BARBADOS

SUPREME COURT OF BARBADOS

IN THE HIGH COURT OF JUSTICE

CV 1043/2015

BETWEEN:

JORDIE NTUKILA DIVUNGULA **APPLICANT**

AND

THE CHIEF IMMIGRATION OFFICER **1st RESPONDENT**

AND

THE ATTORNEY GENERAL OF BARBADOS **2nd RESPONDENT**

Before the Honourable Sir Marston Gibson K.A., Chief Justice

2015: July 23, 31
August 4, 6, 10
2016: February 19

Mr. Patterson Cheltenham, Q.C., Ms. Keren Prescott and Ms. Rhea Cheltenham for the Applicant
Mrs. Diedre Gaye-McKenna and Mr. Jared Richards for the Respondent

GIBSON CJ:

Introduction

[1] On Monday 10 August 2015, I delivered a decision with concise reasons and made orders in this matter. I promised to give fuller reasons for the decision than those which I had then given. I now proceed to do so.

Facts

[2] The facts are largely taken from the application and supporting affidavit as the respondents indicated that they had no time to respond to the application. This matter was filed in the Court on 23 July 2015 as an urgent application. At the time, the applicant was being detained at the Grantley Adams International Airport ("GAIA") by the second respondent, the Chief Immigration Officer ("CIO"), pending his deportation from Barbados. He applied *ex parte* for an order (1) restraining the first and second respondents from obtaining or acting upon any deportation order or any other order or otherwise taking any steps whatsoever for the removal of the applicant from Barbados pending the hearing and determination of the applicant's substantive claim; and (2) directing the first and second respondents to release the applicant from detention at the GAIA, pending the hearing and determination of the applicant's substantive claim.

[3] On 23 July 2015, I granted the order directing *ex parte* restraint of the first and second respondents with the directive that the respondents be served with a copy of the order on or before 27 July 2015. Argument on the matter was heard on 4 August 2015.

[4] In his affidavit sworn to on 23 July 2015, the applicant deposed that he was born in London and was a resident of Camden, London. He is currently a student at Barnet & Southgate College, Wood Street, Barnet where he is pursuing a course of study in Business and Law. He arrived in Barbados on 9 July 2015 from London with friends, some of whom are Barbadians residing in London. He obtained a visitor's permit which was imprinted on a page in his passport.

[5] On 21 July 2015, 12 days after his arrival in Barbados, the applicant was arrested and charged by Sergeant Wayne Fortune of the Royal Barbados Police Force with unlawfully having in his possession a controlled drug, to wit, cannabis in contravention of **section 6(1)** of the **Drug Abuse (Prevention and Control) Act, Cap. 131 of the Laws of Barbados ("the DAPCA")**. Until his arrest, he had been residing at the home of the father of one of the friends with whom he had travelled to Barbados.

[6] On 22 July 2015, the applicant appeared before His Worship Elwood Watts, Magistrate (Ag.) in the District 'A' Magistrate's Court. While in the dock,

the prosecutor read the charge indicating that the quantity of marijuana of which the applicant had been in possession was four grams with a street value of $10.00. The applicant pleaded guilty to the charge and mitigated on his own behalf with the assistance of Attorney Samuel Legay, who had entered an appearance as *amicus curiae*. The learned Magistrate (Ag.) reprimanded and discharged the applicant and ordered him to pay $300.00 costs. Significantly, despite the applicant's guilty plea, the learned Magistrate (Ag.) recorded no conviction against the applicant.

[7] The applicant stated that one of his friends paid the costs (the applicant understandably described it as a "fine") forthwith while he sat in court. While waiting on the process of payment to be completed, the applicant was arrested by an officer of the Royal Barbados Police Force and officers of the Immigration Department, and taken to the GAIA. He stated that he had a legitimate expectation that, as no conviction had been recorded against him, the status and permission granted to him on 9 July 2015 by the CIO would have continued unimpaired. He claimed that the CIO had failed to give him any notice of, or reasons for, her revocation of his visitor's permit or to give him an opportunity to be heard prior to its revocation.

