struck out as it has put an unfair onus on the Claimant to disprove the false statement."

## The applicable law

[26] It is appropriate at this juncture to examine the law which governs the application. Rule 24.1(2) of the Civil Procedure Rules empowers the court to require claimants to provide defendants with security for costs. Rule 24.2(1) gives a defendant the right to apply to the court for such an order while rule 24.3 gives the court the discretion to order security for costs against a claimant.

Rule 24.3(a) provides:

> "The court may make an order for security for costs under rule 24.2 against a claimant only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order, and that-
>
> (a) the claimant is ordinarily resident out of the jurisdiction;
> ..."

## Was the appellant ordinarily resident in Jamaica?

[27] Mrs Reid-Cameron submitted that the learned judge erred in fact when he found that the appellant was ordinarily resident outside of the jurisdiction and that the 1st respondent had satisfied the conditions of rule 24.3(a). She contended that the appellant had voluntarily adopted residence in Jamaica as part of the regular order of his life for the time being. His residence could not have been considered as casual, temporary or unusual. He has a business and a fixed place of abode in Jamaica. For the past 10 years he has visited Jamaica for three months in a year. She directed our attention to Lord Scarman's ruling in **Shah v Barnet London**

**Borough Council** [1983] 1 All ER 226 and to the work of the learned authors Loughlin and Gerlis, Civil Procedure, Second Edition.

[28] Mr Hylton QC on the other hand submitted that Mr Quant was a visitor to the island. He relied on the affidavit of Sundiatta Gibbs which exhibits Mr Quant's affidavit of 15 July 2013 in which he averred that he has been visiting Jamica for over a period of 10 years. Mr Quant, he argued, had not obtained permission to live or work in Jamaica. In November he was only granted permission to remain in the island for one month and he overstayed. He submitted that he owned no house in Jamaica and ownership of shares in a company is not evidence of residence. He relied on the works of the authors of Halsbury's Laws of England 5th (on line) edition; volume 19 (2011) at paragraph 359; and Blackstone's Civil Practice 2003.

[29] The learned authors of Halsbury's Laws of England have succintly and effectively defined the term ordinary residence as:

> "...residence adopted voluntarily and for settled purposes as part of the regular order of life for the time being, as opposed to such residence as is casual, temporary or unusual."

[30] Blackstone's Civil Practice 2003, provides even further clarification. At page 808, the learned authors state:

> "Ordinary residence is determined by the claimant's habitual or normal residence, as opposed to any temporary or occasional residence... The question is one of fact and degree... A foreign business person who makes regular visits to England would probably be regarded as resident abroad, but there will come a point, through the length of time spent in this country,

> and other factors, such as owning a house here, when ordinary residence will be established."

[31] It is settled law that a claimant may be ordinarily resident in two jurisdictions. In the case of **Commissioner of Inland Revenue v Lysaght** [1928] AC 234, the taxpayer was found to be ordinarily resident in both Ireland and England. Lightman J's decision in **Leyvand v Barasch and others** The Times Law Reports 23 March 2000, also supports the view that a claimant can be ordinarily resident in two jurisdictions. In **Leyvand's** case, he was found to be ordinarily resident in in both Israel and in England. Also the interpretation section of the Aliens Act defines residence as:

> "ordinary dwelling-place and, where an alien has more than one dwelling-place, each of such dwelling-places; and resident shall have a corresponding meaning;"

[32] Part 1 of the First Schedule to the Representation of the People Act establishes residential qualifications for ordinarily resident for enumeration and registration purposes. Although its definition seems to concern electoral purpose, examination of the relevant rule is nevertheless helpful. Rule 3 states:

> "Subject to the provisions of rules 1, 2, 4, 5 and 6 the question as to whether a person is or was ordinarily resident at any material period shall be determined by reference to all the facts of the case."

[33] Rules 4 and 5 provide:

> "4. The place of ordinary residence of a person is, generally, that place which has always been, or which he has adopted as, the place of his

habitation or home, whereof when away from there he intends to return. Specifically, when a person usually sleeps in one place and has his meals or is employed in another place, the place of his ordinary residence is where the person sleeps.

5. Generally, a person's place of ordinary residence is where his family is; if he is living apart from it in another place, the place or ordinary residence of such person is such other place. Temporary absence from a place of ordinary residence does not cause the loss or change of place of ordinary residence:

   Provided that any person who has more than one place of ordinary residence may elect in respect of which place he desires to be registered and inform the enumerator accordingly in the form set out in the Schedule to these Rules."

The Representation of the People Act therefore recognises duality of residences in Jamaica.

[34] A question which posed itself was whether it would be necessary for Mr Quant, in order to attain the status of being ordinarily resident, to make an application to the relevant authorities. Could the number of visits to the island, shares in a company and a fixed address transform Mr Quant's status from a mere visitor to being ordinarily resident? The English House of Lords case of **Shah v Barnet London Borough Council** is instructive.

[35] In that case the applicants were granted permission to reside in the United Kingdom to pursue studies. Grants were made available to students for university studies. A prequisite was that the applicants were ordinarily resident in the United Kingdom. By virtue of regulation 13 of the Local Education Authority Awards

Regulations 1979, there was no obligation on the authority to make a grant if the applicant had not been ordinarily resident in the United Kingdom for three years before his studies commenced.

