

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Criminal Law Division
2021/CRI/CON/006**

BETWEEN

**Rui Hao
Litao Ye
Shaojian He
Puijian Cai
(a Minor, by her next friend, Shaojian He)**

Applicants

AND

**The Hon. Elsworth Johnson
(In his capacity as Minister of Immigration)**

1st Respondent

**Clarence A. Russell
(In his capacity as Director of Immigration)**

2nd Respondent

**Peter Joseph
(In his capacity as Officer in Charge of the Carmichael
Detention Center)**

3rd Respondent

**The Hon. Carl Bethel
(In his capacity as Attorney-General of The Bahamas)**

4th Respondent

BEFORE:

The Honourable Mr Senior Justice Bernard Turner

APPEARANCES: Mr Frederick Smith KC, and Ms Raven Rolle for the Applicants

Mr Keith Cargill and Mr Kingsley Rolle for the Respondents

HEARING DATES: 13 August, 28 September & 14 October 2021, 13 January & 17 February 2022

DECISION

TURNER Snr J

The Applicants applied by way of an ex parte summons filed 21 July 2021 for leave to issue a writ of habeas corpus. On 5 August 2021 leave was granted, with a return date of 13 August 2021.

2. On 13 August 2021 counsel for the applicants advised the court that the applicants had all been released on 6 August 2021.

3. Upon an indication by the applicants that they would be seeking costs in respect of the application for the writ of habeas corpus, which the respondents indicated they would be resisting, the matter was fixed for the filing of a return and a hearing on the application for costs, with the necessary directions for affidavits and submissions.

4. The return to the writ was filed 11 November 2021, indicating that the applicants had been released 6 August 2021.

5. I have been advised that the applicants may have filed a separate Writ of Summons in relation to matters which may or may not be related to the instant matter, that Writ is not before me and I am not addressing any issue in relation to any such Writ.

6. This is my decision in respect of the application for costs for a habeas corpus application.

7. To set the context, the ex parte summons sought:

“1. Leave to issue a Writ of Habeas Corpus ad Subjiciendum as against the Respondents herein on the ground that the Applicants has been in unlawful custody since 4th June 2021 having paid a fine for overstaying the Applicants and were discharged by the Magistrate Court on 8th June 2021 and have yet to be charged with any criminal offence; and notwithstanding the foregoing the Respondents continue to falsely imprison the Applicants in breach of their Constitutional Rights; and

2. An Order that the Respondents, or any of them, shall not, whether acting by themselves, or by any person under them in their chain of command, or by any agent, or by giving any direction or consent or permission or encouragement to any person, deport or otherwise remove from The Bahamas, the Applicants or any of them unless it is by consensual pre-arrangement with the Applicants and or their attorneys.

3. An Order that the Costs of and occasioned by this Application be costs in the cause.”

8. The affidavit in support of the application was not filed by the applicant but by a Wislande Geffrard, described as being a Legal Assistant in the Chambers of counsel for the applicant. The information in the affidavit was said to have been provided by:

“...Callenders and thus to me through the instructions by Attorney Victor Cerda of Cerda Law and Ding Lin of the Rule of Law Foundation in New York, New York, USA.”

9. The affidavit asserts that the applicants could not swear the affidavit themselves due to the Covid protocols in place at the Carmichael Detention Centre.

10. This is mentioned, having regard to the decision of The Bahamas Court of Appeal in the matter of **Hon. Carl Bethel et al v Jean-Rony Jean-Charles No. 26 of 2018**, wherein the Court stated, under the rubric **“Was the Judge Correct to Dismiss the Writ of Habeas Corpus and the Motion for Contempt?”** the following:

“28. In my judgment not only was the judge correct to dismiss or discharge the Writ of habeas corpus on the material that was before him, the judge ought not in my judgment to have caused the writ to be issued.

.....

32. Further, in paragraph 4 of the Clotilde affidavit she states that the affidavit contains statements of facts which are not of her own knowledge. This is impermissible. Order 41 rule 5 states,

“5. (1) Subject to Order 14, rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.”

An application for a writ of habeas corpus is not an interlocutory application.

33. In paragraph 17 she states categorically that her brother is still “unlawfully in prison” this was not a matter of which she had any knowledge at the time she made her affidavit. Her affidavit does not state that she ever saw her brother at the detention camp nor did it state the basis upon which she knew at the time the affidavit was sworn that he was still being detained at the detention camp.

34. These defects illustrate why it was important and why the rules require that an affidavit be made by the applicant himself.”

11. The Return to the Writ reads:

“The return to this writ on behalf of the Respondents herein appears by Schedule annexed to the said writ as follows:

Schedule

I, Fausteen Major-Smith, Officer-in-Charge of the Carmichael Detention Center, declare that I am duly authorized to make this return on behalf of myself and the Respondents named in the writ to which this return is annexed.

