EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

Consolidated Claim Nos. BVIHCV 2016/0037 and BVIHCV 2016/0050

IN THE MATTER OF SECTION 40 OF THE IMMIGRATION AND PASSPORT ACT, CHAPTER 130 OF THE LAWS OF THE BRITISH VIRGIN ISLANDS

IN THE MATTER OF A NOTICE OF DEPORTATION AGAINST PETER GRAY DATED APRIL 9, 2015 MADE PURSUANT TO SECTION 18 OF THE CONSTITUTION OF THE BRITISH VIRGIN ISLANDS

IN THE MATTER OF STATUTORY INSTRUMENT NUMBER 48 OF 2015 – DEPORTATION ORDER DATED JUNE 26, 2015 AND GAZETTED ON JUNE 26, 2015

IN THE MATTER OF ARTICLES 9 AND 19 OF THE CONSTITUTION OF THE VIRGIN ISLANDS 2007

IN THE MATTER OF AN APPLICATION BY PETER GRAY FOR REDRESS PURSUANT TO ARTICLES 31 OF THE SAID CONSTITUTION FOR LIKELY CONTRAVENTION OF ARTICLES 9 AND 19 THEREOF IN RELATION TO HIM

BETWEEN:

PETER GRAY

1st Applicant/Claimant

AND

JULIE FOREMAN

2nd Applicant/Claimant

AND

DKHOYA QUAMMIE (By next of Friend, JULIE FOREMAN)

3rd Applicant/Claimant

AND

KAILA RYAN

4th Applicant/Claimant

AND

KIA FOREMAN

5th Applicant/Claimant

AND

THE ATTORNEY GENERAL OF THE BRITISH VIRGIN ISLANDS

1st Respondent/Defendant

AND

THE CHIEF IMMIGRATION OFFICER OF THE BRITISH VIRGIN ISLANDS

2nd Respondent/Defendant

Appearances:

Ms. Ruth-Ann Richards with her Ms. Christina Hart of Maximea and Co., for the Claimants
Ms. Maya Barry, Senior Crown Counsel, for the Defendant

2017: May 4

JUDGMENT

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

(a) The First Claimant is a national of Jamaica. Although, he had previously visited the Territory of the Virgin Islands for brief periods, he only took up employment as a labourer in 2008 on a work permit held by Newton Construction. His documents indicated that he returned to Jamaica and after a brief period he again took up employment in the Territory on a 2011 work permit held by B's Landscaping Services. He has remained continually resident in the Territory since 2010.

(b) He continued in the employment of B's Landscaping until 10th August 2012 when he was arrested and charged with the offence of Indecent Assault of a Woman and the offence of Criminal Trespass. On 5th September 2014, he was convicted and sentenced to 15 months for the charge of Indecent Assault of a Woman and 10 months on the charge of Criminal Trespass. The sentences were to run concurrently.

(c) In October 2010, the First Claimant fathered a female child, Taylor Smith. She is his only natural child. She currently resides with her mother who is a Belonger. The First Claimant no longer has a relationship with Taylor's mother but he avers that he is still very much a part of Taylor's life and has a meaningful bond with her that continues to persist notwithstanding his incarceration.

(d) The Second Claimant is a national of St. Kitts. She has lived and worked in the Territory for the past 23 years. She is a hairdresser and manages the "Simply Beautiful" Salon. The evidence before the Court is that the First and Second Claimants have been in a romantic relationship for the past 6 years. They have lived together since October 2010 and their relationship has also survived the First Claimant's prosecution, conviction and incarceration. They state that they are planning to take steps to marry. However, the Second Claimant is still legally married to her husband and from all accounts no divorce proceedings have been initiated.

(e) The Third to Fifth Claimants are the daughters of the Second Claimant: (D'khoya-14 years, Kaila-26 years and Kia-24 years). The Claimants contend that although these children were fathered by 3 separate persons, they enjoy a close relationship with each other. The Second Claimant also has a son Dillon Quammie who is also an adult and not a party to this Claim. Save for D'khoya whose Belonger status is still pending, all of the Second Claimant's four children are all Belongers.

(f) Kia and Kaila do not currently reside in the Territory. Kalia lives and works in St. Kitts and Kia is currently studying architecture in Atlanta, USA. Dillon resides with his father but visits with his mother on weekends. D'Khoya is a 14 year old minor and still resides with the First and Second Claimants. The Second Claimant avers that although her first three children are adults, she is still responsible for them. At paragraph 12 of her first affidavit and paragraph 14 of her second affidavit, she details that she provides financial support to her children and that prior to his incarceration the First Claimant was a source of support all of them.

(g) The First Claimant concurs that ever since he came into Second Claimant's family, he has helped to take financial and daily care of them

and that they have forged a meaningful bond. He says that he considers them his children and has sought to treat them as a father would.

(h) Upon his release from prison, the First Claimant's employer applied for a work permit to allow him to resume his duties. The First Claimant avers that on 25th January 2016, he was informed by the Labour Department that his work permit was ready and he was instructed to collect the same on 29th January 2016. However, he was unable to collect the same and because by then (9th April 2015) the Office of the Governor had served him with a Notice of Intention to Deport. In this Notice, the Governor sought to have the First Claimant provide representations showing why the Governor should not exercise his discretion to deport him. These representations were submitted via Counsel on 15th April 2015 and referenced *inter alia*, the First Claimant's relationship with the Second Claimant and her children; his meaningful relationship with his daughter; the fact that he is not a career criminal and his contribution to the society.

(i) On 23rd April 2015 the First Claimant's attorneys wrote to the Governor seeking a pardon or remission. On 24th June 2015, the Governor notified Counsel of the First Claimant of his decision to deport him. On 26th June 2015, the Governor caused a deportation order to be issued and published as Statutory Notice, No. 48 of 2015 pursuant to section 40 (1)(b) of the Immigration and Passport Act Cap. 130.

(j) In accordance with section 40 (3) of the Immigration and Passport Act, the First Claimant appealed against the deportation order on 7th July 2015. Grounds of Appeal were later advanced on 13th August 2015 and statement and submissions were provided in support on 21st October 2015 and 27th October 2015. The Governor convened the appeal hearing on 27th October 2015. After hearing the Claimant he reserved his decision.

(k) In a decision letter dated 28th January 2016 (received on 29th January 2016), the Governor dismissed the First Claimant's appeal. In dismissing

the appeal, the Governor noted the nature and the gravity of the First Claimant's offending and he made clear his opinion that the First Claimant's deportation would not be a disproportionate interference with his rights protected by section 19 of the Constitution.

(l) Thereafter, Claimants filed an Amended Originating Motion in which they seek the following relief:

(i) An order that the deportation order - Statutory Instrument No. 48 of 2015 is a disproportionate interference with the Claimants' fundamental right to private and family life enshrined on section 9 and 19 of the Constitution;

(ii) An order that the deportation order is a disproportionate interference with the right of the First and Second Claimants to marry as enshrined in section 20 of the Constitution;

(iii) An order that the Statutory Instrument No. 48 of 2015 is a disproportionate interference with the rights of the First and Second Claimants to confirm the family that they have founded or to found a family as enshrined in section 20 of the Constitution;

(iv) An order that the Statutory Instrument No. 48 of 2015 is a disproportionate interference with the First Claimant's fundamental right to private and family life with his daughter Taylor Smith as enshrined on section 9 and 19 of the Constitution;

(v) An order of certiorari quashing Statutory Instrument No. 48 of 2015 which orders the deportation of the First Claimant;

(vi) A declaration that the deportation of the First Claimant is a disproportionate interference with the Claimants' fundamental right to private and family life as enshrined on section 9 and 19 of the Constitution;

(vii) A declaration that the deportation of the First Claimant is a disproportionate interference with the rights of the First and Second Claimants to marry as enshrined in section 20 of the Constitution;

(viii) A declaration that the deportation of the First Claimant is a disproportionate interference with the rights of the First and Second Claimants to confirm the family that they have founded or to found a family as enshrined in section 20 of the Constitution;

(ix) A declaration that the deportation of the First Claimant is a disproportionate interference with the First Claimant's fundamental right to private and family life with his daughter Taylor Smith as enshrined on section 9 and 19 of the Constitution;

(x) An order quashing the Governor's decision to proceed with the order for deportation of the First Claimant;

(xi) Costs.

