

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. BVIHCV 2013/0324

**IN THE MATTER OF SECTION 40(1) (B) OF THE IMMIGRATION AND PASSPORT
ORDINANCE CAP 130**

AND

**IN THE MATTER OF ARTICLE 9 AND 19 OF THE CONSTITUTION OF THE VIRGIN
ISLANDS [2007]**

AND

**IN THE MATTER OF STATUTORY INSTRUMENT NO. 72 OF 2013 – DEPORTATION
ORDER DATED THE 1ST NOVEMBER, 2013 AND GAZZETTED ON 7TH NOVEMBER,
2013**

AND

**IN THE MATTER OF AN APPLICATION BY TOVA NAKOTA KING FOR REDRESS
PURSUANT TO ARTICLE 31 OF THE SAID CONSTITUTION, FOR THE LIKELY
CONTRAVENTION OF ARTICLE 9 AND 19 THEREOF, IN RELATION TO HIM**

BETWEEN:

- [1] TOVA KING**
- [2] NATASHA O’NEAL KING**
(as next friend for Nakita Toveisha King and
Tova Nakota King Jr.)
- [3] NAKITA TOVEISHA KING**
- [4] TOVA NAKOTA KING JR.**

Claimants

And

THE ATTORNEY GENERAL

Defendants

Appearances:

Mr. Patrick Thompson for the Claimants

Mrs. Kaidia Edwards-Alister with her Mrs. Sarah Potter for the Defendants

2014: May 20;
July 2

JUDGMENT

- [1] **BYER J.:-** This claim was commenced by way of an Originating Motion filed on the 8th day of November 2013; the motion was re-amended on 28th day of February 2014; and again re-re-Amended on the 15th April 2014.
- [2] The parties relied on the re-re-Amended Motion which sought the following reliefs pursuant to Part 56 of the Civil Procedure Rules (2000):
- (1) An order that Statutory Instrument No. 72 of 2013 dated the 1st of November 2013, is a disproportionate interference with the claimants' fundamental right to private and family life as enshrined in Article 9 and 19 of the Virgin Islands Constitution Order (2007).
 - (2) An order for a *writ of certiorari*, quashing the Governor's decision to proceed with the order for the First Claimant's deportation as set out in his letter of 13th February 2014.
 - (3) A declaration that the First Claimant's deportation is a disproportionate interference with the claimants' fundamental right to private and family life as enshrined in Article 9 and 19 of the Virgin Islands Constitution Order (2007).
 - (4) An order for *certiorari* quashing Statutory Instrument No. 72 of 2013 dated the 1st of November 2013, ordering the first claimant's deportation from the Territory.
 - (5) Damages for the humiliation and distress occasioned by the attempted removal of the First Claimant from the Territory by the servants and/or agents of the Chief Immigration Officer on or about 21st February 2014, and, for the first claimant's unlawful detention at the Virgin Gorda Police Station between 5:00 p.m. and 11:00 p.m. on 21st February 2014.
 - (6) Costs.

[3] Prior to the matter coming on for hearing of the substantive matters under the Originating Motion, an attempt was made by the servants or agents of the Immigration Department to remove the First Claimant on the 21st February 2014. Thus, by order of this court dated the 21st day of February 2014, Her Ladyship Madam Justice Vicki Ann Ellis upon hearing an application for interim injunctive relief, restrained the Chief Immigration Officer, his agents or assigns from removing the first claimant from the Territory of the Virgin Islands pending the full hearing of the said application for injunctive relief. This injunction was extended on the 7th March 2014 until the final hearing and determination of the substantive matter.

[4] The original Originating Motion having been amended, the sole issues for determination for this Court were therefore as identified in the re- re-amended originating motion in relation to which the hearing was held on the 20th day of May 2014.

[5] In an attempt to follow the events that led to the order of His Excellency the Governor sanctioning the deportation of the First Claimant, it is indeed helpful to establish a chronology as follows:

(a) **21st April 2011** - the First Claimant moves to the Territory of the Virgin Islands from the Federation of St. Christopher and Nevis.

(b) **11th June 2011** – The First Claimant pleads guilty to possession of 21 grams of cannabis seeds, contrary to section 7(1) of the Drugs (Prevention of Misuse) Act, Cap 178. He was sentenced to pay a fine of \$500.00, or 3 months imprisonment. The fine was duly paid.

(c) **21st June 2011** - The First Claimant marries the Second Claimant at the Valley, Virgin Gorda. At the time of the marriage, the Second Claimant, the mother of 2 children, Lasean Allen and Michael Woodley became step children of the First Claimant. Subsequently, the Third Claimant is born on the 22nd of January 2012; and, the Fourth Claimant on the 11th of December 2013.