[8] On arrival at GAIA, the applicant was allowed to make one telephone call. While in custody, arrangements were made for his deportation. He was

visited by his attorney-at-law who filed the Urgent Application with this Court. On 24 July 2015, at approximately 10:31 a.m., he was served with a deportation order but he refused to accept the order because, he stated, on 22 July 2015 his counsel had advised him not to speak with anyone. On 24 July 2015, at about 4:13 p.m., he was visited by his counsel and subsequently released from the custody of the immigration officials at GAIA. His passport had, however, been withheld.

[9] At issue was whether the interim injunction granted by me on 23 July 2015 ought to have been discharged, thus permitting the deportation of the applicant.

The Contentions

[10] Counsel for the applicant submitted that the two important considerations in determining whether the interim injunction should be discharged are those adumbrated in the celebrated House of Lords decision in ***American Cyanamid v Ethicon***, ***[1975] AC 396*** per ***Lord Diplock***, as explained and applied by our Court of Appeal in ***Toojays Ltd v Westhaven Ltd***, ***CV App No. 14/2008*** per ***Burgess JA*** namely (1) whether there was a serious issue to be tried; and (2) whether the balance of convenience, or the balance of justice, favoured the discharge of the interim injunction. She further contended that there was a serious issue to be tried and that the balance of

justice as stated by ***Burgess JA*** in ***Toojays***, favoured retention of the injunction. While she conceded that the applicant had pleaded guilty before the magistrate to possession of marijuana, she argued that no conviction had been recorded against him. Moreover, she took the position that damages were not an adequate remedy because the applicant's rights to natural justice, as set forth in **section 16** of the **Administrative Justice Act, Cap. 109B of the Laws of Barbados ("the AJA")**, were infringed and there was no remedy in damages which could compensate for that breach. It was not made entirely clear to the Court what natural justice right or rights were not accorded to the applicant by the CIO but I will return to this point.

[11] In response, counsel for the CIO and the Attorney General ("AG") countered that the fact that no conviction had been recorded against the applicant did not gainsay the fact that he had pleaded guilty to possession of a prohibited substance contrary to the **DAPCA** for which the magistrate could have ordered a maximum term of imprisonment of five years. They urged that there had been no undertaking in damages and, should the CIO prove successful in this application, there was no way of compensating the CIO and AG for being prevented from doing what they were statutorily obligated to do. The balance of justice, they urged, favoured the discharge of the injunction.

[12] During the course of the Crown's argument, I noted that there were provisions in the **Immigration Act Cap 190 of the Laws of Barbados ("the Act")**, namely **section 23**, which contained a so-called ouster or privative clause purporting to preclude inquiry by the court into the actions of the Minister or the CIO. The response from counsel for the Crown was that, in light of the ***Anisminic*** line of cases (see, ***Anisminic v Foreign Compensation Commission***, and particularly, the discussion at paragraph [28] *et seq)*, the ouster clauses were to be disregarded and, therefore, could not be relied on.

[13] *Au fond,* the ultimate issue is whether the interim injunction ought to have been discharged, but within that issue are two others, namely, (1) whether the applicant had taken advantage of alternative remedies afforded him under the **Act** or, in other words, whether he had exhausted the remedies available to him for vindicating his rights; and (2) what is the permissible approach to the ouster or privative clauses in the **Act**?

Discussion

[14] In ***Toojays***, ***Burgess JA*** commenced his analysis of the ***American Cyanimid*** case by citing **section 44** of the ***Supreme Court of Judicature Act, Cap. 117A of the Laws of Barbados***, ("***SCJA***") which provides that "the High Court may, at any stage of the proceedings. . .(b) grant a mandatory or other

injunction where it appears to the Court to be *just or convenient* to do so for the purposes of the proceedings before it." (Emphasis added). His Lordship noted that ***American Cyanimid*** sets forth a two-stage, not a three stage, inquiry, namely the serious issue to be tried and the balance of justice. He clarified that the purported third stage, namely whether damages were an adequate remedy, was not a separate, freestanding factor but was to be subsumed within the consideration of the balance of justice.

