COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Public Law Division
2020/PUB/jrv/00005

BETWEEN:

ROSETTA FOSTER
JAMAR WRIGHT

Applicants

AND

(1) THE ATTORNEY GENERAL
(2) MINISTER OF IMMIGRATION
(3) MAGISTRATE CAROLYN VOGT-EVANS

Respondents

Before: The Honourable Mr. Justice Loren Klein

Appearances: Mr. Geoffrey Farquharson for the Applicants
Mr. Basil Cumberbatch for the Respondents

Hearing date(s):

JUDGMENT

24 June 2020

KLEIN J

INTRODUCTION

[1] This is an application by a mother and son duo, Jamaican nationals living in The Bahamas, for leave to apply for judicial review of decisions which respectively landed them in prison for immigration offences and subsequently the Detention Centre awaiting deportation. Specifically, the applicants are seeking to challenge what they describe as the "Detention and or Deportation Order" made by the Second Respondent (the Minister) and the "detention and denial of Constitutional Rights" by the Third Respondent, a Stipendiary and Circuit Magistrate (the Magistrate).

[2] The claim arises out of the charge and conviction of the applicants before the Magistrate on 22 January 2020 on charges of overstaying contrary to Section 28(1) and (2) of the Immigration Act, Chapter 91 (the Act), and which are punishable under section 49. According to the record, the pair pleaded guilty and were convicted and fined $2,500 each or three months' imprisonment at the Bahamas Department of Correctional Services (BDOCs), then to be handed over to the Department of Immigration for deportation after payment of the fine or serving time. Unable to pay the fines—or having made the conscious decision not to pay the fines, as will be explained later—the

applicants served their time at BDOCs and were then taken to the Carmichael Road Detention Centre (DC), at about the very same time as the Government declared a state of emergency due to the Coronavirus (Covid-19) pandemic that resulted in a virtual lockdown of the country.

Covid-19 delays

[3] Before turning to look at the issues, I should state that it is a matter of great regret that there should have been a lapse of just over two months since this matter was initially set for hearing and its disposition. The fact that it arises in the context of an application for judicial review, which are meant to be speedily resolved by the courts, makes it all the more regrettable. But this is one, of which are likely to be a significant number of cases, which have been disrupted and delayed as a result of the state of public emergency declared on the 17 March 2020 by His Excellency the Governor-General to respond to the novel Coronavirus (Covid-19), declared to be a global pandemic by the World Health Organization on 11 March 2020. To prevent the spread of the disease, the Government, through a series of Emergency Regulations, imposed a stay-at-home order for all but the most essential of public servants (mainly uniformed services), which as indicated resulted in the cessation of services by private enterprises and the majority of public entities. This included the Courts, for all but the most urgent of legal matters, although over time hearings in various categories of cases were incrementally restored via the use of remote technologies.

[4] While any delays in the delivery of justice are always to be lamented, the prerogative of the Government to take extraordinary and overriding measures to preserve public safety during situations of grave public emergency is given constitutional imprimatur by article 29 of the Constitution, and long recognized by the common law. "*Salus populi suprema lex*" goes the Latin maxim—'the welfare of the public is the supreme law.' Yet, despite legal and other efforts to protect the welfare of the people, The Bahamas has to date tragically sustained the loss of 11 lives to Covid-19, and over 100 persons have been infected. The pandemic has left no corner of the globe unscathed, infecting over 9 million persons worldwide and claiming over 470,000 lives, numbers that unfortunately are still climbing.

PROCEDURAL BACKGROUND

[5] As this matter appeared to me to fall into Lord Donaldson M.R.'s "intermediate category" of judicial review applications, which require further scrutiny on the application for leave (*R v Secretary of State for the Home Department, ex parte Doorga* [1990] C.O.D. 109 (110), I directed early on that the papers be served on the Respondents. The parties appeared before me initially on 11 March 2020, and at the request of the Respondents, which was not opposed by the Applicants, was adjourned to 19 March 2020 for an *inter partes* hearing and to allow the Respondents an opportunity to file responsive documents. The Respondents indicated that they would be opposing the application. The Applicants also requested and were given leave to amend the Application.

[6] The Application was amended several times and eventually settled on 16 March 2017. The Applicants also laid over the sworn (but unfiled) affidavit of Leslie Greene on 20 March 2017 (filed 20 May 2020). The Respondents, also on the 20 March 2020,

lodged two draft affidavits (of Immigration Officer Freelander Rolle and Honorary Jamaican Consul Terrel A. Butler). Owing to the challenges caused by Covid-19, these draft affidavits were not sworn and filed until the 8 and 9 June 2020.