[36] Five foreign students applied but were refused by the education authority on the ground that they were not ordinarily resident in the United Kingdom. All had been in the country for the required period. Four of the applicants, upon entry into the United Kingdom, were granted student visas and were required to leave upon the completion of their studies. The fifth student and his parents had been granted leave to remain indefinitely upon their arrival.

[37] Applications were made to the Divisional Court for orders of certiorari to quash the decision and of mandamus to compel the award of the grant. The court granted the application of the student who had been given indefinite leave to remain but refused the others. The education authority appealed against the Divisional Court's decision granting the student who was allowed to remain indefinitely while two of the applicants who were refused, also appealed.

[38] The Court of Appeal held that overseas students who were admitted to the United Kingdom to pursue studies were not ordinarily resident in the United Kingdom as they were not resident for the purpose of homemaking or everyday life. On appeal to the House of Lords, the education authority propounded as the proper test, the place where the applicant had his permanent home, that is, "the real home test".

[39] The House of Lords rejected that argument. It is necessary to quote copiously from the judgment as it elucidates the meaning of "ordinarily resident" Lord

Scarman in criticising the decision of the Court of Appeal commented thus at page 238:

> "In the end he based his decision on the immigration status of the student and on his view that 'ordinary residence' implies a home. A person 'will not become ordinarily resident in the United Kingdom unless and until he becomes entitled to remain in the United Kingdom indefinitely' (see [1982] 1 All ER 689 at 711, [1982] QB 688 at 729). Finally, he summed up his view as follows ([1982] 1 All ER 698 [1982] QB 688 at 733):
>
> > '… in the context and against the background of the Education Act 1962 overseas students, that is to say persons who are admitted to and are present only for the limited purpose of pursuing a course of study, are not ordinarily resident in the United Kingdom during their period of study.'
>
> He found the simplicity, for which he was right to search, in immigration status.
>
> My Lords, the basic error of law in the judgments below was the failure by all the judges, save Lord Denning MR, to appreciate the authoritative guidance given by this House in the ***Levene*** and ***Lysaght*** cases as to the natural and ordinary meaning of the words 'ordinarily resident'. They attached too much importance to the particular purpose of the residence, <u>and too little to the evidence of a regular mode of life adopted voluntarily and for a *settled* purpose, whatever it be, whether study, business, work or pleasure.</u> In so doing, <u>they were influenced by their own views of policy and by the immigration status of the students.</u>
>
> The way in which they used policy was, in my judgment, an impermissible approach to the interpretation of statutory language. Judges may not interpret statutes in the light of their own views as to policy. They may, of course, adopt a purposive interpretation if they can find in the statute read as a whole or in material to which they are permitted by law to refer as aids to interpretation an expression of Parliament's purpose or policy. But that is not the case. The Education Act's only guidance is the requirement contained in the

regulations that, to be eligible for a mandatory award, a student must have been ordinarily resident in the United Kingdom for three years. There is no hint of any other restriction, provided, of course, he has the educational qualifications and his conduct is satisfactory.

Both courts also agreed in attaching decisive importance to what the Divisional Court called 'the immigration status' of the student. 'Immigration status', unless it be that of one who has no right to be here, in which event presence in the United Kingdom is unlawful, means no more than the terms of a person's leave to enter as stamped on his passport. This may or may not be a guide to a person's intention in establishing a residence in this country; it certainly cannot be the decisive test, as in effect the courts below have treated it**.** Moreover, in the context with which these appeals are concerned, ie past residence, intention or expectations for the future, are not critical; what matters is the course of living over the past three years.

A further error was their view that a specific limited purpose could not be the settled purpose, which is recognized as an essential ingredient of ordinary residence. This was, no doubt, because they discarded the guidance of the ***Levene*** and ***Lysaght*** cases. But it was also a confusion of thought, <u>for study can be as settled a purpose as business or pleasure. And the notion of a permanent or indefinitely enduring purpose as an element in ordinary resident derives not from the natural and ordinary meaning of the words 'ordinarily resident' but from a confusion of it with domicile</u>

I therefore reject the conclusions and reasoning of the courts below. And I also reject the 'real home' test (and the variant of it) for which the local education authorities contended. In my view neither the test nor the variant is consistent with the natural and ordinary meaning of the words. And, once it is accepted that it is not legitimate to look to the 'recoupment' provisions of the Education Acts for guidance, there is nothing in the Acts to suggest that the words should bear any other than their natural and ordinary meaning. In particular, the Immigration Act 1971, passed some nine years after the Education Act 1962, gives no guidance to the interpretation of that Act. It cannot be permissible in the absence of a reference (express or necessarily to be implied) by one statute to the other to interpret an earlier Act by reference to a later Act. But, if it were

