

IN THE SUPREME COURT OF
THE TURKS AND CAICOS ISLANDS
CIVIL

BETWEEN:

1. BALASUNDRAM, KABILRAJ
2. KAJEENPAN, PAINTAMILKAVALAN
3. KUMARALINGAM, JEYASEELAN
4. MAHENDRAN, KARUNAKARAN MAKENTHIRAN
5. MAILUAGANAM, THANGAUADEUAL
6. MAILVAGANAM, THANGAWADEVEL
7. NAGARATHNAM, KRISNAKUMAR
8. NIRMALADHASA, PRATHEEPAN SADHA
9. PANKAJBHAIPATEL, CHRIAGKUMAR L
10. PARAMATHURAI, KOHULAN
11. PREMATHANSAN, PARASATH
12. RASARATNAM, VARATHARAJ
13. SEVAJEYAN, GAJENDRAN
14. SIVAPALAN, JESEEPAN SWAPALAN
15. SURESAN, NATHUSAN

Applicants

and

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

Respondents

BEFORE the Hon Mr Justice Carlos Simons QC
Mr Timothy Prudhoe for the Applicants
Ms Clemar Hippolyte, Principal Crown Counsel, for the Respondents
Considered on the papers, without a hearing



RULING

Consideration on the Papers

1. In light of the unprecedented circumstances created by the COVID-19 pandemic and the extraordinary measures being taken by the TCI Government and governments worldwide to combat its spread, I was compelled to consider this Application on the papers. In that regard I have reviewed the following:
 - A. For the Applicants:
 - (i) Notice of Motion for Writ of Habeas Corpus *Ad Subjiciendum*
 - (ii) First Affidavit of Mikhail Charles in Support and Exhibit "MC1"

- (iii) Second Affidavit of Mikhail Charles and Exhibit "MC2"
- (iv) Third Affidavit of Mikhail Charles and Exhibit "MC3"
- (v) Fourth Affidavit of Mikhail Charles and Exhibit "MC4"
- (vi) Applicants' Application Bundle – Bundle A
- (vii) Applicants' Authorities Bundle – Bundle B
- (viii) Applicants' Skeleton Argument
- (ix) Draft Order
- (x) Applicants' "Reply" Skeleton Argument *

B. For the Respondents:

- (i) First Affidavit of Derek Been and Exhibit "DB1"
- (ii) First Affidavit of Peter Parker and Exhibit "PP1"
- (iii) First Affidavit of Willet Harvey and Exhibit "WH1"
- (iv) Respondents' Submissions *

[*I received these items around noon today and having reviewed same I am not minded to change anything I say below]

The Application

2. This is an application to move the Court to issue a Writ of Habeas Corpus *ad subjiciendum* to the First Respondent to bring the Applicants before the Court so that the lawfulness or otherwise of their detention may be examined, and their release ordered if the Court so directs. It comes hard on the heels of a similar application in **Ravikkumar v. Been and Another** in Action Number CL 33/2020, which I heard on 19 March 2020 and reserved judgment.
3. The Applicants in the instant case are members of the same group as the Applicant in CL 33/2020 and the background facts are identical, as are the Respondents. At the hearing of CL 33/2020, when this application was foreshadowed (these proceedings were filed on 23 March 2020), there was discussion of consolidating the two applications. However, given the expiry of my appointment at midnight tonight it seems more orderly to (and I will) deliver my Judgment in CL 33/2020 and my Ruling in this matter separately and simultaneously today.
4. When this Notice of Motion first came before me on 25 March, I adjourned the hearing to today, 31 March, pending delivery by 2:00 pm on Monday 30 March via soft copy email of the Respondents' material to defend the Motion. I (and counsel on both sides) had in mind the fact that my appointment will expire at midnight tonight and accordingly it was in everyone's interest to have these matters concluded, at least at first instance if at all possible.
5. At this stage of habeas corpus proceedings, the question before the Court is whether or not to issue the Writ applied for. To assist the Court in considering this question Mr. Prudhoe has submitted a strong Skeleton Argument, supported by a well populated bundle of authorities comprising the relevant White Book Rules, leading case law decisions and relevant excerpts from standard texts.
6. The starting point is Order 54, Rule 1 (2) and (3) which are in the following terms:

"APPLICATION FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM

1.(1)

(2) An application for such writ may be made *ex parte* and, subject to paragraph (3) must be supported by an affidavit by the person restrained showing that it is made at his instance and setting out the nature of the restraint.

