COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Criminal Law Division
2021/CRI/CON/008

BETWEEN

Wilkens Garcon

Applicant

AND

Vonette Flowers
Immigration Officer at the Carmichael Detention Center

1st Respondent

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

2nd Respondent

Fausteen Major Smith
(In her capacity as Officer in Charge of the Carmichael Detention Center)

3rd Respondent

The Hon. Keith Ricardo Bell
(In his capacity as Minister of Immigration)

4th Respondent

The Hon. Ryan Pinder
(In his capacity as Attorney General of The Bahamas)

5th Respondent

BEFORE: The Honourable Mr Senior Justice Bernard Turner

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

Ms Cordell Frazier and Ms Karine Macvean for the Respondents

HEARING DATES: 7 & 14 October, 8 December 2021, 13 January & 10 February 2022

DECISION

TURNER Snr J

The Applicant applied by way of an ex parte summons filed 22 September 2021 for leave to issue a writ of habeas corpus. On 28 September 2021 leave was granted, with a return date of 7 October 2021.

2. On 7 October 2021 counsel for the applicant advised the court that the applicant had been released.

3. The return to the writ was duly filed 13 October 2021, indicating that the applicant had been released 1 October 2021.

4. Upon an indication by the applicant 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 a hearing on the application for costs, with the necessary directions for affidavits and submissions.

5. I have been advised that the applicant 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 Applicant has been in unlawful custody since on or about September 11, 2021 and notwithstanding being released by the Magistrates Court the Respondents continue to falsely imprison the Applicant in breach of his Constitutional Rights; and**
>
> **2. An Order that the Respondents, 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 the Applicant from The Bahamas.**
>
> **3. An Order that the Costs of and occasioned by this Application be costs in the cause."**

7. 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 a Kensley Joseph, described as being a cousin of the applicant. The affidavit asserts that the applicant could not swear the affidavit himself due to the Covid protocols in place at the Carmichael Detention Centre.

8. 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.**
>
> **29. Order 54 Rule 1 provides:**
>
>> **"1. (1) An application for a writ of habeas corpus ad subjiciendum must be made to a judge in court except that in cases where the application is made on behalf of an infant, it must be made in the first instance to a judge otherwise than in court.**
>>
>> **(2) An application for such writ may be made ex parte and, subject to paragraph (3), must be supported by an affidavit by the person restrained showing that it is made at his instance and setting out the nature of the restraint.**

(3) Where the person restrained is unable for any reason to make the affidavit required by paragraph (2), the affidavit may be made by some other person on his behalf and that affidavit must state that the person restrained is unable to make the affidavit himself and for what reason." [Emphasis added]

30. It is clear that the affidavit of Clotilde Charles did not satisfy the requirements of the Rule. It does not state that Jean-Rony Jean-Charles is "unable to make the affidavit himself" and does not state "for what reason" he is unable to make the affidavit. The mere fact that the applicant was being restrained does not mean that he is unable to make the affidavit himself. All applicants who make the application are by definition restrained.

31. The Clotilde affidavit raises the specter whether or not he was unable to make the affidavit because he was no longer restrained and was no longer in the country. It is surprising therefore that the trial judge would have acted on that affidavit given its glaring defect and given the fact that it failed to state what the rules required.

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."

9. The issue of whether this affidavit was properly before the court was not raised in the proceedings and does not fall for consideration, having regard to my decision. That being said, pertinent portions of the affidavit in support of the summons read as follows:

"7. Mr. Garcon was born in the Princess Margaret Hospital Nassau, The Bahamas on March 23, 1993. He is now 28 years old. There is now produced a copy of his birth certificate at page 2.

8. Mr Garcon was issued a Certificate of Identity numbered C/ABA/0013/2010 on February 16, 2010 with an expiration date of February 16, 2011. There is now produced a copy of the Certificate of Identity at Page 3.

9. On or around Saturday September 11, 2021 Mr. Garcon was taken to the Detention Centre

10. After his arrest, Mr. Garcon was taken before a Magistrate in Nassau where he pleaded guilty to an offence, which may have been illegal embarkation. The Magistrate did not sentence him to any punishment. Presumably he was discharged. In any event the Magistrate the ordered him to be released. Instead of releasing him,

the Immigration Department have continued to falsely imprison and unlawfully detain him in breach of his rights.

