EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. BVIHCV208 of 2014

IN THE MATTER OF SECTION 40(1) (A) AND (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, ORDER 2007

AND

IN THE MATTER OF STATUTORY INSTRUMENT NO. 36 OF 2014 – DEPORTATION ORDER DATED THE 5TH DAY OF JUNE, 2014 AND GAZETTED ON JUNE 13TH, 2014

AND

IN THE MATTER OF AN APPLICATION BY MARK ANTONIO DEFREITAS FOR REDRESS PURSUANT TO ARTICLE 31 OF THE SAID CONSTITUTION, FOR THE LIKELY CONTRAVENTION OF ARTICLE 9, 19 AND 20 THEREOF, IN RELATION TO HIM

BETWEEN:

MARK DEFREITAS

Claimant

And

THE ATTORNEY GENERAL

Defendant

Appearances:

Mr. Patrick Thompson for the Claimant
Mrs. Joann William-Robert and Ms. Sarah Potter for the Defendant

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2015: May 19th

JUDGMENT

[1] **ELLIS, J.:** The facts out of which this Motion arises are not in dispute and are shortly summarised below:

a) On or about 3rd day July 1999, the Claimant caused the death of Darrel Jacobs of Diamond Village, St. Vincent. On 20th day July 2000, the Claimant was convicted of the offence of murder. The Claimant appealed against his conviction and on September 17th, the Claimant's appeal was allowed and his conviction for murder was substituted for one of manslaughter. He was sentenced to serve a 10 year term of imprisonment and was subsequently released from prison in St. Vincent on March 19th, 2007.

b) By Deed Poll dated November 22nd, 2007 the Appellant changed his name from Mark Peters to Mark DeFreitas. Thereafter a passport was issued to the Claimant in the name of Mark Antonio DeFreitas on December 5th, 2007. On page 2 of that passport there is an endorsement confirming that the bearer's name had been changed from Mark Cousel Peters to Mark Antonio DeFreitas.

c) By letter dated 7th February 2008 to Harold and Harriett Anderson (Claimant's proposed employers in the Territory), the Claimant was informed that he had been granted a work permit to work as a joiner for a period of one year. On 15th March 2008, the Claimant entered the Territory of the Virgin Islands to take up employment. Upon entry, the Claimant completed an Application for an Entry for Immigration purposes. On both applications the Claimant stated that his name was previously **"Mark Cousel Peters."** Following this initial permit, the Claimant's entry and work permit were renewed yearly.

d) In or about 20th January 2014, the Claimant was interviewed by the Immigration Department about his immigration status in the Territory. On or about 25th January 2014, the Claimant was asked to surrender his passport to the Immigration Department by 3rd February, 2014 and leave the Territory by 13th February, 2014.

e) By a letter dated 11th February 2014, the Claimant's legal practitioners wrote to the Immigration Department requesting the basis for their decision to have the Claimant removed from the Territory.

f) The Chief Immigration Officer made a request for deportation on 7th March, 2014. The basis of the request was expressed as follows: *"subject was convicted in a court in a foreign jurisdiction for the following" Manslaughter. Pursuant to section 40.1 of the Immigration and Passport Ordinance Cap 130 ("the Act") of the revised edition 1991 of the laws of the Virgin Islands, it is my opinion that Mark Defreitas is an undesirable immigrant and his presence in the Territory is not conducive to the public good."*

g) On 3rd April 2014, the then Governor, His Excellency Boyd McCleary, notified the Claimant in writing that he intended to make an order of deportation against him following the receipt of information that he had been convicted by a court of competent jurisdiction in St. Vincent of the offence of manslaughter, sentenced to 10 years imprisonment and as such he was not eligible to legally land in the Territory. The Claimant was informed that he was required to show cause on or before 9th April 2014 why the Governor should not exercise his discretion under section 40 of the Immigration and Passport Ordinance to make the deportation order against him.

h) On 8th April 2014, the Claimant's attorneys, Maximea & Co. wrote to the Governor seeking an extension of time of seven days to make submissions. This request was approved by the Governor by letter dated 10th April, 2014.

i) On 14th April 2014, Maximea & Co. wrote to the Governor setting out the reasons why the Claimant should not be deported, which included:

    i. His engagement to Ms. Perlin Dawson, who is a Belonger;

    ii. His name was changed at the request from his grandmother;

    iii. His passport which was submitted with both Labour and Immigration Department on several occasions stated that his name was changed;

    iv. He has not contravened any provisions of the Act;

    v. He has never been convicted of any offence while in the Territory.

j) On 3rd June 2014, the Governor wrote to Maximea & Co. stating that he had weighed the grounds cited and had considered whether the Claimant remaining in the Territory would be conducive to the public good. He concluded that the Claimant should be deported. As a result by Statutory Instrument No. 36 of 2014 dated 5th June 2014, a deportation order for the Claimant was issued and served on the Claimant on 17th June, 2014.

k) Thereafter then Acting Chief Immigration Officer, Mr. Guy Hill, cancelled the Claimant's entry permit in accordance with section 32(1)(e) of the Ordinance.

l) Two (2) days after being served with the deportation order, on 19th June, 2014, the Claimant and Ms. Pearlin Dawson completed a marriage license application which was denied on the basis that the Claimant did not have a valid entry permit and therefore no legal status in the Territory.

m) In a letter dated 23rd June 2014, McW Todman & Co. (the new legal representative of the Claimant), responded that:

i. There was no basis for the assertion that the Claimant wilfully deceived immigration authorities;

ii. The Governor did not give sufficient weight to the fact the claimant has been residing in the Territory for the past 7 years;

iii. The Claimant has applied for a pardon for his manslaughter conviction and he is awaiting the ruling;

iv. The Claimant intends to marry his fiancé shortly;

v. The Claimant's employment permits him to provide for his children and

vi. The Claimant and his fiancé have significant business interest in the Territory.

