EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

GRENADA

GDAHCVAP2015/0028

BETWEEN:

[1] THE ATTORNEY GENERAL OF GRENADA
[2] CHIEF IMMIGRATION OFFICER

Appellants

and

[1] SEBASTIAN ISAAC
[2] MARIA YTTERHOLM

Respondents

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario F. Michel	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mr. Thomas Astaphan, QC with Mr. Dwight Horsford, Solicitor General
and Ms. Maurissa Johnson, Crown Counsel for the Appellants
Mr. Darshan Ramdhani and Ms. Sabrita Khan Ramdhani for the Respondents

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2016: January 27;
June 20.

Civil appeal – Interlocutory appeal – Rule 17.4 of the Civil Procedure Rules 2000 – Ex-parte application – Interim injunction – Whether learned judge erred in law in granting interim injunction upon an ex parte application – Whether learned judge erred in law in not ordering that Attorney General be served – Whether learned judge erred in principle in concluding that the requirements of the CPR 17.4 were satisfied – Whether learned judge erred by continuing the injunction without affording Attorney General a hearing of the merits of the application or on the continuation

Ms. Maria Ytterholm ("Ms. Ytterholm") and Mr. Andreas Thomas Kummert ("Mr. Kummert"), both Maltese nationals, are the parents of a minor child over whom a custody battle ensued between them in Malta. However, Ms. Ytterholm left Malta with the

child and moved to Grenada where she eventually married a Grenadian national, Mr. Sebastian Isaac ("Mr. Isaac") on 21st July 2015 and applied for citizenship shortly thereafter. Upon knowing of Ms. Ytterholm's whereabouts, Mr. Kummert went to Grenada and is alleged to have have been able to engage the State machinery with a view to having her deported from the jurisdiction. On 25th September 2015, Ms. Ytterholm learnt that Mr. Kummert was on the island. Being fearful that he would attempt to take the child from her, she made an ex parte application on 25th September 2015 and on the same day obtained an order restraining him from leaving Grenada with the child.

Ms. Ytterholm was subsequently informed that she was needed by the police for an interview and voluntarily attended the Criminal Investigation Department for same. After being there for a number of hours, she learnt that the immigration officers were there to arrest her and have her deported on the basis that she was an undesirable alien. Ms. Ytterholm was placed into police custody and a deportation order was made against her on 2nd October 2015.

During this period, Mr. Kummert made an ex parte application to discharge the order that Ms. Ytterholm had obtained which prevented him from leaving Grenada with the minor child. The judge before whom this application was brought instructed that Ms. Ytterholm's attorney be notified and appear before the court. At the hearing of the application, the judge refused to discharge the injunction.

On 3rd October 2015, Mr. Isaac had filed an ex parte application and obtained the interim injunction restraining the Attorney General from deporting Ms. Ytterholm pursuant to the deportation order. The learned trial judge also ordered that Ms. Ytterholm be released forthwith and that notice of the order be given to the Attorney General and the Chief Immigration Officer. Ms. Ytterholm also filed a fixed date claim in which she challenged the constitutionality of the actions of the relevant public officials.

The injunction was made returnable on 6th October 2015 and came on for hearing on that date along with the fixed date claim. At the hearing, the learned judge gave directions on the fixed date claim and made an order continuing the ex-parte order that was granted and restrained the appellants from deporting Ms. Ytterholm until the conclusion of the proceedings.

Both the Attorney General and the Chief Immigration Officer are aggrieved by the orders and on 19th October 2015 filed a notice of appeal against both orders. In relation to the order of 3rd October 2015, the appellants' essential complaint is that the learned judge erred in law in concluding that it was proper to grant the order on an ex parte basis and not ordering that the Attorney General be served and that she erred in principle in concluding that the requirements of the Civil Procedure Rules 2000 ("CPR") rule 17.4 were satisfied. The gravamen of their complaint in relation to the 6th October 2015 order is that the learned judge erred by continuing the injunction without affording the Attorney General a hearing of the merits of the application or on the continuation.

Held: dismissing the appeal; declaring that the deportation order issued on 2nd October 2015 is a nullity; and awarding costs to Mr. Isaac and Ms. Ytterholm, to be assessed, if not agreed within 21 days, that:

1. There is no principle of law neither is there any authority for the proposition that if an application is made for an injunctive order against a public official the judge must order that the application should be served on the public official. If such a principle were to exist, its effect would be to improperly fetter the exercise of the discretion of the judge who is seized of the ex parte application. It is for the judge to determine whether or not the application for the interim injunction was one which satisfies the threshold of being one of exceptional urgency and whether the other prerequisites have been met to warrant hearing the application on an ex parte basis.

   National Commercial Bank Limited v Olint Corp. Ltd. [2009] UKPC 16 applied.

2. In relation to the appellate court's interference with the exercise of the judge's discretion, the law is very well settled. The appellate court will rarely interfere with the exercise of discretion by the trial judge save and except where it is satisfied that (1) the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into or being influenced by irrelevant factors and considerations and (2) as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. In the present case, the onus falls on the Attorney General and Chief Immigration Officer to prove that the learned judge improperly exercised her discretion in granting the ex parte injunction. Since they been unable to point to any error of principle that has been committed by the judge, there is no basis for this Court to interfere with the judge's exercise of discretion.

   Michel Dufour and Other v Helenair Corporation Ltd (1996) 52 WIR 188, pp. 190-191 applied; American Cyanamid Co. v Ethicon Ltd. [1975] AC 396 applied; Bates v Lord Hailsham of St. Marylebone [1972] 1 WLR 1373 applied.

3. It is the law that CPR 26.1 clothes the judge with very wide case management powers. It is entirely open the judge to determine whether the prerequisites of the CPR have been satisfied or the threshold has been met. In so doing, the judge must act judicially. There has been no evidential basis provided for the contention that the learned judge erred in principle by concluding that the requirements of CPR 17.4 were satisfied. The learned judge's exercise of her discretion on this ground is unassailable as the evidence that was provided to her was sufficient to persuade her to exercise her discretion in the manner that she did; the urgency of the matter necessitated a hearing on an expedited basis and she acted judicially in the order she made and the discretions that were given.