[7] At the hearing listed for the 19 March 2020, the matter was adjourned to the 23 March 2020, although it was tolerably clear at this point that this was a moving target, considering the emergency regulations and the Protocols promulgated to govern court hearings during this period. However, on 20 March 2020, a few days after the state of emergency had been declared, I heard Mr. Farquharson in-court at short notice (subject to strict physical-distancing measures), while Mr. Cumberbatch was patched in by phone, on an urgent application for an interlocutory injunction to prevent the applicants being deported. It had come to Mr. Farquharson's attention that the applicants were at that point being taken to the Detention Centre and he apprehended their immediate deportation. The Respondents did not oppose the interlocutory injunction, and I granted an injunction restraining the Second Respondent "from taking any action to deport the Applicants….from the Commonwealth of The Bahamas until the hearing and determination of the Applicant's leave for Judicial Review…which has been adjourned for hearing on Monday 23rd March 2020…or until further order." In any event, the injunction turned out to have been somewhat academic, as regular international commercial travel between The Bahamas and foreign states was suspended, and remains so for the time being.

[8] Obviously, the hearing for the 23 March 2020 did not take place, and it is to be noted that the Applicants had specifically requested an oral hearing. At this point, no one could have predicted the extraordinary events that would unfold and the measures that would be taken pursuant to the emergency regulations to protect public health, and certainly not its prolonged duration. As it became more and more clear that an in-court oral hearing was not likely to come on anytime soon, I sought the consent of the parties to hear the matter on the papers, having already heard preliminary submissions from the parties. Mr. Farquharson eventually indicated his consent on 22 May 2020 to this mode of disposition. I should say, however, for the avoidance of any doubt, that as the Applicants were seeking an oral hearing, this is a hearing on the written submission of the parties pursuant to Order 31A, Rule 18(2)(o), R.S.C., and not the peremptory determination on the papers without a hearing permissible under O. 53, r. 3(3).

THE TEST FOR THE GRANT OF LEAVE

[9] *Order 53, rule 3(1)* provides that no application for judicial review shall be granted unless the leave of the Court has been obtained. The permission stage in judicial review is to filter out challenges where the applicant either does not have the necessary interest to maintain the challenge, or in which the claim is unarguable, doomed to fail or subject to some legal or discretionary bar.

[10] The traditional statement of the test for the grant of leave has been that an applicant for judicial review had to make out what has been variously stated as a *prima facie* or arguable case on one or more of the traditional heads of judicial review such as illegality, irrationality, procedural impropriety (and now legitimate expectation). In *R v Secretary of State for the Home Department, ex parte Swati* [1986] 1 W.L.R. 477, Lord Donaldson, MR, said (at pg. 482, f-g):

> "If the applicant were to obtain leave, he had at least to satisfy the court that he had an arguable case for judicial review upon the grounds of illegality, "irrationality," (i.e., *Wednesbury* unreasonableness: see *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 K.B. 223), or procedural impropriety: see *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, 410."

[11] To similar effect, in *R v Civil Service Appeal Board, ex parte Cunningham* [1992] I.C.R. 310, Lord Donaldson made the following observations (at pg. 823):

> "Those of us with experience of judicial review are very much aware that the scope of the authority of decision-makers can vary very widely and so long as that authority is not exceeded, it is not for the courts to intervene. They and not the courts are the decision-makers in terms of policy. They and not the courts are the judges in the case of judicial or quasi-judicial decisions which are lawful. The public law jurisdiction of the courts is supervisory and not appellate in character. All this is very much present in the minds of judges who are asked to give leave to apply for judicial review. *Such leave will only be granted if the applicant makes out a prima facie case that something has gone wrong of a nature and extent which might call for the exercise of the judicial review jurisdiction*." [Emphasis Supplied.]

[12] However, while the initial threshold for leave was rather low and thought necessary mainly to weed out "busybodies with misguided or trivial complaints of administrative error" (per Lord Diplock in *R v Inland Revenue Commissioners ex parte National Federation of Self Employed and Small Businesses Ltd.* [1982] AC 617, pp. 642-643) the test has evolved over time and as now applied by the UK Courts and adopted by our apex court is somewhat more stringent. In *Sharma v Browne Antoine* [2007] 1 WLR 780 (at 787), the Privy Council formulated the test as follows (para. 14, pg. 787):

> "The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that *there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or alternative remedy*". […] It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen'. " [Emphasis supplied.]

