

IN THE SUPREME COURT

Public Law Division

IN THE MATTER of an Application for Judicial Review, Rules of The Supreme Court, Order 53 and in the matter of Articles 7, 17, 26 and 28 of the Constitution of The Bahamas.

BETWEEN:

THE QUEEN

- (1) THE RT. HON. HUBERT MINNIS, PRIME MINISTER OF THE COMMONWEALTH OF THE BAHAMAS
(In his capacity as presiding over the proceedings of the Board of Immigration)
- (2) THE HON. BRENT SYMONETTE, MINISTER OF IMMIGRATION
- (3) THE BOARD OF IMMIGRATION
- (4) MR. CLARENCE A. RUSSELL, DIRECTOR OF IMMIGRATION
- (5) CARL W. BETHEL Q.C., ATT'ORNEY GENERAL OF THE BAHAMAS

Respondents

Ex Parte

DAHENE NONORD

Applicant

JUDGMENT

Before: Madam Justice Ruth M.L. Bowe-Darville

Attorneys for the Applicant: Frederick Smith K.C.
Dawson Malone, Martin Lundy, Raven Rolle, Garth Phillipe, Keath Smith, Ian Cargill, and Donneth Cartwright

Attorneys for the Respondents: Shaka Serville, Sonia Thompson Williams and Audirio Sears

Hearing Dates: 21st February, 2021

Judicial Review - Bahamas Immigration Act –Bahamas Nationality Act, Section 7 – Registration of Citizenship - Breach of the of Constitutional Rights (Articles 7, 17 (1) and 26(2) and 28 – Damages for False Imprisonment, Assault and Battery – Aggravated Damages – Exemplary Damages

1. This is an application for Judicial Review filed 27th July, 2018.
2. The following documents were filed:

The Originating Notice of Motion filed 7th November, 2018. This was supported by the Affidavits of the Applicant filed on 27th July, 2018, 2nd July, 2019 and 27th September, 2019. The application was further supported by the Affidavit of Wislande Geffard filed 10th September, 2019
3. The Applicant complied with the Rules of the Supreme Court as at Order 53 which provides for an application for Judicial Review. Leave to file the application for Judicial Review was granted by Thompson, J. (Ret'd) on 25th October, 2018.
4. The Applicant is a 23-year-old female born in The Bahamas at the Princess Margaret Hospital at New Providence to parents who were at the time citizens of Haiti and living in The Bahamas. She has always lived in The Bahamas and has never held a Haitian passport nor had she ever visited Haiti.
5. The Respondent are government officials.
 - (i) The First Respondent, the Prime Minister, according to the Immigration Act shall preside over the Immigration Board;
 - (ii) The Second Respondent was the Minister responsible for the Department of Immigration at the material time;
 - (iii) The Third Respondent, the Board of Immigration, is a statutory board pursuant to Section 7(3) of the Immigration ACT 1967; and
 - (iv) The Fourth Respondent was at the material time the Director of Immigration properly appointed pursuant to the Immigration Act and who had the general responsibility for the administration and performance of the Department Immigration. More importantly, the Director is statutorily vested with decision-making powers in respect of the Citizenship Registration application process.
6. The full context of the Originating Notice of Motion reads as follows:

.....
“... heard on behalf of the Applicant for an order for relief in the terms and on the grounds set out in the Ex Parte Application for Leave to Apply for Judicial Review filed herein on July 27, 2018 which relief and grounds are in turn set out below for ease of reference:

Relief

1. *The Applicant seeks Declarations that:*
 - 1.1 *The Director of Immigration and/or the Board of Immigration acted in breach of the Constitution and/or ultra vires and/or irrationally and/or in breach of natural justice in failing or refusing to consider, determine and/or grant the Citizenship Application within a reasonable time or at all; and*
 - 1.2 *The Director of Immigration and/or the Board of Immigration acted in bad faith, alternatively, with reckless indifference in refusing to consider, determine and/or grant the Citizenship Application within a reasonable time or at all.*
2. *The Applicant also seeks*
 - 2.1 *An Order of mandamus requiring the Director of Immigration to register the Applicant as a citizen of The Bahamas forthwith;*
 - 2.2 *Alternatively, an Order of Mandamus requiring the Director of Immigration to properly and in a timely manner exercise his discretion under Article 7 of The Constitution to consider whether to register the Applicant as a citizen of The Bahamas;*
3. *The Applicant seeks:*
 - 3.1 *Damages for misfeasance in public office by the Director of Immigration in acting maliciously in failing / refusing to consider or determine or accede to the Applicant's Citizenship Application within a reasonable time or at all;*
 - 3.2 *Damages for misfeasance in public office by the Respondents by their failure to determine and/or grant the Applicant's Citizenship Application within a reasonable time or at all;*
 - 3.3 *Damages pursuant to Article 28 of the Constitution for breach of the Applicant's constitutional rights under Articles 7, 26(2) and/or 17(1);*
 - 3.4 *Such further and or other relief as the Court may deem fair and just; and*

