

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2008/0449

BETWEEN

CLIVE OLIVEIRA

Claimant

And

THE ATTORNEY GENERAL
THE CHIEF IMMIGRATION OFFICER

Defendants

Appearances:

Dr. David Dorsett for the Claimant

The Attorney General Mr. Justin Simon QC with Crown Counsel II Ms. Luann Da Costa for the Defendants

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2009: March 26, 30
April 2
May 26
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JUDGMENT

[1] **Blenman J:** Mr. Clive Oliveira has brought this claim against the Attorney General of Antigua and Barbuda, as the representative of the State. He has also added the Chief Immigration Officer as a party.

[2] **Background**

Mr. Oliveira, who is a Guyanese national, arrived in Antigua for the first time in May 1993. He alleges that he has, except for short periods, been living in Antigua since, as a self-

employed person with permission to work on the basis of work permits issued to him. In October 1997, he got married to a Guyanese national who was naturalised as a citizen of Antigua and Barbuda pursuant to section 114(1) (c) (ii) of the Antigua and Barbuda Constitution.

- [3] In 2002, he was charged with the rape and indecent assault of a 14 year old girl. He was tried, convicted and sentenced. However, he successfully appealed his conviction. He was retried and convicted again, and was yet again successful on appeal. During the retrial, he was kept in custody. Subsequently, in February 2007, the learned Director of Public Prosecutions entered a nolle prosequi. Mr. Oliveira was then released from prison and was sent out of the country in March 2007. He, however, returned to Antigua in August 2007 using a newly issued Guyanese passport and was given a month to stay. Later, he sought an extension of stay which was denied. He was detained by the police for several days but was subsequently released. The police also retained his Guyanese passport.
- [4] Subsequently, it appears as though Cabinet declared him a prohibited immigrant on September 4, 2007. He has nevertheless continued to live in Antigua.
- [5] He has filed this claim and contends that he is entitled to be registered as a citizen of Antigua and Barbuda by virtue of his marriage and seeks an Order to that effect.
- [6] Also, he alleges that the State has breached his constitutional rights to property; personal liberty and freedom of movement. Further, he says that the Cabinet decision is unlawful. He complains that his arrest and detention were unlawful and seeks compensation. Also, he seeks a number of declarations and orders, together with exemplary damages against the State.
- [7] The State denies that it has acted unlawfully or that it has breached Mr. Oliveira's constitutional rights. The State contends that in so far as Mr. Oliveira has been deemed a prohibited immigrant, he is not entitled to the declarations sought. In addition, it says that Cabinet's decision that deemed Mr. Oliveira a prohibited immigrant is not reviewable.

[8] Finally, the State says that it has in no way breached his constitutional rights and that he is not entitled to any of the reliefs that he has claimed. The State denies that it unlawfully kept his passport.

[9] **Issues**

The issues that arise for the Court to resolve are as follows:

- (a) Whether the Cabinet's decision is amenable to judicial review.
- (b) Whether the Court should grant a declaration to Mr. Oliveira that he is entitled to be registered as a citizen of Antigua and Barbuda.
- (c) Whether the State's retention of Mr. Oliveira's passport constitutes a wrongful detention of his property, in violation of the constitution.
- (d) Whether the State has breached Mr. Oliveira's right to freedom of movement, as guaranteed by the Constitution.
- (e) Whether Mr. Oliveira's detention and arrest were unlawful.
- (f) What are the reliefs, if any, to which he is entitled?

[10] **Evidence**

Mr. Oliveira testified on his own behalf and Mr. Edison Hampson, Supervisor of the Immigration Department, testified on behalf of the State.

[11] **The Attorney General Mr. Justin Simon QC's submission
Cabinet's decision**

The learned Attorney General said that the authority of Cabinet as the executive body of government to declare any person, not being a citizen of Antigua and Barbuda, an undesirable inhabitant or visitor is contained in section 8(b) of the Immigration and Passport Act Cap 208 of the Laws of Antigua and Barbuda.

[12] The learned Attorney General referred the Court to the relevant section of the Immigration Act, namely, Section 8(b) of the Immigration and Passport Act Cap 208 provides as follows:

"8. **Entry of Certain Persons Prohibited**

The entry of any of the following into Antigua and Barbuda is hereby prohibited-

- (b) any person not being a citizen of Antigua and Barbuda, who from information and advice that in the opinion of the Cabinet is reliable information or advice, is deemed by Order of the Cabinet to be an undesirable inhabitant of or visitor to Antigua and Barbuda, and if any of the persons mentioned in paragraphs (a) and (b) of this section are at any time after the making of such Order found in Antigua and Barbuda such persons shall be deemed to be prohibited immigrants and may be dealt with as such."

[13] Mr. Simon QC said that the Cabinet's decision as to what constitutes "an undesirable inhabitant of or visitor to Antigua and Barbuda" based on the reliable information or advice received is not justiciable in as much as it is an executive decision made pursuant to a statutory provision, only subject to judicial review on the three grounds of illegality, irrationality, and procedural irregularity: **HMB Holdings v Cabinet of Antigua and Barbuda [2007] 70 WIR 130 at page 145 para 30**. Mr. Oliveira has failed to establish any of the allowed grounds; his only claim is that of alleged irrationality based on his alleged entitlement to citizenship is without legal basis and the issue of Mr. Oliveira's wife and children which does not and cannot arise on Cabinet's consideration of the "information and advice received that in the opinion of Cabinet is reliable information or advice" as per section 8(b) of the Immigration and Passport Act Cap 208. That issue may well be raised at the Magistrates Court when an order for Mr. Oliveira's removal is sought under section 24(b) of the Act, as a consideration under the judicial process but not otherwise. Cabinet's action is limited to a declaration, not deportation which is a judicial act where Mr. Oliveira would have a right to be heard.

[14] In **Re Blake 47 WIR 174** at page 180, Sir Vincent Floissac, Chief Justice, took the view that "the decision to appoint a Prime Minister or any other Minister of Government is one of the many decisions which are made in the exercise of the prerogative powers and which are not justiciable or subject to judicial review for the simple reason that the subject matter

is not amenable to the judicial process". This immunity of executive decisions in immigration matters is well established by the Court of Appeal in the Grenadian case of: **Minister of Immigration, the Chief Immigration Officer v Sharon Nettlefield, Beat Wild, In the Court of Appeal Grenada, Civil Appeal No. 6 of 2002**. Redhead JA said that it should be noted that the facts of the **Nettlefield** case are not detailed in the Court of Appeal Decision and a review of the first instance decision is helpful to put the Court of Appeal decision in full context.

[15] **Right to be registered**

Learned Attorney General Mr. Simon QC referred the Court to section 114(1) (b) (i) of the Antigua and Barbuda Constitution Order which states:

"(1) Subject to the provisions of paragraph (e) of section 112 and of 117 of this Constitution, the following persons shall be entitled, upon making application, to be registered on or after 1st November, 1981-

(b) any person who –

(i) was married to a person who is or becomes a citizen;"

[16] Mr. Simon QC said that Mr. Oliveira's evidence elicited under cross-examination clearly indicates that he has not been lawfully resident in Antigua having failed throughout the period to obtain the necessary extensions and work permits as required by law. He is yet to make an application for citizenship pursuant to section 114(1) (b) (i) of the Constitution as he is entitled to; in fact the issue of such an application has only surfaced with his institution of these proceedings. There is no evidence that he ever indicated to the Immigration Department that he intended to apply for citizenship or that he has made a request for the return of his passport for that reason, or at all.

