COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 6 of 2022

B E T W E E N

BRADLEY BRATHWAITE COOPER

Intended Appellant

AND

(1) CLARENCE A. RUSSELL
(In his capacity as Director of Immigration)

(2) FAUSTEEN MAJOR-SMITH
(In his capacity as Officer in Charge of the Carmichael Detention Center)

(3) THE HON. KEITH RICARDO BELL
(In his capacity as Minister of Immigration)

(4) THE HON. RYAN PINDER
(In his capacity as Attorney General of The Bahamas)

(5) DR. RAYMOND KING
(In his capacity as Commandant of the Royal Bahamas Defence Force)
Intended Respondents

BEFORE: **The Honourable Mr. Justice Issacs, JA**
The Honourable Mr. Justice Evans, JA
The Honourable Madam Justice Bethell, JA

APPEARANCES: **Ms. Raven Rolle, Counsel for the Intended Appellant**

Mr. Kirkland Mackey with Ms. Sophia Lockhart, Counsel for the Intended Respondent

DATES: **28 March 2022; 13 July 2022; 11 August 2022**

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Civil appeal – Extension of time - Habeas corpus ad subjiciendum – Detention – Lawful detention - Sections 19, 40 and 41 of the Immigration Act - Rules 9 and 11 of the Court of Appeal Rules

The intended appellant is a Jamaican national who was granted entry in to The Bahamas on 7 September 2021 and given approval to remain in The Bahamas until 14 September 2021. On 11

September 2021 the intended appellant and others were apprehended off the coast of Miami by the United States Coast Guard (USCG) as part of a human smuggling operation. The vessel departed Bimini, destined for the United States. Two days later, on 13 September 2021, the intended appellant was transferred from USCG custody to the Bahamas Department of Immigration, Grand Bahama. The intended appellant was charged with the offence of illegal embarkation. On 14 September 2021 the intended appellant appeared before the Magistrate's Court in Grand Bahama. He was arraigned and pleaded guilty to the offence. He was convicted and ordered to remain in the custody of the Immigration Department for further processing. On 15 September 2021 the intended appellant was transferred to the Detention Centre in New Providence. Thereafter a Detention and Deportation Order was served on him.

The intended appellant applied for and was granted leave to file a Writ of habeas corpus ad subjiciendum, asserting that his detention was unlawful as there was no authority in the Immigration Department to detain him. His assertion was based on the premise that the section of the Immigration Act which he was convicted pursuant to did not enable the Magistrate to order that he remain in the custody of the Immigration Department for further processing. Further, he says that there is no valid detention as the return date on the Writ was 8 October 2021 and the Detention and Deportation Order were not signed by the Minister until 15 October 2021. While the learned judge agreed with the intended appellant that no reliance could be placed on the Detention and Deportation Order, he stated that this was not dispositive of the matter. The intended appellant also argued that reliance could not be placed on the magistrate's direction to justify his detention as the power to detain persons pending deportation is set out in sections 40 and 41 of the Immigration Act.

The learned judge refused to issue the Writ on 2 November 2021. The intended appellant now applies for an extension of time within which to appeal the decision of the court below.

Held: Extension of time application refused. Judge's refusal to grant the Writ of habeas corpus ad subjiciendum affirmed. No order as to costs.

On an application for an extension of time within which to appeal, the Court is required to consider four factors: the length of the delay, the reasons for the delay, the prospects of success and the prejudice, if any, to the respondent.

The delay of twenty-four days in the present case is moderately long and there is no reasonable explanation for the delay.

Relative to the prospects of success, the intended appellant was convicted pursuant to section 19 of the Immigration Act. Section 40 of the Immigration Act authorizes the Minister to make a deportation order if it comes to his knowledge that a person has been convicted of an offence against the laws of The Bahamas. The intended appellant's conviction was not mentioned in the initial Return but was stated in the 2nd Return.

The authorities may detain a person for a reasonable period of time to be processed by the Immigration authorities. The Return shows that the authorities were actively and timeously

working on the deportation of the intended appellant. The judge did not err by finding that the detention of the intended appellant following his conviction was justified.

As noted, the length of the delay in this case was "moderately" long, the explanation for such delay was unsatisfactory and there were no prospects of success. The extension of time application is refused.

Alexander Williams v Regina SCCrApp. No. 155 of 2016 considered
Atain Takitota v The Attorney General et al SCCivApp. No. 54 of 2004 applied
Derek G. Turner et. al. v Edward Turner et. al. SCCivApp. No.170 of 2013 considered
Douglas Ngumi v The Hon. Carl Bethel and others SCCivApp. No. 6 of 2021 considered
Exavier v Minister of National Security [1986] BHS J No. 98 considered
Glen Alexander Colebrooke and anor. v The National Insurance Board SCCivApp. No. 127 of 2008 considered
London Borough of Southwark v Nejad and Others [1999] 1 Costs L.R. 62 mentioned
Sherry v R [2013] UKPC 7 considered
Tan Te Lam and others v Superintendent of Taio A Chau Detention Centre and another [1996] 4 All ER 256 considered

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J U D G M E N T

Judgment delivered by the Honourable Mr. Justice Isaacs, JA:

1. On 13 July 2022, we heard the submissions of Counsel; and reserved our decision. We render it now.

2. The intended appellant makes application for leave of the Court to extend the time for appealing ("EOT application") so that he may challenge the decision of Mr. Senior Justice Bernard Turner ("the Judge") that denied the intended appellant's habeas corpus ad subjiciendum application on 2 November 2021. The EOT application was filed on 7 January 2022.