3.5 Costs.

Further Relief

Further or other relief as this Honourable Court may deem just AND TAKE NOTICE that the Applicant relies on the grounds contained in the Ex Parte Application for Leave to Apply for Judicial Review which grounds are set out below for ease of reference:

Grounds upon which Judicial Review Relief is sought

1. *The Applicant seeks to judicially review the Respondents' ongoing failure or refusal to process, consider, determine and/or grant Ms Nonard's application dated 13 September 2013 and made on 16 September 2013 under Article 7 of The Constitution of The Bahamas for registration as a citizen of The Bahamas ("the Citizenship Application") within a reasonable time or at all ("the Failure"). The Applicant seeks to do so on the following grounds;*

Ground I — Breach of constitutional rights

The failure to consider Ms. Nonord's Citizenship Application in a timely manner or at all and/or the failure to accede to the application are breaches of Ms. Nonord's constitutional rights. The Director of Immigration has a duty pursuant to Article 7 to consider, determine and grant all applications submitted to him that contain all of the documentation and information required by law to be included and that do not fall within any of the exceptions or qualifications prescribed in the interests of national security or public policy.

Ms. Nonord's application contained all the required information and documentation as confirmed by Immigration Officer King and did not fall within any exception or qualification. In addition, Ms. Nonord is not a citizen of any other country and in any event was not asked by the Department of Immigration to renounce any such citizenship. Ms. Nonord is a Bahamian citizen in waiting, as such the Director was required by law to register Ms. Nonord as a citizen of The Commonwealth of The Bahamas and to do so in a timely manner.

Ground 2 - Ultra vires

The Failures are ultra vires because (for the reasons set out under Ground I) Ms. Nonord is entitled to be registered as a citizen of The Bahamas under Article 7 and accordingly the Director of Immigration had a mandatory duty under Article 7 to process her Citizenship Application and to grant it and register her as a citizen of The Bahamas and there was and is no proper basis for failing or refusing to do so.

Ground 3 — Irrational

The Failures are irrational because they are in breach of Article 7 for the reasons set out under Ground 1-

Further, the Failures are irrational because no decision maker acting properly and taking into account only relevant considerations and leaving out of account irrelevant

considerations could have reached the decision to refuse/fail to consider and determine and/or to refuse to accede to Ms. Nonord's Citizenship Application in the circumstances. Additionally, the history of Ms. Nonord's treatment at the hands of the authorities set out in her Affidavit suggests that the decisions were motivated by animosity and/or prejudice and for discrimination towards her. Such considerations are irrelevant and indeed unconstitutional and improper.

Ground 4 - Breach of natural justice

In all the circumstances, Ms. Nonord had a legitimate expectation that she would be registered as a citizen of The Bahamas, The failure to do so was a breach of natural justice. The Applicant reserves the right to amend to add further grounds.

AND TAKE NOTICE that the Applicant seeks findings of breach of constitutional rights and misfeasance in public office on the following grounds;

GROUND UPON WHICH CONSTITUTIONAL RELIEF IS SOUGHT

Breach of Constitutional Rights

1. *The Respondents by their Failures (as defined herein) have acted in breach of Article 7 of the Constitution of The Bahamas which provides that an Applicant:*
 - i. *who is born in The Bahamas to parents who are not citizens of The Bahamas;*
 - ii. *who applies in the prescribed form within a year of their [her} 18th birthday;*
 - iii. *who is not a citizen of another country who has refused to renounce that citizenship; and*
 - iv. *Whose application does not come within an exception or qualification prescribed in the interests of national security or public policy, must be registered as a citizen.*
2. *The Applicant fulfills this criteria as is set out in her Affidavit*
3. *The Respondents by their failures as set out herein have also acted in breach of Article 26(2) of the Constitution of The Bahamas which provides:*
"subject to the provisions of paragraphs (9) and (10) of this Article, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the function of any public office or any public authority."
4. *The 2014 Immigration Policy of the then Government appears to be behind the Respondents' Failures and Ms. Nonord appears to have been (and continues to be) discriminated against both on the basis of her Haitian parentage and on the basis of her political opinions. The Respondents' Failures as set out herein amount also to a breach of Article 17 of the Constitution which protects individuals from "degrading treatment or punishment. The Applicant's life has had to be put on hold for nearly 5 years; she is unable to study, work, travel or hold a bank account; and she has been subjected to*

arbitrary and illegal search and detention and beatings as a result of being unable to produce documentation to establish her legal right to remain in The Bahamas.