[17] Mr. Oliveira's entry into and stay in Antigua as a non-citizen is regulated by the provisions of Immigration and Passport Act, Cap 208 as amended: section 14(2), (5) (6) and section 20 in particular. The legislation makes no distinction between a non-citizen who is married to a citizen and a non-citizen who is married to a non-citizen; only citizens are entitled to enter and stay in the State without restriction.

- [18] The learned Attorney General said that prior to September 2007 Mr. Oliveira was to present himself in person to the Chief Immigration Officer, pursuant to section 22(1) of the Act for an extension of his permit to stay in Antigua and Barbuda and for that purpose he was to be dealt with as if he were entering Antigua and Barbuda for the first time in accordance with section 22.
- [19] The learned Attorney General quite skillfully said that while it is admitted that Mr. Oliveira can fall within section 11(1) (b) of the Antigua and Barbuda Constitution Order to be registered as a citizen of the country but the provisions of that section state that person must first make an application before any consideration can be given to his entitlement. See the case of **Application by Kareem Abdulghani [1985] LRC 425** in on point. In that case, the claimant's right to citizenship of Dominica was declared on the basis of his application done in accordance with section 100(1) (a) of the Constitution of Dominica (which is similar to the Antigua and Barbuda provision).
- [20] Singh J in that case at p 428 stated:
- "I hold as a matter of law that having been married to a citizen of Dominica and having filed an application for citizenship in accordance with the laws and rules governing such an application, and having taken the prescribed oath of allegiance, the applicant has brought himself within the confines of section 100 of the Constitution".
- [21] Instructively, section 117 of the Antigua and Barbuda Constitution calls for the taking of an oath of allegiance (in the case of a citizen of the Co-operative Republic of Guyana which is a Republic within the Commonwealth) prior to registration. Section 114(1) makes this a condition precedent to registration as a citizen.
- [22] Further, Mr. Simon QC submitted that Mr. Oliveira need not have used his passport to make his application nor need he be in Antigua and Barbuda to do so. His current citizenship is immaterial; he need only satisfy the authorities that he is married to a person who is a citizen. In fact, in Mr. Oliveira's affidavit filed on the 23rd day of July, 2008 at

paragraph 4, he states that his wife became a citizen of Antigua and Barbuda on September 30, 2002 and he exhibits his wife's Certificate of Registration as a citizen of Antigua and Barbuda. Therefore, he was eligible to apply for citizenship from October, 2002 but took no steps to do so. The only reason he wishes to do so at this point in time is to circumvent the Order of Cabinet.

[23] The learned Attorney General Mr. Simon QC urged the Court make the following findings:

(a) up to the time of the filing of this action in the High Court by Mr. Oliveira, he had not requested his passport.

(b) that unless and until he has complied with the requirements of section 114(1) (b) (i) and section 117 of the Constitution, Mr. Oliveira's status in Antigua and Barbuda is that of a "prohibited immigrant" pursuant to the Order of Cabinet made on September 4, 2007.

(c) that in any event, Mr. Oliveira is an unlawful resident in Antigua and Barbuda having been refused an extension of his permit to stay in the country post September 6, 2007.

[24] In the premises, Mr. Simon QC advocated that Mr. Oliveira cannot be entitled to be registered as a citizen since he has not made an application. Once he applies and proves that he is married to a citizen of Antigua and Barbuda and takes the required oath of allegiance then and only then will Mr. Oliveira be entitled to stay in Antigua and Barbuda as of right.

[25] **Fundamental Rights**

Passport

The learned Attorney General Mr. Simon QC took issue with Mr. Oliveira's contention that his passport was wrongfully detained. He also denied that, based on the totality of circumstances, a trespass was committed.

[26] Mr. Simon QC, the learned Attorney General stated that Mr. Oliveira's passport was brought by his wife to the Immigration Department, at their request. This practice is to

ensure that non-citizens leave the country, upon the expiration of their permits to stay. Mr. Oliveira never returned for or requested the return of his passport; in fact he avoided returning for fear of deportation. Can it properly be claimed in these circumstances that the Chief Immigration Officer was in unlawful possession of the passport when his attempts to find Mr. Oliveira proved fruitless? The learned Attorney General Mr. Simon QC asked the Court to find that Mr. Oliveira never returned for or requested the return of his passport for fear of being deported. Further, that all attempts at finding him to execute the Cabinet Order failed and Immigration Officers were therefore unable to return same to him to facilitate his departure from the State. In these circumstances, there was no wrongful detention of Mr. Oliveira's property. Further, there was no compulsory taking possession of his property as envisaged by section 9 of the Constitution.

[27] **Deprivation of Liberty**

The learned Attorney General Mr. Simon QC stated that Mr. Oliveira claims that he was unlawfully detained and kept in custody for five days and he claims damages. Mr. Oliveira additionally claims vindictory damages for breach of constitutional rights on the strength of the **Ramanoop** line of cases. Mr. Simon QC stated that the facts of the case at bar is a far cry from the facts of the quoted authorities and the legal principles have no application to the present case. The defendants deny in particular that Mr. Oliveira was placed in any situation of distress. Mr. Simon QC stated that Mr. Oliveira may be entitled to a claim for damages for his unlawful detention for 5 days at the police station. That apart, Mr. Simon QC submitted that there is no basis for any compensatory award in favour of Mr. Oliveira against the defendants.

[28] **Dr. David Dorsett's submissions**

Learned Counsel Dr. Dorsett asked the Court to find the following facts. Mr. Oliveira is a native of Guyana married to a citizen of Antigua and Barbuda. Their marriage is subsisting of upwards of three years, the marriage having taken place 1997. His wife has been a citizen of Antigua and Barbuda since 2002. The couple has children who are citizens of Antigua and Barbuda. Also, the couple has been granted a non-citizen's land holding licence and in fact owns a parcel of land within the State of Antigua and Barbuda. While

admitting that he has been twice convicted of a sexual offence involving a minor, Dr. Dorsett reminded the Court that both convictions were set aside by the Court of Appeal which ordered a retrial. On 16th February, 2007 the Director of Public Prosecution filed a nolle prosequi. On the 19th February, 2007 he was released from prison and shortly thereafter detained at the St. John's Police Station. On 14th March, 2007 he was deported to the land of his nativity. On the 8th August, 2007 he returned to Antigua and was granted leave to stay for one month. On 20th August, 2007 the Immigration Authorities demanded and retained Mr. Oliveira's passport. A Notice of Appeal was filed with respect to the actions of the Immigration Authorities. The appeal is yet to be heard. Mr. Oliveira alleges that he was detained at the St. John's Police Station without charge for more than five days.

[29] On 6th September, 2007 he applied to the Immigration Department for an extension of time. The application was denied. He later learnt that Cabinet, on the 4th September, 2007 had issued instructions for his deportation on the ground that he was deemed an undesirable visitor to the State.

[30] **Right to be registered**

Learned Counsel Dr. Dorsett referred the Court to section 114 of the Constitution which provides that the spouse of the citizen is entitled to be registered upon application. Section 114, as relevant, is in the following terms:

"114 (1) Subject to the provisions of paragraph (e) of section 112 and section 117 of this Constitution, the following persons shall, upon making application, to be registered on or after 1st November 1981-

(b) any person who-

(i) was married to a person who is or becomes a citizen;

Providing that no application shall be allowed from such person before the marriage has subsisted for upwards of three years and that such person is not, or was not at the time of the death of the spouse, living apart from the spouse under a decree of a competent court or a deed of separation.

