



IN THE SUPREME COURT  
TURKS AND CAICOS ISLANDS

CL 43/21

BETWEEN

The Queen (on Application of)  
(1) Kajeepan Paintamilkavalan  
(2) Rasaratnam Varatharaj  
(3) Sivapalan Jeseepan Swapalan  
(4) Ariyaputhiran Ravvikumar  
(5) Thambyrasa Srikanth  
(6) Vinojan Theivendram  
(7) Kugagnanam Nesarupan  
(8) Paskaran Vithursan  
(9) Kengatharan Kokulan  
(10) Varatharajah Sekeeran  
(11) Logithan Karunkaran  
(12) Moin Alhashash

Applicants

v.

Hon. Arlington Musgrove, Minister of Immigration and Border Services (Her Majesty's  
Government of the Turks and Caicos Islands)

Derek Been, Director of Immigration

The Attorney General of the Turks and Caicos Islands

Respondents

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JUDGMENT

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**Before:** **The Hon. Mr. Justice Carlos W. Simons QC**

**Appearances:** **Mr Tim Prudhoe and Ms Devon McLean of Prudhoe Caribbean for the 1<sup>st</sup>-5<sup>th</sup>, 7<sup>th</sup>, 10<sup>th</sup> and 12<sup>th</sup> Applicants.**  
**Ms Clemar Hippolyte of the Attorney General's Chambers for the Respondents.**

**Hearing Dates:** **1 March 2022**

**Venue:** **Court No. 5, Graceway Plaza, Providenciales**

**Date Delivered:** **Wednesday, 11 May 2022 at 3:00 pm**



### **Brief Factual Background**

1. This Application concerns illegal migrant entrants in the Turks and Caicos Islands. In the separate proceedings, CL 8/21, CL 42/21 and CL 49/21 (“the False Imprisonment Proceedings”), the Applicants alleged that they were unlawfully detained at the Immigration Detention Centre for a period between 19 October 2019 and 20 August 2020.
2. In the False Imprisonment Proceedings, the Applicants sought declarations that their respective false imprisonments breached their constitutional rights, damages for breaches of their constitutional rights and false imprisonment, and exemplary damages. The Respondents admitted liability, with damages to be assessed. The Applicants filed Asylum Applications over a range of dates, the most recent being that of the 12<sup>th</sup> Applicant in early April 2021.

### **The Judicial Review Application CL 43/21**

3. On 21 May 2021 the Applicants applied for Judicial Review seeking certiorari, mandamus and declaratory relief, pertaining to the refusal by the 2<sup>nd</sup> Respondent of the Applicants request to work pending the determination of their Asylum Applications.
4. On 1 March 2022 the Court heard submissions in respect of the Judicial Review Application. Mr Prudhoe told the Court that the 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 11<sup>th</sup> Applicants have given up their Asylum Applications. Mr Prudhoe appeared on behalf of the 1<sup>st</sup> to 5<sup>th</sup>, 7<sup>th</sup>, 10<sup>th</sup> and 12<sup>th</sup> Applicants, who have not been granted asylum in TCI. The 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 11<sup>th</sup> Applicants did not appear and were unrepresented.

5. Mr Prudhoe told the Court that as a result of the appeal CL-AP 7/2021 on appeal in CL33-2021 as heard on 25 January 2021 the order of certiorari and for declaratory relief were no longer live issues. The judgment of the Court of Appeal in CL-AP/2021 was handed down on 7 April 2022, so therefore after the hearing of the present application. The only live issue for determination by this court was the 2<sup>nd</sup> item of relief claimed on the Notice of Motion:

An order for mandamus requiring the 1<sup>st</sup> and / or 2<sup>nd</sup> Respondent to state expressly any applicable policy or policies as may be reflected in the emailed refusal of permission for gainful employment of asylum seekers as contained in the 2<sup>nd</sup> Respondent's email (Been / Prudhoe and Hon Musgrove) timed 4 pm on 7 May 2021 and which it stated (in relevant part):

