GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.6 OF 2002

BETWEEN:

[1] THE MINISTER OF IMMIGRATION
[2] THE CHIEF IMMIGRATION OFFICER

Appellants

and

[1] SHARON NETTLEFIELD
[2] BEAT WILD

Respondents

Before:

The Hon. Sir Dennis Byron — Chief Justice
The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Ephraim Georges — Justice of Appeal [Ag.]

Appearances:

Mr. Hugh Wildman for the Appellants
Mr. James Bristol for the Respondents

2002: July 3;
2003: January 28.

JUDGMENT

[1] **REDHEAD, J.A.**: The First and Second Respondents are citizens of England and Switzerland respectively. They arrived in Grenada as visitors on 22nd June, 1998.

[2] Four days prior to the expiration of their stay, on 2nd July 1998 they made application for an extension and was granted such extension until 2nd September 1998.

[3] It was contended by learned Counsel for the Appellants that during the period of their extended stay the Respondents applied for and obtained work permits surreptitiously from the Labour Commissioner.

[4] In fact, in an affidavit sworn to by Cyrus Griffith on 13th December 2001 he deposed that the first-named Respondent was issued with a work permit on 22nd July 1998 and the second-named Respondent was issued with a work permit on 29th July 1998.

[5] On 17th August 2001 the Minister of National Security deemed the Respondents to be undesirable persons and had Deportation Orders served on them. They were taken into custody and deported from Grenada the following day, 18th August 2001.

[6] Mr. Wildman, learned Counsel for the Appellants in his written skeleton arguments said:

> "An application was made to the Court supported by an affidavit sworn to by their attorney. The Court ordered that the Applicants be released forthwith to appear in Court on 24th day of August 2001 for the hearing of an application for revocation.
>
> When the matter came on for hearing on 24th day of August 2001, Counsel for the Respondent then made submissions. In the course of these submissions it was stated that the Respondents had already been deported from Grenada."

[7] On a reading of the above quoted paragraphs I did not get a full chronology of events until I read the judgment of Sylvester J heard on 24th August and delivered on 25th September 2001.

[8] In paragraph 4 of that judgment he said:

> "On the basis of an affidavit sworn to by Carol Walter John Bristol, QC……on the said 17th August, 2001 the Court ordered that the Applicants be released forthwith to appear in Court on Friday 24th August 2001 for the hearing of an application for the revocation of the Deportation Orders.
> When the matter came on for hearing on 24th August 2001, Counsel for the Respondents rose and made submissions in liminie in the course of which it was stated that the Applicants have already been deported from Grenada."

[9] The Order of the Court to release the Respondents forthwith was made on 17th August 2001. According to Mr. Wildman they were deported from Grenada on 18th August 2001. This to my mind was in deliberate defiance of the Court's Order.

[10] I cannot imagine any Judge taking kindly to an Order of Court being deliberately flouted by anyone particularly by the Executive.

[11] I say so because the Executive being an arm of the government should be at the vanguard in the obedience of the Court's Order. The Judiciary though distinct and separate from the Executive is also an arm of the government. In my opinion therefore, the Executive has not only an interest in ensuring that Courts' Orders are obeyed, but should also set an example to the citizens of the country in the obedience of Courts' Orders.

[12] The matter came on for hearing before Sylvester J on 19th December 2001 and on 26th February 2002 he delivered a written judgment in which he held that the Respondents were entitled to the protection of the Constitution of Grenada. They could not lawfully be deported without being given a hearing in keeping with the principles of natural justice. For the sake of completeness I should say that on an earlier application made on 24th August 2001 the learned trial Judge ordered the Appellants who were Respondents in that action to procure the Applicants' safe return to the jurisdiction of the High Court not less than three [3] days prior to 18th October 2001. The costs of the return of the Applicants to the jurisdiction of the Court to be provided for by the Respondents.

[13] The learned trial Judge further said that the Respondents had a legitimate expectation that they would be entitled to remain in Grenada to operate their business and if it became necessary to remove them then they would have been afforded a fair hearing. The learned trial Judge also found that the Respondents were not undesirable persons within the meaning of the Immigration Act.

