BARBADOS
[Unreported]

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION

No. 1666 of 2012

BETWEEN:

RAUL GARCIA **CLAIMANT**

AND

MINISTER RESPONSIBLE FOR IMMIGRATION **FIRST RESPONDENT**

CHIEF IMMIGRATION OFFICER **SECOND RESPONDENT**

BEFORE: The Hon. Madam Justice Margaret Reifer, Judge of the High Court

2012: October 10, 24;
December 12,17, 18, 19, 20, 21;

2013: February 8, 11, 13, 20.

Mr. David Commissiong in association with Mr. Leslie Haynes Q.C.,
Mr. Ajamu Boardi and Ms. Paula Jemmott, Attorneys-at-Law for Claimant

Ms. Donna Brathwaite and Mrs. Margreta Jordan-Watson, Attorneys-at-Law for Respondents

DECISION

Nature of Proceedings

[1] By Application Without Notice , the Claimant herein Raul Gracia applied for an Order that a Writ of Habeas Corpus ad Subjiciendum issue forthwith to the Minister Responsible for Immigration and the Chief Immigration Officer to have the body of the said Raul Garcia brought immediately before a Judge of the Supreme Court of Barbados that"they may show cause why the Claimant should not be immediately released and/or to undergo and receive all and such matters and things as the said Judge shall and there consider of and concerning him in this behalf".

[2] This Application was accompanied by the Affidavit of the Claimant Raul Garcia.

[3] The said Application was heard on the 10th October, 2012 and upon hearing the submissions of counsel for the Claimant and reading the said Affidavit this Court issued an Order in the following terms:

"THAT A Writ of Habeas Corpus ad Subjiciendum do issue forthwith directed to the Minister responsible for Immigration..and the Chief Immigration Officer..to produce to the High Court…the body of Raul Gracia by whatsoever name he is called, said to be detained in the custody of the Minister Responsible for Immigration.. and the Chief Immigration Officer, and be prepared to state the day and cause of his being taken and detained so that the court may then and there examine whether such cause is legal".

[4] It was also ordered that notice of the said Application be given to the Minister Responsible for Immigration and the Chief Immigration Officer
and a date was fixed for the hearing of this matter by the Court.

[5] On the 24th October, 2012 at a hearing at which all parties were represented, leave was granted to the Respondents to file their Affidavit[s] in Response, for the Claimant to File his Affidavit in Reply, if so advised, and a date fixed for the hearing of the substantive application in November 2012.

[6] On the 6th December, 2012 the Second Respondent filed the document titled Return of Writ of Habeas Corpus Ad Subjiciendum effectively asserting that the Claimant had been lawfully detained in her custody "under and by virtue of a Deportation Order dated the 24th day of March 2010 hereto and an Order for Release from Detention dated the 6th September 2012".Copies of the said Orders were attached to and Exhibited to this document.

[7] In addition thereto, the following Affidavits have been filed by the Respondents:

(i) The Affidavit of Senior Foreign Service Officer and Head of the Consular Division, John Benjamin Blackman;

(ii) The Affidavit of Assistant Superintendent of Prisons in charge of custody, Cedric DaCosta Moore;

(iii) The Affidavit of Immigration Officer Emerson Shepherd;

(iv) The Affidavit and Supplemental Affidavit of Inspector of the Royal Barbados Police Force, David Welch.

[8] The Claimant on December 11th 2012 filed an Affidavit in Response to the above.

[9] At the first hearing of the substantive matter on the 12thDecember 2012 an "in limine" application was made by counsel for the Respondents questioning the jurisdiction of the Court. Summarised her argument was, that by virtue of the filing on December 6th 2012 of the document titled Return of Writ of Habeas Corpus ad Subjiciendum and certain Affidavits in support thereof, which together established on the face of the record that both the deportation and detention orders issued respectively on the 24th day March 2010 and 7th day of December 2012 were lawful, section 23 of the Immigration Act Cap. 190 ousted the jurisdiction of this Court to review the said Detention and/or Deportation Order.

[10] This Court ruled on this "in limine" submission on Monday 17th December, 2012 rejecting the same.

[11] The hearing of the substantive application commenced on 18th December 2012.

[12] The main focus of the Claimant's submission shifted somewhat from the approach taken and/or outlined in the Without Notice Application of October 2012, but the factual matrix within which these submissions were made remains the same and I propose to begin by outlining the relevant facts in this determination.

The Relevant Facts

[13] Raul Garcia is a Cuban national, having been born there in 1954. This fact, however, was not immediately known to the Barbadian authorities who

apprehended him in 1994; and this concealment of his true identity was the genesis of the significant troubles facing Raul Garcia from 2010 to date.

[14] In September 1994 the Barbadian authorities apprehended a man named EdilbertoCoronell, who was tried by the Barbadian courts for crimes involving the importation, possession and trafficking of a substantial amount of the drug cocaine (490 pounds). Edilberto Coronell carried a passport which identified him as a national of Colombia. This passport evidenced the fact that prior to his apprehension in September 1994, EdilbertoCoronell had made two previous visits to Barbados in May and August 1994 and had used the same passport for travel to Trinidad and Tobago and Venezuela (see Affidavit of Emerson Shepherd, Immigration Officer). Counsel for the Respondents asserts that these are relevant facts, as is the fact that the passport of EdilbertoCoronell was false.

(15) It appears also to be undisputed that EdilbertoCoronell in the years prior to his capture in Barbados used the following aliases: EdilbertoCoronell-Munoz, Edilberto Munoz-Coronell, Edilberto Munoz and Raul Thomas Garcia. It is deposed that he has also used as his date of birth, the 4th day of September 1954 and the 5th day of January 1961.

[16] Edilberto Coronell was eventually sentenced by our Court of Appeal to a term of imprisonment of 15 and 20 years for the drug related offences referred to above.

[17] There is some dispute as to when his true identity became known: whether 1997 (when Interpol passed certain information to the Commissioner of Police), 2001 (when the Claimant asserts that he informed the then Superintendent of Prisons), or 2010 (when the information was first made known to Immigration Department/Chief Immigration Officer). However, since both the Claimant and the Respondents have based their submissions on the relevant authorities, (namely the Minister Responsible for Immigration and the Chief Immigration Officer) becoming aware of his true identify in 2010 (see Affidavit of and cross-examination of Emerson Shepherd; in addition the Claimant as part of his case asserts that he informed the Immigration Department of his true identity in early March 2010), it has become a moot point whether this information was known prior to 2010. The Claimant asserts that after the death of his son in 2001 from a drug overdose, he made his true identity known to the then Superintendent of Prisons, but it appears from the unchallenged Affidavit in Response of Cedric Moore, currently Assistant Superintendent of Prisons, filed herein on

December 6th 2012 "that there is no record of the Claimant notifying the Prisons in 2001 that he was not a Colombian national but was in fact a Cuban by birth".

[18] The Claimant tells us, and this was independently confirmed by the Chief Immigration Officer in 2010, (as evidenced by the Affidavit of Emerson Shepherd) that he abandoned Cuba with his family in 1964 at the age of ten (10). He spent his childhood and young adult life in the United States of America where he was subsequently granted the status of a legal permanent resident. (see Affidavit of David Welch Exhibit DW6).