(2) An application under this section shall be made in such manner as may be prescribed as respect that application by or under a law enacted by Parliament and, in the case of a person to whom subsection 1(f) of this section applies, it shall be made on his behalf by his parent or guardian:

Provided that if the person to whom subsection 1(f) of this section applies is or has been married, the application made by that person."

[31] Learned Counsel Dr. Dorsett said that the evidence is clear that Mr. Oliveira is the spouse of a citizen of Antigua. It is also clear that his marriage has subsisted for upwards of three years. When he was deported in 2007, his marriage was subsisting for 10 years and his wife had been a citizen of Antigua for five years. Dr. Dorsett submitted that these facts, which are not subject to argument, qualify Mr. Oliveira to be entitled to registration as a citizen upon application pursuant to section 114 of the Constitution. No further fetter on the right to be registered, upon application, may be made by any public body. Once he applies, he is entitled to be registered. There can be no abridgement of this right, an entitlement pronounced by the Constitution, the supreme law of the land.

[32] Dr. Dorsett maintained that Mr. Oliveira is entitled to a declaration that he has a right to be registered. It ought to be common ground that no governmental authority has the right to fetter the constitutional right of Mr. Oliveira. The statement of Barrow JA, with the concurrence of the other members of the Court of Appeal, in **Noel v The Attorney General and Minister responsible for Citizenship, Civil Appeal No.11 of 2006, 13th November 2007**, at [14] is on point:

"I accept that there is no discretion in the minister to refuse an application that is properly made: see **Application by Kareem Abdulghani and Neilson v Barker**. I also accept that where there is a constitutional right, the duty of the authority concerned is to verify that the preconditions for claiming the right exists but the authority has no discretion to fetter the right; see **Electrotec Services Ltd v Issa Nicholas (Grenada) Ltd.**"

[33] Dr. Dorsett submitted that this right to citizenship upon application cannot be frustrated by the Government seeking to deport Mr. Oliveira. The Constitution declares that a citizen is entitled to belong status. Section 111 of the Constitution is in declaratory terms:

“On or after 1st November 1981 a person shall, for the purposes of any law, be regarded as belonging to Antigua and Barbuda if, and only if, he is a citizen.”

[34] Mr. Oliveira was deported 14th March 2007. Mr. Hampson on behalf of the defendants asserts that Mr. Oliveira was deported as he was a threat to national security. Matters of national security are non-justiciable, provided there is some evidence that national security is at stake (**Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935**).

[35] Mr. Oliveira challenges the decision to deport him. The decision is being challenged on the ground that no proper account has been taken of his constitutional rights. No account has been taken of his rights, also the decision to deport is both irrational and unfair. In such circumstances, the government is under an obligation to provide evidence that the decision to deport is in fact based on grounds of national security and is not being used as a fig leaf to disguise the absence of a proper legal foundation for the decision to deport. The point is one of evidence, not mere assertion. The words of Lord Scarman in **Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935 at 946f-948d** are very telling on this point:

“The point of principle in the appeal is as to the duty of the court when in proceedings properly brought before it a question arises as to what is required in the interest of national security. The question may arise in ordinary litigation between private persons as to their private rights and obligations; and it can arise, as in this case, in proceedings for judicial review of a decision by a public authority. The question can take one of several forms. It may be a question of fact which Parliament has left to the court to determine: see for an example s 10 of the Contempt of Court Act 1981. It may arise for the consideration as a factor in the exercise of an executive discretionary power. But, however it arises, it is a matter to be considered by the court in the circumstances and context of the case.

Though there are limits dictated by law and common sense which the court must observe in dealing with the question, the court does not abdicate its judicial function. If the question arises as a matter of fact, the court requires evidence to be given. If it arises as a factor to be considered in reviewing the exercise of a discretionary power, evidence is also needed so that the court may determine whether it should intervene to correct excess or abuse of the power.

My Lords, I conclude, therefore, that where a question as to the interest of national security arises in judicial proceedings the court has to act on evidence. In some cases a judge or jury is required by law to be satisfied that the interest is proved to exist; in others, the interest is a factor to be considered in the review of the exercise of an executive discretionary power. Once the factual basis is established by evidence so that the court is satisfied that the interest of national security is a relevant factor to be considered in the determination of the case, the court will accept the opinion of the State or its responsible officer as to what is required to meet it, unless it is possible to show that the opinion was one which no reasonable minister advising the State could in the circumstances reasonably have held. There is no abdication of the judicial function, but there is a commonsense limitation recognised by the judges as to what is justiciable; and the limitation is entirely consistent with the general development of the modern case law of judicial review."

- [36] So it is with Mr. Oliveira. Section 114 of the Constitution of Antigua and Barbuda "deposits" to the credit of any individual who is married to a citizen of Antigua and Barbuda for upwards of three years the right to citizenship upon application. Mr. Oliveira's right to citizenship upon application is a right that is deposited by the Constitution to the credit of Mr. Oliveira. The fact that Mr. Oliveira, until now, has not chosen to apply for registration as a citizen and thereby make a claim on the deposit does not mean that the deposit is not there.

[37] In *Noel v The Attorney General and the Minister responsible for Citizenship*, Civil Appeal No. 11 of 2006, 13th November 2007, Barrow JA at [14], with the concurrence of the other members of the Court of Appeal, accepted that where there is a constitutional right the duty of the authority concerned is to verify that the preconditions for claiming the right exists but the authority has no discretion to fetter the right. Dr. Dorsett stated that the precondition for the right to citizenship claimed by Mr. Oliveira is his marriage upwards of three years to his wife who is a citizen of Antigua and Barbuda. An application is not a precondition to the right. An application is the means by which the right is claimed. The Order of Cabinet deeming Mr. Oliveira an undesirable inhabitant of or visitor to Antigua and Barbuda is a fetter on the right. Likewise the seizure of Mr. Oliveira's passport is a fetter on the right as he is without a convenient, readily available, and commonly accepted means of identifying himself and proving to the authorities that the preconditions have been met and that the right to citizenship upon application applies to him in particular.

[38] An undesirable immigrant of or visitor to Antigua and Barbuda is not entitled to stay in the State. A person entitled to citizenship is entitled to stay and belong. Dr. Dorsett said that the entitlement to stay and belong as provided by the Constitution cannot be whittled away or negated other than by some express provision of the Constitution.

[39] Accordingly, Dr. Dorsett maintained that Mr. Oliveira is entitled to the declaration that he is entitled to be registered as a citizen.

[40] **Cabinet decision**

Next, Dr. Dorsett argued that the fact that a Cabinet decision is not justiciable does mean that the decision is immune from judicial review (*HMB Holdings v Cabinet of Antigua and Barbuda* [2007] UKPC 37, (2007) 70 WIR 160 AT [30]). A decision of Cabinet is open to challenge on any of the grounds of judicial review to include the traditional grounds of illegality, irrationally, procedural impropriety, and the additional ground of breach of a legitimate expectation.