n) By letter dated 24th July 2014, the Governor informed McW Todman & Co. that he does not agree that the deportation order would breach the Claimant's constitutional right to private and family life and asked that the issues raised be substantiated by 29th July 2014.

o) The Claimant provided no response to this letter. Instead, by originating motion filed on 25th July 2014, the Claimant seeks the following relief:

i. A declaration that statutory instrument No. 36 of 2014 dated 5th June 2014 is a disproportionate interference with the Claimant's fundamental right to private and family life and right to marry and found a family as enshrined in Article 9, 19 and 20 of the Constitution.

ii. A declaration that the Claimant's deportation is a disproportionate interference with the Claimant's fundamental right to private and family life and right to marry and found a family as enshrined in Article 9. 19 and 20 if the Constitution.

iii. An order for certiorari quashing statutory instrument No 36 of 2014 dated 5th June 2014 ordering the Claimant's deportation from the Territory.

iv. An order prohibiting the Chief Immigration Officer, his servants and or agents from removing the Claimant from the Territory pursuant to the said statutory

instrument No. 36 of 2014 pending the hearing and determination of the Claimant's constitutional motion.

v. Costs.

COURT'S ANALYSIS AND CONCLUSIONS

[2] Counsel in the matter have identified two main issues arising out of the Originating Motion (1) Is the Claimant's deportation a disproportionate interference with the Claimant's fundamental right to private and family life? and (2) Is the Claimant's deportation a disproportionate interference with the Claimant's fundamental right to marry and found a family?

[3] Each issue has been separately considered by the Court and in doing so the Court took into account the following affidavit evidence filed in compliance with the Court's orders.

1. Affidavit of Mark De Freitas filed on 25th July 2014.
2. Affidavit of Guy Hill filed on 12th November 2014.
3. Affidavit of His Excellency the Governor, John S. Duncan filed on 18th November 2014.
4. Affidavit of Janice Rhymer filed on 17th November 2014.
5. Affidavit of Natalie S Smith filed on 17th November 2014.

Is the Claimant's deportation a disproportionate interference with the Claimant's fundamental right to private and family life?

[4] In his address to the Court, Counsel for the Claimant made it clear that this Court was obliged to first consider whether the Claimant can be classified as an illegal immigrant for the purposes of the **Immigration and Passport Ordinance Cap 130** (**as amended) (the Ordinance)**. Counsel conceded that in the event that the Court finds that the Claimant is in fact an illegal immigrant, then certain inescapable consequences would follow.

[5] This Court agrees that any discourse on this first issue must commence with that precursor.

Is the Claimant an illegal immigrant?

[6] Counsel submitted that it was clear that the deportation order was premised on the fact that the Claimant wilfully deceived the immigration authorities, but he disputed that there was any wilful deceit or misrepresentation on the part of the Claimant. First, Counsel submitted that there is no evidence that the Claimant wilfully changed his name for the purpose of entering the Territory. In his view, the fact that the Claimant changed his name in November 2007 and sought to enter the Territory in early 2008 could not suffice to pass the high threshold for advancing an allegation of fraud. Counsel

pointed to paragraphs 7 and 8 of the Claimant's affidavit in which he explained the rationale for the name change and he submitted that the fact that this explanation was not communicated to the Immigration authorities when the Claimant was initially interviewed could not *without more* lead to an inference of fraud.

[7] Counsel submitted that the Claimant was in no way deceitful when he entered the Territory. He argued that there was no burden on the Claimant to disclose that Mark Peters had a previous conviction and so no deception or fraud was perpetrated on the immigration authorities by the non-disclosure of that fact. Instead, Counsel pointed the Court to the evidence of the Chief Immigration Officer[1] which he said, demonstrated a cursory or defective screening process conducted by the relevant immigration officer. He submitted that the Claimant should not be held liable for the failure of the immigration authorities to properly screen the Claimant who has never denied or hidden the fact that he was formerly known as Mark Peters.

[8] Further, while he accepted that lies told on entry may form the basis of deportation on the ground that an immigrant's presence in the Territory is not conducive to the public good, Counsel submitted that there is no evidence that the Claimant told any lies on entry. He therefore concluded that the Claimant is not an illegal immigrant under section 40 1(a) or (c) of the Ordinance.

[9] In advancing these arguments, Counsel for the Claimant argued strenuously the Defendant's purported reliance on the authority of **Zamir v Secretary of State for the Home Department**[2] is wholly misconceived as the reasoning in that case has been expressly disapproved in later decisions from the House of Lords. Counsel commended instead the reasoning of the House of Lords in **Khawaja v Secretary of State for the Home Department** [3] and **R v Immigration Appeal Tribunal ex parte Patel.**[4]

[10] Counsel referred the Court to the following relevant excerpt of Lord Bridge's judgement in **Khawaja.**

> "It remains to consider some of the implications of the principle stated in the foregoing paragraph. First, it is clear that a mere non-disclosure to the immigration officer by the person seeking permission to enter of a fact known to him cannot, by itself, amount to a contravention of section 26 (1) (c). In so far as the passage in the speech of my noble and learned friend Lord Wilberforce in Zamir's case at p. 950 may be understood as imposing on an applicant for leave to enter a duty of candour approximating to uberrima fides the breach of which would have the same effect as fraud, it cannot, I think, be accepted. If intended in that sense, it was obiter, was not supported in the present case by Mr. Brown for the Secretary of State and, as I understand, does not now find favour

[1] Paragraphs 10 and 16 of the Affidavit of Guy Hill
[2] [1980] 2 All ER 768
[3] [1983] 1 All ER 765
[4] [1988] 2 WLR 1165

with my noble and learned friend Lord Wilberforce himself. On the other hand, as Lord Wilberforce said in Zamir's case, at p. 950:

"It is clear on general principles of law that deception may arise from conduct, or from conduct accompanied by silence as to a material fact."

