BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2010/0105

BETWEEN:

IN THE MATTER of Section 40 of the Immigration and Passport Ordinance, Cap. 130 of the Revised Edition 1991 of the Laws of the Virgin Islands

-AND-

IN THE MATTER of Statutory Instrument No. 10 of 2010 –Deportation Order dated 26th day of March, 2010

-AND-

IN THE MATTER of article 18 of the Constitution of the Virgin Islands, Order 2007

-AND-

IN THE MATTER of an Application by Desmond Emanuel Alphonso for redress pursuant to article 31 of the said Constitution, for the likely contravention of article 16(9) thereof, in relation to him

Applicant

AND

The Attorney General of the Virgin Islands

Respondent

Appearances:
Mr. Stephen Daniels of V.E. Malone & Co. for the Applicant
Ms. Karen Reid, Senior Crown Counsel, Attorney General's Chambers for the Respondent

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2010: December 02
2011: February 08

Immigration – Deportation – Alien convicted of offence punishable with imprisonment for three months or more – Governor issued deportation order – Alien appealed the deportation

order – Order made in due form as exercise of executive power of State – Alien filed Origination Motion in High Court challenging that Governor should not hear the appeal – Appeal stayed pending hearing of these proceedings - Whether alien has a right at law to be given reasons for the making of the expulsion order - exercise of executive powers of State – Right to deport or expel alien from State at pleasure - Immigration and Passport Act, cap. 130, sections 40 (1) and 40(3) referred.

Alien's constitutional rights –Fundamental rights – Article 16(9) of Constitution – Right to fair hearing in determining "civil rights and obligations" – Non-applicability of article 16(9) to deportation order proceedings – Freedom of movement – Article 18 of Constitution- Principles of natural justice – Whether Governor would be impartial on hearing appeal - *audi alteram partem* and *nemo judex in causa sua* rules inapplicable.

The applicant, a Guyanese national, is a well-known businessman in this Territory. He entered the Territory on 10 January 1971 when he was 14 months old. He alleged that he has never returned to Guyana. On 17 July 2008, he pleaded guilty to the offence of Assisting Offenders and was sentenced to 4 years imprisonment. Upon completion of his sentence, the applicant was served with a deportation order issued by His Excellency, the Governor in accordance with section 40(1)(b) of the Immigration and Passport Act, Cap. 130 ("the Act").

On 1 April 2010, in accordance with section 40(3) of the Act, the applicant appealed to the Governor against the deportation order. Prior to the hearing of the appeal, the applicant filed this present Originating Motion challenging the constitutionality of the appeal procedure. His main contention is that the hearing of the appeal by the Governor violates his right under article 16(9) of the Virgin Islands Constitution Order, 2007 ("the Constitution") to have a hearing before an independent and impartial tribunal established by law. He alleged that the Governor will not be independent or impartial since he is the same person issuing the deportation order and for this reason, there will be the appearance of bias.

The applicant seeks a Declaration that section 40 (3) of the Act is inconsistent with article 16(9) of the Constitution, as guaranteed by article 18 thereof, and is therefore unconstitutional, null and void. He also seeks a Declaration that the laws governing his deportation from the Territory should be done pursuant and consistent with section 40(1) of the Act and article 18 of the Constitution.

During the pendency of this action, the hearing of the appeal before the Governor has been stayed. Also, during this time, a new Governor has been appointed to the Territory.

HELD:

1. The applicant cannot challenge the validity of the deportation order on the day of the hearing of the action without giving the other party adequate notice. To do so is contrary to the principles of pleadings: **Cedric Liburd v Eugene Hamilton and the Attorney General of St. Christopher & Nevis**, Claim No. SKBHCV2010/0020 [unreported]; **London Passenger Transport Board v Moscrop** [1942] AC 332 and **Waghorn v George Wimpey** [1970] 1 All ER 474.

2. Parliament has expressly empowered the Governor to make deportation orders as he thinks fit. Nowhere in the Act is there any provision to indicate that it was ever intended that an alien should be heard or have the right to make representation before the making of the deportation order or that the Governor should give reasons for his decision: see **R v Leman Street Police Station Inspector, and Secretary of State for Home Affairs, ex p. Venicoff** [1920] 3 K.B. 72; **Rolf Brandt v A.G. of Guyana et al** (1971) 17 W.I.R. 448, **England and Another v Attorney-General of St. Lucia** (1989) 35 W.I.R. 171 and **Reg. v Brixton Prison (Governor) ex p. Soblen** [1963] 2 Q.B. 243. Be that as it may, the reasons for the applicant's deportation are intrinsic in the deportation order and they are known to him namely that: (i) he is an alien; (ii) he has been convicted of an offence punishable with imprisonment for three months or more and (iii) he is a prospective candidate for deportation.

3. Article 16(9) of the Constitution is only engaged in respect of a dispute or contestation about civil rights and obligations. Deportation of aliens does not concern the determination of civil rights or obligations. Therefore, article 16(9) is not applicable to deportation orders: **Maaouia v France** (Application no. 39652/98 delivered on 5 October 2000.

4. A State has the exclusive right of determining the entry, residence and expulsion of aliens within its domain though it recognized that an alien has limited rights in accordance with article 18 of the Constitution.

5. Parliament has conferred upon the Governor, as the representative of the British monarch, the powers to exclude undesirable aliens who have criminal convictions from this Territory for the public good. The extent to which an alien is afforded any remedy with respect of the exercise of this power, is limited strictly to what Parliament has decided should be allowed: **Rolf Brandt v A. G. of Guyana et al** (1971) 17 W.I. R. 448 at page 462.

6. The right which an alien has is the right of appeal to the Governor. This right is a creature of statute. The law is that where a statute creates a right and a corresponding remedy, the person seeking to enforce that right can only seek to do so by the remedy provided: **Barraclough v Brown** (1897) A.C. 615 at page 619 and **Pasmore v Oswaldtwistle UDC** (1898**)** AC 387.

7. Article 18 of the Constitution means exactly what is says: that an alien has the right to have his deportation order reviewed by a competent authority prescribed by law. That competent authority is no other than the Governor himself. Parliament has conferred such power on him and the Court cannot intervene in the affairs of Parliament.

8. The principles of natural justice are inapplicable to these present proceedings. In any event, the applicant has not adduced any cogent evidence to demonstrate that the Governor will be biased when he comes to consider this case. Furthermore, the Governor who issued the deportation order has retired and the Territory has a new Governor.

9. The fact that the legislature permits one body to perform both investigative and adjudicatory functions, that in itself, is not sufficient to find that the body is itself biased or that a conflation of powers infringes upon constitutional rights. In any event, disqualification

must be founded upon some act of the body going beyond the performance of the duties imposed upon it by the enactment under which proceedings are conducted. In order to disqualify the body, in this case, the Governor, from hearing the appeal, some act going beyond his statutory duties must be found. No such allegations were made in this case.

10. There is no cogent evidence to support any finding of bias on the part of the Governor. The court ought not to lightly hold that high office holders, in this case, the representative of Her Majesty, the Queen and the de facto head of state of this Territory, who take oaths to discharge their functions faithfully, are guilty of bias or improper motives especially where they act in good faith in pursuance of the powers accorded to them by law: **Hamilton Properties Limited v Minister of the Environment and anor** (CA 264 of 1994) – Supreme Court of Bermuda.