(d) **28th November 2012** – The First Claimant is served with a Notice of Intention to Deport, pursuant to Section 40(1)(b) of the Immigration and Passport Act. This Notice of Intention to Deport appeared to be premised on the First Claimant's conviction for possession of the cannabis seeds as aforesaid.

- (e) **11th December 2012** – by a letter of this date, the First Claimant through his legal practitioners writes to the Governor indicating the reasons why he should not be deported from the Territory. This letter was four days past the limit given by the Governor, and sets out the reasons why the deportation should not proceed.
- (f) **28th October 2013** – the Governor indicates to the First Claimant that he proposes to proceed to make an order for the First Claimant's deportation from the Territory.
- (g) **7th November 2013** – the First Claimant is served with a copy of the Governor's letter of 28th October 2013, and he is deported from the Territory on 7th November 2013 inside the proscribed time frame set for the appeal against the deportation order which resulted in this purported deportation being unlawful.
- (h) **7th November 2013** – The First Claimant by his legal practitioners write to the Governor indicating, that the deportation effected on the 7th November 2013 was unlawful and an intention that an appeal would be lodged against the said deportation order, and, requesting copies of the Police Records referred to by the Governor in his letter of 28th October 2013.
- (i) **8th November 2013** – the First Claimant filed the original Originating Motion.
- (j) **18th November 2013** – the Governor writes to the First Claimant's legal practitioners indicating that permission will be granted to the First Claimant to return to the Territory for the purpose of pursuing his appeal against the order for his deportation. The Governor extended the period for filing the said appeal to 7 days from the date of the First Claimant's return to the Territory which was affected on the 21st November 2013.
- (k) **26th November 2013** – The Originating Motion that was filed on 8th November 2013 came on for hearing. At this hearing before this Court judgment was entered in favour of the First Claimant for damages for his unlawful removal from the Territory. The First Claimant applied to have the damages assessed and the hearing date of the 19th February 2014 is set.
- (l) **December 2013 - February 2014** – there is an exchange of correspondence between the First Claimant's legal practitioners and the Governor. On 7th February 2014, a hearing was convened by the Governor, the First Claimant and his legal practitioner attend the hearing and

representations are made to the Governor to set aside the deportation order.

- (m) **13th February 2014** – the Governor indicates that the deportation order will stand.
- (n) **19th February 2014** – the First Claimant is given leave to file an amended Originating Motion, before the 26th of February 2014, and, the hearing of the Originating Motion is set down for case management on 15th April 2014.
- (o) **21st February 2014** – Officers Stevens and Hillhouse, from the Immigration Department, attend upon the home of the First Claimant in Virgin Gorda and take him into custody. They indicate that the deportation order is to take effect on the Saturday, 22nd February, 2014, and, keep the First Claimant in custody at the Virgin Gorda Police Station for this purpose.
- (p) **21st February 2014** – an urgent application for injunctive relief is filed by the First Claimant’s legal practitioners seeking to restrain the Immigration Department from removing the First Claimant from the Territory, pending the hearing and determination of the filed Originating Motion. Madam Justice Ellis hears the application and orders that the First Claimant is not to be removed until March 7th 2014.
- (q) **7th March 2014** – Madam Justice Ellis orders the continuation of the injunction, restraining the immigration Department from removing the First Claimant from the Territory, pending the hearing and determination of the Originating Motion in this matter. Case management directions are given on March 7th 2014, and the Originating Motion is set down for hearing on 15th April 2014.
- (r) **15th April 2014** – the First Claimant is granted leave to add the Second to Fourth Claimants to the proceedings and the matter is set down for hearing on the 21st May 2014, but brought forward for hearing to the 20th May 2014.

The Claimants’ Submissions

[6] The Claimants in their Skeleton Argument for the hearing of the re- re-amended Originating Motion, filed on the 15th April 2014, bolstered by the oral submissions made by Counsel Mr. Patrick Thompson, sought to structure their arguments around the claims as stated in the aforementioned motion. Thus, the two main issues which encapsulated the prayers as sought which were advanced by the Claimants were: (i) whether the removal of the First Claimant pursuant to the order

of deportation was a disproportionate interference with his and his family's constitutional right to private and family life: and (ii) whether the First Claimant is entitled to damages for his detention at the Virgin Gorda Police Station on 21st February 2014 for 6 ½ hours.

