IN THE COURT OF APPEAL

TURKS AND CAICOS ISLANDS **CL-AP 4/20**

BETWEEN

1. **KAJEEPAAN, PAINTAMILKAVALAN**
2. **RASARATNAM, VARATHARAJ**
3. **SIVAPALAN, JESEEPAN SWAPALAN**

Appellants

AND

1. **DEREK BEEN, DIRECTOR OF IMMIGRATION**
2. **THE ATTORNEY GENERAL OF THE TURKS AND CAICOS ISLANDS**

Respondents

BEFORE:

Sir Elliott Mottley	**President**
The Hon. Mr. Justice Stanley John	**Justice of Appeal**
The Hon. Mr. Justice Ian Winder	**Justice of Appeal**

APPEARANCES: **Mr. Philip Rule with Mr. Tim Prudhoe for the Appellants**
Ms. Clemar Hippolyte for the Respondents

Heard: **22, 23, 24 September 2020, 2 October 2020 and 9 October 2020**

Delivered: **31 December 2020**

JUDGMENT

Winder JA

1. This is an appeal of the decision of the Honourable Chief Justice dated 1 May 2020, whereby she found, following a Habeas Corpus application, that the detention of the Appellants at the Immigration Detention Center was lawful.

Background.

2. On 10 October 2019, the Royal Turks & Caicos Islands Police Force ("RTCIPF") intercepted a Haitian sloop in the territorial waters of the Turks and Caicos Islands ("TCI"). When intercepted, it was discovered that the Haitian sloop had 154 persons on board including 1 Indian and 28 Sri Lankan nationals. The three Appellants were a part of the group of Sri Lankan nationals.

3. The Respondents' case, both here and in the Court below, was that this interception presented a number of complex and significant issues. Firstly, they say that the inability to communicate with the Sri Lankan detainees, who only spoke Tamil, frustrated the investigation. Secondly, they say that the investigations were prolonged since it was imperative that comprehensive and proper assessments be carried out on the detainees, to establish whether they had been the victims of human trafficking and or smuggling to identify who was responsible for it.

4. In relation to the latter of the issues, the Respondents say that the capacity and experience within the Immigration Enforcement Unit could not support such a complex and sensitive investigation. Further they say that this necessitated the RTCIPF taking the lead in the investigation. It then unfolded that the RTCIPF itself was forced to solicit the assistance of more experienced and specialized investigators from the Serious Crime Investigation Agency in the UK. Such an engagement which required significant and extraordinary funding, it was said, required parliamentary appropriation following a formal request to the Governor in Cabinet.

5. It would not be until early November 2019, following the approval of the House of Assembly, that the engagement of investigative services could be confirmed. Further, it would not be until 3 December 2019, some two months since initial detention, that interviews with the detainees commenced, following the arrival of UK based officers and Tamil speaking interpreters in the TCI.

6. Following the investigations by the RTCIPF it was determined that the Haitian sloop intercepted on 10 October 2020, was engaged in a human trafficking or smuggling operation led by Srikajamukam Chelliah (*Chelliah*) who was also found on board. Chelliah, a Canadian national of Sri Lankan descent is believed to be part of a Sri Lankan based trans criminal operation which engaged in the smuggling of undocumented migrants from Sri Lanka to the United States through the Caribbean.

7. Upon completion of their work the RTCIPF, on 7 February 2020, provided the Immigration authorities with a schedule of the Sri Lankan and Indian nationals involved in the investigation along with recommendations for each. The recommendations fell into three categories:
   (1) 1 detainee (Chelliah) was identified as a suspect;
   (2) 6 detainees were to be utilized as potential witnesses (for proceedings against Chelliah); and
   (3) All others were to be repatriated.

   The Appellants were identified in the class of persons to be repatriated. According to the Respondents, *"once that information was received much efforts was placed in determining the ideal way and means to return the Sri Lankan and Indian National to their homeland".* On 7 March 2020, Voluntary Departure Forms (IS101) prescribed under the Immigration Ordinance were presented to all of the detainees. The three Appellants were the only Sri Lankan nationals who refused to sign to IS101 forms. Upon this refusal they were isolated from the other Sri Lankan nationals.

8. The International Office for Migration (IOM), which was engaged to assist in the repatriation exercise, arrived in the TCI on 9 March 2020. The IOM completed its tasks, related to persons to be repatriated, on 16 March 2020 and informed the Immigration Department of details relevant to the repatriation then proposed for 24 March 2020. The IOM advised the Immigration Department that Varatharaj Rasaratnam, Jeseepan Silvapalan and Kajeepan Paintamilkavalan, the Appellants, had indicated *"that they do not wish to return home as they are afraid of what might happen upon return"*. The declaration of the Covid-19 virus as an international pandemic by the World Health Organization (WHO) and the subsequent closures of transit countries, and Sri Lanka itself, delayed the possibility of the proposed repatriation exercise. The Tamil interpreters were repatriated to the UK ahead of a national Covid-19 lockdown at the end of March 2020.

9. On 31 March 2020, upon the application of the Appellants (and 12 of the other Sri Lankan nationals), Simons J (Ag.) made an order for a Writ of Habeas Corpus ad subjiciendum, returnable on 24 April 2020, to be issued. The Writ of Habeas Corpus was issued on 20 April 2020. The Writ of Habeas Corpus directed the First Respondent to produce the Appellants (along with the other 12 detainees) before the Court.

10. On 23 April 2020, three days after the Writ of Habeas Corpus was issued, and some six (6) months since the initial detention of the Appellants, a Notice of Intention to Make a Deportation Order was issued by the Minister of Border Control, in respect of the Appellants and served on them at the Immigration Detention Center.

11. The Writ of Habeas Corpus was heard by the Chief Justice, remotely, in accordance with the Emergency Powers (Covid-19) (Court Proceedings) Regulations 2020 on 24 April 2020. The Appellants appeared at the hearing remotely from the detention center. At the hearing, Counsel for the Appellants objected to the quality of the production of the Appellants upon the Writ. The substance of the Respondents' objection, at the hearing, was that all of the Applicants to the habeas corpus application were not present in the hearing at the same time. The result was that they were not able to attend for the entirety of the

proceedings. According to the Respondents, as a result of the size of the hearing room at the detention center and the need for social distancing, only 5 persons could safely be in the hearing room at any one time. As 15 persons were involved in the hearing, they were brought into the hearing room in groups of 5. Each of the applicants (including the Appellants) was identified to the court and thereafter taken away. None of the Appellants was therefore permitted to attend for the entirety of the proceedings. Despite the challenges, the Chief Justice sought to ensure that applicants were present in the video hearing when matters specific to them were being raised.

12. During the proceedings the First Respondent ("Been") was examined under oath and subject to cross-examination. The Appellants' attorneys became aware of the existence of the Notice of Intention to Make a Deportation Order, for the first time, during Been's evidence.

