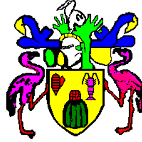

IN THE SUPREME COURT OF

THE TURKS AND CAICOS ISLANDS

ACTION NO. CL 44/2020

BETWEEN

1. **BALASUNDRAM, KABILRAJ**
2. **KAJEEPAN, PAINTAMILKAVALAN**
3. **KUMARLINGAM, JEYASEELAN**
4. **MAHENDRAN, KARUNAKARAN MAKENTHIRAN**
5. **MAILUAGANAM, THANGAUADEUAL**
6. **MAILVAGANAM THANGAWADEVEL**
7. **NAGARATHNAM, KRISNAKUMAR**
8. **NIRMALADHASAN, PRATHEEPAN SADHA**
9. **PANKAJBHAIPATEL CHIRAGKUMAR L**
10. **PARAMATHURAI, KOHULAN**
11. **PREMATHANSAN, PARASATH**
12. **RASARATNAM, VARATHARAJ**
13. **SELVAJEYAM, GAJENDRAN**
14. **SIVAPALAN, JESEEPAN SWAPALAN**
15. **SURESAN, NATHUSAN**) **APPLICANTS**

AND

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

CORAM: AGYEMANG CJ

MR.T. PRUDHOE OF PRUDHOE CARIBBEAN FOR THE APPLICANTS

MS. C. HIPPOLYTE OF ATTORNEY GENERAL'S CHAMBERS FOR THE RESPONDENTS

DELIVERED ON 1ST MAY 2020

JUDGMENT

On 31st March 2020, Simons J (Ag.) made an order for a writ of *habeas corpus ad subjiciendum* to issue, returnable on the 24th of April 2020, and directed at the first respondent herein, to release the applicants herein and then to produce them before this court. The order contained directions for pretrial matters before the return date.

The order followed an application made on behalf of the applicants herein under Order 54 R 3 of the Rules of the Supreme Court 2000 by learned counsel for the applicants: Mr. Prudhoe.

The affidavits in support of the application were sworn to by Mr. Mikhail Charles, who described himself as a Litigation Paralegal but explained that he was in fact an attorney admitted to practice in the UK and his native St Vincent and The Grenadines as well as other jurisdictions within the region; thus, he understood the weighty matter of making assertions under oath.

Before Simons J (Ag.)

In the application aforesaid, the respondents *inter alia*, challenged the bringing of the application by a third party on behalf of the applicants as well as the legal standing of Mr. Prudhoe to bring an application in respect of all fifteen applicants. This was because on learned counsel's own showing, only three of the fifteen had had his services retained for them.

In its ruling, the court made a two-pronged ruling in favour of the applicants - upholding the argument made on their behalf in response to the said objections - that learned counsel (Mr. Prudhoe) was entitled to bring the application on their

behalf as they were allegedly held incommunicado and were therefore not in a position to bring their application themselves, and furthermore, that learned counsel Mr. Prudhoe was entitled to represent all the fifteen applicants. The court reasoned thus: *"… I am persuaded by paragraphs 25 to 27 of Mr. Prudhoe's Skeleton Argument and am satisfied that in respect of these three Applicants at least, there is sufficient reason to believe that they wish to but are unable to make the required affidavits themselves, within the meaning of the Rule. I also agree with Mr. Prudhoe's suggestion that if the Writ is to run for these three, it must run for all."*

The writ as ordered, was duly issued and served along with the requisite notice in accordance with, ***Order 54 rule 6(4)*** of the Rules of the Supreme Court 2000 on the first respondent.

The second respondent the legal representative of the first respondent appeared for the first respondent, and for the second respondent, the nominal respondent.

The Facts - Applicants' case:

The matters antecedent to the bringing of the instant application are contained in six affidavits deposed to by the said Mikhail Charles, Litigation Paralegal of the office of Prudhoe Caribbean. In the first of these affidavits which supported the initial application before Simons J (Ag.), the deponent alleged the following: that as a result of his work in the law firm of Prudhoe Caribbean on behalf of one Chelliah who had been arraigned on charges in connection with immigration offences including human smuggling, it had come to his notice that twenty-nine Sri Lankan nationals had been detained since the 10th of October 2019 at the Immigration Detention Centre (IDC), where they were under the control of the Department of Immigration and Border Control through the first respondent, its Director.