[15] ***Burgess JA*** shared the disquiet of some courts with the phrase "balance of convenience" since, in the words of ***de la Bastide CJ,*** as he then was, in ***East Coast and Workover Services Ltd v Petroleum Co of Trinidad and Tobago Ltd (2001) 58 WIR 351*** at ***358***, the real question is "where does the greater risk of injustice lie, in granting or refusing the injunction?" In this case, as in ***Toojays***, the issue resolves itself into the question "where does the greater risk of injustice lie, in retaining or discharging the injunction?' I turn now to consider the application of the ***Toojays*** principles to this case and the two sub-issues identified above, namely exhaustion of remedies and the ouster clauses in the **Act**.

[16] There is little doubt that there is a serious issue to be tried. The applicant was detained by the CIO and, in my view, detention, without more, raises an issue of freedom of the individual which must, perforce, always be regarded

as a serious issue. More pivotal, however, is the second ***Toojays*** consideration, namely whether the balance of justice favours retention or discharge of the injunction. The facts are that the applicant was permitted entry into Barbados as a visitor under ***section 13(1)(b)*** of the ***Act***. 12 days later, he was charged with, and pleaded guilty before a magistrate to, possession of marijuana. No conviction was recorded against him but the learned magistrate required him to pay $300 costs. It was while the costs were being paid that the applicant was taken into custody and detained in preparation for deportation.

[17] The Crown contends that the fact that the magistrate did not record any conviction against the applicant is entirely irrelevant. I agree. What is recorded is that he had committed a criminal offence against the laws of Barbados while enjoying the privilege of being a visitor to our shores. Therefore, that the magistrate did not record a conviction against him was but a facet of the well-known discretion with which each sentencing judge or magistrate is empowered under our laws, including the ***Penal System Reform Act, Cap 139 of the Laws of Barbados***.

[18] The absence of a record of conviction is not to be taken, as the applicant's counsel subtly implies, as tantamount to innocence. As a result of his plea of guilty to the drug offence he was detained by the CIO under powers

bestowed on her by **section 13(8)** of the **Act** which provides that the CIO may detain a person pending the execution of a deportation order.

[19] I turn now to consider the first issue, namely, whether the applicant at bar was required to pursue and exhaust an alternative remedy available to him under **Sections 2A** and **2B** of the **Immigration Act** and, if so, whether this without more justifies the discharge of the interim injunction.

<u>Alternative Remedy or Exhaustion of Remedies</u>

[20] **Sections 2A** , **2B** and **2C** of the **Immigration Act** provide, so far as pertinent, as follows:

> **2A. (1)** There is established by this Act a committee to be known as the "Immigration Review Committee."
>
> (2) The Third Schedule has effect with respect to the constitution of the Committee and otherwise in relation thereto.
>
> . . .
> **2B. (1)** The Committee shall hear and determine appeals made to the Committee
> . . .
> **(b)** by any person against whom a deportation order has been made;
> . . .
> **(2)**. An appeal to the Committee against a deportation order stays the execution of the order pending the determination of the appeal.
>
> **2C**. No court has jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding or decision of the Committee.

[21] The **Third Schedule** to the **Act** provides that the membership of the Committee shall comprise (a) a Minister, other than the Minister responsible for Immigration, appointed by the Minister responsible for Immigration; (b) the Solicitor General, *ex officio*, or her nominee; and (c) two other persons

appointed by the Minister. Under the same **Schedule**, the CIO shall appoint a public officer to the secretary of the Committee.

[22] It is beyond doubt that Parliament has provided both the remedy of an appeal for the benefit of any person against whom a deportation order has been made by the Chief Immigration Officer and has established a tribunal to hear the appeals. Moreover, the legislation provides that the filing of an appeal against such deportation order results in an automatic stay of the order while the appeal is being heard and determined. The **Immigration Act** therefore does not leave remediless a person aggrieved by an adverse decision of the Minister or other immigration official. Notably, **section 2C** contains an ouster clause purporting to deprive the courts of "jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding or decision of the Committee." The discussion of the ouster clause in **section 23 (1)** of the **Act** is equally applicable to **section 2C**.