13. At the conclusion of the hearing the Chief Justice reserved her decision which was delivered shortly thereafter on 1 May 2020. In her written decision, the learned Chief Justice found, at page 21, as follows:

> It seems to me then that the respondents have demonstrated on the preponderance of the probabilities, that the accommodation arrangements at the detention facility are adequate for the purpose. Juxtaposed with this is the fluid nature of COVID 19 infection and how the science of infection changes daily. This is something I take judicial notice of, see: S. 39 of the Evidence Ordinance Cap 2:06. In this regard, I have considered the affidavit of Dr. Nadia Astwood and her recommendation that the applicants not be removed except to be sent out of Turks and Caicos Islands. It is the case of the first respondent that all the applicants who entered Turks and Caicos Islands illegally, are due to be removed from the Islands. These include the persons who signed the IS101 Forms, the three applicants who refused to sign them, as well as the six persons who before their removal will be used as prosecution witnesses in the case against one of the detainees. On the showing of Mr. Parker in his unchallenged affidavit, all the detainees are at this time, supplied with the necessaries of life. To release such persons pending their removal from the Turks and Caicos Islands into vacant tourist places to fend for themselves at this time with the curfew in place (even if less restricted since yesterday), and with very little offered by way of service

to cater for daily needs, will not serve any useful purpose to them or to the community which is doing all it can to combat the spread of COVID 19.
I am satisfied that on the balance of the probabilities, the respondents have demonstrated that the applicants are not the subject of unlawful detention. I hold that the detention of the applicants pending removal is lawful, as pursuant to Ss.54(3) and 56(4) of the Immigration Ordinance Cap 5:01. In thus holding, I am mindful of the court's duty to protect and enforce fundamental rights enshrined in the Constitution of Turks and Caicos Islands, including freedom from the deprivation of liberty and the security of the person, as well as its caveats set out in S.5, and more particularly S5 (2)(h) of the Constitution of Turks and Caicos Islands which provide as follows [emphasis added]:

> "5(1) Every person has the right to liberty and security of person.
> (2) No person shall be deprived of his or her personal liberty save in accordance with a procedure prescribed by law in any of the following cases:
> (h) for the purpose of preventing the unlawful entry of that person into the Islands or for the purpose of effecting the expulsion, extradition or other lawful removal from the Islands of that person or the taking of proceedings relating thereto."

I decline to interfere with the detention at this time, as the delay in repatriation which gave rise to the application has been sufficiently explained as justified, and especially as I am satisfied that the first respondent's intention to repatriate is active and continuing, and there is some prospect of achieving it without unreasonable delay. [emphasis added]

The application before this court for the release of the applicants (or in the alternative, a relocation into other residential accommodation), must therefore fail. It is accordingly dismissed.

14. The parties have lodged an Agreed Chronology to chronicle the events which transpired, including those subsequent to the decision of the Chief Justice. There has been no application to admit fresh evidence. However, insofar as there is an agreement by way of the Agreed Chronology, indicating that certain events have indeed occurred, it is open to the Court to have regard, to the occurrence of these events, which were relied upon by *both* parties in arguing their case. The Court made no objection to the Agreed Chronology at any time during the hearing. One such significant event in the Agreed Chronology is the

decision of the Respondents to voluntarily release the Appellants subsequent to the hearing before the Chief Justice.

15. Beyond acknowledging the occurrence of the events in the Agreed Chronology, the Court ought to restrain itself from considering any new factual matter which may be disputed, such as new matters set out in the Skeleton Argument of the Appellants. Subject to this, I am satisfied that notwithstanding the submission of the Appellants, *that the court rehear the matter and consider matters occurring before and after the hearing before the Chief Justice*, this appeal ought to be largely focused on the state of affairs which were in existence before the Chief Justice and upon which she found that the Appellants' detention was lawful.

16. According to the Agreed Chronology, on 30 April 2020, the Notice of Intent to make a Deportation Order in respect of each of the Appellants was emailed to the Appellants' attorneys at the firm of Prudhoe Caribbean. Between 1 May 2020 and 20 May 2020, the Appellants' attorneys and the Minister of Border Control and Labour engaged in correspondence with respect to the decision to issue Notices of Intention to deport without first having the Appellants interviewed by an official with knowledge and experience of interviewing asylum applicants. That decision became the subject of judicial review applications before the Supreme Court in Civil Action No. CL 54/2020. On 19 June 2020, the Respondents registered the Appellants with the United Nations Human Rights Commissioner for Refugees ("UNHCR"). On 10 July 2020, the UNHCR, after interviewing and assessing the Appellants, found them to be genuine refugees entitled to proper humanitarian care and registered them as refugees. The UNHCR requested that the Respondents release the Appellants.

17. As indicated above, the Agreed Chronology also showed that the Appellants and all other Sri Lankan detainees were conditionally released on 24 August 2020, after 320 days (or 10 ½ months) in detention.

The Appeal

18. The Notice of Appeal in this action was filed on 14 May 2020, and amended on 7 August 2020. Whilst the Amended Notice of Appeal spanned 34 pages, the complaints of the Appellants may be identified into 2 broad areas. These are:
    (1) The challenge to the lawfulness of the detention; and
    (2) Complaints concerning the procedure employed at the hearing of the Writ of Habeas Corpus and the production of the Appellants.

19. These broad complaints are seen in the nature of the Order initially sought by the Appellants, namely that:
    i. the appeal be allowed;
    ii. an Order of release forthwith of the Appellants; and/or
    iii. a Declaration of the violation of section 5 of the Constitution for the detention for such period as the Court shall identify;
    iv. a declaration that the procedure adopted in the Appellants' cases at the hearing on 24 April 2020 was deficient and unfair at common law or in violation of section 6 of the Constitution;
    v. such further or relief as this Court shall deem fit or as is appropriate, including declaratory relief and/or compensation pursuant to section 5(7) of the Constitution.

20. Upon the release of the Appellants on 24 August 2020, subsequent to the Amended Notice of Appeal, the relief in item (ii) above was abandoned in these proceedings.

Whether the Appeal is Academic or Moot

21. During the hearing of the appeal, the issue was raised, by the President, of whether the subsequent release of the Appellants has rendered the pursuit of this appeal academic or moot. The Respondents had been content to argue the appeal on its merits as the issue had not been raised by them in their submissions. The issue has since been embraced by the Respondents and supplemented by a written note. According to the note:

> *At the hearing of this appeal the Court asked the parties to consider the effect of the release of the Applicants on this appeal. Specifically, the court required the*

parties to address it on whether the appeal is a purely academic appeal and whether the Court should seek to entertain it.
In these circumstances, where the appellants have been released, the Respondents …
The question arises as to whether this Court can hear academic appeals and, if so, in what circumstances and subject to what considerations should it do so. The rules governing appeals to this Court are stated in very broad terms.
Section 4 of the Court of Appeal Ordinance states that the Court shall have jurisdiction to hear and determine appeals from "any" judgment or order of the Supreme Court given or made in civil proceedings.
It is the Respondent's submission that this despite this seemingly broad jurisdiction of the Court to entertain any appeal, it is an important feature of our judicial system that this Court decides disputes between the parties before it and does not pronounce on abstract or hypothetical questions of law where there is no dispute to be resolved. In general, there must exist between the parties a matter in actual dispute or controversy which this Court can decide as a live issue.

22. The Respondents relied on the House of Lords decision in ***R v Secretary of State for the Home Department, Ex Parte Salem [1999] 2 All ER 42, 47***, where the court stated:

> "*The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future*".

23. The Appellants have rejected the contention that the appeal was now only academic or moot and that there are no longer any outstanding issues between the parties. They sought to answer the issue as follows:

> *As a preliminary point the [Appellants] invite the Court to note that the issue between the parties remains the question whether or not the detention was lawful. Although the relief sought is amended, the cause of the complaint – detention – is wholly unchanged from the Court below.*
>
> *The question is not rendered academic as a result of the belated release. That release (24 August 2020) occurred only after the Amended Notice of Appeal, dated 7 August 2020. The Amended Notice of Appeal seeks an order that 'The Appellants' detention was or is now unlawful' … The Court is respectfully referred to the amended requests for relief … The request for the common law remedy for unlawful detention is express made there. The [Appellants] seek a remedy for their unlawful detention. In addition, the recognition of the unlawfulness of the previous detention is capable of acting as a safeguard against future detention, for example if a ruling is given to establish the unreasonable duration of it or established lack of due*

diligence and expedition as was required to address the matters in some respects still unconcluded. …

The [Appellants] seek a remedy for their unlawful detention. In addition, the recognition of the unlawfulness of the previous detention is capable of acting as a safeguard against future detention, for example if a ruling is given to establish the unreasonable duration of it or established lack of due diligence and expedition as was required to address the matters in some respects still unconcluded.