He deposed further that during a hearing on a *habeas corpus* application in respect of the detention of one Ariyaputhuram, Ravikkumar, a Sri Lankan national, it was alleged by the respondents therein that the said applicant had declined legal advice. The respondents allegedly produced as evidence in support of such declining of legal advice, forms described as Voluntary Departure Forms (Form IS 101) apparently signed by fifteen detainees at the detention facility. It was this circumstance that prompted learned counsel (Mr. Prudhoe) to request a visit to the facility to see the said detainees. The request did not yield the desired result for no such access was granted to him as counsel.

It was further deposed on behalf of the applicants that despite the claims made in open court regarding efforts of a prompt repatriation of the detained Sri Lankans (including the applicants), no such repatriation had been effected. Furthermore, that no explanation had been given by the respondents as to the legality of the on-going detention, but rather, that the first respondent in an email response to learned counsel's enquiries, simply detailed logistical difficulties in respect of repatriating any of the Sri Lankan detainees.

In the subsequent affidavits, the same deponent averred on behalf of the applicants, that following the notice of motion that was filed pursuant to the order of the court, it was communicated to learned counsel that three of the fifteen detained persons, (the second, twelfth and the fourteenth applicants) had requested legal advice. The deponent averred that the chronology of events indicated that the said requests had been made within an hour of learned counsel's request for access to all the applicants. Subsequently, the second applicant's sister, the wife of the twelfth applicant, the mother of the fourteenth applicant, the father of the fifteenth applicant and the wife of the eleventh applicant made contact with learned counsel asking him to represent the said applicants. Emails containing the requests for representation were exhibited in respect of the first three. None was shown in

respect of the eleventh applicant, however. According to the deponent, the detaining authority while refusing learned counsel physical access to the applicants, offered him telephone access which by reason of the applicants' inability to communicate in English, was rendered pointless because of the departure of Tamil interpreters from the Turks and Caicos Islands. Even so, that learned counsel had made strenuous efforts to secure the services of a Tamil translator through whom communication had been made with the second, twelfth and fourteenth applicants. In that lawyer-client communication, the said applicants were said to have echoed one another in stating these: that they wanted present learned counsel Mr. Prudhoe to represent them; that they did not wish to return to Sri Lanka as they believed their lives to be in danger there; that they wished to be physically present at the hearing of the application; that their religious and cultural beliefs as Tamil Hindus were flouted at the detention centre, and that their nutrition was inadequate (as they were only given bowls of salad or bread as their main meals). The twelfth applicant is alleged to have stated also that he wished to leave the detention facility because of over crowding poor food, lack of medical care, and the flouting of his religious and cultural beliefs. The fourteenth applicant allegedly stated further that he was concerned for his mental state if he remained at the detention centre and also, that his human rights were not protected at the detention facility. The second applicant also added that he had become suicidal and that more of the applicants wanted to be represented by learned counsel.

All of this was to say, that the detainees had been held at the detention centre in conditions that were poor, with no access to legal advice that at least three of them had requested for.

Respondents' Case:

The application was vehemently opposed by the respondents. The first respondent had apparently been misinformed that the instant application was consolidated with another application: CL 33/20. He therefore filed two affidavits both of which were said to supplement what had been deposed to in the earlier matter. Another person (the Assistant Director of Immigration, in charge of the detention facility: Mr. Peter Parker) also, labouring under a similar misapprehension, filed two supporting affidavits also expressed to be supplementary to what was filed in that prior application.

This circumstance is unfortunate, as no order for consolidation was made by the court. It is my view that as the said affidavits are not before the court, it will be improper in the determination of the instant application to consider the said affidavits filed in a different application. I derive some comfort in holding thus as in my view, the respondents' affidavits filed in support of this application as supplemented by the oral evidence of the first respondent, sufficiently respond to the matters raised in the applicants' affidavits.

It was the response of the respondents, as contained in their affidavits filed by and on behalf of the first respondent, that on 10th of October 2019, Immigration officials intercepted a Haitian sloop in Turks and Caicos Islands waters on which were found among others, twenty-nine Sri Lankan nationals. The present applicants were among the number. The applicants are therefore illegal immigrants to the Turks and Caicos Islands.