[14] Finally, the learned trial Judge held:

> "The Applicants are entitled to [1] their cost of transportation from Switzerland to England en route for the trial [their costs to and from England having already been provided for] and accommodation in London I award $2,500 and [2] a further sum of $1,000 for telephone calls between the Applicants and their agents in Grenada regarding the state of their business making a total of $3,500 as special damages and general damages of $50,000."

[15] Damages were therefore awarded in favour of the Respondents in the sum of $53,500 and costs of $5,000.

[16] From this judgment the Appellants have appealed to this Court. Twelve grounds of appeal were filed on behalf of the Appellants.

[17] In his written submissions Mr. Wildman, learned Counsel for the Appellants argued that this appeal revolves around four critical issues, which are inextricably bound up. He identified the issues as:

[1] whether or not the Respondents not being citizens of Grenada, are entitled to a hearing by the Minister prior to the making of Deportation Orders pursuant to Section 26[2][b] of the Immigration Act;

[2] whether or not the Minister's decision is subject to judicial review and if so;

[3] was the Minister under a duty to satisfy the Court that there was evidence on which he could make an order and;

[4] whether the Respondents had a legitimate expectation of a hearing from the Minister before they could be deported.

[18] Grounds 3[a] and [b] could conveniently be dealt with as one ground of appeal.

[19] The learned trial Judge having found that the Respondents were lawfully in Grenada when they were arrested and taken to South St. George Police Station on 17th August 2001, he then went on the consider Section 1 of the Grenada Constitution which provides:

> "whereas every person in Grenada is entitled to fundamental rights and freedoms that is to say the right."

[20] Section 12[1] of the Constitution mandates:

> "No person shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Grenada, the right to reside in any part of Grenada, the right to enter Grenada, the right to leave Grenada and immunity from expulsion from Grenada."

[21] Section 12[3]:

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –
>
> > [d] for the imposition of restriction on the freedom of any person who is not a citizen of Grenada."

[22] Section 12[1] creates a blanket prohibition against free movement of persons in Grenada, the right to reside in Grenada and immunity from expulsion from Grenada.

[23] I now analyse the Immigration Act Cap.145. For the purpose of this analysis the relevant sections are:

Section 2:

> "undesirable person" means a person who is or who has been conducting himself to be a danger to peace, good order, good government or public morals."

Section 4:

> "4[1] Except with the authority of the Minister and subject to such conditions as to duration and place of residence, occupation or any other matter or thing as the Minister may think expedient, an Immigration Officer shall not grant leave to an alien to enter Grenada if the alien is a prohibited alien that is to say –
>
> > [f] a person who, from information or advice received from the government of any other country through official or diplomatic channels, is deemed by the Minister to be an undesirable inhabitant of or visitor to Grenada.
> >
> > [g] a person or a class of persons deemed by the Minister on economic grounds, or on account of living standards or habits, to be an undesirable inhabitant of Grenada.

Section 19[1] and [2]:

> "19[1] Except in the case of deportation restriction and safety orders made by a Minister whenever a person is detained, restricted or arrested as a prohibited alien, notice of that fact and the grounds of his detention restriction or arrest shall be given to such person in the prescribed form.
>
> [2] A person to whom such notice has been given may bring an appeal to the nearest Magistrate's Court directed to the question of his identity only. Notice of the appeal shall be given to the Magistrate and to the Chief Immigration Officer within seven days of the detention, restriction or arrest."

Section 26[1] and [2][b]:

> "26[1] The Minister may in any of the cases mentioned in subsection [2] make a deportation order requiring an alien to leave or to be removed from and to remain out of Grenada
>
> [2] Subject to the provisions of this Act, the Minister may make a deportation order in the case of an alien who is
>
> [b] an undesirable person."

Section 35:

> "No appeal shall lie against an order made by the Minister under the authority of Sections 25, 26, 27 or 28 unless such appeal is directed to the question of identity only, of the person affected by the Order."

[24] There can be no doubt in anyone's mind that but for the provision of Section 12[3] of the Constitution that any law which restricts the freedom of movement, the right to leave and enter and leave Grenada and immunity from expulsion from Grenada would be unconstitutional, having regard to the provision of Section 12[1].