24. There is merit in the Appellants' submission that there remains a *lis* between these parties, requiring a decision by this Court. Whilst the release of the Appellants was the primary relief in the Habeas Corpus application the substantive claim was that the detention was unlawful. Vindication of this fundamental right is not a mere academic pursuit. The importance of the court's role was aptly stated by ***Dingemans J*** in the English case of ***R (AA Sadan)) v Secretary of State for the Home Department et al [2014] EWHC 2118,*** at paragraph [2]:

> "It is established that the Courts will, in order to vindicate the rule of law, "regard with extreme jealousy any claim by the executive to imprison a citizen without trial and allow it only if it is clearly justified by the statutory language", R v Home Secretary ex parte Khawaja [1984] AC 74 at 122E. This approach by the Courts includes cases of administrative detention of foreign nationals pending deportation pursuant to the Immigration Act 1971."

The challenge in the appeal is to the decision by the Chief Justice where she determined that the detention was lawful. As the Appellants' counsel Mr. Rule argues, the issue remains, because they continue to challenge the decision on appeal whilst the Respondents continue to uphold the decision.

25. The Appellants have sought to pursue, in these proceedings, a claim for compensation for unlawful detention, identified by them as *freestanding constitutional relief*. This certainly represents an outstanding matter for which the Court is required to decide. Whether the Court entertains the application or determines that it should be pursued as a separate action, it nonetheless demonstrates that there remain matters between these parties which require resolution.

26. An Order by this Court dismissing the appeal, without determining the issue of the lawfulness of the detention, requiring the Appellants to litigate the issue in fresh proceedings, demonstrates the need to determine this issue. How will another judge of the Supreme Court be able to consider the lawfulness of the Appellant's detention, in the face of a finding by the Chief Justice that the Appellants were lawfully detained? How could they overcome the issue of res judicata or issue estoppel? This Court ought not to shirk its responsibility to do justice between the parties and resolve the issue of the lawfulness of the detention, which has already been fully argued before us.

27. Separate and apart from the question of the release of the Appellants, a determination in their favour, as to the lawfulness of the detention, would undoubtedly affect the determination of the entitlement to costs in the proceedings below. This included the costs which had been reserved by ***Simmons J(Ag.)*** on 31 March 2020. This is especially so where, rather unusually, the Appellants had to cover the costs of providing translation services in the Habeas Corpus proceedings. The Chief Justice sought to balance this issue in her determination that no costs ought to be paid. At page 23 of her decision below it is recorded:

> "*I have had regard to the matters placed before me, and to the efforts of counsel to represent the applicants, including engaging at his own cost, a Tamil interpreter. There will therefore be no order as to costs."*

Had the Appellants been successful in the court below one would have expected other considerations with respect to costs would have been made, if only for the recovery of translation services provided for the Court. In the case of ***Trinidad and Tobago Attorney General v Trinidad and Tobago Civil Rights Association et al, Civil Appeal No. 149 of 2005***, in considering this issue of an academic or moot appeal, ***Warner JA***, stated at paragraph 10:

> *A Court may choose to hear arguments and hand down a decision which has no practical effect, in order to clarify the law or give guidance to decision makers; where there is good reason in the public interest or even for resolving issues as to costs. An example of a case in the first category is* ***R v Birmingham City Juvenile Court, ex p. Burmingham City Council 1988 1 WLR 337****, which concerned conflicting first instance decisions on 'care' proceedings in the juvenile court. By the time the matter was determined, a care order had already been made so that*

the problem was no longer outstanding. Nonetheless the court found that it was appropriate to declare what the law was.

28. The issue of costs would therefore reflect an outstanding *lis* between the parties and therefore the classification of the appeal as academic or moot would be inappropriate.

29. The Appellants say that the Court should determine the question of the lawfulness of the detention as the terms upon which the Appellants were released specifically indicated that they remain subject to further detention. The Appellants relied on the decision in ***R (C) v S&W London Mental Health Tribunal [2002] 1 WLR 176*** which applied ***R v Secretary of State for the Home Department, Ex Parte Salem.*** In that case, despite the release of C the Court determined that the appeal should be heard as (i) the application raised a point of public general importance; and (ii) the point might prove more than academic interest to C who might find himself detained again in the future.

30. The Respondents contend that the Appellants are not subject to an order for deportation while their application for asylum is pending (or under appeal). Whilst I accept the Respondents' statement as to the legal position, it is nonetheless accepted that the terms of the releases are said to be conditional. The voluntary release of the Appellants and the presence of conditions do suggest that the issue of the lawfulness of the detention may remain an issue which ought to be resolved by a decision of this Court. A decision on the question of the lawfulness of the prior detention could stand as a safeguard and caution to further detention.

31. In the decision of this Court (differently constituted) in ***Governor of the Turks and Caicos Islands and another v. The Proprietors, Strata Plan 108 and another CL 38/15,*** the respondents successfully argued for the dismissal of the appeal on the basis that the appeal was against the finding or reasons but not the judgment or order or determination of the Chief Justice. In that case, the Chief Justice had found that amendments to the Turks and Caicos Islands Development Manual were ultra vires and of no effect. The Chief Justice also held that the failure to hold public consultation would lead to the proposal being quashed. The respondents in that case contended that the appeal was academic and/or moot

as the appellants did not challenge the holding as to the failure to hold public consultations. At paragraph 14 of the decision, ***Mottley JA*** (as he then was) accepted the submission and stated:

> 14. I accept that if the appeal is allowed to continue on the first ground of the judicial review and is successful, the finding by the Chief Justice on the second ground of the judicial review i.e. the failure to hold proper consultations would still remain, and on the ground the Chief Justice would still have been entitled to make the declaration that because of the failure to hold the proper consultations the Amendment are null and void.
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> 15. There is no jurisdiction to entertain an appeal against reasons which does not challenge the order. …

32. ***Mottley JA*** relied upon the decision in ***Hutcheson v Popdog Ltd (News Group Newspapers Ltd, third party) [2012] 1 WLR 782*** where it was stated:

> 15 Both the cases and general principle seem to suggest that, save in exceptional circumstances, three requirements have to be satisfied before an appeal, which is academic as between the parties, may (and I mean "may") be allowed to proceed: (i) the court is satisfied that the appeal would raise a point of some general importance; (ii) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced; (iii) the court is satisfied that both sides of the argument will be fully and properly ventilated.
> 16 I accept that there would be a real prospect of requirement (i) being met if this appeal went ahead. The projected appeal would, I accept, potentially raise at least one issue of general importance, although I do not regard it as a foregone conclusion that either of the two points which have been identified would necessarily be determined on the projected appeal. In that connection the two issues Mr. Tomlinson contended would have to be considered on the projected appeal were, first, the judge's view that the interim injunction ceased to have interim effect once Mr. Hutcheson and Popdog had effectively settled their differences and, secondly, the correctness of the decision in the Jockey Club case [2003] QB 462.

