

## **Eugene Dupuch Distinguished Lecture**

**23 March 2023**

**Status rights and obligations. Legal issues in citizenship, immigration and asylum laws the Commonwealth of The Bahamas**

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Let me begin by expressing my gratitude to the Eugene Dupuch Law School for the invitation to deliver this year's Eugene Dupuch Distinguished Lecture. Having attended many of these distinguished lectures, delivered by eminent speakers, I am humbled to have been given the high honor of addressing this forum.

I will issue the usual disclaimer, that nothing I say in this presentation binds any future decision, in the event a case may subsequently be brought before me.

As some of you may know, I have a household of lawyers and a law aspirant. So when Principal Bastian Galanis asked me to deliver this address, I decided to ask them what would be a good topical issue which I could speak on. I expected, as I saw myself as somewhat of a commercial judge, I would have to choose from some nice commercial topics. To my surprise, and I confess disappointment, they each said that I should speak on issues of immigration and citizenship.

I have to accept, and I do, that this is the current issue of the day which the media, civil society, the executive arm of government and the legal system grapples with. Every

newspaper this week carried multiple stories on immigration and citizenship. The ongoing turmoil in Haiti, keeps these issue in the foremost of our minds.

The title of the presentation, I think speaks for itself.

Citizenship, Immigration and Asylum issues are interrelated. It is hoped that in the discussion, I will simply trace and consider the legal issues which the courts of The Bahamas have had to deal with arising from citizenship, immigration and asylum in our 50 years of existence as a nation.

### **Historical Background**

Civilization in these islands, throughout their known history, have been plagued by immigration issues. The Arawak civilization was extinguished as a result of European migration. Early English settlement began as a result of exiled puritans, landing on Eleuthera, from Bermuda in search of religious freedom. In the next phase of the development of these Islands, African slaves, whose descendants now make up (90%) of the population<sup>1</sup>, were migrated here by force. Later, the fallout from the American War of Independence saw large numbers of Americans, loyal to the British crown, migrate to The Bahamas. They settled in the Abacos, Eleuthera, Long Island and Great Exuma along with their slaves in considerable numbers, having been gifted large parcels of land to compensate for plantations lost in the American War of Independence.

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<sup>1</sup> Bahamas 2010 Census

In his book, the *African Diaspora in The Bahamas*, Professor Keith Tinker includes a chapter, which he titles *Caribbean Migration and the Making of the Modern Bahamas*. He writes<sup>2</sup>:

In the late 1970s and early 1980s thousands of Bahamian children were taught primarily by Jamaican teachers in the public school system. Then, many of the local prison officers were Trinidadian, a significant amount of police officers were Barbadian, Haitians were the most popular tailors and Guyanese dominated the land surveying sector. The migration began as a steady stream in the 1920s. The Caribbean immigrants, mostly of African descent effectively impacted all spheres of life in the Bahamas. Almost as dramatically as did the migration of the loyalist from the United States in the late 1700s. In consequence, thousands of new black immigrants swelled the populations of the islands and impacted every sector of life. This wave of migration in many ways, helped to shape the modern Bahamas.

Whilst within the region a fair amount of Cubans and Jamaicans have reached our shores, undoubtedly the single largest population of migrants, legal and illegal have come from our southern neighbors, the Republic of Haiti.

As far back as 1980, in a case called ***Jean and others v Minister of Labour and Home Affairs***<sup>3</sup>, Chief Justice Vivian Blake highlighted the then burgeoning challenge of Haitian Migration. He recorded in the evidence, that the Consul General for the Republic of Haiti

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<sup>2</sup> Page 189, the African Diaspora in The Bahamas

<sup>3</sup> [1981] 31 WIR 1

estimated the number of illegal immigrants in the Bahamas at between 7,000 and 10,000, with the Government's estimates at over 20,000.

The 2010 census (some 30 years after *Jean* was decided) estimated that there were nearly 40,000 Haitians living in The Bahamas. This was more than 60 percent of the total number of foreigners residing in the country.

The recently released 2022 US State Department Human Right Report cites unofficial estimates that between 30,000 and 60,000 residents of The Bahamas were Haitians or persons of Haitian descent, making them the largest ethnic minority<sup>4</sup>.

The results of the Covid-delayed, 2020 census, are not available. The expectation certainly is that the numbers would have increased.

According to the statistics provided by the Ministry of Labour and Immigration, 4,748 persons were repatriated in 2022. 71% or 3,349 of those repatriated were Haitian nationals.

## **Citizenship**

Citizenship, and the right to it, impacted by migration, be it Bahamians moving out of The Bahamas and abroad or immigrants moving into The Bahamas. Citizenship rights apply, whether the persons involved were in The Bahamas legally or not.

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<sup>4</sup> US State Department Country Report 2022, State Department website, <<https://www.state.gov/>>

The determination of who is, or who is not a Bahamian citizen begins with a reference to Chapter II of the Constitution. The Constitution recognizes various routes to citizenship depending on:

- (a) place of birth,
- (b) the status of the mother and/or father (in addition to marital status)'
- (c) marriage to a male citizen; or
- (d) presence in the country before 10 July 1973.

The Constitution expects parliament to make laws for the attainment of the citizenship rights conferred in Chapter II of the Constitution<sup>5</sup>. The Bahamas Nationality Act sought to fulfill this obligation.

Early challenges to citizenship centered on the failure of the government to issue citizenship when persons felt otherwise entitled. In the case of ***Ryan v the AG***<sup>6</sup> the appellant, Thomas D'Arcy Ryan, a citizen of Canada by birth, claimed to have been ordinarily resident in the Bahamas since 1947, when he was aged 22. Ryan applied in June 1974, under Article 5(2) of the Constitution, to be registered as a citizen of The Bahamas having been ordinarily resident in The Bahamas for more than three decades and having been issued a Belonger's certificate, pre-independence. The application was denied by the Minister of Immigration.