[19] In 1988 Raul Garcia left the United States. At that time he had a 1982 conviction for cocaine possession and fled in avoidance of a pending drug charge. He took up residence in Colombia under a new identity, namely, Edilberto Munoz Coronell.

[20] It was from Colombia some 6 years later that he launched the enterprise of bringing drugs into Barbados for which he was incarcerated in 1994. His sentence of imprisonment for these offences came to an end in March 2010.

[21] The Claimant raises in issue as a relevant fact his record in Barbados since incarceration. It is his assertion that he is fully rehabilitated and that the Raul Garcia of 1994 is not the same person presently before the Court. He asserts that he was a model prisoner who participated in Rehabilitation Programmes at the Prison, and at the end of his sentence both the Prison's Head of Custody, De Carlo Payne and his Rehabilitation Officer/Counsellor, Father Clement Paul gave the Claimant an outstanding Rehabilitation Report (see Exhibit RG1 and 2). Whilst at the Prison he was enrolled in the Art Programme and won awards at the National Independence Festival of Creative Arts (NIFCA). He was allowed to participate in the annual Holetown Festival and Bridgetown Market and attended at IIaro Court to receive his NIFCA Awards. It is his assertion (in large measure confirmed by the report of Superintendent of Prisons DeCarlo Payne in his letter of 12th January, 2009) that he was an unofficial counsellor to other inmates who had drug addiction problems. He deposes that the death of his eldest son in 2001 of a drug overdose was cathartic and proved to be a significant milestone in his rehabilitation. It is also asserted by him that his prison sentence was discounted as a result of his good behaviour.

[22] On the 11th March 2010 the Claimant's prison term came to an end. On that date, he was handed over to officers from the Immigration Department and was taken to a detention area at the Grantley Adams International Airport, where he remained until the 17th December 2010.

[23] On or about April 2010 the Immigration Department contacted the Cuban Embassy and requested that the Cuban Government allow the Claimant to return to Cuba. At the time of the hearing of this matter, there was no expressed intention by the Cuban Government to allow the Claimant to return to Cuba or for that matter, and just as importantly, that he will not be allowed to return to Cuba. On the contrary, it is the case for the Respondents that this request is being "processed" and consequent on this on-going dialogue, in December 2010, the Claimant was issued with a Cuban passport valid until 2016. The parties disagree as to how this act by the Cuban Government should be interpreted. It is the uncorroborated allegation of the Claimant that it was issued by the Cuban Government to facilitate his travel to a third country. Without doubt, there are other more positive assumptions that can be drawn from this fact.

[24] On the 17th December 2010 the Claimant was returned to the Prison by officers of the Immigration Department. On that said date the Claimant was served a Deportation Order dated the 24th March 2010 at the Grantley Adams International Airport signed by the Minister Responsible for Immigration (see Affidavit of Emerson Shepherd Exhibit ES7).

[25] This Deportation Order reads as follows:

FORM D	THE IMMIGRATION ACT (CAP.190)

DEPORTATION ORDER AGAINST

RAUL TOMAS GARCIA
Aka EDILBERTO MUNOZ CORONELL

TO: RAUL TOMAS GARCIA
Aka EDILBERTO MUNOZ CORONELL

I, **Harcourt Allan Husbands,** Minister responsible for Immigration, in exercise of the powers vested in me by Section 13 (6) of the Immigration Act Cap. 190, herby Order you to be Detained and to be deported from the island to the Republic of Cuba.

I further order you to remain out of Barbados while this Order is in force.

Dated this 24th day of March 2010

……
Minister responsible for Immigration

[26] It is asserted by the Respondents that it is a relevant and undisputed fact that this Deportation Order has never been cancelled and remains in full force and effect. It is pointed out by the Claimant as significant and relevant, that the said Deportation Order has remained unexecuted two years and nine months after its issue.

[27] The Claimant was then informed by the Immigration Officers that an Order for Detention pending removal from Barbados had been issued and that the place of detention was the Prisons (see Affidavit of Emerson Shepherd Exhibit ES8). The said Detention Order was served on the Superintendent of Prisons, through one of the Prison Officers, in the presence of the Claimant.

[28] In December 2010 the Claimant went on a hunger strike and then again in January 2012.

[29] In September 2011, the Claimant through his counsel at that time filed an Application for a Writ of Habeas Corpus Ad Subjiciendum, which was later discontinued by Notice of Discontinuance filed September 27th 2011. The parties are disagreed on the reason for the discontinuance and it was not considered a relevant issue for further clarification by either party. What appears undisputed, however, is that there was an exploration at that time of the possibility of the Claimant taking up residence in the Dominican Republic. That evidently proved to be unsuccessful.

[30] On the 6th September 2012 an Order for release from detention was issued by the Minister Responsible for Immigration (see Affidavit of Emerson Shepherd and Exhibit ES10). On the 9th September 2012 the Claimant was transported from the Prisons and taken to a site located at the Garrison pending his deportation from Barbados to Cuba.

What are the disputes of fact?

[31] Certain disputes of fact are apparent on the face of the record and in the parties' submissions to the Court, but none of them were central to the ultimate issues determined. For example, it is undisputed that Cuba has a prohibitive practice as it relates to the return to the jurisdiction of those nationals that have departed. Counsel for the Claimant submitted as a statement of fact that the Claimant has lost his right to return to Cuba and did not fit into any of the discretionary exceptions that are sometimes made to a strict application of the law. It was his submission that the Claimant was "Stateless".

[32] Counsel for the Respondents has a much more sanguine view as expressed in the Affidavit of Foreign Service Officer, John Blackman, where he deposes that discussions commenced between the Cuban Embassy and his Ministry in 2010 and the issue of the Claimant's repatriation is the subject of on-going diplomatic discussion between these parties. He states as follows at paragraph 10 and 11.

> "10. I am informed and verily believe that at a meeting, the Consular Officer of the Cuban Embassy had informed the Ministry that the repatriation of the Claimant to Cuba was not a simple matter.
>
> 11. I am informed and believe that as a result of this meeting, the Ministry was of the view that the Government of Barbados would have to enter into a further round of discussions with the Cuban Government on the repatriation of the Claimant to Cuba. These discussions are on-going".

And further at paragraph 16:

> "16. I am further informed and verily believe that as recently as 15th day of October 2012, the Ministry met with the Cuban Ambassador. The Ambassador's Assistant was requested in the repatriation of the Claimant to Cuba or alternatively, assistance with securing the Claimant's repatriation to a third country".

[33] Further, the Claimant alleges that he has lost his rights as a resident of the United States, that he is no longer wanted by law enforcement in the United States and that he would not be permitted to return there. The Affidavit evidence of the Respondents shows that the Claimant is a legal permanent resident of the United States (see paragraph 18 of the Affidavit of David Welch) and that there is an outstanding criminal matter against him (see paragraph 13 of the Affidavit of David Welch that INTERPOL Washington has indicated to the Barbados Police that the Claimant is currently wanted by the United States of America Marshals Service in the Southern District of Florida for violating bond on charges of distribution of cocaine). It is clear, however, that there has been no official notification as to whether the United States Government proposes to extradite, and if so, when.