[23] It is clear on this record that the applicant never filed an appeal with the Immigration Review Committee ("IRC") seeking review of the deportation order made against him. Rather, he immediately sought recourse to the High Court by way of Urgent Application seeking an interim injunction. The question arises whether this was permissible.

[24] In his work ***Commonwealth Caribbean Administrative Law*** (Routledge 2013), at p. 104, **Prof. Eddy Ventose** posits that

> [a]t common law and under various statutory provisions, the court is given power to reject applications for judicial review if the applicant has an alternative remedy, under either the common law or legislation. Where such remedies exist, the claimant must exhaust them before making an application to the court.

[25] In ***Judicial Remedies in Public Law*** (London, Sweet & Maxwell, 2000), para 11-045, **Clive Lewis** explains the *raison d'etre* of the exhaustion principle as follows:

> The rationale for the exhaustion of remedies principle is relevant to the scope of that principle. A two-fold justification has been put forward. First, that where Parliament has provided for a statutory appeals procedure, it is not for the courts to usurp the functions of the appellate body. The principle applies equally to bodies not created by statute which had their own appellate system. Secondly, the public interest dictates that judicial review should be exercised speedily, and to that end it is necessary to limit the number of cases in which judicial review is used. To these reasons can be added the additional expertise that the appellate bodies possess.

[26] There is a rich body of jurisprudence supporting the existence of the discretion in a court to "refuse to grant permission to apply for judicial review or [to] set aside a permission previously given or refuse relief at the substantive hearing if an adequate alternative remedy exists, or if such a remedy existed but the applicant had failed to use it. The courts have evolved a general principle that an individual should normally use alternative remedies where these are available rather than judicial review" (**Lewis**, at para 11-043).

[27] In ***Gaskin v AG; Hawkesworth v AG; and Scantlebury v AG***, BB 2007 HC 16, ***Reifer J*** referred to "a basic principle of Judicial Review that it should not be invoked unless the applicant has exhausted the adequate alternative remedies." In ***Re Clarke (1971) 17 WIR 49, (1970-1971) 6 Barb. L. R. 69***, the applicant had been charged before a magistrate with contravening the **Public Order Act 1970**. He was convicted and appealed to the (then) Divisional Court, which dismissed his appeal (see, ***(1970-1971) 6 Barb. L. R. 53)***. He thereafter sought judicial review on constitutional grounds which he had never raised before the magistrate nor the Divisional Court. ***Williams J***, as he then was, rejected the application noting, at p. 53A-B that it was "clearly settled that the grant of relief by way of *certiorari* is discretionary, and one of the matters to be taken into consideration is whether there is a satisfactory alternative remedy." His Lordship also observed, however, that the existence of an alternative remedy was no bar to relief by way of *certiorari* and may be available even after the remedy by way of appeal had been exhausted. (See, 17 WIR at 52 I to 53 A).

[28] In ***Saga Trading Ltd v The Comptroller of Customs and Excise***, ***TT 1998 HC 132***, ***Archie J***, as he then was, noted "the substantial body of judicial authority which supports the proposition that where there is an effective alternative remedy, the discretion to grant judicial review will only be

exercised in 'exceptional circumstances.'" In another decision from Trinidad and Tobago, ***Furguson v McNicholls***, ***TT 2008 HC***, the High Court observed, following ***R v Secretary of State for the Home Department, ex p Swati [1986] WLR 477***, that "[b]y definition, exceptional circumstances defy definition, but where Parliament provides an appeal procedure, Judicial Review will have no place, unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided."