11. I therefore apply to the Supreme Court for leave to issue forthwith a Writ of Habeas Corpus directed to the Respondents, commanding them that they do have the body of Mr. Garcon together with the day and the cause of his being taken and detained, so that the Supreme Court, may examine and determine whether such cause is legal, upon the receipt of the Writ issued from the Supreme Court, and to show cause why Mr. Garcon should not be thereupon released immediately."

10. 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 7th September 2021, the Applicant along with eleven (11) other persons was intercepted by the United States Coast Guard being found on a vessel two (2) nautical miles off the coast of Juno Beach, Florida having left from Freeport, Grand Bahama without clearing immigration.

On the 10th September, 2021 the Applicant along with the aforementioned persons was turned over to the Department of

Immigration, Freeport Grand Bahama. The Applicant was assessed by the Ministry of Health Disease and Surveillance Unit headed by Dr. Hedge and given an Antigen Test which was negative. The Applicant was subsequently transported to New Providence.

On the 13th September 2021 the Applicant was arraigned before Magistrate Shaka Serville, Court #4 on the charge of Illegal Embarkation. The Applicant pled guilty to the said charge with the aid of translator, Ernsy Charles. While before the Court the Applicant alleged that he was born in The Bahamas. He was subsequently discharged by the Magistrate and the Magistrate recommended that the Immigration officer/prosecutor investigate the Applicant's claim. The Applicant was thereafter taken into custody of the Department of Immigration to verify the authenticity of his claim.

A search of our Identity Document Management System (IDMS) that encompasses Immigration the Permit Issuance System revealed that there was no evidence that the Applicant had applied for any form of legal status in The Bahamas even though he possessed a Bahamian birth certificate. A further search of our registry was conducted to ascertain whether an application for Citizenship was ever submitted by the Applicant with negative result. A further check was made at the Medical Records Department of the Princess Margaret Hospital and the Registrar General's Department to verify the validity of the birth certificate and the same was subsequently confirmed in both instances. The Applicant has not to date made an application for Citizenship in The Bahamas.

At the time of his detention, the Applicant was also in possession of a Bahamian Voter's Card#17281. A check was conducted at the Parliamentary Registration Department where it was discovered that the said Voter's Card was not authentic.

I do hereby certify that on the 1st October, 2021 WILKENS GARCON, the subject named herein was released from the custody of the 1st through 3rd Respondents since the writ was issued and since a Notice of same was served on the Respondents herein.

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

11. In relation to the issue of costs in this application, the applicant's contention was that since the application for the writ of habeas corpus resulted in the release of the applicant, that they should have their costs for a successful application.

12. The respondent's contention was that the jurisdiction of the Court to grant costs is not inherent and comes from statute, specifically section 30 of the Supreme Court Act. That section reads:

"30.(1) Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid.

(2) Nothing in this section shall alter the practice in any criminal cause or matter or in bankruptcy."

13. Counsel for the respondent submitted that the discretion granted in the section must be exercised in accordance with the prevailing practice in any criminal cause or matter, as per the provisions of subsection (2).

14. In support of this submission, counsel cited The Bahamas Court of Appeal's decision in **The Government of the United States of America and others v. Kozeny [2010] 1 BHS J No, 71, No. 92 of 2007**, where it was stated, beginning at paragraph 7:

> **"These appeals arise out of an extradition matter. The respondent was the subject of an extradition request by the Government of the United States of America. Following the hearing in the Magistrate's court, the learned magistrate dismissed some of the charges that were the subject of the Minister's Authority to Proceed (ATP) made under the Extradition Act (Chapter 96) (the Act), but she committed him to custody to await his extradition to the USA on other charges contained in the ATP. He made an application for habeas corpus to the Supreme Court pursuant to section 11 of the Act. That application, which was heard by Isaacs Sr. J, was successful and the committal order made by the magistrate was set aside. It is against that order that the appellants now appeal, seeking ultimately, the restoration of the order made by the magistrate for the respondent's extradition. Isaac Sr. J also made an order for costs and the appellants contend that there was no jurisdiction to make the order for costs."**

15. The Court of Appeal dismissed the appeal against the grant of Habeas Corpus, but allowed the appeal against the award of costs (notwithstanding that the applicant on his application for Habeas Corpus).

