

ANTIGUA AND BARBUDA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO ANUHCV2016/0039

In the matter of sections 3, 5,8, 9, 18,111 and 119 of the Antigua and Barbuda Constitution

And

In the Matter of the Antigua and Barbuda Citizenship by Investment Act 2013

And

In the Matter of an Application for an Administrative Order

And

In the Matter of an Application for an interim remedy

BETWEEN:

[1] LIHUA TIAN

[2] RUOXI TIAN (BY HER NEXT FRIEND LIHUA TIAN)

Applicants

AND

[1] THE ATTORNEY GENERAL

[2] THE CHIEF IMMIGRATION OFFICER

[3] THE COMMISSIONER OF POLICE

Respondents

.....
2016: May 10; 11
.....

Appearances:

Dr David Dorset for the Applicant

Mrs.Carla Brookes-Harris and Ms Rose-Ann Kim for the Respondents

JUDGMENT

[1] LANNIS, J. [Ag]: This is an application by the Applicants LIHUA TIAN and RUOXI TIAN (By her mother and next friend) LIHUA TIAN under the Civil Procedure Rules (CPR) 17.3, for the following interim reliefs:

1. An order directing that the Respondents do yield up possession of the Applicants Antiguan and Barbudan citizenship documents (to include their passports and certification of registration as citizens of Antigua and Barbuda), and that the said citizenship documents be returned to the Applicants, and that the Applicants be granted possession of the same until further order, or the determination of this matter
2. An order that there be liberty to apply.

GROUNDS OF APPLICATION

[2] In summary, the grounds of the application are:

1. The applicants are citizens of Antigua and Barbuda and have been issued Antigua and Barbudan citizenship documents, including passports and certificates of registration as citizens of Antigua and Barbuda. The said documents are property in which the Applicants have an interest in or right to.
2. The citizenship documents have been confiscated by the Respondents, and are in their possession. The Respondents, by taking possession of the Applicants citizenship documents, have contravened the constitutional rights of the Applicants, and the protection of their family life.
3. The first Applicant desires to marry and is unable to do so without being in possession of her passport. The first applicant has no other passport.
4. The first applicant desires to open a bank account and establish a company for the purposes of doing business, but is unable to do so without her passport. She also desires to obtain a driver's license but is unable to do so because she is unable to present a passport;
5. The first applicant desires to fulfill other civic obligations but is unable to do so on account of her not being in possession of a passport.
6. The interim remedy sought for will likely produce a just result. The Respondents will not hand over the Applicants' citizenship documents unless compelled by the court.

[3] The first Applicant Lihua Tian swore to an affidavit in support of the application and Gregson Gardiner, Junior Supervisor in the Enforcement Unit within the Immigration Department swore to an affidavit in opposition to the application.

[4] For the reasons that follow, I would accede to the application of the Applicant.

The factual background

[5] The facts, so far as relevant are gleaned from the material filed in these proceedings..

[6] The first Applicant was born in China, and on the 10th December 2015 she became a citizen of Antigua and Barbuda under the provisions of the Antigua and Barbuda Citizenship by Investment Act, 2013 (the Act). The Applicant's daughter RUOXI TIAN is also a citizen under the Act.

[7] The Applicants arrived in Antigua on the 15th January 2016. Upon arrival, the immigration authorities detained them at the V.C. Bird International Airport for about four hours. The immigration authorities took the passport and citizenship registration documents of the Applicants. The Applicants were then ferried to the Tradewinds Hotel, then to the Buccaneer Cove Hotel, and finally to the Grand Royal Antigua Resort Hotel where they were being guarded by a squadron of immigration and police officers.

[8] On the 21st January 2016, the Applicants successfully applied to the High Court for a writ of habeas corpus. The learned Judge who heard the application ordered that "the Applicant and her daughter be set at liberty forthwith".

[9] Since their confiscation, the citizenship documents have not been returned to the Applicants who are desirous of fulfilling certain civil obligations with the aid of their passports and other documents. In response to a question posed by the court, learned counsel for the Respondents, Mrs Carla Brookes-Harris informed the court that the documents are presently in the possession of the Chief Immigration Officer. It is worthwhile noting at this juncture, that the Chief Immigration Officer, who is said to be holding the documents, is named as a Respondent in these proceedings, but has not seen it fit or necessary to attend the hearing. In fact, neither of the three named Respondents have attended the hearing, and no excuse was forthcoming for their absence.