[25] Section 12[3][d] creates an exception in relation to non-citizens.

[26] Section 2[1] of the Immigration Act defines an "alien" thus "a person who is not a citizen of Grenada".

[27] Mr. Wildman submitted that it is clear that an alien does not have the constitutional right to freedom of movement. It is clear, he argued, that in so far as the Constitution is concerned the alien is subject to domestic or municipal law [in this case the Immigration Act] which determines the aliens status in the country, admissions and deportation of aliens are governed by the Immigration Act. He submitted that it is within the provisions of the Immigration Act and not the Constitution that an alien's status is to be determined.

[28] Mr. Wildman relies on the case of **De Raedt and Others v Union of India** [1992] LRC. De Raedt and Getter two of the petitioners had resided in India on the basis of residential permits since 1937 and 1948 respectively and the third petitioner was married to Getter. De Raedt held a Belgian and Getter a United States passport. In 1985 they were refused an extension to their permits. In July 1987 they were finally refused an extension or

naturalization by an Order signed by the Superintendent of Police. They filed a petition challenging the Order on the ground that [a] for De Raedt since he had resided in India for more than five years before the commencement of the Constitution he was a citizen of India pursuant to Art 5[c] of the Constitution and could not be expelled and [b] they had been denied a proper hearing before the Order was made, in breach of the rules of natural justice.

[29] At page 417 Sharma J said:

> "The next point taken on behalf of the petitioners, that the foreigners also enjoy some fundamental right under the Constitution of the country, is also of not much help to them. The fundamental right of the foreigner is confined to Art 21 for life and liberty and does not include the right to reside and settle in this country. It was held by the Constitution Beach in **Muller v Superintendent Presidency Jail Calcutta Air** [1955] S.C. 367 that the power of the Government in India to expel foreigners is absolute and unlimited and there is no provision in the Constitution fettering this discretion."

[30] Article 21 of the Indian Constitution:

> "No person shall be deprived of his life or personal liberty except according to procedure established by law."

[31] Learned Counsel for the Appellants contended that the Constitution of India is fashioned off the Westminster model. Its fundamental human rights provisions are in para matera with those of Grenada's. I agree.

[32] Article 19[1] of the Indian Constitution guarantees certain fundamental rights to all citizens of India eg. freedom of speech and expression, the right to assemble peaceably, the right to move freely throughout the territory of India, the right to reside and settle on any part of India etc.

[33] In Basu Commentary on the Constitution of India 5th Edition at page 724 it is there stated:

> "The right of re-entry of a citizen should be distinguished from the right of entry of aliens. The right to restrict or regulate the immigration of aliens is the inherent right of every sovereign state, and in the absence of any constitutional provision it is a matter for municipal legislation of each sovereign state."

[34] Mr. Wildman, learned Counsel contended that the learned trial Judge erred when he held that the Respondents were not undesirable persons. In **The King v Inspector of Leman Street Police Station Ex Parte Venicoff** [1920] 3 K.B. 72. The headnote reads:

> "Art. 12 para 1 of the Aliens Order, 1919, which empowers the Secretary of State "if he deems it to be conducive in the public good" to make a deportation order against an alien is not ultra vires. In acting under the article the Secretary of State is not a judicial, but is an executive officer and is therefore not bound to hold an inquiry or give the person against whom he proposes to make a deportation order the opportunity of being heard."

[35] At pages 79 and 80 Earl of Reading C.J. had this to say:

> "But in dealing with a regulation such as that with which we are now concerned the value of the order would be considerable impaired if it could be made only after holding an inquiry……I therefore come to the conclusion that the Home Secretary is not a judicial officer for this purpose, but an executive officer bound to act for the public good, and it is left to his judgment whenever upon the facts before him it is desirable that he should make a deportation order. The responsibility is his." [my emphasis]

[36] **Regina v Governor of Brixton Prison Ex Parte Soblen** [1963] 2 Q.B. 243. At pages 305 and 306 Donovan L.J. said:

> "since that time Parliament on numerous occasions made fresh Orders concerning aliens and their possible deportation without attempting to alter the law laid down in Venicoff's case [supra] and this is a weighty reason why we should not overrule this case now, unless we were quite clear that it had been wrongly decided.
>
> For myself, I do not think it was. The power vested in the Home Secretary to order deportation is a power to do an executive or administrative and not a judicial act."