[41] Learned Counsel Dr. Dorsett said that the decision of the Cabinet to deport Mr. Oliveira is amenable to judicial review as it was illegal in light of the constitutional right of Mr. Oliveira to be registered as a citizen upon application. Cabinet is not entitled to deport a person who, by virtue of the Constitution, is entitled to be registered as a citizen upon application, that is, a person who is entitled to belong to that State. It is not lawful to deport those that belong as a matter of right. Mr. Oliveira was entitled to belong upon application. Deportation would frustrate his attempt to apply for registration for citizenship as he is entitled under the Constitution. The Cabinet by using its discretion under section 8 of the Immigration and Passport Act to declare Mr. Oliveira an “undesirable visitor” was acting contrary to the “policy and objects” of the Act. A decision contrary to the policy and objects of the law is amenable to judicial review on the ground of illegality.

[42] Furthermore, the decision of the Cabinet to deport Mr. Oliveira is amenable to judicial review on the ground that it was irrational. The decision to deport was irrational for want of consideration of the relevant matters. The adverse effect that a person’s deportation would have on third parties is a relevant matter. The classic statement of Lord Bridge of Harwich speaking for their Lordships in **R v Immigration Appeal Tribunal, ex p Singh (Bakhtaur)** 1 WLR 910 at 919B-D is on point:

“On classic Wednesbury principles (**Associated Provincial Picture Houses Ltd. v Wednesbury Corporation** [1948] 1 KB 223) in exercising his discretion whether to implement a court recommendation for deportation or whether to decide to make a deportation order against an overstayer, the Secretary of State is bound to take account of all relevant considerations. If, therefore, some interest of third parties which is known to the Secretary of State and which would be adversely affected by deportation is in truth relevant to the proper exercise of the discretion, a decision made without taking into account would in any event be open to challenge by judicial review and consequently would be open, in the case of an overstayer, to an appeal under section 19(1) as being “not in accordance with the law” quite apart from the immigration rules.

- [43] Learned Counsel Dr. Dorsett opined that there has been an admission of a failure of the Cabinet to consider the family circumstances status of Mr. Oliveira. This failure led to a failure of Cabinet to have regard to his fundamental right to the protection of his family life as guaranteed under section 3 of the Constitution.
- [44] Any interference by the State with one's right to the protection of his family life must be exercised proportionately. In the leading case of **EB (Kosovo) v Secretary of State for the Home Department [2008] 3 WLR 178** in the lead judgment of Lord Bingham of Cornhill at [12] held that with regard to a claim that deportation would violate the right to the protection of family life, that it would rarely be proportionate to uphold an order for removal of a spouse when the other spouse could not reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order were to sever a genuine and subsisting relationship between parent and child.
- [45] Dr. Dorsett said that the fact that Mr. Oliveira, having been found in Antigua and Barbuda after the making of the Order deeming him an undesirable inhabitant of or visitor of Antigua and Barbuda and is thereby deemed a prohibited immigrant is not conclusive or decisive of the fact of whether or not Mr. Oliveira is a prohibited immigrant. If deeming him a prohibited immigrant was conclusive of the matter, the law would read "and shall be dealt with as such". But such is not the law. The law reads: and may be dealt with as such. "The law is internally consistent as it is quite possible for a person to be deemed a prohibited immigrant when in fact the person is not a prohibited immigrant or when it would otherwise be improper to treat such a persons as if he were a prohibited immigrant."
- [46] The Constitution entitles Mr. Oliveira to be registered as a citizen upon application. Any determination by Cabinet that the presence of Mr. Oliveira in the State might be prejudicial the public interest does not nullify his constitutional right to registration as a citizen upon application.
- [47] Based on information and advice that the Cabinet considered reliable, Mr. Oliveira was "deemed by Order of the Cabinet to be an undesirable inhabitant of or visitor to Antigua

and Barbuda". That was an executive policy decision. The court cannot invade the province of the executive and usurp the executive's function by substituting its own policy. However, the matter of Mr. Oliveira being deemed a prohibited immigrant and him being treated as such by the Chief Immigration Officer is a matter subject to judicial review. Dr. Dorsett submitted that it is unlawful and irrational for Mr. Oliveira to be considered a prohibited immigrant and to be dealt with as such when section 114(1) of the Constitution entitles Mr. Oliveira to citizenship upon application by virtue of his marriage of upwards of three years to a citizen of Antigua and Barbuda.

[48] The declaration is not made in a legal vacuum as s 114 of the Constitution provides that Mr. Oliveira, being married to a citizen of Antigua and Barbuda for upwards of three years, is entitled upon application to be registered as a citizen of Antigua and Barbuda. Application is only the route or the administrative vehicle via which the substantive right to citizenship may be enjoyed and taken advantaged of as a practical matter. The right to citizenship via s 114 of the Constitution is a residual or latent right that is broadcast and made blatantly known to the consciousness of the State of Antigua and Barbuda when the application is made by the non-citizen.

[49] A number of recent cases (e.g. **EB (Kosovo) v Secretary of State for the Home Department** [2008] UKHL 41, [2008] 3 WLR 178; **Beoku-Betts v Secretary of State for the Home Department** [2008] UKHL 39, [2008] 3 WLR 166; **AB (Jamaica) v Secretary of State for the Home Department** [2007] EWCA Civ 1302, [2008] 1 WLR 18930) have highlighted the fact that the effect of a deportation order on family members must be considered. The right to protection of one's family life as guaranteed by section 3(c) of the Constitution of Antigua and Barbuda is a fundamental and basic right. The Chief Immigration Officer has been ordered by Cabinet to treat Mr. Oliveira as a prohibited immigrant, that is to say, to see to his removal from the State. The authorities clearly lay down that the rights of Mr. Oliveira's family members are fully engaged in such a context.

[50] The case of **AF (Jamaica) v Secretary of State for the Home Department** [2009] EWCA Civ 240 is the most recent case that reiterates the obligation of a full and broad

consideration of the rights of family members when it is deemed in the public interest to deport a non-citizen. In the case of **AF (Jamaica)** *ibid*, AF has arrived in the United Kingdom in 1998 and married a British citizen the following year. He and his wife had two children, and he also had a daughter by a previous relationship who was a British citizen. He applied in October 1999 for leave to remain as a spouse, but that application was not dealt with until it was refused in November 2005. Meanwhile, AF was admitted to a witness protection programme having given evidence in a murder trial. He himself was convicted in November 2001 of conspiracy to supply heroin and cocaine, and sentenced to seven years imprisonment. When notice of intention to deport was served on him in September 2004 he claimed asylum. The Secretary of State subsequently rejected his application to remain as a spouse, together with his asylum application.

[51] On the 8th December 2006 the Secretary of State issued her decision to make a deportation order the case of AF. Her letter of the even date giving her reasons for the deportation order stated:

“It is concluded that in light of your criminal offence your removal from the United Kingdom is necessary in a democratic society for the prevention of disorder and crime and for the protection of health and morals. Furthermore, no reason can be found why your wife and child would not be able to accompany you to Jamaica should they wish to do so. Your child is considered young enough to adapt to life abroad.”

[52] Whereas in **AF (Jamaica)** *ibid* the appellant was a convict, in the case at bar, Mr. Oliveira stands free of conviction having twice successfully appealed his conviction. Moreover, a *nolle prosequi* has been entered against him. There is no danger of any conviction being entered against him. Dr. Dorsett said that in the circumstances Mr. Oliveira is entitled to no worse treatment than AF. Indeed, Mr. Oliveira is entitled to better treatment. Mr. Oliveira has by lawful means withstood attempts to convict him. The presumption of innocence does not arise *per se* as there are no charges pending against him. Moreover, Mr. Oliveira has a constitutional right to citizenship upon application. In the circumstances, Dr. Dorsett submitted that it does not make good law or good sense for Mr. Oliveira to be treated as a

prohibited immigrant and unceremoniously removed from the State as a non-belonger, as is clearly the State's intention.