It is the case of the first respondent as contained in his affidavits and as supported by the affidavits of Mr. Peter Parker, that the said illegal Sri Lankan immigrants were detained pending repatriation from the Turks and Caicos Islands.

In this regard it was deposed that several efforts had been made to effect the repatriation. These efforts included (per Mr. Parker), a preliminary investigation by himself, as supported by investigations of UK counterparts, to ensure that it was safe to repatriate the detainees to Sri Lanka without fear of human rights abuses. The preliminary efforts were said to have been followed by travel arrangements with various entities including Inter-Caribbean Airlines who gave a quotation for the best route which would permit a transit through other countries (preferably Greece where there would be no fourteen day period of quarantine), to Sri Lanka. The efforts of the first respondent were said to be complemented by that of the International Organization for Migration: IOM-UN Migration (referred to simply as IOM) in the logistics and the implementation of the removal agendum which included medical screening as well as screening for information on the detainees. The first respondent deposed that the considerable expense involved to effect the repatriation had been placed before the National Security Council and the Appropriations Committee of the House of Assembly for monies to be provided.

These efforts to effect repatriation, which were robust, it was deposed, have been gravely hampered by the COVID 19 pandemic which has led to the interdiction of international flights not only in Turks and Caicos Islands, but also in Sri Lanka. More particularly, the first respondent deposed that on the 12th of April 2020, he received communication from IOM that the interdiction of inbound flights into Sri Lanka's airports imposed by reason of the COVID 19 pandemic, had been extended from 7th to 21st April 2020, with a possibility of further extension.

Despite these set backs, the first respondent indicated that the IOM through its Chief of Party (Sri Lanka), was engaging with the Sri Lankan Government on behalf of Turks and Caicos Islands to permit for humanitarian reasons, an inbound flight for the repatriation of the detainees, including the applicants.

It was the case of the first respondent per oral evidence (which somewhat altered the affidavit evidence), that while repatriation was the course adopted for all the applicants requesting voluntary repatriation, the repatriation would be staggered for the following reasons: that while all the applicants save three: (the second, twelfth and fourteenth applicants) had signed Voluntary Departure Forms (IS101), six of them were needed on the Islands as prosecution witnesses in the case against one of the twenty-nine Sri Lankans intercepted: one Srikajanukan Chelliah. These six potential prosecution witnesses, it was deposed and repeated in oral testimony, had informed the authorities that they would wish to be repatriated (voluntarily) after they were done with their testimony as prosecution witnesses. With respect to these, the Royal Turks and Caicos Islands Police Force had allegedly expressed an intention to place them in their witness protection programme. With regard to the three applicants who had refused voluntary repatriation, he averred in oral testimony that administrative arrangements were under way to deport them. The remaining applicants would, in accordance with their wishes (expressed by the execution of the IS101 Forms in the presence of a witness) be repatriated as soon as Sri Lankan authorities gave the go-ahead for the in-bound flight to access its airport.

It was also the case of the respondents that the applicants were detained in proper and healthy conditions in accordance with the Operational Guidance Manual of the Ministry of Border Control and Labour which was exhibited in this court. In this regard, the said Peter Parker deposed that to accommodate the social distancing protocols in place by **Emergency Powers (COVID 19) (Amendment) Regulations 2020, (LN 18 of 2020)** the detainees (including the applicants) were kept from overcrowding, even during recreational times. Alternative places of detention he stated, were being located to enable the Immigration authorities to detain illegal immigrants without compromising their health during the COVID 19

pandemic. He further deposed that the detainees (including the instant applicants) were kept in cells which were reasonably sized, ranging from 17 by 17 feet, 211/2 feet by 161/2 feet, 181/2 feet by 11 feet and 16 by 161/2 feet, and able to take twenty detainees. He stated also that all detainees were supplied with necessary toiletries as well as given access to alcohol-based hand sanitizers in secure settings, they were well fed with three meals a day supplied by an outside restaurant with provision made for special diet needs that were brought to their attention, and given medical screening and assessment by doctors and nurses provided by the Ministry of Health. He averred that none had exhibited signs of mental ill-health or any suicidal tendencies which state would have been communicated to the authorities, as one of the detainees communicates in English and has been used to communicate with the rest. Besides this, he deposed, the authorities had received no report of malnutrition, depression, or threats of suicide from doctors who visit frequently (weekly). He further stated that the care of the detainees (including the applicants) was supervised by the watchful eyes of the Human Rights Commission in its regular visits to the facility.