Bates v Lord Hailsham of St. Marylebone 1972] 1 WLR 1373 applied; Rule 26.1 of the Civil Procedure Rules 2000 applied.

4. In order to be able to properly prosecute the ground of appeal that the learned judge erred by continuing the injunction without affording the Attorney General a hearing of the merits of the application or on the continuation, the Attorney General and the Chief Immigration Officer ought to have furnished the Court with the transcript of the proceedings. This Court is not in a position to say, even on a balance of probabilities, that the state of affairs as alleged by the Crown is correct. Therefore, in the absence of clear evidence to support contention of the Attorney General and the Chief Immigration Officer's contention, it must be presumed that the order that was issued by the judge was properly issued.

JUDGMENT

Introduction

[1] BLENMAN, JA: This case exemplifies the situation of a matter that started out as a private law custody battle over a minor child, involving two foreigners, inexplicably mushrooming into a public law matter in which the Attorney General has become involved. Indeed, the genesis of the appeal is a custody battle between Ms. Maria Ytterholm ("Ms. Ytterholm") and Mr. Andreas Thomas Kummert ("Mr. Kummert") who are the mother and father of the minor child, respectively.

[2] It appears that there was some dispute between Ms. Ytterholm and Mr. Kummert in Malta in relation to the custody of their child. Ms. Ytterholm came to Grenada with the child and was so residing when Mr. Kummert is alleged to have been able to engage the state machinery with a view to having her removed from the jurisdiction of Grenada. By this time, Ms. Ytterholm was asked to attend the police station for an interview and once there was taken into custody for reasons which are not pertinent to this appeal. She was also charged by the police in Grenada but the charge appeared to have been withdrawn. She was then given over to the immigration authorities. Ms. Ytterholm being fearful that steps would have been taken to have her deported from Grenada filed a without notice application and obtained an injunction restraining the Attorney General and the Chief Immigration Officer from deporting her and ordering that she be released from the custody of

the immigration authorities. She also filed a constitutional motion challenging the actions of the relevant public officials.

[3] However, by the time the ex-parte application had been filed, Ms. Ytterholm was already married to a Grenadian national, Mr. Sebastien Isaac ("Mr. Isaac") and was in the process of seeking to regularise her status in Grenada. She was granted an ex-parte injunction which restrained the immigration officials from deporting her from Grenada. The application was further adjourned for an inter partes hearing. The return date coincided with the first date of the constitutional motion. The learned judge continued the injunction which restrained the immigration officials from deporting her and gave certain directions. The Attorney General and the Chief Immigration Officer are dissatisfied with those directions and orders and have appealed against them. Before the hearing of the appeal, the relevant Minister granted approval for Ms. Ytterholm to obtain citizenship of Grenada and this information was placed before this Court by way of fresh evidence that was adduced by Ms. Ytterholm during the hearing of the appeal.

[4] I propose now to address the background in some detail.

Background

[5] The background facts are gleaned from pleadings. Ms. Ytterholm and Mr. Kummert have a minor child together. He seems to be a wealthy businessman from Malta and she is a national of Malta. However, she left Malta with the child and came to live in Grenada. She eventually married a Grenadian national on 21st July 2015 and resides in Grenada. It appears that Mr. Kummert learnt that Ms. Ytterholm was residing in Grenada and came to Grenada. Upon learning that Mr. Kummert was on the island and being fearful that he would be seeking to take the child away from her, Ms. Ytterholm filed a without notice application on 25th September 2015 and obtained an order on even date restraining Mr. Kummert from leaving Grenada with the child. The order was continued at an inter partes hearing.

[6] Ms. Ytterholm was then informed that she was needed by the police for an interview and voluntarily attended the Criminal Investigation Department for the interview. After being there for a number of hours, she learnt that the immigration officers were there to arrest her and have her deported on the basis that she was an undesirable alien. However, Ms. Ytterholm by this time had applied to become a Grenadian citizen.

[7] Mr. Kummert during this same period made an ex parte application to discharge the order that she had obtained, which prevented him from leaving Grenada with the minor child. This application was heard by another judge who instructed that Ms. Ytterholm's attorney be notified and appear before the court. At the hearing of the application, the judge refused to discharge the injunction.

[8] As events unfolded, it appears that steps were being taken to have Ms. Ytterholm deported on the basis that she was an undesirable alien. Ms. Ytterholm was placed in the lock up while her husband stood outside of the police station all night long. In an affidavit deposed to by Mr. Isaac in support of the application, he alleged that all night long persons had been calling his wife's cell phone trying to locate the minor child. He said that the police had also enquired of him and his wife as to the whereabouts of Ms. Ytterholm's child. Meanwhile, a deportation order seemed to have been made against Ms. Ytterholm. Mr. Isaac indicated in his affidavit that he feared that the immigration authorities wished to deport his wife while taking steps to locate the minor child. Further, he deposed that insofar as he and his wife have been married since July 2015 and she has expressed the desire to be registered as a citizen of Grenada, the deportation order was not properly made since Ms. Ytterholm could not be regarded as an alien.

[9] It was in those circumstances that on 3rd October 2015, Mr. Isaac had filed a without notice of application and obtained the interim injunction restraining the Attorney General from deporting Ms. Ytterholm pursuant to the deportation order dated 2nd October 2015. Additionally, the learned trial judge ordered that Ms. Ytterholm be released forthwith and that notice of the order be given to the

Attorney General and the Chief Immigration Officer. Ms. Ytterholm also filed a fixed date claim in which she challenged the constitutionality of the actions of the relevant public officials.

[10] The injunction was made returnable on 6th October 2015 and came on for hearing on that date along with the fixed date claim. At the hearing, the learned judge gave directions on the fixed date claim and made an order continuing the ex-parte order that was granted and restrained the appellants from deporting Ms. Ytterholm until the conclusion of the proceedings.