Disproportionate Interference with the Constitutional Right to Private and Family Life

- [7] Counsel for the Claimants in advancing this issue submitted to this Court that he was not purporting to suggest that the Governor of the Territory could not or was not empowered to make a deportation order but that specifically, in making that order in the instant case, it was a disproportionate interference (being excessive) with the constitutional right of the First Claimant to a private and family life.
- [8] Counsel submitted that in assessing whether the action of the Governor was disproportionate, he invited this Court to consider the right being sought to be protected was not abstract but one which engaged the rights of his family - his wife, his children and step children, and therefore the action must be taken in the context of their rights as well.
- [9] Counsel further submitted to this Court that the issue of proportionality must be assessed based on the effect that the order would have on the Claimants as a family unit. Counsel Mr. Thompson submitted that there being no allegation that the familial unit, of which the First Claimant is a part, was not a genuine and subsisting unit meant that in these circumstances it was unconscionable to proceed to sever that unit by issuance of the deportation order.
- [10] Counsel Mr. Thompson strenuously argued that the separation of the Third and Fourth Claimants, the children of the First and Second Claimant from the First Claimant was not warranted in the present circumstances and he sought to impress upon the Court that the interference in that family life resulted in the entire family being disrupted and they all should be regarded as "victims."¹
- [11] Counsel Mr. Thompson asked this Court to perform the necessary balancing act between the right and the basis for the interference with the right. By doing so, he has invited this Court to assess the reason given for the deportation against the impact that the making of the order would have on the family members. Counsel was clear to state that there can be no preservation of those family rights with the First Claimant being required to reside elsewhere.

¹ Bekou-Betts v Secretary of State for the Home Department [2009] AC 115

- [12] Further, Counsel Mr. Thompson submitted to this Court the process by which the deportation order was made by the Governor was flawed for the following reasons: a) the police reports upon which the Governor purportedly relied on to come to the conclusion that the First Claimant was an undesirable individual to remain in the Territory were never presented to the First Claimant and his legal practitioners to enable them to respond to the same; b) that in any event, the nature of the complaints that formed the basis for those reports once presented showed that no criminal charges were ever brought against the First Claimant; c) the offence that led to the issue of the deportation order originally, although was serious in its general nature was in the context of the First Claimant so minimal as was reflected in the fine imposed for the same; d) that there was nothing to suggest that the removal of the First Claimant from the Territory was necessary to prevent crime and disorder in the Territory and that if the proper test had been applied to find whether the First Claimant posed such a threat to society (the test of whether the First Claimant would have caused disorder or engage in criminal activity) the findings would have led to one conclusion - that he was not such a threat.
- [13] Finally, Counsel Mr. Thompson submitted that the Claimants have satisfied all the criteria that were identified by the Court in the authorities that he relied on against the making of a deportation order and that the disadvantages far outweighed the necessity of making the order, and as such, the Court should make the orders prayed for in the claim.

Damages for Detention

- [14] Under the issue of damages, the First Claimant made a claim for damages for the humiliation and distress suffered to him and his family by the attempted removal from the Territory on the 21st February 2014, and the time spent on detention.
- [15] Counsel Mr. Thompson asks this Court, once it finds that the deportation order was not properly made or should not have been made, that the First Claimant is entitled to damages for the unlawfulness of the actions taken pursuant to that order.
- [16] The First Claimant has therefore invited this Court to approach the assessment of the same along the lines of that adopted in the case of ***Thompson & Hsu v Commissioner of Police of the Metropolis***² and award the First Claimant the sum of \$3,900.00.

² [1998] 1QB 498

The Respondent's Submissions

- [17] The Respondent's summary of the facts did not dispute the Claimant's version; however, on the Respondent's behalf slightly different issues were raised. The Respondent saw the issues for the Court as being the following: (i) whether Section 40(1) of the Immigration and Passport Ordinance Cap 130 (the Act) violates the Applicant's rights under Articles 9 and 19 of the Virgin Islands Constitution order; and (ii) whether it was proportionate to deport the Applicant.
- [18] Despite being framed in slightly different ways, this Court is of the view that the parties raised the same issues for the Court although the approach differed. Thus, the Respondent in making their address to the Court sought to rely on certain questions which they said the Court had to ask itself in coming to a decision in relation to the actions of His Excellency.
- [19] These questions were as follows:
1. Will the proposed removal be an interference that suggests that the right to private and family life would be possibly contravened?
 2. If there is such interference is it in keeping with the law?
 3. Is such interference necessary in the interests of national security, public safety and other such considerations;
 4. If so, is that interference proportionate to the legitimate public end sought to be achieved.
- [20] The Respondent submitted to this Court that they accepted that the Claimant like any other member of this Territory is entitled to the fundamental rights and freedoms in respect to private and family life as enshrined in the Constitution. They however make it clear that these rights are not absolute and can be interfered with where it can be so justified.
- [21] The Respondents defended the action of His Excellency in making the deportation order on the basis that the conviction of the First Claimant for the offence of possession of Cannabis seeds brought him within the very clear tenets of Section 40 of the Act which taken together with the "undesirable behaviour" of the First Claimant meant that he fell within the exception to the protection of the right to a private and family life and that interference was in all ways in the interests of public safety.