> permissible to refer to the Immigration Act 1971 as an aid in the interpretation of the education legislation, it would immediately become apparent that the Act uses 'ordinary residence' to denote something less than 'right of abode' and less even than 'settlement'. Indeed, it would seem to use the words in their natural and ordinary meaning: see ss 2(1)(c) and (3)(d), 7, 33(2), Sch 1, App A (the substituted s 5A(3) of the British Nationality Act 1948). The indications are, therefore, strong that the Immigration Act 1971 uses the words in their natural and ordinary meaning, though it is not, of course, necessary to decide the question in these appeals.
>
> My Lords, it is, therefore, my view that local education authorities, when considering an application for a mandatory award, must ask themselves the question: has the applicant shown that he has habitually and normally resided in the United Kingdom from choice and for a settled purpose throughout the prescribed period, apart from temporary or occasional absences? If a local education authority asks this, the correct, question, it is then for it, and it alone, to determine whether as a matter of fact the applicant has shown such residence. An authority is not required to determine his 'real home' whatever that means; nor need any attempt be made to discover what his long-term future intentions or expectations are. The relevant period is not the future but one which has largely (or wholly) elapsed, namely that between the date of the commencement of his proposed course and the date of his arrival in the United Kingdom. The terms of an immigrant student's leave to enter and remain here may or may not throw light on the question; it will, however, be of little weight when put into the balance against the fact of continued resident over the prescribed period, unless the residence is itself a breach of the terms of his leave, in which event his residence, being unlawful, could not be ordinary." (Emphasis added)

[40] In **Commissioner of Inland Revenue v Lysaght** the tax payer regularly went to England and spent fewer than three months in a year. One week was spent in a hotel for the purpose of attending board meetings. The House of Lords found that he was ordinarily resident in England. The House defined habitual residence as

residence *"...adopted voluntarily and for a settled purpose" .* In Lord Buckmaster's opinion, ordinarily resident means "*no more than that the residence is not casual and uncertain but that the person held to reside does so in the ordinary course of his life" .* Lord Sumner said: "*I think the converse to 'ordinary' is 'extraordinary' and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not 'extraordinary'."*

[41] In the English case of **Leyvand v Barasch and Others**, the claimant, an Israeli national, instituted proceedings against his business partner. Mr Leyvand resided in England for 80 days a year and owned substantial property including a home in England. He also operated a business and owned properties. He was found to be ordinarily resident in England.

[42] On Mr Quant's evidence, at the time of his deportation, he had, for a period of over 10 years resided in Jamaica for three months in each of those years and had a fixed place of abode, albeit a rental. It was a part of the 'regular order of his life' to reside in Jamaica for three months in each year. His presence was also for business. He is a shareholder in a Jamaican company. The fact that his "real home" is in Curacao is immaterial in light of the view expressed by the House of Lords. He can therefore be deemed to have been ordinarily resident in Jamaica.

[43] In determining whether Mr Quant was indeed ordinarily resident in Jamaica, his presence in Jamaica must have been lawful. It is worthy of note that the order which was made by the minister under the Immigration Restriction (Commonwealth Citizen's) Act also prohibited him to land. Mr Quant is not a Commonwealth Citizen. The definition section of the Jamaican Nationality Act defines alien as "*a person who*

*is not a Commonwealth citizen, a British protected person or a citizen of the Republic of Ireland".* Mr Quant was therefore an alien. The Immigration Restriction (Commonwealth Citizens) Act is inapplicable.

[44] The Aliens Act is the relevant Act. Had Mr Quant overstayed the period he was allowed to remain, his presence on the island would have been unlawful. In the circumstances, he could not have been ordinarily resident at that time as he would have been considered an alien who was prohibited to land.

[45] Sections 5, 7(3) and 20(1)(a) and (b) of the Aliens Act, make it plain that at that point his presence would have become unlawful. Section 5 provides:

> "Subject to such exemptions as may be made by the Minister under section 17, an alien coming from outside the Island shall not land in the Island except with the leave of an immigration officer."

Section 7(3) of the Aliens Act provides:

> "(3) An alien who fails to comply with any condition attached to the grant of leave to land or imposed by way of variation of any condition so attached, or <u>an alien who is found in the Island at any time after the expiration of the period limited by any such condition, shall for the purpose of this Act be deemed to be an alien to whom leave to land has been refused."</u> (Emphasis added)

Section 20(1)(a) and (b) further provide that:

> "20-(1)(a) If any person acts in contravention of, or fails to comply with, any provisions of this Act or any order or regulations made or conditions imposed or directions given thereunder; or
>
> (b) If any alien, having landed in the Island in contravention of section 5, is at any time found within the Island,

he shall be guilty of an offence against this Act."

[46] It is true that he had overstayed his permission to remain when he landed in November 2012 but his assertion that the immigration authorities, upon his application, had remedied his breach by retroactively granting him permission for the period he had overstayed is unchallenged. There is also no evidence that at the time of his apprehension he was unlawfully on the island.

[47] Although he may be deemed to have been ordinarily resident in the island, the court must have regard to all the circumstances of the case bearing in mind that the overarching aim is to do what is just. The reality is that Mr Quant is also and more often ordinarily resident outside of the jurisdiction. He spends approximately nine months of the year away from the island.

[48] There is no evidence of the value of property he owns here. The objective of an order for security for costs is to ensure that if the respondent is successful in his defence of the claim, he will be able to enforce a judgment for costs. Should the respondent succeed the enforcement of an order for costs might prove to be more difficult than if he were a Commonwealth citizen. The difficulty might also be compounded by language barrier as Curacao is a Dutch speaking territory. There is also the obvious consideration of the increased costs involved in enforcing a judgment in those circumstances.