[11] Both the Attorney General and the Chief Immigration Officer are aggrieved by the orders and on 19th October 2015 filed a notice of appeal against both orders and in particular stated grounds which challenge fact and law. It is noteworthy that the learned trial judge did not provide a written judgment but merely produced two orders; one in relation to the ex parte application and the other based on the inter partes hearing which will be produced later in this judgment.

[12] I will now examine the grounds of appeal.

Grounds of Appeal

[13] With no disrespect intended, the following grounds of appeal which can be extracted from the stated grounds are as follows:

(1) In relation to the order of 3rd October 2015:

a. Whether the learned judge erred in law in concluding that it was proper to grant the order on a without notice basis and not ordering that the Attorney General be served.

b. Whether the learned judge erred in principle by concluding that the requirements of CPR 17.4 were satisfied.

(2) In relation to the order of 6th October 2015:

a. Whether the learned judge erred by continuing the injunction without affording the Attorney General a hearing of the merits of the application or on the continuation.

[14] Before addressing the grounds of appeal, I would reproduce the orders the judge made:

The Orders below

[15] Order dated 3rd October 2015

> "UPON an application pursuant to Part 17 of the CPR 2000 filed herein on the 3rd day of October, 2015
>
> AND UPON READING the Without Notice Application dated the 3rd October 2015 and the affidavits filed herein in support, the Applicants/Claimants having satisfied the requirement of Part 17 of CPR 2000
>
> IT IS HEREBY ORDERED that:-
>
> 1. The application filed herein on the 3rd day of October, 2015 is allowed.
>
> 2. On the Claimants/Applicants by their counsel giving the usual undertaking as to damages and undertaking to file originating process by 10 am on Monday the 5th day of October, 2015 the defendant be restrained until the returned day of these proceedings from deporting the 2nd Named Claimant/Applicant pursuant to Deportation Order dated the 2nd day of October, 2015.
>
> 3. The 2nd named Claimant/Applicant be released forthwith from the custody of the Immigration Authorities.
>
> 4. The said Fixed Date Claim be returnable before me on 6th day of October 2015 at 9 am.
>
> 5. Time is abridged for service of the Fixed Date Claim and Claimants/Applicants affidavits to 12 noon on Monday the 5th day of October, 2015.
>
> 6. The order is entered forthwith.

7. Notice of this order be given to the defendant and to the Chief Immigration Officer by personal service of a sealed copy of the order in the meantime by facsimile from the Registrar addressed to the defendant and transmitted to them in person if so required.

8. Costs reserved."

Order dated the 6th day of October, 2015

"UPON this matter coming on for hearing on the return of the Fixed Date Claim

AND UPON HEARING Mr. Darshan Ramdhani and appearing with him Mrs. Sabrita Khan-Ramdhani of Ramdhani & Associates Legal Practitioners for the Claimants and Mr. Dwight Horsford Solicitor General and appearing with him Ms. Francine Foster of the Attorney General's Chambers Legal Practitioners for the Defendants

IT IS HEREBY ORDERED that:-

1. The Second named Claimant be released from custody and is to appear before the Chief Magistrate Ms. Tamara Gill on Wednesday the 7th day of October 2015 at the St. George's Magistrate Court at 9:00 a.m.

2. This order is not an order for bail and does not prevent the Magistrate from considering bail when the Claimant/Applicant appears before the court.

3. The court order dated the 3rd day of October 2015 is varied and the defendants are restrained until the conclusion of these proceedings from deporting the Second Named Claimant pursuant to the Deportation Order dated 2nd October 2015."

Appellants' submissions

Ground 1 **–** Whether the learned judge erred in law in concluding that it was proper to grant the order on a without notice basis and not ordering that the Attorney General be served

The learned judge erred in law

[16] Learned Queen's Counsel, Mr. Thomas Astaphan reminded the Court that injunctions are discretionary equitable remedies and the Court has power to grant

them if it is just or equitable to do so.[1] He noted that ex parte interim injunctions belong to an exceptional category of remedies which are granted in absence of the defendant. He said that in the exercise of the court's discretion to grant such a remedy an essential prerequisite must be that the matter is of such urgency that there is no time to serve the defendant.[2] In exceptional cases, the certainty of success at the interlocutory stage may persuade the court to grant the remedy where urgency is not established, but this must be a rare event.[3]

[17] Learned Queen's Counsel accepted that it is true that the Civil Procedure Rules 2000 ("CPR") authorise ex parte applications to be made but, before any injunction is granted ex parte it ought to be shown that there are strong grounds to justify the injunction so granted. He reminded the Court that an injunction is a very serious matter, and it may have very grave consequences. Mr. Astaphan, QC further reminded the Court that accordingly an ex parte injunction ought not to be granted against a party without first giving him an opportunity of being heard, unless the circumstances are such as to require prompt and immediate action.[4]

[18] Mr. Astaphan, QC submitted that the public interest may affect the impact of the American Cyanamid guidelines. He said that when the Court is asked to grant an interim injunction in a public law case, it should approach the matter along the lines indicated by the House of Lords in American Cyanamid Co. v Ethicon Ltd.[5], but with modifications appropriate to the public law element of the case. The existence of a public law element is a special factor in relation to the balance of convenience and this gives the Court a wide discretion to take such course of action as would minimise the risk of an unjust result.[6]

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[1] Cap. 336, The West Indies Associated States Supreme Court (Grenada) Act, 1968, s. 24.
[2] Inglis and McCabe v Granburg (1990) 27 J. L.R. 107, 109, per Downer JA.
[3] ibid.
[4] Manogeesingh et al v Airport Authority and Another (1985) 42 WIR 301, 309, per Kelsick CJ.
[5] [1975] AC 396.
[6] Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment and Another (2003) 63 WIR 42.

[19] Mr. Astaphan, QC relying on the case of National Commercial Bank Jamaica Ltd. v Olint Corp. Ltd[7] submitted that there was no viable cause of action before the learned judge and therefore the interim injunctive remedy should have been refused.