3. The EOT application is necessary because a person who is dissatisfied with a decision emanating from the Supreme Court is required to lodge his appeal within a period of time specified by the Court of Appeal Rules ("the Rules"), to wit, six weeks in relation to a final judgment and two weeks in relation to an interlocutory decision: Rule 11(1) of the Rules. In my view, the decision of the Judge to dismiss the habeas corpus application falls to be considered as a final judgment. Thus, the intended appellant was expected to file his appeal within six weeks of the date of the pronouncement of the judgment.

The Extension of Time Application

4. On an EOT application, an applicant asks the Court to exercise its discretion to enlarge the time for appealing pursuant to Rule 9(1)(a) of the Rules; but in doing so, the applicant is expected to explain a number of matters, to wit, the length of the delay, the reasons for the delay, the prospects of success of his grounds of appeal and prejudice, if any, to the respondent.

5. Allen, P (as she then was) in delivering the judgment in **Derek G. Turner et. al. v Edward Turner et. al.** SCCivApp. No. 170 of 2013 stated as follows:

> **"17 Notably, the court has an absolute discretion whether to grant leave to appeal out of time or not, but there are numerous authorities that have firmly established the factors which are normally taken into account in exercising such discretion. We have adopted those factors and took them into consideration in exercising our discretion in this case.**
>
> **18 The classic statement of the factors relevant to the exercise of the discretion to extend time within which to appeal are as stated by Griffiths LJ in CM Van Van Stillevoldt BV v El Carriers Inc [1983] 1 All ER 699, and are as McCowan LJ set them out in Norwich and Peterborough Building Society v Steed [1991] 2 All ER 800 as: (1) the length of the delay; (2) the reasons for the delay; (3) the chances of the appeal succeeding if time for appealing is extended; (4) the degree of prejudice to the intended respondent if the application is granted.**
>
> **19 Moreover, Lord Donaldson of Lymington MR in Norwich and Peterborough Building Society v Steed (above) [1991] 2 All ER 800, gives guidance on how the above considerations are applied to any particular case. He said at page 888 paragraph g:**
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> > **'Once the time for appealing has elapsed, the respondent who was successful in the court below is entitled to regard the judgment in his favour as being final. If he is to be deprived of this entitlement, it can only be on the basis of a discretionary balancing exercise, however**

blameless may be the delay on the part of the would-be appellant.'

20 Lord Donaldson MR further demonstrated how the balance was to be achieved, by reference to two cases at different ends of the spectrum of delay. In the case of Palata Investments Ltd. v Burt & Sinfield Ltd [1985] 2 All ER 517, where the delay was only three days which was fully explained, he noted that in such circumstances the balancing exercise would be unlikely to come down on the side of refusing an extension of time, but that in an extreme case of lack of merit it could do so.

21 This was compared to the case of Rawashdeh v Lane (1988) 40 EG 109 where the delay was six weeks. He referred to a passage from the judgment of Glidewell LJ in that case, who after quoting a passage from Ackner LJ in Palata's case, said as follows:

> **'There Ackner LJ was considering a case in which the time which had elapsed was very short; but suppose (as here), the reverse is the case. The time which has elapsed is lengthy and there is little valid explanation for it. Suppose, also that the prospective appellant (the tenant) wishes to argue that he has a good chance of success in his appeal. Should the court then go on to consider how great it thinks that chance is; or, should it simply say: 'You are very much out of time. You have given so little explanation for the delay that we are not prepared to consider the chances of a successful appeal?' In my view in such circumstances it is a relevant matter for the court to consider the merits of the appeal. We are not bound to do otherwise by the decision in Palata Investments Ltd. We therefore went on to hear argument on the merits, as to which I now turn.'**

22 Finally, Lord Donaldson said of the two cases:

> **'So it will be seen that that case (Rawashdeh) was the other side of the coin to that shown**

> **in Palata's case. In Palata's case the delay was as short as could be and was wholly excusable. The merits therefore played little part. In Rawashdeh's case the delay was very much longer- it was six weeks in fact- and was not wholly excusable. Much more merit was required to overcome it.'"**

6. The Court, differently constituted, in **Glen Alexander Colebrooke and anor. v The National Insurance Board** SCCivApp. No. 127 of 2008 referred approvingly to the decision of Waller, L.J. in **London Borough of Southwark v Nejad and Others** [1999] 1 Costs L.R. 62 where Waller, L.J. was considering an EOT application for lodging a Bill of Costs. At paragraph 21 of the Court's judgment the following appears:

> **"21. Waller L.J. in the case of London Borough of Southwark v. Nejad and Others [1999] 1 Costs L.R. 62, provides useful guidance in weighing the factor of prejudice when exercising the court's discretion in extending time within which to lodge a Bill of Costs. At page 69, the learned judge states:**
>
> > **'The question is whether the judge in this case applied the correct principles and/or was plainly wrong in concluding that this was a case in which an extension of time to lodge the bill should simply be refused…the courts should not adopt a mechanistic approach to questions of extending time. The court should not for example fetter itself from exercising a discretion to extend time simply because there is no explanation for the delay and in particular because there is no explanation which is acceptable as a reason for the delay. Each case will depend on its own circumstances. But I would emphasise the explanation given or the lack of it or the frankness of it are factors which the court is entitled to take into account in exercising its discretion, and the prejudice to the opposing party is also a factor to be placed in the scales, but is not necessarily determinative any more than any other factor. The exercise is one of balancing all the relevant factors, and where the result of not granting an extension will be draconian, the court is**

> **concerned to assess the proportionality of the resulting penalty to the applicant to his failure or failures.'"**

7. I turn then to consider the factors the Court is called upon to address and determine, bearing in mind Waller, J's injunction that the application must be approached with an open mind and that each case will turn on its own peculiar facts.