[53] Dr. Dorsett maintained that Cabinet acted irrationally when it failed to consider:

- (1) Mr. Oliveira's family ties and the constitutional rights of members of his family to the protection of their family life;
- (2) the fact that the Court of Appeal had twice determine that the convictions could not be allowed to stand, and
- (3) the right of Mr. Oliveira's right to citizenship upon application, and hence the right to belong in Antigua and Barbuda, which was a bar to their proposed interference with his right to protection of his family life.

[54] **Fundamental Rights**

Dr. Dorsett stated that Mr. Oliveira applies for the following remedies with respect to damages:

- (1) Vindictory damages and exemplary damages, pursuant to section 119 of the Antigua and Barbuda Constitution Order 1981, for breach of his constitutional rights as provided for under section 114(1) (b) of the Constitution.
- (2) Damages for distress and inconvenience, pursuant to section 119 of the Antigua and Barbuda Constitution Order 1981, for breach of the applicant's constitutional rights as provided for under section 114(1) (b) of the Constitution.
- (3) An order that he is entitled to compensation for unlawful arrest or detention pursuant to section 5(7) of the Constitution.
- (4) An order that the defendants do pay compensation for his unlawful arrest or detention, the quantum of such compensation in the form of damages should include exemplary and vindictory damages.
- (5) A declaration and determination pursuant to section 9(2) of the Antigua and Barbuda Constitution Order 1981 that the applicant is entitled to

compensation for the compulsory possession of his passport which said passport is property in which the applicant has an interest in or right to.

[55] Dr. Dorsett said that the Court in assessing and determining the quantum of damages to be ordered payable to Mr. Oliveira may find guidance from the following cases:

- (1) **Attorney General of Trinidad and Tobago v Ramanoop**; Mr. Ramanoop was awarded \$18,000.00 for the deprivation of his liberty for two hours. In the case at bar, Mr. Oliveira was deprived of his liberty for five days without charge. There has been no defence to this allegation.
- (2) **Fraser v Judicial and Legal Service Commission and the Attorney General**; Mr. Fraser was awarded \$10,000.00 for distress and inconvenience. In the case at bar, Mr. Oliveira has suffered distress and inconvenience since 20th August 2007 when the Chief Immigration Officer unlawfully impounded his passport depriving him of property in which he has an interest or right to, the ability to apply for registration as a citizen, or at the minimum to apply for a work permit so that he may be able to provide a living for himself, wife and family. The indignity of not being able to lawfully work for an extended period of time must have been overwhelming.
- (3) **Merson v Cartwright**; \$100,000.00 was awarded for breach of constitutional rights: (a) protection from inhuman treatment and (b) protection of right to personal liberty.
- (4) **Takitota v The Attorney General et al [2009] UKPC 11**; \$100,000.00 was awarded representing constitutional or vindicatory damages for breach of the appellants rights as guaranteed under Articles 17 and 19 of the Constitution (protection from inhuman treatment and protection of rights to personal liberty).
- (5) **Inniss v The Attorney General of St. Kitts and Nevis**; \$50,000.00 was awarded for contravention of section 83(3) of the Constitution (the section dealing with the power to appoint the Registrar of the High Court and other legal officers. The Privy Council held that the fact that the

guidance offered by other cases (e.g. Ramanoop) dealt with the breach of a fundamental right or freedom does not deprive those cases of value in a case where the breach does not involve a breach of a fundamental right or freedom protected by the Constitution. Dr. Dorsett submitted that the guidance from **Ramanoop, Fraser, Innis, Merson and Takitota** *ibid* are all useful in providing guidance to the quantum of damages to be awarded for breach of:

- (i) Mr. Oliveira's constitutional rights as provided by s 114 (1) (b) of the Constitution;
- (ii) Mr. Oliveira's right against unlawful arrest or detention pursuant to s 5(7) of the Constitution; and
- (iii) Mr. Oliveira's right against compulsory possession of his passport, property in which he has an interest or right to, pursuant to s 9(2) of the Constitution.

[56] Next, Dr. Dorsett adverted the Court's attention to the fact that Mr. Oliveira has alleged a number of violations of his fundamental rights as guaranteed under the Constitution to include:

- (1) Breach of the Applicant's right to personal liberty under s 5;
- (2) Breach of the Applicant's right to freedom of movement under s 8;
- (3) Breach of the Applicant's right against deprivation of property under s 9;
- (4) Breach of the Applicant's right to be registered as a citizen under s 114.

[57] Dr. Dorsett said that the Constitution provides for relief for all of these violations of Mr. Oliveira's rights. In the case at bar, the defendants have not denied or otherwise seriously contested violation of Mr. Oliveira's right to personal liberty, freedom of movement or deprivation of property as alleged. Surely in such an instance Mr. Oliveira is entitled to constitutional relief to include vindicatory damages.

[58] **Redress**

Dr. Dorsett said that a mere declaration of the rights of Mr. Oliveira will not be adequate. There must be more than words. There must be an award for vindicatory damages for the multiple breaches of his rights which have not been defended or denied. The words of Lord Hope of Craighead in **Chester v Asher [2004] UKHL 41, [2004] 3 WLR 927 AT [87]** in the context of an injured patient are apropos:

“The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached. Unless this is done the duty is a hollow one, stripped of all practical force and devoid of all content. It will have lost its ability to protect the patient and thus to fulfill the only purpose which brought it into existence”.

[59] Lord Nicholas in **Attorney General of Trinidad and Tobago v Ramanoop [2005] UKPC 32 (2005) 66 WIR 334 at [17]-[19]** emphasised the role and function of vindicatory damages when the constitutional jurisdiction of the court is called upon to provide redress for the violation of constitutional rights:

“17. Section 14 (pari materia with section 18 of the Antigua and Barbuda Constitution) recognises and affirms the court’s power to award remedies for contravention of chapter I rights and freedoms. This jurisdiction is an integral part of the protection chapter I of the Constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against misuse of State power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the State’s violation of a constitutional right. This jurisdiction is separate from and additional to (“without prejudice to”) all other remedial jurisdiction of the court.

18. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court

may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

19. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. Redress in section 114 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expression "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award."

[60] Next, Dr. Dorsett referred the Court to **Inniss v The Attorney General of St. Kitts and Nevis [2008] UKPC 42**. Lord Hope of Craighead pointed out that the purpose of vindicatory damages is to "vindicate the right of the complainant to carry on his or her life free from unjustified Executive interference, mistreatment or oppression". Lord Hope also stated with respect to a vindicatory award:

"The sum chosen must be enough to provide an incentive to the defendant and other state agencies not to repeat the infringing conduct and also to ensure that the plaintiff does not reasonably feel that the award is trivializing of the breach (at [26]).

Allowance must of course be made for the importance of the right and the gravity of the breach in the assessment of any award. The fundamental points are of general application, however. The purpose of the award, whether it is made to redress the contravention or as a relief, is to vindicate the right. It is not to punish the Executive. But vindication involves an assertion that the right is a valuable one, as to whose enforcement the complainant herself has an interest. Any award of damages for its contravention is bound, to some extent at least, to act as a deterrent against further breaches, The fact that it may be expected to do so is something to which it is proper to have regard (at [27])."