Ground 1B – Whether the learned judge erred in principle by concluding that the requirements of CPR 17.4 were satisfied

[20] Mr. Astaphan, QC submitted that although the matter is in the end one for the discretion of the judge, audi alterem partem is a salutary principle. He said a judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. These live alternative conditions are reflected in CPR 17.4(4). Even in a case in which there was no time to give the period of notice required by the CPR, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none.[8]

[21] Mr. Astaphan, QC opined that it is generally undesirable for judges to be granting ex parte application in matters of great public interest. He submitted that in such cases it is clearly in the public interest to order that such an application (without notice) be served so that all affected parties may be heard on the merits of such an application before granting it.

[22] Mr. Astaphan, QC referred the Court to the cases of Belize Alliance[9] and Chief Fire Officer and Another v Felix-Phillip and Others[10] in his submission that the learned judge failed to recognise that the matter entails a substantial public law element and that it was accordingly improper to grant an injunction ex parte in

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[7] [2009] UKPC 16.
[8] ibid.
[9] (2003) 63 WIR 42.
[10] Civil Appeal No. S 49 of 2013 (delivered 7th October 2013, unreported), paras. 32-39 and 43, per Bereaux JA.

those circumstances enjoining the Minister in the exercise of statutory powers. He argued that the learned judge therefore erred in making the order as she failed to have regard to a crucial factor, namely the public interest factor in granting the injunction under complaint.

[23] Mr. Astaphan, QC complained that the court shortened the time for service of the order and the constitutional motion by fixed date claim, but gave no direction in the order for service of the without notice application upon which the learned judge purported to issue the ex parte injunction against the Minister's deportation order. The result was that in the very short period (one working day – Monday 5th October 2015) the Attorney General had to obtain copies of the without notice application upon which the judge made the order in the manner described in the affidavit of Crown Counsel Francine Foster.

[24] Mr. Astaphan, QC also complained that having made the order ex parte the learned judge failed to ensure that the Attorney General was served by an appropriate direction to that effect in the order itself, particularly, when the judge had decided to abridge the time for service and hearing under the CPR of both fixed date claim and the return date for the ex parte application. [11] He argued that the injunction was improperly granted and should be set aside.

Ground 1 B – The learned judge erred in principle by concluding that the requirements of CPR Rule 17.4 were satisfied

[25] Turning his attention to the next ground of appeal, Mr. Astaphan, QC posited that even on the merits of the application before the learned judge there was no serious question to be tried. The respondents' evidence supporting the without notice application before the judge disclosed no triable constitutional issue warranting the Minister to be enjoined by ex parte order in this manner in which he was restrained without hearing from the State or at all. Mr. Astaphan, QC said that Ms. Ytterholm's intended constitutional case was predicated on a right to

[11] Natural Resources Authority v Seaford & Ting International Limited (1999) 58 WIR 269, 278 b, per Downer JA.

remain in the jurisdiction on account of marriage to a Grenadian which the respondents alleged was automatic upon marriage to a Grenadian. Mr. Astaphan, QC stated that Ms. Ytterholm's claim therefore was that she had acquired Grenadian citizenship automatically under section 98 of the Constitution of Grenada ("The Constitution") upon marriage to Mr. Isaac. Her alleged cause of action was a breach or a threatened contravention a section 98 right of the Constitution.

[26] Mr. Astaphan, QC opined that the jurisprudence regarding the acquisition of Grenadian citizenship by marriage is not controversial and quite established. He reminded the Court that Grenadian citizenship under section 98 of the Constitution is not automatic upon marriage to a Grenadian. The law is that once a spouse applies for registration which complies with the applicable law and rules regarding registration and takes the oath of allegiance, the Minister responsible has no discretion in the matter. He must register the spouse as a citizen of Grenada.[12] Mr. Astaphan, QC opined that the Court is not in a position to determine whether a person is an undesirable person for the purposes of deportation; that decision is the exclusive province of the Minister.[13] Accordingly, Mr. Astaphan, QC submitted that the jurisdiction of the court to grant the injunctive order ex parte was invoked on an improper and wholly false basis. The learned judge manifestly failed to advise herself of the foregoing legal considerations entailing the grant of the ex parte injunction on Saturday, 3rd October 2015; a completely erroneous exercise of judicial power without any legal basis. The Ms. Ytterholm had no viable constitutional claim and the order was badly made in all the circumstances.

[12] Re: Kareem Abdulghani [1985] LRC (Const) 425, 427g – 428a and 428e, per Singh J.
[13] Minister for Immigration and Another v Nettlefield and Another GDAHCVAP2002/0006 (delivered 28th January 2003, unreported), paras. 41- 42, per Redhead JA.

Ground 2

Order of the 6th October – Whether the learned judge erred in not affording the Attorney General the opportunity to be heard on continuation of the ex parte injunction

[27] Mr. Astaphan, QC submitted that the learned judge was completely wrong in principle of law when she purported to continue the ex parte order of the 3rd October, 2015 by the order of the 6th October 2015 without giving the Attorney-General at least the opportunity to make representations on the merits of the application or the continuation of the injunction before making such an order. During his oral arguments when faced with conflicting evidence from Mr. Sebastian Isaac and Crown Counsel Ms. Francine Foster in relation to what transpired before the judge, Mr. Astaphan, QC seemed to have recognised that this Court could have placed very little weight on the version of what had transpired as deposed by Crown Counsel Ms. Foster. He accepted that the absence of the transcript of the proceedings in the court of first instance could not help the cause of the Attorney General and Chief Immigration Officer.

[28] For all of the above reasons, Mr. Astaphan, QC submitted that the appeal should be allowed and the orders should be set aside.

Respondents' submissions

[29] Learned Counsel Mr. Darshan Ramdhani said that Ms. Ytterholm was as at the 3rd October 2015 married to a Grenadian and had an application for citizenship pending before the Citizenship by Investment Committee. Ms. Ytterholm was being deported on the ground that she was an undesirable alien in Grenada. Mr. Ramdhani pointed out that the deportation order on its face referred to section 4(1)(g) of the Immigration Act to a class of persons deemed by the Minister on economic grounds, or on accounts of living standards or habits, to be an "undesirable inhabitant of Grenada". He said that by 6th October 2015 when the fixed date claim was heard by the High Court judge, Ms. Ytterholm had already taken steps to be registered as a citizen on the basis of her marriage.