Length of delay

8. The length of delay in this case is that period of time between the time limited for appealing has expired and the date of the filing of the EOT application. In my view, as the decision of the Judge was a final decision, the intended appellant had to appeal within six weeks of 2 November 2021, that is, by 14 December 2021. The EOT application was filed on 7 January 2022. Thus, the delay in this case is to be calculated from 14 December 2021 to 7 January 2022, to wit, some twenty-four days.

9. The delay is said by the intended appellant to be moderately long as it is measured in days; and not months as was the case in **Derek G. Turner**.

10. The intended respondents do not appear to controvert the intended appellant's view that the delay is moderately long but they do take issue with the reason proffered for the delay. I accept the characterisation that the period of delay is moderately long, to wit, not unduly long in the circumstances.

Reasons for the delay

11. The reasons for the delay were outlined in paragraph 6.2 of the affidavit of Ms. Doneth Cartwright, a Registered Associate in the firm of Callenders & Co., filed in support of the Notice of Motion for leave to appeal out of time:

> **"6.2 Unfortunately the Notice of Appeal Motion was not filed by 24 (sic) December, 2021 as a result of Callenders receiving instructions to appeal the Judgment of Turner J after the time prescribed for lodging the appeal due to the Intended Appellants continued detention, subsequent, deportation and overall limited ability to communicate with Counsel."**

12. The paucity of information provided by the intended appellant to explain the delay in this case was highlighted by the intended respondents when they submitted that the attorneys have not provided details about any incident following the ruling of the Judge where they attempted to meet with their client during the nine days that he was detained prior to his deportation to

Jamaica; and were unable to meet with him. Further, there are no specifics given to the purported limited ability to communicate with the intended appellant.

13. Although various affidavits were sworn to by the intended appellant's Counsel, e.g., Mr. Ian Cargill, none deign to provide a single instance, post the decision of Turner, Sr. J., of being hindered, obstructed or otherwise unable to communicate with the intended appellant due to some impediment thrown up by the intended respondents or their agents; or at all.

14. Moreover, inasmuch as there is no averment that the various means of communicating with persons in Jamaica were not in operation during the material time, I hold the view that it was within the powers of the intended appellant and his advisors to speak telephonically or otherwise communicate by, e.g., Skype, WhatsApp or email.

15. I am satisfied, therefore, that there is no reasonable explanation provided by the intended appellant for the delay that has occurred in this case following the decision of the Judge.

Prospects of Success

16. Nevertheless, I proceed to consider the intended appellant's prospects of success because as Allen, P. noted at paragraph 15 in **Alexander Williams v Regina** SCCrApp. No. 155 of 2016:

> **"15. Inexorably, notwithstanding the length of the delay, and the absence of good or sufficient reasons for the delay, if the prospects of success of the intended appeal are good, then this Court would nevertheless grant an extension of time and hear the appeal, provided there is no prejudice to the other side."**

17. It must be appreciated, however, that even good prospects of success do not guarantee that the leave sought will be granted. In **Sherry v R** [2013] UKPC 7 at paragraph 14, Lady Hale said:

> **"[14] The Board accepts that the merits of any proposed appeal are relevant to an application to extend time. At the very least, it must be shown that there is some merit in the proposed appeal before a court will consider whether the delay can be excused. If the appeal has no prospect of success, then it is in no-one's interests to allow it to proceed, however short or understandable the delay. Conversely, <u>if the appeal is bound to succeed, the court may look more kindly upon the reasons for the delay. But even in such a case it is by no means inevitable that permission will be granted.</u> It is in the interests of everyone that there be an end to litigation, both civil and criminal. The longer the delay, the better the explanation must be." [Emphasis added]**

18. The intended appellant's proposed grounds of appeal are:

> **"1. The learned Judge erred in holding that the Supplemental Return justified the Appellant's detention. The Supplemental Return was bad on its face as:**
>
> **a. The basis for the Appellant's detention as found by the Judge was an order of the Magistrate, which, according to the Supplemental Return and the Court docket, was purportedly made under section 19(2) of the Immigration Act;**
>
> **b. Section 19 (2) of the Immigration Act provides that a person convicted of an offence under section 19 is "liable on summary conviction to a fine not exceeding three hundred dollars or to imprisonment for a term not exceeding twelve months or to both such fine and Imprisonment",**
>
> **c. The Magistrate however purported to order that the Appellant "was to remain in immigration custody for further processing";**
>
> **d. That order for a custodial sentence of indeterminate length is not an order that the Magistrate had power to make under section 19(2) of the Immigration Act (not least because such a sentence could potentially lead to detention for in excess of 12 months);**
>
> **e. No other legal basis for the making of such an order by the Magistrate was advanced on the face of the return.**
>
> **2. The learned Judge erred in relying on the case of Ngumi to justify the Appellant's detention. This was not a matter relied upon by the Respondents in the Supplemental Return. The justifications for detaining the Appellant set out in the Supplemental Return were:**
>
> **a. The Order of the Magistrate said to have been made under section 19(2) of the Immigration Act (which was bad on its face, as set out in Ground 1 above); and**

b. A Detention and Deportation Order dated 15 October 2021, which the Judge correctly held at [14] to be a matter that could not justify the detention of the Appellant from 11 September 2021.