16. On the issue of costs, the Court ruled as follows:

"..when sections 30(1) and 30(2) are read together, they appear to be open to the construction that the Supreme Court has jurisdiction to make an award of costs in criminal cases and the discretion is only to be circumscribed by any practice that was in existence at the time of the passage of the Act in 1996, (See R v Chief metropolitan Magistrate ex parte Osman [1998] 3 All E.R 173) (Osman). In other words, since the prevailing practice is not altered by the enactment, the discretion to order costs in criminal cases in my judgment, must be exercised in accordance with the prevailing practice in such cases, which practice must have immediately predated the passage of the enactment. So before purporting to exercise the discretion conferred by the section, it is imperative that there must be evidence of the prevailing practice. If there is no evidence either way then there is no proper evidential basis for the court to exercise its discretion."

17. The Court also stated, at paragraph 63:

"In this case the learned judge purported to exercise discretion to grant cost to the respondents without the benefit of any evidence as to the prevailing practice. This in my judgment was an error because the effect of the order is that there was in existence a practice of awarding cost in criminal cases when there is no evidence to support that conclusion."

and concluded, on this point, at paragraph 66, as follows:

"66. I have reviewed the Law Reports of the Bahamas volumes 1 and 2 for 1965-70 and the 1989-90 volume which include several cases of habeas corpus which were decided before and after the 1978

Rules of the Supreme Court came into effect, and I have been unable to find one case where costs were awarded. I refer to the following cases: R v Superintendent of Her Majesty's Prison, ex parte Crux [1965-70] 2 LRB 450, and 476; Crux v Government of Canada [1965-70] 1 LRB 348; R v Superintendent of Her Majesty's Prison, ex parte Grey [1965-70] 2 LRB 29; R v Chief Immigration Officer ex parte Heller [1965-70] 2 LRB 93; R v Stipendiary and Circuit Magistrate ex parte Brown Nos 1 and 2 [1989-90] 1 LRB 273 and 395; R v Superintendent of Her Majesty's Prison, ex parte Bain [1989-90] 1 LRB 156; R v Superintendent of Her Majesty's Prison, ex parte Darville nos 1 and 2 [1989-90] 1 LRB 128 and 163; R v Stipendiary and Circuit Magistrate ex parte Triana [1989-90] 1 LRB 107 and 264 (Triana)."

18. Buttressed by this decision, the respondents submitted that there was no evidence before the Court of a prevailing practice of awarding costs in criminal causes or matters, predating the enactment of section 30 of the Supreme Court Act, and that therefore the court ought not to award costs, but should dismiss the application for costs and order each party to bear their own costs.

19. The applicant, in response to the respondent's posture on the issue of costs, submitted that the Court of Appeal's decision in **Kozeny** has no application to this matter since in the instant matter, the applicant's case is not a criminal matter, but a civil one.

20. In support of this proposition, counsel cited the decision of the House of Lords in **Amand v Home Secretary and the Minister of Defence of Royal**

Netherlands Government [1943] AC 147, where the Lord Chancellor, Viscount Simon stated, at page 156, penultimate paragraph of the page:

> **"It is the nature and character of the proceeding in which habeas corpus is sought which provide the test. If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal."**

21. Counsel for the applicant submitted that, as recognised in **Amand**, for a habeas corpus application to be considered criminal, it required two conditions:

1) it must involve the consideration of some charge of crime, i.e., of an offence against the public law, and
2) that charge must be preferred or be about to be preferred before some court or judicial tribunal having or claiming jurisdiction to impose punishment for this offence or alleged offence.

22. Applied to the facts of this case, the applicant submitted that this habeas corpus application is manifestly not on the criminal side as Mr. Garcon was not subject to the charge of having committed any crime. The submission continued that this case was the same as the habeas corpus case of **Jean v Minister of Labour and Home Affairs [1989] 31 WIR,** wherein the applicant was detained while he awaited removal from The Bahamas. Counsel cited the decision of Blake J, where he concluded:

> **"The applications are allowed and the applicants are ordered to be released. The applicants are to have their costs from the respondents to be agreed, or failing agreement to be taxed. It**

remains only to add that in the light of my findings, the applications fall to be treated as arising on the civil side of the court's jurisdiction, and not the criminal, as they were originally entitled."