[13] These principles have been applied by the Supreme Court of the Bahamas recently in *The Queen v. The Attorney-General and Ors., ex parte Andre Rollins and Anor.* (2017/PUB/jrv/0003), where Winder J., following an *inter partes* hearing, refused to grant the applicants leave to challenge the report of the Constituency Commission of The Bahamas on the grounds, *inter alia*, that it was produced out of time. Winder J. said: (para. 30):

> "I remind myself that this is a leave application and that it is the duty of the applicants to satisfy me that there are arguable grounds with realistic

prospects of success. The position is not as simple as counsel for the applicants have stated in his presentation, that he merely has to get past this filtering process and develop his case thereafter."

THE O. 53 STATEMENT

[14] The Applicants seek leave in respect of two decisions, which are described in the Application as (i) "Detention and or Deportation Order of the Minister of Immigration"; and (ii) "Detention and denial of Constitutional Rights by Magistrate Carolyn Vogt-Evans". In respect of the impugned decisions, the Applicants seek a battery of reliefs, of which the following are material:

> "(5) Prohibition to prevent the Minister of Immigration from expatriating (sic) the Applicants prior to the completion of the review of their Immigration status and this action.
> (6) Certiorari to quash their conviction and any expatriation order.
> (7) An Injunction to restrain the Minister from detaining or expatriating the Applicant pending the resolution of this application.
> (8) The Magistrate's Sentences and or Orders and all further proceedings against the applicant be stayed pending the outcome of this application for judicial review.
> (9) The applicants seek an expedited hearing of the substantive application for judicial review (if leave to move is granted) together with an Order abridging time for service of the Respondent's evidence to ten days or such other period as the Court deems appropriate.
> (10) The applicants seek an oral hearing of the application for leave."

The grounds

[15] Rather more difficult to discern are the grounds on which the relief is sought. Under the rubric "Grounds on Which Relief is Sought" the Applicant simply states the following: "1. The Applicants are constitutionally entitled to due process in the consideration of their Immigration status"; and "2. The Immigration Act and regulations give the applicants the right to request reconsideration of any adverse decision to their Immigration status." There is no further elaboration on these grounds.

The evidence

The applicants'

[16] In support of the Application, the applicants have filed affidavits by both applicants, Rosetta Foster and Jamar Wright, and an affidavit by a Mr. Leslie Greene, who claims to be the 'common law' husband of Ms. Foster. For all their detail, the affidavits of the Applicants do not provide the facts that would ordinarily be expected to shore up a claim for judicial review. Instead, they refer to various historical civil and criminal matters involving the applicants either as witnesses or parties before the magistrates' courts, and attempt to paint a picture of collusion, bad faith and intrigue between Immigration authorities and the other parties involved in those matters. It is implied that these conflicts may have been the source of the instigation of enforcement action against the pair, including the recent charges of overstaying. It is import to summarize in some detail the allegations which are made to put them in context.

[17] In her affidavit (which may be taken as representative of the affidavit by Jamar), Ms. Foster states that she has resided in The Bahamas since 2000, except for a brief period after 2002, and that Jamar (who was born in Jamaica) came here in 2013. She refers to an incident in 2017, when Jamar was allegedly attacked and suffered injuries to his face, which led to them being witnesses in a case before "Magistrate's Court No. 6" (the 3rd Respondent's Court) and required to "sign in" every Tuesday at Immigration. She indicates that when the trial was about to begin before the magistrate, they were both detained "for weeks" at the DC, later released without charge, but that their passports were retained in the custody of Immigration. She then refers to a civil claim commenced against her for eviction in 2019, in which she counterclaimed against the complainant for monies owed pursuant to her work as a caretaker. This was heard in Magistrate's court No. 13, and she indicates that "judgment was entered for her" on the 22 of January 2020, but earlier that same day she and her son had been taken before the magistrate on the overstaying charges and convicted. She says she was not permitted to consult with a lawyer, but that "the Jamaican Consul (a lawyer) insisted that I withdraw my not guilty plea, pay a fine and return to my previous arrangement where I signed in at the Department on Tuesdays." She also states that on being committed to prison, she was inquiring with "intent to pay the fine" but was told that they would be deported immediately if they paid the fines, so "instead I am taking advice on regularizing my status with the Immigration Department and taking measures to implement that advice." She concludes by praying for an "injunction and Order of Prohibition to prevent the Minister of Immigration from expatriating *(sic)* me prior to the completion of the consideration or reconsideration of my application for Judicial Review and residency status." Jamar's affidavit basically contains the same narrative, the necessary changes being made for his personal details.