What is the Claimant's legal Status under Barbados Law

[34] The Claimant Raul Garcia is a subject of the realm and as such is entitled to the protection of Habeas Corpus as a mechanism for protecting his right to liberty from

unlawful interference:**see Khawaja v Secretary of State for the Home Department (1984) AC 74.**

[35] However, when Raul Garcia entered Barbados in 1994 he did so on a false passport; he did so fraudulently and by this act alone he is deemed to be an `illegal entrant': see **Khawaja above;Zamir v Secretary of State for the Home Department [1980] 2AER 768 and Nielsen v Barker [1982] WIR 254**

[36] Additionally, his admitted history of being a convicted drug dealer would immediately have placed him in the category of Prohibited Persons referred to in section 8 of the Immigration Act Chap. 190 (First Schedule) had he applied for lawful entry into this island. His conviction in Barbados further places him in the category of persons likely to be expelled by the Immigration authorities. While, as pointed out by counsel for the Respondents, the Claimant would have committed an offence under section 29(g) of the Immigration Act when he entered Barbados in 1994 under a false passport, it is here noted that he has not been charged with an offence

under section 29, and there are inherent challenges in proffering such a charge in 2013.

[37] He has no status under the Immigration Act of Barbados, he falls within a category of persons that can lawfully be deported were it not for the complications attendant on that exercise.

[38] As an "illegal immigrant" he cannot work, has no access to public funds and the Chief Immigration Officer has a discretionary power seen at 13(6) and (8) of the Act which reads as follows:

> "(6) Where a person to whom a permit is issued under subsection (2) remains in Barbados after the expiration or revocation thereof, the Minister may make a deportation order against him".

And at

> "(8) The Chief Immigration Officer may detain a person mentioned in subsection (6) pending the making and execution of a deportation order".

See also section 21 and 22 of the Immigration Act referred to below.

[39] It at all times remains within the discretion of the Chief Immigration Officer to issue and execute a deportation order against this Claimant.

Is he a "Stateless" Person?

[40] I will briefly address the issue of whether the Claimant is a "Stateless" person.

[41] The Claimant's Without Notice Application for the issue of the Writ of Habeas Corpus placed primary emphasis on the assertion that he was a "Stateless" person entitled to the benefits of the 1954 Convention relating to the Status of Stateless Persons to which Barbados acceded in 1972.

[42] In the *inter partes* presentation of the Claimant, counsel for the Claimant made clear that he rested his submission on the domestic law and common law outlined below and not on international law.

[43] It is however observed in passing that "Statelessness" is not a concept found in Barbados domestic law. Nor has Barbados incorporated the provisions of the 1954 Convention Relating to the Status of Stateless Persons into its domestic law.

The Issues

[44] Many matters have been raised in the several Affidavits filed by the parties and to a large extent by the submissions of the parties, but in the opinion of this Court the issues for determination are narrow.

[45] The Claimant's concession or acknowledgement that the purported detention and deportation are prima facie lawful, has in effect significantly narrowed the issues to be determined by this Court.

[46] It is the continued detention that is the central issue: given the long period that the Applicant had already been detained, further detention would be unreasonable and therefore unlawful. Additionally, given the policy of the Cuban government with respect to the repatriation of its nationals there is no likelihood of his removal or of his removal within a reasonable time.

[47] In summary, the core issues are two:

1. whether a reasonable period has expired; and
2. whether it is clear that the removal/deportation is NOT going to be possible within a reasonable time.

Conditions of Detention Addressed

[48] While reference has been made by the Claimant to the issue of Conditions of Detention, that subject is of itself not an issue in this determination. All parties are agreed that consideration of such would perforce required further 'in limine' submission and ruling on the issue of the limits of this Court's jurisdiction on the hearing of a Writ of Habeas Corpus. Traditional legal theory certainly appears to be that the Court is only empowered to review the lawfulness or unlawfulness of the detention.

[49] **In Khawaja v Secretary of State for the Home Department, Lord Scarman** stated as follows:

> "The law (of liberty of the subject) has largely developed through the process of Habeas Corpus. But in the common law Habeas Corpus was itself of limited scope, though a rapid and effective remedy where it applied. It brought the gaoler and his prisoner into Court but, if the respondent's return to the writ was valid on itsface that was the end of the matter"

[50] In the United Kingdom, legislation starting with the Habeas Corpus Act 1816, has substantially extended the scope of the process.

[51] The determination of what was received into Barbadian law or how much of the English jurisprudence has been received in our law is a discussion for another time.

[52] Any challenge to the conditions of detention should properly be made by way of an Application for Judicial Review under the Administrative Justice Act Cap109B. Counsel for the Claimant in that context made it clear that he would not be pursuing any submission in that regard, save only in terms of its relevance to the issue of whether the detention was unreasonably long.**(**see **R v Secretary of State for the Home Department ex parte Muboyayi** on a discussion of whether Habeas Corpus or judicial review).

[53] This Court observes that in the case of **R(In the Application of I) v Secretary of State for the Home Department** where Lord Justice Simon Browne spoke to conditions of detention, the appellant in that case brought linked proceedings, that is, Habeas Corpus and Judicial Review.

The Case for the Claimant

[54] The core submissions of counsel for the Claimant reflect the issues outlined above. In short, he submitted that a prima facie case of unlawful detention having been established, the burden shifted to the Respondents to prove that the detention was lawful, that a reasonable time for effecting such a deportation has not yet expired; that it has not become apparent that the Respondents will not be able to effect the deportation within a reasonable time; and finally that the Respondents have not acted with reasonable speed, effectiveness and expedition to effect the deportation.

[55] Counsel for the Claimant grounded his submissions around the circumstances listed by Lord Justice Dyson as relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation**:** In the caseof **R (In the Application of I) v Secretary of State for the Home Department**.

[56] He submits in summary: firstly, that a period of detention of 2 years 9 months and 7 days is unreasonably long especially when compared with one year and three and a half months in this case, 5 months in the **Hardial Singh** case, 10 months in the case of **Re Wasfi Suleman Mahmod [1995] lmm AR 311,**44 months (3 years 8 months) in **Tan Te Lam,** all of which the courts considered to be too long.Secondly, that the obstacles (specifically Cuba's prohibitive repatriation law and policies) in the path of the Claimant's deportation are so great that it is clear that the Barbados authorities will be unable to effect deportation within a reasonable time or at all. Thirdly, that the Barbadian authorities have not acted with the diligence, speed and effectiveness necessary to surmount these significant obstacles; that the Barbados Government is not even dealing with this matter with seriousness. Fourthly, that the conditions of the Claimant's detention are such that he is in no better position than when he was in prison, he has been seriously restricted for the last three years and guarded by soldiers and police officers.

Fifth, that the Claimant's detention has had a deleterious effect (both psychological and physical) on him and on his family. Sixth, that there is little or no risk that the Claimant will abscond as he is not resisting deportation and will go to any country that will take him. Seventh, that the Claimant's record over the last20 years, as outlined above is indicative, with a high degree of certainty, that he is unlikely to re-offend. He argued further that the case of **R (In the Application of I)** shows that even where there is a significant risk of absconding and/or re-offending, an unreasonably long period of detention was still found to be unlawful.