The relevant words of section 26(1) (c): "a statement or representation which he knows to be false or does not believe to be true;" embodying as they do the classic definition of a fraudulent deception, are amply wide enough to allow for the operation of this salutary principle."

[11] In applying these legal principles to the agreed factual matrix of this case, this Court has no reservation in concluding that this Claimant's entry into the Territory was in breach of the Ordinance.

[12] In ordering the deportation of the Claimant, His Excellency the Governor relied on section 40(1) (a) and (c) of the Ordinance. These provide as follows:

40. (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 of 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. **(Emphasis Mine)**

[13] Underpinning these grounds is the contention that the Claimant's was landed in this Territory in contravention with the provisions of the Ordinance.

[14] Counsel for the Respondent referred the Court to section 23 of the Ordinance which prescribes the circumstances under which a person may be granted leave to remain in the Territory. In the case of the Claimant, the following provisions are applicable:

> **23.** (1) Subject to the other provisions of this Ordinance an immigration officer may grant leave to any person to land and remain in the Territory for such period as he may determine in accordance with subsection (2), upon being satisfied that the person—
>
> *(a)* has in his possession either a ticket, or some other means of travelling to some other country which he will be able to enter, or a valid permit, not having been obtained by fraud or misrepresentation, issued to him under section 31 permitting him to remain in the Territory for the period specified therein.
>
> *(b)* will not engage or seek to engage in any gainful occupation other than occupation which is specified in a valid permit, nhot having been obtained by a fraud or misrepresentation;
>
> *(c)* it is not likely to behave in a manner prejudicial to the peace, order and good government of the Territory;
>
> *(d)* is not suffering from a mental disorder nor is mentally defective;
>
> *(e)* is not suffering from any contagious or infectious disease which, in the opinion of a medical practitioner appointed under paragraph *(e)* of section 5(1) makes his presence in the Territory dangerous to the community;
>
> *(f)* is not a person who is reasonably believed to have come to the Territory for any immoral purpose, or who is not believed to be a prostitute or to have come to the Territory for the purpose of prostitution;
>
> *(g)* has not been convicted in any place of, or admits to having committed, an offence of a nature punishable in the Territory with imprisonment for a term of three years or more who by reason of such conviction is deemed by the Chief Immigration Officer to be undesirable;
>
> *(h)* is not addicted to the use of any drug;
>
> *(i)* has not been convicted of an offence under any written law relating to dangerous or narcotic drugs whether in the Territory or in any state or country outside the Territory

(j) has not at any time advocated—

(i) the overthrow by force or violence of the lawful Government of the Territory or of any other state or country or of all forms of law;

(ii) the abolition of organised Government; or

(iii) the assassination of any person or the unlawful destructions property;

(k) has not been a member of or affiliated to any organisation which entertains or teaches any doctrine specified in sub-paragraphs (i) to (iii) of paragraph (j);

(l) is not a person whose name is for the time being entered in the stop list;

(m) is not a member of a class of persons declared by the Governor in Council, by Order, to be a prohibited class of persons for the purpose of this section;;

(n) is not a person whose presence in the Territory would in the opinion of the Chief Immigration Officer and on the direction of the Minister be undesirable and not conducive to the public good;

(o) is not a person who is capable of supporting himself and his dependants during such time as he may be permitted to remain in the Territory; and

(p) is not the dependant of a person who is precluded from being granted leave to land by reason of any of the provisions of this section.

(2) The period for which an immigration officer may grant to any person leave to remain in Territory under subsection (1) shall be—

(a) where such person produces a permit issued to him under section 31 permitting him to remain in the Territory, the period specified in that permit;

(b) where such person does not produce to the immigration officer such a permit, such period not exceeding six months as the immigration officer may, subject to any directions of the Minister determine.

[15] A person who has been landed in contravention of the Ordinance may be removed either under the summary procedure prescribed by section 26 and 27 of the Ordinance or by deportation. The Court notes that the case at bar concerns removal by deportation. There is a long line of authorities that where permission to enter has been obtained by the fraud or deceit of the purported entrant, then he is an illegal entrant, such permission having been vitiated by the fraud or deception. The clearest statement of this principle is set out in the judgment of Lord Wilberforce in **Zamir**.

> "The basis on which the Secretary of State seeks to justify the detention and removal of the appellant is that the leave to enter the United Kingdom was vitiated by deception and there is ample authority that an apparent leave to enter which has been obtained by deception is vitiated, as not being "leave [given] in accordance with this Act" (section 3 (1)): see Reg. v. Secretary of State for the Home Department, Ex parte Hussain [1978] 1 W.L.R. 700 (Court of Appeal) and numerous cases following."

[16] Counsel for the Claimant trenchantly argued that there is no positive duty of candour on the part of a person seeking entry into the Territory. This submission is derived from the revised opinion of the English House of Lords in **Khawaja** and **Patel**. Here, Their Lordships expressed a clear departure from the previous position held in **Zamir** and this is captured in the following excerpt from Lord Bridge:

> *"First, it is clear that a mere non-disclosure to the immigration officer by the person seeking permission to enter of a fact known to him cannot, by itself, amount to a contravention of section 26 (1) (c). In so far as the passage in the speech of my noble and learned friend Lord Wilberforce in Zamir's case at p. 950 may be understood as imposing on an applicant for leave to enter a duty of candour approximating to uberrima fides the breach of which would have the same effect as fraud, it cannot, I think, be accepted. If intended in that sense, it was obiter, was not supported in the present case by Mr. Brown for the Secretary of State and, as I understand, does not now find favour with my noble and learned friend Lord Wilberforce himself."*

[17] However, it is apparent that Their Lordships did not propose a complete departure from the dicta in **Zamir**. This is evident in the observation which directly followed the quote above. Lord Bridge went on to state:

> "On the other hand, as Lord Wilberforce said in Zamir's case, at p. 950: "It is clear on general principles of law that deception may arise from conduct, or from conduct accompanied by silence as to a material fact."

[18] In the Court's view this general principle of law remains and it is here that the Claimant's case meets its first roadblock.