[18] Leslie Greene, who styles himself as the "common law husband" of Ms. Foster and someone with whom he has "co-habited" for some 20 years, also relates the criminal and civil matters in which the pair were involved, but with more lurid details. He goes so far as to name names, but the identity of the persons involved in these matters is not relevant to these proceedings. Mr. Green relates that as a result of the complaint made in respect of the attack on Jamar in 2017, there was a another "assault" on Ms. Foster and Jamar by an associate of the person charged with the attack, which resulted in Ms. Foster being struck with two cases of beer, and Jamar nearly run over by a truck. When they complained about this, he says they were apprehended by Immigration authorities. The perpetrator of that attack was allegedly charged before the Third Respondent in this matter, and he alleges that the mother of this person may have been responsible for "setting the Immigration authorities on them in an effort to thwart these prosecutions." He alleges further that the mother of the second accused is a relative of the persons involved in the civil action, and may somehow have been involved in setting the Immigration authorities in motion on this most recent occasion, after the civil claim which Ms. Foster was defending was dismissed by the court. Mr. Green also alleges that after the recent arrest of the pair, he spoke to an Immigration officer responsible for enforcement who checked the register and "identified the applicants as persons who had been signing in for years and who has just signed in the previous Tuesday", but who determined that the matter should be dealt with by the Court. He apparently made inquiries of the magistrates' court with respect to the signing-in orders, but states that there was no record of any such orders made by either Court, and that the Magistrate who heard the charges in the current case denied having made such an order and "pressed

them [the Applicants] to take advice from the Jamaican Honorary Consul". He states that the Consul "insisted" that they plead guilty—which they did—and that his entreaties to the court resulted in him being removed and the matter concluded in minutes.

The Respondents'

[19] In her affidavit, Immigration Officer Freelander Rolle basically recounts how the pair was arrested by Immigration Officers on 17 January 2020, as a result of immigration checks conducted in the western area of New Providence, and when questioned were unable to produce any documentation as to their legal status in The Bahamas. She indicates that Ms. Foster stated that both she and her son, Jamar, were in the Bahamas "for a while due to an ongoing court case and that she and her son are required to sign in every Tuesday at the Department of Immigration on the third floor". However, they were not able to produce any documentation with respect to the signing in. They were both taken to the Detention Centre for further processing. Officer Rolle indicates that a check of the Border Control System indicated that Rosetta Foster entered The Bahamas on 15 April 2016 as a "visitor", and although no specified number of days is recorded for her stay as a visitor, the law (Immigration Act) allows a maximum of 8 months, which means that giving Ms. Foster the benefit of the longest permissible visitor stay, she would have overstayed by some 2½ years. As to Jamar Wright, he was shown to have landed as a "visitor" on 8 August 2013 for a period of 30 days, and therefore would have overstayed in excess of 6 years. Based on this, Officer Rolle indicated that recommendations were made for the pair to be charged with the Offence of overstaying contrary to s. 28(1) and (3) of the Immigration Act, and this is how they came to be before the magistrate on the 22 January 2020.

[20] The affidavit by the Honorary Jamaican Consul, Terrel A. Butler, paints a rather different picture of what transpired in the Magistrate's court. I set out the relevant passages:

> "2. I recall that two men came to my office and they informed me that they acted on behalf of Rosetta Foster and Jamar Wright and advised me that [they] needed my assistance in court. The older man told me among other things that Rosetta and Jamar are Jamaican Nationals… they were being lawfully (*sic*) held in at the Detention Center because they had a trial going on in the Bahamas and the Magistrate had given them permission to remain in the Bahamas until the case was completed but they had to go in to Immigration and sign in as a part of the Order. I advised them to go to court and get a copy of that Order which gave them permission to stay in the country and take it to the Immigration Department.
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> 3. Subsequently, about a day or two later, I was in Court No. 6, Magistrate's Court, representing another client when the same older man approached me and told me her matter was going to be mentioned in that court. I was asked to speak to the Magistrate on their behalf, which I did. I met them for the first time in court and I introduced myself to them and they asked me to help them. They never said they had any objection to my presence and they told me a similar account that the said older man had given me. As a result, I thought that they were lawfully in the Bahamas and I tried to assist. Initially, they pleaded not guilty when [they] were read the charges.