[30] Learned Counsel Mr. Ramdhani told this Court that both sides to this appeal have presented this Court with fresh evidence on the nature of affidavit evidence setting out matters which have taken over the appeal, and which both sides are clearly saying are crucial to the appeal. Mr. Ramdhani submitted that this new and fresh undisputed evidence shows that subsequent to the filing of the appeal, the State of Grenada has approved Ms. Ytterholm's application made under section 5 of the Citizenship Act[14] to be registered as a citizen on the basis of her marriage to the Mr. Isaac. Mr. Ramdhani accordingly urged this Court to accept the fresh evidence.

[31] Mr. Ramdhani said that from the Attorney General and the Chief Immigration Officer, they have also presented new and fresh evidence which shows that the Minister with Responsibility for Citizenship has on 25th November 2015, made a decision under section 9(2)(b) of the Citizenship Act, to deprive Ms. Ytterholm of her citizenship on the basis that he considers that 'it is the interests of national security' to do so. Mr. Ramdhani stated that this decision is contained in S.R.O. No. 43 of 2015 which was gazetted on 26th November 2015. He pointed out that incidentally, it is this new evidence from the Attorney General and the Chief Immigration Officer on which they rely to ground an application for an expedited hearing. Mr. Ramdhani said that now they effectively contend, since Ms. Ytterholm is no longer a citizen, the stay on the deportation order granted by the learned High Court judge should be removed as there is a real need to have Ms. Ytterholm sent out of Grenada and a stay on that deportation prevents the State of Grenada from so acting.

[32] Mr. Ramdhani said that both pieces of evidence are truly fresh evidence, as being unavailable at the time the orders were made. If anything, from the respondents' side, as is being submitted, the registration of Ms. Ytterholm's citizenship pursuant to section 98 of the Constitution is that bit of evidence which is necessary in the

[14] Cap. 54, 1976.

interests of justice to be placed before the Court of Appeal. He also posited that it is determinative of the appeal. Mr. Ramdhani said that Mr. Isaac and Ms. Ytterholm have no objection to the Court of Appeal considering the evidence of the Deprivation of Citizenship Order, but will contend that the deprivation order is irrelevant to the issues on this appeal.[15]

Learned Counsel Mr. Ramdhani dealt with the Preliminary Answer to the Appeal names the Registration of Citizenship Proof of Citizenship – Its effect on the Deportation Order

[33] Mr. Ramdhani submitted that Ms. Ytterholm's registration of citizenship nullifies all of the effects of the deportation order and that this appeal which seeks to remove the stay on that order is now moot, as that order is incapable of being revived. He pointed out that deportation orders fall to be governed by the Immigration Act, 2001 and can only be made in favour as an 'alien' under Grenada law. Mr. Ramdhani argued that if the deportation order in this case could have ever been valid, it could have only been valid so long as the person remained an 'alien'. If after the issue of the 'deportation order' the status of the 'alien' changes and he or she becomes a citizen, it is surely common sense that the deportation order will thereafter have no effect in law against that person. He referred the Court to the ex tempore judgment of Mekudi Yau (applicant) v The Minister of Justice, Equality and Law Reform and another[16] which provides examples as to when deportation orders will cease to have force.

[34] Learned Counsel Mr. Ramdhani submitted that the Attorney General and the Chief Immigration Officer are clearly contending that this deportation order was not nullified but that it was simply 'suspended' awaiting that time, when the new citizen would have his or her citizenship revoked, in which case, the old deportation order held in abeyance would suddenly spring to life and be capable of enforcement. Mr. Ramdhani opined that one of the logical ends of this reasoning is that the

[15] Guy Joseph v The Constituency Boundaries Commission et al SLUHCVAP2015/0013 (delivered 1st October 2015, unreported).
[16] [2005] IEHC 360 (delivered 14th October 2005, unreported).

deportation order never dies and can actually remain in suspension for all the life of that new citizen, which he submitted is absurd. Mr. Ramdhani argued that the preferred view must be that once the citizenship of Ms. Ytterholm was proven by registration, no deportation granted prior could continue to have any effect in law.

Ground 1 A – Whether the learned judge erred in law in concluding that it was proper to grant the order on a without notice basis and not ordering that the Attorney General be served

The learned judge erred in law

[35] Mr. Ramdhani submitted that the argument of the Attorney General and Chief Immigration Officer that the High Court Jjudge should not have made such an order ex parte is without merit for the reasons set out in paragraphs in this section. He pointed out that though the respondents have cited a number of authorities to ground this proposition, none of these cases had established a clear principle of law that a High Court judge has no power to make an ex parte order. The cases treating with this issue have made the point that whether or not to make an order ex parte is 'in the end a matter for the discretion of judge'. Mr. Ramdhani referred the Court to the pronouncements of Lord Hoffman in National Commercial Bank Limited v Olint Corp Ltd.[17]. The Board in that case made the point at paragraph 13 that the 'audi alterem partem' principle is a salutary and important principle:

> "Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (…) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act."

[36] Learned Counsel Mr. Ramdhani said that, it is clear that the issue is one of the exercise of discretion and whether the learned High Court judge exercised her discretion in a legally unacceptable manner and was clearly and blatantly wrong. As Sir Vincent Floissac CJ explained in Michel Dufour and Others v Helenair

[17] [2009] UKPC 16, para. 14.

Corporation Ltd[18] quoted with approval in David Shimeld et al v Doubloon Beach Club Ltd[19]:

> "We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or the degree in principle, the trial judge's discretion exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

[37] Mr. Ramdhani submitted that on this appeal the Attorney General and the Chief Immigration Officer would have to show not that another judge or the Court of Appeal may have exercised the discretion in another way and call for a full inter partes hearing or some limited version of it, but that on the evidence presented to the High Court judge, hearing that matter ex parte and granting an order ex parte was clearly and blatantly a wrong exercise of her discretion.