COURT'S ANALYSIS

[2] The Amended Originating Motion raises two main issues for determination: (1) Is the First Claimant's deportation a disproportionate interference with the Claimants fundamental right to private and family life? and; (2) Is the First Claimant's deportation a disproportionate interference with the First and Second Claimant's fundamental right to marry and found a family?

[3] Each issue has been separately considered by the Court. In so doing, the Court took into account the following affidavit evidence:

i. Affidavits of the Peter Gray
ii. Affidavits of Julie Foreman
iii. Affidavit of Kaila Ryan
iv. Affidavit of Shelly Pemberton
v. Affidavit of Derek Marshall
vi. Affidavit of Carolyn Stoutt – Igwe

Is the Deportation Order in accordance with the Law?

[4] In order to be consistent with the Constitution any interference with the rights protected by Articles 19 and 20 must first be in accordance with law. If the actions

complained of do not fulfill this requirement, it will violate the Constitution and the case would end there. In order to be "in accordance with law" the interference complained of must have a legal basis**.** Decisions made within the context of a legislative framework prescribing substantive provisions and procedural rules and practice are unlikely to run afoul of this requirement.

[5] In the case at bar, the relevant statutory underpinning is set out at section 40 (1) (b) of the Immigration and Passport Act (the Act) which provides 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

[6] As a Jamaican national who has been convicted of serious offences carrying sentences of 15 months and 10 months, the First Claimant is clearly a person to whom section 40 of the Act applies. However the exercise of the power conferred under this section also invokes constitutional protections – in particular section 18 of the Virgin Islands Constitution which provides as follows:

> **18.** — (1) **A person shall not be deprived of his or her freedom of movement, that is to say**, the right to move freely throughout the Virgin Islands, **the right to reside in any part of the Virgin Islands**, the right of a person who belongs to the Virgin Islands or on whom residence status has been conferred by law to enter and leave the Virgin Islands, and immunity from expulsion from the Virgin Islands.
>
> (2) Any restriction on a person's freedom of movement that is involved in his or her lawful detention shall not be held to contravene this section.
>
> (3) **Nothing in any law or done under its authority shall be held to contravene this section to the extent that the law in question makes provision—**
>
> (a) for the imposition of restrictions on the movement or residence within the Virgin Islands or on the right to leave the Virgin Islands of persons generally or any class of persons that are reasonably justifiable in a democratic society in the interests of defence, public safety, public order, public morality or public health;
>
> (b) for the imposition of restrictions, by order of a court, on the movement or residence within the Virgin Islands of any person or on any person's right to leave the Virgin Islands either in consequence of that person having been found guilty of a criminal offence or for the purpose of ensuring that he or she appears before a court later for trial for a criminal offence or for proceedings relating to his or her extradition or lawful removal from the Virgin Islands;
>
> (c**) for the imposition of restrictions on persons who do not belong to the Virgin Islands;**
> **but—**

i. no restriction may be imposed by virtue only of this paragraph on the right of any such person, so long as he or she is lawfully present in the Virgin Islands, to move freely throughout the Virgin Islands and to reside anywhere in the Virgin Islands;

ii. no restriction may be imposed by virtue only of this paragraph on the right of any such person to leave the Virgin Islands; and

iii. no such person shall be liable, by virtue only of this paragraph, to be expelled from the Virgin Islands unless the requirements specified in subsection (4) are satisfied;

(d) for the imposition of restrictions on the acquisition or use by any person of any land or other property in the Virgin Islands and the imposition of any fee in respect thereof;

(e) for the imposition of restrictions on the movement or residence within the Virgin Islands or on the right to leave the Virgin Islands of any public officer that are reasonably required for the proper performance of his or her functions;

(f) for the removal of a person from the Virgin Islands to be tried or punished in some other country for a criminal offence under the law of that other country or to undergo imprisonment in some other country in execution of the sentence of a court in respect of a criminal offence of which he or she has been convicted, or to relocate to some other country for the protection of the person with his or her consent; or

(g) for the imposition of restrictions on the right of any person to leave the Virgin Islands that are reasonably justifiable in a democratic society in order to secure the fulfillment of any obligations imposed on that person by law.

(4) **The requirements to be satisfied for the purposes of subsection (3) (c) (iii) are as follows—**

(a) the decision to expel that person is taken by an authority, in a manner and on grounds prescribed by law;

(b) that person has the right, save where the interests of defence, public safety or public order otherwise require, to submit reasons against his or her expulsion to a competent authority prescribed by law;

a. that person has the right, save as aforesaid, to have his or her case reviewed by a competent authority prescribed by law; and

(d) that person has the right, save as aforesaid, to be represented for the purposes of paragraphs (b) and (c) before the competent authority or some other person or authority designated by the competent authority.

(5) For the purposes of subsection (3)(e), "law" in subsection (3) includes directions in writing regarding the conduct of public officers generally or any class of public officer issued by the Government of the Virgin Islands. **Emphasis Mine**

[7] It is apparent that the Claimants do not oppose the Deportation Order on the basis of any procedural irregularity or on the basis of non-compliance with section 18 of the Constitution. Moreover, it appears to be common ground between the Parties that the Governor's decision to issue to deportation order was in accordance with the Immigration Law. Certainly, the Claimant have levied no challenge to the *vires* of his decision making, neither have they alleged that he exceeded his authority or powers. The Court therefore finds that the Order is in accordance with the Immigration and Passport Act.

[8] Further, the Claimants do not contend that the Governor was not acting for a proper purpose neither do they dispute the legitimacy of the aims pursued. The

Governor has relied on section 19 (3) and 20 (3) of the Constitution. These sections prescribe that where there are public interest considerations at stake, a defendant can make a plausible case in support of the interference. There can be no doubt that the preservation and furtherance of public order, public morality and the prevention or detection of offences against the criminal law are legitimate aims to be pursued.

[9] The fulcrum of the Claimants constitutional challenge is the Order mandating the deportation of the First Claimant breaches of the fundamental rights provisions at section 19 and section 20 of the Constitution. In considering the alleged breaches, the Court has had regard to the burden and standard of proof to be met by persons seeking to challenge executive decisions on constitutional grounds.

Burden and standard of proof

[10] A claimant who claims that there has been a breach of his fundamental rights must show on the face of his pleadings the nature of the alleged violation or contravention that is being asserted.[1] In order to succeed in his claim for relief under the Constitution, a Claimant would have to establish a violation or threat of violation of his constitutional rights. The Claimants' case must not only allege but provide cogent evidence that the Defendant has through action or inaction disproportionately interfered with their right to private and family life as enshrined in section 19 of the Constitution. The relevant subsections provide as follows:

> ***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.*

[11] In the same way, the Claimants' case must also not only allege but provide cogent evidence that the Defendant has through action or inaction disproportionately interfered with their right to marry and found a family as enshrined in section 20 of the Constitution. This provides that:

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

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.*

[12] A Claimant must therefore first satisfy the Court that the claim concerns one or more of the personal interests protected under these constitutional provisions. A 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 these provisions.

[13] However, these provisions must be read within the context of section 9 of the Constitution. This provision makes it clear that protections afforded under sections 19 (1) and 20 (1) are not absolute. Section 9 provides that:

> "…Whereas it is recognised that those fundamental rights and freedoms apply, subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—
>
> (a) life, equality, liberty, security of the person and the protection of the law;
>
> (b) freedom of conscience, expression, movement, assembly and association; and
>
> (c) protection for private and family life, the privacy of the home and other property and from deprivation of property save in the public interest and on payment of fair compensation;
>
> **Now, therefore, it is declared that the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, and to related rights and freedoms**, **subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the protected rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.** Emphasis Mine

[14] In the case of section 19 (1) the relevant limitations are set out at subsection 19 (3) which provides that:

> ***19 (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

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

[15] And in the case of the right to marry and found a family, the limitations are set out at section 20 (3) which provides that:

> ***20 (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.*

[16] The Governor clearly has the power to deport a non-national convicted of serious criminal offences in order to maintain and secure the interests of public safety, public order, public morality or public health, to protect the rights and freedoms of

other persons and to further the prevention and detection of crime, but there are circumstances where the expulsion will give rise to a violation of fundamental constitutional rights.

[17] Fortunately, the courts within and without this jurisdiction have pronounced on the factors which would assist in assessing these relevant legal principles. The Court will first consider the alleged breach of the right to family life enshrined under section 19 (1) of the Constitution.

IS THE CLAIMANT'S DEPORTATION A DISPROPORTIONATE INTERFERENCE WITH THE CLAIMANT'S FUNDAMENTAL RIGHT TO MARRY AND FOUND A FAMILY?