Ryan challenged the decision up to the Privy Council. The Board held that the Minister of Immigration, had the 'sole jurisdiction to the exclusion of all courts of law' to determine

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<sup>5</sup> Article 13 of the Constitution

<sup>6</sup> *The Attorney General V Thomas D'arcy Ryan Privy Council Appeal No. 29 Of 1977*

whether any facts existed to justify a refusal of the application. The Board declared however, that the decision to refuse Ryan's registration was null and void and it struck down the proviso to Section 7 of the Bahamas Nationality Act. The Board further declared that Ryan was entitled to a reconsideration of his application for registration.

Ryan was not registered as a citizen until 1993. Some 13 years after the Privy Council ordered his application be reconsidered.

#### Article 7

Perhaps the most challenging immigration and citizenship issue is case of a person affected by Article 7 of the Constitution. That article provides:

7. (1) A person born in The Bahamas after 9th July 1973 neither of whose parents is a citizen of The Bahamas shall be entitled, upon making application on his attaining the age of eighteen years or within twelve months thereafter in such manner as may be prescribed, to be registered as a citizen of The Bahamas...

It is clear that the Constitution offers, in the case of persons born in The Bahamas to non-Bahamian parents, a deferred right to citizenship. A right deferred to the 18<sup>th</sup> birthday. Some may also say that it is a deferred, conditional right as it seems that the application must be made within a window of 12 months. I have often heard this right diminished as simply a right to apply. It is certainly not a simple *right to apply*. Everyone and anyone has a *right to apply*. The right given to persons qualified under Article 7 is an entitlement to be registered upon application and subject only to national security and public policy considerations.

The challenge for this class of persons is ascertaining their status in the period before age 18 and after age 19, in the event no citizenship has been applied for or granted.

This was the issue raised in the case of ***Jean Rony Jean Charles v Attorney General***<sup>7</sup>.

This case involved a man of Haitian descent claiming to have been born in The Bahamas. He was arrested by Immigration officers in September 2017 and detained at the Carmichael Road Detention Centre. He was never charged with any offence under the Immigration Act or any criminal offence. Despite being detained he was never served with a Detention Order or a Deportation Order. He was deported to Haiti. In his absence from the country, a Writ of Habeas Corpus was filed which challenged the constitutionality of his detention and deportation. Mr Justice Hilton, at first instance, ordered his return to The Bahamas. Upon his return he was once again arrested and detained. The court then ordered his release from detention.

On Appeal, the Court of Appeal determined that there was procedural unfairness to the Government in the conduct of the Habeas Corpus application, as the identity of the person detained, said to be Jean Charles, was never ascertained.

This case was litigated up to the Privy Council, which, in a recent decision, held that there was indeed procedural unfairness to the Government. The Privy Council nonetheless held that that it was permissible for Jean Charles to have sought constitutional relief in the context of the Writ of Habeas Corpus application.

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<sup>7</sup> Jean Rony Jean Charles v The Attorney General, Minister Of Immigration, Director Of Immigration, Officer In Charge Of The Detention Centre, Commodore Of Defence Force SCCivApp No. 26 of 2018; Jean-Rony Jean Charles (Appellant) v The Honourable Carl Bethel (in his capacity as Attorney General of the Bahamas) and 4 others (Respondents) (Bahamas) [2022] UKPC 51

There is some uncertainty in the law as it relates to this class of persons, who if not recognized by The Bahamas, often find themselves, in certain albeit limited circumstances, stateless. The situation is often compounded when they, by our application process are forced to assume the nationality of their parents, if they can, in order to make the application for citizenship and access this deferred right.

But what is their right to remain in The Bahamas?

In relation to the Immigration policy, as I understand it, persons in this class had long been recognized as having some right to remain in The Bahamas. By Section 30A of the Immigration Amendment Act 2015, the Director of Immigration is empowered to issue a Resident Belonger Permit to persons impacted by Article 7.

But what about the person who missed the window to apply established by Article 7? Jean-Rony Jean Charles alleges that he was such a person and on that basis challenged his detention and subsequent deportation from The Bahamas. There is an interesting statement at paragraph 36 of the recent decision of the Privy Council in respect to the appeal of Jean Charles which reads as follows<sup>8</sup>:

36. It appears to be common ground that the appellant did not apply for registration as a Bahamian citizen between his 18th and 19th birthdays as he may have been entitled to do under article 7 of the Constitution. It also does not appear to be contested that the appellant is entitled to permanent residence in The Bahamas if it is established that he was born there and has resided there all of his life or, if he

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<sup>8</sup> Jean-Rony Jean Charles (Appellant) v AG et al[s [2022] UKPC 51

has travelled outside The Bahamas, he has done so and returned with the necessary travel authorisations.

Since the Privy Council does not get it wrong, here is a clear statement as to what, they understood the Government accepted as the legal position. Where he did not apply for registration between his 18<sup>th</sup> and 19<sup>th</sup> birthday he is entitled to permanent residence in The Bahamas if:

- (a) it is established that he was born in The Bahamas; and
- (b) he has resided there all of his life; or,
- (c) if he has travelled outside The Bahamas, he has done so and returned with the necessary travel authorizations.

This statement, in paragraph 36, is very likely to be argued as obiter dicta, but the statement as to the representation to the Board seems clear. In any event there is clearly a lacuna as to what is the status, or right to a status, for persons in this class who do not apply for citizenship in the window provided in the Constitution.