[29] In the instant case, the applicant has not shown that there are any exceptional circumstances justifying his failure to exhaust the alternative remedy provided to him under **sections 2A** and **2B** of the **Immigration Act** under which he could have received an automatic stay of the deportation order made against him. Seen through the prism of the ***Toojays*** principles, it is my judgment that, in such circumstances, the balance of justice could not favour the grant of an interim injunction of an applicant who has not exhausted his administrative remedies and who has given no plausible explanation for his failure to do so. His remedy was to file an appeal with the IRC, have his appeal heard, and exhaust his remedies there before coming to the court seeking injunctive relief.

[30] Moreover, assuming without asserting that I am wrong, it is clear that the best remedy for his detention is damages for wrongful detention, if available.

The CIO was acting against someone who had abused the privilege of a visitor by committing a criminal offence and who, in the face of a deportation order made against him, never sought relief from the IRC. In my judgment, therefore, damages were quantifiable and an adequate remedy. On these facts, there is little doubt that the balance of justice favoured the discharge of the injunction.

[31] This should suffice to decide the main issue regarding the interim injunction. But there is another reason justifying the discharge of the injunction and upon which the application must be denied. It relates to the so-called "ouster" or "privative" clause contained in **section 23(1)** of the ***Act***. I turn now to discuss this issue.

The Ouster Clause in Section 23(1)

[32] During argument before me, both sides conceded that the ouster clause in **section 23(1)** of the **Act** was unenforceable because of the celebrated House of Lords decision in ***Anisminic v Foreign Compensation Commission***, ***[1969] 2 AC 147*** and its progeny, which all stand for the proposition that statutory ouster clauses do not operate to exclude the jurisdiction of the Courts. The issue, however, is whether the ouster language of such statutes in general, and of the **Act** in particular, can simply be ignored. In my respectful view, such language cannot.

[33] It bears noting that we in the Caribbean have for many years ignored cogent local, and in my view binding, authority on this issue which, in fact, predated ***Anisminic***. In the recent second edition of his text ***Changing Caribbean Constitutions (2nd Ed., Carib Research and Publications Inc., 2015)***, ***Dr. Francis Alexis QC***, cites, at para. 17.157, the decision of the Federal Supreme Court in ***Sowatilall v Fraser and Another (1960), 3 WIR 70*** (***Hallinan CJ, Lewis and Marnan JJ***), a case arising out of what was then British Guiana (now Guyana).

[34] ***Alexis*** writes, after analysing the *ratio decidendi*, that the "masterful articulation in ***Sowatilall v Fraser***, of the doctrine that jurisdictional errors trump ouster clauses was to be mirrored nine years later by the ruling of the House of Lords in ***Anisminic Ltd v Foreign Compensation Commission***, ***[1969] 2 AC 147***." (*Ibid*; see, also, ***Fiadjoe Commonwealth Caribbean Public Law***, ***3rd Edn, Routledge-Cavendish 2008, pp. 63-66, 78 fn. 75***; **Ventose** ***Commonwealth Caribbean Administrative Law***, ***Routledge 2013, p 114, fn. 215)***. I turn now to consider that "masterful articulation."

[35] In ***Sowatilall***, the appellant was a member of the Co-operative Society, the second respondent. The appellant had been allocated certain lots of land, Nos. 12, 13 and 14 by the society. He alleged in his statement of claim that the allotment was to be subject to a survey and that it was agreed that there

should be an adjustment and shifting of the boundaries if the survey showed this to be required. After the survey, the society ordered him to quit lot 14 and to accept lot 11 in exchange. He refused and the dispute was referred to the Commissioner of Cooperative Development who determined that the appellant had to do as the Society required.

[36] The appellant then brought an action for a declaration setting aside the decision of the Commissioner and for an injunction to safeguard his occupation of lot 14. He alleged in his pleadings that the Commissioner had failed to give him an opportunity to hear all the appellant's witnesses and to present his whole case; and that further, the re-allocation of the lots was contrary to the rules of the society. **Section 49(4)** of the Co-operative Societies Ordinance provided that the Commissioner's decision "shall be final and shall not be called in question in any civil court." The trial judge came to the conclusion that **section 49(4)** excluded the jurisdiction of the Supreme Court to review the decision of the Commissioner. The appellant appealed to the Federal Supreme Court.