With regard to access to communication, he deposed that by reason of the restriction placed on personal visitation at the material time by the **Emergency Powers (COVID 19)(Amendment) Regulations 2020**, telephone calls which had local call capacity were offered to the detainees. However, since that was of little use to detainees who were new to the Islands, detainees were given access to Whatsapp by the Police and Tamil translators on their personal telephones to enable them reach relations abroad, to give them the detentions centre's telephone numbers to call them on.

Acting Superintendent of Police Mr. Willet Harvey also deposed in an affidavit that the Police had become involved in the case involving the interception of the Haitian sloop which carried a number of Sri Lankan nationals including the

applicants. They were illegal immigrants. He detailed his involvement in criminal investigation of one of the persons: Srikajamukan Chelliah, a Canadian of Sri Lankan descent who having been convicted of Alien Smuggling in 2003 in the USA, was suspected to be involved in the offence of human trafficking in the instant matter. It was his evidence that the investigation involved several criminal investigative bodies and agencies in and outside Turks and Caicos Islands and that some of the detainees were witnesses in that investigation. Of these, one of them who spoke English had had his statement taken in English. The remaining detainees allegedly declined access to legal advice having been informed of their right which was communicated to them by a Tamil translator. Their statements for the criminal investigation was written down in Tamil and translated into English. These six witnesses were due to be provided with witness protection facilities, a course of action that had been found to be necessary because they seemed to have a real fear for their safety back in Sri Lanka due to threats made on their families by reason of the evidence they were to give in the criminal investigation against Chelliah.

Further affidavit evidence in support of the respondents' case was provided by the Chief Medical Director/ Director of Health Services of the Turks and Caicos Islands: Dr. Nadia Astwood who deposed to the efforts made by the Ministry of Health to curb or combat COVID 19 in the Turks and Caicos Islands as well as rigorous efforts to monitor the health needs of the detainees through regular visits made by a team of doctors and nurses to the facility. She deposed that there was to date, no COVID 19 infection at the detention centre. Having regard to the measures put in place by the Ministry of Health to combat the spread of the COVID 19 disease, she made the following recommendation: *"At the moment, we are not recommending the release of immigrants outside of direct and immediate removal of the detainees from the Turks and Caicos Islands"*.

In my considered opinion, this application raises the following issues for the determination of the court.

ISSUES:

1. Whether or not the detention of the applicants was according to law;
2. Whether or not the delay in repatriation has affected the legality of the applicants' detention.
3. Whether or not the applicants are entitled to the relief sought by this application.

In my consideration of these weighty issues (which shall be considered seriatim), I shall have recourse to the arguments made by counsel on both sides contained in skeleton arguments as expatiated by oral submissions during the hearing of the application.

I must commend learned counsel on both sides for their industry in research and their resourcefulness in the application of seminal judgments that throw light on the matters to be considered in the instant application.

As a starting point, I must say that I consider insightful, the dictum of Lord Donaldson MR in one of the cases cited for my persuasion: ***R v Secretary of State for the Home Department ex parte Cheblak [1991] 2 All ER 319***: *"A writ of Habeas corpus will issue where someone is detained without any authority or purported authority or the purported authority is beyond the powers of the person authorising the detention and so is unlawful".*

In the *locus classicus*: ***R v. Governor of Durham Prison; ex parte Hardial Singh [1984] 1 WLR 704,*** the following, later distilled by Dyson LJ in ***R(I) v. Secretary***

of State for the Home Department [2002] EWCA Civ 888, were set out as the limits of the power of detaining authority to detain pending deportation (or removal):

1. *The detaining authority must detain only to deport (or remove) the person and can only use the power for that purpose;*
2. *The detention must be for a reasonable period;*
3. *If before the expiry of the reasonable period, it becomes apparent that the removal cannot be effected within that reasonable period, the detaining authority must not seek to exercise the power of detention;*
4. *The detaining authority must act with reasonable diligence and expedition to effect the removal.*

In the light of these, it is the duty of this court at the return to the instant writ, to enquire into the detention of the applicants to see whether their detention was lawful in the first place and whether or not it has become unlawful in that they have been detained for an unreasonable length of time with no end in sight.