11. In cases of deportation, a dilemma may occur between the interests of national security on the one hand and the rights of the individual on the other. The balance between the two is not for the court but for the Governor. He is the person entrusted by Parliament with the task of determining the appeal of a deportation order. This is not a matter for the court.

JUDGMENT

Introduction

[1] **HARIPRASHAD-CHARLES J:** On 10 January 1971, Desmond Alphonso arrived in the British Virgin Islands.[1] At the time, he was a toddler, only 14 months old. He grew up in this Territory. He attended school here and in 1989, he graduated from the BVI High School (now the Elmore Stoutt High School). On 30 March 1984, he was granted a Certificate of Residency. He alleged that he has never been back to Guyana, the country of his birth.

[2] Mr. Alphonso is a prominent businessman in the Territory. He owns substantial properties here. On 17 July 2008, he pleaded guilty to the offence of Assisting Offenders. A high court judge sentenced him to 4 years imprisonment. Upon completion of his sentence, Mr. Alphonso was served with a deportation order dated 26 March 2010 ("the deportation order") issued by His Excellency, the Governor ("the Governor"), in accordance with section 40(1)(b) of the Immigration and Passport Act. ("the Act") [2]

[1] In this judgment, "the British Virgin Islands is referred to as "the Territory".
[2] Cap. 130 of the Laws of the Virgin Islands, Revised Edition, 1991.

[3] On 1 April 2010, Mr. Alphonso lodged an appeal against the deportation order. Prior to the hearing of the appeal, Mr. Alphonso filed the present Originating Motion challenging the constitutionality of the appeal procedure. At the heart of his contention is that the Governor ought not to hear his appeal as he is the same person who made the deportation order and, consequently, he will not be impartial, which offends article 16(9) of the Constitution of the Virgin Islands, Order 2007 ("the Constitution"). It is worth mentioning that the Governor who made the deportation order has since retired and the Territory now has a new Governor.

[4] On 9 June 2010, the court stayed the appeal procedure pending the outcome of these proceedings. Mr. Alphonso seeks the following:

1) A Declaration that section 40(3) of the Act is inconsistent with article 16(9), as guaranteed by article 18 of the Constitution and is therefore unconstitutional, null and void and

2) A Declaration that the laws governing his deportation from the Territory should be done pursuant and consistent with section 40(1) of the Act, and article 18 of the Constitution.

The constitutional framework

[5] Article 16(9) of the Constitution speaks to the entitlement of a person to a "fair hearing" for the determination of the existence or extent of his "civil rights and obligations". It says:

> "For the determination of the existence or extent of his or her civil rights and obligations, every person shall have the right to a fair hearing within a reasonable time before an independent and impartial court or other authority established by law."

[6] Article 18 guarantees the freedom of movement of persons. Article 18(1) provides as follows:

> "A person shall not be deprived of his or her freedom of movement, that is to say, the right to move freely throughout the Virgin Islands, the right to reside in any part of the Virgin Islands, the right of a person who belongs to the Virgin Islands or on

whom residence status has been conferred by law to enter and leave the Virgin Islands, and immunity from expulsion from the Virgin Islands."

[7] Article 18(3)(c)(iii) states as follows:

> "Nothing in any law or done under its authority shall be held to contravene this section to the extent that the law in question makes provision …(c) for the imposition of restrictions on persons who do not belong to the Virgin Islands; but…(iii) no such person shall be liable, by virtue only of this paragraph, to be expelled from the Virgin Islands unless the requirements specified in subsection (4) are satisfied."

[8] The requirements to be satisfied in subsection (4) are as follows:

> "(a) the decision to expel that person is taken by an authority, in a manner and on grounds prescribed by law;
>
> (b) that person has the right, save where the interests of defence, public safety or public order otherwise require, to submit reasons against his or her expulsion to a competent authority prescribed by law;
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> (c) that person has the right, save as aforesaid, to have his or her case reviewed by a competent authority prescribed by law; and
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> (d) that person has the right, save as aforesaid, to be represented for the purposes of paragraphs (b) and (c) before the competent authority or some other person or authority designated by the competent authority."

The legislative framework

[9] Part VIII of the Act relates to deportation and provisions relating to the removal of persons from the Territory. Section 40 sets out the procedure where deportation is desirable. In view of the importance of this section and what revolves around it, I shall set it out fully. Section 40 provides as follows:

> "(1) Subject to the provisions of sections 41 to 44 inclusive, **if at any time after a person,** other than a person deemed to belong to the Territory, **has landed in the Territory, it shall come to the knowledge of the Governor that such person-**
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> (a) has landed or remained in the Territory contrary to any provisions of this Ordinance;

(b) has been convicted of any offence against this Act, or of any other offence within the Territory punishable with imprisonment for three months or more;

(c) is a person whose presence in the Territory would in the opinion of the Governor, acting after consultation with the Chief Immigration Officer, be undesirable and not conducive to the public good,

the Governor may make an order (hereinafter referred to as the "deportation order") requiring such person to leave the Territory within the time fixed by the deportation order and thereafter to remain out of the Territory. [emphasis added]

(2) In the exercise of the powers conferred upon him by subsection (1), the Governor may act in his discretion in any matter where he deems it necessary to do so.

(3) Where a deportation order is made in respect of a person who immediately before the making thereof was lawfully within the Territory under 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 against the making of the order**." [emphasis added]

Procedure adopted in deportation cases

[10] In his affidavit filed on 16 June 2010, Governor Pearey set out the procedure which is adopted in every deportation case in accordance with the provisions of section 40 of the Act. He stated as follows:[3]

i. The Chief Immigration Officer, who is charged under the Act with the duty of ensuring that the provisions thereof are not being or have not been contravened, makes recommendations for the deportation of persons who have cause to be deported under section 40(1) of the Act.

ii. Those recommendations, together with the reasons therefor as well as background information on those persons, including details of their entry, immigration status, employment and known family or dependants resident in the

[3] See paragraph 3 of the affidavit of David Pearey.

Territory are submitted to the Premier's Office. A copy is also sent to the Governor's Office. At this stage, no action is taken by my office concerning the recommendations.

iii. The Premier's Office, in consultation with the Premier, considers the recommendations of the Chief Immigration Officer and if the reasons submitted establishes [sic] cause for deportation under section 40(1) of the Act, they write to me, forwarding the documents sent by the Chief Immigration Officer, and requesting that I consider the recommendation and make the deportation order sought.

iv. On receipt of this request I consider the recommendation made. I look at the facts to determine whether there is cause under section 40(1) of the Act for making the deportation order sought. I also consider the background and other information submitted by the Chief Immigration Officer to determine whether there may be factors which would, when weighed against the grounds for deportation, assist me in determining whether or not to exercise my discretion to make the deportation order. In some cases, depending on the facts, I may discuss the matters further with the Premier.

v. In cases where I decide to make the deportation order, I forward the documents to the Attorney General's Chambers for the preparation of the Order.

vi. On receipt of the Order, I sign same and forward it to the Gazette Officer to be gazetted and then to the Chief Immigration Order for execution.

