

BREACH OF CONSTITUTION IN DEPORTING PERSONS BORN IN THE BAHAMAS TO THE REPUBLIC OF HAITI

JOHN GF CAREY, JP*

CASE NOTE

JEAN-RONY JEAN CHARLES V THE ATTORNEY GENERAL, MINISTER OF IMMIGRATION, OFFICER IN CHARGE OF THE DETENTION CENTRE AND COMMODORE OF DEFENCE FORCE [2017] CRI/HCS/0068; (26 JANUARY 2018)

The case that is being discussed is significant because of the constitutional application, public interest and the serious concern regarding individuals with uncertain status in the Bahamas. It is important to understand how this court ruling affects thousands of individuals born in the Bahamas of non-Bahamian parentage. The learned Judge examined Article 19(1), (2) and (3) and Article 25(1) of the Bahamas' Constitution and exercised his powers with reference to The Attorney General, Minister of Immigration, Officer in Charge of the Detention Centre and Commodore of Defence Force (Respondents) breach of the Constitutional rights of Mr. Jean-Rony Jean Charles (the Applicant.)

On 26 January 2018, the Bahamas Supreme Court issued a Judgement in the case of *Jean-Rony Jean Charles v The Attorney General, Minister of Immigration, Director of Immigration, Officer in Charge of the Detention Centre and Commodore of Defence Force*¹, declaring:

that the Applicant's rights under Article 19(1), (2), and (3) and Article 25(1) were breached, that the

Respondents were to issue a travel document to the Applicant immediately in order to allow him to return to the Bahamas from The Republic of Haiti, that the Respondents were to pay for the Applicant's return to the Bahamas, that the Minister of Immigration and Director of Immigration were to issue status to the Applicant which would permit him to remain and work in the Bahamas no later than 60 days after his return and once he has made application for the status and that the Respondents were to pay compensation to the Applicant under Article 19(4) for the breaches of the Applicant's right under Article 19(1), (2) and (3) and Article 25(1) to be determined by the Court (para 38).

BACKGROUND AND HISTORY

The Applicant who was born in the Bahamas on 5 December 1982, had never travelled outside of the Bahamas, "was arrested by Immigration Officers in September 2017" and never charged with any offence and (para 3). He was later deported from the Bahamas on 24 November 2017 to the Republic of Haiti (para 4). "The Applicant invoked the jurisdiction of the court by his Notice of Motion for constitutional relief under Article 28 of the Bahamas Constitution" (para 14). The court dismissed the application for a Writ of Habeas Corpus Ad Subjiciendum because the Applicant was not in the custody of the Respondents at the time of application (para 13).

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Article 19(1) states that, "No persons shall be deprived of his liberty save as may be authorised by law in any of the following cases" –

(c) for the purpose of bringing him before a court in execution of the order of a court;

(d) upon reasonable suspicion of his having committed, or of being about to commit, a criminal offence."

Article 19(2) states that, "Any person who is arrested or detained shall be informed as soon as is reasonably practicable... of the reasons for his arrest or detention and shall be permitted at his own expense to have a legal representative."

Article 19(3) states that, "Any person who is arrested or detained in such a case as is mentioned in subparagraph (1)(c) or (d) of this Article and who is not released shall be brought without undue delay before a court. In the case of the Applicant, this did not happen.

"The Respondents objected to the Applicant seeking constitutional relief" and submitted that the court if "satisfied that adequate means of redress are or have been available to the person concerned under any other law", the Applicant could file a civil suit for false imprisonment if the court found that he has been unlawfully detained" (para 16). An ordinary civil remedy could not be adequate if the circumstances surrounding the process in which the Applicant "was arrested, detained and deported from The Bahamas" were true (para 17). The matter of persons being born in the Bahamas of Haitian parents has been a public interest issue primarily because the numbers of persons in this category are numbered in the thousands and anecdotally reflect at least 10% of the Bahamas population. It poses a policy challenge which successive Governments of the Bahamas have failed to adequately address resulting in these persons with no status and in terms of their existence are born, educated and culturally Bahamian.

To add insult to injury there is no effort being made by the Executive to properly address these category of persons through the Constitutional remedy as outlined in Article 7(1). The Executive compounds the problem and in this case the court supported the position that what happened to the Applicant would "constitute an egregious abuse of executive power" (para 17) based on the circumstances of the case.

VIEW POINT

The Respondents who were acting on behalf of the Bahamas Government breached the constitutional rights of the Applicant through deportation and this was ultra vires to the fundamental rule of law.

"Haitians have been oppressed for far too long. Those who are legally here face discrimination and those Bahamians of Haitian descent often complain about how insensitive many are in this country toward them."² Article 7(1) of the Bahamas' Constitution states,

"A person born in The Bahamas after 9th July 1973 neither of whose parents is a citizen of The Bahamas shall be entitled, upon making application on his attaining the age of eighteen year or within twelve months thereafter in such manner as may be prescribed, to be registered as a citizen of The Bahamas. Provided that if he is a citizen of some country other than The Bahamas he shall not be entitled to be registered as a citizen of The Bahamas under this Article unless he renounces his citizenship of that other country, takes the oath of allegiance and makes and registers such declaration of his intentions concerning residence as may be prescribed.