[19] There can be no doubt that the Claimant's criminal conviction is a serious one. Equally, there can be no doubt that this fact would be material in all the circumstances. Indeed, section 23 of the Ordinance makes it clear that an immigration officer must satisfy himself that an entrant *"has not been convicted in any place of or admits to having committed an offence of a nature punishable in the Territory with imprisonment for a term of three years or more who by reason of such conviction is deemed by the Chief Immigration Officer to be undesirable"*.

[20] The Court does not doubt that the Claimant was aware of this requirement because upon entry, he presented a police certificate of character issued by the Criminal Records Office of the Royal St. Vincent Police Force on 22nd February 2008 which reflected that the name Mark Antonio De Freitas does not appear in the Criminal Records. In so doing, the Claimant positively represented to the immigration authorities that he had no criminal convictions which could be of concern. This representation was a patent untruth.

[21] Regardless of his name, what is readily apparent is that this Claimant would have been released from custody on 19th March 2007, having been convicted of a serious crime and having served a substantial sentence of imprisonment. He could not then in support of his application for entry purport to proffer any document to the immigration authorities which would have misrepresented that position.

[22] In the Court's view, it is not so much his silence which is culpable but rather his conduct in actively misrepresenting his status and doing so deliberately in circumstances where he was well aware or where he should of been aware, that his true status would be relevant in determining his entry[5].

[23] In the Court's judgment, the Claimant's conduct was deliberately deceptive. Having been allowed entry on the basis indicated, it is also clear to the Court that his landing would have been contrary to the provisions of the Ordinance. Section 23(1) (g) of the Ordinance provides that an immigration officer may grant leave to any person to land and remain in the Territory on being satisfied that such person has not been convicted of an offence of a nature punishable in the Territory with imprisonment for a term of three years or more who by reason of such conviction is deemed by the Chief Immigration Officer to be undesirable.

[24] Undesirable is defined in the Immigration and Passport Regulation 1969 as a person not belonging to the Virgin Islands and enumerated in Schedule to the Regulations. Paragraph (d) of Schedule of 4 provides as follows:

> "any person who, not having received a free pardon has been in any country convicted of an offence for a sentence of imprisonment has been passed and who for this reason appears to be an undesirable immigrant."

When the Claimant presented himself to the immigration authorities, he had been convicted in St. Vincent and the Grenadines for manslaughter and had been sentenced to a term of imprisonment of 10 years. At the material time he had not received a free pardon for the said offence. In this regard,

[5] R v Seecretary of State for the Home Department ex parte Olasebikan [1986] Imm AR 337; Marquez v Immigration Officer [1992] Imm AR 354; Akhlar v Immigration Appeal Tribunal [1991] Imm AR 326.

the Claimant fell within the ambit of section 23(1) (g) of the Ordinance and this was clearly material to his entry.

[25] In this Court's judgment and on the authority of **Patel,** it is clear that it was well within the power of the Governor to deem his deportation conducive to the public good on the ground that the Territory's immigration laws has been avoided by deception. The Court finds the following dicta from that judgment particularly instructive.

> "At first blush there is some attraction in the view that the remedy of summary removal of an illegal entrant pursuant to schedule 2 and the more ponderous remedy of deportation deemed to be conducive to the public good under section 3(5)(b) are mutually exclusive. But once attention is directed, as it was in *Cheema [* 1982] Imm AR 124, but unfortunately not in *ex parte Khawaja,* to the use of section 3(5)(b) to deport a person who entered the country legally but subsequently obtained indefinite leave to remain by deception, that view is seen to be untenable. As in the case of illegal entry by fraud, so also in the case of indefinite leave to remain obtained by fraud after entry, the fraud may only be discovered when it is too late to prosecute for an offence under section 26(1)(c) of the Act. There would, therefore, indeed be a lacuna in the Act if, in the latter case, the immigrant could profit from his fraud by securing a status of irremovability in the United Kingdom. But that apart, now that I have had the advantage of reading the judgment of Lord Lane CJ in *Cheema* I find myself in complete agreement with his opinion that the exercise by the Secretary of State of the power to deem deportation conducive to the public good on the ground that the immigration law has been avoided by dishonest deception is within both the literal meaning of section 3(5)(b) and the spirit of the Act. If this is correct as a matter of construction, there can be no possible ground to distinguish between a fraud practised in order to obtain leave to enter and a fraud practised after entry to obtain indefinite leave to remain."

[26] It follows that the Governor could properly initiate the deportation procedures on the basis of both grounds which have been set out. This process commenced with his letter of 3rd April 2014 and it appears that while this process was initially fully engaged by the Claimant, there came a point when he precipitately chose to commence legal proceedings seeking enforcement of his right to private and family life and right to marry and found a family as enshrined in Article 9, 19 and 20 of the Constitution.

[27] Given the conclusions drawn herein and applying Counsel for the Claimant's submissions, it may not be necessary for the Court to consider or rule on the alleged breaches under Article 9 and 19 of the Constitution. However, as substantive submissions were advanced by both sides, the Court resolved to consider this aspect of the Claimant's case.

GENERAL: BURDEN AND STANDARD OF PROOF

[28] A claimant who claims that there has been a breach of his fundamental rights must show on the face of the pleadings the nature of the alleged violation or contravention that is being asserted.[6] In order to succeed in his claim for relief under section 31 of the Constitution, the Claimant would have to establish a violation or threat of violation of his right.

[29] The Claimant's pleadings must therefore not only allege but provide cogent evidence that the Defendant has through action or inaction disproportionately interfered with his right to private and family life as enshrined in Article 19 of the Constitution. This provides that:

> ***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, or the development or 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*

[6] Operation Dismantle v The Queen (1985) 1 SCR 441 and Amerally and Bentham v Attorney General (1978) 25 WIR 272.