GROUND UPON RELIEF FOR MISFEASANCE IS SOUGHT

Misfeasance in Public Office

1. *In addition, the Respondents have committed the tort of misfeasance in public: office as follows:*
 - a. *The Respondents failed (and continue to fail) to determine and/or grant Ms. Nonord's Citizenship Application for in excess of 4 years and it remains undetermined leaving Ms. Nonord in a state of limbo and effectively denying her Article 7 right to be registered as a citizen of The Bahamas.*
 - b. *These Failures (which continue) were effected in bad faith with the intention of causing injury to Ms. Nonord.*
 - c. *Further or alternatively, these failures (which continue) are so unreasonable that the court will be invited to draw the inference that, in light of the lack of any response to the letter of 17th October, 2017 sent by Ms. Nonord's attorneys the Failures are only explicable by the presence of bad faith and the intention of causing injury to Ms. Nonord.*
 - d. *Alternatively, the Respondents presided over and effected these failures with a state of mind of reckless indifference or blind disregard as to the legality of the said Failures and with an awareness that they would in all probability cause injury or loss to Ms. Nonord.*
 - e. *The Respondents have, by their Failures, acted in an oppressive, arbitrary and unconstitutional manner in their treatment of Ms. Nonord.”*

7. The Applicant claimed the following awards for damages:

i. <i>Constitutional Damages by way of compensation and vindication for breach of Article 17(1)</i>	<i>\$250,00.00</i>
ii. <i>Constitutional Damages by way of compensation and vindication breach of Article 26 (2)</i>	<i>\$250,000.00</i>
iii. <i>Damages for misfeasance in public office</i>	<i>\$200,000.00</i>
iv. <i>Exemplary Damages</i>	<i>\$200,000.00</i>
v. <i>Aggravated Damages</i>	<i>\$100,000.00</i>
vi. <i>Interest on each of the foregoing at 5% per Annum from 7th November 2013 until judgment and thereafter at the statutory rate provided by the Civil Procedure (Award of Interest) Act</i>	
<i>TOTAL Damages sought</i>	<i>\$1,000,000.00</i>
vii. <i>Costs on a full indemnity Solicitor Client basis</i>	

8. Lord Brightman in **Chief Constable of the North Wales Police v Evans [1982] 1 WLR 1155** described judicial review “... as not being an appeal from a decision, but a review of the manner in which a decision was made.” **R v Criminal Inquiries Compensation Board ex**

parte Lam [1967] 2 QB 864 established that judicial review can be had against anybody charged with the performance of a public duty.

9. Generally, judicial reviews lie against inferior courts and tribunals but it has been held that other bodies are subject to judicial review, namely government ministers [See **Pyx Granite Co Ltd v Ministry of Housing and Local Government [1960] AC 260**]; Immigration Officers [See **R v Secretary of State for the Home Department, ex parte Khawaja [1984] AC 74**]; and Police Authorities [See **Ridge v Baldwin [1964] AC 40**].
10. An Applicant for judicial review must have a definitive and substantial interest in the matter under review. For the instant action, the Applicant has a direct personal interest as she is the Applicant to be registered as a citizen pursuant to the relevant provisions of The Bahamas Constitution. She therefore has locus standi. The reviewing court is called upon to consider the circumstances of the complaint together with the relationship of the parties; the relevant/statutory duties of the public office or authority complained of; and the Applicant's claim and relief. **R(West) v Parole Board [2005] 1 WLR 350** went further to state that consideration should be given to the facts of the case and the importance of what is at stake for the Applicant and the rules of society.
11. Grounds for judicial review can be found where there has been a breach of the Rules of Natural Justice. The leading case in this regard, **Ridge v Baldwin [1964] AC 40** which **extended** the principle of natural justice as a means of procedural fairness into the realms of administrative law. In considering the implications of natural justice in a judicial review application the court must consider to what extent, if any, the decision up for review affects the Applicant's pecuniary interests or livelihood. Further, should the Applicant have a legitimate expectation of entitlement as per the instant case? An Applicant has a right firstly, to a fair hearing and secondly, a right to be informed of any adverse findings, allegations, or reports.
12. This application is in two parts: the claim for breach of constitutional rights and malfeasance in public office.

13. **Background Summary of Action:**

Miss Dahene Nonord of Cowpen Road, New Providence, was born on 11th July 1995 to parents who are citizens of the Republic of Haiti, but who are legal residents of The Bahamas. She was granted a Certificate of Identity (COI) on 4th April 2011, which expired on **3rd April 2016**. After applying to the Department of Immigration (DOI) on 16th September 2013 to be registered as a citizen of The Bahamas under Article 7(1) of the Constitution of The Bahamas, and subsequently supplying the DOI with all the requisite documentation, she was interviewed by DOI officer, Ms. King, sometime in 2014. Ms. King informed Miss Nonord that her interview score was a "C" and that the DOI would contact her later with an oath of allegiance recital date. Miss Nonord followed up frequently for this date; however, it was never forthcoming and on 17th October 2017, she was informed that her file could not be located.

Approximately six years later, in 2019, and in the process of these Court proceedings, Miss Nonord was finally registered as a Bahamian citizen. In the interim, however, she alleged that she was subject to discriminatory and abusive treatment at the hands of the Department of Immigration and the Royal Bahamas Police Force. Her Certificate of Identification expired with the result that Miss Nonord became a citizen of no country, with no legal ties to Haiti or The Bahamas. This state of affairs prevented Miss Nonord from engaging in simple citizenry activities such as obtaining work, traveling, holding a bank account, attending higher education, and registering under the National Insurance Act. Additionally, she was under a constant fear of deportation to Haiti, a country in which she had no experience.