I do hereby certify that on 5th June, 2021, a vessel was intercepted of the coast of Bimini, The Bahamas, and towed to a Bimini port by the Royal Bahamas Police Force. The Applicants, who are Chinese Nationals, were discovered on board of the said vessel and were found to have overstayed their time granted by an immigration officer in The Bahamas. On 9th June, 2021, the Applicants, except the minor, were charged in Magistrate's Court No. 2 for the offence of Overstaying. The Applicants plead guilty and were convicted. The Magistrate ordered that the Applicants were to pay a fine of \$1,500.00 or serve 3 months in prison. It was also ordered that once the fine was paid or the sentence served, the Applicants were to be turned over to the Department of Immigration ("DOI") for deportation. The Applicants paid the fine and were transferred to DOI to await deportation. The Applicants were committed to the DOI Detention Centre to wait on a schedule for deportation. On 8th June, 2021, the Ministry of Foreign Affairs ("MOFA") was advised by way of memorandum to inform the Embassy of the People's Republic of China, officially, of the apprehension of the Applicants. The Deportation Unit of DOI immediately made preparatory steps for the deportation of the Applicants. Several requests for travel arrangements of the Applicants were made. However, due to the unwillingness of certain countries to allow the transit of the Applicants, the deportation process proved to be unsuccessful. Subsequently, an agreeable and workable transit itinerary for the Applicants was arranged for their travel on 5th August, 2021 as follows: Nassau - London - Doha - Singapore - China. The Applicants were escorted from the Detention Centre to the airport to begin their journey back to China with the exception of Litao Ye, who required a visa to transit through the United Kingdom and did not obtain the same. On arrival at the airport, immigration officers were advised by a British Airways representative that the leg from Doha to Singapore in the itinerary had been cancelled. As a result, the deportation exercise could not proceed and had to be aborted. The Applicants were returned to the Detention Centre. The Applicants insisted that their desire was to return to their homeland. The Applicants denied

that they had engaged the services of legal counsel, and the said denial was made in an audio recording and not in writing or by official statement. The Applicants were disappointed that they were not able to return to their homeland as scheduled and requested the DOI to reschedule the journey for them as soon as possible. The DOI rescheduled the deportation exercise for 7th August, 2021. The DOI received instructions from the Office of the Attorney-General on 6th August, 2021 to release the Applicants immediately, despite the fact that the Applicants had been rescheduled to depart on 7th August, 2021. On 6th August, 2021, the Applicants were released as instructed. During their committal to the Detention Centre, Pui Kin Cai, the young male Chinese National (Minor), was housed at the Safe House along with his mother, Shaojian He. The other Applicants, Rui Hao and Litao Le were housed at the Detention Centre property. At all material times, the Applicants appeared normal and healthy.

I do hereby certify and return in obedience to the said writ that Rui Hao, Litao Ye, Shaojian He and Puijian Cai (a minor, by her next friend, Shaojian He), the subjects named therein, at the time of the application for the writ and the issuing of the said writ was detained at the Carmichael Detention Center pending the travel itinerary necessary for their removal from the Bahamas.

For the reason above, the Respondents pray that the writ herein be dismissed.

12. I find that on the face of the return, the Writ ought to have been dismissed, had it fallen for consideration by the court. Counsel for the applicants asserted that it was because of the Writ that the applicants were freed, which is far from clear on the face of the Return, indeed the basis of the Office of the Attorney-General directing the Department of Immigration to release the applicants is

not disclosed, but on the Return, I find that the applicants were lawfully in custody for the purposes of deportation.

13. Further, from the Return, there seems to be a very real question as to whether the application was brought with the authorization or consent of the applicants themselves. As already indicated, the affidavit was sworn by a Legal Assistant in the Chambers of counsel who filed the application, and does not purport to be made from information coming from the applicants, but from the very Chambers and from counsel in a foreign jurisdiction.

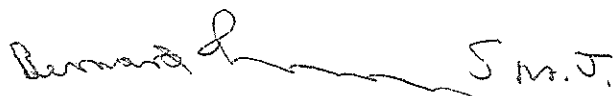
14. Based on the decision earlier cited (**Jean-Rony Jean-Charles**) it would appear as if indeed I ought not to have issued the Writ itself.

15. These reasons alone are a sufficient basis for the rejection of an application for costs by the applicants.

16. In addition however, this court's recent decision in **Wilkins Garcon v Vonette Flowers et al (2021/CRI/CON/008) 6 October 2022** constitutes a separate basis for the rejection of an application for costs.

17. For these reasons, I hereby dismiss the application for costs by the applicants, and I order that each party is to bear their own costs.

Dated this 19 day of October AD 2022

A handwritten signature in black ink, appearing to read "Bernard S A Turner S.M.J.", written over a horizontal line.

**Bernard S A Turner
Senior Justice**