[37] Mr. Wildman, in my opinion makes the obvious comment in his submission that the Minister in exercising the power given under the Immigration Act is only fettered by the provisions of the Act itself.

[38] Learned Counsel argued that nowhere in the Immigration Act does it state that the Minister should give a hearing to an alien whom he proposes to deport. He argued further that in fact the Act expressly states the opposite, that is, he is not required to give notice of any deportation or reasons for his decision. He referred to Section 19[1] of Act in support of his argument.

[39] Mr. Wildman submitted that under Section 35 of the Immigration Act whenever the Minister makes a deportation Order under section 26 of the Act that decision is not subject to appeal unless it goes only to the question of identity. He submitted that the learned trial Judge erred in law when he held that the Respondents were not undesirable persons. Learned Counsel contended that nowhere in the Act does it give the learned trial Judge the power to make that determination.

[40] In my considered opinion the terms undesirable inhabitant [Section 4[1][f] and [g]] and undesirable person Section 26[1][2][b] are used interchangeably and mean the same thing.

[41] If that is the case and the Minister deems an alien to be an undesirable inhabitant from information received from another government or diplomatic channels, [see Section 4[11][f]] the Minister may in order to maintain good diplomatic relationship with the government or diplomatic channels providing him with the information, wish to keep that information confidential. In this regard the learned trial Judge would not be in a position to know what information the Minister acted upon. I therefore agree with Mr. Wildman's submission that the learned trial Judge cannot and is not in a position to make the determination whether a person is an undesirable person.

[42] Secondly, the authorities to which I have referred clearly show that the Minister when he is making a deportation order he is not even performing a quasi-judicial function but an executive function. If that is so then of course the learned trial Judge cannot interfere with the exercise of that power unless it is shown that he exceeded the power given to him under the Act.

[43] I now turn to the question of legitimate expectation. The Respondents sought to justify the claim of legitimate expectation by relying on **Attorney General of Hong Kong v Ng Yuen Shin** [1983] A.C. 629.

[44] The Appellant who was born in China entered Hong Kong illegally from Macau in 1967. In 1976 he was removed to Macau but re-entered shortly afterwards and remained. By 1980 he was the part-owner of a small factory in Hong Kong. In October 1980 the government announced changes in its immigration policy. It abandoned its "reached base" policy whereby illegal entrants had been allowed to remain once they had reached the urban areas without being arrested and it stated that those who had entered illegally would be repatriated. It gave power to the Director of Immigration to make removal orders against them. The announcement created fears among the illegal entrants living in Hong Kong who had entered from Macau and who were of Chinese origin that they would be repatriated to China. On their petition to the Governor a Senior Immigration Officer made an announcement of the government policy which it was intended should be applied to them. That included the statement that each illegal entrant from Macau would be interviewed and his case "treated on the merits". Having been questioned by an immigration officer, the applicant was detained and the Director of Immigration then made a removal order against him without giving him an opportunity of making any representations as to why he should not be removed. The applicant applied to the High Court for orders of certiorari to quash the removal order and prohibition restraining the director from executing it. The full Bench of the High Court refused the application. On the applicant's appeal the Court of Appeal granted an order of prohibition preventing the director from executing the removal order until he had given the applicant an opportunity to be heard.

[45] On the Attorney General's appeal to the Judicial Committee. Held, dismissing the appeal that where a public authority charged with a duty of making a decision promised to follow a certain procedure before reaching that decision good administration required that it should act by implementing the promise provided the implementation did not conflict with the authority's statutory duty, that accordingly assuming that an alien had no general right to be heard before being deported, the implementation of the promise to interview illegal immigrants and decide such case on the merits required the applicant to be given an opportunity to state his case and the failure to ask him whether he wished to make representations why he should not be removed was a sufficient ground for setting aside

the decision, and that, accordingly, the Court would substitute for the inappropriate order of prohibition an Order of Certiorari to quash the decision.