> 4. They informed Magistrate Vogt-Evans that they were given permission to stay in the country on the condition that they sign in to the Immigration Department every Tuesday. However, there was a representative from the Immigration Department that confirmed that they had no status in the country and said there was no evidence of such arrangements. Magistrate Vogt Evans checked her records and realized that the case which they said they had remained in the Bahamas to give evidence for was already concluded about three (3) years ago and that they were illegal in the country. When they were confronted with that fact, they admitted that the case was over and they were signing in to the immigration department every Tuesday. They could not say what the name of the person was who they signed in with.
>
> 5. Stipendiary and Circuit Magistrate Mrs. Vogt Evans asked them to words to the effect if they thought they could remain here for so long after the case was completed without status in the Bahamas. At some point during their conversation, Rosetta maintain that someone at immigration allowed them to sign in there. However, the immigration officer who was in court said there is no record of any such arrangement.
>
> 6. Based on their admission to the court, I spoke to them again and I advised them of their rights to plead guilty or not guilty. They elected to plead guilty. They insisted they wanted to get over with it (*sic*) and they pleaded guilty. Their guilty plea was voluntary. …"

ANALYSIS AND DISCUSSION

The supervisory jurisdiction of the court

[21] It is trite that in exercising its supervisory jurisdiction over inferior courts (and other administrative tribunals or bodies), the Supreme Court is only concerned to see that the decision-maker acted lawfully: that is, that the tribunal did not embark upon the adjudication of a dispute where there was strictly no legal jurisdiction to do so, and that in exercising jurisdiction which it properly possessed it did not commit errors of law, abuse its powers, or act in a manner that is procedurally improper or *Wednesbury* unreasonable—the latter now conveniently grouped under the head of administrative fairness. In *R v Lord President of the Privy Council, ex parte Page and Boddington* [1993] AG 682, Lord Browne-Wilkinson conveniently summarized the position as follows (701-c-e):

> "The fundamental principle [of judicial review] is that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully. In all case, save possibly one, this intervention by way of prohibition or certiorari is based on the proposition that such powers have been conferred on the decision-maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a *Wednesbury* sense…reasonably. If the decision-maker exercise his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is *Wednesbury* unreasonable, he is acting ultra vires his powers and therefore unlawfully….".

[22] Despite the generalized allegations as to collusion and bad faith in the affidavits, the Court is only concerned to see whether or not the Applicants can make out an

argument with a realistic prospect of success that (i) the magistrate acted unlawfully in trying, convicting and sentencing the Applicants; and (ii) that the Minister acted unlawfully with respect to the detention and/or deportation orders.

The submissions

[23] As indicated, the Applicants do not advance much by way of grounds in their application, but the following submissions may be extracted from their skeleton submissions. They assert generally that the "procedure to which they were subjected was unlawful, in breach of their constitutional and due process rights and, in the circumstances, beyond of (*sic*) the jurisdiction of the Magistrate and Minister." Specifically, they contend that "the Magistrate purported to try and convict the Applicants in breach of the provisions of article 20 of the Constitution and the Immigration Act and made a deportation order to take effect automatically and without allowing the applicants to have recourse to the remedies provided by s. 40 of the Act". They argue further that both parties (the Magistrate and the Minister) acted "not only illegally but also in bad faith as clearly the magistrate's role in the matter ought to have disqualified her from sitting in the matter and the actions of the Minister could reasonable (*sic*) be seen as calculated to prevent the Appellants from asserting their lawful rights."

[24] The Respondents submit generally that in all the circumstances this is not a proper case for the grant of leave for judicial review, as the applicants have not made out an arguable case with any realistic prospect of success, and that in any event the Applicants had the alternative remedy of instituting an appeal against their conviction and sentence by the magistrate.

The pleadings

[25] Even before turning to look at the arguability of any of the grounds, something needs to be said about the state of the application. In *R (Gjini) v London Borough of Islington* [2003] EWCA Civ. 558, the Vice-Chancellor said:

> "It is incumbent on those applying for judicial review to make clear in the detailed statement of their grounds and facts relied on required by CPR 54 PD 5.6, paras 1 and 2 [see O. 53, r. 3] what their case is."

There is little doubt that the Application (Form A in Order 53) is very bare, and does not state with any cogency the grounds relied on which are said to vitiate the decisions being challenged. The reason judicial review is sometimes referred to as a front-loaded process is because the Court should be able to discern up-front and from a very quick glance the decision(s) being challenged and the ground(s) which are being advanced in support of the Application. The affidavit(s) should provide the facts supporting those grounds and the skeleton submissions should amplify the legal reasons. In this regard, the founding affidavits are vital, as subject to the filing of any additional evidence as may be allowed by the court for the substantive hearing (if leave is granted), they alert the court as to the possible strength of the applicants' claim. Although the Court is obviously not called upon to conduct a mini-trial at the leave stage, the court must necessarily form a view of the evidence.