Has family life been established?

[18] As regards Section 19 of the Constitution, the First Claimant contends that the evidence before this Court clearly demonstrates that notwithstanding that he is not legally married to the Second Claimant; he has enjoyed a family life with her such that he has a section 19 right worthy of protection. 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 consider whether there are close personal ties between the parties.[2]

[19] In this regard the case of **Wakefield v United Kingdom**[3] is instructive**.** It demonstrates that courts maintain a flexible approach to the interpretation of

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[2] 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.
Also in **Kroon and Others v. the Netherlands 27 October 1994**, ECHR pointed out that the notion of "family life" was not confined solely to marriage-based relationships and might encompass other "family ties".
[3] 66 DR 251 (1990)

family life, bearing in mind the diversity of modern family arrangements, the implications of divorce and medical advance. It is now clear that family life 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.

[20] In the case at bar, the Second Claimant is legally married to someone other than the First Claimant. The First and Second Claimants are not engaged and it does not appear that marriage is imminent. However, the Parties have been in a relationship for about 6 years and they have cohabited since 2010. There is no evidence that this relationship subsists for the purpose of avoiding immigration rules or for acquiring Belonger status. Having reviewed evidence filed in support of the Claim and the supplemental submissions filed by Counsel in this matter, it is the Court's view that notwithstanding the Second Claimant's subsisting marriage, (which precludes marriage to the First Claimant) the relationship between them engages the protection afforded by section 19 of the Constitution.

[21] The First Claimant also contends that he is the father of a young daughter with whom he does not reside but with whom he has a strong relationship. During the course of the trial, Counsel for the Respondent disputed the strength of the relationship between the First Claimant and his daughter and whether he in fact provided any financial support. In the Court's judgment, section 19 of the Constitution (much like Article 8 of the ECHR)[4] applies automatically to the relationship between a parent and his/her child regardless of his/her marital status. Constitutional protection is also enjoyed regardless of whether the family members live together or are separated due to divorce or legal separation or by arrangement.

[4] Article 8 of the European Convention on Human Rights provides a right to respect for one's "private and family life, his home and his correspondence", subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society". The ECHR judgment in Marckx v Belgium, judgment of 13 June 1979 explores the scope of this right.

[22] Applying this principle, the Court in **Boughanemi v. France**[5] held that the applicant's relationship with his son who was born outside marriage, and with whom he had had little contact, was found to amount to family life within the meaning of that provision. The court observed that:

> "[t]he concept of family life on which Article 8 is based embraces, even when there is no cohabitation, the tie between a parent and his or her child, regardless of whether or not the latter is legitimate. Although that tie may be broken by subsequent events, this can only happen in exceptional circumstances."

[23] Indeed, the ECHR has gone further to make it clear that neither a father's delay in recognizing his child, his failure to support the child financially, nor his decision to leave the child in the care of relatives when emigrating to a Convention State have been found to constitute exceptional circumstances in this regard.[6]

[24] The untraversed evidence in the case at bar reveals that although the relationship between the First Claimant and the mother of his daughter is acrimonious, Taylor knows the First Claimant as her father. Following his release from prison, he has continued to engender a relationship with her and the two have a close bond. The Court therefore accepts that this relationship has sufficient constancy to amount to family life and therefore engages section 19 of the Constitution.

[25] The evidence also discloses that the Second Claimant is the mother of 4 children, only one of whom resides permanently with the couple. The Claimants contend that of the First Claimant's removal from the Territory would cause significant prejudice to this family unit. Although, there is a general dearth of regional judicial authorities dealing with a right to family in the context of a step parent/step child relationship, Article 8 of the European Convention of Human Rights applies automatically to the relationship between parent and child, regardless of its nature. So that step-families are generally included within the concept of "family" used by both Article 8 of the Convention.

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[5] ECHR judgment of 24 April 1996

[6] C v Belgium ECHR judgment of 7.8.1996 and Ahmut v. the Netherlands, judgment of 28 Nov. 1996

[26] The European Court places clear emphasis on the social rather than the biological reality of a situation in determining whether family life exists and this Court concurs with this approach.[7] Provided that the child is sufficiently integrated and that close personal ties can be demonstrated, then step-family ties could in the Court's judgment fall within section 19 of the Constitution.

[27] However, recent legal authorities emanating from the ECHR make it clear that there will be no family life between parents and adult children unless they can demonstrate additional elements of dependence beyond normal emotional ties.[8] In **Slivenko v Latvia**[9] the ECHR held that there was no "family life" with the first applicant's parents, who were adults not belonging to the core family and who had not been shown to be dependent on the applicants' family. Also, in **A.W. Khan v The United Kingdom**[10] the Court did not accept that the applicant had family life with his mother and brothers, notwithstanding the fact that he was living with them and that they suffered from several health problems. At paragraph 32 of the judgment, the Court observed that:

> "In immigration cases the Court has held that there will be no family life between parents and adult children unless they can demonstrate additional elements of dependence (*Slivenko v. Latvia* [GC], no. 48321/99, § 97, ECHR 2003 X; *Kwakye-Nti and Dufie v. the Netherlands* (dec.), no. 31519/96, 7 November 2000). The Court does not accept that the fact that the applicant was living with his mother and brothers, or the fact that the entire family suffered from different health complaints, constitutes a sufficient degree of dependence to result in the existence of family life. In particular, the Court notes that in addition to his two brothers, the applicant also has three married sisters who live in the United Kingdom. It does not, therefore, accept that the applicant is necessarily the sole carer for his mother and brothers. Moreover, while his mother and brothers undoubtedly suffer from health complaints, there is no evidence before the Court which would suggest that these conditions are so severe as to entirely incapacitate them."

[7] Babul v United Kingdom Application No. 17504/90
[8] S v United Kingdom ECHR judgment of 10.12.1984
[9] ECHR judgment 9.10.2003 [GC]
[10] ECHR judgment 12.01.2010

[28] The Court has no doubt that the Second Claimant has been and continues to be the major breadwinner for her family and their direct source of support. On the shallow evidence advanced, the Court was not persuaded that the First Claimant provided any significant financial support to these adult children. Indeed, apart from the normal emotional ties, it has not been satisfactorily demonstrated that they are financially or otherwise materially supported by the First Claimant. The Court has also considered that at the present time, the adult children of the Second Claimant do not usually reside within the household. Kaila resides and works overseas, while Kia studies overseas and returns home on school breaks. Dillon resides ordinarily with his father and visits the Second Claimant on weekends.

[29] Having reviewed the totality of the evidence advanced, this Court is not satisfied that the Fourth and Fifth Claimants have demonstrated any additional elements of dependence such as would justify a finding of "family life" within the meaning of section 19 of Constitution. Accordingly, the claims of the Fourth and Fifth Claimants cannot be maintained. It follows that the Claim under section 19 will only advance with the remaining Claimants.

Interference with family life

[30] In order to advance their Claim, the remaining Claimants must however go on to meet their next burden. They must establish that the Defendant's action has the potential to or has in fact interfered with the rights under section 19.[11] In determining whether a claimant's deportation interferes with his section 19 rights, the Court must 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 taken 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

[11] Campbell v. the United Kingdom ECHR judgment of 25.3.1992

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. In assessing whether deportation is justified in all the circumstances, the European Court of Human Rights has provided some useful precedents which have provided guidance to Courts within our region.

[31] In **Uner v the Netherlands**[12] the tribunal made it clear that the criteria given by the European Court of Human Rights in **Boultif v Switzerland**[13] 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. Whether the spouse knew about the offence at the time when he or she entered into a family relationship.
7. Whether there are any children of the marriage and if so, their 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.

[32] Implicit in the criteria adumbrated by **Boultif** are the following factors which the Court must also consider[14]:

1. The best interests and well-being of the children in particular the seriousness of the difficulties which any children of the applicant are

[12] (2007) 45 EHRR 14
[13] (54273/00) [2001] 2 F.L.R. 1228
[14] Balogun v United Kingdom ECHR judgment 10.04.12 at paragraph 58

likely to encounter in the country to which the claimant is likely to be expelled.

2. The solidity of the social, cultural and family ties with the host country and with the country of destination.

[33] These factors then have to be balanced against the reasons for the removal, in order to determine whether the interference with family life is proportionate to the need thereby fulfilled.