[37] ***Hallinan CJ***, commenting on ***Racecourse Betting Control Board v Secretary for Air [1944] 1 All ER 60; [1944] Ch. 114***, a decision relied on by the trial judge, as well as the later decision of ***R v Northumberland***

Compensation Tribunal, Ex p. Shaw [1951] 1 All ER 268; [1951] 1 KB 711, observed, at p. 73, that

> ***Lord Greene MR*** and ***Goddard LJ***, were careful to make it clear that, although the statute declared the decision of the tribunal to be final, *certiorari* would lie if the tribunal acted in excess of its jurisdiction. *Certiorari* can be granted on three other grounds besides excess of jurisdiction, namely, breach of the rules of natural justice, error of law on the face of the record, and fraud or collusion.

[38] After examining other authorities, including De Smith's Judicial Review of Administrative Action (1959) which argued that, contrary to decision in ***Racecourse***, an ouster clause could deny *certiorari* for error of law on the face of the record, his Lordship concluded:

> In light of the authorities I have cited, I have come to the conclusion that *certiorari* would lie from the decision of the Commissioner under **section 49** for a jurisdictional defect, but not for error of law on the face of the record; an error of law not on the face of the record is not, of course, of itself ever a ground for certiorari.
>
> In view of the privative words in **section 49(4)**, I do not consider that certiorari could lie for a failure of natural justice unless it was so serious as to go to jurisdiction.

The Chief Justice then referred to **Regulation 66** of the **Co-operative Society Regulations** which provided that proceedings before the Commissioner should be conducted, as nearly as possible, to proceedings in a court of law. His Lordship found that the Commissioner may not have complied with this provision and remitted the matter back to the Court for this to be heard and determined (see, at pp. 74-75).

[39] The judgment of ***Lewis J*** was in accord with that of the Chief Justice. His Lordship "consider[ed] that the words in **section 49** give finality to the Commissioner's decision provided he has acted within the limits of his jurisdiction, as defined by the Ordinance and the Regulations and in accordance with the rules of the society." (id., at 77). ***Lewis J*** then explained, at pp. 77-78, why the matter was to be remitted for further proceedings:

> In the instant case, the allegations are that the plaintiff was not allowed to present his case fully, and that the decision violated the rules of the society. As reg. 66 requires that proceedings before the Commissioner should be conducted in the same manner, as nearly as possible, as proceedings before a court of law, a breach of this provision, if substantial, would, in my view, make the proceedings so irregular as to affect the jurisdiction of the Commissioner. Such a breach may result from a refusal, before the close of the proceedings, to hear witnesses produced by one of the parties. So, too, a registered society has no power to act contrary to its rules and the Commissioner, in arriving at his decision, is equally bound by these rules. A decision purporting to affirm an act of the society which was ultra vires would, in my judgment, itself be ultra vires and beyond the competence of the Commissioner. In either of these cases the court has the power to declare the decision void and to set it aside.

[40] The ***Sowatilall*** decision provides, in my respectful view, the clearest exposition of the basis upon which ouster clauses are to be construed when administrative acts are being reviewed, and of "the doctrine that jurisdictional errors trump ouster clauses." (see, **Alexis *Changing Caribbean Constitutions,*** at para [33]).

[41] ***Anisminic v Foreign Compensation Commission*** is not, in my respectful view, nearly as clear an exposition as ***Sowatilall*** and it is, at least, arguable

that ***Anisminic*** is authority for the proposition that an error of law is a basis upon which an ouster clause can be trumped. There, the appellants were a mining company with property worth some £4 million in the Sinai Peninsula of Egypt. In 1956, after the outbreak of Israel-Egypt hostilities, the Egyptian government sequestrated the property and sold it to an Egyptian organisation called T.E.D.O., which purported to buy the property from the appellants for £500,000. In 1959, the British government concluded a treaty with the Egyptian government under which £27 million was to be paid by the latter to the former government as compensation, this compensation to be distributed by the Foreign Compensation Commission set up under the **Foreign Compensation Act 1950**. **Section 4(4)** of the **Act** provided that "[t]he determination by the Commission of any application made to them under this **Act** shall not be called in question in any court of law."