Miss Nonord proffered several affidavits outlining the abuse she suffered, and finally applied to the Courts for constitutional relief via judicial review along with claims for damages resulting from acts of misfeasance in public office, and breach of her constitutional rights under Articles 7,17, and/or Article 26(2) of the Constitution of The Bahamas. Details in support of Nonord's application are outlined in her 27th July 2018 Affidavit in which she claimed the following occurrences:

- a) *Miss Nonord is a Bahamian citizen in waiting who has waited more than 5 years for a response to an application to be registered as a Bahamian citizen by the Department of Immigration (DOI)*
- b) *Miss Nonord was abused by officers of the DOI and the Royal Bahamas Police Force*
- c) *Miss Nonord's continued abuse as a result of "Fred Mitchel's policy i.e. the cessation of the issuance of Certificates of Identity (COI). Instead, persons with valid COIs were mandated to apply for a residency permit. All persons should have documents proving the right to live and work in The Bahamas on their person.*
- d) *Brutality at the hands of officers of DOI on 3rd December 2014 after being unable to supply resident documents on demand. Miss Nonord was handcuffed, slapped, dragged, verbally abused, and transported to the Carmichael Road Detention Center. She was released after calling her mother to bring her COI documents.*
- e) *A female Immigration Officer informed the Officer in Charge at the detention center that Miss Nonord had bitten her. This action was denied.*
- f) *The Officer in Charge of the Detention Center told female immigration officers to document the incident so that Miss Nonord would not be granted her citizenship*
- g) *Miss Nonord sought medical help for injuries*
- h) *Abuse by Officers of DOI on 29th Dec 2014*
- i) *Abuse (choking) by Officer Beckford, one of the Officers from the detention center, and two male officers from DOI. Officer Beckford reported the alleged assault (bitten fingers) to officers at the Carmichael Police Station. The ambulance called for Miss Nonord.*
- j) *Miss Nonord was placed in a cell and subsequently charged in Magistrate's Court with obstruction and assault. Pled not guilty and bail was granted.*
- k) *Abuse at the hands of Police 30th December 2014*

14. Attorneys for Miss Nonord submitted that the proceedings relate to the failure by the Director of Immigration and/or the Immigration Board presided over by the Prime Minister as provided for at Section 5(2) of the Immigration Act to:
 - a. Consider and determine within a reasonable time or at all the Applicant's application dated 13th September 2013 and made on 16th September 2013 under Article 7 of the Constitution of The Bahamas for registration as a citizen of The Bahamas.
 - b. Register the Applicant within a reasonable time or at all as a citizen of The Bahamas pursuant to Article 7(1) of the Constitution of The Bahamas.
15. The Applicant's attorneys filed a Writ of Summons on 25th March 2015 seeking relief for assault and battery, false imprisonment, and breach of her constitutional rights. The Applicant's counsel submitted that she was only registered as a citizen of The Bahamas as a direct result of the institution of these proceedings and she is nevertheless entitled to pursue the reliefs sought in her Originating Notice of Motion.
16. Even though vindicated by her subsequent registration as a citizen, it was submitted that the registration cannot and should not cure or undo the many years of "... disadvantage, trauma, worry, degradation and expense" suffered by the Applicant during and as a result of the six (6) year delay in registering her. The Applicant suffered and was subject to degrading treatment and punishment and rank discriminatory treatment while she was without registration. Her affidavits filed herein speak definitively to her experience.
17. The Court's attention was drawn to the fact that the Respondents, firstly, had failed to file a Defence to the action, and secondly, had failed to comply with the Case Management Directions handed down by Thompson, J. (Ret'd) and its several extensions as it related to the production of the Respondents' evidence. In this regard the Court was strongly urged to impose penal sanctions for non-compliance as provided for in Order 31A of the Rules of the Supreme Court. The Respondents' attempt at compliance came in the form of two affidavits from counsel in the Office of the Attorney General laid over on the day before trial. These late affidavits did not present a Defence or any evidence necessary to challenge the Applicant's Statement of Claim or her affidavits. The Applicant's counsel relied on the Revised Trial Submissions laid before the Court while the Respondents produced submissions and supplemental submissions.
18. Mr. Smith, Counsel for the Applicant, stated in the strongest terms that "... the facts in this case show an extraordinary, egregious and intentional case of negligence and reckless disregard. The facts in this case are uncontroverted and as such are deemed admitted." He noted that the question of the Magistrate's Court criminal appeals was of no moment presently as the 2014 appeal had not been determined and the 2016 appeal was out of time. Smith grounded the Applicant's case on misfeasance in public office and the misconduct of public officials relying on the cases of **Three Rivers DC v Governor and Company of the Bank of England (no. 3) [2003] 2 AC 1** and **Belize Alliance of Conservation Non-Governmental Organizations v The Department of The Environment [2004] UKPC 6**.
19. The Applicant claimed damages as provided for in Article 28 of the Constitution for breaches of her constitutional rights. She claimed that her Article 7 right, being a person born in The