33. The authorities all accept, as do the Respondents, that the Court may, in appropriate circumstances, hear an appeal notwithstanding it may be considered academic or moot. In my view, even if I had not found (as I do) that it is not an academic or moot appeal, this would be an appropriate case for the exercise of the Court's discretion to hear it. According to ***Lord Neuberger MR,*** in ***Hutcheson v Popdog Ltd (News Group Newspapers Ltd, third party)*** this discretion could be exercised in either of 2 instances, which are:

> (1) in an exceptional case; or

(2) where:

(i) the court is satisfied that the appeal would raise a point of some general importance;

(ii) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced;

(iii) the court is satisfied that both sides of the argument will be fully and properly ventilated.

34. What is exceptional has understandably not been defined by ***Lord Neuberger***. Some insight however may be gleaned from paragraph 12 of his judgment in ***Hutcheson v Popdog Ltd (News Group Newspapers Ltd, third party),*** where it was stated:

> 12. The mere fact that a projected appeal may raise a point, or more than one point, of significance does not mean that it should be allowed to proceed where there are no longer any real issues in the proceedings as between the parties. In Gawler v Raettig [2007] EWCA Civ 1560, the Court of Appeal refused permission to appeal on the ground that the issue it would raise was academic as between the parties. In his judgment, Sir Anthony Clarke MR gave helpful guidance as to the correct approach in such cases. He said, at para 36, that before an appeal could proceed in those circumstances, the court must be satisfied that it would be in the public interest for the projected appeal to proceed, but he added that it would be "a very rare event, especially where the rights and duties to be considered are private and not public". None the less, in the following paragraph he emphasized that all must "depend upon the facts of the particular case" and that he did not "intend to be too prescriptive".
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> (emphasis added)

35. In ***Ya'Axchè Conservation Trust v Chief Forrest Officer, The Attorney General, Belize Hydroelectrical Development and Management Company Limited [2014] CCJ 14 (AJ)***, a decision of the Caribbean Court of Justice, an application for special leave to appeal from the Court of Appeal of Belize, permission was granted to hear an appeal notwithstanding it had become academic in nature. ***Anderson JCCJ*** said at paragraph [6]:

> There are compelling features of the present case which would make it appropriate for us to hear the appeal, though academic. This matter does not concern private law rights but rather a narrow and discrete point of public law namely the proper construction to be placed on the statutory power of the Administrator to grant authorization to conduct otherwise forbidden activities within a nature reserve.

There are no complex facts to be sorted or resolved. The issue of statutory interpretation is of great significance to the protection of the environment in Belize and, in particular, the protection of areas declared for the protection under the Act such as national parks, nature reserves, wildlife sanctuaries and natural monuments and the underlying principle of the rule of law. Cases raising similar issues have occurred in the past and are likely to recur in the future.

36. I am of the view that this matter ought to be considered exceptional:

(1) As indicated in the preceding paragraphs, there are clearly outstanding issues which remain extant between these parties, namely:

(a) the determination of the issue of the lawfulness of the detention;

(b) the claim for free standing constitutional relief;

(c) claims for compensation for unlawful detention whether in this case or in the future;

(d) the issue of costs; and,

(e) the fragile voluntary release and the possibility that the Appellants might find themselves in detention in the future.

(2) Unlike in the context of ***Hutcheson v Popdog Ltd (News Group Newspapers Ltd, third party)*** this is not simply a question of leave to appeal. The complete appeal has been heard over a period of 5 days and all issues thoroughly ventilated. This issue, of whether the appeal would be moot, was never taken by the Respondents in their papers but raised by the Court suggesting that the Respondents initially had no issue with the prosecution of the appeal.

(3) The circumstances of this case are distinguishable from that of ***Governor of the Turks and Caicos Islands and another v. The Proprietors, Strata Plan 108 and another*** and ***Ogle Airport Inc. Applicant v Competition and Consumer Affairs Commission [2020] CCJ 19 (AJ) GY,*** where successful litigants sought to upset certain findings made in the lower Court. Here, the Chief Justice found against the Appellants completely. The Appellants not only challenge the reasons which the Chief Justice found that the detention was lawful but her actual finding of a lawful detention.

(4) The matter was concerned with the exercise of public law duties, and in particular a review of the duties and responsibilities of immigration officers in the

examination and treatment of detainees intercepted at sea in the TCI. This is an important matter having regard to the geographical location of the TCI and its frequent use as a transit point for human trafficking operations and other illegal immigration activities. Issues of this nature, albeit not as extreme in this case, will undoubtedly arise in the future and the guidance, which this Court could provide, would be of utmost significance for the police and immigration authorities as well as the lower courts.

(5) Important points of principle arise for consideration in this case, which are:

(a) whether the Respondents could, as they did here, hand over immigration detainees to the police to conduct criminal investigations into human trafficking; and

(b) whether the Respondents were entitled to refrain from conducting immigration interviews of persons placed in their custody for an indefinite period of time and in the context of this case, 6 months up to the hearing before the Chief Justice.

There is a shortage of reported authorities in this jurisdiction on the fundamental rights issues which arise for consideration in this dispute.

(6) This matter required the extraordinary expenditure of public funds through the House of Assembly to bring in expert investigators and should therefore be given the fullest of ventilation. Additionally, as indicated by the parties in their respective submissions, the matter garnered widespread domestic and international attention and as such the matter should be given the fullest of ventilation.

37. I am satisfied therefore that this Court ought to proceed to hear the substantive appeal.

Whether the Appellants were unlawfully detained

38. Section 5 of the Constitution of the Turks & Caicos provides:

> **Protection from arbitrary arrest or detention**
> **5.** (1) Every person has the right to liberty and security of person.
> (2) No person shall be deprived of his or her personal liberty save in accordance with a procedure prescribed by law in any of the following cases—

(a) in execution of the sentence or order of a court, whether established for the Islands or some other country, in respect of a criminal offence of which he or she has been convicted or in consequence of his or her unfitness to plead to a criminal charge;
(b) in execution of the order of a court punishing him or her for contempt of that court or of another court;
(c) in execution of the lawful order of a court made in order to secure the fulfilment of any obligation imposed on him or her by law;
(d) for the purpose of bringing him or her before a court in execution of the lawful order of a court;
(e) on reasonable suspicion that he or she has committed, is committing or is about to commit a criminal offence;
(f) in the case of a minor, under the order of a court or with the consent of his or her parent or legal guardian, for the purpose of his or her education or welfare;
(g) for the purpose of preventing the spread of an infectious or contagious disease or in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his or her care or treatment or the protection of the community;
(h) for the purpose of preventing the unlawful entry of that person into the Islands or for the purpose of effecting the expulsion, extradition or other lawful removal from the Islands of that person or the taking of proceedings relating thereto.

(3) Any person who is arrested or detained shall be informed promptly, in a language that he or she understands, of the reasons for his or her arrest or detention and of any charge against him or her.

39. The legal principles relative to the power to detain persons in the position of the Appellants are fairly well settled. Those principles are rooted in the decision of ***Woolf J*** (as he then was) in the case of ***Re Hardial Singh*** **[1984] 1 WLR 704, 706D**. A good distillation of these principles is to be found in the dicta of ***Dyson LJ*** in the English Court of Appeal case of ***R (I) v Secretary of the Home Department,*** **[2002] EWCA Civ 888.** According to ***Dyson LJ:***

> 46. There is no dispute as to the principles that fall to be applied in the present case. They were stated by Woolf J in *Re Hardial Singh* [1984] 1 WLR 704, 706D in the passage quoted by Simon Brown LJ at paragraph 9 above. This statement was approved by Lord Browne−Wilkinson in *Tan Te Lam v Tai A Chau Detention Centre* [1997] AC 97, 111A−D in the passage quoted by Simon Brown LJ at paragraph 12 above. In my judgment, Mr. Robb correctly submitted that the following four principles emerge:
>
> i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;

ii) The deportee may only be detained for a period that is reasonable in all the circumstances;
iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;
iv) The Secretary of State should act with the reasonable diligence and expedition to effect removal.