[11] At paragraphs 4 to 7 of Governor Pearey's affidavit, he explained the procedure on appeal. This is what he had to say:

i. Where the Order has been served and the subject of the Order lodges an appeal within the 7 day period stipulated in the Act, I consider the new material submitted by the subject, including statements and other documents, and, where necessary, request further information and/or speak with persons identified by the subject who

may be in a position to verify facts submitted by the subject for the purpose of his appeal. This is done in accordance with Section 40(3) of the Act and Section 18(4) of the Constitution.

ii. I consider all the information, documents and statements submitted by the subject as well as the severity of the grounds on which the Order has been made and determine whether or not to exercise my discretion to revoke the deportation order.

iii. If the appeal is successful, I convey this in writing to the subject and forward the matter to the Attorney General's Chambers for the preparation of a Rescinding Order. On receipt of that Order, I sign same and forward it to the Gazette Officer to be gazetted and then to the Chief Immigration Officer for information.

iv. If the appeal is unsuccessful, I convey this in writing to the subject, the Premier's Office and the Chief Immigration Officer, who then arranges for the subject's deportation.

[12] There are separate provisions in sections 41 to 44 dealing with the deportation of British subjects.

The issues

[13] Mr. Alphonso is unhappy with the appeal procedure and challenges its constitutionality. He raises a multiplicity of grounds of challenge namely: (1) by appealing his deportation order to the Governor does not guarantee him a fair hearing and would be in breach of the rules of natural justice; (2) the fact that the Governor signed the deportation order and he has to appeal to him renders that inconsistent with article 16(9) of the Constitution; (3) article 1 of the Constitution guarantees him a fair hearing by an impartial and competent authority; (4) if the Governor is to hear his appeal, there is a likelihood that the Governor would lack impartiality and (5) the Governor had publicly acknowledged receiving a letter from an anonymous person dated 6 March 2010, requesting that he deports him. Ground (5) was

disposed of on the date of the hearing and consequently, does not concern us any further. The remaining grounds, though 4 in number, raise 2 issues for determination namely:

(1) whether section 40(3) of the Act infringes article 16(9) of the Constitution; and

(2) whether the Governor would be impartial in hearing the appeal since he is the same person who issued the deportation order.

[14] Before I venture to address these two issues, I should address another issue which came to light for the first time when Mr. Alphonso filed his written submissions on 30 November 2010; that is, two days before the hearing. This novel issue challenges the validity of the deportation order.[4] Mr. Alphonso contended that the deportation order does not address article 18 of the Constitution which guarantees him a fair hearing but incorporates the provision of the Act which does not guarantee him a fair hearing.[5] He next contended that the Governor was under a duty to give reasons for his decision so that he can appeal the deportation order if necessary.[6] Mr. Alphonso further contended that, the Governor, in offering no explanation why he made the deportation order, "such an omission was an example of bias, bad faith and lack of even-handedness on the part of the Governor"[7].

[15] Ms. Reid, Senior Crown Counsel for the Attorney General vehemently objected to this issue being raised at the last-minute. She submitted that paragraphs 44 to 48 of Mr. Alphonso's submissions ought to be struck out for two reasons; first, the validity of the deportation order was never in dispute, and secondly, if Mr. Alphonso is alleging "change of circumstances", pursuant to CPR 56.13(3), he must do so properly so as to give the other party adequate notice.

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[4] See paragraphs 12 to 13 and paragraphs 44 to 48 of the Applicant's Legal Arguments filed on 30 November 2010.
[5] Ibid, paragraph 44.
[6] Ibid, paragraphs 12 and 13 and paragraphs 44 -48.
[7] See paragraph 44 of the Applicant's Legal Arguments filed on 30 November 2010.

Making a claim outside the pleadings

[16] Mr. Alphonso alleged that this issue only arose after the Governor filed his affidavit on 18 June 2010. On 25 June 2010, when Mr. Alphonso addressed the contents of the Governor's affidavit, this is what he said at paragraph (2):

> "With regards to paragraph (2), I do contend that I was not given any deportation order under the provision of article 18 of the Constitution of the Virgin Islands, for reasons best known to the Governor, and I will rely on my exhibit DA4 of my affidavit in support of my Application."

[17] Subsequently, in an affidavit filed on 1 October 2010, Mr. Alphonso expressly stated that he was not challenging the deportation order made by the Governor.

[18] Therefore, to challenge the validity of the deportation order as this late stage is contrary to the principles of pleadings. In **Cedric Liburd v Eugene Hamilton and the Attorney General of St. Christopher & Nevis**[8], the court considered the function of pleadings and stated that "It [The function of pleadings] is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties."[9] A party must so state his case that his opponent will not be taken by surprise.

[19] **A party may not raise any new ground of claim, or include in his pleadings, any allegation or fact inconsistent with his previous pleadings** [emphasis added]. In order to raise such a new ground of claim, or to include any such allegations, amendment of the original pleading is necessary. He must either apply for leave to amend the pleading or particulars already served, or for leave to serve further particulars: Lord Russell of Killowen in **London Passenger Transport Board v Moscrop**.[10]

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[8] Claim No. SKBHCV2010/0020. Judgment of Hariprashad-Charles delivered on 13 October 2010 [unreported].
[9] Halsbury's Laws of England 4th ed. Vol. 36: Pleading, para. 4. 'Function of pleadings'. See also the case of *Esso Petroleum Co. Ltd v Southport Corpn.* [1955] 3 All ER 864.
[10] [1942] AC 332; [1942] 1 All ER 97, 105 C-E.

[20] Where a party makes a radical departure from the case stated in their pleadings, amounting to a new, separate and distinct case, the party will not be entitled to succeed: **Waghorn v George Wimpey**.[11]

[21] Therefore, Mr. Alphonso cannot now challenge the validity of the deportation order when he expressly stated on 1 October 2010, that he was not challenging that order.

[22] In the event that I am wrong to come to that conclusion, and, for the sake of completeness, I will address the issue. It raises two subsidiary issues namely (i) the supremacy of the Constitution and (ii) whether the Governor was under a duty to give reasons for his decision.

[23] I will address the latter issue now and the former will be dealt with in the course of the judgment.

Is the Governor entitled to give reasons for making the deportation order?

[24] Mr. Daniels, appearing as Counsel for Mr. Alphonso submitted that the Governor was under a duty to provide reasons for the making of the deportation order so that Mr. Alphonso can appeal same if necessary. He further submitted that the Governor did not offer any explanation in his affidavit for the reason for not doing so and, that omission by the Governor, is an example of bias, bad faith and lack of even-handedness on the part of the Governor. Learned Counsel could not point to a single authority to support this contention.

[25] Turning to the legislative framework, section 40(1) of the Act empowered the Governor to make a deportation order against an alien who has been convicted of an offence within the Territory that carries an imprisonment of three months or more. Such a power to make a deportation order is within the discretion of the Governor.[12] The prospective deportee may appeal to the Governor[13] to exercise his discretion to revoke the order. There is a procedure on appeal as contained in the affidavit of Governor Pearey.

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[11] [1970] 1 All ER 474.
[12] See Subsection 40(2) of the Act.
[13] Subsection 40(3) of the Act.