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

The Applicants’ Material

7. The principal affidavit in the instant application is the First Affidavit of Mikhail Charles, an employee of Mr. Prudhoe’s law firm. Though not admitted to practice in the TCI, Mr. Charles is a trained lawyer and a member in good standing of the Bars of England and Wales and of St. Vincent & The Grenadines, his country of nationality. So, although not an officer of this Court, he knows the solemnity of the witness’s oath and the reliance that the Court places on it. He has also sworn three subsequent Affidavits as noted above.
8. To satisfy the requirements of Order 54 Rule 3, Mr. Charles paints a picture in broad strokes of 29 detainees sequestered away in the Immigration Detention Center without easy access to the outside world or legal advice, coupled with indications via the detaining agencies themselves of the detainees’ denial of any desire to speak with lawyers. The Court is moved particularly by paragraphs 15 to 24 of Mr. Charles’ First Affidavit where he describes conditions, not quite but bordering on incommunicado. The Court is also told in Mr. Charles’ Second and Third Affidavits of three (3) of the Applicants’ requests to access legal advice.
9. In the circumstances, 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 Respondents’ Material

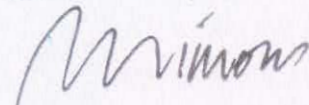
10. Parts of the Affidavit of Peter Parker, paragraphs 14 to 21 in particular, go to the standing issue. However, paragraphs 22 to 27 show clearly that at least three of the Applicants have embraced the immigration authorities’ offer of access to legal advice and have managed to identify Mr. Craig Oliver of the Wessex Fairchild law firm, who is known to the Court, as their counsel of choice. This is an indication that the processes of the Court are not being sought to be set in motion by a busybody, but rather it appears to the Court that it was Mr. Prudhoe’s activism that has brought matters to this point.
11. Beyond this, the Affidavits submitted on behalf of the Respondents really go more to that stage of the habeas corpus process, when the Court is concerned with the lawfulness of the initial detention, and of its continuation. At this stage, what might be called the “standing” stage, the Court is more concerned to see that the requirements of Order 54, Rules 2 and 3 (in this case Rule 3) are satisfied. However, as the application is usually made *ex parte* in any event, the Court will advise itself, as much as it is moved by counsel, of the propriety of issuing the Writ. At the end of

note 54/1/3 (p. 928) of the White Book the proper approach is captured in the descriptions “special responsibility” and “most anxious scrutiny”, analogous to the approach for asylum cases.

Conclusion and Orders

12. I am fully mindful of the time and resources that TCI government agencies and senior officials must be devoting to management of the coronavirus/COVID-19 crisis, but it is precisely in times like these – times of danger and uncertainty - that the Court will be even more vigilant of individual liberties and evermore jealous of its guard over them.
13. Accordingly, the Writ will run. It shall be returned on the first convenient date after 20 April or any extension of the current general restrictions under the Emergency Powers (COVID-19) (Amendment) Regulations 2020 and Practice Direction 2 of 2020. Upon its return the Respondents will justify the continued detention of Applicants 1 through 15. I invite Counsel to submit if possible, an agreed directions order for the Court’s consideration framed around paragraphs 12 and 13 of Mr. Prudhoe’s Skeleton Argument.
14. Costs reserved.

Dated 31 March, 2020



Carlos W. Simons QC
Judge (Ag)