47. Principles (ii) and (iii) are conceptually distinct. Principle (ii) is that the Secretary of State may not lawfully detain a person "pending removal" for longer than a reasonable period. Once a reasonable period has expired, the detained person must be released. But there may be circumstances where, although a reasonable period has not yet expired, it becomes clear that the Secretary of State will not be able to deport the detained person within a reasonable period. In that event, principle (iii) applies. Thus, once it becomes apparent that the Secretary of State will not be able to effect the deportation within a reasonable period, the detention becomes unlawful even if the reasonable period has not yet expired.

48. It is not possible or desirable to produce an exhaustive list of all the circumstances that are or may be relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation pursuant to paragraph 2(3) of schedule 3 to the Immigration Act 1971. But in my view they include at least: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences.

…

56. Taking account of all the circumstances of the case, I am of the opinion that by 29 May 2002, the appellant had been detained for a period that was longer than was reasonable. I take account of the difficulties facing the Secretary of State in effecting removals to Afghanistan and the fact that he has been conducting sensitive negotiations with neighbouring countries to enable removals to take place with their assistance. I also take account of the fact that the appellant has been convicted of criminal offences for which he was sentenced to three years' imprisonment and that he became liable to register as a sex offender. On the other hand, there is no evidence that he is liable to reoffend. I accept that there is a risk that he will abscond. I find it difficult to assess the seriousness of this risk, but I am not persuaded on the material that has been placed before this court that he will probably abscond. The nature of his detention and its effect on him have been summarised by Simon Brown LJ at paragraph 18 above. Taking account of all these circumstances, I am satisfied that 16 months detention is unreasonably long.

57. I would, therefore, allow this appeal on the simple basis that, on an application of principle (ii) above, by 29 May 2002 the appellant had been in detention for an unreasonable period. If I were of the opinion that a reasonable period had not expired by that date, then I would have to consider principle (iii) and decide whether

> it has become apparent that the Secretary of State will not be able to effect deportation within a reasonable period I prefer not to express an opinion on this alternative question. There are obvious difficulties in deciding when a reasonable period *will* expire when one has already decided that a reasonable period *has* expired.

40. In the English Court of Appeal decision of ***R (I) v Secretary of State for the Home Department [2002] EWCA Civ 888***, ***Dyson LJ*** stated:

> It is not possible or desirable to produce an exhaustive list of all the circumstances that are or may be relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation pursuant to paragraph 2(3) of schedule 3 to the Immigration Act 1971. But in my view <u>they include at least: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences</u>.
>
> (emphasis added)

41. The Appellants' complaints, as to the lawfulness of the detention, may be summarized as the following:

    a) They were not examined by an immigration officer in accordance with the provisions of the IO.
    b) They were not interviewed for the purposes of considering their asylum claims in accordance with the written policy of the Ministry of Border Control and Labour.
    c) They were not advised of:
        (i) the reasons of the detention;
        (ii) the right to instruct counsel and inability of counsel receive instructions from the Appellants.
    d) All of the elements identified in the case of ***Re Hardial Singh*** **[1984] 1 WLR 704.**

42. The Respondents are charged with the burden of showing that the detention was lawful. The learned Chief Justice found that:

"a balance of the probabilities, the respondents have demonstrated that the applicants are not the subject of unlawful detention. I hold that the detention of the applicants pending removal is lawful, as pursuant to Ss.54(3) and 56(4) of the Immigration Ordinance Cap 5:01. In thus holding, I am mindful of the court's duty to protect and enforce fundamental rights enshrined in the Constitution of Turks and Caicos Islands, including freedom from the deprivation of liberty and the security of the person, as well as its caveats set out in S.5"

43. The Respondents' evidence as to the treatment of the Appellants, up to February 7, 2020, is seen in the Affidavit of TCIPF Superintendent Willet Harvey ("the Harvey Affidavit"). Superintendent Harvey, who was the officer in charge of the investigation, stated at paragraphs 12, 13, 14, 16 and 18 as follows:

> 12. The UK based officers arrived in TCI on the evening of the 25th November later joined by two Tamil speaking interpreters who arrived from London on Sunday the 1st of December. Their services were secured through engagement contracts which had to be extended from time to time to facilitate the completion of the ongoing investigation into the criminal proceedings as well as to conduct specialized interviews. Their contracts would come to an end on 29th March 2020. As the Senior Investigating Officer from the RTCIPF I worked very closely with them throughout the process.
> 13. Interviews commenced with detainees on Tuesday the 3rd December and were recorded on video. There were ongoing challenges with respect to available resources and further assistance in the form of physical resources including additional video systems had to be sourced as well as other trained officers from the UK.
> 14. Through continued investigations and interviews of the remaining detainees, as well as intelligence received from the Human Rights and Special Prosecutions Section of the United States Department of Justice, Criminal Division; the United States Attorney for the Southern District of Florida; and the Department of Homeland Security Homeland Security Investigations (collectively, the U.S. Law enforcement Authorities); the key investigating team of which I am a part, became aware of the Sri Lanka-based transnational criminal organization ("TCO") which was involved in the illicit smuggling of undocumented migrants from Sri Lanka to the United States before crossing into Canada through Buffalo, New York via the Caribbean (including the Turks and Caicos Islands). The transport of those illegal migrants would be facilitated through the Caribbean by way of the Dominican Republic, Haiti, Cuba, Turks and Caicos Islands, and the Bahamas. Others were moved through South America and Mexico and across the southwest border of the United States.
>
> …
>
> 16. The interviews were quite lengthy, challenging and highly complex but were necessary. In the course of the interview we learned that some of the detainees had left their home over two years ago and their accounts were long,

detailed and harrowing. The interviews have lasted up to six hours in some cases.

…

18. As of midday of the 17.1.2020 we had interviewed eighteen (18) detainees on video as per ABE (Achieving Best Evidence) and in keeping with TCI Trafficking Ordnance directions that such victims may, in certain circumstances, give evidence in video. The interview process was concluded on 7th February, 2020.

44. The appropriate starting point in assessing the lawfulness of the detention is an examination of the power of the immigration authorities to detain the Appellants. That power arises by virtue of Section 54 of the Immigration Ordinance. Section 54(1) of the IO provides:

> Detention of persons liable to examination or removal
> 54. (1) A person who may be required to submit to examination under subsection (2), (3) or (4) of section 50 or under section 51 may be detained under the authority of an immigration officer pending his examination and pending—
>
> (c) in the case of a person to whom section 50 applies, a decision to give or refuse him leave to enter; or
>
> (d) in the case of a person to whom section 51 applies, a decision whether to recommend his deportation.

Section 50(2)(c) of the Immigration Ordinance provides:

> Power of immigration officers to examine persons on entry
> 50. (1) An immigration officer may board, and without a search warrant may search any ship or aircraft for the purpose of exercising his functions under this Ordinance.
>
> *(2) An immigration officer may examine any person who has arrived in the Islands by ship or aircraft for the purposes of establishing—*
>
> (a) whether the person is not an Islander, a British Overseas Territories citizen or a permanent resident;
>
> (b) if he is not a person within paragraph (a), whether he may or may not enter the Islands without leave; or
>
> *(c) if he may not enter without leave, whether he should be given leave and for what period and on what conditions (if any), or should be refused leave.*

The law therefore is that the immigration officer was empowered to detain the Appellants on 10 October 2019 upon their entry, by ship, for the purpose of examining them for the purpose of establishing *whether he should be given leave and for what period and on what conditions (if any), or should be refused leave*. The immigration officer may also detain them *pending the decision to give or refuse them leave to enter.*

45. Under the *Turks & Caicos Ministry of Border Control and Labour Operations Manual* there are references to interviews of unlawful entrants. Under the policy manual, dealing with sloops intercepted at sea, it is stated:

> "any person who expresses a fear of persecution in their country of origin (or habitual residence) will be transferred to be interviewed by an official who has knowledge and experience of interviewing asylum applicants".