The Case for the Respondents

[57] The case for the Respondents is the converse of the Claimant's. It is their case that a reasonable period has not yet expired and that it is not apparent that the Claimant's deportation will not be effected in a reasonable time.

[58] It is counsel's submission that the Claimant has not lost his right to return to Cuba. She argues that repatriation is not a simple matter and it is clear that despite Cuba's published policies on repatriation that the Cuban Government has made exceptions. There are on-going negotiations with the Cuban Government to effect his repatriation and it is reasonable to expect that through the process of negotiation that the Claimant can be repatriated to Cuba within a reasonable period notwithstanding Cuba's current policies.

[59] It is their assertion that the continued detention of the Claimant has been for a period necessary for the purpose of making arrangements for the Claimant's removal from Barbados. She argues further that such period has not been unreasonable and is in keeping with the provisions of the Constitution and of the Immigration Act. The

protection of the right to personal liberty as found in section 13 of the Constitution of Barbados is not absolute and in respect of this matter has not been breached. Section 11 of the Constitution provides that the rights and freedoms of any individual should not prejudice the rights and freedom of others or the public interest and National Security and Public Order and when balanced against the liberty of the individual, must be put above the liberty of the Claimant at the present time.

[60] Counsel agrees with the Claimant's argument that it is implicit under the Immigration Act that the authority responsible for the making of the deportation order exercises all reasonable expedition to ensure that following the detention of a deportee steps are taken to ensure that individual's removal within a reasonable time: **See Hardial Singh and R (In the Application of I) v Secretary of State for the Home Department.** It is the case for the Respondents that having been faced with this very difficult situation the Respondents have acted with expedition to effect the Claimant's deportation. The conduct of these negotiations is not a simple matter as the process has been significantly complicated by the Claimant's criminal record not only in Barbados but in the United States of America. In this context, she argues that it cannot be justifiably argued that the period of time reasonably necessary to carry out the process of removal from Barbados has elapsed; neither can it be justifiably argued that the Respondents should conclude that the deportation of the Claimant can no longer be achieved in a reasonable time.

[61] Counsel for the Respondents made the further significant submission and it is this: **that even if this court makes the finding that it is apparent to the 2nd Respondent that the Claimant's removal or deportation from Barbados can no longer be achieved within reasonable time**, **it has been established by the affidavits of E Shepherd and D Welch that the continued detention of the Claimant can be claimed as being necessary on grounds of National Security and Public Order.**

[62] This extract from Counsel's submission encapsulates the core of this argument:

> "the offences that the Claimant was convicted of impinged on the public domain of this country. National security was at risk, public good was being compromised and the social well-being of our population particularly our young men and women, many of whom have fallen prey to the activities of persons like the Claimant and who now find themselves as patients of the Psychiatric Hospital or drug treatment facilities. It is for that reasons that Public Good must outweigh any right of the Claimant to liberty at this stage and that continued detention is necessary on the grounds of National Security and Public Order".

[63] This submission immediately raises two critical questions: (1) can the Chief Immigration Officer in the exercise of an **administrative detention** under section 22 of the Immigration Act lawfully detain solely on the grounds of National Security and Public Order? and (2), In such event, have the Respondents established that this Claimant is a threat to National Security and Public Order?

[64] I am of the view that this argument is totally unsustainable because these two questions are easily answered with a resounding "No".

[65] The **Hardial Singh Principles** not only establish that this form of administrative detention must be exercised reasonably, but most importantly for these purposes, the power to detain only exists for the prescribed purpose of facilitating deportation. While an assessment of the risk of re-offending is relevant to a determination of the reasonableness of the period of detention, by itself it does not constitute a "stand-alone" reason for lawful detention. Detention in such circumstances would be an excess of jurisdiction or jurisdiction wrongly exercised rendering such an executive act 'ultra vires', unlawful and a nullity: **see Anisminic Ltd v Foreign Compensation**

Commission [1969] 12 AC 147; Boddington v British Transport Police [1999] 2 AC 143.

[66] This point is expressed very firmly by Lord Walker in the case of **Walumba Lumba** as follows:

> "The wide general principle of not deviating from the statutory purpose is of such fundamental importance in public law that it can be seen as going to the existence of the power, rather than merely to its exercise. In law the power exists only for thepurposes for which Parliament has conferred it on the executive. In Tan Te Lam v Superintendent of Tai AChau Detention Centre [1997] AC 97 the Privy Council put it very simply: "if removal is not pending…the director has no power at all".

[67] In answer to question (2) I would state simply that the factual matrix (and in this regard, the Claimant's record since incarceration outlined at paragraph 21 above is of critical relevance) is not in any event supportive of a finding that the Claimant is a threat to National Security and Public Order.

[68] In this regard, it is relevant to observe that personal freedom is the most important freedom of a democratic society and is thus safeguarded by our Constitutions, not only for citizens and permanent residents, but also for friendly aliens, resident or otherwise temporarily resident in our jurisdictions. The effect of a submission such as this is to **'deprive a "subject" of those safeguards by making personal fundamental rights subservient to a vaguely defined public interest whose limits are to be resolved solely by executive decree': see The Idea of Law by Dennis Lloyd.**

[69] It is to be noted that the above represents a brutal summarization of the submissions of counsel for the Claimant and Respondents and in no way does justice to the depth and extent of the submissions made. Only those submissions directly relevant to the issues outlined above, have been addressed above, in the interest of brevity.

The Burden and Standard of Proof

[70] The law is unquestionably that the burden lies on the detainor (in this case the Minister Responsible for Immigration/the Chief Immigration Officer) to satisfy this court on the balance of probabilities that Raul Garcia is being properly detained "pending deportation": see **Tan te Lam; Khawaja v Secretary of State for Home Department.** Lord Scarman at page 782 in stating the above had this to say to those who argue that it should be the criminal standard:

> "The Court of Appeal has held that the standard of proof of criminal offences in civil proceedings is that of the balance of probabilities: see **Hornal v Newberger Products Ltd. [1956] 3 AER 970…**
>
> My Lords, I have come to the conclusion that the choice between the two standards is not one of any great moment. It is largely a matter of words. There is no need to import into this branch of the civil law the formula for the guidance of juries in criminal case. The civil standard as interpreted and applied by the civil courts will meet the ends of justice".

And later at page 784:

"Accordingly, it is enough to say that, where the burden lies on the executive to justify the exercise of a power of detention, the facts relied on as justification must be proved to the satisfaction of the court. A preponderance of probability suffices; but the degree of probability must be such that the court is satisfied".

See also: **Lord Justice Simon Browne in R (in the Application of I) v Secretary of State of State for the Home Department.**

Discussion

[71] The heart of the issue to be addressed by this court in this Habeas Corpus proceeding is best captured by this observation made by the authors of the text **The Law on Habeas Corpus (**3rd ed.), chapter 5 of which examines the topic "Habeas Corpus in Immigration Law'. At page 147 of this text the learned authors state as follows:

"As for challenges to detention itself, the governing principles having their origin in Hardial Singh, are settled but their application is fact sensitive. Analysis of the cases shows that judges grappling with underlying and competing public-policy factors. The importance that English Law attaches to the liberty of the individual-whether citizen or alien-is balanced against a concern for effective immigration control. While detention has been an authorized tool of immigration control, the courts have been appropriately vigilant to ensure that its use is not extended beyond that purpose. The law in this area is not readily reduced to cut and dried propositions but retains a measure of flexibility to ensure an appropriate level of judicial scrutiny in this most anxious area of administrative detention".