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

[30] The Claimant must therefore first satisfy the Court that the claim raised falls within the scope of this provision. The complaint must concern one of more of the personal interests protected under this constitutional provision namely private life, family life, home or communications. The Claimant must clearly characterise the interest which he seeks to protect and advance it in such a way that it is clear that it falls within the scope of this provision.

[31] As regards Article 19 of the Constitution, the Claimant contends that his evidence before this Court clearly demonstrates that he has enjoyed a family life with Ms Pearlin Dawson such that he as an Article 19 right worthy of protection. He submitted that the family life is strengthened by the fact that he is engaged to Ms Dawson and hoped to be married by July 2014. The Claimant also avers that Ms Dawson is the mother of six children ranging from 26 to 10 years old (he is not their natural father) in respect of whom he provides financial assistance. He contends that his removal would cause significant prejudice to this family unit. Finally, he states that he is the natural father of three children ranging from 20 to 17 years old who do not reside in the BVI but who he also supports financially.

[32] Counsel argued that as a matter of law, engagements to marry when accompanied by sufficient evidence of the strength of the intention or establishment of relations may give rise to a family life. In support of this contention, he cited **Wakefield v United Kingdom 66 DR 251 (1990)** and he submitted that family life now extends to and includes relationships between unmarried adults provided the relationship is sufficiently enduring. And in considering whether the relationship is sufficiently enduring the Court must consider the stability of the relationship, the intention of the parties and whether they are cohabiting.

[33] Counsel submitted that the Claimant's evidence discloses that he is engaged to Ms Dawson and that they are presently cohabiting. In that regard, Counsel relied extensively on letter from Pearlin Dawson dated 11th April 2014 and the letter from Shuwanna Stoutt dated 8th April 2014 which infers that the Claimant has been in a relationship with Ms Dawson for the past 7 years. Ms. Stoutt further states that they have been inseparable and living together ever since and that their marriage is

imminent. Counsel submitted that on the totality of the evidence before the Court, the Claimant should be deemed to enjoy a family life worthy of respect under section 19 of the Constitution.

[34] There is no doubt that the concept of family life has evolved steadily to take account of social and legal change. Generally, courts have maintained a flexible approach to the interpretation of family life. A court must determine the existence of family life based on the facts of each individual case. In doing so a Court must apply a general principle that is; whether there are close personal ties between the parties[7].

[35] In applying this test it is readily apparent to the Court that there is very little made out in regards to the family relationship between the Applicant and his fiancé's children. However, the evidence before the Court indicates that there are more substantial ties than the mere meeting or correspondence between the Claimant and his fiancé.[8]

[36] In order to advance his claim, the Claimant must however also meet his next burden. He must establish that the Defendant's action of inaction has interfered with his right to family.[9] And it is here that the Claimant meets his second roadblock.

[37] In determining whether a Claimant's deportation interferes with his Article 19 rights, the Court mustl look at the extent of the links which the individual enjoys with both the host state and the receiving state which will be the individual's state of origin. Among the factors taking into account include (1) the length of time spent and knowledge of the language and culture in either State; (2) the existence of family ties and a social circle in the respective countries; (3) the impact on their relationship with those family members who remain behind, and (4) any other personal circumstances, such as health or psychological factors, which may mean that the deportation has a particularly drastic effect on the individual. These factors then have to be balanced against the reasons for the removal – either the prevention of crime or disorder where there has been a breach of the criminal law, or the economic

[7] This was evidenced in case of ***Johnston and others v Ireland*, judgment [1986] ECHR 17, 9697/82, [1986] 9 EHRR 203 45** where in reaching its conclusion the Court was persuaded by the stable nature of the Parties relationship (unmarried couples who live together with their children) and the fact that it was otherwise indistinguishable from the family based on marriage.

[8] Wakefield v United Kingdom

[9] Campbell v. the United Kingdom ECHR judgment of 25 March 1992

well-being of the country, where the country has a strict immigration policy – in order to determine whether the interference with family life is proportionate to the need thereby fulfilled.

[38] In **Uner v the Netherlands**[10] the tribunal made it clear that the criteria given by the European Court of Human Rights in **Boultif v Switzerland (54273/00) [2001] 2 F.L.R. 1228** should be taken into account in all cases concerning settled migrants who were to be expelled or excluded following a criminal conviction. This criteria which was extensively relied on by both sides in this litigation includes:

1. The nature and seriousness of the offence committed.
2. The length of the claimant's stay in the country from which he is to be expelled.
3. The time which has elapsed since the offence was committed and the claimant's conduct during that period.
4. The nationalities of the persons concerned.
5. The claimant's family situation e.g. the length of marriage and strength of ties.
6. Knowledge of the spouse.
7. Whether there are any children of the marriage and respective ages.
8. The seriousness of the difficulties which the spouse is likely to encounter in the country to which the Claimant is to be expelled.

[39] In **Uner**, the Grand Chamber of the ECHR concluded that while it could not be said that the Claimant did not have strong ties to the Netherland, he had only lived with his partner and first-born son for a short period. He had then seen fit to put an end to the cohabitation and had never lived with the second child. Moreover, at the time the exclusion order became final, that claimant's children were still very young and thus of an adaptable age. Further, whilst it was true that he had arrived in the Netherlands at a young age, it could not be said that he no longer had any social or cultural ties with Turkey.

[40] The learned Judge also reasoned that the offences of manslaughter and assault committed by claimant were of a very serious nature. Given the nature and seriousness of the offences, and bearing in mind that the exclusion order was limited to 10 years, the Claimant's expulsion and

[10] (2007) 45 EHRR 14

exclusion from the Netherlands were proportionate to the aims pursued and therefore necessary in a democratic society. Accordingly the Court concluded that there had been no breach of Article 8 of the European Convention on Human Rights.