Bahamas who made an application as prescribed therein to be registered as a citizen of The Bahamas was made within a reasonable time. It was also claimed that the Applicant's Article 17 (1) right to protection from degrading and inhumane treatment or punishment had been breached. Her affidavit evidence related to how she was unable to study, work, travel, or open a bank account. She had also been the subject of arbitrary illegal searches, detention, and assault and battery simply because she could produce no legal documentation to show that she was entitled to remain in The Bahamas or that she was entitled to be registered as a citizen of The Bahamas. There was likewise a breach of Article 26 (2) her right to protection from discriminatory treatment by any person acting by virtue of any written law or in the performance of the function of any public office or public authority. The Applicant maintained that she suffered such discrimination because she was of Haitian parentage.

20. The claim for damages for misfeasance in public office arises out of the Respondents' inaction, bad faith, oppressive, arbitrary and/or unconstitutional behavior in delaying, failing and/or refusing to determine the Applicant's application for registration as a citizen of The Bahamas.

21. Article 7 of the Constitution of The Bahamas reads:

Article 7 (1) 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 years 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 interests of national security or public policy.

22. Article 7, it was submitted, fully supported by Section 7 of The Bahamas Nationality Act.

Any person claiming to be entitled to be registered as a citizen of The Bahamas under the provisions of Articles 5, 7, 9, or 10 of the Constitution, may make an application to the Minister in the prescribed manner and, in any such case, if it appears to the Minister that the Applicant is entitled to such registration and that all relevant provisions of the Constitution have been complied with, he shall cause the Applicant to be registered as a citizen of The Bahamas:

Provided that, in any case to which those provisions of the Constitution apply, the Minister may refuse the application for registration if he is satisfied that the Applicant :-

(a) has within the period of five years immediately preceding the date of such application been sentenced upon his conviction of a criminal offence in any country to death or to imprisonment for a term of not less than twelve months and has not received a free pardon in respect of that offence; or
(b) is not of good behaviour; or
(c) has engaged in activities whether within or outside of The Bahamas which are prejudicial to the safety of The Bahamas or the maintenance of law and public order in The Bahamas; or
(d) has been adjudged or otherwise declared bankrupt under the law in force in any country and has not been discharged; or
(e) not being the dependant of a citizen of The Bahamas, has not sufficient means to maintain himself and is likely to become a public charge, or if, for any other sufficient reason of public policy, he is satisfied that it is not conducive to the public good that the Applicant should become a citizen of The Bahamas.

23. It is the Applicant's case that she provided all the necessary information in her application for registration and, further confirmed the same in her interview with the senior immigration officer. She maintained that she did not fall afoul of any of the qualifications set out in the Act. Having met the statutory requirements, the Applicant was fit to be registered. The subsequent registration is proof that she had met the requirements.

24. It was also submitted that the six (6) year delay in determining the application was "ultra vires and in breach of Article 7, irrational and a breach of the Applicant's legitimate expectation to have her application decided in a timely manner." The Applicant filed evidence detailing the continuing effect such delay had on her life in that she had to suffer many disadvantages and deprivations. The Applicant's continued misfortune was further exacerbated by the discriminatory, degrading, and inhumane treatment by the employees and officials of the Department of Immigration as she was unable to prove that she was a citizen of The Bahamas and rightly entitled to be. She seemed to have suffered severe prejudice by those with whom she came into contact at the Department of Immigration. In toto the Applicant asserted that she had a right to be registered as a citizen of The Bahamas.

25. The Applicant relied on the case of **Oliveira v The Attorney General (Antigua and Barbuda) 2016 UKPC 24** in which the Privy Council held that a 27-month delay in determining an application for registration was a breach of the appellant's constitutional rights as per the dicta of Sir Bernard Rix at Paragraph 43 thereof.

43. The Board has come to this conclusion in the light of the following factors. The only, but also regarded as the critical, evidence in support of the decisions below was the evidence of Ms. Simon that Mr. Oliveira had been given the earliest available appointment, albeit 19 months down the line and still longer counting from the original application. However, not only was a period of that length of time unjustifiable in itself on any reasonable basis, rendering it almost inevitable that the complete period from application down to registration would be materially longer still, but that evidence was of too general and superficial quality to merit the weight that was placed on it. It was not supported

by any documentary evidence as to the relevant appointment book. Ms Simon referred to such a “book” in her cross-examination, but she did not have it to hand. Ms Cornelius spoke of applicants for citizenship having to wait “several months” for their appointment. She put forward two examples from 2008-2009 (not from 2009- 2010), as presumably the best examples she could find from the point of view of the Attorney General’s case, but they showed only periods of 11 months’ and between 11- and 12-months’ delay between application and interview. Ms Cornelius also spoke of an “average period of 12 to 18 months” for the whole process from application to approval. In the present case all these periods were greatly exceeded. Moreover, when Ms Simon, who had the responsibility of conducting the Immigration Department interviews herself, was cross-examined as to the detail of the backlog, she could not support a backlog of longer than five months. In the circumstances, the blithe assurance that Mr Oliveira had been given the earliest possible interview date should not have been accepted in the context of his claim to a constitutional right. Moreover, in Phansopkar at p 622E-F Lord Denning MR observed that in straightforward cases (there of certificates of patriality), a separate queue could be formed “because they are entitled as of right and not by leave”. That observation appears to be appropriate here.