[34] In the case at bar, the evidence reveals the Claimant is an adult Jamaican national who has continually resided in the Territory since 2010. While it is apparent that the First Claimant may have been visiting the Territory since 2003, for the purposes of this claim, his residence has been directly tied to his employment status within this Territory. He has lived most of his life in Jamaica and the Court is satisfied that he has not severed his ties with that State. Indeed, at paragraph 25 of his First Affidavit, the First Claimant states this affirmatively, detailing that his mother still resides there and that he continues to visit. There is therefore no evidence that he has severed or no longer has any close social and cultural ties with Jamaica.[15]

[35] However, the First Claimant has averred that he has established strong ties in this Territory. The evidence of Shelly Pemberton and Derek Marshall was advanced to support of the First Claimant's contention that he has integrated locally. The affidavits were essentially character references and provided marginal assistance in assessing the First Claimant's connection to the Territory. He also asserts that he has contributed to the development on the Territory although this appears to be limited his paid employment as a labourer/gardener working within the local construction sector. In the Court's view, this would carry little weight in determining the extent of his integration into this community.

[15] Paragraphs 24 and 25 of First Claimant affidavit filed on 2.5.2016

[36] Effectively, the First Claimant's case provides little evidence of this other than the several personal friendships and employment relationships which he would have fostered since his arrival. It follows that his ties to the Territory largely stem from the family unit which he has fostered with the Second Claimant and her minor children, his relationship with his daughter, Taylor as well as friendships which he has formed. No other compelling social, economic or cultural ties to the Territory have been demonstrated outside of these relationships.

[37] With respect to the nationalities of the persons concerned, the Applicant has proffered evidence that he is a national of Jamaica, the intended receiving state. Interestingly, the evidence of the Second Claimant is that although she has been legally resident in the Territory for the past 22 years, she is not a Belonger but remains a national of St. Kitts and Nevis. The Parties have however indicated that all of the children save the Third Claimant, Dkhoya, are Belongers.

[38] As regards the family life enjoyed by the Parties, it is apparent that there is a stable, cohabiting relationship between the First and Second Claimant. They aver that they regard each other as a spouse notwithstanding that they are unable to legally marry because the Second Claimant is still married to another individual. Nevertheless, their relationship has endured for the past 6 years and from all accounts it is a genuine and loving relationship which has survived the First Claimant's prosecution, conviction and incarceration on account of sexual offences involving a female virtual complainant. The Court is satisfied on the evidence that the ties are sufficiently stable, close and personal to invoke the section19 protections.

[39] Their union has produced no natural children, but the Second Claimant has four children, three of whom are co-claimants. It is clear from all relevant authorities that the absence of a genetic link will not preclude a relationship from constituting family life. Instead, the courts will focus on the strength of the social rather than the biological connection. For reasons which have already been explained the

Court is not satisfied that that the relationship between the First Claimant and the adult children of the Second Claimant constitute family life.

[40] With regard to, the Second Claimant's son, Dillon who resides with his natural father (the Second Claimant's estranged husband) and visits his mother on the weekends, the Court is not satisfied on the limited evidence advanced that the ties between the First Claimant and Dillon would amount to family life. However, from all accounts the Claimant also has a close relationship with the Dkhoya Quammie, the Third Claimant. Dhkoya is currently a part of the household and notwithstanding that she is no blood relation to the First Claimant she appears to have formed a close personal bond with him.

[41] In their evidence, the Claimants have taken pains to describe the difficulties which deportation would pose to the family dynamic. Both the First and Second Claimant stress that relocation of the family would be fraught with difficulty and would be near impossible. They stress that the Second Claimant is a successful business owner. She has a long standing business enterprise and a clientele which she took several years to build up. They state that it would be impossible for her to uproot her business and attempt to restart in Jamaica, a country where she has no roots or connections.

[42] The Claimants pointed out that relocation would have a detrimental impact on the financial health and stability and well-being of the family. Without the support of this thriving business, the Second Claimant would be severely hampered in her efforts to support her children who are still pursuing studies here and abroad. She noted that even if she were to relocate her business to Jamaica, her earnings would be drastically reduced due to the current value of the Jamaican currency.

[43] Relocation would not only cause financial hardship but would also be emotionally devastating because Second Claimant and her children have never travelled to

Jamaica before. They stress that they know nothing of the country or its culture and that relocation would mean uprooting them from their life, family and friends.

[44] Counsel for the Claimants also stressed the very high crime rate in Jamaica as a basis for which deportation would be prejudicial. This argument was not pursued with much enthusiasm and no authorities were advanced in support of the contention that a high crime rate in the receiving state should militate against the deportation of convicted non-nationals. While consideration could be given to possible threats of political, social or cultural victimization, no such issues are raised in the case at bar.

[45] Essentially, the Claimants have indicated that deportation would mean the breakup of the family because they would simply not be able to relocate to Jamaica to be with the First Claimant. Counsel for the Claimants referred the Court to the judgment in **Tova King v Attorney General** where at paragraph 93, Byer J stated[16]:

> "A family should only be broken up in exceptional cases. As stated by the House of Lords in the case of Huang v Secretary of State for the Home Department " ... human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives."

[46] Counsel for the Defendant on the other hand has submitted that the Claimants have failed to demonstrate that relocation would mean anything more than a difficult inconvenience. And she noted that the courts have made it clear that financial hardship *without more* would not be enough. She pointed out that the courts have instead stressed the lack of social and cultural ties and the difficulties which this would present. In that regard she noted that Jamaica is an English speaking country with a socio-economic background and culture which is not

[16] Claim No. BVIHCV 2013/0324

unlike the BVI and she submitted that there are no political or language or cultural barriers which would militate against deportation.

[47] Further, Counsel argued that the Claimants have not addressed the very real possibility which relocation to a third country would present. She submitted that on the Second Claimant's own evidence, she is also a national of St. Kitts and Nevis and has clear ties there since it is apparent that the Fourth Applicant also lives and works there. The evidence also disclosed that the First Claimant has even spent time in St. Kitts visiting with the Second Claimant's family. Notwithstanding this apparent "third option", the Claimants have all failed to consider the possibility that family ties could be established in St. Kitts. Counsel referred the Court to paragraph 54 of the **Boultif** judgment, where the Court observed:

> "There remains the question of the possibility of establishing family life elsewhere, notably in Italy. In this respect the Court notes that the applicant lawfully resided in Italy from 1989 until 1992 when he left for Switzerland, and he now appears to be living with friends in Italy again, albeit unlawfully. In the Court's opinion, it has not been established that both the applicant and his wife could obtain authorisation to reside lawfully in Italy, so that they could lead their family life in that country. In that context, the Court has noted that the Government have argued that the applicant's current whereabouts are irrelevant in view of the nature of the offence which he has committed."

[48] The Court concurs that relocation to St. Kitts is an obvious possibility which seems to have been largely ignored by the Claimants. Indeed, it was only in legal submissions that the Counsel for the Claimants attempted to address this point. Counsel pointed out that unlike the case at bar, in **Boultif**, there were established ties to the third state, Italy because that claimant had been employed there on a work permit and had resided there lawfully. Counsel also argued that in any event, the Claimants in this case would encounter the same difficulties as would obtain in relocation to Jamaica.

[49] While relocation would present somewhat similar difficulties, the Claimants have not adequately demonstrated that they not be entitled to pursue family life in St. Kitts, since it is clear that the Second Claimant is a national and entitled as of right

to live and work there. Further, it has not been demonstrated that there are any legal, social or cultural impediments which would militate against the establishment of family life in St. Kitts and Nevis.