The learned Judge should accordingly not have relied upon a basis for the detention of the Appellant was (sic) which not even relied upon by the Respondents in their Original Return or Supplemental Return.

3. The learned Judge erred in any event (at paragraphs 26—32 of the Judgment) in holding that the case of Ngumi was applicable to this case:

a. In Ngumi detention was purportedly justified on the basis that the magistrate had "recommended deportation' which purportedly created a power of detention under section 41(4) of the Immigration Act ("... a person in whose case a recommendation for deportation is in force under section 40 shall....be detained...";

b. In the present case, however, the magistrate did not make a "recommendation for deportation". No such "recommendation" appears on the Magistrates' Court docket. The statutory basis purportedly underpinning the decision in Ngumi is absent in this case.

4. Even if the Magistrate had made a recommendation for deportation (which he did not) an order for detention based on such a purported "recommendation" would be bad on its face and not justify the continued detention of the Appellant:

a. There is no legal basis for a magistrate to make a "recommendation for deportation" under section 40 of the Immigration Act (which could then provide justification for detention under section 41(4) of that Act). There is no coherent construction of the wording of section 40 that can read as providing for such a power for a magistrate (and nor is any legal basis for a magistrate to make such a "recommendation" identified in Ngumi);

b. Any such power would usurp the powers and functions of the Minister and the Governor General to make deportation orders (under s.40 and s.41 of the Immigration Act respectively);

c. Ngumi itself did not decide this point, but failed to grapple with the issue of whether the Magistrate had any power to make a "recommendation for deportation" at all (and it should be noted that the Court of Appeal has now given leave for the case of Ngumi to be appealed to the Privy Council).

5. The learned Judge erred in law (at paragraph 36) in holding that any challenge to the decision of the Magistrate should be by way of appeal against that decision. In considering a writ of Habeas Corpus ad Subjiciendum the Court is entitled to consider whether an order is good on its face. In this case, no evidence is required to show that the Magistrate's order for an indefinite period of detention was outwith the powers he was purporting to exercise under section 19(2) of the Immigration Act."

History of the Appeal

19. In the intended respondent's reply (in the court below) to the intended appellant's further submissions, a background to this matter is outlined; and I set out paragraphs 4 through 12:

"4. The Applicant, Mr. Bradley Braithwaite Cooper was admitted entry into the Bahamas on the 7th day of September, 2021 and was given approval to stay in the (sic) Bahamas until the 14th day of September, 2021.

5. The Applicant, Mr. Cooper along with nineteen (19) migrants was interdicted on a Human Smuggling Operation by the United States Coast Guard eleven (11) nautical miles off Miami Florida on the 11th day of September, 2021. They claimed that the vessel departed Bimini, Bahamas on the 11th day of September, 2021 and they were destined for the United States.

6. The Applicant along with thirteen (13) other migrants was (sic) subsequently transferred from the United States Coast Guard transferred (sic) over to Bahamas

Department of Immigration, Freeport, and (sic) Grand Bahama on the 13th day of September, 2021.

7. Due to the fact that Mr. Cooper embarked a vessel in Bimini, Bahamas destined for the United States without the leave of any Immigration Officer and in particular, the place of embarkation was not an authorized port or at such other place as an Immigration Officer may in any particular case allow; Mr. Cooper was cautioned and charged with the offence of Illegal Embarkation contrary to Section 19(1)(a) and punishable under section 19(2) of the Immigration Act, Chapter 191.

8. In fact, the applicant voluntarily left the (sic) Bahamas on 11th of September, 2021 and entered United States territory and thereby bring (sic) his 7 day admission to the (sic) Bahamas to an end.

9. Further, when the (sic) Applicant transferred to the Freeport Immigration on the 13th September, 2021, and appeared before the Magistrate on the 14th September, 2021 the Applicant had no lawful status in the (sic) Bahamas.

10. On the 14th day of September, 2021, the Applicant appeared before Magistrate Lequay (sic) Laing, Court #3 in Freeport, Grand Bahama for a first plea. He was arraigned and pleaded guilty to the charge. Mr. Cooper was subsequently convicted with no fine and ordered to remain in Immigration custody for further processing.

11. On the 15th day of September, 2021, the Applicant was escorted to New Providence by the Bahamas Department of Immigration, Freeport Enforcement/Deportation Unit Officers and subsequently committed into Department of Immigration Detention Centre located at Golden Isles Road.

12. The Applicant Mr. Cooper, is a Jamaican national (sic) does not possess a Bahamian Citizenship nor is he a Permanent Residence (sic). He has been convicted of an offence against the Immigration Act namely, Illegal Embarkation contrary to section 19(1)(a) and punishable

under section 19(2) of the Immigration Act, chapter 191, Statute law of the (sic) Bahamas. As a result, a detention and deportation order was personally served and read to the Applicant, Mr. Bradley Braithwaite Cooper."

20. I note that in the intended appellant's submissions it is stated that he has a Jamaican passport. I note also that he does not claim that it was in his possession when he was transferred into the custody of the Immigration authorities by the United States Coast Guard.