46. The evidence in the Harvey Affidavit is incontrovertible that the Appellants were not detained for immigration purposes but for criminal purposes, namely to unravel the human trafficking ring and to determine whether the detainees were victims or involved in the criminal conduct. The immigration authorities outsourced their investigations to the police, they say, as a result of the complex nature of the investigations. The police authorities themselves outsourced the investigations to specialist investigators from the United Kingdom. When the police investigations ended on 7 February 2020 (4 months into the detention) it was clear that the investigations which had been conducted were all about the human trafficking investigation and not any examination of the Appellants with respect to *whether they should be given leave and for what period and on what conditions (if any), or should be refused leave*. The investigation resulted in the identification of Chelliah as the human trafficker and charges eventually being laid against him. Six of the detainees had agreed to become witnesses in the case against Chelliah whilst the remainder (including the Appellants) were earmarked for repatriation to their home country. The detention of the Appellants, up to 7 February 2020, was therefore not for the lawful purpose provided for under the IO. They had not been interviewed by an immigration officer for the purposes of Section 54 of the IO.

47. Upon completion of the criminal investigation, the Immigration authorities, for the first time, it appears, turned to consider the fate of the detainees who had been in their custody since 10 October 2019. That singular consideration, it seems, was to begin the process to repatriate the detainees whom the police had earmarked for repatriation. The examination required by Section 54 of the IO, which was the basis upon which the Respondent could detain the Appellants, had not been carried out. On the evidence which was before the

learned Chief Justice, such an examination, could not be said to have taken place prior to 7 March 2020. On that day the Appellants were presented with IS101 forms seeking their consent to be voluntarily repatriated. On the evidence this is the first recorded encounter in respect of an immigration related event. Even this encounter, which saw the IS101 form presented to the Appellants in the presence of an investigator and a Tamil interpreter, could hardly qualify as the examination contemplated by the IO. In fact, presenting voluntary repatriation forms, presupposed that a decision had been taken, that the Appellants were to be repatriated (i.e. refused entry) rather than granted permission to enter. Respectfully, it was not possible to take such a decision in the absence of an examination.

48. The Appellants contend, and I accept, that the forms were presented on 7 March 2020 without the examination contemplated by the IO. In fact, there was no evidence that the examination took place even up to the hearing before the Chief Justice. When the Appellants refused to sign the IS101 forms, it is recorded that they did so on the basis that they entertained fears of being returned to Sri Lanka. Had the examination, required by the IO taken place, the written Immigration Policy would have required the immigration officer to cause the Appellants to be *transferred to be interviewed by an official who has knowledge and experience of interviewing asylum applicants.* This too, on the evidence, clearly did not occur. Either the examination, or the interview, would have revealed that the Appellants were likely refugees, and not immediately returnable to Sri Lanka.

49. Even in the absence of the examination and specialized interview, there was an abundance of indications that the Appellants were or could be refugees. These indicia include:

    (a) At the time of the initial discovery of the Haitian sloop, the Respondents say that immediate concerns arose that these detainees may be victims of human trafficking or modern slavery and therefore potentially vulnerable persons;
    (b) The police accounts of the interviews conducted with the detainees revealed harrowing accounts;
    (c) The Minister of Border Control and Labour (according to the Respondents) was furnished with three letters from Members of Parliament in Sri Lanka dated 25 January, 2020; 29 January, 2020; and 29 February 2020. These letters disclosed allegedly troubling circumstances for each of the Appellants, details of security concerns and the very present need for them to be out of Sri Lanka in order for their lives to be preserved.

(d) On 14 February 2020, in the course of seeking assistance from the Canadian authorities with respect to the detainees transiting through Canada, the Canadian authorities refused to assist on the basis of a fear that the Appellants would seek asylum in Canada; and,
(e) On 7 March 2020, when the Appellants refused to sign the IS101 voluntary repatriation form, they each indicated a fear of persecution if they were to be returned to Sri Lanka.

50. The evidence of the Respondents also did not reveal compliance with the fundamental rights requirements under section 5(3) and 5(4) of the Constitution of the Turks and Caicos Islands, namely:

(i.) that a person detained be informed promptly, in a language that he or she understands, of the reasons for his or her arrest or detention and of any charge against him or her (Section 5(3)); and,
(ii.) that a person who is arrested or detained shall have the right, at any stage and at his or her own expense, to retain and instruct without delay a legal representative of his or her own choice, and to hold private communication with that representative (Section 5(4)).

Insofar as Section 5(4) of the Constitution speaks to the right to retain and instruct a legal representative, the courts have held that unless the detainer is impressed with the obligation to inform the detainee of that right any such right to retain and instruct legal representation is meaningless (See ***Attorney General of Trinidad and Tobago v Whiteman [1991] 2 AC 240, 246***). The nature of the Respondents' evidence is in terms of what would ordinarily happen and what the practice was, not that the Appellants in this case were informed. Having regard to the fact that there was a language barrier, up to early December 2019, such a conversation likely did not occur and if it did, the Respondents, upon whom the legal burden rests, could easily have indicated. Additionally, as the police interviews were said to have been video recorded, the ability to prove (or confirm) that it occurred, ought not to have been a difficult prospect for the Respondents.

51. Breaches of public law, such as occurred in:

(1) the breach of the written immigration policy; and
(2) the failure to inform of the right to legal counsel and of the purpose of the detention,

when exercising a discretionary power to detain, renders the subsequent detention unlawful (i.e. amounts to the tort of false imprisonment) if the breach bears on and is relevant to the decision to detain. See ***R (Lumba) v. Secretary of State for the Home Department [2012] AC 245.***

52. There was a mixed-bag of detainees who appeared before the learned Chief Justice. The law requires that the immigration authorities, and by extension the Court in considering a detainee's case, consider the circumstances of his case individually. The Chief Justice's findings however, that their detention pending removal was lawful, reflects a universal treatment of the detainees which did not properly consider the peculiar nature of these three Appellants. So, whilst the majority of the detainees in the action below had agreed to be repatriated voluntarily these Appellants could not have been repatriated in the same manner. The onset of the Covid-19 pandemic and the associated delays arising from border closures, which appeared to weigh heavily in the learned Chief Justice's reasoning, could not be said to impact the Appellants' detention as it very likely impacted the other detainees. In fact, as it has now transpired, the Appellants were not removable by the Respondents, as they were entitled to undergo the asylum process.

53. Clearly, had the examination occurred at the earliest (or most reasonable) opportunity, as it ultimately was, subsequent to the Chief Justice's decision, it would have been determined that these Appellants were not removable without embarking upon the refugee/asylum process. It is accepted that the entry of the Appellants into the TCI was unlawful and that there were real challenges in communicating with them for the purposes of conducting the examination of them as required by the IO. Putting aside the delays in securing the services of Tamil interpreters, or the fact that the authorities did not consider remote means for translation services, the failure to examine them for immigration purposes beyond the arrival of the Tamil interpreters in early December is unreasonable and inexcusable.