In this regard, it is important for this court to set out the matters that have come before it regarding how the detention of the applicants came about.

It is common ground that the applicants are illegal immigrants having arrived on a Haitian sloop which was intercepted by the authorities on 10th October 2019. They were not, under ***S. 4(1) of the Immigration Ordinance Cap 5.01***, given permission to enter the country as lawful entrants. In fact, subsequent investigations demonstrated that the journey was perhaps in pursuance of a criminal enterprise. It is for this that criminal investigations involving some of the detainees have assumed the international dimensions described in the affidavit of Acting Superintendent of Police Willet Harvey.

The actions of the first respondent with respect to the detainees (including the applicants), was in consonance with S. 54 (3) of the Immigration Ordinance Cap 5.01 (described hereafter as 'the Ordinance').

I reproduce the said provision:

S.54 (3) "…person on board a ship or aircraft may under the authority of an immigration officer be removed from the ship or aircraft for detention under this section."

The persons who were intercepted in the said sloop and detained in consequence were thus deemed to be in proper legal custody, see: ***S. 56(4) of the Immigration Ordinance*** (the Ordinance) which reads*: "A person shall be deemed to be in legal custody at any time when he is a detainee…"*

There is then no question that the persons (applicants included) were illegal immigrants detained lawfully under the applicable law.

I daresay, that upon the interception of the sloop, it was open to the first respondent to have recourse to a number of procedures to deal with the illegal immigrants. These included, especially because of the involvement of persons suspected of criminal activity, procedures for their deportation under ***S. 54 or S. 95 (1)(c) of the Ordinance***, the institution of criminal proceedings under ***S. 102 of the Ordinance***, or their repatriation under ***S. 54 (2) of the Ordinance.***

It is the respondent's case that they chose the last course because the applicants opted for voluntary removal from Turks and Caicos Islands.

Regarding the exercise of this option, learned counsel for the applicants who maintains in his submission that the applicants who refused to sign the IS101 Forms do not wish to leave Turks and Caicos Islands, has invited this court to find that the execution of the IS101 Forms by a number of the applicants in the

presence of a Tamil interpreter and an attesting witness, was suspicious, and the reason for this is that the person whose name has been set out as the attesting witness wrote the time of the execution as 1pm on all the forms.

While the said circumstance is certainly curious, it seems to me that it falls short of proof by any standard that undue influence was exerted on the applicants to secure their signatures on the forms.

As learned counsel has maintained throughout the proceedings and in all the processes filed in support of this application, he is counsel for all of the detainees who were produced in court (albeit not all at once due to the COVID 19 social distancing restrictions).

It was therefore, if he was persuaded that the signing of the forms was done by the exerting of improper pressure or some other vitiating circumstance on the applicants, incumbent on him to produce evidence of such improper pressure on the detainees at the point of, or prior to the signing of the IS 101 Forms, especially as on the face of each form, it was stated that it was explained to the person in Tamil who then signed it. Since no such evidence was produced, this court has no reason not to take the IS 101 Forms at face value, that they met the standard of voluntariness required for their due execution.

I note the evidence that some of the applicants opted for voluntary repatriation by signing the IS101 Forms, but that three refused to do so. Furthermore, that the presence of six of the applicants was needed to prosecute one of the detainees for various serious immigration offences. These matters notwithstanding, my reading of Ss.50-56 of the Immigration Ordinance informs my understanding that the power of the first respondent to detain illegal immigrants or persons denied entry into the Islands is for the ultimate purpose of removing them from the Islands. Therefore the failure to repatriate all the applicants detained for the said purpose

for no just cause would indeed amount to unlawful conduct on the part of the first respondent the detaining authority.