23. Counsel submitted that this case was manifestly not a case where the applicant was subject to a charge of having committed a criminal offence, as he had been discharged by the Magistrate on 13 September, 2021. As such, it was submitted, there was no possibility of him being tried and punished for any alleged offence and therefore these are not criminal proceedings for the purposes of costs, and, as in **Jean,** this case should therefore be treated as arising on the civil side of the court's jurisdiction.

24. I cannot accept the proposition that this case was manifestly not a case where the applicant was subject to a criminal charge, since, on the evidence, the applicant had been charged with Illegal Embarkation before the Magistrates Court and discharged, upon his guilty plea to that offence. Thereafter he was taken into custody by the Immigration authorities, as indicated in the Return.

25. The applicant cited in support of his application a number of cases in which costs were awarded in what were all classified as civil habeas corpus applications, because, it was asserted, in none of them was the applicant charged with any criminal offence.

26. If indeed these are all civil habeas corpus matters, then none of those cases would go towards demonstrating that there was a prevailing practice in the court, established prior to the passage of section 30 of the Supreme Court

Act, of the awarding of costs in criminal causes or matters, since they would not be criminal causes or matters.

27. The applicant also advanced two supplemental submissions in respect of the issue of costs, that:

(1) The Court had jurisdiction to award costs to the Applicant under the provisions of the Constitution, notwithstanding any purported limitation imposed by any practice in criminal proceedings, and

(2) That the applicant's detention was unlawful, and therefore, if he had not been released, he would shortly have been released by the Court in any event.

28. Having considered the submissions, and what I find to be the law on this issue, I am constrained to dismiss the applicant's application for costs for the following reasons.

29. I find that the decision of the House of Lords in **Amand** does not provide the support that counsel for the applicant places on the decision, in fact, a statement of the Lord Chancellor largely undermines counsel's argument. That statement is found, beginning at page 156, immediately before the passage cited earlier. That passage reads:

> **"If however, the application for the writ of habeas corpus is refused, a distinction must be made. If the judgment of the High Court refusing the writ is in any criminal cause or matter no appeal lies. If it is not, an appeal is competent. This distinction between cases of habeas corpus in a criminal matter, and cases when the matter is not criminal goes back very far. *The Habeas Corpus Act, 1679***

***(which improved the common-law remedy in various ways), applied only to cases where persons were detained in custody for some criminal matter.* Similar statutory improvements in non-criminal cases were not made till the Habeas Corpus Act, 1816..."**

[Italics applied]

30. This is a pronouncement on the scope of the Habeas Corpus Act of 1679 and is a matter of some importance, since, in the other case cited by counsel **(Jean)** it was recognized by Blake J. that:

> " **it is important to examine the Habeas Corpus Act of The Bahamas. That statue was enacted in 1679. It is for all practical purposes identical with the Habeas Corpus Act of the United Kingdom of the same year, enacted in the reign of Charles II. It still retains its state of pristine purity. In the 302 years which have since elapsed, it has yielded neither to the change of time, nor circumstance. In contradistinction, the history of the Habeas Corpus Act in England has been entirely different. In that country, as a result of agitation as to the deficiencies of the 1679 Act, Parliament passed the Habeas Corpus Act 1816. The effect of the 1816 Act, as Lord Parker CJ pointed out in *R v Brixton Prison Governor* [1969] 2 QB 222, was to give the Court specific power in a civil matter to enquire into the facts."**

31. That was stated in relation to the issue as to whether on an application for Habeas Corpus, the 1679 Act permitted you to go beyond the return to inquire into the facts of the matter, but it recognizes that the Act, still in force in

The Bahamas, is the 1679 Act of England, which, as indicated by the Lord Chancellor in **Amand**, applied only to criminal matters.

32. Further support for this interpretation of the Habeas Corpus Act, chapter 63, Statute Laws of The Bahamas, is found in the Act itself, which reads, in section 7:

> **7. [PROVIDED alwayes that nothing in this Act shall extend to discharge out of prison any person charged in debt or other action or with processe in any civill cause but that after he shall be discharged of his imprisonment for such his criminall offence he shall be kept in custodie according to law for such other suite.17]**

33. Finally, on this point, I also find support for this interpretation of the scope of the Habeas Corpus Act, from the decision, earlier cited, of The Bahamas Court of Appeal, in **Kozeny**, where the court, in referencing the habeas corpus decisions cited in paragraph 66 of their decision, described them each, inclusive of the immigration related matters, as being criminal matters.