[41] Turning to the case at bar, it is apparent that the Claimant has lived most of his life in the receiving state, St. Vincent. It does not appear to the court that he has severed or no longer has any close social and cultural ties with St. Vincent. In fact there is clear evidence of equally close family ties and social connections in St. Vincent.[11]

[42] The Claimant is a Vincentian national who travelled to the BVI in 2008 for the purpose of taking up employment and has lived and worked in the BVI for the past seven (7) years. While the Claimant has demonstrated that he intends to marry and has established a family life with Ms. Dawson, there is very little (other than financial support) made out in regards to the family relationship between the Applicant and his fiancé's children. Moreover, apart from this, the Claimant has not demonstrated that he has otherwise integrated into the BVI society or established any other links which would be hindered.

[43] He avers that Ms Dawson have renewed trade licences for them to engage in the business of furniture manufacturing and general residential commercial handyman services following their wedding. During the course of his oral submissions, Counsel for the Claimant advanced that the Court was obliged to consider the impact which the deportation would have on the Claimant's business interests. Counsel submitted that notwithstanding that he holds no trade license in the Territory, the Court can infer from the evidence before it that the Claimant is interested in the two businesses licensed by his fiancée, Ms. Dawson. The Court notes that other than this bare statement, the Claimant did not develop any substantive arguments in that regard.

[44] Furthermore, the Claimant has not persuaded this Court that there are any obstacles to his establishing his matrimonial and family life in St. Vincent or elsewhere or and he has not indicated

[11] Paragraph 18 and 21 of the Claimant's Affidavit as well as the letter dated 14th April 2014 from his attorneys to the Governor and see Boughanemi v France App. No. 22070/93, 22 Eur. H.R. Rep. 228 (1996)

whether there are any special reasons why they should not be expected to do so.[12] The Claimant has also not alleged any other personal circumstances, such as health or psychological factors, which may mean that the deportation would have a particularly drastic effect on him.

[45] Clearly, these factors must be weighed against the reasons for his removal and while conceding the seriousness of the relevant offence, Counsel for the Claimant highlighted the length of time which has elapsed since the offence has been committed, the fact that it was not committed in the BVI and that the fact that there is no evidence that the Claimant has committed any offence in the BVI. In fact, he argued that since his entry, the Claimant's conduct has been exemplary. These matters were raised in correspondence to the Governor and there is no cogent evidence that he failed to consider them. What is patently clear is that having weighed all of the factors presented, the Governor was satisfied that the Claimant was never lawfully landed in the Territory and that his willful deceit rendered his continued presence undesirable and not conducive to the public good.[13] In the Court's view these conclusions were consistent with the Ordinance and general legal principle.

[46] In striking a fair balance between the two competing interests, the Court has taken into account the factors summarized in the **Boultif** and **Üner** cases. Although the Claimant is not being deported for having committed a crime within the BVI, the Court has analysed the nature or seriousness of the offence committed, and the time elapsed since the offence and his conduct during that period. The Court has also analysed the existing personal and family life of the Claimant and the solidity of social, cultural and family ties with the BVI, the nationalities of the persons concerned, and the Claimant's family life. The Court has also taken into consideration his remaining ties with the country of origin.

[47] Surprisingly, the Claimant has not advanced any evidence which would assist the Court in assessing the possibility of transferring the family life to the country to which he is to be expelled, neither has he contended that there are any serious difficulties to be encountered in that regard.

[48] The Court has carefully considered the Claimant's evidence as to the likely impact of his removal from the Territory and has attached significant weight to the same. However, the Court must also

[12] Abdulaziz, Cabales and Balkandali v The United Kingdom [1985] ECHR 7 (28 May 1985)
[13] Letter from the Governor to Claimant's attorneys dated 3rd June 2014.

attach significant weight to the reasons for his deportation and his irregular immigration status in the Territory. On the way that the Claimant has chosen to plead his case; the Court finds that whilst some disturbance in the Claimant's family life will inevitably result from his deportation, the Court considers that he has not shown that it would in the circumstances involve a violation of his rights under Article 19 of the Constitution.

[49] Further and in any event, the Court finds that there are no elements concerning the right to family which outweigh the valid considerations applied by the Defendant in enforcing the provisions of the Ordinance. In the Court's view enforcing the provisions of the Immigration and Passport Ordinance is critically connected to the interests of public order. So that at any rate if any interference could be proved by the Claimant, such interference would, in the Court's view be in accordance with the provisions of the Ordinance and justified as being necessary in a democratic society.[14]

ARTICLE 20 – THE RIGHT TO MARRY AND FOUND A FAMILY

[50] The second limb of the Claimant case stems from an apparent communication from the personnel of the Civil Registry in response to the Claimant's application for a marriage license. This Application is addressed to His Excellency the Governor and is dated 19th June 2014. Paragraph 7 of the application indicates that the BVI has been the applicants' usual place of abode for a period of 15 days immediately preceding the application.

[51] The Claimant's evidence is that he has been advised by the Civil Registry Office that in view of the deportation order made against him that he cannot marry his fiancé as he has no legal status in the country. The actual text of that communication was not placed before the Court but Counsel for the Defendant did not dispute the veracity of the Claimant's averment.

[52] The Claimant's case is that the refusal to process and issue his marriage licence on the basis advance by the Civil Registry amounts to a disproportionate interference with his right marry and found a family. This right is encapsulated in Article 20 of the Constitution which provides as follows:

[14] Application 5269/71 X and Y v United Kingdom at page 5

Protection of the right to marry and found a family

20.*—(1) Every man and woman of a marriageable age has the right to marry and found a family in accordance with laws enacted by the Legislature.*

(2) No person shall be compelled to marry without his or her free and full consent.

(3) Nothing in any law or done under its authority shall be held to contravene subsection (1) to the extent that it is reasonably justifiable in a democratic society—

(a) in the interests of public order, public morality or public health;

(b) for regulating, in the public interest, the procedures and modalities of marriage; or

(c) for protecting the rights and freedoms of other persons.