- [22] The Respondent also sought to argue that the First Claimant in fact had no settled family life in that he was not employed nor was he or his wife in the process of building a home. It was a short marriage with young children who could easily and rightfully migrate with him. As such, there was therefore no unjustified interference in his rights.
- [23] The Respondent also sought to submit to this Court that the gravity of a deportation order and whether its consequences resulted in the deprivation of some rights of the individual had to be balanced against the rights of a state to expel undesirable aliens.
- [24] Counsel for the Respondent, Ms. Sarah Potter and Mrs. Kaidia Edwards-Alister sought to impress upon the Court that the right of the state to expel undesirable aliens is part and parcel of the State's entitlement to protect its borders and to ensure that they retain as part of their ultimate sovereignty the decision making process as to who can and cannot remain within its domain.
- [25] The Respondent argued that this must be necessary in order for a State to protect itself and that even if it was an interference with those fundamental rights, that it can only be seen as being a necessary evil.
- [26] In assessing the criteria for deportation the Respondent made it clear that they considered that the Claimants and the First Claimant in particular had fulfilled the criteria in favour of his deportation. They submit that: (i) the seriousness of the offence of which he was convicted; (ii) the police reports made against him since the conviction although no charges were brought; (iii) that he had only been in the Territory for three (3) years; (iv) that he is Kittian and that his wife and children could also obtain that citizenship; (v) that although he is married with children that he has no other family life; (vi) that the birth of the second child was after he was already convicted; (vii) that the children are young and could therefore adapt to the new environment of St Kitts; (viii), and that the legal entitlement of the Second Claimant to her property in Virgin Gorda would not be affected as any migration would not interfere with those rights, all amounted to factors which allowed the order to be made.
- [27] In assessing these factors, the Respondent submitted therefore that the act of deportation could not be seen as a disproportionate exercise of His Excellency's discretion.
- [28] The Respondent also argued that the interference has been in keeping with the Act and Section 40 thereof with the requisite safeguards to allow for the affected

person a right to be heard, and he being in fact heard, meant that His Excellency was entitled to make a determination to issue the deportation order as he did.

[29] The Respondent further submitted to this Court that in an attempt to protect the safety and well being of society at large it was necessary to wield this power to ensure that public order is maintained.

[30] In order to do, so they submit that unfortunately at times the rights of individuals may be compromised, but in that compromise, once it is done in keeping with the law that allows such action, then it cannot be argued that it is disproportionate.

[31] In their words, "**as a non citizen under immigration control the most reasonable way to accomplish the goal of prevention of crime and further disorderly conduct is to deport the Applicant.**"³

[32] Thus, they submit that the interference in the rights of the Claimant was proportionate and should stand.

[33] In relation to the issue of damages on the basis that there was a valid deportation order, the Respondent submitted that the Claimant would not be entitled to damages.

Court's Analysis and Finding

[34] I do not think that it is in any doubt that this Court is entitled to review the decision made by the Governor of this Territory in issuing the Deportation order by way of Virgin Islands Statutory Instrument 72 of 2013 dated 1st November 2013, made pursuant to Section 40(1) (b) and (c) of the Immigration and Passport Ordinance Cap. 130 (the Act).

[35] The question for this Court however, must be the nature of the review and what is required by this court in making that assessment.

[36] In the case of ***R (on the application of Razgar) v The Secretary of State for Home Department***⁴ the House of Lords recognized that this role must be supervisory and done with careful scrutiny given the nature of the complaint. It had this to say at paragraph 16 therein, "**...on an application for judicial review of the Secretary of State's decision (herein the Governor's decision) to**

³ Paragraph 47 of the Respondent's submissions filed 13 May 2014

⁴ [2004]UKHL 27

certify the court is exercising a supervisory jurisdiction, although one involving such careful scrutiny as is called for where an irrevocable step, potentially involving a breach of fundamental human rights, is in contemplation.

[37] Thus by paragraph 17 of ***R (on the Application of Razgar)***⁵ case, certain questions were posed that had to be borne in mind by the reviewing Court in matters of this nature and which I am also prepared to accept wholesale to the matter at hand with them in mind:

1. ***“Will the proposed removal be an interference by a public authority with the exercise of the applicant’s right to respect for his private or (as the case may be) family life?”***
2. ***If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?”***
3. ***If so, is such interference in accordance with the law?”***
4. ***If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others?”***
5. ***If so, is such interference proportionate to the legitimate public end sought to be achieved?”***

[38] The Court notes that the reference to Article 8 of the European Convention on Human Rights is in very similar terms to Section 19 of the Constitution of the Virgin Islands upon which, together with Section 9, have been relied upon by the Claimants.