[42] The appellants filed a claim with the Commission. The Commission, in error, determined that the claim could not succeed because the appellants had not shown (indeed, they could not), as required by the Order made under the **Act**, that T.E.D.O., which had become the successor in title to the appellants, was at the time a British national. It was common ground in the House of Lords that this determination was erroneous since the words "successor in title" had no relevance when ***Anisminic***, the original owner of

the property, had survived, albeit it had changed its name from Sinai Mining Company.

[43] The House of Lords (***Lords Reid***, ***Wilberforce*** and ***Pearce***; ***Lords Morris*** of Borth-y-Gest and ***Pearson*** dissenting), held that the Commission's error of law could be called in question in a court of law. ***Lord Reid*** opined, at p. 216, as follows:

> The order requires the commission to consider whether they are satisfied with regard to the prescribed matters. That is all they have to do. It cannot be for the commission to determine the limits of their powers. Of course, if one party submits to a tribunal that its powers are wider than in fact they are, then the tribunal must deal with that submission. But if they reach a wrong conclusion as to the width of their powers, the court must be able to correct that – not because the tribunal has made an error of law, but because as a result of making an error of law, they have dealt with and based their decision on a matter with which, on a true construction of their powers, they had no right to deal.

[44] Since, ***Lord Reid*** concluded, the commission purported to determine the meaning of the words "successor in title" when the original owner was in existence, the commission had rejected the appellant's claim on a ground which they had no right to take into account and their decision was a nullity. (id., at pp. 216-217). The basis for the dissent of ***Lord Morris*** of Borth-y-Gest was clear. At p. 223, his Lordship stated:

> If a tribunal, while acting within its jurisdiction, makes an error of law which it reveals on the face of its recorded determination then the court, in the exercise of its supervisory function, may correct the error unless there is some provision preventing a review by a court of law. If a particular issue is left to a tribunal to decide then even where it is shown (in cases where it is possible to show) that in deciding the issue left to it the tribunal has come to a wrong conclusion that does not involve that the tribunal has

> gone outside its jurisdiction. It follows that, if any errors of law are made in deciding matters which are left to the tribunal for its decision, such errors will be errors within its jurisdiction. If issues of law as well as of fact are referred to a tribunal for its determination, then its determination cannot be asserted to be wrong if Parliament has enacted that the determination is not to be called in question in any court of law.

[45] In coming to the above conclusion, ***Lord Morris*** cited in support the dicta of ***Lord Reid*** in ***Armah v Government of Ghana [1968] AC 192***, where ***Lord Reid*** himself said that "[i]f a magistrate or any other tribunal has jurisdiction to enter on an enquiry and to decide a particular issue, and there is no irregularity in the procedure, he does not destroy his jurisdiction by reaching a wrong decision. If he has the jurisdiction to go right, he has the jurisdiction to go wrong."

[46] It is my judgment that ***Sowatilall***, and the dissent in ***Anisminic*** more aptly set out the relevant principles to the determination of this matter. And since the Federal Supreme Court of the West Indies, albeit non-resident, was a part of our judiciary because Barbados was a member of the West Indies Federation, I believe that its decisions are not, like House of Lords decisions, merely persuasive, but binding. Accordingly, it is against the backdrop of the ***Sowatilall*** principles that I examine the provisions in **sections 2C** and **23(1)** of the **Act** which provide as follows:

> **2C.** No court has jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding or decision of the [Immigration Appeal] Committee.

> **23. (1)** No court has jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Minister or an immigration officer had, made or given under the authority of this Act relating to (a) the refusal of permission to any person to enter Barbados or the removal of that person from Barbados; or
>
> (b) the detention or deportation of any person, upon any ground whatsoever unless that person is a citizen or a permanent resident.