[46] Lord Fraser of Tullybelton in explaining the term legitimate expectation. First of all considered the word legitimate and then went on to consider expectation. At page 636 he said:

> "…..their Lordships consider that the work "legitimate" in that expression falls to be read as meaning "reasonable". Accordingly, "legitimate expectations" in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some basis."

[47] At page 637 he continued:

> "The expectations may be based upon some statement or undertaking by, or on behalf of the public authority which has the duty of making the decision, if the authority has through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry."

[48] Learned Counsel Mr. Bristol also relied for support on the question of legitimate expectation on the case of **Chief Immigration Officer of the British Virgin Islands v Burnett** [1955] 50 W.I.R 153.

[49] The Respondent who was divorced, had been granted access to the children of the marriage by Order of the Court. The Order prevented the respondent from taking the children out of the jurisdiction. On occasions the respondent was allowed to enter the British Virgin Islands. In November 1993, following contact by phone between the respondent and the Deputy Governor the latter wrote a letter to the respondent stating that the acting Chief Immigration Officer was aware of the respondent's planned visit to the Territory and the Minister of Immigration's position that the respondent's wife should be allowed to enter the Territory, and accordingly on that day they were refused permission to enter. In refusing permission the Chief Immigration Officer was acting under the Immigration and Passport Act Section 23[1][n] [refusal of leave to enter to a person] whose presence in the Territory would in the opinion of the Chief Immigration Officer and the direction of the Minister be undesirable and not conducive to public good. The respondent

challenged the validity of the decision of the Chief Immigration Officer and Georges J granted an Order of Certiorari quashing the decision. On appeal by the Chief Immigration Officer – Held: dismissing the appeal, that by reason of the Order of the Court allowing the respondent access to his children by a former marriage who were living in the Territory and by implication [from the terms of the letter from the Deputy Governor] that he could be able to enter and remain in the Territory, further, he had a legitimate expectation that the audi alteram partem rule would be observed before any decision was taken to refuse him permission to enter and remain, the failure to give the respondent notice of the grounds on which he had been refused permission to enter and to provide him with an opportunity on such grounds before the decision was taken was a breach of the audi alteram partem rule, and a procedural irregularity which nullified the refusal of the respondents' application to enter and remain in the Territory.

[50] Learned Counsel Mr. Wildman argued that these two cases are not relevant to the instant case because these two respondents cannot rely on legitimate expectation. Mr. Wildman contended that the two respondents came to Grenada on visitors' visa which were due to expire on 6th July 1998. Just four days before the expiration of their visitors visas they applied for and received extensions to remain in Grenada as visitors up to 2nd September 1998. During the period of the extension of their visitors visas, they applied for and were granted work permits on 22nd and 29th July 1998.

[51] In an affidavit sworn to by Cyrus Griffith he deposed that the first-named Respondent was issued with a work permit on 22nd July, 1998 and the second-named Respondent was issued with a work permit on 29th July, 1999. Both work permits were for a duration of one year.

[52] The first-named Applicant was issued with a second work permit on 20th November, 1998 to expire on 19th November, 1999. The second-named Appellant was issued with a second work permit on 22nd November, 1998 to expire on 21st November, 1999.

[53] The authorities sought to cancel their work permits which the Respondents resisted strenuously. In the meantime, the first-named Respondent of course realizing her precarious position so far as her stay in Grenada was concerned set up a business which was incorporated on 11th day of June 1999 and quickly had it registered. This was to my way of thinking to tie the Government's hands in granting her whatever demands she would have made in relation to her stay on the island. In other words I interpret her motive as by having a business incorporated on the island the Appellants would not deport her. I am fortified in that view because after the first-named Appellant's work permit was cancelled she continued to work in defiance of the orders that she should not do so because her work permit was cancelled.