[39] I set out in their entirety Sections 9 and 19 of the Constitution as follows:-

“9. Whereas every person in the Virgin Islands is entitled to the fundamental rights and freedoms of the individual;

Whereas those fundamental rights and freedoms are enjoyed without distinction of any kind, such as sex, race, color, language, religion, political or other opinion, national, ethnic or social origin, association with a national minority, property, family relations,

⁵ Op cit

economic status, disability, age, birth, sexual orientation, marital or other status, subject only to prescribed limitations;

Whereas it is recognized that those fundamental rights and freedoms apply, subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:-

- (a) Life, equality, liberty, security of the person and the protection of the law;*
- (b) Freedom of conscience, expression, movement, assembly and association; and*
- (c) Protection for private and family life, the privacy of the home and other property and from deprivation of property save in the public interest and on payment of fair compensation;*

Now, therefore, it is declared that the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, and to related rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the protected rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

Protection of private and family life and privacy of home and other property

- 19.- (1) Every person has the right to respect for his or her private and family life, his or her home and his or her correspondence, including business and professional communications.**
- (2) Except with his or her own consent, no person shall be subjected to the search of his or her person or property or the entry by others on his or her premises.**
- (3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society-**
- a) in the interests of defence, public safety, public order, public morality, public health, town and**

country planning, the development of mineral resources, of the development of utilisation of any other property in such manner as to promote the public benefit;

b) for the purpose of protecting the rights and freedoms of other persons;

c) to enable an officer or agent of the Government of the Virgin Islands, a local government authority or a body corporate established by law for public purposes to enter on the premises of any person in order to inspect those premises or anything on them for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government of the Virgin Islands or that authority or body corporate, as the case may be;

d) to authorise, for the purpose of enforcing the judgment or order of a court in any proceedings, the search of any person or property by order of a court or the entry upon any premises by such order; or

e) for the prevention or detection of offences against the criminal law or the customs law.”

[40] As can be seen, Section 9 enshrines the rights and freedoms of individuals of this Territory while Section 19 speaks specifically to the enshrined right of private and family life.

[41] It is therefore pellucid that the Constitution of the Virgin Islands (the Constitution) protects those rights to private life and family life, but it is also very clear and generally accepted that they are not absolute rights and as stated in Section 9 are subject to such limitations as are necessary to not prejudice the rights and freedoms of others or the public interest.

[42] It is therefore very clear that only if an action can be sanctioned as being within the public interest will it be considered a legitimate interference with those fundamental rights and freedoms.

[43] I do not think therefore, on the words contained in the Constitution itself, that it can be disputed by the Respondent that the Claimants in this case are entitled to such

rights and freedoms. This Court is now therefore charged with reviewing whether the Act of His Excellency interfered with those rights and freedoms and if it did, whether it was justified in the public interest.

[44] In addressing my mind to this fundamental issue, the questions itemized by the **R (on the application of Razgar) case**⁶ are indeed instrumental and I propose to adopt and adapt those questions to undertake this exercise.

Will the proposed removal be an interference by a public authority with the applicant's right of respect for the private or family life?

[45] I do not think that it can be questioned that the Claimants have established a family life.

[46] The First and Second Claimants are married and have added to their family unit with the birth of the Third and Fourth named Claimants.

[47] It is indeed therefore an odd submission to hear Counsel for the Respondent state to this Court and repeat it several times that these persons do not represent family life as would be protected by the Constitution. This Court is struck by the incongruity of this assertion, where there is no committant submission as to what more could be required to establish a family life.

[48] Neither is this Court aware of any other act on the part of the Claimants that could have been undertaken to amount to be considered a family life. In that regard, this Court completely rejects this submission on the part of the Respondent. The unit that has been created by the Claimants must be and without more be considered as having established a family life.

[49] Having so established that, without more, this Court is also of the opinion that the proposed removal of the First Claimant would therefore effectively break up this established family unit. There would therefore be, without the requirement to prove more at this stage, an interference with the Claimant's right to private and family life. Having so determined, the Court must now move onto the next question.

If so, will such interference have consequences of such gravity as to potentially engage the operation of Article 8 or Article 19 of the Constitution?

⁶ Op cit

[50] Article 8 of the European Convention on Human Rights states as follows:-

“Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country for the prevention of disorder or crime for the protection of health or morals or for the protection of the rights and freedoms of others”

[51] In large measure, Article 8 of the European Convention on Human Rights (Article 8) speaks to the same fundamental rights and freedoms of the individual encapsulated in Section 19 of the Constitution.