26. Counsel for the Applicant urged the Court to accept the twelve months outer limit imposed by the Privy Council for the determination of such registration applications. In the instant case the Applicant’s actual delay was five (5) years. It remains that the Respondents acted unconstitutionally, arbitrarily, and in an oppressive and abusive manner. In this latter regard the Court’s attention was averted to the Bahamian cases of **Wells v Attorney General of the Commonwealth of The Bahamas [1992] BHS J. No. 16 and Fitzroy Forbes No. 498 of 1990**. The Court agrees that the wait/delay of six years was unreasonable and unacceptable and, with no evidence to the contrary, breached the Applicant’s Article 7 constitutional right. **The Court makes the declaration that the Director of Immigration and the Immigration Board acted in breach of Article 7 of the Constitution in failing or refusing to consider, determine, and/or grant the Applicant’s citizenship application within a reasonable time.**

27. Article 17 of the Constitution of The Bahamas provides:

Article 17. (1) No person shall be subjected to torture or to inhuman or degrading treatment or punishment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question authorises the infliction of any description of punishment that was lawful in the Bahama Islands immediately before 10th July 1973.

The Applicant seeks redress for the breaches of her constitutional rights under Article 17, namely her right to protection from degrading treatment and punishment. The Applicant’s evidence in this regard is noted above. The Respondents have adduced no evidence to the contrary. The Court is satisfied that she did so suffer such treatment and as such her constitutional right under Article 17 has been breached.

28. Article 26 of the Constitution of The Bahamas in part states:

Article 26. (1) Subject to the provisions of paragraphs (4), (5) and (9) of this Article, no law shall make any provision which is discriminatory either of itself or in its effect.

(2) Subject to the provisions of paragraphs (6), (9) and (10) of this Article, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

29. It was submitted that the discriminatory treatment suffered by the Applicant at the hands of the Immigration authority and/or officers was due wholly to the fact that she was of Haitian parentage. The delay and inaction of the Respondents rendered her unable to establish her Bahamian citizenship. Such treatment, it was submitted, was not authorized under any Bahamian law. She maintains that such treatment caused her undue embarrassment, fear, inconvenience, loss, and damage. Again, the Respondents have not challenged the Applicant's evidence. The Court finds that the Applicant's constitutional right under Article 26 has been breached.

30. The Applicant claimed damages according to the relief provided for in Article 28(1) of the Constitution.

28. (1) If any person alleges that any of the provisions of Articles 16 to 27 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

In this regard, the Applicant seeks damages, aggravated damages, punitive and exemplary damages against the Respondents for false imprisonment, assault, and battery, and for breach of her constitutional rights.

31. Counsel submitted that the Court needed to consider the cases of **Coalition to Protect Clifton Bay et al v The Hon. Frederick Mitchell et al [2016/PUB/con/0016]** and **Merson v Cartwright and another [2005] UKPC 38**. In the former, the Court found that the Applicant's constitutional rights had been "trampled upon" because of statements made inside and outside of Parliament by two Cabinet Ministers. In the result, the Applicant's redress could only be found in the Constitution and as provided for under Article 28(1). The Applicant in that case, however, did not suffer any loss and was awarded \$150,000.00. The incidents giving rise to the latter case occurred in 1994. It involved the issue of false imprisonment for two days and assault. In that case, the Applicant was awarded \$90,000 for the assault, battery, and false imprisonment; a further \$100,000.00 for breaches of her constitutional rights; special damages of \$8,160.00 and \$90,000 for malicious prosecution. The Applicant herein was detained for a few hours and save for being handcuffed and involved in a brawl with DOI and Detention Centre officers suffered no real injury and was later released. She too had suffered no pecuniary losses. **The Court awards the Applicant the sum of One Hundred and Twenty-five Thousand Dollars (\$125,000.00) for**

breaches of her Article 17(1) rights and the sum of One Hundred and Twenty-five Thousand Dollars (\$125,000.00) for breaches of her Article 26(2) rights.

32. In addition to constitutional relief the Applicant also claimed against the Respondents for the tortious relief of misfeasance in public office. The Applicant's counsel referenced **Three Rivers DC v Governor and Company of the Bank of England (no. 3) [2003] 2 AC 1**. The case gives the historical development of the tort with its many variations and distinguishing factors. However, Lord Steyn opined that there were two different forms of liability for misfeasance in public office namely,

“The case law reveals two different forms of liability for misfeasance in public office. First there is the case of targeted malice by a public officer i.e. conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful.”