[50] Turning to the First Claimant's relationship with his daughter Taylor, the judicial authorities all demonstrate that a mere blood link between individuals will not be sufficient to constitute family life unless there is sufficient evidence that they enjoy close personal ties in addition to the blood link.[17] In that regard, the Court has had regard to the judgment in **Khan v UK**[18] where at paragraph 34 the Court noted that:

> "It is clear from the Court's case-law that children born either to a married couple or to a co-habiting couple are *ipso jure* part of that family from the moment of birth and that family life exists between the children and their parents (see *Lebbink v. the Netherlands*, no. 45582/99, § 35, ECHR 2004 IV). **Although co-habitation may be a requirement for such a relationship, however, other factors may also serve to demonstrate that a relationship has sufficient constancy to create *de facto* family ties (*Kroon and Others v. the Netherlands*, 27 October 1994, § 30, Series A no. 297 C). Such factors include the nature and duration of the parents' relationship, and in particular whether they had planned to have a child; whether the father subsequently recognised the child as his; contributions made to the child's care and upbringing; and the quality and regularity of contact** (see *Kroon*, cited above, §30; *Keegan v. Ireland*, 26 May 1994, § 45, Series A no. 290; *Haas v. the Netherlands*, no. 36983/97, § 42 ECHR 2004 I and *Camp and Bourimi v. the Netherlands*, no. 28369/95, § 36, ECHR 2000 X)." Emphasis mine

[51] In the present case, the evidence before the Court is that First Claimant and Taylor's mother are no longer in a relationship. Indeed, their relationship history could best be described as checkered. No details of the duration and stability of that relationship prior to Taylor's birth have been provided and there is no evidence that Taylor's birth was planned. However, it is apparent that the First Claimant has recognized Taylor as his daughter and that he has been involved in her life since birth. He avers that Taylor is aware that he is her father and that they have a close relationship. However, he concedes that his contact with her is

[17] G v. The Netherlands 8.02.1993, 16 EHRR 38
[18] (2010) 50 ECHR 47

not regular. Instead, he sees her "when circumstances permit". It also appears that while he may have been previously more involved in her care in recent times, he has not provided any significant financial contribution to her care and upbringing.

[52] The Court agrees with Counsel for the Respondent that the evidence provided in support of the First Claimant's ties with Taylor is set out in vague terms. The reality is that Taylor is a six year old who resides with her mother who has custody, primary care and control. While the Court does not doubt the strength of the First Claimant's love for his daughter, the scope of his access and visitation is undefined and there is little indication of the regularity or the depth of the contact. Further, the lack of any real detail gives rise to significant doubt as regards his financial support of Taylor. It appears to the Court that his role in her day to day care and upkeep has also been minimal.

[53] However, the untraversed evidence is that there is paternal bond exists which the First Claimant would wish to have strengthened. There is therefore a potential for the family life to be further solidified. The First Claimant's deportation will mean that he will be physically separated from Taylor however; Counsel for the Defendant submitted that while there is no doubt that physical separation would have a significant impact on the developing relationship between father and daughter, there is no indication that it would preclude it. She was not persuaded on the First Claimant's evidence that any of the matters mentioned at paragraph 34 of his first affidavit would necessarily militate against the Order. She submitted that Taylor is at an adaptable age and that her parents and could clearly utilize alternative means to preserve and foster the parental relationship, whether by regular visits (in the receiving state or a third state), or electronic communications including Skype or social media.

[54] In **Uner v The Netherlands**, the Grand Chamber of the ECHR considered the application of Article 8 considerations in extradition and similar proceedings. The

court considered the best interests and well-being of the children involved, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and the solidity of social, cultural and family ties with the host country and with the country of destination. The court concluded that while it could not be said that the Claimant did not have strong ties to the Netherlands, 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, the claimant's children were still very young and thus of an adaptable age.

[55] In the Court's view, the similarities in the case at bar are remarkable.

[56] In striking a fair balance between the two competing interests, the Court must also consider the nature and seriousness of the First Claimant's offending. It is common ground between the Parties that the offences with which the First Claimant was charged and convicted are serious. They both attract substantial custodial sentences no doubt due to the potential trauma suffered by victims.

[57] In one local case, **R v Donald Rogers**[19]**,** Hariprashad–Charles J outlined the various types of harm which can result from such offending including inter alia the violation of the victim's anatomy; embarrassment, distress or humiliation of the victim; the psychological harm caused by non-consensual offences; the relationship between the victim and the offender and the abuse of a position of trust and the infringement of standards of socially acceptable behaviour.

[58] The offences with which the First Claimant was convicted are serious. The prosecution's case was that First Claimant entered the bedroom of an adult female without permission, touched her inappropriately and performed a sexual act against her will. There can be no doubt that the First Claimant's conduct was deserving of the punishment meted out and it is certainly clear that such offending

[19] Case No. 24 of 2009 (BVI)

could itself be sufficient threat to public safety and public order as to justify deportation.

[59] The Court also notes that the First Claimant was charged in 2012 and convicted in 2014. He was released from prison in 2015 so that a little less than two years had elapsed since his conviction. It is common ground between the Parties that in that time, the First Claimant has had no further encounters with the legal system and the First Claimant's evidence makes it clear that he has every intention of avoiding such trouble in the future. His conduct while incarcerated also appears to have been exemplary and he has provided evidence from a number of individuals who have spoken positively of his seamless reintegration into the society and the unlikelihood of recidivism.

[60] The Court notes that the Defendant has not alleged that the First Claimant has displayed a propensity for reoffending and takes no issue with his conduct since his conviction. While this is a relevant factor to be considered, it is clear that cases have arisen where the personal conduct of the proposed deportee has been such that it gives rise to deep public revulsion such that public policy requires deportation.[20] In **N (Appellant N) (Kenya) v. Secretary of State for the Home Department,** the Court held that:

> "The risk of re-offending is a factor in the balance, but, for very serious crimes, a low risk of re-offending is not the most important public interest factor. In my view, the adjudicator's decision was over-influenced in the present case by his assessment of the risk of re-offending to the exclusion, or near exclusion, of the other more weighty public interest considerations characterised by the seriousness of the appellant's offences. This was an unbalanced decision and one which in my view was plainly wrong"

Is the interference reasonably justifiable in a democratic society?

[20] N (Appellant N) (Kenya) v. Secretary of State for the Home Department [2004] EWCA Civ 1094; R v Immigration Appeals Tribunal ex parte Florent [1985] Imm. AR 141; Said v Immigration Appeal Tribunal [1989] Imm. AR 372

[61] In considering this Claim, the Court has reviewed the limited local and regional decisions available. The Court has also reviewed a number of ECHR decisions in which Article 8 of the European Convention on Human Rights (which enshrines the right to respect for his private and family life, his home and his correspondence) has been applied. In considering such authorities, the Court has adopted a cautious approach bearing in mind that they are of persuasive and not binding authority. Moreover, it is clear that these decisions are highly fact sensitive and must be viewed in that light.

[62] The Court notes that the cases in which the ECHR has found that the effect on the individual's Article 8 rights would be disproportionate to the aim sought to be achieved by deportation reflects a similar scenario. In those cases the applicant had lived most of his/her life in the expelling state and he had considerable social and family ties within that State while having little contact or familiarity with the receiving state.

[63] In **Moustaquim v Belgium**[21] the applicant had arrived in Belgium aged 2, all his close relatives were there and had acquired Belgian nationality; he had received all his schooling in French and visited Morocco only twice on holiday. In **Mehmi v France**[22], the applicant had been born and educated in France and had lived there more than thirty years prior to the order. Most of his family including his parents and four brothers and sisters lived there. He was the father of three minor children of French nationality whose mother he had married. His family could not be reasonably expected to live elsewhere. Notwithstanding that in 1989, the applicant had participated in a conspiracy to import a large quantity of illegal drugs, nevertheless, in view of fact that deportation would separate him from his minor children and his wife the Court found that permanent exclusion order was disproportionate to the aims pursued.

[21] (Application no. 12313/86) judgment delivered 18 February 1991
[22] (Application no. 85/1996/704/896) judgment delivered 26 September 1997

[64] In a more recent United Kingdom decision **AP (Trinidad and Tobago) v Secretary of State for the Home Department,**[23] AP appealed against the Home Secretary's decision to deport him after being sentenced to 18 months imprisonment for a drug offence. He had lived in the UK since the age of 4. On the facts, the immigration and asylum tribunal concluded that the effect of his removal on all members of the family unit in the UK would mean that deportation would disproportionate, especially as he has a child who has a strong bond with him and there was evidence that he is a good and caring father.

[65] Conversely, where an applicant's links to the leaving state are not strong and where he has retained some links with the receiving state, such claims under Article 8 are demonstrably less successful. In **Boughanemi v France,** the applicant was a Tunisian who had lived in France since he was 8 with his parents and ten siblings and had a French-born child. He was to be deported because of a number of serious criminal offenses. The Court held that the deportation was justifiable in the interests of '"the prevention of disorder'**.** The Court found it probable that the applicant had retained links with Tunisia. He did not claim that he could not speak Arabic or that he had cut off all ties with that country. The Court also gave particular weight to the offences that he had committed and the fact that he had cohabited with a French woman and had a child with her only subsequent to the making of the deportation order.