[10] On the 16th February 2016, the Applicants filed a Fixed Date Claim Form accompanied by the affidavit of Lihua Tian, the first Applicant, seeking constitutional redress. That matter is still pending before the court.

ISSUE

[11] The over-arching issue in this application is whether it is lawful for the Chief Immigration Officer to confiscate or take possession of the passport and citizenship documents of a citizen of Antigua and Barbuda.

THE LAW

[12] The law to be applied in answering this question is section 9 of the Constitution of Antigua and Barbuda which reads in part:

- "9. (1) No property of any description shall be compulsorily taken possession of, and no interest or right to, or over property of any description shall be compulsory acquired, except for public use and except in accordance with the provisions of a law applicable to the taking of possession or acquisition and for the payment of fair compensation within a reasonable time.
- (2) Every person having an interest in or right to or over property which is compulsorily taken possession of, or whose interest in or right over any property is compulsorily acquired shall have the right of access to the High Court for ---
- (a) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right and the amount of any compensation to which he is entitled; and
- (b) the purpose of obtaining payment of that compensation. ..."
- (3) ..."
- (4) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section --
- (a) to the extent that the law in question makes provision for the taking or acquisition of any property, interest or right ---
- (i) to (vi)
- (vii) for so long as may be necessary for the purposes of any examination, investigation, trial or enquiry ... "

[13] From a reading of section 9, it seems clear that taking possession of a person's passport and or citizenship documents must be done under the authority of a law which authorises the taking possession of such property.

[14] The applicable law is **The Immigration and Passport Act, 2014**. Section 36 (1) expressly states that persons who are citizens of Antigua and Barbuda are entitled to be issued Antigua and Barbuda passports.

- [15] Nowhere in **The Immigration and Passport Act** does it authorise the retention of a person's passport. Counsel for the Respondents has pointed to no law authorising the Respondents to confiscate or retain the passport and citizenship documents of the Applicants, or legitimizing the actions of the immigration authorities.
- [16] The first Applicant has in her supporting affidavit, given details of the many inconveniences she has suffered and continue to suffer as a result of deprivation of the use of her passport. Learned counsel for the Applicants, Dr Dorset, during his presentation has referenced those inconveniences and has submitted that the Respondents have no lawful ground that justify their actions. Counsel cited the Nigeria case of **Eshhugbayi Eleko v Officer Administering the Government of Nigeria and Another** [1931] H.L. 662. and quoted Their Lordships as saying at page 70: "[T]he executive ... can only act in pursuance of powers given ... by law. No member of the executive can interfere with the liberty or property of a British subject except on condition that he can support the legality of his action before a court of justice." It was Dr Dorset's further submission that a private person can do anything until the law says no. But a public authority can do nothing until the law says yes.
- [17] Mr Gregson Gardiner in his affidavit in opposition pointed to the fact that a Committee of Enquiry has been set up to enquire into the circumstances surrounding the application of Lihu Tian for citizenship of Antigua and Barbuda under the Citizenship by Investment Act, 2013, and her registration as a citizen of Antigua and Barbuda; The Committee is required to recommend to the Minister with responsibility for Citizenship of Antigua and Barbuda whether or not Lihu Tian should be deprived of her citizenship of Antigua and Barbuda on certain specified grounds; and to provide a report on the Enquiry.
- [18] Mrs. Brookes Harris has submitted that in light of the fact that a Committee of Enquiry has been convened to enquire into the Applicants' application to become citizens of Antigua and Barbuda, it is not in the best interest of the public to return the documents to the Applicants. If the documents were returned to the Applicants, submitted counsel, there is strong possibility that they will seek to flee the jurisdiction. It was counsel's further submission that the government of Antigua is the owner of the passports. However, counsel accepted that the Applicants do have an interest in the passports. Counsel was of the view that an enquiry into citizenship is one which invokes public interest, and it is not in the public interest to defeat the purpose for which the Committee was set up. Dr Dorset countered the public interest submission by pointing out that the terms of reference of the Committee of Enquiry stipulate that the Enquiry is to be held in camera with a police guard; so the proposition about grave public interest cannot be so, for no one can come in.
- [19] Even if the Court were to find that returning the documents would defeat the purpose of the Enquiry that would not make the confiscation of the Applicants citizenship documents lawful. The Respondents must ground their actions under a law that empower them to act as they acted.