(4) Spouses shall be entitled to equal rights and subject to equal responsibilities—

(a) as between themselves, both during the marriage and, if the marriage is dissolved, at its dissolution; and

(b) as regards their children, where there are any, both during the marriage and, if the marriage is dissolved, at and after its dissolution; but this equality of rights and responsibilities shall be subject to such arrangements or measures as may be agreed or as may be ordered by a court, in accordance with prescribed law, in the interests of the spouses and their children.

[53] Counsel argued that the Claimant's right to marry is strong right, qualified only to the extent that the purported interference is reasonably justifiable in a democratic society. He submitted that the restriction on the Claimant's right to marry does not meet this criterion.

[54] Contrary to Defendant's intimation, Counsel argued that the Claimant's legal status in the Territory has no relevance to and no bearing on his ability or right to marry. In fact, Counsel submitted that permitting the Claimant to marry would not restrict the Defendant's ability to have him removed through deportation. Counsel relied on the reasoning in **R (Baiai and another) v Secretary of State for the Home Department.**[15]

[55] In that case, the appellant Secretary of State appealed against a decision that the scheme established under the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 involved a disproportionate interference with the respondents' right to marry under the European Convention on

[15] [2009] 1 A.C. 287

Human Rights 1950 art.12.[16] The scheme covered anyone who was subject to immigration control. Unless they had been given entry clearance expressly for the purpose of enabling them to marry in the United Kingdom, or were "settled" in the UK, they had to have the written permission of the Secretary of State before they could marry. Applications had to be made in writing accompanied by a fee of £295. The Immigration Directorate's Instructions stated that permission would be granted if the applicant had a valid right to enter or remain in the UK for more than six months, and had at least three months of that period remaining at the time of the application. Outside of that category, permission would be refused unless there were especially compassionate features.

[56] The House of Lords held that the Strasbourg jurisprudence required the right to marry to be treated as a strong right which could be regulated by national law both as to procedure and substance but could not be subjected to conditions which impaired the essence of the right. Therefore, a national authority could properly impose reasonable conditions on the right of a third-country national to marry in order to ascertain whether a proposed marriage was one of convenience and, if it was, to prevent it. The Court held that Article 12 existed to protect the right to enter into a genuine marriage, not to grant a right to secure an adventitious advantage by going through a form of marriage for ulterior reasons. A member state could take steps to prevent marriages of convenience. Where a third-country national proposed to marry within the jurisdiction, the member state might properly check whether the proposed marriage was one of convenience and seek information necessary for that purpose.

[57] Counsel for the Claimant submitted that it was not open to the Defendant to simply say that the Claimant could marry anywhere outside the Territory. He was quick to point out that there is no evidence in the case at bar that the proposed marriage would be one of convenience or a sham. He also pointed out that the first case in **Baiai** involved an Algerian male claimant who had entered the United Kingdom illegally and who wanted to marry the female Polish claimant who was lawfully working in the United Kingdom. Counsel argued that notwithstanding this fact, the House of Lords found that the scheme, insofar as it restricted the right to marry, could be justified only to the extent that it operated to prevent marriages of convenience which, because they were not genuine

[16] This article is akin to Article 20 of the Virgin Islands Constitution

marriages, did not earn the protection of the right. Counsel argued that if the scheme restricted the right to marry to a greater extent than that, it would be disproportionate.

[58] There can be no doubt that Article 20 of the Constitution gives those within the jurisdiction a right to marry. However that right is subject to national laws governing or regulating its exercise. In the BVI the relevant regulating statute is the Marriage Ordinance Cap 272 of the Revised Laws of the Virgin Islands (as amended). Part IV of the Ordinance (sections 33 -39) regulates the grant of a licence to marry. While section 36 (f) of the Ordinance prescribes that the applicant for a marriage licence must indicate that at one of the parties to the marriage has for the space of fifteen (15) days immediately preceding the licence had his/her usual place of abode within the Territory[17] it does not expressly prescribe that the parties be legally landed or present in the Territory, neither does it address the situation where one of the parties is the subject of a pending deportation order. This scenario however, has been judicially considered.

[59] In **R v Secretary of State for the Home Department and Another, ex parte Bhajan Singh[18],** the claimant was an Indian national illegally in Britain who sought to marry before being deported. He claimed the right to marry under Article 12 of the ECHR. In dismissing the appeal, the English Court of Appeal held that that though it was fair on the evidence to say that the proposed marriage, though arranged, was not a sham, and although a couple might have a right to marry within article 12 even though there was no immediate prospect of founding a family, that right applied only so far as circumstances permitted. So that where under article 5 (1) (*f*) a person was deprived of his liberty by reason of being lawfully detained with a view to his deportation, the Secretary of State was entitled in the exercise of his discretion under the immigration legislation to refuse to release him in order that he might marry.

[60] Lord Denning's judgment in that case is instructive. Speaking of Article 12 of the Convention he noted:

[17] In the case of a *special licence* the period is now one (1) day.

[18] [1975] 3 W.L.R. 225 and see R. (on the application of Kasaj) v Secretary of State for the Home Department unreported judgment of the Queen's Bench Division (Administrative Court)29 April 2015

> "It seems to me plain that that article does not give to people an unlimited right to marry simply because they are of marriageable age. It only gives such a right so far as the circumstances in which they are placed permit. A sailor out at sea on a voyage cannot be expected to have a right to marry until he gets home. A soldier who is posted on active service due to go the next day cannot say that he is entitled to stay at home because he wants to get married. This article 12 must be subject to the circumstances in which the parties are placed**.** In particular, it is subject to article 5 which says that no one is to be deprived of his liberty save in the following cases, including
>
> "(*f*) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."
>
> Clearly a person in prison for a crime does not have any right to leave prison in order to get married. We were referred to a manual (p. 53) which is published by the European Convention of Human Rights. A man who was detained in a German prison complained that the German judicial authorities had refused him permission to marry. He took his complaint before the Commission on Human Rights and they rejected it. They held that article 12 was subject to article 5 (1) (c) and (a). Similar considerations apply in regard to an illegal entrant who is detained with a view to his removal. Article 12 is subject to article 5 (1) (f). A man who is detained as an illegal entrant with a view to his removal has no right to be released in order to get married. The Home Secretary in his discretion is entitled to have him removed. I think there is no ground for mandamus here."