[66] In **Onur v United Kingdom,**[24] the applicant was a 30 year old male who migrated to the United Kingdom from Turkey when he was 11 years old. The ECHR found the interference with his Article 8 rights was proportionate, taking into account the serious nature of his offending (robbery committed when he was 22 years old), he had not lived with his oldest child from a previous relationship, his relationship with his partner was relatively short and she was aware of his criminal record and risk of deportation, there would be practical difficulties in the partner and children

[23] [2011] EWCA Civ. 551
[24] [2009] ALL ER 161

relocating to Turkey but no evidence that it would be impossible or exceptionally difficult and the children were young and of an adaptable age.

[67] Any statutory instrument or order which purports to deport someone from this Territory where their children or other people with whom they enjoy family life reside will of necessity interfere with their family life under section 19 of the Constitution. Such a measure will only be compatible with the Constitution where it fulfills a legitimate aim and it is reasonably justifiable in a democratic society.

[68] In order to determine whether a decision to deport a person from this Territory will be compatible with respect for their family life, the Court has considered the extent of the links which the First Claimant enjoys with both this Territory and the receiving state, Jamaica. Among the factors which the Court has considered are the length of time spent in and knowledge of the language and culture in either State; the existence of family ties and social circle in the respective countries; the impact on their relationship with family members who remain behind, and any other personal circumstances, such as health or psychological factors, which may mean that the deportation has a particularly drastic effect. These factors then have to be balanced against the reasons for the removal in order to determine whether the interference with family life is proportionate to the need thereby fulfilled.

[69] Given the age at which the First Claimant came to this Territory, the length of his residence and the strength of his personal ties to the Territory, it cannot be said that this Territory has become his only home. The Court has also taken into consideration his remaining ties with his country of origin. He left Jamaica as an adult male after living there most of his life. It could not be said that he no longer has any social or cultural ties with Jamaica and given his existing close family connections, he is unlikely to find himself isolated there.

[70] This Court has also taken into account that the First Claimant has been continually resident in the BVI for 6 years before the Claim. Within a few years of his taking up residence, he was charged and convicted of serious offences of a sexual nature. He came here as an adult male and his residency was principally tied to his employment within the Territory. He has no property and no business interests here. He has not asserted an involvement in any social, philanthropic or religious groups or associations. He has however formed a number of firm friendships which are evident from the testimonials submitted to the Court. In the Court's judgment however, the First Claimant has demonstrated no other significant personal ties to the Territory.

[71] However, during his time here in the Territory, the First Claimant has established family ties. Since 2010 he has taken on the role of *de facto* spouse and father to the Second Claimant and her children. Although the Court does not doubt the genuineness of these relationships, the Court cannot ignore the fact that the Second Claimant is still legally married to another man and that there are no tangible plans to resolve this, six years into their relationship.

[72] The Claimants have submitted that it would not be reasonable to expect the Second Claimant to uproot her life and her successful business to follow the First Claimant to Jamaica and they have highlighted a number of practical issues which would make it very difficult for them to do so. In considering this factor, the Court has considered that the appropriate test is not whether there is an insurmountable obstacle to their following the First Claimant but rather, whether they cannot reasonably be expected to follow him there.[25] The Court has considered the considerable strength of the Second Claimant's ties to this Territory; her substantial business investment; the longevity of her residence; the fact that most of her dependents are Belongers and her continuing obligation to their welfare and upkeep. The Court has also taken into account that the Second Claimant and her children have no ties to Jamaica and have never travelled there. While it has not

[25] Boultif v Switzerland [2001]

been demonstrated that relocation would be impossible, in the Court's judgment the family cannot realistically be expected to follow the First Claimant to Jamaica. It follows that deportation may well be detrimental to that relationship.

[73] In light of the Second Claimant's nationality and the fact that the First Claimant had in fact spent some time there in the past, it was critical that some consideration be given to the possibility of relocating to St. Kitts and Nevis. Although it is possible that similar difficulties would be encountered there, Court is not satisfied that sufficient attention was given to this possibility.

[74] It will rarely be proportionate to uphold the deportation of an individual if the effect of the order is to sever a genuine and subsisting relationship between parent and child. However, each case must be decided on the particular facts and so a careful and informed evaluation of the facts is critical.

[75] In the case at bar, the adult children of the Second Claimant do not reside permanently within the household (and in the case of the Fourth and Fifth Claimants, within the Territory) and for the reasons already set out, the Court finds that there is marginal family life with these children which would invoke section 19 of the Constitution.

[76] The Second Claimant has a 14 year old daughter in respect of whom the Claimant acts as a *de facto* parent. In the relatively brief time that they have lived together a strong family bond has nevertheless developed. During his time here, the First Claimant has also fathered a young child. The Court must consider the best interests of these children. Dkhoya's is not currently a Belonger but she has resided in the Territory for all of her life together with the rest of her family. She resides with the Second Claimant and in her primary care and control. There is no doubt that relocation would be disruptive to her.

[77] The Court has also given significant weight to the fact that Taylor is a Belonger of this Territory who has lived here all of her life. Her family is here and the Court

has also considered that she has never travelled to Jamaica. The importance of nationality was considered in the English case of **ZH (Tanzania) v Secretary of State for the Home Department**[26]. In that case, the Court found that the children were British not only by birth but also by descent. They had an unqualified right of abode there; they had lived there all their lives; they were being educated there; they had other social links with the community there; they had a good relationship with their father there. The Court stressed that the intrinsic importance of citizenship should not be downplayed. As citizens, these children had rights which they would not be able to exercise if they moved to another country and they would lose the advantages of growing up and being educated in their own country and in their own culture and language.

[78] The Court found that it is not enough to say that a young child may readily adapt to life in another country. In making the proportionality assessment under Article 8, the best interests of the child must be a primary consideration. This means that they must be considered.

[79] This Court respectfully adopts this reasoning and finds that in the circumstances of this case it would not be reasonable to expect the child to move to Jamaica. However, the Court is also cognizant of the fact that this case must be determined on its own facts. This conclusion can be outweighed by the cumulative effect of other considerations. Although from all accounts the First Claimant intends to strengthen and solidify his bond with and to fully assume his parental responsibilities, he does not currently live with or support Taylor. Unlike **ZH (Tanzania)**, the First Claimant is not Taylor's primary carer. The Court notes that she is in the primary care and control of her mother who is a Belonger and who presumably supports her In the Court's view, the effect of deportation is unlikely to have the same impact as if they were living together as a family. The First

[26] [2011] UKSC 4

Claimant currently has a visiting relationship with Taylor which could no doubt continue with appropriate commitment from both her parents. [27]

[80] It will rarely be proportionate to uphold the deportation of an individual who has a close and genuine bond with their family and the latter cannot reasonably be expected to follow the removed person. But inherent in all such constitutional challenges is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. Deportation will only be compatible with the Constitution where it fulfills the requirements of section 19 (3) which prescribe against arbitrariness. It is now accepted that what is necessary in a democratic society for the purposes of the Constitution is determined by reference to the balance achieved between the rights of the individual and the public interest, through the application of the principle of proportionality. The principle of proportionality recognises that human rights are not absolute and that the exercise of an individual's rights must always be checked by the broader public interest.

[81] In considering this balance, the Court has been referred to the case of **Allan Samaroo v Secretary of State for the Home Department.**[28] This case concerned two appeals against the dismissal of the applications for judicial review of the Secretary of State's decisions to make deportation orders in respect of the two applicants following their detention for drug trafficking offences. The English Court of Appeal decided that in applying the principle of proportionality there are two distinct steps. In step one the court must consider whether the objective (in this case the prevention of crime and disorder) can be met by some other less onerous means. In step two, the court must consider whether the measure would have an excessive or disproportionate effect on the interests of affected persons. In taking the second step the court must ask is the action a fair balance between

[27] Onur v United Kingdom – the Court found that the Applicant's relationship with his eldest daughter would be disrupted by his deportation but given that they had never cohabited, they could continue that relationship by way of telephone and e-mail contact and visits.

[28] [2001] EWHC Civ 1139

the legitimate aim of crime and disorder prevention and the affected person's human rights.

[82] After weighing the competing interests, Lord Dyson held that the objective in that case could not be met by less interfering means and concluded that the Secretary of State had been entitled in law and on the evidence to make the deportation orders in issue.