[26] Nowhere in the Act is there any provision to indicate that it was ever intended that an alien should be heard or have a right to make representation *before* the making of a deportation order or that the Governor should give reasons for his decision. Indeed, there is a wealth of judicial authorities to support the fact that the Governor has the power to make a deportation order against an alien without giving him an opportunity to be heard before its making and/or without giving reasons: see **R v Leman Street Police Station Inspector, and Secretary of State for Home Affairs, ex p. Venicoff**[14]; **Rolf Brandt v A.G. of Guyana et al**[15], **England and Another v Attorney-General of St. Lucia**[16] and **Reg. v Brixton Prison (Governor) ex p. Soblen**.[17]

[27] In **Ex p. Venicoff**, the Secretary of State was empowered under Art. 12 of the Aliens Order 1919 to make a deportation order. It was argued that the Secretary of State had no power to do so without giving the person affected an opportunity of knowing the grounds on which the order was made, and/or the evidence or information relied on in support thereof, and/or giving him a fair opportunity of meeting the same. At page 78, the Earl of Reading CJ said:

> "I have no doubt that it is not for us to pronounce whether the making of the order is or is not conducive to the public good. Parliament has expressly empowered the Secretary of State as an executive officer to make these orders and to impose no conditions…."

[28] And, at page 79, His Lordship continued:

> "The value of the order would be considerably impaired if it could be made only after holding an inquiry, because it might very well be that the person against whom it was intended to make a deportation order would, the moment he had notice of that intention, take care not to present himself and would take steps to evade apprehension. I therefore come to the conclusion that the Home Secretary is not a judicial officer for this purpose, but an executive officer bound to act for the public good, and it is left to his judgment whether upon the facts before him it is desirable that he should make a deportation order."

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[14] [1920] 3 K.B. 72; [1920] All E.R. Rep. 17.
[15] (1971) 17 W.I.R. 448.
[16] (1989) 35 WIR 171.
[17] [1963] 2 Q.B. 243.

[29] This case has stood the test of time. It was approved in **Reg. v Brixton Prison (Governor) ex p. Soblen** and **Schmidt & Anor. V Secretary of State for Home Affairs**.[18] In **R. v. Brixton Prison**, Lord Denning, M.R. concluded that there is no right to be heard *before* a deportation order is made against an alien, but reserved decision on the point of whether *after* a deportation order is made and before it comes to be executed, an alien may not in some circumstances have a right to be heard.

[30] If I may encapsulate, in this Territory, Parliament has expressly empowered the Governor to make deportation orders as he thinks fit. No conditions were imposed in the making of a deportation order because the value of the order will be considerably impaired if he has to hold an inquiry or give reasons. In fact, it is doubtful what reasons Mr. Alphonso seeks in order to appeal since he has already lodged his appeal and has argued a plethora of grounds against deportation.[19] In any event, the reasons that Mr. Alphonso may be seeking from the Governor are intrinsic in the deportation order itself and they are known to him namely: (i) he is an alien; (ii) he has been convicted of an offence punishable with imprisonment for three months or more and tried in the Supreme Court in its criminal jurisdiction and (iii) he is a prospective candidate for deportation.

[31] The law is clear. There can be no injustice in first making the deportation order, provided that, on appeal, he is permitted to make those representations showing reasons why that which has already been validly and unconditionally made by the Governor, ought not to be executed. I can see no logic why, in these circumstances, he requires reasons from the Governor for the making of the deportation order. The making of the order under section 40(1) of the Act was purely an act of the Governor and neither the provisions of the Act nor the rules of natural justice required that the Governor should give reasons to Mr. Alphonso why he made the order. Further, there is not an iota of evidence to support the sweeping statement of learned Counsel, Mr. Daniels that because the Governor did not give any reasons for the making of the deportation order, this is an example of bias, bad faith and lack of even-handedness on the part of the Governor.

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[18] [1969] 1 All E.R. 904.
[19] See Notice of Appeal against deportation dated 1 April 2010 with grounds. Exhibit DA5.

[32] In **Brandt**, at page 476, Crane L.J. said:

> "In cases of deportation, it is to be expected that a dilemma may occur between the claims of the personal liberty of the individual and what is in the interests of the nation. But, as has been seen, the only remedy which the alien to be affected has, lies in the procedural safeguards which the Legislature has deliberately laid down. When such procedural safeguards have been fully and properly complied with, the court would have no power or would, in any event, be reluctant, even if it has, to interfere."

[33] I would however add that except in the case of sham, ulterior motive and *mala fides* (the burden of proving which rests on the alien) the making of a deportation order may not be attacked. In this case, Mr. Alphonso has no right to be heard before the order was made or to be provided with reasons for the decision. In addition, in my view, once the Governor deems it necessary to make a deportation order, the courts may not inquire into his reasons for doing so, nor, into the sufficiency of those reasons, for such a decision, apart from being an executive one, may be based on policy, or on other matters, which the courts are not proficient to undertake or investigate: **R v Secretary of State for the Home Department, ex parte Hosenball**.[20]

[34] Accordingly, the submissions advanced by Learned Counsel, Mr. Daniels are untenable and must fail.

Issue 1 - Does section 40(3) of the Act infringe article 16(9) of the Constitution?

The nature of proceedings under section 40 of the Act

[35] Section 40 sets out the procedure where deportation of aliens from the Territory is desirable. It is beyond dispute that a State enjoys the exclusive right of determining the entry, residence and expulsion of aliens within its domain, though it is recognised that an alien who is resident within the realm is accorded the same rights for the protection of his person and property as a natural born or naturalised subject (per Lord Phillimore in **Johnstone v Pedlar**.[21] In **Brandt**,[22] the Court of Appeal said:

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[20] (1977) 3 All ER 452.
[21] [1921] A.C. 262.
[22] (1971) 17 WIR 448.

> "Generally, it can be said that a State's right to expel aliens is a logical and necessary consequence of its sovereignty and independence, exercisable in conformity with its laws and/or administrative concessions as it might wish to bestow in due recognition of "humanity" and "justice."

[36] At page 516 of the judgment, Crane L.J. stated:

> "This right to expel or deport an alien at pleasure was expounded in the case of *A.G. for Canada v Cain* (55) where Lord Atkinson, in delivering the opinion of their Lordships' Board, advised His Majesty in a matter involving the expulsion of an alien from the Dominion of Canada thus ([1904-07] All E.R.Rep. at p. 584):
>
> > One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from that State, *at pleasure*, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order and good government, or to its social or material interests…."
>
> "And I would respectfully add, as a general proposition it seems to follow that if an alien has no right to enter any State, he can have no right not to be expelled."

[37] The most fundamental principle of immigration law is that aliens do not have an unqualified right to enter or remain in the country. At common law, an alien has no right to enter or remain in the country: **R. v. Governor of Pentonville Prison**.[23]

[38] Section 40 of the Act is plain: the Governor has the discretionary power to expel aliens from the Territory if he considers it advisable to do so. It does not involve the determination of any "rights" of an alien as, in such proceedings, the alien does not have any right. The State has the right to expel. In **England and Another v Attorney-General of St. Lucia**,[24] the court was considering the deportation of the Englands, British subjects, who were ordinarily resident in St. Lucia and had been residing there for over 15 years. Bishop J.A. in delivering the judgment of the Court of Appeal stated (at page 177):

> "The Englands did not have a right, in law, to reside in St. Lucia. They did not have a right, in law, not to be deported from St. Lucia. They did not have a right, in law, not to be declared prohibited immigrants."

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[23] [1973] 2 All E.R. 741. See also **Prata v Minister of Manpower and Immigration,** [1976] 1 S.C.R. 376.
[24] (1989) 35 WIR 171.

[39] Unquestionably, an alien, whether ordinarily resident in the Territory or not, has no right to be granted residency or not to have his residency revoked or not to be deported from the Territory. Therefore, the Governor, in issuing a deportation order under section 40 of the Act is not involved in the determination of any rights of the alien so as to engage the provisions of article 16(9) of the Constitution.