21. In the court below, the intended appellant contended that he was being detained unlawfully as there was no authority in the Immigration Department to hold him. Thus, he applied for and was granted leave to file a Writ of habeas corpus ad subjiciendum ("the Writ") to test the legality of his detention and possibly gain his freedom. The authorities were being called upon to satisfy the Judge as to the legality of the detention of the intended appellant.

22. In the body of the Writ, the following appears:

> **"WE COMMAND you that you have at 9:45a.m. on Friday, 8th October, 2021 before the Honourable Mr. Senior Justice Bernard Turner, of the Supreme Court of the Commonwealth of The Bahamas situate on Bank Lane on the Island of New Providence, one of the islands of the Commonwealth of The Bahamas, on the day and time specified herein and in the notice served with this writ, the body of Bradley Braithwaite Cooper, being taken and detained under your custody as is said, together with the day and cause of his being taken and detained, by whatsoever name he may be called therein, that our Supreme Court may then and there examine and determine whether such cause is legal, and have you there then this writ." [Emphasis added]**

23. The intended respondent produced a Return to the Writ ("the Return") which does not appear to have been filed in the Supreme Court's Registry, but which set out the following:

> **"The return to this writ on behalf of the Respondents herein appears by Schedule annexed to the said writ as follows:**
>
> **Schedule**
>
> **I, Fausteen Major-Smith, Officer in Charge of the Carmichael Detention Center, declare that I am duly**

authorized to make this return on behalf of myself and the Respondents named in the writ to which this return is annexed.

I do hereby certify that on 11th September 2021, the Applicant was found on a vessel eleven (11) nautical miles off Miami, Florida without leave of an Immigration (sic) Officer. On the 14th of September, 2021, the Applicant appeared before Magistrate L. Laing, Court #3 where he was arraigned and pleaded guilty. He was then ordered to remained (sic) in the custody of the Department of Immigration for further processing.

On the 15th of September, 2021, the Applicant was brought into the custody of the Department of Immigration Detention Centre located at Carmichael Road. At the time he was taken into the said custody, he did not possess a passport or a travel documentation (sic) identifying him as a citizen of Jamaica. The Department of Immigration liaised with the Jamaican Honorary Consulate and the Ministry of Foreign Affairs in order to obtain the necessary travel documentation.

At that time, the Department of Immigration was advised that Mr. Patrick Hanlan had retired and the new person assuming the position was Ms. Tyrell Butler. Once the Department of Immigration reached out to Ms. Tyrell Butler, she informed the Department that she herself will be retiring and Mr. Patrick Hanlan will be resuming that position. The Department of Immigration then made a request to the Ministry of Foreign Affairs for assistance in obtaining the travel documentation for the Applicant and subsequently forwarded the relevant information to the Ministry of Foreign Affairs. The Ministry of Foreign Affairs also instructed the Department of Immigration to also forward the documentation over to Mr. Patrick Hanlan.

At this present time the Department of Immigration is awaiting the travel documentation from either the Ministry of Foreign Affairs or Mr. Patrick Hanlan.

I do hereby certify and return in obedience to the said writ that BRADLEY BRAITHWAITE COOPER, the subject named therein, at the time of the application for the writ and the issuing of the said writ was detained at the Carmichael Detention Center pending the travel

documentation necessary for his removal from the (sic) Bahamas." [Emphasis added]

24. The intended respondent applied for and was granted leave – despite the objections of the intended appellant – to file a Supplemental Return ("the 2nd Return"). On 15 October 2021, the 2nd Return was filed. It essentially repeated what was stated by Mrs. Major-Smith earlier in the Return, but did add that:

> **"In particular, stated on the face the Freeport Magistrate Court docket filed in the Magistrate (sic) Court Registry on the 14th day of September, 2021.**
>
> **'NATURE OF COMPLAINT**
>
> **ILLEGAL EMBARKINATION (sic): Contrary to Section 19(1)(a) and punishable under Section 19(2) of the Immigration Act, Chapter 191, Statute Law of The Bahamas, Revised Edition 2000.**
>
> **Particulars are:**
>
> **That you on Saturday 11th September, 2021 were found on a vessel in waters eleven nautical miles off Miami, Florida destined for a place outside The Bahamas without the leave of an Immigration Officer.**
>
> **On the 14th September 2021, the def. appeared before Mag. Laguay Laing, Court #3 for first plea. He was convicted with no fine & ordered to remain in immigration custody for further processing.'"**

25. Also added to the 2nd Return was the following:

> **"There is a Detention and Deportation Order for the Applicant's removal from The Bahamas."**

26. The intended appellant argued that the section of the Immigration Act under which he was convicted did not enable the magistrate to make an order that he remain in Immigration custody for processing. Thus, there was no valid detention disclosed on the Return; nor in the Supplemental Return because the Detention and Deportation Order signed by the Minister responsible for Immigration was not issued until 15 October 2021, well after leave to issue the Writ had been granted and the initial return date of 8 October 2021.

27. The Judge agreed with the intended appellant that no reliance could be placed on the Detention and Deportation Order "to justify the applicant's detention which, according to the return, was from the 11September 2021". However, as he stated, that was not dispositive of the matter.

28. It was also the intended appellant's position that the intended respondent's reliance on the magistrate's direction that he be detained for processing could not legally justify his detention. His Counsel, Mr. Frederick Smith, QC argued in the court below, and repeated by Ms. Raven Rolle before us, that the power to detain a person pending deportation is set out in sections 40 and 41 of the Immigration Act.