In 2018, the Law Reform Commission had disseminated, for public consultation, an Immigration, Naturalization and Asylum Bill. The intent of the Bill was to repeal the Bahamas Nationality Act and the Immigration Act and establish an entirely new regime for the acquisition of citizenship and other status in The Bahamas including as it relates to asylum. Under one draft of the bill, somewhat controversially, anyone born in The Bahamas after July 9, 1973 to non-Bahamian parents and who does not apply for citizenship before by their 19th birthday would lose the right to apply for citizenship. Additionally, the bill would have given individuals who fall under that category six months

after the law takes effect to apply for some form of status or risk being deported. It also establishes a “right of abode” in The Bahamas for anyone born in the country to foreign parents while they are a minor.

The current administration has indicated, through the Attorney General<sup>9</sup>, that it will introduce a new Bill although some of the concepts in that earlier Immigration, Naturalization and Asylum Bill will be utilized. Attorney General Pinder, KC is reported as saying that ***“the better approach is to do an issue by issue approach rather than what we would have seen in the bill.”***

It is widely known that applicants often have to wait several years for the government to decide on their nationality applications and, “in the interim, do not have documentation to secure employment, housing, and public services”. The lack of a passport also prohibits students from pursuing higher education outside the country. Until recently, these students had to pay the same rate (of double the tuition) at the University of The Bahamas as foreigners. They continue to be denied any opportunity for government scholarships, notwithstanding their entitlement to be registered as a citizen, limited only by national security and public policy concerns.

Respectfully, requiring people with these deferred rights, who are essentially “Bahamians in waiting” to live on the outside of their own society, is a recipe of social discontent, which we can hardly afford. There is absolutely no lawful justification why these applications ought to take years and in some cases a decades to be processed. Such interactions leave a bitter taste and often hinder these Bahamians from fully embracing their

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<sup>9</sup> The Tribune Newspaper, 22 April 2022 article written by Khrisna Russell

Bahamian identity when their applications are eventually approved. Dr. Ian Strachan, I think, summed up the situation accurately when he stated:<sup>10</sup>

Disenfranchising a person for 18 years or more, while they await entry into the exclusive club of Bahamian citizenship, creates frustration, shame, anger, alienation and bitterness in the hearts of thousands of young people who know, have, and want no other home but this one. It's simply inhumane, short sighted...

## Article 10

Article 10 of the Constitution provides:

10. Any woman who, after 9th July 1973, marries a person who is or becomes a citizen of The Bahamas shall be entitled, provided she is still so married, upon making application in such manner as may be prescribed and upon taking the oath of allegiance or such declaration as may be prescribed, to be registered as a citizen of The Bahamas:

There is a quiet unspoken disdain by persons entitled to be registered as citizens under Article 10. This disdain is particularly acute among female lawyers who require citizenship in order to practice before the Bar.

The Government has an interesting policy reflected in several actual cases of which I am aware. After requiring the married woman to undergo a 5 year period of utilizing the

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<sup>10</sup> Strachan (2011), "The Haitian Problem":

spousal permit, they would offer to them permanent residency, notwithstanding their application was for citizenship.

As a practitioner, I had two colleagues who toyed with the idea of testing the policy but ultimately, the fear of jeopardizing their chances of gaining their citizenship, caused them to get cold feet. Whilst no one has been courageous enough to challenge it, one has to ask what interest of national security or acceptable public policy would warrant the grant of permanent residency to someone but not citizenship in circumstances where the constitution confers an entitlement to be registered as a citizen?

### ***Treatment of Women viz a viz Men***

It is a fact, that notwithstanding its expressions of fundamental rights and freedoms expressed in Chapter III of the Constitution some provisions of the Constitution, in particular as it relates to Chapter II reflect differential treatment of certain classes of people, and it is particularly skewed against women. These anomalies are recorded by the Report of the Constitutional Commission into a Review of the Bahamas' Constitution (the Report), dated July 2013, Chaired by Sean McWeeney KC. At paragraphs 3.11 and of the Report, on the issue of citizenship, it is stated<sup>11</sup>:

3.11 ... This is, in many respects, the most singularly difficult subject the Commission had to consider. As might be expected, the Commission recommends that all of the provisions relating to the acquisition of citizenship and transmission to children or spouses be cast in gender neutral language to provide for the equal

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<sup>11</sup> Report of the Constitutional Commission into a Review of The Bahamas Constitution, July 2013

attribution of the right of citizenship and to remove any discrimination against women in this and indeed in every other regard.

Further at paragraph 14.26 the Commission went on to definitively conclude:

14.26 Many of the citizenship provisions outlined above describe a patrilineal and male oriented Constitution, one that relegates women to an inferior status in civil and social life because of gender. The Commission is unequivocal in its view that there ought to be no difference in the ability of Bahamian men and women to transmit their citizenship to their children and spouses. To provide for different treatment on the basis of gender is tantamount to saying that there are classes or degrees of citizenship, and that the citizenship of a woman is somehow less than that of a man. Such thinking must be relegated to the annals of history. It can have no place in a modern Bahamas.

Following the Commission's report the Government sought to address the anomalies by a referendum. The referendum failed to achieve the correction of these the anomalies. This was but a second occasion by which a Government attempted to bring gender parity. The Government has indicated that it has drafted legislation to rebalance the gender anomalies. We await the release of the legislation for public consultation.

There has been some commentary amongst some legal scholars expressing concerns about the ability of parliament to pass law to confer citizenship outside of the Constitution, in the wake of the defeated referendum, some 6 years ago.

In my respectful view, this commentary is against the clear language in Article 13 of the Constitution. Article 13 provides:

13. Parliament may make provision:

(a) for the acquisition of citizenship of The Bahamas by persons who do not become citizens of The Bahamas by virtue of the provisions of this Chapter;

...

Parliament, having been elected by the people of The Bahamas and constitutionally mandated to ensure the peace order and good governance of The Bahamas, is empowered to enact legislation to balance any gender anomalies. Every citizen of this Commonwealth, regardless of gender should enjoy the same rights. There is no reason why my mother or my aunt or my sister or my daughter, should not enjoy the same rights as I, to pass on my citizenship.