54. I am satisfied that the principles identified in ***Re Hardial Singh*** were offended by the Respondents, in large measure, in that:

(1) the power to detain was not used for the immigration-related examination, for which it was designed, but actually used to investigate the criminal offences of Chelliah;

(2) the period of time for which the Appellants were detained was not reasonable in the circumstances as these were not criminals but vulnerable individuals seeking refuge;

(3) there were barriers to any removal of the Appellants and therefore no purpose in properly detaining them while these barriers existed and no prospect of imminent removal; and

(4) no due diligence or expedition was demonstrated by the immigration authorities in discharging their responsibilities under the IO.

Respectfully therefore, the decision of the Chief Justice, that the detention of the Appellants was lawful, cannot be supported and must be set aside.

55. Putting aside any question of propriety, having determined that the detention of the Appellants was unlawful, the need to determine whether their continued detention following the Chief Justice's decision was also unlawful, has become unnecessary.

Whether the Appellants may pursue constitutional relief in this Appeal

56. The Appellants say that there are two very distinct complaints concerning constitutional violations in this case:

(1) The treatment of the Appellants during their detention, including failures or delays in informing them of the basis for their detention or their right to access a lawyer to address their immigration detention engaging Section 5 of the Constitution ("Substantive Constitutional Claims"); and

(2) The conduct of the hearing and the production on the Writ of Habeas Corpus. These are issues of procedural fairness and of complying with the obligation to produce at such a hearing engaging section 6 of the Constitution. ("Procedural Constitutional Claims")

57. The Respondents have raised the issue as to whether the reliefs sought above, which are constitutional in nature, may be raised on this appeal. At paragraphs 104, 105, 107 and 108 of their submissions, they state:

> 104. Your Lordships are being invited by the Appellants to consider the question [the constitutionality of regulation 4(1)] not as a matter of appeal but as a court of first instance. It is the Respondents submission that the Court of Appeal does not have any jurisdiction to do. The question of whether or not the said regulation now infringe the constitutional rights of the Appellants has not yet been considered by the lower court. The jurisdiction of the Court of Appeal to deliberate upon this question will only arise after it has been considered and adjudicated upon by the Supreme Court.
> 105. Section 21of the Turks and Caicos Island Constitution gives the High Court original jurisdiction to hear and determine any such application, and to give such directions as may be appropriate for the enforcement of the protection to which the person concerned is entitled under the provisions of Chapter 1 of the Constitution.
> …
> 107. The Respondent's argument is that the Court of Appeal does not have an original jurisdiction comparable to the original jurisdiction of the Supreme Court recognized or conferred by section 21(1) and (2) of the Constitution, and that to order the unconstitutionality of the Emergency Powers (COVID-19) (Court Proceedings) Regulations 2020 ('the Regulations') is beyond its jurisdiction as an appellate body reviewing the trial proceedings, as distinct from the jurisdiction which the Court of Appeal would have had if it were hearing an appeal from an application to the High Court based on the unconstitutionality of the said Regulations.
> 108. The separation of the jurisdiction of the Court of Appeal, as an appellate body in civil proceedings, from any decision as to the constitutionality of any piece of legislation is apt in these proceedings and must be carried out.

58. The Appellants' response to the objection was to be found at paragraphs 10-12, 16-17, and 18-20 of their submissions that:

> 11. Section 21 of the Constitution bestows on the Supreme Court an original jurisdiction to hear allegations of breach of Part 1 of the Constitution. That is an additional cause of action and does not prejudice any other action an individual may commence: s.21(1); and the similar consideration by the Cayman Islands Court of Appeal in Coe v Governor [2014 (2) CILR 465] at [82]-[83] identifying the constitutional cause of action did not replace judicial review. Importantly, on the very language of section 21, it does not exclude this Court considering such issues raised for the first time: see 21(3).
>
> 12. This Court ought not to be prevented from upholding constitutional values and fundamental rights. Any judgment this Court delivers can fully respect such values. That is consistent with section 19 of the Constitution Order.

…

16. The granting to the Supreme Court original jurisdiction in respect of alleged breaches of Part 1 of the Constitution simply prevents its exercise also of an appellate jurisdiction in respect of such allegation.

17. On appeal from Antigua and Barbuda, the Eastern Caribbean Court of Appeal in Rashid A. Pigott v. The Queen ANUCRAP2009/0009 considered whether Section 18(1) and 18(2) of the Antigua and Barbuda Constitution preclude raising for the first time in the Court of Appeal issues of alleged constitutional breach. Sections 18(1), 18(2) and 18(3) are strikingly similar to Section 21 of the Constitution and read as follows (and which are quoted in Pigott at [23]:

…

18. In Pigott the ECCA (Thom JA.) rejected the argument that the appellate court was unable to determine the issue of alleged constitutional breach [18] on the basis that the lower court has been granted original jurisdiction. In so deciding Pigott actually granted a declaration as to constitutional breach [47] as to delay impeding fair trial rights.

19. Pigott relied on two decisions on appeal to the Privy Council from Trinidad and Tobago. In Ramesh Lawrence Maharaj v Attorney General of Trinidad and Tobago (No.2) (1978) 30 WIR 310 and at 321f-g (Lord Diplock):

> "a party to legal proceedings who alleges [in appellate proceedings] that a fundamental rule of natural justice had been infringed in the course of the determination of his case, could in theory seek collateral relief in an application to the High Court…with a further right of appeal to the Court of Appeal…The High Court, however, has ample powers both inherent and under [the Trinidad Constitutional provision] to prevent its process being misused in this way; for example it could stay the proceedings…"

20. The second Privy Council decision referred in Pigott is Chokolingo v. Attorney General (1980) 32 WIR 354 at 359e-f (also Lord Diplock).

> "To give Chapter 1 of the Constitution an interpretation which would lead to this result [of parallel remedies] would in their Lordships' view, be quite irrational and subversive of the rule of law which it is a declared purpose of the constitution to enshrine"

59. Section 21 of the Constitution of the Turks and Caicos Islands provides:

> Enforcement of fundamental rights
> 21. (1) If any person alleges that any of the foregoing provisions of this Part has been, is being or is likely to be contravened in relation to him or her, 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.
> (2) The Supreme Court shall have original jurisdiction—

(a) to hear and determine any application made by any person in pursuance of subsection (1); and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3), and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the foregoing provisions of this Part to the protection of which the person concerned is entitled; but the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.

(3) If, in any proceedings in any court established in the Islands other than the Supreme Court or the Court of Appeal, any question arises as to the contravention of any of the foregoing provisions of this Part, the court in which the question has arisen shall refer the question to the Supreme Court, unless, in its opinion, the raising of the question is merely frivolous or vexatious.

60. The Respondents relied upon the Privy Council decision in ***Hunte and Khan v R.*** **2015 UKPC 33.** In that case, during the course of the hearing before the Court of Appeal, the appellants raised the constitutional complaint that their death sentences ought to be commuted. They argued that the passage of time since the sentences were passed, rendered them unconstitutional. The Board dismissed the appeal on the basis that the sentences of death were lawful and mandatory at the time of imposition. It was held that the Court of Appeal had no jurisdiction under the Supreme Court of Judicature Act [Trinidad] to entertain appeals against their sentences. The Court of Appeal had not been asked to do so, but rather the complaint was that the execution of the sentences of death would be unconstitutional through passage of time. The appellants' appeal to the Privy Council was dismissed.

61. The Board had this to say:

(a) Sections 14(1)-(2) of the Trinidad Constitution [which is similar to Sections 21(1)-(2) of the Turks and Caicos Islands Constitution] grant original jurisdiction to hear and determine applications as to constitutional violations to the High Court of Trinidad and Tobago however no such application was made by Hunte and Khan.

(b) If the Board allowed these appeals against sentences, it would be making an order which the Court of Appeal would have had no jurisdiction to make and would be exercising an original jurisdiction which it does not have.