[83] These relevant principles have since been honed by Lord Sumption in **Bank Mellat v Her Majesty's Treasury (No.2)** where he proposed a four stage test[29]:

> "…the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."
>
> The question is whether a less intrusive measure could have been used without unacceptably compromising the objective…"[30]

[84] The Court is guided by this dictum. The Court is also cognisant that in considering the issue of proportionality, it must be sensitive to the context of the claim which is constitutional challenge and not an application for judicial review. The Court's approach must therefore go beyond a mere review of the Governor's decision. The Court must instead make a value judgment or evaluation by reference to the relevant circumstances of this case. [31]

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[29] (No 2) [2014] AC 700,at paragraphs 20-21 and 68-76

[30] This statement of principle was more recently approved in the 2016 Privy Council judgment in Arorangi Timberland Limited et al v Minister of the Cook Islands National Superannuation Fund (Cook Islands) [2016] UKPC 32

[31] R (SB) v Governors of Denbigh High School [2207] 1 AC 1

[85] In the case at bar the Claimants contended that the deportation order was not necessary in a democratic society. They submitted that the interference is disproportionate to the legitimate aim of national security, public safety and the prevention of crime and disorder. Counsel for the Claimants argued that based on the relatively low maximum penalty assigned to the offences with which the First Claimant was charged; the actual sentence meted out; the fact that his offending would not have the same impact on the community that a drug offence could have and the fact that there is no evidence that the First Claimant is predisposed to criminality, there is no overwhelming need to protect society from him.

[86] Counsel further submitted that given the strength of his personal and family ties, deportation would be disproportionate as it would be devastate those relationships. Counsel concluded that deportation could not be justifiable in a democratic society in the absence of factors which clearly weighed in favour of the public interest.

[87] This position was strenuously opposed by Counsel for the Defendant who submitted that the First Claimant's deportation is reasonably justifiable and proportionate. She noted that it is for Territory to maintain public order and to control its borders. Counsel argued that it is in the public interest to deport persons who come to the Territory and have committed crimes. This is particularly so for persons who have not been resident in the Territory for a very long time before running afoul of the criminal laws of the Territory.

[88] Counsel relied heavily on the dicta in **OH Serbia v SSHD**[32] in which Wilson J considered the public interest in the context of criminality:

> "(a) The risk of reoffending is one facet of the public interest but, in the case of very serious crimes, not the most important facet.
>
> ii. Another important facet is the need to deter foreign nationals from committing serious crimes by leading them to

[32] [2008] EWCA Civ 694

understand that, whatever the other circumstances, one consequence of them may well be deportation.

iii. A further important facet is the role of a deportation order as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes.

iv. Primary responsibility for the public interest, whose view of it is likely to be wider and better informed than that of a tribunal, resides in the respondent and accordingly a tribunal hearing an appeal against a decision to deport should not only consider for itself all the facets of the public interest but should weigh, as a linked but independent feature, the approach to them adopted by the respondent in the context of the facts of the case. Speaking for myself, I would not however describe the tribunal's duty in this regard as being higher than "to weigh" this feature."

[89] Counsel for the Defendant submitted that one of the critical aims of the Immigration and Passport Act is to send a clear message to non-belongers who take up residence in the Territory that the consequence of serious crimes may be deportation and there is some judicial support for this contention. In **N (Kenya) v SSHD**[33], May LJ said as follows:

> "64…Where a person who is not a British citizen commits a number of very serious crimes, the public interest side of the balance will include, importantly although not exclusively, the public policy need to deter and to express society's revulsion at the seriousness of the criminality."

[90] Counsel for the Claimant has sought to distinguish the **Samaroo** judgment on the basis of the pernicious nature of the class of drug offences. Counsel submitted that such offenders are proper candidates for expulsion from Her Majesty's Territories. In the Court's judgment, it is not enough to highlight the difference in the maximum sentencing prescribed. Clearly, the threshold in the Immigration and Passport Act is much lower in the BVI than in United Kingdom and this factor cannot be ignored.

[33] [2004] EWCA Civ. 1094

[91] The seriousness of the offending is a critical factor to be considered. In **N (Kenya) v Secretary of State for the Home Department**[34] the applicant came to the UK at age 20, was in a relationship with a Dominican citizen living in the UK, with whom he later had two children. At age 21, he was convicted of abducting and imprisoning a woman and raping her three times and sentenced to 11 years imprisonment. He appealed against his deportation order, which the immigration and asylum tribunal allowed under Article 8 because the risk of re-offending was low and the vulnerability of the family meant relocation to Kenya or Dominica would be very difficult (he was a victim of torture in Kenya and his wife was vulnerable with a history of social services involvement).

[92] The English Court of Appeal however upheld the deportation order because the public interest side of the balance has to include the public policy need to deter and to express revulsion at the seriousness of the criminality. The Court also held that for very serious crimes a low risk of re-offending is not the most important public interest factor.[35]

[93] By any standard, the First Claimant's offending is a serious departure and infringement of the standards of socially acceptable behaviour in this Territory. It is also clear that the Governor is entitled to take into account that deportation may be necessary as an example to other actual or potential foreign criminals.[36] In that regard, this Court has considered the important observation made Lord Dyson at paragraph 36 of that judgement;

> "In my judgment, in a case such as this, the court should undoubtedly give a significant margin of discretion to the decision of the Secretary of State…. But the court does not have expertise in judging how effective a deterrent is a policy of deporting foreign nationals who have been convicted of serious drug trafficking offences once they have served their sentences. In *R v Secretary of State ex parte Ali Dinc* [1999] 1NLR 256 (where the applicant had been sentenced to five years imprisonment for

[34] [2004] EWCA Civ. 1094
[35] This position was later confirmed in Gurung v Secretary of State for the Home Department [2012] EWCA Civ. 62 where the Court of Appeal held that the absence of a risk of re-offending is not the "ultimate aim" of the deportation regime.
[36] OH (Serbia v Secretary of State for the Home Department [2008] EWCA Civ. 694 at paragraph 15

possession of heroin with intent to supply) Henry LJ said that, in making his decision whether under the Immigration Rules, a deportation order should be made, the Secretary of State was:

> "...better placed to take a wider policy based view on the key question as to whether in the language of [the guidance known as] DP/2/93, removal can be justified as necessary in the interests of a democratic society."

[94] The First Claimant had no previous convictions and there is no evidence to show that he could reasonably be expected to engage in criminal activity in the future, but that is not the determinative factor.[37] The Court must also consider that the offences committed by the First Claimant are of a serious nature. In the Court's judgment there is a significant public interest in expressing the Territory's revulsion for amoral acts committed by the First Claimant. There is also a clear public interest in deterrence.

[95] In considering the question of proportionality, a decision maker must focus on whether there was a less intrusive measure which could have been utilised to accomplish the objective. None has been suggested to the Court and the Court has struggled to find a positive answer to this query.

[96] Having considered all of the relevant evidence and having weighed the level of interference against the prejudice to the legitimate aim pursued in declining deportation, this Court cannot conclude that Claimant's deportation from the Territory of the Virgin Islands is disproportionate to the aims pursued and not reasonably justifiable in this democratic society.

IS THE CLAIMANT'S DEPORTATION A DISPROPORTIONATE INTERFERENCE WITH THE CLAIMANT'S FUNDAMENTAL RIGHT TO MARRY AND FOUND A FAMILY?

[97] As regards section 20 of the Constitution, the First Claimant contends that it will be virtually impossible to pursue married life if the First Claimant is deported. Counsel for the Claimant directed the Court's attention to the parts of the evidence

[37] N (Kenya) v Secretary of State for the Home Department [2004] EWCA Civ 1094

which detailed the deep and abiding nature of the relationship between the First and Second Claimant. She submitted that there is cogent evidence by which the Court could find that the Parties have a specific intent to marry and that the anticipated marriage is in no way in the nature of a sham.

[98] Although it is accepted that presently, the First and Second Claimants would not be able to marry because of the Second Claimant's marital status, Counsel for the Claimants submitted that would not prevent the Parties from invoking the protection of the right to marry. According to Counsel, section 20 of the Constitution confers this right irrespective of an individual's marital status. She submitted that the Constitution anticipates protection against past, current and future human rights violations. She stressed that neither of the Parties intend to commit bigamy and fully appreciate that there is a need to take certain steps to fully facilitate marriage.

[99] This contention was firmly opposed by the Defendant who submitted that there is no evidence that the Claimants' right to marry has been or will be impeded by the First Claimant's deportation. Counsel argued that the First Claimant's legal status in the Territory has no relevance to and no bearing on his ability or right to marry. Rather, it is the Second Claimant's existing marriage which poses an impediment to her marriage to the First Claimant. Counsel further submitted that in any event, the Claimants are free to marry outside the Territory.