[52] Thus, when this Court looks at the end result the removal of the First Claimant would have on the Claimants, it is clear it would amount to an interference of the rights to private and family life. It would effectively not remove a nonessential member of the family unit, but the *de facto* and in some minds the *de jure* head of the unit itself, the husband and father.

[53] It is therefore clear in this Court’s mind that such interference would engage the rights protected by the Constitution. Those rights being engaged it is for the person who has sought to interfere with the right to justify the same.

[54] Thus for the Court, the next question that must be addressed to the decision maker is:

Is such interference in accordance with law?

[55] By Section 40 of the Immigration and Passport Act Cap 130 of the British Virgin Islands (the Act) provision is made for the deportation of persons from the Territory.

[56] Section 40 states as follows:

“(1) Subject to the provisions of sections 41 to 44 inclusive, if at any time after a person, other than a person deemed to belong to the Territory, has landed in the Territory, it shall come to the knowledge of the Governor that such person: –

- (a) has landed or remained in the Territory contrary to any provisions of this Ordinance;**
- (b) has been convicted of any offence against this ordinance, or of any other offence within the Territory punishable with imprisonment for three months or more;**
- (c) is a person whose presence in the Territory would in the opinion of the Governor, acting after consultation with the Chief Immigration Officer, be undesirable and not conducive to the public good;**

the Governor may make an order (hereinafter referred to as the "deportation order)" requiring such person to leave the Territory within the time fixed by the deportation order and thereafter to remain out the Territory.

- (2) In the exercise of the powers conferred upon him by subsection (1), the Governor may act in his discretion in any matter where he deems it necessary to do so.**
- (3) Where a deportation order is made in respect of a person who immediately before the making thereof was lawfully within the Territory under this Ordinance, a copy of the order shall be served upon him by an immigration officer or by any police officer and he shall be entitled within the period of seven days next following the date of such service to appeal in writing to the Governor against the making of the order." (my emphasis added)**

[57] It is therefore clear and it is common ground as between the parties that the interference by deportation is provided by the law.

[58] Once the person against whom the deportation order has been issued fulfills one or more of the criteria in Section 40 (1) then it is not disputed that the order can be made. It is however a discretionary act on the part of the Governor who has the lawful authority.

[59] This ability to act must be seen as part and parcel of the State's ability to protect their sovereignty and regulate persons who may or may not remain within their borders.

[60] This having answered that the interference is provided for by the legislative framework, the next question must therefore be whether the same was in fact necessary.

Was it reasonably justifiable in a democratic society in the interests of public order and prevention of crime?

[61] The action of the decision maker must be looked at as to whether the same is “***reasonably justifiable***” in a democratic society. Thus, the decision must be assessed as to whether it was in the interests of defence, public safety, public order or for the prevention or detection of crime. In order to so answer, the basis for the decision must therefore be examined.

[62] By letter dated the 28th November 2012, the First Claimant was notified that he could be deported due to his conviction on the 11th day of June 2011 for possession of cannabis contrary to Section 7 of Drug (Prevention of Misuse) Ordinance Cap. 178 upon which he was fined the sum of \$500.00 in default of which payment he would have had to spend three (3) months in prison.

[63] It is clear from the decision of His Excellency that he considered as a result of this conviction the First Claimant had met the criteria for deportation pursuant to Section 40 of the Act.

[64] His Excellency in making his decision after consideration of the appeal by the First Claimant made it clear in his letter of the 13th February 2014 that he had found the First Claimant remaining in the Territory was contrary to the public good and that upon the basis of the conviction and his “pattern of undesirable behavior” that the First Claimant was a proper candidate for deportation.

[65] His Excellency found that the marriage was of short duration and the fact that he was unemployed with the inference of being an unproductive member of this Territory’s society made him “deportable”.

[66] There is no argument as I noted earlier, that His Excellency had the power under statute to make the order and he did so well within the scope of the law having found as he did that the criteria of Section 40 was satisfied. However, the concomitant question following immediately upon the heels of that finding must be whether the order in any event should have been made.

⁷ Section 19 of the Constitution

[67] Thus, the next question must be as an amalgamation of questions 4 and 5 of the **R (on the application of Razgar) case:**⁸

Is such interference necessary in a democratic society in the interests of national security, public safety, or the economic wellbeing of the country for the prevention of disorder or crime for the protection of health or morals or for the protection of the rights and freedoms of others and if so, is such interference proportionate?