- [61] Dr. Dorsett submitted that there was arbitrary use of State power in its continued and ongoing seizure of Mr. Oliveira's passport, notwithstanding a Court order for its release. There was also arbitrary use of State power when Mr. Oliveira was in jail for five days in at best austere conditions without charge. The conditions of his detention were described as unhygienic. The entire incident, Dr. Dorsett said, was calamitous. There was arbitrary use of the State power when Mr. Oliveira was unlawfully deported from the State in 2007. Also, there was arbitrary use of State power to attempt to have Mr. Oliveira deported again subsequent to the Cabinet meeting of 4th September, 2007. In the circumstances, the case at bar is a fit and proper case for constitutional relief.
- [62] The award of vindictory damages for violation of constitutional rights as granted in **Ramanoop** *ibid* has been applied in **Merson v Cartwright [2005] UKPC 38, (2005) 67 WIR 17, Fraser v Judicial Services Commission and the Attorney General [2008] UKPC 25** and **Inniss** *ibid*.
- [63] Dr. Dorsett said that given the multiple and flagrant violations of Mr. Oliveira's rights in the case at bar, it is appropriate for an award of damages for distress and inconvenience as in **Fraser** *ibid*. Damages for distress and inconvenience are warranted particularly in light of Mr. Oliveira's languishing in jail for five days and his embarrassment of being unable to earn a living to provide for his wife and children; he being unable to obtain a work permit or otherwise being able to work on account of being a citizen by registration.

[64] **Court's analysis and findings**

I have given careful consideration to the evidence adduced and to the very helpful submissions of both learned Counsel. For the most part, the facts are not in dispute. In any event the following represents my finding of facts in relation to the issues that have been joined: Mr. Oliveira is a Guyanese national who has been living in Antigua and Barbuda for several years. At one time, he was self employed and for various periods, the relevant government department granted him work permits. He apparently ran afoul of the law in relation to serious sexual offences. He was charged, tried, convicted and eventually freed by the Court of Appeal. He was retried and the same sequence of events obtained. Finally, the learned Director of Public Prosecutions discontinued all criminal proceedings against him. It is apparent that the State was not satisfied with those developments and after Mr. Oliveira was released from prison, the State deported him. By the time of his criminal trial, he had acquired property in Antigua and Barbuda and had married to a naturalised Antiguan, who was Guyanese born. His marriage is in excess of 10 years and together they have children.

[65] Having been deported, he was somehow able to acquire a new passport and returned to Antigua where he gained entry and was given a month to remain. The circumstances under which he was able to obtain a new passport in Guyana are unclear, but it is evident that the new passport did not indicate that he had previously been deported. What is equally unclear is whether the Immigration Authorities had followed the letter of the law in deporting him in the first instance. Be that as it may, it is obvious that subsequently, the Immigration Authorities realised that Mr. Oliveira had returned to Antigua and they set about to have him repatriated to the country of his birth. Mr. Oliveira was determined to remain in Antigua and Barbuda and the Immigration Authorities were determined to send him home. The Immigration Authorities visited his home and took him into custody. He was detained for five days.

[66] Meanwhile, the Immigration Authorities had obtained possession of his passport, which they kept and was only returned to him on the instructions of the learned Attorney General, during the trial, despite the fact that several months before the trial His Lordship Mr.

Justice Harris, on the 31st July, 2008, had ordered that the passport be returned to him. While there was no direct evidence led to show that he had requested the return of his passport, surely, had the State so desired to return his passport, they could have indicated that to his wife. The clear inference based on all of the evidence is that his passport was impounded. Meanwhile, Mr. Oliveira went into hiding and was able to evade the Immigration Authorities who no doubt wished to deport him. The Immigration Authorities did not succeed in their efforts.

[67] In the intervening period, Cabinet, in circumstances which are unclear, deemed him a prohibited immigrant. It is against those facts that Mr. Oliveira has sought the Court's intervention. Indeed, it is in those circumstances that he has filed the claim seeking declarations that he is entitled to be registered as a citizen, together with damages for the State's alleged contravention of his fundamental rights. He also contends that the Cabinet decision is unlawful and seeks an Order to that effect.

[68] **Cabinet decision**

First, I will address the legality of the Cabinet decision. It is the law that Cabinet decisions are not reviewable, except in limited circumstances, either on the basis that the decision is irrational, illegal or procedurally irregular, see **HMB Holdings v Cabinet of Antigua**.

[69] National security issues are not wholly outside judicial review but the Court will confine itself to deciding whether the decision-maker, usually a minister, is acting in good faith within the language of the governing legislation, if any. The Court can also look at evidence to determine if the issue is genuinely one of national security. Beyond that the Court will accept the opinion of the State as to what national security requires and a claim of national security will normally suffice to exclude a right to be heard. Therefore, while there is no denying that the law enables the Cabinet to deem that a person is a prohibited immigrant, it was also in the contemplation of the legislature that this executive discretion should only be exercised in very clear cases. See section 8(b) of the Immigration and Passport Act. It is clear to the Court that while the Court cannot properly enquire into the decision itself, save in those limited situations as stated above, at the very least, the Court

has to be provided with credible bases in order for the State to substantiate the decision to deem a person a prohibited immigrant. It is usual for the State to have a person who can properly provide the evidence as to the exercise of the Cabinet decision. One would not have thought that an Immigration Officer would not have been able to provide admissible or reliable evidence in relation to the Cabinet decision. This becomes of particular importance since the relevant section provides several bases on which Cabinet can deem a person a prohibited immigrant.

[70] While it is accepted, it is no part of the Court's function to determine whether the Cabinet decision was fair or just, the sole issue for the Court to determine is whether the decision was rational. The Court will not abdicate its responsibility to review executive decisions not on the basis of whether they are right or wrong, but whether for example, they are irrational or illegal. In this regard, the principles stated in **Council of Civil Service Unions v Minister for the Civil Service** *ibid* are very helpful in dealing with the issue of national security. In that case, the failure of the Secretary of State to consult with employers before taking a decision which prevented them from continuing to belong to trade unions. The issue arose as to whether the decision was reviewable based on two grounds, namely, it was that dealt with as the State's prerogative and secondly, it concerned matters of national security. Lord Fraser stated that:

"The question is one of evidence. The decision whether the requirements of national security outweigh the duty of fairness in any particular case is for the Government and not for the Courts; the Government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decision on national security."

Authority for both these points is found in **The Zamora** [1916] 2 AC 77. I would borrow from the words of Lord Scarman in the **Council of Civil Service Unions v Minister for the Civil Service** *ibid* case in which he said:

"Where a question as to the interest of national security arises in judicial proceedings, the court has to act on evidence. In some cases a judge is required by law to be satisfied that the interest is proved to exist, in others the interest is a factor to be considered in the review of the exercise of an executive

discretionary power. Once the factual basis is established by evidence so that the court is satisfied that the interest of national security is a relevant factor to be considered in the determination of the case, the court will accept the opinion of the Crown or its responsible officers as to what is required to meet it, unless it was possible to show that the opinion was one which no reasonable minister advising the Crown could in the circumstances reasonably have held.”