29. The Judge refused to issue the Writ; and in so doing, he made reference to **Douglas Ngumi v The Hon. Carl Bethel and others** SCCivApp. No. 6 of 2021 and said at paragraphs 29-32 of his judgment that:

> **"29. Notwithstanding the absence of a deportation order, both the Learned Trial Judge and their Lordships noted, without disapproval, the fact that the Magistrate had recommended deportation and then went on to recognize and approve that a period of time was necessary for the authorities to organize the removal from The Bahamas of the person. That period, in that case, was determined to be three (3) months. During that period, their Lordships accepted, the appellant was in lawful detention.**
>
> **30. In Ngumi, the Learned Magistrate recommended deportation (see paragraph 17 ibid). In this matter the Learned Magistrate ordered the convict (as he was, upon his guilty plea and conviction for an immigration Act offence) to remain in the custody of the Immigration authorities to be further processed.**
>
> **31. That processing, can only reasonably be understood to be for the purposes of his removal from The Bahamas, having pleaded guilty to illegally embarking on a vessel without the leave of an immigration officer. As the affidavit of the respondents noted, the applicant, a Jamaican national, had legally arrived in The Bahamas on 7 September 2021 and been given seven (7) days to remain in The Bahamas. His being found 11 miles off of the coast of the United States on a vessel effectively means that he had brought his period of being lawfully in The Bahamas to an end during the course of an illegal embarkation from The Bahamas."**

30. It is not lost on the Court that in **Ngumi** the magistrate had made a "recommendation" that Mr. Ngumi be deported, but in the instant case the magistrate said that the intended appellant was **"to remain in Immigration custody for further processing".** Neither formulation by the respective magistrate can underpin the detention of any person under section 19(2) of the

Immigration Act, contended the intended appellant, as that section does not speak to anything other than imprisonment or a fine or both. The section reads:

> **"19. (2) Any person landing or embarking in The Bahamas in contravention of this section shall be guilty of an offence and liable on summary conviction to a fine not exceeding three hundred dollars or to imprisonment for a term not exceeding twelve months or to both such fine and imprisonment."**

31. That having been said, I turn to consider the proposed grounds.

Ground 1 - The learned Judge erred in holding that the Supplemental Return justified the Appellant's detention. The Supplemental Return was bad on its face

32. The intended appellant submitted that the intended respondent had failed to show any justification for his detention by the Immigration authorities; and that the Judge had erred when he held that the "order" of the magistrate who had convicted the intended appellant of illegal embarkation contrary to section 19(1) of the Immigration Act, provided a proper basis for the detention of the intended appellant. The contested order was that the intended appellant be detained, "for further processing" by the Immigration authorities.

33. I outlined at paragraph 30 above, the penalty a person convicted of a section 19(1) offence could receive and I have noted the intended appellant's submission that his detention could not be authorised by the Magistrate. Strictly speaking that is a correct position. However, as a practical matter, he would be in those circumstances detained for a time, however short, to complete his processing out of custody, for example, to complete the necessary paperwork to effect his release and perhaps return his personal effects. It could not be seriously argued that for that compass of time to satisfy administrative steps, the intended appellant was being detained unlawfully. There is bound to be some lag time between the steps taken to effect removal and the actual removal from the country.

34. Sections 40 and 41 of the Immigration Act state as follows:

> **"40. (1) If at any time after a person, other than a citizen of The Bahamas or a permanent resident, has landed in The Bahamas, it shall come to the knowledge of the Minister that such person —**
>
> > **(a) has landed or remained in The Bahamas contrary to any provisions of this Act;**

(b) has been convicted of any offence against this Act or of any other offence punishable on indictment with death or imprisonment for two years or upwards; or

(c) is a person whose presence in The Bahamas would in the opinion of the Board be undesirable and not conducive to the public good,

the Minister may make an order (hereinafter referred to as a "deportation order") requiring such person to leave The Bahamas within the time fixed by the deportation order and thereafter to remain out of The Bahamas.

(2) Where a deportation order is made in respect of a person who immediately before the making thereof was lawfully within The Bahamas under the provisions of this Act, a copy of the order shall be served upon him by an Immigration Officer or by any police officer and he shall be entitled within the period of seven days next following the date of such service to appeal in writing to the Governor-General against the making of the order.

41. (1) Subject to the provisions of subsection (5) of this section any person in whose case a (sic) order has been made may be placed, under the authority of the Governor General, on board any ship or aircraft which is about to leave The Bahamas and the master of the ship or commander of the aircraft shall, if so required by an Immigration Officer, take such steps as may be necessary for preventing the person from landing from the ship or aircraft before it leaves The Bahamas, and may for that purpose detain the person in custody on board the ship or aircraft.

(2) The Governor-General or an Immigration Officer may give directions to the master of any ship or commander of any aircraft which is about to leave The Bahamas, requiring him to afford to any person in whose case a deportation order has been made, and to his dependants (sic) (if any), a passage to any port specified in the directions, being a port at which the ship or aircraft

is to call in the course of its voyage, and proper accommodation and maintenance during the passage.

(3) The Governor-General, may, if he thinks fit, apply any money or property belonging to any such person as aforesaid in payment of the whole or any part of the expenses of or incidental to the voyage from The Bahamas and the maintenance until departure of the person and his dependants (sic) (if any).