[68] In the words of Lord Justice Tyson in the case of **Allan Samaroo v The Secretary of State for the Home Department**⁹, the issue that must be at the forefront of the reviewing Court's mind is that ***"given that this is a legitimate aim (the prevention of crime etc) how should the decision maker decide whether deportation in a particular case is justified knowing that it will involve interference with an Article 8 (1) right? It is common ground that what is required is a proportionate response."*** (my emphasis added)

[69] It is therefore required by the decision maker to undertake a balancing exercise before it can be considered whether the action although legal in every sense of the word was **in fact** necessary.

[70] The circumstances leading to the deportation order in the **Samaroo case**¹⁰ were somewhat similar to those in the case at bar. Samaroo like the First Claimant was slated after conviction of a drug offence for deportation. In the **Samaroo case** however, the facts of the case that led to conviction were quite divergent.

[71] Sarmaroo, who has a Guyanese National, arrived in the United Kingdom in June 1988. In September 1988, he married a British Citizen who had children of her own previous to the relationship with Samaroo, who also owned her own home and worked. In 1990, Samaroo was given indefinite leave to remain in the United Kingdom and in 1991 a child was born to the union. In 1994, Samaroo was convicted of being knowingly concerned with the importation of 4kgs of cocaine worth £450,000.00 and sentenced to 13 years imprisonment.

[72] Unlike the present case, Samaroo was in fact incarcerated and the offence for which he was charged had the value of almost half a million pounds sterling and at sentence, he was characterized as "the London end of the smuggling entity."

⁸ Op cit

⁹ [2011] EWCA Civ 1139 at paragraph 13

¹⁰ Op Cit.

- [73] Mr. Samaroo sought to question the deportation order on the basis of it being an interference of his right to a family life; and further, that the effect of the order would have been to return him to Guyana, a place he had not resided since 1983, some 18 years previous to the application. The Court in coming to its decision which did not favour Mr. Samaroo's appeal, however made it clear what was required of the decision maker when they were undertaking the balancing exercise.
- [74] The Court in Samaroo, citing R (Daly) v Secretary of State for the Home Department¹¹ said that the decision to enforce the legitimate aims of protecting society must be assessed as to whether the interference was "**to an extent much greater than necessity requires.**"
- [75] In the instant case, the First Claimant was convicted of a crime that in all fora would be considered serious. His punishment however matched the seriousness of his individual act. A small fine with a default provision for a brief period of imprisonment, which never occurred as the fine was paid in total.
- [76] There was no evidence that there was any resistance to the punishment as meted out and there was no evidence that his payment was not forthcoming. What there is evidence of is that since that 2011 incident, the First Claimant has had no other charge of any nature laid against him.
- [77] However, what His Excellency seemed to rely on to substantiate the characterization of this Claimant as "undesirable" were reports, not charges made to the police on Virgin Gorda which all seemed when analyzed, to surround an ongoing family dispute between the Second Claimant and her family into which the First Claimant is now a party. This Court is of the considered opinion that these could not have amounted to make this First claimant an "undesirable alien".
- [78] Thus, it is this Court's considered opinion that His Excellency's decision must be assessed as to whether "**the aim relied on [was] the maintenance of effective immigration control**".¹²
- [79] However, as Richards LJ in UE (Nigeria)¹³ case stated of this aim it, "**... goes into the balance as weighing in favour of removal. On the other side of the**

¹¹ [2001] 2 WLR 1622 at page 1633G

¹² UE (Nigeria) and ors v Secretary of State for the Home Department [2010] EWCA Civ 975 at para 39 per Richards LJ

¹³ Op Cit

balance weighing against removal is the individual's right to respect for private life."

[80] He went on to say at paragraph 40:

"Factors are relevant to the assessment of proportionality under Article 8 in such a case only in so far as they impact either on the weight to be given to the maintenance of effective immigration control or on the weight to be given to the individual's private life. It is not a question of dropping in the scales all aspects of the public interest for or against removal or anything that might be relevant to the exercise of discretion under the statute or Immigration Rules. It is a more specific and targeted exercise."¹⁴

[81] It being a specific targeted exercise ***"...it calls for a careful assessment of the factors at play in the individual case both those favouring the interests of the appellant and any others who rights may be affected and those favouring the interests of the public."***¹⁵

[82] The situation of the individual under threat of deportation ***must*** be considered and a fair balance struck. In ***Sporring v Sweden***¹⁶ the Court said of the European Convention on Human Rights which is just as applicable to the Constitution, ***"...the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights ...the search for this balance is inherent in the whole of the convention..."*** and dare I say the Constitution.

[83] The test therefore that must be applied is proportionality.