[71] In **Council of Civil Service Unions v Minister for the Civil Service** *ibid*, a genuine case of national security no less a person than the Secretary of State provided the Court with the requisite information. In the case at bar, let it be clear that there ought to be evidence from the Cabinet indicating that it took the decision to deem Mr. Oliveira an undesirable visitor or alien. It is usual for this evidence to be provided by either the Cabinet Secretary or a member of Cabinet but certainly not from an Immigration Officer. The quality of the evidence adduced by the State falls short of what is required to enable the Court to conclude that the decision was rational.

[72] By way of emphasis, the Court accepts the principle stated in **HMB Holdings** *ibid* as binding, namely that the decision of Cabinet is open to challenge on the ground that it was irrational or illegal. In addition, I see no reason for holding that the Cabinet decision could not be challenged on the ground that it was without foundation. While the decision as to who is an undesirable citizen rests exclusively within the purview of Cabinet, the Court is surely clothed with the power to determine whether any such decision as was taken was rational. It is apposite to repeat that the Court is not prepared to accept that a person was a threat to national security based on the mere say so of an Immigration Officer, without more. There is no credible evidence presented by the State in this regard. The Court recognises that in cases of threat to national security, Cabinet should not be required to divulge the extent or source of information on which it acted in coming to the conclusion that a person is a threat. The Court is however satisfied on the evidence presented that the facts of this case fail to meet the threshold required for establishing that it was a matter of national security.

- [73] There is no doubt that matters of breaches, national security or matters of that gravity do suffice to enable Cabinet to deem a person an undesirable immigrant. I am mindful of the fact that it is not part of the Court's function to determine who should or should not be deemed a prohibited immigrant. I am however not constrained from saying, as stated earlier, that even in cases of national security the Court has a duty to consider the circumstances and context of the case. See **Council of Civil Service Unions v Minister for the Civil Service** *ibid*. I am of the view that if the question arises, as in the case at bar, in reviewing the exercise of a discretionary power, evidence is also needed so that the Court may determine whether it should intervene to correct any alleged excesses or abuse of power or irrationality.
- [74] In the case at bar, there is no evidence placed before the Court as to which of the bases Cabinet has relied on to deem Mr. Oliveira a prohibited immigrant.
- [75] Applying those principles, I am afraid that the Court can place very little weight, if any, on the statement of the Immigration Officer in relation to the issue of national security, a matter which predated the Cabinet decision. In any event, in the case at bar, I am afraid that Mr. Oliveira has lead credible evidence from which the Court can properly conclude that the Cabinet decision was irrational. This does not negate the fact that the totality of circumstances of the case has given the Court great cause for pause.
- [76] In addition, it is far from satisfactory that the Court should be asked to extrapolate that since Mr. Oliveira was previously deported, purportedly for breach of national security, that it was on that basis that Cabinet deemed him a prohibited immigrant. In fact, Mr. Hampson's evidence does not address the basis on which Cabinet deemed Mr. Oliveira a prohibited immigrant. Exhibited to Mr. Hampson's affidavit is a document which appears to be a minute from the Secretary to Cabinet addressed to the Chief Immigration Officer. There is no basis provided in the minute for the apparent deeming of Mr. Oliveira as a prohibited immigrant. I digress to state that the Immigration Officer Mr. Hampson was quite wrong when he said in evidence, that once Cabinet had deemed Mr. Oliveira an undesirable visitor, the Immigration Authorities were empowered to remove him from

Antigua and Barbuda. The Immigration Authorities have absolutely no power to deport any person. The legislature has provided a procedure that has to be followed before an alien can be deported by the Magistrate. The learned Attorney General, during the trial quite properly conceded this.

[77] Dr. Dorsett has persuaded the Court that based on the totality of circumstances no reasonable person who had applied its mind to it would have arrived at that decision. It seems to be that Dr. Dorsett's contention that Cabinet's decision is irrational is unimpeachable. See **HMB Holdings** *ibid*. There is persuasive evidence to suggest that Cabinet's decision to deem Mr. Oliveira an undesirable immigrant was irrational.

[78] In view of the totality of circumstances, there is no credible evidence before the Court on which the Court could properly conclude the decision taken by Cabinet to deem Mr. Oliveira an undesirable immigrant is a rational one. Further, the Court is driven to conclude that Cabinet's decision to deem Mr. Oliveira an undesirable inhabitant or visitor has no basis since none was provided.

[79] **Right to be registered**

I will now address the issue of the entitlement to citizenship, as contended for. This issue brings into sharp focus section 114 of the Constitution. I have no doubt that section 114 of the Constitution entitles the person to apply to be registered as a citizen if that person is married to an Antiguan citizen for upwards of three years. The question of citizenship is a matter for the State to determine.

[80] I am not of the view that the State can properly plead in their defence that Mr. Oliveira did not apply for citizenship when the public officials, by their clear intention, have sought to frustrate any such application. That may well be because he was running from the Immigration Authorities who were bent on deporting him, as the learned Attorney General has urged the Court to find. I have no doubt that he intended to apply for citizenship and was fearful that had he only presented himself, he would have been deported. He was clearly in a dilemma. In addition, the State cannot be heard to say that he has led no

evidence to substantiate his assertion that he needed his passport in order to be able to identify himself, when his uncontroverted evidence was that he needed his passport to identify himself. This flies in the face of the concession of the defence that in order to be able to apply for citizenship, he needed to present identification. The passport is one of the means of indentifying oneself.

[81] I agree with the learned Attorney General Mr. Simon QC that ordinarily, there ought to have been evidence presented to the Court that the person who is seeking a declaration to entitlement of citizenship, has filed an application to become a citizen and that all of the other prerequisites have been fulfilled. However, each case turns on its own facts and while I find the enunciation in **Kareem Abdulghani** *ibid* very helpful, I am of the respectful view that the facts of that case are clearly distinguishable from those in the case at bar.

[82] With the greatest of respect, it seems to be that the relevant public officials cannot be heard to say that Mr. Oliveira did not apply to become a citizen when by their every effort, they have taken several steps to fetter and did fetter his ability to apply for citizenship. He ran the real risk that on presenting himself, he would have been deported. I accept the submissions of Dr. Dorsett in this regard.

[83] Accordingly, I do not share the view that the Court is barred from making any declaration in relation to his entitlement in so far as he has not applied to be registered as a citizen of Antigua and Barbuda. There is no doubt in my mind that on the facts presented, read together with the law, there is nothing to prevent the Court from declaring that he is entitled to apply to be registered as a citizen of Antigua and Barbuda. I so hold.

[84] **Fundamental rights**

At this juncture, it is appropriate to note that section 3 of the Antigua and Barbuda Constitution states that “every person in Antigua and Barbuda is entitled to the fundamental rights and freedoms of every individual, that is to say, the right, regardless of race, place of origin, political opinions or affiliations, colour, creed or sex.”

[85] **Passport**

There are a number of authorities which were not provided to the Court, which indicate that the unlawful deprivation of an interest in property is sufficient in law to trigger the contravention of a person's fundamental rights to his property as provided by provisions which are similar to section 9 of the Constitution of Antigua and Barbuda. By way of comment, as stated earlier, I find it interesting that the Immigration Authorities did not see it fit to return his passport even in the face of an order of Court to that effect. Quite apart from infringing Mr. Oliveira's fundamental rights to his property, the Immigration Authorities have acted in breach of the law. Of course, it bears stating that section 2 of the Constitution stipulates that it is the supreme law of the land.