62. In ***Forrester Bowe and Trono Davis v The Queen*** **[2006] UKPC 10**, the Privy Council, approving ***Chokolingo***, settled the issue of the undoubted jurisdiction of the Court of Appeal to deal with constitutional challenges which arose in their courts. That case was a challenge to the mandatory death penalty in The Bahamas. In ***Hunte and Khan***, the Privy Council distinguished ***Bowe v Davis***, and stated:

> 55. The sentence of death passed on the appellants was fixed by law: Offences Against the Person Act 1925, section 4. If it were argued that the law purportedly imposing a mandatory death sentence was itself unconstitutional, the Court of Appeal would have jurisdiction to entertain an appeal against such a sentence on the ground that it was not a lawful sentence at all: Bowe v The Queen [2006] UKPC 10, [2006] 1 WLR 1623. But in this case there is no dispute that the sentence imposed on the appellants was lawful and mandatory.
>
> …
>
> 93. In Bowe v The Queen [2006] UKPC 10, [2006] 1 WLR 1623, the Privy Council held that virtually identical provisions in the Court of Appeal Act of the Bahamas did not preclude that Court from entertaining the argument that the death penalty was not, in fact, "fixed by law" because it would be unconstitutional to impose it. Furthermore, a challenge to the constitutionality of the penalty did not have to be taken through a separate constitutional motion under the Bahamian equivalent of section 25 of the Constitution of Jamaica and section 14 of the Constitution of Trinidad and Tobago, but could be taken on an appeal against sentence. The Constitution obviously contemplated that the courts could remedy a breach of the constitution if the question arose in ordinary proceedings before them. The Board distinguished Walker on the basis that there the sentences had been constitutional when passed – it was only the passage of time which had rendered it unlawful for the sentence to be carried out (para 11).

63. Although none of the Substantive Constitutional Claims was sought by the Appellants at the hearing below, the complaints concerning section 5 of the Constitution were before the learned Chief Justice as part of the challenges to the lawfulness of the detention. In my view this court need not trouble itself with considering the propriety of the Appellants application to introduce the Substantive Constitutional Claims. There are ample reasons for not doing so. These include:

a) Habeas Corpus applications are discrete specialized applications which are not ordinarily conflated with other relief or constitutional claims. In fact, a review of the prescribed forms reveals that they do not allow, as Mr. Prudhoe has conceded, for adjustment to expand the nature of the claim. (See ***Bethel et v Jean-Charles SCCivApp No. 26 of 2018***). Freestanding constitutional relief is generally pursued by separate action in the court below, even if the judge (as often occurs) determines to hear them together.

b) Even if I were satisfied that the Substantive Constitutional Claims were made out, it would still require the matter to be remitted to the Supreme Court for assessment. That remittal process would require proper pleadings to be settled and evidence presented. In this vein there is no prejudice to the Appellants to have to commence a new claim for relief for the unlawful detention. I did not find that the absence of legal aid, as proffered by the Appellants, was a sufficient basis not to require a new action.

c) Having been released and it having been determined that the detention was unlawful, the only benefit which may accrue to the Appellants in adding the Substantive Constitutional Claims, which was not available under the Habeas Corpus process, is that of compensation for wrongful or unlawful detention. Compensation for unlawful detention is undoubtedly akin to false imprisonment, which is an adequate remedy and available under the common law. As much was conceded by Mr. Rule on behalf of the Appellants. Section 21(2) of the Constitution prohibits the Court from considering claims for breaches of fundamental rights, such as the Substantive Constitutional Claims, if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.

The Appellants' applications for consideration of the Substantial Constitutional Claims are therefore refused. It is open to the Appellants to commence separate proceedings for compensation for their unlawful detention.

64. In the Procedural Constitutional Claims, the Appellants complain about the procedure employed by the Learned Chief Justice at the hearing of the Writ of Habeas Corpus and the production of the Appellants. In particular, those complaints may be summarized as follows:

    a) the Appellants were required to attend via live video link rather than in person as was their preference;
    b) the quality of the production of the Appellants, which did not permit them to attend for the entirety of the hearing was inadequate and ineffective.

    These claims, which challenge the process utilized by the Chief Justice, arose out of the proceedings below. It is therefore open to the Appellants to raise these challenges in the Court of Appeal as a part of the challenge to the decision of the learned Chief Justice. In fact, as these matters arose out of these proceedings, the authorities suggest that they may not be raised if not taken on appeal. The effect of the Privy Council decision in ***Independent Publishing Co. v. AG of Trinidad & Tobago [2005] 1 A.C. 190*** is that the Supreme Court should not entertain collateral applications for constitutional redress in respect of judicial errors where the legal system provides the ability for an appeal.

65. The quality of the production was clearly far from adequate. As much was recognized by the Learned Chief Justice in her ruling of 1 May 2020, where she stated:

> "The impact of COVID 19 on all spheres of life at this time cannot be denied; this is a matter of which the court can take judicial notice. So great is the impact in fact that this hearing has been conducted in a most unusual manner that in the ordinary scheme of things would have been open to challenge due to the observance of social distancing protocols."

A review of the transcripts however, demonstrates that the Appellants made it clear that they didn't want an adjournment to permit some alleviation of the production challenges. At page 34 of the official transcript it is recorded:

> MR. TIM PRUDHOE: Well, let me be clearer about my position. I don't want an adjournment. I have -- I face an invidious choice. The response is not satisfactory because it's quite clear from the current regulations in place that as a substitute to in-person hearing that the attendance by those being produced on writs of *habeas corpus*, (inaudible) he is expressly clear, and this is not a proper production if all

that happens in relation to the particular applicants is they identify themselves and then led away.
HER LADYSHIP: Mr. Prudhoe, at this point I am not sure what your pleasure is because you have heard from Miss Hippolyte that the room that they could secure to enable them to make the applicants visible to the court is a small room, and they have to observe social distancing according to regulations. That is what they can do. We can adjourn this matter while they look for a bigger room, or we can proceed as we are doing. But I will not put them in one room. I will not put fifteen people in one room that can only take five in order for them to observe social distancing. It's entirely up to you, Mr. Prudhoe.
MR. TIM PRUDHOE: I'm -- let me be clear again, I am not asking for adjournment. I am simply stating the position of the applicants that this is not a proper production. I am ready to proceed.
HER LADYSHIP: And I am saying that, for the purposes of the court, it is a proper production. That's why I took pains and took so much time to make sure that each one was identified. It's unfortunate that they cannot be in the same room. But we all know that COVID-19 has turned the world on its head, and we are doing the best we can in the circumstances. And if all they can produce is a room that can take five at once, then I am satisfied with it as the Court. And if you do not object to it, you proceed.
MR. TIM PRUDHOE: I'm obliged. Thank you. Now, that we have been through the materials that are available to the Court, I am wondering if I may ask the question whether the Court has had the opportunity to read those materials in a prereading way.

Putting aside any question as to the lawfulness of the production, it seems that the learned Chief Justice could hardly be faulted for proceeding with the hearing notwithstanding the objections/complaints of Counsel for the Appellants. In any event having determined that the detention was unlawful, any detailed interrogation of this matter has essentially been rendered otiose.

Disposition

66. In all the circumstances therefore, I would allow the appeal, setting aside the decision of the Chief Justice and grant the declaration that at the time of the hearing of the Writ of Habeas Corpus application the Appellants were being unlawfully detained by the Respondents.

67. The Appellants shall be entitled to their costs in the appeal and in the court below, such costs to be taxed if not agreed.

Dated this 31st day of December, 2020

Ian Winder JA

Justice of Appeal

I agree

Stanley John JA

Justice of Appeal