[84] Can it be said that the action of deporting the individual in question to protect the public order is proportionate and justifiable in the breaking up of the family unit. Thus not only must we look at the impact on the individual but as in the case of ***Beoku - Betts (FC) v Secretary of State for the Home Department***¹⁷ the individual's spouse and children must be considered. In so doing, the question whether it is reasonable to expect the spouse to also relocate must be an

¹⁴ Op Cit

¹⁵ AS(Pakistan) v Secretary of State for the Home Department [2008] EWCA Civ 1118 at para 24

¹⁶ [1982] 5EHRR 35 at paragraph 69

¹⁷ [2008] UKHL 39

important consideration during that balancing exercise to determine proportionality.¹⁸

- [85] This Court must therefore review whether the Governor “**has struck the balance fairly between the conflicting interests of [the Claimant’s] right to respect for his family life on the one hand and the prevention of crime and disorder on the other.**”¹⁹
- [86] In this case, the evidence of the Second Claimant whose rights have also been engaged is that she is a citizen of the Territory; she has had her entire life here and not only does she have two (2) young children with the First Claimant, she also has two (2) older children, one 19 and one 13, who together with the First Claimant is their primary caretaker. The 19 year old suffers from encephalitis and suffers seizures which require constant monitoring and medication which together with the First Claimant she is tasked with providing.
- [87] Taken together with the nature of the unsubstantiated reports that were made against the First Claimant subsequent to his one conviction in 2011, this Court is of the considered view that there was insufficient consideration given to these factors in the balancing exercise undertaken by His Excellency. Instead, it appears that the legitimate aims of statehood were given preeminence without a proper assessment of the same as against all the relevant considerations. This Court is therefore of the opinion that no proper or in fact no consideration was given to the personal interests of the First Claimant and the Claimants as required, in order to satisfy the test of proportionality.
- [88] This Court is therefore hard pressed to find that the deportation of the First Claimant was warranted in these circumstances.
- [89] This does not however, by any stretch of the imagination, mean there can never be times when the aim of protecting the society from undesirables would not be warranted. It simply means that in this case, the act of deporting the First Claimant in the present circumstances was disproportionate.
- [90] This Court has not found any evidence of the First Claimant being a career criminal or of him embarking on a life of crime to warrant his being sent from these shores.

¹⁸ AF(Jamaica) v Secretary of State for the Home Department [2009] EWCA Civ 240

¹⁹ Samaroo case op cit para 35

- [91] I am therefore of the opinion that in making the deportation order, insufficient consideration was given to the effect the order would have had on the infringement of the rights to private and family life conferred upon the Claimants by the Constitution. When there is an intention to so infringe those rights, there must be sufficient justification for so doing. The Claimants were “***entitled to something better than the cavalier treatment [they] received.***”²⁰
- [92] This Court is not convinced that the justifications given by His Excellency in the letter of the 13th February 2014 upon hearing the appeal were sufficient to show that the discretion to issue the deportation order in these present circumstances was properly exercised.
- [93] A family should only be broken up in exceptional cases. As stated by the House of Lords in the case of ***Huang v Secretary of State for the Home Department***²¹ “***...human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives.***”
- [94] Thus, this court is of the opinion that in order for a balanced and true picture to emerge which warrants interference of these rights enshrined in the Constitution, a less mechanistic or narrow view must be taken of all the circumstances. His Excellency having failed to do so, I set aside the deportation order dated 1st November 2013.

Damages and Costs

- [95] Having found the deportation order should be set aside, I am prepared to order payment of damages to the Claimants in the sum as submitted of \$3,900.00.
- [96] I have found there were no circumstances which aggravated the normal procedure of taking the First Claimant into custody upon the service of an order for deportation and accordingly do not order any further sum in damages.
- [97] I further find that the Claimants having been entitled to bring the action are entitled to their costs.

²⁰ AB (Jamaica) v Secretary of State for the Home Department [2008] HRLR 465 per Sedley LJ

²¹ [2007] 2 AC 167 at 186

[98] I therefore order that costs are to be assessed if not agreed between the parties within 21 days of this order.

[99] This Court will encourage both sides in that regard to be reasonable and sensible.

[100] The order of the court is therefore as follows:

1. It is declared that the First Claimant's deportation pursuant to Statutory Instrument 72/2013 dated the 1st November 2013 is a disproportionate interference with the Claimants fundamental right to a private and family life as enshrined in Article 9 and 19 of the Virgin Islands Constitution Order 2007.
2. That the Statutory Instrument No. 72 of 2013 dated 1st November 2013 is quashed and declared null and void.
3. That the Governor's decision to proceed with the order of the First Claimant's deportation as set out in letter 13th February 2014 is quashed, having failed to act proportionally in all the circumstances.
4. Damages to the First Claimant for his detention at the Virgin Gorda Police Station on the 21st February 2014 in the sum of \$3,900.00.
5. Cost to the Claimants to be assessed of not agreed within 21 days of this order.

Nicola Byer
High Court Judge