[40] The only rights that an alien enjoy are only those prescribed in article 18(4) of the Constitution namely:

> (a) the decision to expel that person is taken by an authority, in a manner and on grounds prescribed by law;
>
> (b) that person has the right, save where the interests of defence, public safety or public order otherwise require, to submit reasons against his or her expulsion to a competent authority prescribed by law;
>
> (c) **that person has the right, save as aforesaid, to have his or her case reviewed by a competent authority prescribed by law**; [emphasis added] and
>
> (d) that person has the right, save as aforesaid, to be represented for the purposes of paragraphs (b) and (c) before the competent authority or some other person or authority designated by the competent authority."

[41] Ms. Reid eloquently submitted that the "rights' therefore, are that the Governor (the authority prescribed by law) makes a deportation order on the grounds stated in section 40(1) of the Act, then the alien can make representations and have his case reviewed by the Governor (the authority prescribed by law) and that the alien is entitled to counsel when making those representations and during the review process. The present case is similar to the **England** case. Counsel for Mr. England made analogous submissions to those of Mr. Daniels.[25] To emphasize, the Court of Appeal held that the Englands did not have a right, in law, to reside in St. Lucia. They did not have a right, in law, not to be deported from Saint Lucia. They did not have a right, in law, not to be declared prohibited immigrants. The same can be said of Mr. Alphonso.

[25] See page 178 of the judgment, letters h-j.

[42] Section 40(1) of the Act sets out the strictures by which an alien can be deported namely: (1) where the alien is in the Territory illegally; (2) where the alien is a convicted criminal and he has served three months or more in prison; and (3) if the alien's presence in the Territory is not conducive to the public good. Undoubtedly, the objective of the section is to remove dangerous persons from the Territory who are not its citizens. And it is entirely legitimate for Parliament to intend that those aliens be removed without delay.

[43] In essence, the "rights" that an alien has in relation to his expulsion are that he be given an opportunity to make representations and for the Governor to inquire into and decide thereon according to the principles of natural justice. Those are all the "rights" that an alien has in relation to his expulsion. The Governor's decision upon this review is non-justiciable under the Act.

Article 16(9) of the Constitution and deportation proceedings

[44] Article 16(9) of the Constitution provides that every person is entitled to a fair hearing within a reasonable time before an independent and impartial court or other authority established by law for the determination of the existence or extent of his "civil rights and obligations."

[45] Learned Counsel Mr. Daniels submitted that article 16(9) applies to administrative proceedings that determine the civil rights and obligations of individuals and, therefore, it is incumbent for the independent and impartial authority reviewing Mr. Alphonso's deportation order to give a reasoned judgment so that he may appeal the order if necessary. He provided no case law to support this submission.

[46] Learned Counsel submitted that article 16(9) of our Constitution is similar to article 6(1) of the European Convention on Human Rights and Fundamental Freedoms ("ECHR")which provides, among other things, the following:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[47] This is an accurate submission. In fact, in **Capital Bank International Limited v Eastern Caribbean Central Bank and anor**,[26] our Eastern Caribbean Court of Appeal expressly stated that section 6(1) of the European Convention has been construed by the European Court of Human Rights. This has been adopted in the participating states and should inform the meaning that we give to our similar sections in the Constitutions of the territories of the region.

[48] Learned Counsel next submitted that while the common law does not impose a general duty to give reasons for a decision, where article 16(9) is engaged, the decision maker must give a reasoned judgment so as to enable the prospective deportee an opportunity if he wishes to appeal. In **R (on the application of Hasan) v The Secretary of State for Trade and Industry**,[27] the Court of Appeal refused to accede to submissions by the claimant that the time had come to recognise an underlying public law duty to give reasons.

[49] Now, the question which arises is whether article 16(9) is engaged in deportation orders? Article 16(9) does not provide for a "right to a fair hearing" per se. Article 16(9) is only engaged where there are proceedings to determine a person's "civil rights and obligations."

[50] There is a threshold question for the applicability of article 16(9); that is, whether particular legal proceedings qualify as the "determination of civil rights and obligations." For this article to apply under its "civil" heading, there must first be a dispute over a "right" or "obligation." Secondly, that "right" must have a basis in national law. Further, the dispute in question must determine that "right" in a direct and decisive manner. Finally, that right or obligation must be "civil" in nature. Having passed these four requirements, only then will the court embark on examining the applicant's claim that the impugned domestic proceedings were in breach of the requirements of article 16(9).

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[26] Civil Appeal Nos. 13 & 14 of 2002, Court of Appeal, Grenada.
[27] [2008] EWCA Civ. 1311; [2007] All ER (D) 276 (Nov.).

[51] Generally speaking, the question of whether a dispute relates to "civil rights and obligations" is a straightforward matter. The legal relations between private persons will be considered "civil" - for example, claim to damages for personal injury or defamation, alleged breaches of contractual obligations, or disputes over financial arrangements following a divorce. In addition, a statute may confer a "civil right" on individuals who fulfil certain criteria.[28] Difficult questions have arisen as to the applicability of article 16(9) in disputes relating to the domain of public law, for instance in cases where an administrative or disciplinary body has been empowered by law to take action impinging on the rights or interests of the individual, or, in relation to court proceedings where a State authority is one of the parties.

[52] It is beyond dispute that article 16(9) is only engaged in respect of a dispute about "civil rights and obligations." Ms. Reid submitted that since the procedures under section 40 do not determine any civil rights and obligations, article 16(9) is wholly inapplicable. I agree. Article 16(9) is not applicable to deportation proceedings.

[53] In **Maaouia v France**[29], at para. 35 of the judgment, the European Court of Human Rights decided as follows:

> "The Court has not previously examined the issue of the applicability of Article 6 § 1 to procedures for the expulsion of aliens. The Commission has been called upon to do so, however, and has consistently expressed the opinion that **the decision whether or not to authorise an alien to stay in a country of which he is not a national does not entail any determination of his civil rights or obligations or of any criminal charge against him within the meaning of Article 6 § 1 of the Convention**…." [emphasis added]

[54] Subsequently, the Court reiterated that proceedings for the rescission of the exclusion order (in our case, deportation order) do not concern the determination of a "civil right" for the purposes of Article 6 §.

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[28] Tinnelly & Sons LTD and Others and McElduff and Others v United Kingdom (1998)
[29] Application no. 39652/98 delivered on 5 October 2000.

[55] The principle that article 16(9) is not applicable to deportation proceedings was adopted by the English Court of Appeal in **Harrison v Secretary of State for the Home Department**.[30] Keene LJ said (at para. 23):

> "So far as immigration is concerned, the majority of the court in the *Maaouia* case clearly held that such decisions regarding the entry, stay and deportation of aliens do not come within the ambit of art. 6(1), even though such decisions may have major repercussions on the individual's private and family life. It is submitted that art. 6(1) does not apply to disputes about citizenship."[31]

[56] The same position was adopted in the cases of **R (on the application of G) v Immigration Appeal Tribunal and Conjoined Cases**[32] and **R v Secretary of State for the Home Department, ex parte Hosenball**.[33] Lord Denning MR, at page 457, stated that "if they are foreigners, they can be deported. The rules of natural justice have to be modified in regard to foreigners who proved themselves unwelcome and ought to be deported." He quoted the European Commission which held: (at page 457):

> "…that where the public authorities of a State decide to deport an alien on grounds of security, this constitutes an act of state falling within the public sphere and that it does not constitute a determination of his civil rights or obligations within the meaning of art. 6…the State is not required in such cases to grant a hearing…."