Article 6

Then there is the pending challenge to the interpretation of Article 6 of the Constitution.

Article 6 provides:

6. Every person born in The Bahamas after 9th July 1973 shall become a citizen of The Bahamas at the date of his birth if at that date either of his parents is a citizen of The Bahamas.

The Constitutional Commission examined Article 6 of the Constitution and stated<sup>12</sup>:

14.14 The Commission is of the view that this provision is not discriminatory. It adopts a hybrid position between acquisition of citizenship based on birth in territory and descent, and the combination of each grants automatic entitlement at

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<sup>12</sup> Supra

birth. However, it seems to have been susceptible to an interpretation that it is discriminatory in its effects. This results from what the Commission considers—and with the greatest of respect for the Courts—to be the erroneous interpretation of the word “parents” in this provision to include an unmarried Bahamian mother but not an unmarried Bahamian father.

14.15 ... the courts have construed the reference to “parents” in art. [6] (sic) to be caught by the definition of “father” in Article 14(1), and therefore the potential benefit of this article to a child born out of wedlock in The Bahamas to a Bahamian male is removed. ..

In the case of *Rolle et al v AG*<sup>13</sup>, the five applicants claim that they were born in The Bahamas and that their biological fathers are citizens of The Bahamas but their Jamaican and Haitian mothers are not. Their parents were not married at the dates of their births.

They sought declarations from the Supreme Court that they are entitled to citizenship of The Bahamas pursuant to Article 6 of the Constitution. The Supreme Court held that a person born in The Bahamas is entitled to citizenship at birth pursuant to Article 6 of the Constitution if either of their biological parents hold citizenship, irrespective of their parents’ marital status.

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<sup>13</sup> Shannon Tyreck Rolle (1) Lavaughn Shawn Rolle (2) (By his next friend Shannon Tyreck Rolle) Casshonya Pasha Rolle (3) (By her next friend Shannon Tyreck Rolle) [2020] 1 BHS J. No 95; and The Attorney-General Appellant and Shannon Tyreck Rolle and Lavaughn Shawn Rolle (By his next friend Shannon Tyreck Rolle) And Casshonya Pasha Rolle (By his next friend Shannon Tyreck Rolle) Respondents and The Attorney General Appellant and Mayson Juno Pierre (By his next friend Julna Pierre) and Nikey Pierre (By his next friend Julna Pierre) Respondents, SCCivApp. No. 62 of 2020

An enlarged 5 member panel of the Court of Appeal dismissed the Attorney General's appeal and upheld the Supreme Court's decision by a majority of three to two.

The Attorney-General appealed to the Judicial Committee of the Privy Council. The matter was heard by the Privy Council on 16 January 2023 and the decision reserved.

Regardless of the outcome, the Board is expected to give guidance on the interpretation of citizenship provisions in Constitutions and whether they fall to be considered on **Minister of Home Affairs v Fisher** principles. Citizenship rights are of course extremely important rights, and the basis upon which certain other constitutional rights are derived. You would recall that **Fisher** principles call for *"the language of a Constitution to be construed, not in a narrow and legalistic way, but broadly and purposively, so as to give effect to its spirit, and this is particularly true of those provisions which are concerned with the protection of human rights."*<sup>14</sup>

The flip side of the generous broad and purposive approach, as was also advanced in **Rolle**, is that derogations from rights must be construed narrowly in an effort to secure the most meaningful protection for the guaranteed rights.<sup>15</sup>

We all await the decision of the Privy Council in this appeal.

## Immigration

I now turn to consider the legal issues relative to immigration in The Bahamas. In this discussion on immigration, we do not speak of those thousands of lawful immigrants who

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<sup>14</sup> AG v Whiteman (1991) 39 W.I.R. 397 at 412, [1991] 2 A.C. 240 at 247.

<sup>15</sup> See Fundamentals of Caribbean Constitutional Law, Robinson, Baulkman & Saunders 2<sup>nd</sup> ed. 3-020; AG v Coard (2005) 68 W.I.R. 289 (CA Gren) at [68]–[69], per Alleyne JA. See also R. v Hughes [2002]; UKPC 12, 60 W.I.R. 156, [2002] 2 A.C. 259 (PC SLU); Watson v R. [2004] UKPC 34, 64 W.I.R. 241, [2005] 1 A.C. 472 (PC Jam); McEwan v AG [2018] CCJ 30 (AJ), 94 W.I.R. 332, [2019] 1 L.R.C. 608, 46 B.H.R.C. 314 (CCJ Guy).

have helped to build and to frame the modern Bahamas. The discussion is on illegal immigration. In framing the discussion and the challenge it poses to The Bahamas as a nation, I borrow another passage from Chief Justice Blake the case of *Jean*<sup>16</sup>: He stated:

The applicants ... have fled their country for a better life in The Bahamas, the fact remains that they have no right to be here. They have come clandestinely to these shores and are part of a burgeoning population of illegal immigrants. They constitute a serious drain upon the limited resources of The Bahamas in many fields, particularly the social services which are already stretched to the limit to cater to the needs of citizens, and permanent residents, and those who are otherwise entitled to be here.

Whilst illegal immigration is indeed a drain on our, health, educational, national security and social services budgets, we are a country of where the rule of law and the Constitution prevails.

Sections 9 and 10 of the Immigration Act empowers immigration officers and police officers to arrest any person where there is reasonable cause to suspect the commission of an offence under the Act.

Article 19 (1) (g) of the Constitution provides that no person shall be deprived of his personal liberty save as may be authorised by law for the purpose of preventing the unlawful entry of that person into The Bahamas or for the purpose of effecting the expulsion, extradition or other lawful removal from The Bahamas of that person ...