While intention can be established differently it is necessary to prove that the misfeasance caused damage and that the subject public officer was reckless in his actions as to whether an injury was caused or not. Counsel maintained that the Applicant's case satisfied the criteria set down in **Three Rivers**.

33. the Applicant contended that in failing or refusing to consider or determine her application for registration as a citizen of The Bahamas within a reasonable time that the Third and Fourth Defendants, in particular, knew that she was (i) entitled to have her citizenship registered and, having met the statutory requirements, there was no basis to refuse or to delay the registration; and (ii) such delay or refusal would cause the Applicant harm or loss since she was without registration as a citizen of The Bahamas.

34. The Applicant claims that there was misfeasance in public office committed by public officers, namely, the Minister with responsibility for Immigration (the Immigration Board), the Director of Immigration, and the officers and staff of the Department of Immigration. There was misfeasance in that the Respondents failed to consider, determine, or grant the Applicant's application for an excessive period of five (5) years post the time of acceding to her application when it should have taken twelve (12) months. For the most part, the Applicant was in a state of uncertainty and experienced breaches of her Article 7 rights. There was no doubt that the Respondents knew or ought to have known that their actions or inaction would have caused the Applicant loss and damage. Reliance was placed on the Applicant's uncontested evidence relative to her degrading treatment when she attended the Department of Immigration. Within time the Applicant became known to the officers and she with them. From the events chronicled by the Applicant, the failure of the Respondents to act was done in bad faith and to cause injury to the Applicant. The Applicant claimed that the Immigration Officers went out of their way during the course of their dealings with her to hurt and degrade her knowing her lack of immigration status and parentage.

35. It was submitted that the delay in considering the application was unreasonable and outrageous; the lack of any response to her letter of 17th October 2017; and the lack of justification or explanation for the failure of consideration could only amount to bad faith. It was further submitted in this regard that the Respondents acted with careless and reckless indifference to the Applicant's application knowing that the same would prejudice her and cause her injury or harm, especially being a person without status. The Respondent's failure to act was tantamount to oppressive, arbitrary, and unconstitutional behavior toward the Applicant.

36. The Court is called upon to determine if the actions or inactions of the Respondents were misfeasance in public office. Misfeasance is a form of misconduct that is a cause of action against the holder of a public office, alleging in essence that the officeholder has misused or abused their power. Misfeasance in public office occurs when a public official, public servant or public body knowingly and willingly acts in a manner with the realization that their actions are likely to cause loss or harm to another.

37. It is expected that persons in positions of authority are obliged to use their powers for the public good. Should the public official abuse these powers to the detriment of any third party then misfeasance in public office may arise. Such a tortious claim can only be made against a public officer or authority. The tort of misfeasance can be claimed instead of an action in negligence. Its advantages are (i) there is no requirement to establish a duty of care, and (ii) exemplary damages may be claimed. On the other hand, there are also disadvantages to a claim of misfeasance in public office namely, (i) only public officers can commit the tort; (ii) a claimant is required to show that those officers were abusing their power or position; (iii) establishing the tort requires malice on the part of at least one public officer within a department or public body; and (iv) it is insufficient to show gross incompetence, neglect or breach of duty.

38. In establishing the tort, a claimant must show that the public officer's intention may not have been to cause harm but that they knew that their actions would likely cause a loss or injury to someone, and they elected to act that way anyway. It is sufficient to prove that the public officer was knowledgeable about the possible consequences of his action. The onus is on the claimant to show that the officer's action was deliberate and abusive such that it would harm a third party. Regrettably, the Respondents failed to explain that the actions of the Director of Immigration were either reasonable or proportionate to the applicant's right to be granted naturalization.

39. The instant case falls within the first category of targeted malice by a public officer i.e. conduct specifically intended to injure a person. There were exhibited acts of bad faith in the sense of the exercise of public power for an improper and ulterior motive, mostly to delay the registration or to delay the process

40. The Respondents have been dilatory in their Defence of this action. They have offered no explanation to explain their actions or to negate the Applicant's claim. The trial submissions presented by the Respondents did their case even greater harm although it was a valiant attempt to

put forward a Defence. The Respondents presented no evidence to refute the claims save that of an Affidavit of another civil servant outlining the application process. To come now and say that the delay in determining the Applicant's application was caused by "incompetence and lost file" is not a favorable view of the staff of the Department of Immigration. It is unacceptable.