**Does Mr Quant have assets within the jurisdiction?**

[49] Mr Quant says he is a shareholder in a Jamaican company, Stretlaw Media Limited. In his particulars of claim he averred that it was alleged that cash in the

sum of US$10,000.00, JA$88,300.00 and G$100.00 was taken from him. Mrs Reid-Cameron contended that proof of his ownership of shares in Stretlaw Media Limited was exhibited to his affidavit of 19 April 2013. He exhibited the certificate of incorporation; the notice of appointment of directors and the return of allotment. According to her, the 1st respondent at all material times was aware that Mr Quant has shares in a locally registered company and that he was apprehended with currency valued at over JMD$1,000,000.00. She submitted that by virtue of part 48 of the CPR, a charging order can be made against the said shares.

[50] Mr Hylton however argued that it is not enough to show that Mr Quant has shares in the company as the assets of company are not the assets of the shareholder. Further, he submitted that there is no evidence of the value of the shares or that he had substantial assets within the jurisdiction which would enable him to satisfy an order for security for costs made against him. He argued that the exhibits attached to Mr Quant's affidavit are not evidence as its content was not sworn to by the deponent. He relied on **Ramkissoon v Olds Discount Co Ltd** (1961) 4 WIR 73.

[51] In **Ramkissoon,** an application was made by the applicant to set aside judgment obtained in default of defence against him. His application was supported by an affidavit and defence. Both documents were signed by his attorney. The attorney however did not refer to the facts contained in the defence in his affidavit.

[52] McShine CJ (Ag) noted that there was nothing to suggest that the attorney had personal knowledge of the facts about which he deponed to in the affidavit and averred in the defence. He pointed out that the defence which was exhibited could

not substitute for an affidavit of merit by the defendant. The facts of Ramkisson's case are distinguishable. Mr Quant, unlike Ramkissoon who provided no affidavit, sought to provide an affidavit in which he spoke about each exhibit.

[53] In the body of his 'affidavit', Mr Quant exhibited a copy of the certificate of incorporation, notice of appointment of/change of directors and return of allotment. The documents were not merely appended to his affidavit as was the defence to the attorney's affidavit in Ramkissoon, Mr Quant spoke to their purpose. It is important to point out that Mr Quant's affidavit in support of his application is not notarized as required by law. Mr Cameron, one of his attorneys-at-law, has deponed that he was informed by an attorney in Curacao that he was unable to get a notary public to notarize his affidavit because of the circumstances of his detention. Copies of the same exhibits which were attached to his affidavit in support of his application for judicial review were however notarized. The fact that his affidavits are not notarized, ought not to be held against him if in fact it was the act of the 1st respondent which has resulted in his inability to have his affidavit notarized.

[54] It is also the appellant's complaint that:

> "The learned judge was wrong in law when he found that there was nothing adduced by the Claimant in the application to have paragraphs 6 and 7 of Sundiata Gibbs [sic] Affidavit struck out."

According to Mrs Reid-Cameron, Mr Gibbs, wilfully swore to the following statement which he knew was false or did not believe to be true. To wit:

> "The Claimant has not indicated and the [first] Defendant is not aware that the Claimant has any assets in the jurisdiction."

[55] She contended that the statement constitutes a material assertion which was intended to mislead the court and prejudice the appellant. She said that the paragraphs are oppressive, an abuse and ought to be struck out because it places upon the appellant an unfair onus of disproving the false statement. She complained further that by way of affidavit of 22 April 2013, the attorney sought to cure the problem by attributing the statement to the 1st respondent.

[56] It was however her submission that attributing the statement to the 1st respondent does not relieve the attorney of his responsibility to the court and his office. She said that the statement ought to be struck out. She directed the court's attention to the House of Lord's statement in **Myers v Elman** [1939] 4 All ER 484 at 491, 511:

> "A solicitor who has innocently put on file an affidavit by his client, which he has subsequently discovered to be certainly false, owes a duty to the court to put the matter right at the earliest date if he continues to act as solicitor on the record."
>
> "The solicitor cannot simply allow the client to make whatever affidavit or document he thinks fit, nor can he escape the responsibility of careful investigation or supervision"

[57] Mr Hylton however contended that matters in an affidavit cannot be struck on the basis of being false. If Mr Quant alleged inveracity, he is to dispute the allegation by deponing to an affidavit. Mr Quant as aforesaid provided the respondent with the copies of the documents evidencing his ownership of shares in a Jamaican company. It is therefore not correct to state that Mr Quant had given no indication that he has assets in the jurisdiction.

[58] Part 68 of the CPR allows the enforcement of a judgment debt by charging personal property. There is however no evidence as to the value of the shares. Levying on shares in a private company might not be easy. Regarding the monies which Mr Quant said were removed from his house, Mr Hylton submitted that there was no evidence that Mr Quant was indeed in possession of the said sum. He said that the statement in his pleadings was an allegation Mr Quant said was made by the police. Mr Hylton contended that there was no evidence of its availability to satisfy an order for security for costs should one be made against him.

[59] It is worthy of note that there is no evidence at this juncture denying that the said sum was taken as alleged by Mr Quant. That issue is however, one to be determined at a trial. I must agree with Mr Hylton that Mr Quant has provided no cogent proof of having sufficient assets in the jurisdiction. That notwithstanding, was it in all the circumstances of this case, just to make an order for security for costs?