[38] Mr. Ramdhani said that the evidence before the judge showed that there was an elaborate plan which involved a certain amount of deceit practised on Ms. Ytterholm's attorney, had been employed to get her to attend the police station on the afternoon of Friday, 2nd October 2015 on a pretext that the police wanted to ask her some questions. He pointed out that at this time, a deportation order had already been made, and the State together with lawyers representing the father of Ms. Ytterholm's minor child were moving the court ex parte to facilitate the deportation of Ms. Ytterholm. Ms. Ytterholm was then arrested and locked up at St. Paul's police station. Early next morning, information was received that immigration officers were about to attend the police station. Mr. Ramdhani submitted that all of this justified a real fear that most expeditious steps were being taken by the State to deport Ms. Ytterholm.

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[18] (1996) 52 WIR 188.

[19] SLUHCVAP2006/0033 (delivered 23rd March 2007, unreported), para. 14.

[39] Mr. Ramdhani stated that the court at the ex parte stage was presented with evidence that the Minister did not appear to consider that Mr. Ytterholm was married to the Mr. Isaac. On the ex parte application, Ms. Ytterholm was asserting that upon marriage to the Mr. Isaac she was entitled to be regarded as a citizen of Grenada. He referred the Court to Radhay Noel v The Attorney General and the Minister Responsible for Citizenship,[20] where the Court of Appeal stated clearly that there could be no discretion in the minister to refuse an application for registration that was properly made and further there could be no fetter on the exercise of that right. Mr. Ramdhani pointed out that in this case, not only was Ms. Ytterholm married to Mr. Isaac and entitled to be registered as a citizen upon proper application, but she also had an application for citizenship pending under the Citizenship by Investment programme ("the CBI programme"). He pointed further to the fact that prior to the deportation order there was no indication by the government that Ms. Ytterholm's application under the CBI programme was in jeopardy or refused. The evidence before the High Court judge was clearly that Ms. Ytterholm was a person who was desirous of becoming a citizen and had made an application for citizenship.

[40] Learned Counsel Mr. Ramdhani argued that the court was surely entitled to consider that the deportation order at the very least was going to be a serious fetter on Ms. Ytterholm's exercise of her right to become a citizen of Grenada. Mr. Ramdhani opined that our courts have never been faced with a situation where a person has married a Grenadian and is entitled to apply pursuant to section 98 of the Citizenship Act to be registered as a citizen, but who has instead had a prior application under the CBI programme. He said that surely, in these circumstances, the person has given clear notice that she wishes to be a citizen. She may need to take the oath of allegiance[21] and even though she might not be able to 'enjoy' all the rights of citizenship in the Radhay Noel sense, her entitlement to citizenship being latent, she could not be regarded as 'alien' under

[20] GDAHCVAP2006/0011 (delivered 13th November 2006, unreported).
[21] Grenada Constitution Order, 1973, s. 98.

the Immigration Act for deportation purposes. Mr. Ramdhani maintained that this surely is a real triable issue as to whether this deportation order would impose a fetter on her claiming her constitutional right. In Radhay Noel Justice of Appeal Barrow stated:

> "(…) where there is a constitutional right, the duty of the authority concerned is to verify that the preconditions for claiming the right exists [sic] but the authority has no discretion to fetter the right."[22]

[41] Mr. Ramdhani further argued that the very fact that the ex parte order was granted indicates that the Minister had failed to consider relevant matters when he had made the deportation order. On its face, the order was speaking to someone whom the Minister considered 'belonged to a class of persons deemed by the Minister on economic grounds, or on accounts of living standards or habits, to be an undesirable inhabitant of Grenada.'

[42] Mr. Ramdhani submitted that on its face and having regard to the evidence before the court on 3rd October 2015, serious issues were raised as to whether this 'finding' by the Minister could ever be supported having regard to the evidence he was presented with. He reasoned that all of this must mean that the High Court judge had ample material before her to lead the court to consider that there were serious issues to be tried and it could never have been simply that Ms. Ytterholm not having made an application to be registered on the basis of her marriage was an alien and that was the end of the matter to ground a deportation order. Mr. Ramdhani maintained that these serious issues of law were being raised here and needed to benefit from a full trial.

[43] Mr. Ramdhani said that for the above reasons the appeal against the first order of 3rd October 2015 should be dismissed as having no merit.

Ground II – Whether the learned judge erred in continuing the injunction without giving the Attorney General the opportunity to be heard

[22] GDAHCVAP2006/0011 (delivered 13th November 2006, unreported), para 14.

[44] Mr. Ramdhani stated that both the ex parte application and the fixed date claim came up before the learned judge on 6th October 2015. Mr. Ramdhani pointed out that the affidavit of Crown Counsel Ms. Foster is not a verbatim transcript of what transpired on 6th October 2015 and that when such serious matters are being contested, a transcript should be required. Mr. Ramdhani said that both Mr. Isaac and Ms. Ytterholm had not seen it necessary before to file affidavits and submissions on this matter as firstly, they were awaiting the appellants' skeleton arguments as required by the CPR and secondly, they had believed that the registration of Ms. Ytterholm's citizenship had overtaken the appeal and the appeal was now moot. However, Mr. Isaac has deposed to facts as to what transpired before the judge on 6th October 2015.

[45] Learned Counsel Mr. Ramdhani argued that the first hearing of this fixed date claim must be placed in the context of the underlying circumstances and the clear indication coming from the State that they wished to have this matter heard expeditiously. In fact the learned Solicitor General raised certain legal matters and pressed the court on the morning of 6th October 2015 to dispose of the matter there and then. He stated that it was in these circumstances, that the court had to decide whether to accede to this request or whether to adjourn the matter. At this stage, the court was exercising all the powers of case management on this first hearing of the fixed date claim. Mr. Ramdhani pointed out that this included the power to further the overriding objective and do justice between the parties under CPR 26.1.