[100] In support of these contentions Counsel for the Defendant relied on the reasoning in **R (Baiai and another) v Secretary of State for the Home Department.**[38] 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 Human Rights 1950 art.12.[39] The

[38] [2009] 1 A.C. 287
[39] This article is akin to Article 20 of the Virgin Islands Constitution

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.

[101] 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.

[102] The House observed that while the right to marry under Article 12 was a 'strong' right, national authorities were entitled to impose reasonable conditions on the right of a third-country national to marry for the purposes of ascertaining whether the marriage in question was a marriage of convenience and therefore not a genuine marriage warranting the protection of Article 12. Insofar as the scheme restricted the right to marry, it could only be justified to the extent that it operated to prevent marriages of convenience.

[103] There can be no doubt that section 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. Within the BVI, the relevant statute is the Marriage Ordinance Cap 272 of the Revised Laws of the Virgin Islands (as amended). The laws of this Territory expressly prohibit polygamous marriage. Given that a no-fault divorce is not available in the Virgin Islands and there has been no judicial ruling on the sustainability of the Second Claimant's current marriage (i.e. whether there is sufficient evidence to sustain a conclusion that the marriage has irretrievably broken down), it seems to the Court that this claim is fundamentally premature.

[104] Moreover, within the context of deportation proceedings, Strasbourg case law has quite clearly identified that Article 12 of the ECHR (which prescribes the right to marry and found a family) can be successfully invoked only in the case of imminent deportation or expulsion, or denial of admission to the Territory, and only when the person is able to quite clearly show that he has very specific plans to marry and that it is realistic to expect that both partners will not be able to realize these plans outside of the country. In the Court's judgment, the Claimants' claim fails on both limbs.

[105] In **Application No. 10914/84 v Netherlands**[40], 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 and 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.

[106] 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.'

[107] That case is authority for the proposition that the prospect of marriage need not disrupt the ordinary course of immigration control. This Court has also considered the learning in**, X v Federal Republic of Germany.**[41] In that case a man from India whose residence permit was not renewed and who claimed that this prevented him from marrying his German fiancé. The Commission noted that the complainant had not sufficiently demonstrated that he had concrete plans to marry or that these plans were realistic, and that he might also marry outside of Germany. In finding that the complaint does not disclose any appearance of a

[40] (1985) 8 EHRR 308, 10914/84
[41] Application No. 7175/75

violation of the rights and freedoms guaranteed by the Convention, the Commission noted:

> "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."

[108] The European Commission has since confirmed this line in its subsequent case law.[42] Again, in considering these authorities, the Court has adopted a cautious approach bearing in mind that they are of persuasive and not binding authority.

[109] Having reviewed the totality of the evidence filed in support of the alleged interference with the Claimants' right to marry, this Court is satisfied that the Claimants' case is not made out. First, the Claimants have not demonstrated any tangible or concrete plans to marry which have been thwarted by any actions taken by the Governor. Moreover, they have not established that the First Claimant's deportation would prevent him from marrying outside of the Virgin Islands.

[110] In the alternative, the First and Second Claimants have asserted that they have the right to enjoy a union analogous to marriage and found a family. Counsel drew the Court's attention to the historical context and the socio-cultural heritage which obtains in the Caribbean region. According to Counsel, the constructs of family have never conformed themselves to strict definition even by dint of law and so she submitted that our jurisprudence must evolve to accommodate these realities.

[111] This Court finds no basis upon which a court should for the purposes of section 20 of the Constitution, adopt a broad definition of the term "marriage" to include common law unions when it is clear that the provision seeks to protect the right of men and women of "*marriageable age*" to marry "*in accordance with the laws*

[42] See: Capoccia v Italy, Application No. 16479/90 dated 13 October 1993; S.D.P. v Italy, Application No. 27962/95 dated 16 April 1996; X v Switzerland, Application No. 7031/75 dated 2 July 1976; B v Netherlands, Application No. 11619/85 dated 06 May 1986

enacted by the Legislature." Section 20 expressly and unequivocally provides that the exercise of the right to marry and found a family shall be subject to the local laws. It follows that the essence of the right to marry is the formation of a legally binding union recognized by the laws of the BVI. It seems to the Court that individuals have never needed the sanction of the state to engage in common law unions. Rather, what has repeatedly been sought is recognition of such unions and an acknowledgement that the same rights should be accorded as in the case of lawfully married persons.

[112] The Court therefore finds that there has been no interference with the right to marry under section 20 of the Constitution.

[113] However, like Article 12 of the ECHR, section 20 of the Constitution sets out a double barreled right which includes the right to found a family. Originally, the right to found a family has been deemed to be coupled with the right to marry such that only parties who had the right to marry could enjoy the right to found a family. There was some support for this contention in the **Rees v United Kingdom**[43] in which the Court suggested that the use of the singular "this right" in the drafting of Article 12 suggests that the right to marry and found a family are related aspects of a single entitlement. The Court held that "*Article 12 is mainly concerned to protect marriage as the basis of the family."*

[114] However, in recent times the Article 12 right has increasingly been interpreted disjunctively. In **Goodwin v United Kingdom,**[44] the Court observed:

> "Reviewing the situation in 2002, the Court observes that Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision."

[43] (1987) 9 EHRR 56 Judgment 17 October 1986
[44] (2002) 35 EHRR 447at paragraph 98

[115] Consistent with Article 8 of the Convention it would now seem that the text of Article 12 leaves sufficient scope for an interpretation where the right to found a family may obtain with cohabitation where parties are unmarried.[45]

[116] The First and Second Claimants rely on such a disjunctive reading of section 20. They contend that they see each other as husband and wife. They indicate that they are planning to formalize their union. In addition, the First Claimant contends that he has assumed the role of father in the household. They argue that the deportation order would adversely impact the exercise of their right to found this family because such a right must encompass a right to live together.

[117] Although there is distinct overlap between Article 8 and Article 12, it is apparent that the European Court and Commission have interpreted Article 12 more narrowly as allowing a couple the right to procreate. In the Court's judgment, given the scope and remit of section 19 of the Constitution which guarantees the right to respect for family life, section 20 of the Constitution must be similarly circumscribed.

[118] It is readily apparent that the true cusp of the Claimants' claim is the protection of the right to family life. The Claimants have not alleged nor asserted an intention to bear children which could be impeded by the First Claimant's deportation. Instead they contend that his removal would adversely impact the existing family which they have already established. This is precisely the remit of section 19 of the Constitution. It follows that on the evidence advanced section 20 of the Constitution would not be engaged.

[119] In any event, taking guidance from the Strasbourg jurisprudence, it is clear that the right to found a family has been interpreted in a conservative fashion within the context of immigration. It has for instance been made clear that Article 12 of the ECHR does not contain a right to remain in a particular country. In **Babul v**

[45] Goodwin v United Kingdom

United Kingdom, the Commission made it clear that the ECHR does not impose a general obligation on states to respect the choice of residence of a married couple of to accept the non-national spouse for settlement in the State concerned. This position has been frequently applied in the United Kingdom courts.[46]

[120] The Strasbourg jurisprudence reflects a decided reluctance to thwart immigration policy. 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.[47] The jurisprudence also reflects that if an expulsion is permitted under Article 8 (2) of the ECHR, the same conclusion must ensue from Article 12. So that if an expulsion is permitted under section 19 (3) the same conclusion must ensue from section 20.

[121] Moreover, this Court recognizes that unlike Article 12 of the ECHR, section 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 found a family 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). In circumstances where the Court has already determined that there has been no proven violation of the Claimants' section 19 rights occasioned by his deportation, this Court is equally satisfied he could not establish that his deportation would prevent him from founding a family.

[122] Having reviewed the evidence filed in support of the Claim made under section 9, 19 and 20 of the Constitution having the considered the legal submissions

[46] ZH (Tanzania) [2011] UKSC 4
[47] Application 2535/65, X v. Federal Republic of Germany. Coll. 17 (1966), P. 28 and see Agee v. United Kingdom with regard to Article 8

advanced by both sides, this Court is satisfied that the Claimants' claims for relief are not made out. The Claimants' motion is therefore dismissed.

COSTS

[123] 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.

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

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

Vicki Ann Ellis
High Court Judge

By the Court

[SEAL]

Registrar