[60] Mrs Reid-Cameron said that it was not. She reiterated her submissions which were advanced before the learned judge. She however stressed that the order for security for costs which will further deny the appellant of his efforts to have his constitutional rights adjudicated ought not to have been made. She relied on the case **Olakunle Olatawura v Abiloye** [2003] 1 WLR 275 for the proposition that a court ought to be sensitive and alert to the risk of making such an order which may deny the party the right to access the court. She referred the court to the evidence of Mr Chuckwuemeka Cameron which speaks to his inability to get a Notary Public to

notarize Mr Quant's affidavit and the difficulty experienced in making arrangements to pay security for costs.

[61] Mrs Reid-Cameron submitted that the circumstances of Mr Quant's incarceration in Jamaica hindered his ability to conduct any financial transaction together with his being prevented from accessing the court are important factors to be considered. According to Mrs Reid-Cameron, Mr Quant could not file his affidavit within 30 days much less put arrangements in place to pay security for costs. She argued that the court must examine the peculiar circumstances of the case in determining whether or not it is demonstrably justified to limit Mr Quant's access to the court which might possibly be infringed by the order for security for costs.

[62] She said consideration must be given to the substantial allegations laid against the 1st respondent in Mr Quant's fixed date claim form. She cited:

(a) his breach of the judge's order;

(b) his acts of interference with the administration of justice on 12 and 13 April 2013, particularly his refusal to account for his whereabouts and the reasons for his detention;

(c) his removal of Mr Quant from the jurisdiction; and

(a) his statement at the Norman Manley Lecture, which tended to and or was calculated to interfere with the administration and or course of justice.

[63] She contended that the minister's statements at the Norman Manley Lecture have further exacerbated and contextualized his flaunting of the court's order earlier in the day. She pointed out that he has not denied any of the allegations. In

circumstances in which the allegations of contempt have not been denied, it would not be appropriate for the court to make such an order. If the contempt is established, the court would need to consider whether it would be just to order security for costs in favour of a defendant who would have deliberately flouted the court's order. She relied on **JSC BTA Bank v Mukhtar Ablyazov and Others** [2010] EWCH 2352 (Comm).

[64] It was her submission that Mr Quant was illegally extradited under the guise of a deportation. She said that that issue involves an important question which is in the public interest to have determined. Taken together, she argued that the matters are substantial as they concern the rule of law and fundamental human rights. In the circumstances, the 1st respondent ought not to be entitled to security for costs.

**The Minister's involvement**

[65] Queen's Counsel however submitted that there is no evidence that the minister breached or wilfully disobeyed any of the court's orders or made any contemptuous statements about the court's orders. He said there is no evidence that the minister was even aware of the judge's order of 10 April 2013. He relied on the averment of Ms Jarrett in her affidavit of 16 July 2013 that she neither spoke nor communicated with the minister.

[66] It was his submission that the minister was represented in those proceedings by an attorney from the Attorney General's chambers. He said that the minister was neither present at the hearing nor did he instruct the Director of State Proceedings how to proceed. There is no evidence that the minister was served with the order of 10 April 2013 or that he removed Mr Quant from Jamaica whether lawfully or

otherwise. He contended that he was not required to account to the court for the reasons for Mr Quant's detention or his whereabouts.

[67] Queen's Counsel said that the minister's only role was the issuance of the deportation order. There is no evidence that he instructed either the police, the correctional officers or intervened in the process in any other way. Contempt of court is a serious allegation which must be proven to the criminal standard. There is no evidence to support paragraph 1c of the fixed date claim form. In the circumstances, counsel submitted, there was no merit in this ground of appeal. There was therefore no good chance of Mr Quant succeeding.

**What is the minister's role in matters of deportation?**

[68] In light of Mr Hyton's submission of the minister's ignorance of the proceedings, it is necessary to examine the role of a minister in deportation matters. The Aliens Act delineates his role which is not merely the signing of the order. Indeed his role is integral to the entire proceedings. Section 15 of the Act confers upon the minister the power to make deportation orders and to impose any condition he considers proper. By virtue of the Act, an alien is detained in the manner directed by the minister.

[69] Apart from making the deportation order, the minister is empowered by the section 14 of the Aliens Act to impose restrictions on an alien. He is further empowered to impose additional restrictions to those imposed by the Act as he deems necessary in the interest of the public. The minister (or an immigration officer) may also require a master of a vessel to receive and provide passage,

maintenance and accommodation for the alien against whom a deportation order has been made.

[70] Section 16 empowers the minister to apply the money, or property of an alien (whether all or part) against whom a deportation order has been made to defray his and his dependents expenses until departure and their travel expenses. Section 22(1) confers on the minister the power to "make regulations for prescribing anything which is by this Act to be prescribed and generally for carrying the purposes or provisions of this Act into effect".

[71] In light of the integral function the minister plays in the deportation of an alien, the assertion that he was ignorant of the court's order staying his order is curious. It is certainly odd; in light of the crucial role he plays or ought to play in a deportation, that he did not acquaint himself with the outcome of the proceedings.

[72] It is necessary to examine the circumstances of the appellant's deportation. The deportation orders provided the reasons for Mr Quant's forcible removal from the island. As aforesaid, he was deported pursuant to both the Immigration Restriction (Commonwealth Citizens) Act and the Aliens Act. By order of 5 April 2013, the minister deemed Mr Quant an undesirable person and prohibited him from landing in Jamaica. He also ordered his deportation pursuant to section 15(6)(d) of the Aliens Act. By virtue of both Acts, he was deemed to be undesirable. The order made pursuant to the Immigration Restriction (Commonwealth Citizens) Act reads:

> "In exercise of the power conferred on [the Minister] by section 26(2) of the Immigration Restriction (Commonwealth Citizens) Act, and of every other power hereunto enabling, the following Order is hereby made:

> 1. This Order may be cited as the Immigration Restriction (Commonwealth Citizens) (Undesirable Person) **(Shurendy Adelson Quant)** Order, 2013.
>
> 2. **Shurendy Adelson Quant**, a national of the Netherlands is hereby prohibited from landing in Jamaica."