41. In their "Supplemental Submissions" the Respondents further asserted that one could not seek tortious or constitutional relief in a judicial review proceeding. The Respondents had up to that point participated in the trial and now raise the issue of the cause of action or improper procedure. The Court agreed with the Applicant's counsel when he met the challenge to the provisions of Order 53 of the Rules of the Supreme Court. There must only be a factual nexus. In the instant case, the damage claims arise directly from the Respondents' failure to act in determining the application. Counsel for the Applicant was sure to point out that there was no provision in Order 53 that prevented an applicant in a judicial review application from seeking tortious or constitutional damages. He referred the Court to the finding in **Rufa v R and William Pratt SCCiv App NO. 131 of 2016** in which the Court of Appeal approved the bringing of a claim for constitutional damages in a judicial review application. Counsel also referred to the finding of Crane-Scott, JA in writing her decision in that case at Paragraphs 112 – 123. The Court is bound by the Rufa decision that claims for tortious or constitutional claims can be made in judicial review matters.

42. The Respondents' objection, albeit at a late stage and post-trial, that the application should have been made under Section 16 of the Bahamas Nationality Act and not Article 7 of the Constitution is ill-conceived. The present application is under Article 7 of the Constitution and relates primarily to the refusal or failure of the Respondents to determine or grant the Applicant registration as a citizen. At all times the Applicant was exercising her constitutional right. No provision of that Act can oust the jurisdiction of the Court and this was settled at the Privy Council in the **Attorney General of The Bahamas v Thomas D'Arcy Ryan [1980] A.C. 718**. Quite assuredly, counsel's emphasis was that Parliament can never oust the power of the Court when seeking to protect the constitutional rights of persons. Further, the Applicant is not seeking a review or appeal of a decision of the Minister. Instead, her challenge was the Respondents' failure or refusal to so act in determining and granting her citizenship.

43. The Court did not accept the objections raised by the Respondents.

44. The instant case falls within the first category of targeted malice by a public officer i.e. conduct specifically intended to injure a person. There were exhibited acts of bad faith in the sense of the exercise of public power for an improper and ulterior motive. **The Court finds that there was misfeasance on behalf of the Respondents and awards the Applicant damages in the amount of One Hundred and Fifty Thousand Dollars (\$150,000.00).**

45. The Applicant claimed exemplary damages. It was submitted that the instant case had all the elements of such a claim. Counsel invoked the standard set by Lord Devlin in **Rookes v Bernard [1964] AC 1120**. The behavior of the Respondents, their servants, and agents was "oppressive, arbitrary and unconstitutional." The award of damages is penal in nature and is to punish the Respondents' servant or agent for their behavior, disregard, and ill-treatment of

members of the public and should act as a deterrent. The Court must, in making an award, consider the gravity of the actions complained of and the reckless abuse of power.

46. The Court reviewed the Bahamian cases where exemplary damages have been awarded in similar circumstances namely, **Merson v Cartwright [2005] 67 WIR 17; Tynes and Barr (1994) 45 WIR7; Takitota v Attorney General and others COA [2004] BHS J. No. 294; Takitota v Attorney General [2009] 3 BHS J. No. 45; and Anthony Deveaux v AG SC FP 236.** The conduct of the Respondents, their servants, and agents can only be characterized as per the Devlin description. **The Court awards the sum of One Hundred Thousand Dollars (\$100,000.00) under this head of damages.**

47.. The Applicant gave a precise account of her dealings with the Respondents' officers. She was able to see them and gauge their reaction to her. She was at a disadvantage. It was the way they made her feel more than anything. They were disdainful and had no care for how she felt. Knowingly or not, they caused injury to her feelings. They were responsible for the indignity she felt. She suffered humiliation and mental and emotional trauma. The Applicant was subjected to degrading treatment, assault and battery and several incidents of false arrest. The Applicant is also entitled to constitutional redress for the breaches experienced and to this end a compensatory vindicatory award. She should be compensated in aggravated damages for the misconduct of the Respondents, its servants, or agents. **The Court awards the Applicant Seventy-five Thousand Dollars (\$75,000.00) under this head of damage.**

48. Finally, the Court makes the following Orders:

1. A Declaration that the Director of Immigration and/or the Board of Immigration acted in breach of the Constitution and/or ultra vires and/or irrationally and/or in breach of natural justice in failing or refusing to consider, determine, and/or grant the Applicant's Citizenship Application within a reasonable time or at all; and
2. A Declaration that the Director of Immigration and/or the Board of Immigration acted in bad faith, alternatively, with reckless indifference in refusing to consider, determine, and/or grant the Applicant's Citizenship Application within a reasonable time or at all.

Damages

1. Constitutional Breaches:

(i) Article 17(1)	\$125,000.00
(ii) Article 26(2)	\$125,000.00
2. Misfeasance	\$150,000.00
3. Exemplary Damages	\$100,000.00

4. Aggravated Damages **\$ 75,000.00**

Interest on each of the foregoing at 5% per Annum from the date of the writ until judgment and thereafter at the statutory rate provided by the Civil Procedure (Award of Interest) Act

TOTAL Damages **\$575, 000.00**

Costs on a full indemnity Solicitor Client basis

DATED THIS *2nd* **DAY OF** *August* **A.D, 2024**

Prepared By: Ruth M.L. Bowe-Darville

Delivered By: _____