The Magistrate's decision

The Immigration Act

[26] The applicants were charged under s. 28(1) of the Act, which provides that no person shall remain in the Bahamas after the expiration of the period for which he is permitted to remain in the Bahamas by Immigration pursuant to s. 22 (i.e., for the time when he is landed) unless he has a permit under s. 30 of the Act, which makes provision for residency and work permits. Section 28(3) makes contravention of this section an offence. As there is no specific penalty prescribed, the general penalty at s. 49, which provides for a person who commits an offence to be liable on summary conviction to a fine of $3,000 or to imprisonment for two years, or to both such fine and imprisonment, would apply. Section 9 of the Act empowers a police or immigration officer to arrest without warrant any person on reasonable suspicion of them committing an offence under the Act, and to bring them before a magistrate in accordance with s. 18 of the Criminal Procedure Code (CPC). Thus, there is really no issue that can be taken with the magistrate's jurisdiction to try and convict the applicants, and the punishment awarded was also within the permissible statutory range.

Voluntariness of plea

[27] One then has to look to see whether the decision might be impeachable or grounds of procedural impropriety or natural justice with respect to the conduct of the hearing by the magistrate. Front and center in this case is the fact that the applicants pleaded guilty, which creates a rather difficult hurdle for them to surmount. The magistrate's certificate simply records an unequivocal guilty plea. This is not to say that the Court's supervisory powers can never be exercised where there is an unequivocal guilty plea, but the cases where that might be appropriate are exceptional and limited (see, for example, the conjoined appeals of *R v Wilson, et. al.* [2019] EWCA Crim 2410, where the UK Court of Appeal held that the High Court had power to quash decisions where the appellants had pleaded guilty to driving under the influence of a controlled substance (cannabis) exceeding the prescribed limit in their system). This was because it later turned out that the results were based on what was later publicly accepted to have been a faulty system for testing, affecting as many as 8,000 samples. But this present case does not fall into that narrow category of cases.

[28] The Applicants contend that their plea was not voluntary, and that the Honorary Consul insisted that they change their plea. To establish this, they would have to be able to prove that at the time they pleaded, they were under such pressure as to be deprived of a free choice between 'guilty' or 'not guilty' (see *Turner* [1970] 2 QB 321). The evidence of the Honorary Consul, also a very senior counsel, indicates that the applicants voluntarily changed their plea after they were confronted with the fact that not only was the case on which they were relying for cover to remain in The Bahamas long concluded, but that there was no record of them signing in. It is not unusual for an accused to change his plea from 'not guilty' to 'guilty' when forced to confront the reality of the facts or evidence against him, and a magistrate's court has an unfettered discretion to allow a change of plea from not guilty to guilty at any time before a verdict is returned.

[29] Of course, the mere entry of a guilty plea does not preclude inquiry into whether a plea of guilty should not in fact have been entered, where the accused may have pleaded guilty under a misapprehension or lack of understanding of the gravity or the nature of the offence: *R v West Kent Quarter Sessions, ex parte Files* [1951] 2 All ER 728. But I would have great difficulty in accepting that the applicants did not understand the offence with which they were charged, especially given their familiarity with the immigration system. The offence of overstaying by its nature generally does not admit of legal complexities.

[30] More significantly, however, the Applicants' attempted reliance on any naivete is belied by their own affidavit evidence. This is what Ms. Foster says at paras. 54-56 of her affidavit:

> "54. On making inquiries with intent to pay the fine, we discovered that both of us would be deported immediately if we paid the fines. *So I am taking advice on regularizing my status with the Immigration Department and taking measures to implement that advice. 56. I am advised by my attorney and verily believe that I have a better than even prospect of success*." [Emphasis supplied.]

A similar averment, *mutatis mutandis*, appears at the identically numbered paragraphs of the Wright affidavit.

[31] The evidence of Ms. Butler was even more categorical on the applicant's motivation to remain in The Bahamas. She states (at para. 9 of her affidavit) that she believes that the applicants "are now lying because they think it will help them to remain in the Bahamas", and that she was never shown any document or proof of any legitimate status.