[73] As observed above, that order is irrelevant. The relevant order is the deportation order which reads:

> "In exercise of the power conferred upon the Minister by section 15 (6) (d) of the Aliens Act, the following Order is hereby made:
>
> 1. This Order may be cited as the Deportation (**Shurendy Adelson Quant)** Order, 2013.
>
> 2. **Shurendy Adelson Quant**, a national of the Netherlands is hereby required to leave and thereafter, remain out of Jamaica."

[74] Section 15(6)(d) of the Aliens Act confers upon the minister the power to make a deportation order if he considers it to be in the interest of Jamaica. Section 15(6)(d) provides:

> "(6) A deportation order may be made in any of the following cases-
>
> ...
>
> (d) if the Minister deems it to be conducive to the public good to make a deportation order against the alien."

Section 15(7) of the Aliens Act provides:

> "(7) Where any case in which a court has made a recommendation for deportation is brought by way of appeal against conviction or sentence before a higher court and that court certifies to the Minister that it does not concur in the recommendation, such recommendation shall be of no effect but without prejudice to the power of the Minister to make an order of deportation under paragraph (d) of subsection (6)." (Emphasis added)

[75] No reason was however proffered to Mr Quant why it was deemed conducive to the public good to make the order. If the following statements attributed to the minister were his, he would have publicly provided the reason at the Norman Manley Lecture, the day Mr Quant was deported. He allegedly said:

> *"There was a clear national security interest here, an alleged narcotic king pin* [sic] *wanted internationally...Interpol arrest warrant etc*."

[76] The important issue is whether the minister was obliged to do so and if so, whether Mr Quant was entitled to a hearing as contended by Mrs Reid-Cameron. Although at this juncture, the court must avoid pronouncing on the merits of the claim, in order to avoid the risk of stifling a genuine claim, the court ought to consider whether the claim is meritorious. See **Fernhill Mining Ltd v Kier Construction Ltd** [2000] APP LR 01/27.

[77] The deportation order was made pursuant to section 15(6)(d). Section 15(7) on a cursory reading, seemingly empowers the minister to ignore and override even an appellate court's recommendation that he be not deported if an order is made

under that section. If indeed his power is unfettered, the consent order staying his deportation would have been null.

[78] For a number of years, the decisions in **The King v Inspector of Leman Street Police Station, ex parte Venicoff, The King v Secretary of State for Home Affairs, ex parte Same** [1920] 3 KB 72 that an executive officer was under no obligation, to hold an inquiry, held sway. The English legislation is similarly worded to ours. The law in this area has however developed. It is helpful to examine its development without impinging on the trial judge's function. This examination is for the sole purpose of determining whether the appellant has a meritorious case as against one doomed to fail.

[79] In **Robert v Hopwood and others** (1925) AC 578, an Act of Parliament conferred upon the district auditor, the right to "...disallow any item of account contrary to law, and surcharge the same on the person making or authorising the making of illegal payment." In conferring the power on the council, the Act used the words " shall...such ...servants as may be necessary, and may allow to...such servants... such wages as (the Council) may think fit". In that case, the words "*may think fit*" were deemed to infer a discretion which required the council to act reasonably and honestly. It is worthy of note that the words "may" and "deemed" are likewise used in section 6 and 6(d). At page 613, Lord Wrenbury opined:

> "A person in whom is vested a discretion must exercise his discretion upon reasonable grounds...He must act reasonably."

[80] In **R v Governor of Brixton Prison *Ex parte* Soblen** [1963] 2 QB 243, in considering the Home Secretary's power to deport because the alien's presence "*was not conducive to the public good",* Lord Denning MR said it was open to the court to:

> "...go behind the face of the deportation order in order to see whether the powers entrusted by Parliament have been exercised lawfully or no. That follows from **Reg. v Board of Control, Ex parte Rutty**...but if there is evidence on which it could reasonably be supposed that the Home Secretary was using the power of deportation for an ulterior purpose, then the court can call on the Home Secertary for an answer: and if he fails to give it, it can upset his order." (page 302)

That view placed in question the former decisions otherwise.

[81] The view expressed by Lord Hudson in **Ridge v Balwin** [1964] AC 40 reflected a transformed thinking on the matter. At page 130 he said:

> "...the answer in a given case is not provided by the statement that the giver of the decision is acting in an executive or administrative capacity as if that was the antithesis of a judicial capacity. The cases seem to me to show that persons acting in a capacity which is not on the face of it judicial but rather executive or administrative have been held by the court to be subject to the principles of natural justice."