[61] The Court of Appeal clearly recognized that the right under Article 12 had to be read subject to the circumstances in which the parties are placed.

[62] Although this authority was not referenced by the House of Lords in **Baiai**, their Lordships did consider a number of relevant authorities from the ECHR. Strasbourg case law has quite clearly identified that Art.12 can be successfully invoked only in the case of imminent deportation or expulsion, or denial of admission to the territory, but only when the person is able to quite clearly show that he has very specific plans to marry and that is realistic to expect that both partners will not be able to realize these plans outside of the country.

[63] In **Application No 10914/84 v Netherlands (1985) 8 EHRR 308, 10914/84,** the first applicant (a Moroccan) had come to the Netherlands and obtained a residence permit on the strength of a permanent relationship with a Dutch woman. That had failed, but he now wished to marry another Dutch national. The applicants complained that they were not to be allowed to marry. They were both present in the Netherlands. They would be prevented from marrying because of a decision to expel

the intended husband to Morocco. They then went to Morocco and married. The first applicant then obtained a residence permit to stay with his wife in the Netherlands.

[64] In holding that the claim was manifestly ill-founded, the Commission noted that;

> 'Article 12 of the Convention does not guarantee the right to marry in a particular country, or under a particular legal system.'

[65] This case is authority for the proposition that the prospect of marriage need not disrupt the ordinary course of immigration control.

[66] In **Application 7175/75, X vs. Federal Republic of Germany**[19] the applicant complained that the decisions of the German authorities not to grant him a residence permit violates his "right to marry" as is contained in Article 12 of the Convention . In, finding that the complaint does not disclose any appearance of a violation of the rights and freedoms guaranteed by the Convention, the Commission relied on two grounds.

> "On the one hand he has not shown the credibility of his engagement, and on the other he has not established that his expulsion would prevent him from marrying and leading his married life with the person he wants to marry outside Germany."

[67] In the same way, where a claimant alleges an alleged interference with his right to found a family (as in the case of right to family under article 8 of the Convention), the Commission has usually taken the view that deportation, extradition and refusal of entry would not constitute a violation of Article 12 if the partner is in a position to follow the person concerned to country of deportation or extradition, or to their country of residence, or any other country, and if this can be reasonably be required of the partner.[20]

[68] Indeed, for some time now the Commission has held that the refusal of admission or expulsion or a husband of wife, would not conflict with Article 8 rights if the other party has an opportunity to follow the person concerned abroad and this can reasonably be required of him or her. See: **Application No. 7729/76, Agee v United Kingdom**

[19] Decisions and Reports Vol. 6 (1977) P. 138

[20] Application 2535/65, X vs. Federal Republic of Germany. Coll. 17 (1966), P. 28;

[69] Moreover, the Strasbourg jurisprudence reflects a decided reluctance to thwart immigration policy particularly in circumstances where the marriage is contracted at a moment when the Parties are fully aware of the risk that one of them would not be admitted or would be expelled. In **Application 5269/71 X and Y v United Kingdom,** the Commission noted that the first applicant's deportation is based on his defiance of immigration controls and that his marriage to the second applicant was contracted at a time when he was fully aware that he was at risk with his irregular immigration status. After finding that there did not appear to be any insurmountable obstacles to the second and third applicants' following him to Pakistan, the Commission rejected the claim made pursuant to Article 8 of the Convention.

[70] In considering these authorities, the Court has adopted a cautious approach bearing in mind that they are of persuasive and not binding authority. The Court has also recognized that unlike Article 12 of the ECHR, Article 20 of the BVI Constitution includes a second paragraph (20 (3)) - which lays down clear possibilities for restriction. It follows that in the BVI, while the right to marry may be a strong right, it is by no means an absolute right and it may be qualified on the grounds set out in 20 (3).

[71] In circumstances where the Court has already determined that there has been no proven violation of the Claimant's Article 19 rights occasioned by his deportation, this Court is equally satisfied he has not established that his deportation would prevent him from marrying and leading his married life with the person he wants to marry outside the BVI. The Claimant's application for a marriage licence followed the issuance of the relevant deportation order (Statutory Instrument No. 36 of 2014 dated 5th June 2014 and served on him on 17th June, 2014) and the cancellation of his entry permit under section 32(1)(e) of the Ordinance. The Claimant would therefore have been well aware of his precarious immigration status when the Application would have been submitted.

[72] At the date that the application for the marriage licence (19th June 2014), the Claimant would have been the subject of deportation order (made on 5th June 2014) which would have warranted his departure from the Territory within seven (7) days from the date of service of the Order. This Order would have also demanded that he placed upon the first available vessel or aircraft leaving the

Territory and that he be detained pending his removal. In such circumstances, the Court is not satisfied that any interference or violation of Article 20 of the Constitution has been made out.

CONCLUSION

[73] Having reviewed the evidence filed in support of the claim made under section 9, 19 and 20 of the Constitution this Court is satisfied that the Claimant's case is not made out. And having considered the same together with the oral and written submissions of both sides, the Court is satisfied that the Motion and the evidence filed in support do not in any event establish an infringement of the Claimant's fundamental rights under the Constitution. The Claimant's Motion is therefore dismissed.

[74] Finally, CPR 56.13(6) provides that no order for costs may be made against a claimant for an administrative order unless the Court considers that the Claimant has acted unreasonably in making the application or his conduct was in some way worthy of censure in bringing it. Notwithstanding the deficiencies highlighted here, this case does not fall within that matrix.

[75] **It is therefore ordered as follows:**

i. **The Claimant's Originating Motion is dismissed.**
ii. **No order as to costs.**

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Vicki Ann Ellis
High Court Judge