(4) Subject to the provisions of subsection (3) of this section any person in whose case a deportation order has been made may be detained, under the authority of the Governor-General until he is dealt with under subsection (1) of this section; and a person in whose case a recommendation for deportation is in force under section 40 shall (unless the court, in a case where the person is not sentenced to imprisonment, otherwise directs) be detained until the Governor-General makes a deportation order in his case or directs him to be released.

(5) A person in whose case a deportation order is made who is entitled in accordance with the provisions of subsection (2) of section 40 to appeal to the Governor-General against the making of the order, shall not be placed upon a ship or aircraft under the provisions of subsection (1) or detained under the provisions of subsection (4) of this section until the expiration of the period of seven days from the date of service upon him of a copy of the order or, in the event of his making such an appeal, until the decision of the Governor-General thereon is known".

35. The state of affairs envisaged by sections 40 and 41 of the Immigration Act is of some moment to the present appeal. The intended appellant's Writ demanded that the intended respondents explain the reason or reasons for the intended appellant's detention. The Return purported to do just that when it said, inter alia:

> **"… the Applicant appeared before Magistrate L. Laing, Court #3 where he was arraigned and pleaded guilty. He was then ordered to remain in the custody of the Department of Immigration for further processing.**

…

I do hereby certify and return in obedience to the said writ that BRADLEY BRAITHWAITE COOPER, the subject named therein, at the time of the application for the writ and the issuing of the said writ <u>was detained at the Carmichael Detention Center pending the travel documentation necessary for his removal from the (sic) Bahamas</u>." [Emphasis added]

36. According to section 40(1) of the Immigration Act, the Minister may make a deportation order if it comes to his knowledge that a person **"has been convicted of any offence against this Act…".** The Return did not say that the intended appellant had been convicted of illegal embarkation. However, the 2nd Return stated that he had been convicted. The question that must be answered is, was the Judge entitled to rely on the 2nd Return?

37. As a practical matter, a person having committed an Immigration offence could only come to the knowledge of the Minister through the instrumentality of his officers or through the officers of some other agency. Given that the Minister will have to be apprised of the circumstances surrounding the events that give rise to the possibility of his exercise of discretion under section 40, in my view, the authorities may detain a person for a reasonable period of time for the Minister to deliberate and to act.

38. It would defy logic that an agency statutorily required to ensure that a person who has no legal status in The Bahamas and who has breached the Immigration laws of The Bahamas, would stand by and allow such a person to be free without let or hindrance, to roam about the country pending transmission of the information that the Minister will require to make a determination on whether or not to issue a deportation order.

39. Sawyer, P in **Atain Takitota v The Attorney General et al** SCCivApp. No. 54 of 2004 said at paragraph 80 of her judgment:

"80. If it had been proven earlier on that the appellant had landed in The Bahamas illegally, such a decision would have justified the detention of the appellant for a "reasonable period of time" in order to return him to his homeland."

40. Mr. Takitota was an individual who claimed to be Japanese, but who the Japanese Government was unable to confirm was one of the country's nationals. A deportation order was issued by the Minister of Employment and Immigration, Alfred Maycock in 1992; and it was on the strength of that order that Mr. Takitota was detained by the State **"for approximately 8 years and two months on the only ground stated in the detention order that he was "an**

undesirable and his presence was not conducive to the public good". He had not been taken before a court or charged with any offence.

41. He was released from custody in 2000 by Marques, Snr. J. through a habeas corpus application. Shortly thereafter he sued for, inter alia, breaches of his constitutional rights. Longley, J:

> **"…quashed the deportation order, awarded the appellant the sum of $1,000.00 in damages for his unlawful detention during the "brief" period he was in custody before the issue of the deportation order, and declared that the appellant's rights under Articles 17 and 19 of the Constitution had been breached and were likely to be breached."**

Mr. Takitota appealed to the Court.

42. At paragraph 81 of her judgment, Sawyer, P observed:

> **"81. … until a court had decided that he had breached the law, there was no legitimate basis on which the deportation order itself could have been made…"**

43. Ultimately, the Court found, inter alia, that Mr. Takitota's constitutional rights had been breached and awarded him some $500,000.00 in damages. That sum was increased by consent by the Court following an appeal to the Privy Council and a further consideration of the sum by the Court pursuant to the opinion expressed by their Lordships.

44. The point made in **Takitota** is that a person may be detained for a reasonable period of time to be processed by the Immigration authorities. The crucial consideration is "reasonable".

45. In **Exavier v Minister of National Security** [1986] BHS J No. 98, Gonsalves-Sabola, J. (as he then was) considered claims for, inter alia, constitutional relief and orders of certiorari and prohibition in relation to the detention of a group of Haitian nationals who had been charged with illegal landing or overstaying. They had pleaded guilty before Stipendiary and Circuit Magistrate Mr. George Meerabux, were convicted and ordered to pay a fine or serve two months' imprisonment; and were recommended to be deported.