[72] The above extract alluded to and captures the essence of the concept of Separation of Powers/Independence of the Judiciary, which is fundamental to or at the heart of, a constitutional democracy such as ours. It speaks to the importance of the Court's role in the protection of civil liberties, while respecting the equally important role of the State exercised through the Executive, in this case, the exercise of a statutory right of administrative detention for the purposes of immigration control.

What is the relevant law?

[73] Section 13 of the Barbados Constitution like most West Indian Constitution clauses establishes the right to personal liberty in the following terms:

"No person shall be deprived of his personal liberty save as may be authorized by law in any of the following terms.."

[74] Thus, after stating this most basic of rights, the clauses go on to set out (in our Constitution ten (10) circumstances in which liberty may be restrained, for example, detention for the purpose of expulsion, extradition or other lawful removal of that person from Barbados (13(i)); execution of a sentence after criminal conviction and for contempt of court; reasonable suspicion of criminal behaviour; detention of persons of unsound mind and vagrants and persons addicted to drugs and alcohol; unfitness to plead to a criminal charge among other bases of permitted detention.

[75] It is noted that section 11 also speaks to the right to liberty but similarly qualifies it by these words;

"…but subject to respect for the rights and freedoms of others and for the public interest..."

And later:

> "...the following provisions of this Chapter shall have effect for the purpose of affording protection to those 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 said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest".

[76] Section 22 of the Constitution is also relevant. Like sections 11 and 13 it expresses at 22(1) the right to protection of freedom of movement but thereafter provides exceptions thereto as follows:

> "(2) Any restriction on a person's freedom of movement that is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section.
>
> (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –
>
> (c) for the imposition of restrictions on the movement or residence within Barbados of any person who is not a citizen thereof or the exclusion for expulsion from Barbados of any such person";

[77] The Immigration Act Cap. 190 to my mind represents an example of the "law in question" as referred to in the abovementioned section of the Constitution. It is this Act which empowers the Chief Immigration Officer to lawfully deprive a subject of his personal liberty (the administrative detention earlier referenced) in aid of the State's power of immigration control.This authority can be found at section 22 as follows:

> "(1) A person who is refused permission to enter Barbados may be detained in custody by an immigration officer or a member of the police force in such place as the Minister approves until he is removed from Barbados in accordance with directions given under section 20.
>
> (2) Where a deportation order is made against a person, the Minister may order that person to be detained in custody in such place as the Minister directs and for such period as may be necessary for the purpose of making arrangements for his removal from Barbados".

It is the words "for such period as may be necessary for the purpose of making arrangements for the removal from Barbados"; and the wording of section 21(2) which states as follows:

> "(2) Unless otherwise provided in this Act, a deportation order shall be executed as soon as is practicable"

which when read together establish quite clearly that the authority to detain is circumscribed by certain limitations.

[78] This interpretation of the law forms the kernel of the Claimant's submission, and is not challenged by counsel for the Respondents, who in her submission to the Court acknowledges the limitation of the Chief Immigration Officer's power of detention, and further concedes that **"it is also implicit that the authority responsible for the making of the deportation order exercises all reasonable expedition to ensure that following the detention of a deportee steps are being taken to ensure removal of the individual from Barbados within a reasonable time".**

[79] This is in effect a recognition and acceptance by the Crown that the principles of law referred to above as the **Hardial Singh Principles,** generally represent the current state of the common law in Barbados. In this regard counsel referred to an unreported decision of the **Barbados High Court (ORSC" v The Superintendent of Prisons et al)** where **Crane-Scott J.** in Suit No. 117 of 2009 accepted **Hardial Singh and Tan**

Te Lam et al v Superintendent of Tai A Chau Detention Centre et al among others as representing the law applicable to Barbados.

[80] In the United Kingdom the **Hardial Singh Principles**, so-called, are seen to represent the modern law of Habeas Corpus and immigration detention. They represent the standard set by the courts to safeguard the liberty of the subject from the dangers of arbitrary executive action. They reflect a philosophy/core principle that where a man's personal freedom is involved the power of the executive (discretionary or otherwise) should be strictly interpreted. As long ago as 1850, **Pollock CP** in the case **of Bowditch v Balchin [1850] 5 Ex. 378** stated this succinctly as follows:

> **"..**In a case in which the liberty of the subject is concerned we cannot go beyond the natural construction of the statute…In this regard, judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law".

[81] This speaks variously to the Rule of Law and Due Process of Law: the maintaining of the balance between opposing notions of individual liberty and public order; reconciling human rights with the requirements of public interest; courts holding the balance between the citizen and the State and compelling Governments to conform to the law. These are all imperatives of the Rule of Law, the mark of a free society, a constitutional democracy such as ours.

[82] This concept is of such ancient and fundamental importance that it dates as far back as the Magna Carta in 1215. This ancient document states that "no free man shall be seized or imprisoned...except… by the law of the land". It is also reflected in the Statute of Westminister (1354) which provided that "no man of what state or condition he be, shall be... imprisoned...without being brought in answer by due process of law".

[83] These provisions have been observed by many jurists to be classic statements of the Rule of Law.

The English Authorities (The Applicable Principle of Law in this Jurisdiction)

[84] The seminal modern case on Habeas Corpus and Immigration detention is **R v Governor of Durham Prison, ex p. Hardial Singh [1984] 1 WLR704.** This too was a case of detention pending deportation. It appears to be the starting point of a string of English authorities from **R v Secretary of State for the Home Department (ex parte Zamir); Khawaja v Secretary of State for the Home Department; R v Secretary of State for the Home Department, Ex parte Muboyayi; Walumba Lumba v Secretary of State for the Home Department [2011] UKSC 12** all of which are representative of the more

modern approach in the United Kingdom to the law of detention in the immigration context.

[85] The facts of **Hardial Singh** are that the Applicant, after being given indefinite leave to remain in the United Kingdom (having entered that

country lawfully in 1977, a fact that Woolf.J found significant when he distinguished this case from **Reg v Governor of Pentonville Prison, Ex Parte Sital Singh** (unreported), 8th July 1975 a decision of the Divisional Court), thereafter ran afoul of the law and was sentenced to a term of imprisonment following convictions on charges of burglary. While in Prison the Applicant was served with a deportation order on the ground that his deportation was conducive to the public good. The reasonable inference was that this decision was taken solely as a consequence of his criminal convictions. After completion of his sentence in July 1983 he was detained pending deportation. The Applicant's passport was lost, thereby delaying arrangements for his deportation and it appeared that the communication between the Home Office and the Indian High Commissioner was poorly managed, with the result that by November of that year travel documents had not been issued by the High Commission. The issue addressed by the Court was how long it was proper for the Home Secretary lawfully to detain an individual in prison, pending his removal from the country, pursuant to the deportation machinery.