[57] It is plain from the litany of cases[34] that the expulsion of aliens does not give rise to disputes over civil rights and obligations for the purposes of article 16(9) of the Constitution. Accordingly, a decision with respect to the deportation of an alien does not involve a "determination of his civil rights or obligations" and, therefore, section 40 of the Act is not capable of infringing the provisions of article 16(9). That said, the miscellany of authorities cited by learned Counsel, Mr. Daniels are irrelevant since any such right of access entrenched in article 16(9) does not apply to deportation proceedings.

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[30] (2003) EWCA Civ. 432.
[31] See also: **S v Switzerland** [1988] 59 DR 256 (Commission held that art. 6(1) does not apply to proceedings regulating a person's citizenship); **Karassev v Switzerland** (Application Number 31414/96); **Slivenko v Latvia** (Application no. 48321/99).
[32] (2004) EWCA 588 (Admin).
[33] (1977) 3 All ER 452.
[34] See also **Hamilton Properties Limited v Minister of the Environment and anor**. CA 264 of 1994 – Supreme Court of Bermuda.

[58] Additionally, when one looks at the whole structure of article 16 of the Constitution, it is readily apparent that it is intended to apply to trials and not to the decisions of the executive in respect of the deportation of aliens, which was separately provided for under article 18. Like Ms. Reid, I also believe that a requirement for a public trial, as Mr. Daniels has advocated, is incompatible with the intent and purpose of proceedings under section 40 of the Act, which concerns sensitive issues of national security and which must be addressed with promptitude.

[59] A State has the right and duty to keep out and expel aliens from its country if it considers it advisable to do so. This right of a State has its genesis in the prerogative. In this Territory, statute has expressly conferred that right to be exercisable by the Governor. This is in keeping with the role and functions of the Governor, as the representative of Her Majesty, the Queen. It is beyond dispute that the powers given to the Governor pursuant to section 40 of the Act are for a public purpose, namely to exclude undesirable aliens, who have criminal convictions, from this Territory for the public good. The extent to which an alien is afforded any remedy with respect to the exercise of this power, is limited strictly to what Parliament has decided that he should be allowed. In **Brandt**, the Court of Appeal of Guyana said (at page 462):

> "Does the alien then have no opportunity of a right to relief after the order is made? That would depend, of course, on the existence or not of any such statutory entitlement, otherwise it would fall merely to such concessions as it may please the administration."

[60] As I see it, it is entirely up to Parliament to adopt an immigration policy and to enact legislation prescribing the conditions under which aliens will be permitted to enter and remain in the Territory. It has done so in the Act.[35] It is well-established that where a statute creates a right and a corresponding remedy, the person seeking to enforce that

[35] See **Pihak Berkuasa v Sugamar** (2003) 1 LRC 561, where the Federal Court of Malaysia was forced to uphold the constitutional validity of an amendment which took awayan alien's right to be heard prior to the making of any order against him under the Immigration Act and which introduced a specific provision prohibiting judicial review if the said decision.

right can only seek to do so by the remedy provided.[36] In **Barraclough**, Lord Watson said, at page 622, that "the right and the remedy are given *uno flatu,* and the one cannot be dissociated from the other."

[61] Similarly, the right to appeal the deportation order is created by statute, which also prescribes the means by which the right is to be enforced, that is, that the appeal is to be heard and determined by the Governor. It is not for Mr. Alphonso to say that he wishes to appeal but he wishes for the appeal to be heard by some other tribunal. Therefore, Mr. Alphonso cannot dictate that some other tribunal other than the Governor should hear his appeal.

[62] It is plain that article 16(9) does not entitle Mr. Alphonso to an appeal or review, let alone an oral hearing. The Act provides that a prospective deportee, like Mr. Alphonso, "shall be entitled within the period of seven days …**to appeal in writing** to the Governor against the making of the order." For that reason, Mr. Alphonso cannot say that section 16(9) is breached by the hearing of the appeal by the Governor because such an appeal lies outside the scope of article 16(9).

Article 18 (4) of the Constitution

[63] The only entitlement which Mr. Alphonso has is to be found in article 18(4) of the Constitution and section 40 of the Act. That article details the limited rights that an alien enjoys in this Territory. Article 18(4)(c) is relevant to the issue at hand because, according to learned Counsel, Mr. Daniels, article 18(4)(c) should be interpreted in such a manner that any review of Mr. Alphonso's deportation order ought to be done by an independent and impartial tribunal as guaranteed by article 16(9).

[64] Mr. Daniels further submitted that article 18 is quite unique and this may be because of the mission statement which is contained in the said Constitution.[37] He submitted that the European Convention of Human Rights, the Guyanese, the Canadian, the St. Lucian or

[36] See **Barraclough v Brown** (1897) A.C. 615, at page 619 and **Pasmore v Oswaldtwistle UDC** (1898) AC 387.
[37] See page 5 of the Constitution.

any other Eastern Caribbean constitution do not have a provision similar to article 18(4)(c). Therefore, asserted Counsel, when the constitutionality of a statute is under attack, it is imperative to compare similar constitutional provisions in order to determine how the court has interpreted same.

[65] Mr. Daniels submitted that in all the cases cited by the Attorney General, he has failed to identify and compare constitutions with a similar provision to article 18. He submitted that the Caymanian constitution mirrors article 18(4)(c) of our constitution and the Attorney General ought to have used a constitutional model like the Caymanian constitution in order to examine how the courts have interpreted same.

[66] In effect, Mr. Daniels has shifted the burden of proof to the Attorney General. The law is trite that "he who asserts must prove it". It is Mr. Alphonso who asserted that article 18(4)(c) of the Constitution should be interpreted in such a way that he should legitimately expect a hearing before being deported. It is he who argued that article 18(4)(c) should be interpreted in such a way that a review of his deportation ought to be done by an independent and impartial tribunal as guaranteed by article 16(9). The burden is therefore on him to show that he is entitled to the reliefs sought. That burden does not shift to the Attorney General. After all, an applicant must not rely on the weakness of the respondent's case (if there is any such weakness in the present case) but rather on the strength of his own case as proved in court.

[67] I have previously concluded that article 16(9) does not apply to deportation orders and pursuant to the provisions of the Act, the power to make deportation orders is vested in the Governor. Any appeal from that order is also vested in the Governor.

[68] Now, what does article 18(4)(c) of the Constitution really mean? According to Mr. Daniels, it means that Mr. Alphonso's appeal must be heard by an independent and impartial tribunal, other than the Governor. This is a strained meaning. Literally speaking, this subsection means that an alien who was found guilty of a criminal offence **shall** not be liable to be expelled from the Territory unless that alien (who has the right) is given the opportunity to have his or her case reviewed by a competent authority **prescribed by law**

(emphasis added). Put another way, the subsection affords Mr. Alphonso a right to have his deportation order reviewed by **the competent authority prescribed by law**, who is the Governor.[38] Parliament has conferred such power in him. Nowhere in this subsection does it state that Mr. Alphonso should be afforded a hearing. Article 18(4)(c) speaks to a review and Governor Pearey has outlined in his affidavit the procedures which is followed when an appeal has been lodged. If there is any unfairness in that procedure, then that is another matter.