[86] Section 18 of the Constitution enables the High Court to grant redress to any person who proves that any of his rights as provided by section 3 to 17 (inclusive) of the Constitution is being or is likely to be contravened.

[87] Indeed, Mr. Oliveira has an interest in his passport. Section 9(1) of the Antigua and Barbuda Constitution states that "no property of any description shall be compulsorily taken possession of, and no interest in or right over property of any shall be compulsorily acquired."

[88] As alluded to earlier, with the greatest respect, I am not of the view that the Immigration Authorities can lawfully retain a person's passport against that person's wishes. Administratively, this may well be the practice that has developed here in Antigua, but it simply does not accord with the law. Public officers must conform to the law. I am not at all persuaded, as urged on me by the learned Attorney General, that the Immigration Authorities did not deliberately withhold Mr. Oliveira's passport. To the contrary, I have no doubt that the withholding of his passport was part of the greater plan to deport him and it is violative of his fundamental rights to his property.

[89] **Wrongful Detention**

It is impliedly conceded, and quite properly, by the learned Attorney General Mr. Simon QC, in his closing arguments, that the Immigration Authorities had no authority to detain Mr. Oliveira for five days. The Constitution of Antigua and Barbuda protects persons from being deprived of their liberty except in accordance with law.

[90] Section 5(1) of the Constitution of Antigua and Barbuda states “No person shall be deprived of his personal liberty save as may be authorised by law.”

[91] Section 5(7) of the Constitution of Antigua and Barbuda states that any person who is unlawfully arrested or detained by any other shall be entitled to compensation. In view of the undisputed fact that Mr. Oliveira was detained for five days, this clearly was not in accordance with any law. In fact, the legislature in its wisdom has clearly provided the procedure to be adopted in circumstances of intended deportation of an immigrant. It bears repeating that if the Immigration Authorities desire to have an immigrant deported, that person must be taken before a Magistrate in order for the requisite order to be made. The Immigration and Passport Act is clear in this regard.

[92] The Act was not adhered to. The Court has absolutely no doubt that the Immigration Authorities, having detained Mr. Oliveira for five days, acted in clear breach of his fundamental rights for which he is entitled to be compensated.

[93] **Redress for breach of fundamental rights**

I come now to address the reliefs and damages to which Mr. Oliveira is entitled, as a result of the breaches of his fundamental rights.

[94] **Passport**

In relation to the wrongful detention of his passport, the Court is of the considered view that the infraction is of such a nature that he is entitled to damages that is just to compensate him and to vindicate his rights not to be deprived of his interest in the

property. In determining the measure of damages to which he is entitled, the Court is guided by the general principles stated in **Attorney General of Trinidad and Tobago v Ramanoop** *ibid* and **Innis v Attorney General of Saint Christopher and Nevis**. In view of the totality of circumstances, it is just that Mr. Oliveira be awarded \$5,000.00 for the State's breach of his fundamental right to property. This sum represents compensation for the trespass to his property and to vindicate his fundamental rights.

[95] **Wrongful detention/Deprivation of Liberty**

The Court is mindful however that in awarding compensation to a person whose constitutional rights have been infringed, the Privy Council in **Ramanoop's** case has advised that descriptions of "exemplary damages and punitive damages should be avoided". In fact, the Board has maintained that the award of damages for breach of constitutional rights has much the same object as the common law award of exemplary damages.

[96] It is noteworthy that while learned Counsel Dr. Dorsett has suggested different levels of compensation that the Court should award to Mr. Oliveira, the learned Attorney General Mr. Simon QC has not provided the Court with any authority to assist the Court on the quantum of compensation that should be awarded. Mr. Oliveira stated that while he was detained, he suffered much distress and inconvenience. He was forced to sleep on a hard bench for several nights, the conditions were harsh and the condition of the cell was unhygienic. I believe him. I am cognisant of the fact, however, that previously, when he was convicted, he was incarcerated and even though the Court of Appeal had quashed his convictions, he was ordered to be kept in custody while awaiting retrial. I say all of that to indicate that he may have experienced conditions that were harsh. This in no way diminishes his complaint about his unlawful detention and the distress and inconvenience he has suffered as a result of the State's breaches of his fundamental rights. There is no evidence before the Court that he has suffered any losses over and above the inconvenience and distress pleaded.

[97] I find the pronouncements of Lord Nicholas of Birkenhead in delivering the judgment of the Board in **Attorney General of Trinidad and Tobago v Ramanoop** *ibid* very instructive at paragraph 19 when it said:

“An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach and deter further breaches. All of these elements have a place in this additional award. “Redress” in section 14 is apt to encompass such an award if the court considers it is required having regard to all of the circumstances.

[98] While I find the principles enunciated in **Fraser** and **Inniss** *ibid* very instructive nonetheless the circumstances of those cases are distinguishable from the case at bar. The factual circumstances of **Ramanoop** *ibid* are closer to those in the case at bar in that, in that case, he was found to have been wrongfully detained. It is regrettable that neither side saw it fit to advert the Court’s attention to any of the cases from our jurisdiction in which the factual circumstances were similar. The Court notes that in **Ramanoop** *ibid* the Court awarded him \$18,000.00 for being detained for 2 hours. **Mr. Oliveira was detained for 5 days.**

[99] Applying the principles referred to above, it behoves the Court to ensure that Mr. Oliveira’s fundamental rights to liberty are vindicated. Also, the Court has to ensure that Mr. Oliveira is adequately compensated for the loss and damage that he has suffered in consequence of the unlawful detention including the distress and inconvenience he has suffered. Looking at the matter in the round, the Court is of the considered view that the sum of \$15,000.00 is adequate compensation for the State’s breach which resulted in loss and damage. Further, and in view of the fact that his fundamental rights have been breached and in keeping with the pronouncements of the Board in **Inniss** *ibid*, in an effort to reflect the society’s outrage at the conduct of the Immigration Authorities and to deter them from

similar conduct, the Court would add to that sum an additional sum of \$10,000.00. In total, he is awarded the sum of \$25,000.00 as compensation under this limb.

[100] **Conclusion**

Accordingly, there will be judgment for Mr. Clive Oliveira against the Attorney General of Antigua and Barbuda and The Chief Immigration Officer. Mr. Clive Oliveira is awarded compensation in the sum of \$30,000.00 for the wrongful detention for 5 days and the unlawful detention of his passport.

[101] There are a number of other reliefs which Mr. Oliveira seeks. It is appropriate at this juncture to address the declarations to which he is entitled. They are as follows:

- (a) It is declared that Mr. Clive Oliveira is entitled to apply to the relevant authorities to be registered as a citizen of Antigua and Barbuda.
- (b) It is declared that Cabinet's decision to deem Mr. Clive Oliveira an undesirable inhabitant or visitor is irrational, and therefore unlawful.
- (c) It is further declared that Mr. Clive Oliveira's constitutional right to personal liberty was infringed as a consequence of his unlawful detention for five days.
- (d) It is also declared that Mr. Clive Oliveira's fundamental right to the interest in property (his passport) was infringed when his passport was illegally impounded.

[102] Mr. Clive Oliveira is awarded prescribed costs, unless otherwise agreed.

[103] The Court thanks all learned Counsel for their assistance.

Louise Esther Blenman
High Court Judge
Antigua and Barbuda