[32] It seems to me that the applicants took a calculated risk to attempt to use a legal stratagem to avert their possible deportation by clutching at whatever straws they could to give themselves a reason to be in The Bahamas, or time to regularize their status. For example, one of the reliefs sought is prohibition to prevent "expatriation" prior to "the completion of the review of their Immigration status and this action," and before consideration or reconsideration of her "residency status". If in fact the applicants' immigration status or any residency application is under review by the Immigration authorities, no challenge in respect of that process is currently before me. I therefore do not see the argument as to the lack of voluntariness of their pleas being arguable with any realistic prospect of success, when they have basically conceded that they lack status, which they are only now seeking to "regularize".

Adequate time for defence

[33] The Applicants also allege that they were not afforded reasonable time and facilities for preparing a defence. Having regard to the view I have taken of the voluntariness of their plea, this argument has a short trajectory. *Certiorari* can indeed lie where an accused is not afforded sufficient time and facilities to prepare his defence (see, for example, *R v Thames Magistrate Court Ex p. Polemis (The Corinthic)* [1974] 1 WLR 1371). But the applicants having pleaded guilty, and having had the assistance of senior counsel, the magistrate had little option but to convict and sentence. If the applicants had maintained a 'not guilty' plea, it is quite probable that the magistrate would have adjourned the matter and set a date for trial. In any event, as noted, a charge

of overstaying does not usually admit of any complex issues of fact or law, and the crux of the matter is whether or not the applicants have the proper permits or permissions to be in The Bahamas at that point in time. I reiterate that the applicants have basically conceded that they do not have status, and are currently embarking on 'regularizing' such status.

Section 40 of the Act

[34] The Applicants also allege that the process before the magistrate and the making of the deportation order to take immediate effect deprived them of remedies under s. 40 of the Act. For the reasons given below, I do not agree that the magistrate's decision had that effect. Section 40(2) provides as follows:

> "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." [Emphasis supplied.]

[35] Firstly, this section only applies to a person who *immediately* before the making of the deportation order was *lawfully* in the Bahamas, that is with the leave of an immigration officer or by virtue of some permit. A person who is charged with overstaying, and who pleads guilty to that charge, can hardly come within the definition of a person lawfully within the Bahamas. Secondly, it is erroneous to attribute to the magistrate the making of the deportation order, as the magistrate's jurisdiction ceased and she was *functus officio* after conviction and sentencing. True it is that the Magistrate's Order reads: "Defendants to be handed over to the Department of Immigration for Deportation after payment of fine/serving time". But this is only indicative of what would happen in the normal course of events with respect to persons who are convicted and sentenced of offences relating to being in the country without leave or overstaying. As they have no leave to be in the Bahamas, they necessarily remain subject to the control of the Immigration Department.

[36] However, having already served their time for the offence, the applicants cannot now be held at the Detention Centre by virtue of the magistrate's order, nor can they be deported under it. With respect to the deportation point, the Respondents cite the case of *Regina v East Grinstead Justices, ex parte Doeve* [1969] QBD 136, where the UK QB Divisional Court held that justices of a petty sessional division had no authority to order an alien who overstayed his leave to enter into a recognizance of £100 to basically deport himself in seven days. The court held that the power to require recognisances to ensure aliens complied with specified legal requirements, such as registering a change of address, was not an alternative to the statutory deportation procedure, in which deportation was still a matter for the decision of the Home Secretary.

[37] Although *ex parte Doeve* was decided under the provisions of the UK Aliens Restriction Act 1914 and the Aliens Order 1953, the general immigration principles are apposite. The magistrate's jurisdiction ended at her passing of sentence. Deportation, although it might be predicated on a conviction for an offence under the Act, is ultimately an executive act. For example, s. 19(3) of the Act provides for the Director

of Immigration, by order in writing to direct the removal from The Bahamas of anyone convicted of an offence of landing or embarking without leave and sentenced therefor to a term of imprisonment (even before the expiration of the sentence). In a similar vein, section 41(1) provides for the Minister, when it comes to his attention that a person other than a citizen or permanent resident "(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 punishable or any other offence punishable on indictment with death or imprisonment for two years or upwards;…" to make a "deportation order" requiring that person to leave The Bahamas within the time fixed by the deportation order. Section 41(4) provides in part that "…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."

[38] It might be noted *en passant* that the reference to the Governor-General making a deportation order in s. 41(4) appears to be a result of a drafting anomaly, which was pointed out as early as *Jean v Minister of Labour and Home Affairs* (1981) 31 WIR 1, per Blake, J. It appears that prior to 1973, the power to deport and detain pending deportation were all vested in the Governor, and that an attempt was made by amendment to vest the powers of deportation and detention in the Minister, which apparently was only partially done, resulting in the dichotomy. But nothing turns on this for the purposes of this application.