[69] So, for all of these reasons, I hold that section 40(3) of the Act does not infringe article 16(9) of the Constitution, and accordingly, the submissions made on behalf of Mr. Alphonso are untenable.

Issue 2- Whether the Governor would be impartial in hearing the appeal?

[70] Mr. Alphonso alleged that the Governor cannot be impartial in hearing the appeal as he is the same person who issued the deportation order and he is the same person who has to hear the appeal. He further alleged that since the Governor has failed, omitted or in bad faith did not issue the deportation order pursuant to the provisions of article 18 of the Constitution, but under the provisions of the Act, there is a likelihood that he would be denied a fair hearing by an impartial and independent tribunal and this can lead to a breach of the rules of natural justice namely, "*nemo judex in causa sua*" (nobody should be a judge in their own cause).

[71] If I understand learned Counsel correctly, I believe that what he is saying is, that on the face of the deportation order,[39] it should have expressly stated that it is made pursuant to the provisions of article 18 of the Constitution and since it does not state so, that amounts to a breach of the rules of natural justice. This submission, attractive as it may be, eludes me because as the Governor stated at paragraph 2 of his affidavit, "all deportation of persons from the Territory are done in accordance with the provisions of the Act and article 18 of the Constitution." I do not see why Counsel would seek to challenge the form of the

[38] Section 40(3) of the Act.
[39] See Exhibit DA4.

deportation order and, in any event, he has provided a single authority to substantiate this point. This submission is unmeritorious and must fail.

[72] Next, learned Counsel ventured into another area of law: the law against bias. In so doing, he cited a superfluity of judicial authorities including the landmark cases of **Porter v Magill**[40] and **Dr. Vaughn Lewis and the Attorney General of St. Lucia and Monica Joseph**.[41] At pages 4 and 5 of the latter judgment, Byron CJ (ag) said:

> "Without attempting to offer a full definition of bias, I think I can refer to it as being a predisposition to favour or disfavour a party or result, in a manner that is wrongful and which can lead to a denial of judicial imperative of impartiality in the particular matter. In general, bias may fall into three categories: cases of actual bias; cases where the decision maker has a direct pecuniary interest in the outcome of the proceedings and other cases where the circumstances give rise to a presumption of bias."

[73] Mr. Daniels submitted that Mr. Alphonso's case falls within the third category. He submitted that since the Governor was the one who issued the deportation order, his mind has already been predisposed of the facts and as such, he would lack impartiality in hearing the appeal. According to Counsel, the case of **R v Sussex Justices, ex parte McCarthy**[42] is sound authority for such proposition. He quoted Lord Hewart CJ who stated "justice should both be done and be manifestly seen to be done."

Conflation of powers and bias

[74] In summary, Mr. Alphonso alleged that the conflations of powers in one body by a statute give rise to a finding of bias or unfairness. The Attorney General argued to the contrary. Ms. Reid submitted that this issue was considered by the Canadian Supreme Court in **Brosseau v Alberta Securities Commission**.[43] The brief facts of that case are as follows. The appellant complained that the Alberta Securities Commission ought not to be able to determine whether he ought to be disqualified from trading in securities since the chairman of the panel at the hearing of the matter also had received an investigative report

[40] [2001] UKHL 67; (2002) 1 All ER 465.
[41] Civil Appeal No. 12 of 1997 [Court of Appeal –Saint Lucia] (unreported).
[42] [1923] All E Rep. 233 at page 234.
[43] 57 DLR (4th) 458.

into the appellant's alleged wrongdoing. He complained that it infringed his rights under the Canadian Charter of Rights and Freedoms to have a fair and public hearing before an independent and impartial tribunal. The court held that "[T]he principle that no one should be a judge in his own action underlies the doctrine of "reasonable apprehension of bias". An exception occurs where an overlap of function is authorised by statute. In assessing allegations of bias, consideration must be given to the particular structure and responsibilities of a securities commission and its special role in protecting the public. The commissioners, by virtue of the structure if its empowering Act, can be involved in both investigatory and adjudicatory functions does not, of itself, give rise to a reasonable apprehension of bias."

[75] A similar point was made in **Washington State Medical Disciplinary Board v Johnston**.[44] At page of the judgment, the Court said:

> "We agree with the Board and the Superior Court that *Withrow* (Withrow v Larkin, 421 U.S. 35, 95 S. Ct. 1456) controls the issue of due process. In *Withrow*, the Supreme Court stated:
>
> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."

The court went on to hold:

> "The initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation."

[76] It is plain that where the legislature permits one body to perform both investigatory and adjudicatory functions, that in itself, is not sufficient to find that the body is itself biased or

[44] 29 Wash. App. 613.

that a conflation of powers infringes upon constitutional rights. The powers that are "conflated" here are not even of such a character. In any event, disqualification must be founded upon some act of the body going beyond the performance of the duties imposed upon it by the enactment under which proceedings are conducted. In order to disqualify the body, in this case, the Governor, from hearing the appeal, some act going beyond his statutory duties must be found. No such allegations were made in this case.

[77] In the present case, the power to issue deportation orders is given to the Governor with a resultant power to review his decision, once an appeal has been lodged. In no case is there a prosecution of the alien. In no case is the function of the Governor to conduct investigations into the alien prior to his receiving the information upon which he decides to make the order. The Governor does not have a personal interest or anything to gain by making or revoking the deportation order. Given that a State has the right and duty to expel aliens if it considers it advisable to do so, then if the State deems it fit that the Governor ought to have the power to make the deportation order and then hear the appeal, why should that be a violation of the alien's constitutional rights (in so far as he could be said to have any right in that regard). The Constitution must not be abused or misused.

[78] Further, when one considers the issue of bias vis-à-vis the test laid down by the House of Lords in **Porter v Magill**, the fact of the Governor himself holding the review does not come near the threshold of bias. As Lord Hope puts the test, at page 507, "the question is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

[79] As Ms. Reid puts it: "would a fair-minded and informed observer, having considered the facts of this case, come to the conclusion that there was a real possibility that the Governor would be biased? The clear answer must be no. The Governor has no interest in the outcome of this deportation except to do his job in a fair and impartial manner." To hold otherwise, would mean that no body, statutory or otherwise, is capable of reviewing its own decision. This is not so.

[80] Mr. Alphonso complained that the fact of the Governor conducting the review infringes the principle of natural justice that no one shall be a judge in his own cause. As Ms. Reid correctly argued, the review does not involve any cause of the Governor. It is aimed solely at permitting Mr. Alphonso to make those representations showing reasons why the deportation order which has already been validly and unconditionally made by the Governor, ought not to be executed. The facts of this case are not in dispute. Mr. Alphonso belongs to a class of persons who is liable to be deported. The discretion, whether he ought to be permitted to remain in the Territory, is one that rests solely in the Governor. No actual bias is alleged.