[46] Mr. Ramdhani stated that even though the court had ordered that the ex parte order was returnable to chambers that day, there was nothing in law preventing the High Court judge from dealing with all interim matters in open court. He further pointed out that there was considerable latitude given to both sides in addressing the court on the issues raised that morning. He argued that the issue of continuing the order was raised by counsel for Mr. Isaac and Ms. Ytterholm and it was open to the learned Solicitor General to address the court on the matter. However, he

failed to make use of the reasonable opportunity given then. Mr. Ramdhani submitted that therefore in the circumstances the learned judge exercised her discretion properly.

[47] Mr. Ramdhani posed the question as to what the justice of this case required. He pointed out the fact that the State has clearly indicated that they wish to now deport Ms. Ytterholm since her citizenship has been revoked. He reminded the Court that Ms. Ytterholm and Mr. Isaac have sought leave of the Court to challenge the Citizenship (Deprivation) Order. Mr. Ramdhani submitted that if for one moment, this deportation order continues to have some life (and this is seriously disputed), the justice of this case would require that the Court makes an order indicating that the Deprivation Order is a nullity. He implored this Court to make such an order and reminded this Court that making such an order is well within its power if it deems it at all necessary to so do. He said that this has become even more important since the Attorney General and the Chief Immigration Officer have persisted with their appeal. Though not canvassed in his oral arguments learned Queen's Counsel Mr. Astaphan opposed this application.

[48] Mr. Ramdhani stated that it is settled law that an injunction is an order of the court directing a party to the proceedings to do or to refrain from doing a specified act. It is granted in cases where monetary compensation would afford an inadequate remedy and it is discretionary in nature.[23] The purpose of an interim injunction is to regulate the position of the parties pending trial whilst avoiding a decision on issues which could be resolved at trial. It is trite law that an injunction is regarded as an exceptional remedy. This relief will not be granted unless the court is satisfied that there is a real apprehension that if steps are not taken to preserve the party's interest damage would be caused to the party. He submitted that the learned judge seemed to be alive to these principles when she granted the interim injunction, in face of the serious threats that were deposed to by Mr. Isaac. In fact,

[23] [1975] AC 396, 405.

the picture that was painted by Mr. Isaac as to what had transpired in relation to Ms. Ytterholm was serious.

[49] Mr. Ramdhani pointed out that it is the law that the ex parte procedure will only be appropriate either where the delay occasioned by notifying the defendant may cause the plaintiff irreparable damage, or where the injunction is essential. As Megarry J said in Bates v Lord Hailsham of St. Marylebone "ex parte injunctions are for cases of real urgency". [24]

Discussion and Conclusion

[50] In relation to the ex parte injunction that was granted by the learned judge, the onus falls on the Attorney General and Chief Immigration Officer to prove that the learned judge improperly exercised her discretion. Stripped of all of its niceties, the gravamen of the Attorney General and the Chief Immigration Officer's complaint is that the learned judge acted improperly in hearing the matter ex parte and ought to have ordered that the papers be served on the Attorney General and the Chief Immigration Officer. Arising also is the related complaint that the judge exercised her discretion improperly in granting the injunction.

[51] Even though these complaints were addressed in the written submissions, I note that learned Queen's Counsel Mr. Astaphan in his oral arguments did not press this point forcefully and this approach was quite sensible. Indeed, there is not one set of rules that applies to public officials and another set that applies to private citizens. In fact, our courts have been careful to ensure that all persons who come before us to seek justice are treated fairly and equally. To do otherwise would result in the miscarriage of justice.

[52] In relation to the appellate court's interference with the exercise of the judge's discretion, the law is very well settled and this Court has held in several judgments that the appellate court will rarely interfere with the exercise of discretion by the

[24] [1972] 1 WLR 1373.

trial judge save and except in certain circumstances. Indeed in the decision that can be regarded as the locus classicus of our Court namely Michel Dufour v Helenair, Sir Vincent Floissac stated that:

> "(…) the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into or being influenced by irrelevant factors and considerations and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."[25]

[53] In several other judgments of this Court, the above very helpful pronouncements have been applied. In order to determine whether there is any merit in the first ground of complaint, I propose to examine the first aspect of the complaint - failure to order service on the Attorney General and the Chief Immigration Officer. There is no principle of law neither is there any authority for the proposition that if an application is made for an injunctive order against a public official the judge must order that the application should be served on the public official. If there were to be any such principle its effect would be to improperly fetter the exercise of the discretion of the judge who is seized of the ex parte application. It is for the judge to determine whether or not the application for the interim injunction was one which satisfies the threshold of being one of exceptional urgency and whether the other prerequisites have been met to warrant hearing the application on a without notice basis.

[54] I have no doubt that the authorities to which the Court was referred do not support the proposition advanced by the appellants, namely that once an ex parte application is filed or brought against a public official the judge must order that the application be served on the public official. This has never been the law and the law has not been changed or been amended by any of the authorities to which the Court was referred. In fairness to learned Queen's Counsel Mr. Astaphan he was

[25] (1996) 52 WIR 188, pp. 190-191.

very mindful of the concept of equality before the law and the need to ensure that there was full adherence to the rule of law. Though he had sought initially to adopt this position in the face of questions from the bench, Mr. Astaphan, QC seemed to have accepted that his initial position does not represent the law. In fact, during his oral arguments he did not press the point. He was quite correct in not doing so.

[55] Further, I agree with learned counsel Mr. Ramdhani that the Board in National Commercial Bank Limited v Olint Corp. Ltd. underscored the need for the judge to proceed with caution in granting orders on a without notice basis unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. In my mind, Lord Hoffman merely underscored the law and did not make any new point to the effect that ex parte orders ought not to be granted. There was no admonition by the Board that ex parte orders/injunctions should be granted. Equally, I accept that Mr. Ramdhani submissions that whether or not the court at first instance should grant an order ex parte is a matter that falls within the ambit of the judge. Insofar as learned Queen's Counsel Mr. Astaphan has been unable to point to any error of principle that has been committed by the judge, there is no basis for this Court to interfere with the judge's exercise of discretion. Accordingly, I am of the view that the learned did not err and thus this ground of appeal fails.