46. The group appealed complaining that they did not receive a fair trial and alleged "assembly line justice". I do not mention here any more than pertains to paragraph 24 of the decision:

> **"24 I now make a general observation arising from the contention that the applicants' trial was not fair because**

> **they were not given the opportunity to pay the fine imposed. There was no official available after sentence was passed to receive fines. But even if each applicant was minded to pay or had paid the fine imposed, he was not, in the circumstances which occurred, entitled to be free following his conviction. The reason is that the Magistrate had recommended deportation in each case…"**

47. By a process of statutory interpretation – "ut res magis valeat quam pereat" Gonsalves-Sabola, J. concluded at paragraph 26 as follows:

> **"26 So, reading section 37(4) with the transposition made, it is mandatory, on a recommendation of deportation being made and the court not directing otherwise, for the convicted defendant to be detained until the Minister makes a deportation order. The significance of this circumstance is that the imposition of a fine did not create even a spes of freedom immediately following the sentencing by the Magistrate. The payment of the fine would not have entitled a defendant as a recommended deportee to go free pending the making of a deportation order. Therefore, the fact that the proper office to receive the fine was closed on the evening of his sentence is not capable of inducing the exercise of the court's discretion to quash the sentence by way of certiorari."**

48. Although a decision of a judge at first instance, the conclusion of Gonsalves-Sabola, J. commends itself to me as it accords with the view I hold, albeit that I arrived by a different route.

49. I do not agree that sections 40 and 41 of the Immigration Act are the only bases upon which a person may be detained pending deportation. Although not strictly fitting into the circumstances of this case, I set out sub-section 19(3) of the Immigration Act:

> **"19. (3) The Director of Immigration may by order in writing direct the removal from The Bahamas of any person who has been convicted of an offence against the provisions of subsection (2) of this section and has been sentenced therefor to a term of imprisonment, and such person may, at any time before the expiration of his sentence, be placed on board any ship or aircraft about to leave The Bahamas and which is specified in the order**

> **and shall be deemed to be in legal custody until the departure of such ship or aircraft."**

50. Had the intended appellant been sentenced to a term of imprisonment, the Director of Immigration could have at any time during the currency of that sentence "**direct the removal from The Bahamas of"** that person. Thus, it can be said in those circumstances, that the person is detained pending deportation. As Shakespeare noted in his timeless love story, Romeo and Juliet, "What's in a name? That which we call a rose by any other name would smell as sweet".

51. In the headnote of **Tan Te Lam and others v Superintendent of Tai A Chau Detention Centre and another** [1996] 4 All ER 256 a decision by the Privy Council relating to illegal immigration in Hong Kong, a case referred to by Sawyer, P. in **Takitota,** the Privy Council said:

> **"(2) The question whether the applicants could be repatriated to Vietnam and were therefore being detained pending removal was prima facie a jurisdictional question; if removal was not pending within section 13D of the Immigration Ordinance, the director had no power to detain at all. Accordingly, that question was for the court to determine and it was for the director to prove to the court, on the balance of probabilities, the facts necessary to justify the conclusion that the applicants were being detained pending removal…" [Emphasis added]**

52. The State must be given some leeway when seeking to deport or to otherwise process a person since, as the 2nd Return clearly showed, and which is borne out in the authorities, impediments of one sort or the other are thrown up either through the intransigence of the receiving country such as occurred in **Tan Te Lam** or the inability to authenticate the person's nationality such as occurred in **Takitota**.

53. The Return disclosed that the intended respondents were actively and timeously working on the deportation of the intended appellant. Indeed, a Detention and Deportation Order was signed by the third intended respondent on 15 October 2021.

54. I hold the view, therefore, that the Judge has not erred by finding that the detention of the intended appellant by the intended respondents following upon his conviction in the Magistrate's Court was justified by the 2nd Return. In the premises this ground does not hold out any prospect of success.

Ground 2 - The learned Judge erred in relying on the case of Ngumi to justify the Appellant's detention…

Ground 3 - The learned Judge erred in any event … in holding that the case of Ngumi was applicable to this case

Ground 4 - Even if the Magistrate had made a recommendation for deportation (which he did not) an order for detention based on such a purported "recommendation" would be bad on its face and not justify the continued detention of the Appellant

55. Inasmuch as I have found that there are no prospects of success in ground 1, I do not need to enter upon a consideration of grounds 2, 3 and 4 as their determinations would not affect my view on the disposition of this EOT application. Hence, I do not do so.

Ground 5 - The learned Judge erred in law … in holding that any challenge to the decision of the Magistrate should be by way of appeal against that decision...

56. This ground may be answered rather tersely since it does not affect the outcome of this EOT application. Unlike the proviso to Article 28(2) of the Constitution, the Supreme Court is not precluded from providing redress from a detention that is not authorized according to law via the issuance of the Writ, merely because the person may have an alternative adequate means of redress. Additionally, I am not certain how an appeal against the magistrate's "order" would be couched since it is not a sentence recognised in law. The magistrate's pronouncement does no more than articulate what would have happened in any event because the intended appellant would have had to be detained pending processing. It is mere surplusage.

57. Thus, in my view, the Judge erred in holding that the intended appellant could only challenge the magistrate's decision by way of an appeal. Nevertheless, as I said earlier, this ground does not affect the outcome of the EOT application.

Conclusion

58. Although the length of the delay in this case was "moderately" long, the explanation for such delay was unsatisfactory. Moreover, the prospects of success for this appeal – save for ground 5 which is inconsequential to the disposition of the EOT application - were nonexistent. Thus, leave to appeal out of time is refused.

Disposition

59. The EOT application is refused. The decision of the Judge refusing to grant the Writ is affirmed. No order as to costs.

The Honourable Mr. Justice Isaacs, JA

60. I agree.

The Honourable Mr. Justice Evans, JA

61. I also agree.

The Honourable Madam Justice Bethell, JA