[81] Furthermore, the court ought not to lightly hold that high office holders, in this case, the Governor, as representative of Her Majesty, the Queen and the de facto head of state of this Territory, appointed by Her Majesty, on the advice of the British Government, who take oaths to discharge their functions faithfully, are guilty of bias or improper motives; especially where they act in good faith in pursuance of the powers accorded to them by law. In **Hamilton Properties Limited v Minister of the Environment and anor**[45], the Bermudan Supreme Court had this to say at pp 228-229 of the judgment:

> "Each case has to turn upon its own particular facts. On the facts of this case I do not think that Senator Winfield's membership of Cabinet in the past, nor the short overlap in tenure between himself and the acting Minister, are sufficient to give rise to a real danger of bias in his favour. In particular, they have no community of interest in the outcome of the application whatsoever, and none is alleged. The test is whether, looking at it through the eyes of the reasonable man, there is a real danger of bias. It is not whether the circumstances would attract idle or malicious suspicion. Like Collette J…**I am not prepared lightly to assume that leading members of government "are prone to decide matters of public importance coming before them for decision not in good faith as they are sworn to do upon the basis of what is best in the public interest but, on the contrary, in bad faith with a view towards the enrichment of any fellow member having a personal interest in the matter under discussion**…Collette J also referred to the inconvenience which a too ready assumption of the risk of bias would cause, particularly in a small community and under a system, which, of necessity, entrusts many decision making functions to bodies such as the Corporation of Hamilton or the Cabinet." [emphasis added]

[45] CA 264 of 1994 –Supreme Court, Bermuda [unreported].

[82] In the present case, the Governor, past or present, has no interest in whether Mr. Alphonso is deported or not, except to discharge his duties faithfully. There is no cogent evidence to show that the Governor will be biased in reviewing Mr. Alphonso's appeal. It is regrettable that Mr. Alphonso would choose to make such a bald allegation against the Governor. In addition, there is no evidence that the Governor has participated outside his bounds, even if one was to consider Mr. Alphonso's allegations (which were struck out on 2 December 2010) that the Governor publicly acknowledged receiving a letter from an anonymous person seeking his deportation. Be that as it may, the facts of the case does not give rise to a reasonable suspicion of bias not did they undermine public confidence in the integrity of the Governor.

[83] Accordingly, the submissions advanced by learned Counsel Mr. Daniels that the Governor cannot be impartial in hearing the appeal as he is the same person who issued the deportation order and there is a likelihood that Mr. Alphonso would be denied a fair hearing are unsubstantiated by any evidence. This ground of challenge also fails.

Other ancillary issues

[84] Learned Counsel, Mr. Daniels raised some issues namely: legitimate expectation, access to the courts and breaches of the principles of natural justice. It is my view that no useful purpose will be achieved by further considering these issues in the light of the final outcome of these proceedings.

Conclusion

[85] If I may sum up, the most fundamental principle of immigration law is that only citizens are accorded the right "to enter, remain in and leave the Territory." An alien does not have an unqualified right to enter or remain in this Territory. An alien may a right to remain here only if he does not contravene the provisions of section 40(1) of the Act. It is a fact that Mr. Alphonso has violated one of the conditions of his residency prescribed under section 40(1)(b) of the Act by committing an offence punishable within imprisonment for three months or more. Indeed, he has committed an offence which carries a maximum penalty of ten years imprisonment and for which the court opined that "it must take a serious view of

those who assist murderers." He was sentenced to four years imprisonment. Fundamental justice is not breached by deportation. It is the only method of giving practical effect to the termination of an alien's right to remain in this Territory.

[86] Section 40(3) of the Act provides that an appeal lies only to the Governor. By virtue of article 18 of the Constitution, that right of appeal is limited to a review to be done by the Governor. It is not for Mr. Alphonso to dictate who should hear his appeal. He does not have that right. In any event, Governor Pearey, who it is alleged will be biased if he hears the appeal, has since retired and a new Governor has been appointed to the Territory. It is difficult to see how any allegation of bias may be canvassed against the new Governor.

[87] In cases of deportation, a dilemma may occur between the interests of national security on the one hand and the rights of the individual on the other. The balance between the two is not for the court but for the Governor. He is the person entrusted by Parliament with that task of determining the appeal. Governor Pearey has laid down the procedure which is followed when an appeal is lodged. I entertain no doubt that when this matter reaches the new Governor, he will give it his personal considerations.

[88] I conclude this judgment by referring to the case of **R v Secretary of State for the Home Department, ex parte Hosenball**[supra] which may be of some assistance to His Excellency, the Governor when hears the pending appeal. The brief facts are that Mark Hosenball, a United States citizen, worked in England for a journal which made a feature of investigative journalism. He took part in the preparation of an article which was published in the journal about the monitoring of communications by the government. In July 1976, he left that journal and became a reporter for a London evening newspaper. On 15 November 1976, four weeks before Mr. Hosenball's permit to stay in England was about to expire, he received a letter from the Home Office stating that the Secretary of State had information that Mr. Hosenball had obtained for publication information harmful to the security of the United Kingdom and decided that it would be conducive to the public good as being in the interests of national security to make a deportation order against him. Mr. Hosenball immediately consulted his lawyers who requested the Home Office to give further particulars of the allegations against him. The Secretary of State refused to give

further particulars because, in his view, it was not in the interest of national security to add anything contained in his letter. Under s 15(3) of the Immigration Act, 1971, there was no right of appeal against a decision to make a deportation order in the interests of national security, but in accordance with an undertaking given by the then Secretary of State, the decision to make such a deportation order was subject to a non-statutory advisory procedure whereby the person it was proposed to deport could make representations and call witnesses before a panel of three advisers to the Secretary of State. **Mr. Hosenball was given a hearing before the advisory panel. He made representations, through his solicitor, to the panel and called witnesses as to his good character.** On consideration of the panel's report, which was not made available to Mr. Hosenball, the Secretary of State made the deportation order. Mr. Hosenball applied for an order of certiorari to quash the deportation order. The court dismissed the application and Mr. Hosenball appealed to the Court of Appeal, contending that under the rules of natural justice or by virtue of the undertaking, the Secretary of State was required to distinguish between particulars of the allegations which could be disclosed without revealing sources of information and those which could not properly be disclosed, and to disclose the former, and the general statement by the Secretary of State that it was not in the interests of national security to give particulars was not sufficient. The Court of Appeal held, among other things, that where national security was involved the rules of natural justice were liable to be modified. The public interest in the security of the realm was so great that the sources and nature of the highly confidential information supplied to the Secretary of State for the purpose of reaching a decision to make a deportation order in the interests of national security ought not to be disclosed. Accordingly, the requirement of the public interest that such information should be kept confidential might outweigh the public interest in the administration of justice. The balance to be held by those two public interests was a matter for the Secretary of State since he had been entrusted by the Immigration Act with the decision to make a deportation order. Since the Secretary of State had given his personal consideration to the request for further particulars of the allegations against Mr. Hosenball and there was no reason to doubt that he has considered the request with care, he was entitled to refuse to give any further particulars of the allegations and in respect of that refusal was answerable to Parliament and not to the courts.

[89] All things considered, Mr. Alphonso has not established that the procedures under section 40 of the Act violate any of his constitutional rights. He has not given any cogent reason to demonstrate that the Governor will be biased in reviewing his appeal. In short, he has failed to establish any ground for relief and accordingly, I will dismiss the Originating Motion in its entirety.

Costs

[90] The Attorney General seeks costs of these proceedings. I will reserve this issue and order that both parties shall provide, within 14 days hereof, written submissions on costs which I will consider on paper.

[91] Last but not least, I owe a great depth of gratitude to Ms. Reid for her able and admirable argument. I also thank Mr. Daniels for his submissions.

Indra Hariprashad-Charles

High Court Judge