(2) Any application for registration under this Article shall be subject to such exceptions or qualifications as may be prescribed in the interest of national security or public policy".

"In a system of judge-made law, judges are nominally bound to follow precedent whenever

deciding cases, but in actual fact judges do depart from precedent from time to time."³ There are those who may be persuaded that Hilton J., who issued this judgement was involved in judicial activism. "Judicial activism is evident from the large body of ca."⁴ In se law. However, its cohesive and comprehensive development remains a challenge for the Courts the absence of an appeal by the Respondents this court ruling is the current settled law on persons born in the Bahamas to non-nationals.

The Applicant was not deprived of his right to apply to the Supreme Court pursuant to Article 28 of the Constitution. This should only be exercised in exceptional cases.⁵ This case was exceptional as evidenced by the ruling of the court.

In looking at commonwealth jurisdictions in the South Pacific such as the Independent State of Papua New Guinea and the Republic of Nauru, there are similar rights which support the right to liberty enshrined in their constitutions like the Bahamas' Article 19(1).⁶ Interestingly, these jurisdictions have significant illegal immigrant issues and in particular, due to their having established offshore asylum processing operations in collaboration with Australia. While this case does not relate to asylum seekers it shares a commonality with cases in Papua New Guinea involving the deprivation of liberty such as *Namah v Pato*⁷ and *Boochani v Independent State of Papua New Guinea*.⁸

The affidavit of Clotilde Jean-Charles was compelling and any person having read the document would reasonably be moved with compassion. However, compassion is not what matters in this particular case. It is important that the Applicant got justice through the Bahamas Supreme Court. This case is a landmark case in Bahamian constitutional law and its interpretation. It indicates to all and sundry that the rule of law prevails where the Executive exercised its powers incorrectly. Unfortunately,

the Bahamas is developing a track record of reckless behaviour which have been enunciated by its Prime Minister as recently as, charging that anyone who feels the Minnis administration is wrong can "take us to court".⁹ The Rule of law is fundamental to democratic societies and the Bahamas has been brought in line with this reality through the independent Judiciary who has upheld the Constitutional right of the Applicant.

"The Bahamian government must immediately implement the decision of its Supreme Court ordering the return of Jean-Rony Jean Charles, a Bahamian-born man of Haitian descent who was unlawfully expelled to Haiti last November, and stop discriminatory practices against people of Haitian descent."¹⁰ On 11 October 2017, the Bahamian Prime Minister announced that migrants with an alleged irregular status in the Bahamas would have until 31 December 2017 to regularize their status or face aggressive pursuit and deportation.¹¹ This court ruling will result in a more rational approach to addressing the illegal immigration and persons of uncertain status problem that exists in the Bahamas while assuring the rights of all within its borders are protected and preserved.

The learned Judge said, "The fact that the appellant is not a Bahamian citizen does not mean that he is not entitled to all the protection of the Laws of the Bahamas" (para 23). As a result of this case, it is now established that Immigration Officers who apprehend a person on suspicion of having committed an offense, cannot detain the person for more than forty-eight hours without having the person charged and brought before a magistrate as "any time longer is an unauthorised detention and unlawful" (para26).

The Appellant was unlawfully expelled from the Bahamas as "Article 25 of the Constitution grants persons in The Bahamas an immunity from expulsion unless authorized by law. The court referred to the Immigration Act of the Bahamas

which provides that the Minister may make a deportation order and as that there was no such order made. Moreover, "it has been repeatedly stated in numerous cases in The Bahamas that only a court can determine whether a person's presence in The Bahamas is contrary to the Immigration Act" (para 30).

It remains to be seen what the response of the Government of the Bahamas will be either by way of legislation or action in an appeal. However, what is clear is as of now the law related to persons born in the Bahamas who have never left the Bahamas, never been charged with any offence under the Immigration Act and never taken before any court and no recommendation for Deportation are protected constitutionally and arguably they are entitled upon application to the Minister of Immigration to be issued such status as would permit them to remain in The Bahamas and to legally seek gainful employment (para 38).

The framers of the Constitution of the Bahamas have all but died out with the exceptions being Former Governors General Arthur D. Hanna and Sir Orville Turnquest, former Cabinet Ministers and Members of Parliament Loftus A. Roker and George A. Smith. One cannot help but ponder the question of whether this is what they envisioned forty-five years ago at the formation of an Independent Bahamas?

The Immigration debate will continue to be a source of contention in the Bahamas and Bahamian law will have to evolve to meet the changing reality and this case has demonstrated this as arguably a new category of Bahamians have been born as a result of this Supreme court ruling.

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