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<sup>16</sup> *Jean and Others v Minister of Labour and Home Affairs and Others* [1981] 31 WIR

Article 19(2) provides that any person who is arrested or detained shall be informed as soon as is reasonably practicable, in a language that he understands, of the reasons for his arrest or detention and shall be permitted, at his own expense, to retain and instruct without delay a legal representative of his own choice and to hold private communication with him...

Much of the Immigration challenges surround the proper treatment of persons who have been found in The Bahamas unlawfully or where they are perceived to be in the Bahamas unlawfully. These issues include: the proper process to be employed by the authorities upon arrest, and the extent of the right to detain illegal immigrants and their treatment whilst detained. Applications to vindicate these issues are often pursued as a Habeas Corpus applications.

In **Aldinor v. Immigration Department and Another**<sup>17</sup> the applicant, filed a Habeas Corpus application as she had been detained for 2 months by the Enforcement Unit at the Department of Immigration Headquarters. It was believed that she had submitted a fraudulent application for citizenship and that she was illegally in The Bahamas. She was not taken before the Court to be processed:

The Supreme Court, Justice Isaacs (as he then was), found that Aldinor was being unlawfully detained having been in custody for some two months on the suspicion of having committed an offence against the immigration laws and not taken before a Court.

In the case of ***Pierre-Charles v Director of Immigration and the Attorney General***<sup>18</sup> Officers from the Immigration Department went to the home of James Charles on 14

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<sup>17</sup> [2013] 1 BHSJ. No. 82

<sup>18</sup> *CRI/CRG 133 of 2013*

March 2013 around 3:00a.m and arrested his wife, the applicant. Mr. Charles alleged that his wife was pregnant and naked at the time and he had to beg that she be allowed to dress. The officers allowed her to get dressed. Mr. Charles said he explained to the officers that his wife had resided in The Bahamas for over a decade having completed her formal education here. He told them also that he and the applicant had recently married and that he had recently completed an application for a Spousal Residency permit for her for submission to the Immigration Department. He gave the documents to the officers.

The applicant was arrested and taken into custody. Mr. Charles was told that once the marriage certificate was authenticated as genuine the applicant would be released. He went to the Immigration Department the next day and said that he was informed that the certificate was fraudulent, notwithstanding he personally attended the Registrar General's Department, applied for and got a marriage licence.

Three weeks after the applicant had been taken into the custody an application was made for Habeas Corpus relief and for bail. In granting Habeas Corpus relief, the Court stated:

14. Section 10 of the Immigration Act is a penal provision as it provides for penalties to be imposed for breaches of the immigration law. It cannot of itself be the basis for a person's detention unless he has been placed before a court charged with a section 10 offence and the court has issued a Warrant of Remand or Warrant of Committal for the person to be detained. It is an order of the courts or a deportation order issued by the Minister responsible for immigration which provides the authority for the person's detention. No document purporting to

authorise the applicant's detention has been produced to the Court by the respondents.

What these cases demonstrate is that detainees have the same rights to be protected against arbitrary arrest and detention as every other person who is alleged to have breached the law in The Bahamas. The unfortunate practice had been, notwithstanding these line of cases, to detain persons alleged to be in the country unlawfully, for indefinite periods of time, until they can be repatriated to their homeland.

In recent times, certainly in the case of large illegal landings, persons are brought before the Court. In some cases because of the large numbers of persons involved, the Magistrate has often travelled to islands in the Bahamas, most notably Inagua to convene court to take the pleas of illegal immigrants.

#### Prolonged Detention

The period of detention in ***Aldinor*** and ***Pierre Charles*** was 2 months and 3 weeks respectively. And whilst a day wrongfully detained is too long, it is with much regret that there has been many instances of much longer and more egregious periods of detention.

Perhaps the most notable of these was the case of ***Atain Takitota v AG***<sup>19</sup>. Takitota arrived in Nassau sometime on 3 August 1992 from Osaka, Japan having travelled through the United States. Upon arrival he was given leave by Immigration officials to remain for one (1) week as a visitor. Takitota did not check into a hotel instead he went

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<sup>19</sup> **ATAIN TAKITOTA v THE ATTORNEY GENERAL AND DIRECTOR OF IMMIGRATION AND MINISTER OF NATIONAL SECURITY SCCiv App No.54 of 2004**

to a casino to gamble. He alleges that it was here that his luggage which held his passport, and other items were stolen. That very night police officers on Paradise Island picked him up on suspicion of breaking into a car and vagrancy. He was never charged with any of those offences. He was however, reported to the Immigration Department.

In August 1992 a deportation order for Takitota was made by the Minister of Labour and Immigration. He was detained at Her Majesty's Prison (now Bahamas Department of Correctional Services) as a result of the deportation order on the ground that he was "an undesirable and his presence was not conducive to the public good." However, he was also never charged with illegal landing or any other offence that would have violated the Immigration Act. Ultimately, Takitota was imprisoned for more than 6 years (initially in the maximum security unit and then minimum security). He was transferred to the Carmichael Road Detention Centre where he remained for an additional 2 years. Altogether he was detained for 8 years.

In October 2000, Takitota was released on bail after the hearing of his habeas corpus application. He sued for various breaches of his Constitutional rights, general, aggravated and exemplary damages arising from his detention.

The Court of Appeal held that Takitota was entitled to the protection of the laws of The Bahamas, regardless of the fact that he was not a citizen. The Court stated that where an individual's liberty is restricted by the executive, the courts 'should always regard with extreme jealousy any claim by the executive to imprison' them without trial. The Court of Appeal considered that, in the absence of a determination by the court that a person has breached the law there was no basis for a deportation order. The entirety of Takitota's incarceration was therefore unlawful. They agreed with the trial judge that Takitota's

Constitutional rights under Articles 17(1) and 19(1) had been infringed. He was awarded total award of \$600,000 in addition to interest and costs.