The jurisprudence in this regard is overwhelming: that the period of detention impacts on the lawfulness, even where *ab initio*, the detention was lawful. Thus where there is the intention to remove or repatriate or deport, such must be effected within a reasonable time, see: ***Chijioke v. COP of Saint Vincent and the Grenadines et al SVGHCV 232/2010***. Furthermore, it has been held, that where removal cannot be effected within a reasonable time, removal could not be said to be pending so as to make it a lawful detention even where the reasonable period could not be said to have expired, see: per King J in ***R v. Secretary of State for the Home Department [2010] EWHC 1678.***

In the instant matter however, it seems to me that an important distinction must be made between an inability to achieve the desired objective of removal which may be inferred from evidence led, and difficulty which is surmountable by the first respondent given time and effort in the present circumstance of the global scourge: COVID 19. Evidence has been led regarding arrangements made to effect the repatriation of the applicants to their home country. These were said to have been stalled somewhat by the closures of airports and borders in many countries, due to COVID 19 that has impacted international travel globally.

The evidence adduced by the respondents on whom the burden lay to establish the lawful detention of persons, negates a lack of will to achieve the desired objective of removal, or an inability to do so due to an inherent impossibility in carrying it out. The evidence includes arrangements to secure air transportation for the repatriation by the first respondent, the involvement of IOM an organization that deals with all aspects of migration, including repatriations (I take judicial notice of this, see: ***S. 39 of the Evidence Ordinance)***, arrangements to secure funding for the

repatriation from the Appropriations Committee of the House of Assembly, and an active engagement with countries through which the applicants must transit to return to Sri Lanka as well as Sri Lanka the home country of the applicants. That the first respondent through IOM and its Sri Lankan branch is seeking to engage with the Sri Lankan Government to reopen its skies on humanitarian grounds to receive the applicants at this time, is instructive of the lengths to which the first respondent will go to achieve the repatriation.

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. In these circumstances, the case of the respondents that the delay to repatriate is the result not of inertia or other blameworthy conduct on the part of the first respondent, but of COVID 19's impact on movement of persons and air travel, cannot be glossed over or discountenanced.

In Turks and Caicos Islands, the borders, including the airports have remained shut since March, and will not be open until after May 4 2020, see: ***Emergency Powers (COVID 19)(No. 3) Regulations 2020***. But beyond Turks and Caicos Islands' borders and airports, are the policies of other sovereign countries in response to the COVID 19 crisis, countries of transit for this long journey across continents for the returning applicants, as well as the home country of the applicants: Sri Lanka.

While I advert my mind to the seminal holding in ***R v. Governor of Durham Prison ex parte Hardial Singh*** that *inter alia*, the detaining authority being under a duty to act promptly to effect the removal, should not exercise that power unless the removal could be effected within a reasonable time, I am satisfied from the

evidence so far adduced that this is no circumstance in which the first respondent is disabled from effecting the applicants' removal within a reasonable time.

This court cannot ignore the fact that the applicants are illegal immigrants, nor can it shut its eye to the havoc wreaked by the COVID 19 pandemic on international travel. I cannot read into the present circumstances, the lack of an immediate prospect of the applicants being able to return to their home country or at all. This is nothing like the situation in ***Tan Te Lam v. Superintendent of Tai A Chau Detention Centre [1997] AC 97 PC*** where the Vietnamese Government rejected all attempts to accept the repatriation of detainees. Having regard to the peculiar facts of this case, I echo the sentiments of Baroness Hale in ***R v. Secretary of State for the Home Department; ex parte Khadir (FC) [2005] UKHL 39*** *that*: *"There may come a time when the prospects of the person ever being able safely to return, whether voluntarily or compulsorily, are so remote that it would irrational to deny him the status which would enable him to make a proper contribution to the community here, but that is another question. It certainly did not arise on the facts of this case".*

In coming to my conclusion that the delay of six months in effecting repatriation is not unreasonable, I have regard to the conduct of the first respondent in all this set out at length before now, regarding the continuing focused efforts of the first respondent as supported by the IOM-UN to effect the applicants' repatriation. My view is buttressed by the said dictum of Dyson LJ in ***R(I) v. Secretary of State for the Home Department (supra)*** that: *"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 ...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 condition in which the detained person is kept…" I could not agree more in the consideration of this matter which presents issues parallel to that case.