[82] Indeed the 1980s seemed to have ushered in a new approach to the minister's power. The words of Lord Diplock in the English case **AG v Ryan** [1980] AC 718 are supportive of the view that:

> "The minister was a person having legal authority to determine a question affecting the rights of individuals. This being so it is a necessary implication that he is

> required to observe the principles of natural justice when exercising that authority and if he fails to do so, his purported decision is a nullity." (page 727)

[83] Campbell J, in the case of **Reuben Hernandez v The Attorney General** Suit No 2006 HCV 02093 delivered on 18 September 2006, and Legall J in the Belizean case **Karol Mello v Commisioner of Police and Superintendent of Prisons** Claim No 388/2012, delivered 10 August 2012 were similarly of the view that an alien against whom such orders were made, was entitled to be heard. See also **M v Home Office and another** [1993] 3 All ER 537.

[84] Section 13(4) of Chapter 111 of the Charter of Rights has put the final nail in the coffin of a minister's unfettered power in these matters. Chapter 111 of the Constitution protects the rights and liberty of both citizen and aliens alike from arbitrary acts of the state. All persons present in Jamaica are by virtue of the Constitution, entitled to be told the reason for their arrest and to be heard.

[85] Section 14(2) of the Charter afforded Mr Quant the right to: communicate with his partner; be informed of the reason for his detention; and appear before a judge. Section 14(2)-(4) provides:

> "(2) Any person who is arrested or detained shall have the right-
>
> (a) to communicate with and be visited by his spouse, partner or family member, religious counsellor and a medical practitioner of his choice;
>
> (b) at the time of his arrest or detention or as soon as is reasonably practicable, to be informed, in a language which he understands, of

the reasons for his arrest or detention;

(c) where he is charged with an offence, to be informed forthwith, in a language which he understands, of the nature of the charge; and

(d) to communicate with and retain an attorney-at-law.

(3) Any person who is arrested or detained shall be entitled to be tried within a reasonable time and –

(a) shall be –

(i) brought forthwith or as soon as is reasonably practicable before an officer authorized by law, or a court; and

(ii) released either unconditionally or upon reasonable conditions to secure his attendance at the trial or at any other stage of the proceedings; or

(b) if he is not released as mentioned in paragraph (a)(ii), shall be promptly brought before a court which may thereupon release him as provided in that paragraph.

(4) Any person awaiting trial and detained in custody shall be entitled to bail on reasonable conditions unless sufficient cause is shown for keeping him in custody.

[86] The Charter is binding on all persons including the executive. Section 13(4) states: "*This Chapter applies to all law and binds the legislator, the executive and all public authorities*." Further Section 13(5) provides:

> "A provision of this Chapter binds natural or juristic persons if, and to the extent that, it is applicable, taking account of the nature of the

> right and the nature of any duty imposed by the right."

It would seem to me that the minister was obliged to provide Mr Quant with the reasons he deemed his removal from Jamaica conducive to the public good. It cannot therefore be asserted that the appellant's case is unmeritorious.

**Was it just to make the order?**

[87] The quintessence of the appellant's complaint at ground 1 is that it was unjust in all the circumstances to require Mr Quant to provide security for costs. The salient words in rule 24 are that an order for security for costs may only be made if the court, having considered all the circumstances deems it is just to do so.

[88] In the Caribbean Court of Justice case of **Marjorie Knox v John Deane and Others** [2012] CCJ 4 (AJ) Nelson JCCJ at paragraph [40] enunciated thus:

> "The fourth determining factor is that the award of security for costs must, in the final analysis, be 'just' in all the circumstances. In the instant case, in this respect the courts are anxious to preserve access to justice for persons resident abroad or impecunious who are brought before the courts to defend litigation and are desirous of continuing their defence, so to speak, by way of appeal. More especially is this so because both at first instance and on appeal nowadays foreignness and poverty are no longer *per se* automatic grounds for ordering security for costs. It is well to recall the discretionary terms in which Rule 62.17 is cast and two statements of the proposition at first instance:
>
> > (a) It is no longer an inflexible rule that if a foreigner sues within the jurisdiction he or she must give security for costs: **Aeronave S.P.A. v Westland Charters Ltd**. and
> >
> > (b) A defendant is not entitled to security simply because the plaintiff is poor and there is danger that costs may not be recoverable: **Cowell v Taylor**."

[89] The appellant alleged that he was accused publicly of being a narcotic kingpin who was wanted internationally. He said that the minister referred to an arrest warrant. He refuted those allegations. He said that in furtherance of his business pursuit, he was required by the company as part of due diligence process to provide the company with a police record from Curacao which he obtained. The police report was exhibited to his affidavit. He asserted that he is a shareholder in a Jamaican company and has provided proof. He was also found by the Jamaican police to be a fit person to hold a firearm in Jamaica.

[90] Where such damning allegations are made and the person is deported, if untrue, it would be wholly unjust to drive him from the court because of his inability to provide security thus denying him the right to be heard and to clear his allegedly internationally tarnished reputation. Indeed, Mr Quant claims that his reputation has been affected in his own country. It is Mr Cameron's evidence that he was informed by an attorney in Curacao that he was unable to get a notary public to notarize Mr Quant's affidavit because of the circumstances of his detention. His reputation is not only tarnished but his ability to access important services has been affected.

[91] The unchallenged evidence is that he was incarcerated and deported without being given any reason or an opportunity to be heard. Whilst he was incarcerated, his partner was prevented from visiting him. He was therefore denied the opportunity to receive assistance and by the very order, prevented from remaining in or residing in Jamaica by the 1$^{st}$ respondent (and/or his servants and or agents) on the basis that it was deemed conducive to the public good. His constitutional right

as guaranteed by the Charter, to communicate with his partner was therefore infringed.