[20] Both Dr Dorset and Mrs Brookes-Harris referred to, and relied on the Jamaica case of **National Commercial Bank Jamaica Ltd v Olint Corpn Ltd**, [2009] UKPC 16, paragraph 18, which outlines the matters which the court may take into consideration in granting interim remedies, the underlying principle being that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. So far as Mrs. Brookes-Harris is concerned, the Respondents would likely suffer great prejudice if the documents were returned, as this can jeopardise the hearing; whereas the Applicants can be compensated in damages if it is found that they did nothing wrong..

DISPOSITION

[21] Having read the application of the Applicants; and having considered the affidavits in support of, and in opposition to the application, and having heard the competing submissions and arguments of counsel for the Applicants and counsel for the Respondents, the court is of the opinion that the submissions of Counsel for the Applicants are sound; and thus the court accepts the submissions of counsel for the Applicants in preference to those of the Respondents, that:

- (1) The Respondents have not pointed to any law which supports the legality of their actions in retaining possession of the passports and citizenship documents of the Applicants. The Respondents can only act pursuant to powers given to them by law. If they are going to take away, or take possession of citizenship documents, they must point to a law that gives them such powers. They have failed to do so. (**Eshhugbayi Eleko v Officer Administering the Government of Nigeria and Another** [1931] H.L. 662 at 670 relied on).
- (2) The first Applicant has asserted that she has suffered many inconveniences and deprivations¹ as a result of her passport being taken from her. The first Applicant has deposed that in voluntarily acquiring citizenship of Antigua and Barbuda by operation of law, she and her daughter lost their status as citizens of China. Additionally, the first Applicant has deposed that she does not have in her possession any other passport; that the passports seized by the immigration authorities are the only travel documents the Applicants have; that the Applicant and her daughter are citizens of Antigua and Barbuda, and have no other nationality. There has been no challenge by the Respondents to these unambiguous statements. And no plausible evidence has been put forward by the Respondents casting doubt on those assertions.
- (3) The return of the passports to the Applicants will not jeopardise the hearing, as the first Applicant has been cooperating, and attending the hearings, even though she has not been summoned to attend. She attends at her own free will -- not because of any legal duty imposed upon her. The terms of reference of the

¹ See paragraphs 3 - 6 of the affidavit of Lihua Tian, the first applicant

Committee of Enquiry contain no requirement that the presence of the Applicant is required. But she has cooperated anyway. It is not a criminal enquiry; the Applicant is not on bail. In any event, where a person is on bail, his or her travel documents are usually surrendered to the court -- not the DPP.

- (4) The Constitution prevails. Section 8 of the Constitution speaks to freedom of movement. Without the use of their passports, this right is contravened. The Applicants are not at liberty to move as the Constitution allows them.

CONCLUSION

[22] For all the above reasons, I grant the following interim reliefs:

- (1) A Declaration that it is not lawful for the Chief Immigration Officer to confiscate or take possession of the passport and citizenship documents of a citizen of Antigua and Barbuda.
- (2) An order that the Chief Immigration Officer do, by 12:00 noon tomorrow Thursday 12th May 2016, yield up possession of the Applicants' Antigua and Barbuda citizenship documents (to include their passports and certification of registration as citizens of Antigua and Barbuda), and that the said citizenship documents be returned to the Applicants, in the presence of their legal representative Dr David Dorset, and that the Applicants be granted possession of the same until further order of the court, or until the determination of this matter. Counsel for the parties will jointly agree and arrange the mechanics of the handing over of the documents.
- (3) An order that there be liberty to apply.

[23] Although it is not necessary for my decision, the court notes that the first Applicant has been cooperating/attending the Enquiry, and in this regard, the court expects that the first Applicant will continue to cooperate, and the court directs that the first Applicant do continue to make herself available to the Committee of Enquiry, even though she has no legal obligation to do so, and she may not do anything or take any action that will likely frustrate the completion of such Enquiry.

[24] I am grateful to counsel for their assistance.



PEARLETTA E. LANNS
High Court Judge [Ag]