[54] The second Respondent like the first-named Respondent requested and obtained an extension of his stay. In spite of his visitors status he obtained employment as a dive instructor. It appears too that during the period of his extension which he applied for and obtained he too acquired interest in the company in which he was employed. This respondent, to my mind, in so doing, had the same design as the first-named Respondent ie. to tie the hands of authorities by having an interest in a company in Grenada, it would be difficult if not impossible for the Appellants to deport him. That was the thinking of the Respondents. I have no doubt in my mind that when one studies the chronology of events as the facts unfurled in this matter that my unmistaken conclusion as to the motive of the Respondents to tie the hands of the Appellants is correct. If that is so then this case is distinguishable from the two cases referred to above.

[55] Mr. Bristol also argued that the Respondents [particularly the second-named Respondent] were by a consent order given to understand that by the consent order they were "entitled to a fair hearing should the Government of Grenada not wish to renew their work permits".

[56] I make the observation that it is difficult for me to perceive or appreciate what would motivate a government department or a Minister of Government or for that matter a lawyer on behalf of a government department to consent to an alien having "a legitimate expectation to have his work permit renewed" and to further consent that that alien "is

entitled to a fair hearing should the Government of Grenada not wish to renew his work permit".

[57] The granting of a work permit or the refusal to grant one is governed by statute. There are certain guiding principles which the Minister must follow in granting or refusing a work. Guiding principles such as the non-availability of local skilled personnel in the class of the applicant or which the applicant can offer. There are other guiding economic factors.

[58] How then one year before the second-named Respondent's work permit is due for renewal can the Minister of Labour say that he has a legitimate expectation that his work permit would be renewed? I entertain no doubt in my mind that the Minister of labour in issuing a work permit is exercising an executive power and not a legal power. Based on the reading of the authorities the Respondent has no right to be heard. In light of that I have great difficulty in understanding why there was a consent order that an alien "Beat Wild is entitled to a fair hearing should the Government of Grenada not wish to renew his work permit".

[59] Mr. Bristol argued that the Respondents had a legitimate expectation that they would not be deported from Grenada by virtue of the consent order.

[60] There were two consent orders. One entered on 14th December 2000 between the first-named Respondent and Fitzroy Bedeau, Godfrey Fleming by that Consent Order "the Chief Immigration Officer do grant to the applicant, Sharon Nettlefield, indefinite leave to remain in Grenada to carry on her business".

[61] The second Consent Order is between the second Respondent Beat Wild on the one hand and the Minister of Labour and the Chief Immigration Officer on the other hand. By the Consent Order the Minister of Labour do forthwith issue to the applicant a work permit for one year commencing the date of this Order.

[62] I make the observations that [1] the Chief Immigration Officer does not have authority to grant anyone an indefinite stay in Grenada [2] A work permit does not secure one's stay in Grenada. Of course granting a work permit for one to perform work in Grenada without the person being resident in Grenada is meaningless.

[63] Learned Counsel, Mr. Wildman, sought to distinguish the cases of **Burnett** and **Ng Yuen Shin** from the instant case. He argued that on an examination of the facts in the instant case, one would see that there is no change of government policy towards the Respondents. They were illegally overstaying their time in Grenada, the Immigration authorities were always taking steps to remove them from Grenada. Mr. Wildman contended that it is within this context that the Respondents surreptitiously obtained work permits from Labour Commissioner with an obvious intention of tying the hands of the Immigration authorities. He also submitted that there is no evidence to show that the Minister charged with the responsibility of making deportation orders, held out any promise to the Respondents on which they sought to rely.

[64] In **Council of Civil Service Unions et al v Minister For The Civil Service** [1985] A.C. 374 at page 408 Lord Diplock said:

> "to qualify as a subject for judicial review the decision must have consequences which affect some person [or body of persons] other than the decision-maker, although it may affect him too. It must affect such other person either;
>
> [a] by altering rights or obligations of that person which are enforceable by or against him in private law; or
>
> [b] by depriving him of some benefit or advantage which either [i] he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or [ii] he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."

[65] The appeal is allowed. The judgment and orders of the learned trial Judge are set aside. Prescribed costs to the Appellants in the Court below fixed at $14,000.00 and $9,333.33 in this Court.

Albert Redhead
Justice of Appeal

I concur

Sir Dennis Byron
Chief Justice

I concur

Ephraim Georges
Justice of Appeal [Ag.]