Findings:

In my judgment, the respondents on whom the burden lay to demonstrate the lawfulness of the applicants' detention have discharged that burden by showing a continuing intention to repatriate the applicants even in the face of the travel issues raised by COVID 19 pandemic. The continued engagement of Sri Lankan authorities by IOM on behalf of the first respondent indicates that the first respondent is not lax regarding his duty to effect the repatriation.

I am therefore satisfied at this time, that the delay to remove the applicants from Turks and Caicos Islands is for just cause, and therefore does not affect the legality of the detention. It goes without saying that should the detention of the said applicants continue even after the restrictions on air travel have eased in both Turks and Caicos Islands and Sri Lanka, the detention, now lawful will at that point become unlawful.

With regard to the six potential prosecution witnesses, it is my understanding, as contained in the affidavits of the first respondent and Mr. Peter Parker, that they, like the other illegal immigrants, are detained pending removal. The court has been informed that they are scheduled to give evidence as prosecution witnesses in a case of considerable importance to the security of Turks and Caicos Islands.

While I have not in my research found any provision entitling the first respondent to detain any persons for the purpose of their being used as prosecution witnesses, it seems to me that the legality of the continued detention of the said six applicants for the purpose of removal is not affected by the fact that before the planned removal, they will be used as witnesses for the prosecution of one of the detainees.

The said circumstance, is not unreasonable, as long as the prosecution is conducted without undue delay. Should there be undue delay of that trial, any delay caused thereby to the repatriation of the said applicants within a reasonable time, should they remain without charge for any offence (the circumstance under which they may be placed in lawful custody for any length of time), will render their continued detention at that point, unlawful.

At this time, it is my view that the detention of all the fifteen illegal immigrants (the applicants herein - including the three who refused voluntary repatriation) which was lawful in the beginning as done pending their removal from the Islands, continues to be lawful in spite of the delay in repatriation caused by the unforeseen circumstance of COVID 19.

Alternative relief:

I must at this point advert my mind to a matter canvassed by learned counsel presumably by way of an alternative relief, which is: that the applicants be removed from the detention centre into alternative accommodation, specifically, vacant tourist accommodation. The merits of that argument are not clear to me, and I say so for the following reasons: It is apparent that the said submission is premised on a supposition that the detention centre (IDC) offers poor housing and inadequate facilities. Indeed, learned Counsel Mr. Prudhoe (not having been granted physical access to the premises) described the conditions there as oppressive. This belief is apparently anchored on matters deposed to in the affidavit of Mikhail Charles on behalf of the applicants, that the three applicants he interviewed (the second, twelfth and fourteenth) were united in their complaints regarding alleged poor feeding, lack of medical care, and overcrowding among other things at the detention centre (IDC).

In the affidavit of Mr. Parker, he refuted these assertions and went further to set out at length what he said was provided at the detention centre for the detainees. These were said to include three meals per day including special diet meals, as well as the observance of social distancing even at recreational times. He stated further (and this was confirmed by Dr. Nadia Astwood in her own affidavit), that regular visits were made by medical teams from the Ministry of Health to the facility. Furthermore, he supplied the dimensions of the cells (aforesaid) which would make them reasonably roomy. Mr. Parker further deposed that the Human Rights Commission paid regular visits to the facility to satisfy itself of the conditions thereat and added that no complaint of mental ill-health or threat of suicide alleged on behalf of the fourteenth applicant had been noted by the medical teams that regularly visited the facility. With regard to communication, he set out efforts made by the Detention Centre to provide the detainees access to communication by providing them with telephones at this time that visits to the detention centre are restricted by the ***Emergency Powers (COVID 19)(Amendment) Regulations*** in force.

To these factual matters deposed in the affidavits of Mr. Parker and Dr Astwood, which rebutted the assertions made on behalf of the applicants by Mr. Mikhail Charles, no affidavit was filed in reply on behalf of the applicants to refute or challenge the assertions.

Thus, what Mr. Charles deposed to as having been told by second, twelfth and fourteenth applicants remained bare assertions unsupported by any cogent evidence, and in fact, rebutted by the unchallenged evidence of the respondents.

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:

"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.

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.

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.

M.M. AGYEMANG CJ