*"Please note that we have reviewed your request for the granting the right to work by asylum applicants.*

*It has been determined that no right to gainful occupation will be granted to the Sri Lankan Nationals at this time".*

### **Consideration of the Issues**

6. It seems to me that the starting point is a consideration of the Immigration Ordinance and determining whether under the Ordinance the 2<sup>nd</sup> Respondent was empowered to grant permission to work to the Applicants. The 2<sup>nd</sup> Respondent may only act in so far as empowered by law. Here, the applicable law is the Immigration Ordinance<sup>1</sup> and in this regard I accept the analysis of Ms Hippolyte that the Immigration Ordinance, excludes asylum seekers from the category of persons who may engage in gainful occupation in TCI<sup>2</sup>.
7. The Immigration Ordinance makes a distinction between persons who have been granted asylum, who shall be granted the right to work,<sup>3</sup> and asylum seekers who are to be supported, accommodated and kept (in the sense of being sustained – i.e., fed) by or at least at the expense of the state<sup>4</sup>. In the absence of legislation empowering the 2<sup>nd</sup> Respondent power to grant permission to work to the Applicants, he could not do so.
8. The Applicants admit they have no right to work in TCI and that the Constitution does not guarantee a right to work<sup>5</sup>.
9. The Court accepts the evidence of the Respondents as contained in the First Affidavit of Derek Been that:
  - a. the refusal of permission for gainful employment was based on the Immigration Ordinance not guaranteeing a right to asylum seekers to employment.
  - b. no policy exists pertaining to the right to work of asylum seekers.

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<sup>1</sup> Immigration Ordinance, CAP. 5.01.

<sup>2</sup> CAP 5.01 ss 19, 7(1).

<sup>3</sup> CAP 5.01 s 84(2).

<sup>4</sup> CAP 5.01 s 83 (1) (k).

<sup>5</sup> The Turks and Caicos Islands Constitution Order 2011, s 16.

- c. no policy or policies guided the decision to refuse the Applicants permission for employment. No policy has been formulated as historically the TCI does not receive a large scale number of Asylum Applications.
  - d. even in the absence of law or policy empowering the 2<sup>nd</sup> Respondent to grant a right to employment to the Applicants, he recognized the importance of the requests and in refusing the requests gave consideration to; the time since lodging the applications for asylum, the applicants' skills and the scarcity of those skills in the TCI, the likelihood of the applicants securing employment, wider labour and immigration policies, and the implications of the COVID 19 pandemic (extraneous factors).
10. The 2<sup>nd</sup> Respondent's consideration of extraneous factors does not change the fact that he had no power to grant the Applicants, as asylum seekers, permission to engage in gainful occupation in the absence of legislative authority.
11. Mr Prudhoe argued that the 2<sup>nd</sup> Respondent applied an "informal policy" in refusing the Applicants permission to work, which should be disclosed<sup>6</sup>. The Court rejects this argument, as the evidence supports a finding that the 2<sup>nd</sup> Respondent's decision was based on the limitation of exercisable power with respect to granting permission to work to asylum seekers under the Immigration Ordinance.
12. Further the existence of an applicable, enforceable or lawful "informal policy" has not been proved and is inconsistent with the Immigration Ordinance.
13. Finally, the Court accepts the submission of Ms Hippolyte that the responsibility for granting the right to work to asylum seekers is within the purview of the legislature.
14. In all the circumstances the order for mandamus is refused.

### **Disposal and Costs**

15. I therefore dismiss the Application in CL 43/2021. I make no order as to costs.<sup>7</sup>

**Hon. Carlos W. Simons OBE QC**

**Judge of the Supreme Court**

**11 May 2022**



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<sup>6</sup> By an email dated 10 September 2021, the 2<sup>nd</sup> Respondent informed Mr Prudhoe *inter alia* that "...there is no formal policy in place with respect to right to work for asylum seekers."

<sup>7</sup> Due to Mr Prudhoe's pro bono position in these matters. See 2022 TCACA 6 at [67].