[92] Mr Quant complained that his constitutional rights were infringed by the seeker of security for costs. Mrs Reid-Cameron directed our attention to sections 13(3)(f) and 13(5) of the Charter of Fundamental Rights and Freedoms which protects the right "*of every person lawfully in Jamaica to move around freely throughout Jamaica, to reside in any part of Jamaica and to leave Jamaica"* (Section 13(3)(f)).

[93] The 1st respondent is empowered by section 14(1)(i)(ii) to arrest or detain a person for deportation or extradition. However, the deprivation of liberty in those circumstances requires the existence of reasonable grounds. Section 14(1) provides:

> "14.-(1) No person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law in the following circumstances…"

[94] In circumstances where a person, whether Jamaican or alien, is so deprived, especially where the deprivation is at the hand of the very party seeking security, it could not, in my view be demonstrably justified to require that person to provide security. Persons whose constitutional rights have been infringed are entitled to appear before a judge of the Supreme Court. He was afforded that right by the Constitution which entitled him to apply to the Supreme Court for redress for breaches of his constitutional rights. Being aggrieved he accordingly invoked the

court's jurisdiction for the protection of his constitutional rights which he alleged to have been violated. Section 19(1)(3) of the Charter of Rights states:

> **Application for Redress**
>
> "19.- (1) If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.
>
> (2) Any person authorized by law, or, with the leave of the Court, a public or civic organization, may initiate an application to the Supreme Court on behalf of persons who are entitled to apply under subsection (1) for a declaration that any legislative or executive act contravenes the provisions of this Chapter.
>
> (3) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled."

[95] No reason was given for either his detention or deportation. Cole-Smith J's order to have him appear before her was also ignored. Further, he was deported while her order staying his deportation was extant. Court orders are to be obeyed. If there is any disagreement, appeal process exists. It would seem to fly in the face of justice, that the appellant should be deported by the minister either in flagrant disregard of the court's orders or as a result of his negligence (as it was his duty to

oversee the deportation), and be required by that party to provide security for costs in order to access the court.

[96] Teare J in the **JSC BTA Bank v Mukhtar Ablyazov and Others** at paragraph 70 made it plain that:

> "...in circumstances where, let it be assumed, a party has breached orders of the court, it must be right, in principle, for the court to consider whether it is just and appropriate to give that party the benefit of another order of this court."

He concluded that "in those circumstances it would not be right in principle to order security before the contempt hearing is resolved..."

[97] If indeed Mr Quant was publicly declared to be a narcotic kingpin; was detained and deported, his sacrosanct constitutional right to his liberty, a hearing and ability to communicate would have been snatched from him. If those allegations cannot be substantiated, having been uttered in so public a manner, in those circumstances, it would be unjust to impose upon him the requirement to pay security for costs which would be a further act impeding his attempts to access the courts in his quest to obtaining justice.

[98] If the statements attributed to the minister's castigating the learned magistrate's decision to hear the application for a writ of *habeas corpus* for "this individual" and his statement that "it seemed very unusual, highly puzzling... it was very strange to the police officers as well. There is no formal system of querying this type of behaviour or handling complaints", are his, they would seem to lend credence to Mr Quant's allegation that the minister's "pronouncements" at the

Norman Manley Lecture, a public forum, about the said matter "tended to and/or were calculated to interfere with the administration and/or course of justice".

[99] His statements inveighing against the learned magistrate for her industry is unfortunate. Resident Magistrates and judges are required to make themselves available to hear matters of urgency such as injunctions, *habeas corpus* applications in which it is alleged that persons are being held without charge or without facing a court and matters such as the instant in which an allegation was made that someone was about to be deported in the circumstances aforesaid.

[100] The rationale for a magistrate or judge making himself/herself available at any time of day or night is to prevent an irreversible wrong occurring, such as unlawful deportations. There was nothing sinister about the judge sitting on a Saturday afternoon to hear an application for a *habeas corpus* writ. It was her duty to sit and she ought to have been commended rather than castigated and have aspersions publicly cast on her character.

[101] In the English House of Lords case **M v Home Office and another**, the facts of which are somewhat similar to the instant case, the minister had deported the appellant who was a national of Zaire in ignorance of an undertaking which had been given by the Home Office. In that case, the judge received a telephone call at about 11:20 pm at his home from the appellant's solicitor informing him of the breach. The solicitor went to the judge's home at about 12:30 am where the judge wrote an order *inter alia* acceding to an application for judicial review and for the return of the appellant to the jurisdiction.

[102] Section 67 of the Judicature (Resident Magistrates) Act provides:

> "It shall be lawful for any Magistrate to sit in Chambers, and there to make orders as to the mode of trial of persons brought before him charged with any indictable offence, to hear and determine any application for a change of venue from one station to another station in his parish or parishes, for any stay of execution, for a writ of *habeas corpus* to bring up any witness or prisoner, and any application respecting the taxation of costs, and also any unopposed application for probate or administration and also any application that may be properly made *ex parte* and without notice to the other side."

In light of the forgoing, I would allow the appeal with costs to the appellant to be agreed or taxed.

**PANTON P**

**ORDER**

Appeal allowed. Costs to the appellant to be agreed or taxed.