[56] There is no basis upon which this Court could conclude that the learned judge did not pay due regard to the well-known principles that were enunciated in American Cyanamid. I agree with Mr. Ramdhani and have no doubt that the learned judge had before her overwhelming evidence which would have led her to the conclusion that if the application was not heard on a without notice basis the Attorney General and the Chief Immigration Officer would have taken steps if notified to defeat any attempts to maintain the status quo. There is every indication that steps were afoot to get Ms. Ytterholm out of Grenada and this would surely have caused her

irreparable damage for which she would not have been adequately compensated.

The balance of convenience clearly favoured Ms. Ytterholm.

[57] I now turn to the second ground of appeal.

Ground 1 B

Whether the learned judge erred in principle by concluding that the requirements of CPR Rule 17.4 were satisfied

[58] Part 17.4 of the CPR states as follows:

> "(1)17.4 (1) This rule deals with applications for –
> […]
> (c) for an interim injunction under rule 17.1(1)(b);
> […]
>
> (2) Unless the court otherwise directs, a party applying for an interim order under this rule must undertake to abide by any order as to damages caused by the granting or extension of the order.
>
> (3) An application for an interim order under this rule may in the first instance be made on 3 days notice to the respondent.
>
> (4) The court may grant an interim order under this rule on an application made without notice for a period of not more than 28 days (unless any of these Rules permits a longer period) if it is satisfied that
> (a) in a case of urgency no notice is possible; or
> (b) that to give notice would defeat the purpose of the application.
>
> (5) On granting an order under paragraph (4) the court must –
> (a) fix a date for further consideration of the application; and
> (b) fix a date (which may be later than the date under paragraph (a)) on which the injunction will terminate unless a further order is made on the further consideration of the application.
>
> (6) When an order is made under paragraph (4), the applicant must, not less than 7 days before the date fixed for further consideration of the application, serve the respondent personally with -
> (a) the application for an interim order;
> (b) the evidence on affidavit in support of the application;
> (c) any interim order made without notice; and
> (d) notice of the date and time on which the court will further consider the application.

(7) An application to extend an interim order under this rule must be made on notice to the respondent unless the court otherwise orders".

Having given careful consideration to the submissions that have been advanced by both sides in effect the contention, here again is in relation to **the learned judge's exercise of discretion**.

[59] Further, it is the law that CPR 26.1 clothes the judge with very wide case management powers. It is entirely open the judge to determine whether the prerequisites of the CPR have been met or the threshold has been satisfied. In so doing, the judge must act judicially.

[60] This is really a very short point. I am not persuaded that learned Queen's Counsel Mr. Astaphan has been able to provide the Court with any evidential basis for his contention that the learned judge erred in principle by concluding that the requirements of CPR 17.4 were satisfied. Here again Mr. Astaphan, QC did not seem to press this point too much and in any event there is nothing to the point. In fact, the evidence that was provided to the learned judge was more than sufficient to persuade her to exercise her discretion in the manner that she did. The urgency of the matter necessitated a hearing on an expedited basis. The judge's exercise of discretion on this ground is unassailable. Further the order that the judge made and the discretions that were given were very just. Accordingly, this ground of appeal also fails.

Ground 2

In relation to the order of 6th October 2015

Whether the learned judge erred by continuing the injunction without affording the Attorney General a hearing of the merits of the application or on the continuation

[61] This ground of appeal is not straightforward since there is affidavit evidence on both sides which seek to indicate what transpired before the learned judge. In the absence of any cross examination of the deponents, this Court is not in a position to say, even on a balance of probabilities, that the state of affairs as alleged by the Crown is correct. I accept Mr. Ramdhani's argument that in order to be able to

properly prosecute this ground of appeal the Attorney General and the Chief Immigration Officer ought to have furnished the Court with the transcript of the proceedings.

[62] It is also unfortunate that the Attorney General and the Chief Immigration Officer have not provided a transcript of the proceedings before. It therefore comes down to the situation of one deponent's word against another. Quite apart from the fact that this Court is not in a position to conclude that what Mr. Isaac deposed to in is affidavit did not occur, Mr. Isaac clearly indicated that the judge gave every opportunity to the Solicitor General to address the issue of the continuation of injunction. Mr. Ramdhani is correct in saying that the learned judge remanded and seized all of the powers of case management and could have properly dealt with both of the matters on the day in question.

[63] I agree with Mr. Ramdhani that in the absence of clear evidence to support the Attorney General and the Chief Immigration Officer's contention, this Court must presume that the order that was issued by the judge was properly issued. Accordingly, this ground of appeal also fails.

Status of the deportation order

[64] For the sake of completeness, I must indicate that insofar as the Attorney General and the Chief Immigration Officer have persisted with their appeal in the face of the fact that the State has approved Ms. Ytterholm's application for citizenship, has given this Court cause for pause. In the circumstances, I am persuaded by the arguments that have been put forward by Mr. Ramdhani that this Court should issue an order declaring that the deportation order is a nullity. It is so declared.

Costs

[65] Insofar as Mr. Isaac and Ms. Ytterholm have prevailed in defending the appeal, brought by the Attorney General and the Chief Immigration Officer, they are entitled to have their costs; I would order that the costs are to be assessed if not agreed within 21 days.

Conclusion

[66] The appeal of the Attorney General and the Chief Immigration Officer against the orders of the learned judge is dismissed. The Court declares that the deportation order that was issued on 2nd October 2015 is a nullity. Costs to Mr. Sebastien Isaac and Ms. Maria Ytterholm are to be assessed if not agreed within 21 days.

[67] I gratefully acknowledge the assistance of all learned counsel.

Louise Esther Blenman
Justice of Appeal

I concur.

Mario F. Michel
Justice of Appeal

I concur.

Paul Webster
Justice of Appeal [Ag.]