In the case of *Ngumi v AG*<sup>20</sup>, Ngumi, a Kenyan citizen, was detained, arrested and imprisoned from January 2011 for 6 years, 4 months and 6 days. He was detained at his residence and taken to the Carmichael Detention Centre. He was subsequently charged with overstaying and engaging in gainful occupation, contrary to the provisions of the Immigration Act and brought before a Magistrate. He pled guilty to overstaying and was acquitted of engaging in gainful occupation. The Magistrate recommended deportation back to Kenya. In June 2013 Ngumi pled guilty to possession of dangerous drugs. Deportation was once again recommended. He was not deported and in July 2017 a Writ of Habeas Corpus was filed. In August 2017, prior to the hearing of the application he was released from detention.

At first instance, Justice Charles (as she then was), found that during his detention he suffered cruel and inhumane treatment which included assault and battery. He was not charged with any offence under the Immigration Act. Justice Charles also found that his constitutional rights were breached. He was awarded the sum of \$641,950 which was included general and special damages. The Judge held that Ngumi had been unlawfully detained as after his arrest he could only have been lawfully detained for 48 hours.

Ngumi appealed to the Court of Appeal seeking \$11 million in damages. The Court of Appeal agreed with the learned Judge's findings but increased the damages award to

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<sup>20</sup> DOUGLAS NGUMI v ATTORNEY GENERAL et al SCCivApp No. 6 of 2021

\$750,950. He has appealed to the Privy Council and that appeal, which was heard recently on 7 February 2023, remains outstanding.

Whilst these lapses by the immigration authorities have a tremendous impact on the detainees, they also have considerable impact on the country. As is evident, the financial costs of compensating these persons unlawfully detained amount to many many millions of tax payer's dollars. Dollars which could otherwise have improved the delivery of education, health care and social services.

It would be unfair if I do not put forward one of the significant challenges experienced by Immigration authorities in the case of some detainees. Immigration authorities often face repatriation delays where some countries do not readily embrace the return of their nationals. In **Takitota**, the AG complained that they had nowhere to repatriate **Takitota** to since Japan was unwilling to accept him. Also in the case of **Ramon Lop v AG**<sup>21</sup>, the Attorney General complained that both the United States and Cuba, countries with which he had ties, refused to accept him. In those circumstances, what may have begun as a lawful and entirely proper detention, with prolonged delays, became unlawful.

The law on this issue is fairly well settled and the principles are rooted in the decision of **Wolf J** (as he then was) in the case of **R v Governor of Durham Prison, ex p Singh**<sup>22</sup>.

A good distillation of these principles is to be found in the dicta of **Dyson LJ** in the English Court of Appeal case of **R v Secretary of State for the Home Department ex parte P**<sup>23</sup>.

He distilled the principles into four points:

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<sup>21</sup> 2017/CLE/gen/001180

<sup>22</sup> [1984] 1 All ER 983 at 985, [1984] 1 WLR 704 at 706D

<sup>23</sup> [2002] EWCA Civ 888, [2003] INLR 196

- (i) The authorities must intend to deport the person and can only use the power to detain for that purpose.
- (ii) The deportee may only be detained for a period that is reasonable in all the circumstances.
- (iii) If, before the expiry of the reasonable period, it becomes apparent that the authorities will not be able to effect deportation within that reasonable period, they should not seek to exercise the power of detention.
- (iv) The authorities should act with the reasonable diligence and expedition to effect removal.

According to **Dyson LJ**, “it is not possible or desirable to produce an exhaustive list of all the circumstances that are, or may be, relevant to the question of how long it is reasonable to detain a person pending deportation pursuant to the provisions of the law. But they include at least: the length of the period of detention; the nature of the obstacles which stand in the path of the authorities preventing a deportation; the diligence, speed and effectiveness of the steps taken by the authorities to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences.

**Ex parte Singh** principles were followed in the case of **Kajeepan et al v Been**<sup>24</sup>. This was a 2021 decision of the Court of Appeal of the Turks and Caicos Islands. The facts of **Kajeepan** were that on 10 October 2019, the Police intercepted a Haitian sloop in the

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<sup>24</sup> 97 WIR 521

territorial waters of the Turks and Caicos Islands. There were 154 passengers on board including 1 Indian and 28 Sri Lankan nationals. Amongst the 28 Sri Lankan nationals were Kajeepan and the two other applicants. Investigations were complicated by the language barrier, since the Sri Lankans spoke only Tamil and comprehensive investigations needed to take place to determine whether the detainees were victims of human trafficking. It was two months after the initial detention that interviews with the detainees commenced following the arrival of UK based investigators and interpreters. The investigation concluded that the detainees were victims of human trafficking and the main suspect, a man called Chelliah, was identified. Six other detainees were identified as potential witnesses in the criminal proceedings. Chelliah was ultimately extradited to Canada where he was convicted of human trafficking. The remaining detainees, including the three applicants were to be repatriated. The three applicants refused to sign Voluntary Departure Forms claiming that they did not wish to return to Sri Lanka for fear of what might happen to them upon return. A Notice of Intention to Make a Deportation Order had been given, but the order was made without any interview by an official with knowledge and experience of asylum applications in accordance with TCI law. The COVID-19 pandemic and the subsequent closure of borders delayed the proposed repatriation of the detainees. A writ of Habeas Corpus was issued on 20 April 2020 bringing the detainees before the court. At the conclusion of the hearing before the Chief Justice she held, dismissing the application, that the delay of six months in effecting repatriation was not unreasonable in the particular circumstances of the case. However, following the Chief Justice's decision, the United Nations Human Rights Commissioner for Refugees ('the UNHCR') subsequently interviewed and assessed the applicants and found them to

be genuine refugees entitled to proper humanitarian care and they were registered as such. The UNHCR requested their release. All of the detainees were conditionally released on 24 August 2020 after 320 days in detention. The detainees appealed the decision of the Chief Justice as to the lawfulness of their detention.