It was held on an application for a writ of Habeas Corpus as follows:

> "that the power of detention given by paragraph 2 of Schedule 3 of the Act of 1971 (a provision of similar import to our section 21 and 22 of the Immigration Act) was limited to such period of time as reasonably necessary to carry out the process of deportation; that the Secretary of State was under a duty to act promptly in carrying out the process of deportation and he should not exercise the power of detention unless the person subject to a deportation order could be deported within a reasonable time; and that, unless the Home Office produced evidence within three days to show that the applicant was about to be deported or that his continued detention was reasonable in the circumstance, the court would order that the applicant be released from custody.

Woolf J. delivered the judgement and authoritatively statedthe applicable principles of law as follows:

> "Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorize detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Secondly, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise the power of detention.

In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time".

[86] The Privy Council was given the opportunity to make a contribution to this area of the law in 1997 in the case of **Tan Te Lam and ors v Superintendent of Tai A. Chau Detention Centre found at [1997] AC 97.** The Privy Council examined also the limitations of an administrative power of detention in Hong Kong and in so doing examined and endorsed the so-called **Hardial Singh Principles**. This too was an application by way of
'Habeas Corpus' by persons of Chinese origin who arrived in Hong Kong and found themselves subjected to an ordinance regulating the immigration status of the so-called Vietnamese boat people. It too (similar to our Immigration Act)was an ordinance permitting detention "pending removal from Hong Kong".

[87] The jurisdictional issue took prominence in this case when the Court of Appeal of Hong Kong held that the legality of the detentions fell to be determined solely by reference to the statutory power, that it was for the Director of Immigration and not the court to determine whether the duration of the detentions was reasonable or whether repatriation was possible, and that evidence from the director that attempts were on foot to effect repatriation was conclusive proof that the applicants were lawfully detained pending removal.

[88] At the Privy Council level, Lord-Browne Wilkinson in outlining the applicable law formulated the Hardial Singh Principles into three propositions as follows:

1. The power can only be exercised during the period necessary, in the particular case, to effect removal;

2. If it becomes clear that the removal is not going to be possible within a reasonable time, further detention is not authorized;

3. The person seeking to exercise the power of detention must take all reasonable steps within his power to ensure the removal within a reasonable time.

[89] The jurisdictional issue was addressed as follows by the Privy Council: The question whether the applicants could be repatriated to Vietnam and were therefore being detained pending removal was prima facie a jurisdictional question; if removal was not pending within section 13D of the Immigration ordinance, the director had no power to detain at all. Accordingly, that question was for the court to determine and it was for the director to prove to the court, on the balance of probabilities, the facts necessary to justify the conclusion that the applicants were being detained pending removal.

[90] Counsel for the Claimant relied heavily on the case of **R (On the Application of I) v Secretary of State for the Home Department (2002) EWCA Civ. 888**. In this case Dyson LJ reformulated the **Hardial Singh Principles** into four (4) propositions as follows:

1. The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;

2. The detainee may only be detained for a period that is reasonable in all the circumstances;

3. If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;

4. The Secretary of State should act with reasonable diligence and expedition to effect removal.

In that case the core issue for determination was (3) above.

[91] In **Walumba Lumba et al v Secretary of State for the Home Department found at [2011] UKSC 12,** Lord Dyson defended his four propositions as enumerated in **R (I) v Secretary of State for the Home Department,** effectively affirming **Hardial Singh** on the basis that his four (4) propositions were derived from the dicta of Lord Woolf in **Hardial Singh**. In a nutshell he stated that all the **Hardial Singh Principles** do is "require that the power to detain be exercised reasonably and for the prescribed purpose of facilitating deportation".

[92] In support of his further submission that the **Hardial Singh Principles** are not the only applicable law, he states therein:

> **"…**Indeed, the Hardial Singh principles reflect the basic public law duties to act consistently with the statutory purpose **(Padfield v Minister of Agriculture**, **Fisheries and Food [1968] AC 997)** and reasonably in the Wednesday sense (Associated Provincial Picture House's Ltd. Wednesday Corporation [1948] IKB 223. But they are not exhaustive. If they were exhaustive, there could be no room for the public law duty of adherence to published policy…"

[93] In this case the Secretary of State was held liable to the appellants in a case of false imprisonment because she applied to them an unpublished policy which was inconsistent with her published policy.

What is a 'Reasonable Period' within which to Effect Deportation

[94] What is a reasonable period is a fact sensitive consideration. It is a trite but nonetheless profound statement that every case must be determined on its own facts. To apply time periods from other cases where the factual matrix
is markedly different, would result in the misapplication of the general principles. The time periods evident in the cases cited and discussed provide an interesting spectrum from the four months in **Hardial Singh** to the four and one half years in the **Walumba Lumba** case to the five years in **R v Secretary of State for the Home Department ex p Chalal [1995] IWLR 526.**

[95] The cases exhibiting longer periods of detention appear to reflect more complex circumstances surrounding the detention and/or deportation.

[96] In **R (On the Application of I) v Secretary of State for the Home Department**, Lord Justice Dyson attempted to list the "circumstances that are or may be relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation pursuant to paragraph 2(3) of schedule 3 to the Immigration Act 1971. These were his listed criteria:

> "..the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed

and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained persons is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal damage".

[97] Unquestionably, (and so conceded by Lord Dyson) these criteria are not exhaustive, and in a "fact-specific exercise" such as this, I especially endorse the statement of Lord Dyson in **Walumba Lumba** that, **"The Hardial Singh Principles** should not be applied rigidly or mechanically."

[98] It is my view that in the evaluation of the nature of the obstacles in the path of our Chief Immigration Officer, note should be taken of the fact that our Chief Immigration Officer does not have at her disposal the resources and bargaining power of the Secretary of State of a first world power such as the
United Kingdom. Thus, the measure of what is reasonable in the context of a small island state, cannot be the same as in **Hardial Singh**. This is directly
relevant, to my mind, in an assessment of what is a reasonable detention period.

[99] Counsel for the Respondents in her very recent submissions on the import of the newly admitted evidence addressed this point, when she stated in closing:

> "..This matter involves a person who illegally entered Barbados, used a false passport and whose identity was not discovered until close to the end of his prison term. This is a first for Barbados and we would expect that it would take longer to resolve than in other jurisdictions such as the UK, where matters such as administrative experience, human resources, institutional capacity and the international political relationships are greater than in Barbados".

[100] In his further exposition on this issue in **Walumba Lumba**, Lord Dyson conceded that detention pending deportation is permissible for a lengthy period provided that the Secretary of State (in our case the Chief Immigration Officer) is taking reasonable steps to effect deportation and provided that there is a reasonable prospect that deportation will be possible.
But there are safeguards in such circumstances. He states further that particular difficulties for the possibility of deportation may vary from time to time, so it is necessary in such circumstances to keep the practicability of deportation under frequent review.

Is it clear from the circumstances that Deportation will not be effected within a "Reasonable Period" (on the assumption that such reasonable period has not yet expired)?

[101] This determination must be fuelled by a value judgement by this court on an analysis of these special circumstances. In **Tan Te Lam Lord Browne-Wilkinson** has this to say:

> "If it becomes clear that removal is not going to be possible within a reasonable time, further detention is not authorized".