[47] Ms. Prescott referred to the **Administrative Justice Act, Cap**. **109B of the Laws of Barbados** and the High Court decision in ***Sparman v Greaves and the Attorney-General***, ***CV. No. 529/2003***, ***Kentish J***, (decided 15 October 2004). There, respondent ***Greaves***, the then CIO, had revoked the permit which he had granted to the applicant, a CARICOM skilled national with a licence to practice cardiology. The applicant sought judicial review of the revocation. The CIO argued before ***Kentish J*** that the court had no jurisdiction to hear the application because of the language of **section 23(1)** which had rendered non-justiciable the issues stated in the section. Her Ladyship held (at para. 39) that the ouster clause was not enforceable because neither of the four situations in **section 23(1)** applied to the facts before her, namely (1) the refusal of permission to any person to enter Barbados; (2) the removal of that person from Barbados; (3) the detention of any person; or (4) the deportation of any person. In my respectful view, there can be no quarrel with this determination.

[48] Referring to **section 16** of the **Administrative Justice Act**, ***Kentish J*** observed that it was "abundantly clear that Parliament intended the principles of natural justice to be adhered to by any person or body entrusted with decision-making powers to refuse, modify, or revoke any licence, permission, qualification or authority or to impose any penalty under any law." She also noted that **section 13(1)** of the **AJA** required any decision-making body to give reasons for its decision if so requested by the person affected by that decision.

[49] However, more poignantly, her Ladyship observed that **section 13(2)** specifically exempted certain bodies from the requirement to provide reasons for decision. "One such specified decision", she noted, "is 'any decision of the Minister or a government official under the Immigration Act.'" Her Ladyship continued, at para. 50, that "this exemption is particularly instructive as it demonstrates that Parliament was not unmindful of the provisions of **section 23** of the **Act**, (which purported to oust the jurisdiction of the court), when it enacted the **AJA** which required all decision-making bodies to observe the principles of natural justice but at the same time specifically exempted the Minister or a government official under the **Act** from the duty to provide such reasons."

[50] ***Kentish J*** concluded, however, that **section 23** of the **Act** was "not sufficiently explicit to exclude judicial review of the decision of the [CIO] under the provisions of the AJA. I must, respectfully, express my doubt as to whether the position of ***Kentish J*** is as clear-cut as her Ladyship asserts.

[51] For where, as here, there is peremptory Parliamentary language contained, not just in the **Act**, but in the **AJA** itself, stating that reasons for decisions of the Minister or government officials purporting to act under the **Act** shall not be required under the **AJA**, it is difficult to imagine what more explicit language was necessary to effect such an ouster. How much more clearly could Parliament have said it?

[52] But, for present purposes, there is a simpler distinction between the ***Sparman*** case and the case at bar. Dr. Sparman was a CARICOM skilled national, and different provisions applied to his case and, as ***Kentish J*** said at the beginning of her decision, ***Sparman*** had nothing to do with a deportation, as the instant case does, and does not, therefore, support the applicant. I am therefore content to state that the *ratio decidendi* of the ***Sparman*** case does not require a reconsideration of the ouster clause in **section 23(1)**.

[53] In my judgment, the applicant has not shown that the Minister or the CIO acted beyond his or her jurisdiction in detaining him for deportation, and has

therefore not established any reason why this Court should not apply the ouster clause in **section 23(1)** of the **Act**. Moreover, as noted above, **section 13(1)** of the **AJA** enacts the requirement of all officials making decisions to give reasons for those decisions when requested to do so in accordance with **section 14** of the **AJA**. However, **section 13(2)** exempts from this requirement those persons mentioned in the First Schedule to the **AJA**. **Paragraph (b)** of that Schedule specifically exempts "[a]ny decision of the Minister or of a Government Official under the **Immigration Act**." There was accordingly, no basis for the grant of the interlocutory injunction and the application must be rejected.

<u>Disposal</u>

[54] It is therefore ordered that the interim injunction granted by this Court on 23 July 2015 was properly discharged as its retention was not justified by the balance of justice.

[55] There shall be no order as to costs.

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Chief Justice