34. If I am correct in my analysis, then each application for a writ of habeas corpus in relation to any immigration matter is in effect, an application in a criminal cause or matter, and costs are only awardable if it is shown that that was the prevailing practice immediately prior to the passage of section 30 of the Supreme Court Act.

35. On that issue, I agree with the respondent's submissions that it has not been demonstrated that the prevailing practice was for the award of costs in

criminal proceedings. This is necessarily consistent with the Court of Appeal's findings on this issue in **Kozeny** (ibid) at paragraph 66.

36. Further, in relation to the cases cited by the applicant in his submissions, in which, in a number of instances, a Judge of the Supreme Court (including, in one instant, by consent, this court) awarded costs in relation to habeas corpus proceedings, each of those matters would have been decided after the passage of section 30 of the Supreme Court Act (in 1996, when the present Supreme Court Act, No. 15 of 1996 was assented to).

37. It is not apparent from any of the decisions, each of which I have looked at, viz:

> **Curry v Attorney General et al** [2018] 1 BHS J. No 31;
> **Emmanuel Simeon v Peter Joseph** 2017/CRI/HCS/00071;
> **Mirlene Corvil v Peter Joseph** 2017/CRI/HCS/0074;
> **Carlos Pupo v Patrick Wright** 2016/CRI/HCS/0002;
> **Lazaro Seara Marin v Patrick Wright** 2016/CRI/HCS/0001;
> **Joseph Amihere v Attorney General** 2017/CRI/HCS/0018;
> **Matthew Sewell v Attorney General** 2015/CRI/HCS/00010.),

as to whether any of those costs decisions were after submissions, as in the instant matter, or whether they proceeded on an assumption of a prevailing practice, or that they were properly civil matters.

38. However, whatever their factual matrix, they each clearly were decisions after 1996 and therefore do not themselves therefore establish any prevailing practice for the purposes of section 30(2) of the Supreme Court Act, as explicated by the Court of Appeal in **Kozeny**.

39. In relation to the supplemental submissions of counsel for the applicant, that the court has the jurisdiction under the Constitution to award costs, that must fail as this is an application for costs in relation to a habeas corpus application, there was no constitutional or any other type of application before the court, for the court to make any finding on as to the breach of any constitutional right, which would be a necessary precondition to making a constitutional order for compensation for any breach of a constitutional right.

40. Authority for the court declining to purport to act pursuant to the provisions of the Constitution is also found in the decision of the Court of Appeal in **Hon. Carl Bethel et al v Jean-Rony Jean-Charles (ibid)**, where, under the rubric **"Should the court have granted constitutional relief?"** it was stated:

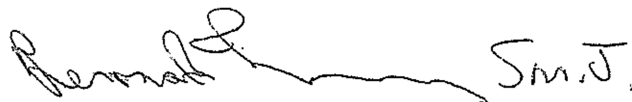
> **"52. In my judgment there were a number of reasons why the judge ought not have proceeded to consider the Application for Constitutional Relief and or to have granted the same.**
>
> **53. Firstly, the habeas corpus having been brought to an end the court ought not to have considered any further applications in that action arising out of the detention of the applicant.**
>
> **54. The court ought to have required the applicant to institute new proceedings if he wanted to seek that relief. An application for a writ of habeas corpus is a discrete action and should always remain a discrete action.....**
>
> ...
>
> **60. The judge fell in error when he proceeded with the application for constitutional relief and I would set aside all orders made by him on that application.**

61. Of course, this does not prevent the Applicant from now applying for constitutional relief. He can still do so. No doubt face the issue as to whether there are other more appropriate causes of action to obtain relief such as an action in tort for wrongful arrest and false imprisonment. However, it would not be appropriate for me to adjudicate on the propriety of those claims on this appeal. They should be ventilated in an appropriate action after proper pleadings, discovery and evidence."

41. The second limb of the supplemental submissions also fails on the finding by the court that the applications are in fact criminal actions, since it is only those types of actions which are cognizable by the court in a habeas corpus application per the provisions of the 1679 Habeas Corpus Act; taken with the court's further finding that the applicant has failed to show to the court at all that the prevailing practice prior to 1996 was for costs to be awarded in criminal proceedings.

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

Dated this 6 day of October AD 2022



Bernard S A Turner
Senior Justice