[102] Lord Justice Simon Browne commenting on that statement by Lord Browne-Wilkinson, said in **R (I) v Secretary of State for the Home Department:**

> "It seems to be plain that the reference there to 'a reasonable time' is to a reasonable further period of time having regard to the period already spent in Detention".

The Application to admit New Evidence

[103] This matter was reserved for decision on 21st December 2012. As the court was about to deliver its decision, an Application was filed on 29th January 2013 for the admission of new evidence. Counsel for the Respondents sought the admission of three (3) documents as follows:

(i) A Diplomatic Note from the Republic of Cuba dated 12th December 2012 (Spanish and English translation);

(ii) A letter dated the 10th December 2012 from UNHCR to the Chief Immigration Officer; and

(iii) A Memorandum dated 22nd January 2013 from the Chief Immigration Officer to the Solicitor General.

[104] It was the argument of counsel for the Respondents, that these documents were directly relevant to the issues raised in the substantive proceedings, and to the determination of the substantive proceeding, and could be admitted in view of the fact that a decision in these proceedings had not yet been rendered.

[105] After some initial objection to (ii) and (iii) above, these documents were admitted with the consent of the parties, together with counsels' Affidavits in Support (of which there were two) and Affidavit in Response.

[106] In consequence, there was no argument by the parties as to why these documents/affidavits should be admitted, but in determining their relevance, this court was guided by **Denning LJ** in the seminal case on this point of **Ladd v Marshall (1954) CA 745.** In that case he stated that the legal principles to be applied when fresh evidence is sought to be introduced are the same as to be applied on an application for a new trial and are as follows:

> "In order to justify the reception of new evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that , if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible".

[107] See also **Romilly MR** in **Thexton v Edmonton (1868) ; Cross & Tapper Evidence (10th ed.)** at page 360.

[108] In an application of the **Ladd v Marshall** principles, I have considered document (i) above as the only relevant document. The full text of the English translation of the same is produced hereunder:

COURTESY TRANSLATION

SEAL
REPUBLIC OF CUBA
Ministry of Foreign Affairs
- Signature -

The Ministry of Foreign Affairs presents its compliments to the Ministry of
Affairs and Foreign Trade of Barbados and has the honour to refer to the Note Verbale 2012/1167 of October 15 from the Ministry of Foreign Affairs and Foreign Trade of Barbados about the request from the Government of Barbados to the Cuban Government with respect to assistance for the repatriation of Raul Tomas Garcia Castilla.

The Ministry of Foreign Affairs of the Republic of Cuba wishes to inform that the citizen Raul Tomas Garcia Castillo, from the perspective of the Cuban Migration Order, does not qualify to be either repatriated or deported to Cuba.

The citizen in question left Cuba, being hardly a boy, in the year 1964definitively for the United States. There is no family on Cuban national territory who can receive him.

To The Honourable Minister of Foreign Affairs
And Foreign Trade of Barbados
Bridgetown

[109] With respect to the Affidavit evidence, in spite of its obvious failure to conform to the requirements of the law, I have exercised my discretion to accept as credible paragraph 2 of the Supplementary Affidavit of counsel for the Respondents where she states as follows:

> "..I have been informed and verily believe that the United States of America is no longer interested in extraditing the Claimant to that country for the prosecution of outstanding charges".

For the reasons more fully addressed below, this court does not accept that documents (ii) and (iii) are relevant to the substantive issue to be determined.

Summary and Assessment

[110] The retention of the Writ of Habeas Corpus in English Law and in our domestic law, is indicative of its fundamental importance in a constitutional democracy as a mechanism for protecting or safeguarding a subject from unlawful interference with his liberty or freedom of the person, and affording a mechanism for enforcing this right.

[111] While indicative of the importance of the subject's right to liberty, it nonetheless is no derogation from the equally important role of the State exercised through the executive, on a limited legal and administrative basis, by virtue of which there is interference with a citizen's or subject's liberty.

[112] Without question, the detention of Raul Garcia is prima facie lawful; there is a prima facie basis in law and fact for the detention. Stated differently, the

Barbados Constitution and attendant statutory provisions (namely, the Immigration Act) provide for deprivation of liberty to effect the two limbs of immigration control, admission and expulsion. Not only is there authority to prevent unlawful entry into the State, but also to effect extraditions and more relevantly, deportations/removals under the law, by the state.

[113] However, the matter for determination does not end there. Detention in these circumstances is not without limitation: see **Hardial Singh.** It is within the jurisdiction of this court to determine as a question of fact provable by the State on the balance of probability (i) whether deportation/removal is pending; (ii) that all steps have been taken to effect removal within a reasonable time; or (iii) whether it is clear that removal is not going to be possible within a reasonable time.

[114] It is the opinion and finding of this Court that deportation/removal is still pending. Despite the newly admitted Diplomatic Note of December 12th 2012, there remains a possibility (now rendered less certain by the said Note) that the Claimant may still be deported to Cuba. Additionally, his removal to a country other than Cuba (a third country) remains a real possibility.

[115] This new evidence renders certain, the Claimant's continued detention for a further and uncertain period.

[116] However, as stated above, the core issues are (ii) and (iii) above, that is, whether all steps have been taken to effect removal within a reasonable time and/or whether it is clear that removal is not going to be possible within a reasonable time.

[117] In this exercise, this Court is called upon to effect a most delicate balance, "any evaluation of the limits on our liberties must always balance the competing interests at stake": see **Introduction to Freedom, the Individual and the Law by Harry Street (5th ed.).**

[118] **Farbey and Sharpe,** in addressing another aspect of this balancing act, in their text **The law of Habeas Corpus** make mention of the case of **Youssef v The Home Office [2004] E.W.H.C. 1884** where it was held that the 'court should make allowance for the way that government functions and be slow to second-guess the Executive's assessment of diplomatic negotiations.

[119] **Toulson J** in **R (A) v Secretary of State for the Home Department [2007] E.W.C.A. Civ 804** held that the Court may recognise that the Home Secretary is better placed than the court to decide certain questions of fact, so that the court 'will no doubt take such account of the Home Secretary's views as may seem proper'.

[120] **In A.S. (Libya) v Secretary of State for the Home Department [2008] E.W.C.A. Civ 289** a contrary view was taken that effectively the executive's

view of the success or otherwise of negotiations should not be automatically accepted by the court but are "entitled to weight accordingly to the expertise, experience and cogency with which they were expressed".

[121] This clearly was the approach taken by **Laws J.** in **Wasfi Suleman Mahmod** when he commented on the Home Office's attempts to persuade the German authorities to take back the Claimant. He said:

> "..I regard it as entirely unacceptable that this man should have been detained for the length of time he has while nothing but fruitless negotiations have been carried on".

See also **Woolf J.'s** analysis in **Hardial Singh.**

[122] This Court is of the view after careful consideration of the law and the facts, that the Barbados authorities have taken all steps necessary to effect removal within a reasonable time. The many steps taken by the Barbados government are evident in the Affidavits of E. Shepherd and J. Blackman: from the verification of the Claimant's identity in its communication with the Cuban Government, the Claimant's family's legal counsel in the United States of America and the Commissioner of Police of Barbados; to the exploration of all avenues open to the Claimant, namely, repatriation to Colombia, removal to the Dominican Republic, repatriation to Cuba (the country of his birth) and the solicitation of Cuba's assistance in his removal to a third country; his repatriation/extradition to the United States where he was resident from age 10, as well as the exploration of the possibilities provided by the United Nations High Commission for Refugees.