The Court of Appeal, by majority, allowed the appeal. In a decision, which I authored, we applied *Ex Parte Singh* principles. It was held that the legal principles relative to the power to detain had been breached by the respondent in that: (i) the power to detain was not used for immigration-related examinations, for which it was designed, but was actually used to investigate the human trafficking criminal offences; (ii) the period of time for which the appellants were detained was not reasonable in the circumstances as these were not criminals but vulnerable adults seeking refuge; (iii) there were indeed barriers to any removal of the appellants and therefore no purpose in properly detaining them while those barriers existed and no prospect of imminent removal; and (iv) no due diligence or expedition was demonstrated by the immigration authorities in discharging their responsibilities under the Immigration Ordinance.

The takeaway for the immigration authorities is that whilst they have a deportation order for an illegal immigrant, they need to take immediate and appropriate steps to secure their deportation. Where barriers are encountered and it becomes apparent that those barrier may not be surmounted, the continued detention of the immigrant, although initially lawful becomes unlawful.

In ***Ousman Bojang v AG***<sup>25</sup> the plaintiff was a national of the Republic of The Gambia who sought political asylum in The Bahamas. He was arrested when he visited the Department of Immigration to seek an extension on his visitor's status after overstaying. He was detained at the Carmichael Road Detention Centre. The Defendants attempted to repatriate Bojang to The Gambia on a flight via Cuba, but the attempt was unsuccessful because the Cuban authorities refused to allow Bojang entry for the passage to The Gambia. He was ultimately detained for 18 months. ***Justice Charles*** held that Bojang was unlawfully imprisoned as he was never taken before the court or charged with an offence and was not the subject of any deportation order. As such, his Constitutional rights under Article 17(1) and Article 19 had been breached. In the circumstances he was awarded compensatory damages in the amount of \$161,100.

Bojang's case demonstrates one of the barriers which countries like The Bahamas encounters in circumstances where an application for asylum is refused. We do not have direct flights for many countries and repatriation often requires passage through third countries. The third countries often refuse passage of the detainee for fear that they will seek to claim asylum whilst they are in transit and rely on the asylum laws there. Cuba refused Mr Bojang entry into their country for in transit to The Gambia. The Immigration Authorities in the TCI case of Kajeepan saw similar challenges. In their efforts to repatriate the Sri Lankans. They had considerable difficulties in finding third countries through which to repatriate them.

The Detention Center

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<sup>25</sup> Ousman Bojang v AG 2017/CLE/gen/01166

Complaints have also been levied at the state of affairs at the Carmichael Road Detention Centre where migrants are ordinarily held. The site was converted into a detention center in the mid-1990s to accommodate the increasing number of migrants. Those conditions have been described as *consistently overcrowded and suffered from inadequate sanitation and medical care*. International reports often cite widespread, credible reports that immigration officials solicited bribes to facilitate better treatment. Human rights organizations and media reporting alleged that officials demanded payment in exchange for telephone calls and necessities such as sanitary napkins. You would recall the fire back in 2004, started by detainees, destroying two of the four dormitories. You would also recall back in 2013 the very public demonstrations in South Florida by activists alleging that Cuban detainees had been beaten by guards, denied access to adequate food, water and medical care, and deprived of the ability to file asylum claims while held in the detention center. There were also the hunger strikes by some detainees protesting the conditions, with six Cubans sewing their mouths shut in protest of conditions.

The state of the Detention Center was considered in the case of ***Ngumi v AG***. Charles J found on the evidence that he was kept in deplorable, inhumane and degrading conditions whilst being housed at the Detention Centre. In so finding, Charles J found that Ngumi's constitutional rights against cruel and inhumane treatment had been violated and sought to factor this into the calculation of the award he was entitled to.

### Irregular Communities aka Shanty Towns

One the most topical or headline catching immigration related issues today centers around the issue of irregular or informal communities, otherwise colloquially referred to as shanty towns. According to a report of the Department of Environment Health, called

*The Shanty Town Project 2013*<sup>26</sup>, Shanty Town” is defined as a cluster of dwellings which do not meet minimum environmental or regulatory standards with respect to water supply, solid waste management, sewage disposal, general aesthetics and structure. The report also states that many of the long term residents of these “shanty towns” have assimilated and are recognized as productive, law abiding citizens who contribute to the growth and development of this country. According to the report, many of the older occupants in these areas were farm laborers who were hired by diverse persons from throughout our society.

According to the more recent US State Departments Country Report 2022, speaking to the Shanty Towns, stated “*Informal communities housed thousands of predominantly Haitian migrants, internally displaced citizens of Haitian descent, and stateless persons whom the government accused of constructing structures that failed to meet the housing code.*.. In October 2022 on Abaco, immigration officers conducted multiple operations in one community, which grew from 50 to 200 acres between 2019 to *[the end of 2022]*, 4 times its size in just over 2 years.

Strictly speaking the issue with the Shanty Town it is not purely an immigration issue. The belief is that the majority of the residents of these communities are migrants, both legal and illegal. The real issue is that they are unregulated, representing cities within the city. Being unregulated, the housing is more acceptable to those migrants who wish to live on the fringes of communities and can only afford sub-standard housing conditions.

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<sup>26</sup> The Shanty Town Project 2013, Department of Environmental Health Services

Successive administrations have pledged to deal with these irregular communities which pose, health and security concerns for neighbouring residents and the wider community. There is also a widespread belief that the majority of these communities are located on crown owned lands.