Bias and bad faith

[39] Although the applicants make generalized allegations of bias and bad faith, they do not specify the acts or conduct that are said to constitute bias or bad faith. Mr. Farquharson suggests that the fact that the magistrate had previously dealt with the applicants in the earlier criminal case in which they appeared as witnesses ought to have disqualified her from sitting, but without more that cannot be an accurate statement of the law concerning bias. The mere fact that the magistrate may have dealt with the earlier matter in which the pair were witnesses would not, without more, lead a "fair-minded informed observer, having considered the facts…[to] conclude that there existed a real possibility that the tribunal was biased…": *Porter v Magill* [2002] AC 257; *R v Jones* 72 WIR 1 (paras. 23-35, per Allen, Snr. J.). Courts have recognized that there is to be accorded a presumption in favour of a tribunal's impartiality, and this presumption can only be displaced by cogent evidence. In addition, the evidence indicates that the magistrate's inquiries revealed that the case on which they were staking their claim had long been completed, and in any event terminated favourably in their regard. I therefore do not find that the applicants can make out an arguable case with any realistic prospect of success on the bias point, and they have not furnished any evidence in respect of the bald allegations of bad faith in respect of either the 2nd or 3rd Respondent.

The challenge to Detention & Deportation

[40] Notwithstanding that the applicants purport to challenge the "Detention and Deportation Order", they have not adduced any reasons or grounds for challenging either. In fact, the court has not been provided with any evidence of whether deportation/detention orders have in fact been made with respect to the Applicants. In the absence of any allegations as to the existence of these orders, or as to their validity

or regularity, the court must rely on the presumption of the regularity of the acts of public official (*omnia praesumuntur rite esse acta*). If this reliance is misplaced, the applicants might be entitled to seek redress in that regard. But as there is no evidence one way or another on this issue, and no ground of that kind has been taken before the court, I cannot enter into the subject any further.

Alternative remedies

[41] The Defendants argue as a discretionary bar that the applicants had alternative remedies available, in that they had the option of a magisterial appeal under s. 14(1) of the Court of Appeal Act, which provides, *inter alia*, that a person charged with any offence for which he is liable to imprisonment for a period of one year or more, may appeal to the Court of Appeal on various grounds, subject to complying with certain procedural requirements (and see s. 234(a) of the CPC).

[42] While it is generally the case that an applicant for judicial review should pursue any available alternative remedies before recourse to judicial review (subject to admitted discretionary exceptions (see *Sargent v Knowles, et. al*, CL 1334 of 1993, per Sawyer J (as she then was)), I do not think this is a case where the applicants are precluded from seeking judicial review by virtue of the avenue of a possible appeal. Having pleaded guilty, there would clearly be no appeal available in respect of their conviction (see *Tannis v Attorney General* [1965-70) 1 LRB 381), and an appeal against sentence only would not likely have provided adequate redress. Thus, I do not find that the very notional possibility of an appeal would have militated against a judicial review challenge.

DISPOSITION

[43] Based on the picture to be gleaned from the affidavits, the applicants have either been incredibly unlucky, careening from one legal and personal misfortune to another, or possibly the victims of their vulnerable status. The allegations that the Applicants have maintained contact with the Immigration authorities throughout these ordeals are disquieting, and raise questions which cannot be answered in this forum. What is clear, however, is that the Applicants feel they have suffered injustice and harbour a real sense of grievance as a result of their exposure to the courts and their interaction with the Department of Immigration. There may well be something there to ignite a spark for legal redress, but it has not been articulated in the application for leave before this court. It is not the role of the court on an application for leave to attempt to find in the interstices of legal arguments or affidavits some slight or other wrong that can be added to the judicial review arsenal of the applicant and thereafter furnish some ground which had not been thought of, or which can be later developed during the interlocutory process (a practice deprecated by the Privy Council in *Sharma*).

[44] Regrettably, and despite a careful ploughing of the applicants' statement, affidavits and skeleton argument, I do not find that there are arguable grounds with a realistic prospect of success that would justify the grant of leave for judicial review. I do not see the basis on which a Court, in its supervisory jurisdiction, would be entitled to interfere with the Magistrate's decision, in particular having regard to what seems to have been a consciously-entered guilty plea, with the assistance of legal advice. Further, and as indicated, there are no grounds advanced in respect of the so-called challenge to

the detention/deportation orders, at least none that are developed before the court. I therefore refuse leave for judicial review. In all the circumstances of this case, I make no order as to costs.

[45] I will hear the parties on any matters arising on two days' notice.

Dated the 24 June 2020.

Loren Klein
Justice