[123] This court rejects counsel for the Claimant's submission that the Barbados government has not acted with Reasonable Diligence and Expedition and that it has not dealt with the Claimant's matter with "seriousness".

[124] In fact, it is the view of this Court that given the intractable nature of the problem created by the Claimant, coupled with Cuba's very prohibitive policies on the repatriation of its nationals, **that a reasonable period has not yet expired** when one takes into account the obstacles faced by the Barbados government in effecting the deportation/removal of the Claimant.

[125] It is my view, nonetheless, that it is not yet possible to conclude, in the changing context of Cuba's increased interaction with Barbados and Caricom (this decision is being written ironically against the backdrop of the 40th anniversary of the establishment of diplomatic relations between Cuba and Caricom), at this stage of what must be very delicate negotiations between Cuba and the Foreign Affairs Ministry, that the Chief Immigration Officer will not be able to deport Raul Garcia to Cuba (or possibly a third country with the assistance of the Cuban Government) in due course.

[126] However, on a consideration of the totality of the circumstances of this matter, particularly in view of the more recent evidence coming from the Cuban Government, this court is also of the view on the balance of
probabilities that removal to Cuba will not be possible within a reasonable time.

[127] It is indeed significant, that after belatedly producing to the court the Diplomatic Note of the Cuban Government, the executive has neglected to provide this court with cogent evidence for its consideration, by affidavit or otherwise, from persons with the expertise or experience to volunteer weighty expert opinion to the effect that, in spite of the above-mentioned Diplomatic Note, this Claimant can still be deported/removed to Cuba within a reasonable time. In failing to do so, the Respondents have in my view failed to discharge the Burden of Proof referred to above.

[128] Furthermore, the authority of this court to make a determination on the hearing of a Writ of Habeas Corpus is limited in scope to a determination of the lawfulness or unlawfulness of the authority for detention. Requests for relief by the Claimant and Respondents, inconsistent with this, are all rejected.

[129] That authority above-mentioned, is the Deportation Order of March 24th 2010, which is an authority for detention for the purposes of deportation to Cuba. In other words, it is specific to Cuba. As already stated, it is the opinion of this Court that it is clear that the removal/deportation to that country is not going to be possible within a reasonable time, if at all.

[130] In view of the foregoing, I am satisfied that the legal limits of the power of administrative detention vested in the Chief Immigration Officer under the Deportation Order of March 2010 have been exhausted. In these peculiar and particular circumstances, in the face of this intractable problem created by the Claimant's actions, it is the finding of this court that a reasonable period has not expired; the Barbadian authorities have done the utmost in these supremely difficult circumstances to effect a resolution and continue to do so, but they have failed to show on a balance of probabilities that deportation to Cuba can be effected within a reasonable time.

What are the Criteria Applicable in a Determination of whether to Detain PendingDeportation/Removal

[131] A look at the case law reveals that in all cases the main criteria applied is that of whether there is a likelihood of re-offending and/or absconding.

[132] The case of **R (Luis Rozo Hermida v Secretary Of State for the Home Department [2011] EWHC 695** was cited by counsel for the Respondent for another purpose. It is inapplicable for the purposes to be determined by this court, as there was no issue in that case as to the lawfulness of the detention, rather, in the circumstances of lawful immigration detention in the United Kingdom a power or discretion exists to house immigration detainees in prison and/or immigration detention centers. There have consequently evolved guidelines on criteria for holding lawful detainees in prison as opposed to detention centers or vice versa.

[133] **Bean J** in his judgement in this case spoke of an "assessment of the need to detain in these circumstances in the light of the risk of re-offending and/or the risk of absconding".

[134] This speaks also to a rationalization of the reason for the vesting of such a statutory power in the Chief Immigration Officer. **Metting J. in R (Bashir) v Secretary of State for the Home Department [2007] EWHL 3017** has this to say:

> "..the facts of this case raise acutely the choice between two unacceptable alternatives: first, that the execution of a lawful deportation order is to put at risk by releasing someone about whom there may be good grounds to believe that he will not keep in touch with the Home office before he can be forcibly removed; secondly, that a man is detained administratively for an indefinite period in circumstances where there is not and never has been any immediate prospect that he will be removed to his home country".

[135] While this represents extreme circumstances not present in this Application, it is nonetheless clear from this exposition that the primary consideration is the risk of absconding and that the risk of re-offending is a secondary/collateral issue.

[136] **Lord Dyson in Walumba Lumba v Secretary of State for the Home Department** had to say on the issue of re-offending:

> "Where there is no such risk, detention is not necessary to facilitate deportation, because it would be possible to effect deportation without the need for detention. The underlying purpose of the power to detain is not to prevent the commission of criminal offences, but to facilitate the implementation of a deportation order".

[137] **Lord Justice Simon Browne** in **R(I) v Secretary of State for the Home Department** weighed in on this point as follows:

> "The likelihood or otherwise of the detainee absconding and/or re-offending seems to me to be an absolutely relevant circumstance. If, say, one could predict with a high degree of certainty that, upon release, the detainee would commit

murder or mayhem, that to my mind would justify allowing the Secretary of State a substantially longer period of time within which to arrange the detainee's removal abroad".

[138] In other words, he is saying that the test to determine whether there is a risk of the Claimant re-offending is whether there is a high degree of certainty that the Claimant would commit a criminal offence.

[139] The facts of this matter speak neither to a high probability of re-offending or of absconding. The evidence relied on by the Respondents speaks to the Claimant's past conduct and not to his conduct since incarceration as alleged by the Claimant; (see paragraph 21 above) this conduct is supportive of an argument that he is unlikely to re-offend. As to the likelihood of his absconding, this court rejects the Respondents' argument that there is a high probability of re-offending when the Claimant is no longer in a controlled environment and that he has 'the ingenuity, capability and propensity to abscond when in 1988 he left the USA whilst on bond for charges of possession of cocaine' after obtaining false documentation to support various identities. While this may be true those facts have been over-ridden by the more recent events outlined in paragraph 21 above.

Disposal

[140] Whilst this Court is of the view that the risk of Re-offending or Absconding is not of such significance as to justify further detention in these circumstances, it **MUST** still be a consideration in the making of any further orders. This Court has a responsibility to ensure that there is no risk of harm to the public or to the Claimant.

[141] The Claimant as stated above is an illegal immigrant subject to deportation/removal from this country, he cannot work, nor can he access public funds. The court must be mindful of the risks of placing the Claimant in an uncontrolled and inappropriate environment that may contribute to or conduce to him turning to crime to support himself.

[142] It is possible for the Claimant to be released into the care of such individual(s) as this court considers appropriate. In the determination of that fact the Chief Immigration Officer and/or her agents shall be heard by the Court on the proposed arrangements and on the suitability of the proposed caretaker(s) at a future hearing.

Margaret A. Reifer
Judge of the High Court