In the case of ***R v Minnis et al ex parte Respect Our Homes Ltd. et al***,<sup>27</sup> 177 Applicants, claiming to be resident in shanty towns in New Providence and Abaco, along with a non-profit company, brought judicial review proceedings in 2018 against the Government challenging a policy they say was designed to “eradicate” Shanty towns. The Government had established a Shanty Town Task Force which the applicants argued, based upon utterance of the then Minister of Public Works, was to eliminate Shanty Towns in The Bahamas and to ensure that all residents of the Bahamas, occupy housing in approved subdivisions, by approved construction as per the terms governed by the regulatory agencies.

In the action, the applicants sought declaratory relief as to the lawfulness of the Governments action and injunctive relief. An interim injunction was granted in 2018. In a recent February 2023 decision the judicial review applications were dismissed by ***Grant Thompson J*** and the injunction discharged. The matter is now the subject of an appeal and makes its way to the Court of Appeal.

### **Asylum:**

Article 1A(2) of the 1951 Convention on the Status of Refugees and Stateless persons defines a refugee as a person who is outside his or her country of nationality or habitual

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<sup>27</sup> R v Minnis et al ex parte Respect our Homes Ltd. et al, 2018/PUB/jrv/27

residence; has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group or political opinion; and is unable or unwilling to avail him— or herself of the protection of that country, or to return there, for fear of persecution.

The Bahamas became a state party to the 1951 convention and the 1967 Protocol relating to the status of refugees and stateless persons on 15 September 1993<sup>28</sup>. Notwithstanding being a state party, The Bahamas has not passed legislation to give effect to its international obligations.

Notwithstanding this failure to enact legislation to permit asylum seekers to obtain a determination as to their refugee status in The Bahamas, there is an informal process which permits the attainment of refugee status. Helpfully, the website of the Immigration Department directs asylum seekers to that process for applying for a determination as to their refugee status.<sup>29</sup>

The Asylum seekers would *complete the necessary forms and undergo an interview. Assistance from the UNHCR and the IOM is had, to conduct the necessary research on the individuals' country of origin and an investigation of the migrant him/herself. At the completion of the Refugee Status Determination (RSD), an assessment of the case is decided.*

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<sup>28</sup> 1967 Protocol Relating to the Status of Refugees and Stateless Persons, the General Assembly resolution 2198 (XXI)

<sup>29</sup> <https://immigration.gov.bs>

The UNHCR has lamented that the lack of refugee legislation, policies, and contacts in the government complicated its work to assist asylum seekers and refugees in The Bahamas.

The 2020 US State Department Human Rights Report noted<sup>30</sup> that The Bahamas *did not issue any special refugee cards in 2020 to the approximately 30 asylum seekers during that year*. These cards would have allowed refugees to work in the country.

As a country we became a state party to the 1951 convention and the 1967 Protocol since 1993. Some 30 years later, whilst we have put in place ad hoc mechanisms to accept some asylum seeker to access asylum in The Bahamas, we have not honored our international obligations to enact legislation to formally provide for this to occur. The Government has shared proposed legislation which seeks to cure this deficit, but no such legislation has been tabled. We look forward to the completion of this process in satisfaction of our international obligations.

## **Conclusion**

I am reminded of the immigration quote that goes: *“the venerated Prophets Abraham, Moses, Jesus and Muhammad (God's peace and blessings be upon them) were immigrants and refugees. Without their emigration, humanity would have lost the priceless good they brought.”*<sup>31</sup> We must bear in mind that immigration is not of itself a dirty word, lawful immigration has always been encouraged in our country. I have already highlighted the contributions of so many immigrants to our national fabric. Without

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<sup>30</sup> Country Reports on Human Rights Practices for 2020 United States Department of State, Bureau of Democracy, Human Rights and Labor

<sup>31</sup> Imam Shpendim Nadzaku, Resident Scholar of the Islamic Association of North Texas *“Immigration strikes at the very heart of a central metathesiophobia, or fear of change.”*

immigration many of our leaders and icons would not be here: Stephen Dillet, Mable Walker, Sir Lynden Pindling, Glenys Hanna Martin, 50% of the Golden Girls, Clay Thompson, Rick Fox, DeAndre Ayton, I could obviously go on for days. And depending on how far I go back I could likely include everyone in this room.

We fast track permanent residency applications for high net worth individuals who buy second homes or engage in significant foreign direct investment. We have also accelerated status applications for young athletes who have exceptional athletic talents and are needed to participate on national teams.

I readily accept that for Bahamians, citizenship and immigration, in particular, are understandably, emotive issues for us. I think everyone accepts that it is the specter of illegal immigration which draws the ire of most Bahamians. We are not alone in grappling with illegal immigration which threaten the viability of many of our essential institutions. The Turks and Caicos Islands is our nearest neighbor both in geography and culture. They have some of the very same, if not more dire, challenges as we do with human trafficking and illegal immigration, particularly as it relates to Haitian migration, being closer to Haiti than we are. Governor Dakin recently reported that last year the TCI Police intercepted some 3,000 migrants at sea, whilst the US Coast Guard intercepted another 9,000 heading for their shores and probably ours.

Challenging legal issues relating to citizenship, immigration and asylum do exist in the Commonwealth of The Bahamas. As I have sought to demonstrate, many areas could benefit from an appropriate legislative intervention. But many other areas, such as applications for status and prolonged detentions, simply require proper due diligence, timely interventions and appropriate vigilance on the part of the immigration authorities.

As to arrest and detention, authorities must recognize that whilst someone may have entered our country illegally and breached our immigration laws, it does not mean that they have surrendered all of their rights at the border. The power to arrest and detain exists, but the use of these powers, which affect the subject's liberty, must be exercised properly and within the legal and constitutional framework.

Thank you.