Trinity Term
[2022] UKPC 29
Privy Council Appeal No 0104 of 2021

JUDGMENT

Jesus Alexander Rodriguez Martinez (by his kin and next friend Luisa Del Valle Martinez Hernandez) and another (Appellants) *v* Chief Immigration Officer (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Reed
Lord Kitchin
Lord Hamblen
Lord Stephens
Lord Lloyd-Jones

JUDGMENT GIVEN ON
14 July 2022

Heard on 17 March 2022

Appellants (Jesus Alexander Rodriguez Martinez and Luisa Del Valle Martinez Hernandez)
Gerald Ramdeen
Tom Richards
(Instructed by Dayadi Harripaul (Trinidad))

Respondent
Peter Knox QC
Fyard Hosein SC
Robert Strang
(Instructed by Charles Russell Speechlys LLP (London))

LORD STEPHENS:

Introduction

1. Jesus Alexander Rodriguez Martinez ("Jesus" or "the first appellant"), a 15-year-old boy, and his mother Luisa Del Valle Martinez Hernandez ("Ms Martinez Hernandez" or "the second appellant") arrived clandestinely to Trinidad and Tobago by boat. They had fled Venezuela and wished to claim asylum. They are currently detained by the Chief Immigration Officer ("the respondent"), at the Chaguaramas Heliport, Port of Spain, purportedly pursuant to the power of detention in section 16 of the Immigration Act Chapter 18:01 ("the Immigration Act").

2. The appellants commenced proceedings under section 14 of the Constitution of the Republic of Trinidad and Tobago (Chapter 1:01) ("the Constitutional proceedings") seeking protection for their right to seek asylum. In those Constitutional proceedings an interim High Court order was made restraining the State from taking any steps to remove the appellants from Trinidad and Tobago until the hearing and determination of those proceedings or any further order. The appellants also commenced Habeas Corpus proceedings ("the Habeas Corpus proceedings") requiring the respondent to present proof of lawful authority to detain them. In the Habeas Corpus proceedings Madame Justice Mohammed ("the judge") refused to order the release of either of the appellants because she was satisfied that the respondent's return to the writ had demonstrated a lawful basis for their detention under section 16 of the Immigration Act. The Court of Appeal dismissed the appellants' appeal. The appellants now appeal to the Judicial Committee of the Privy Council with special leave granted by Lord Kitchin, Lord Sales and Lord Stephens on 1 February 2022 pursuant to section 109(3) of the Constitution.

3. There are three grounds of appeal. The first ground of appeal concerns Jesus. It is argued that there was no lawful basis to detain him as the power to detain in section 16 of the Immigration Act only arises in respect of any person if a deportation order has been made in respect of that person. It is accepted that until 16 March 2022 (on the eve of the hearing before the Board) no deportation order had been made in respect of Jesus. Accordingly, it is submitted that there was no lawful basis for Jesus's detention between the expiry on 15 December 2020 of his detention under a quarantine order (see para 12 below) and 16 March 2022.

4. The second ground of appeal concerns both appellants. It is a condition of detention under section 16 of the Immigration Act, in accordance with the principles

stated by Woolf J in *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704 ("the Hardial Singh principles"), that if a person is detained then the detention must be "pending … deportation." The appellants contend that as the interim order of Quinlan-Williams J dated 18 January 2021 (see para 19 below) in the Constitutional proceedings ("the 18 January 2021 Order") restrained the State from taking any steps to remove the appellants from Trinidad and Tobago, there was no prospect of them being deported so that they could not be said to be detained pending deportation. Accordingly, on this basis they contend that their detention has been unlawful since the date of that order.

5. The third ground of appeal also concerns both appellants. It is contended that if either of them is being detained pursuant to section 16 of the Immigration Act pending deportation, then the period of detention has exceeded that which is reasonable in all the circumstances so that their continued detention is unlawful.

Factual background

6. The appellants are both citizens of the Bolivarian Republic of Venezuela.

7. On 15 November 2020 the appellants left Venezuela in a pirogue, intending to seek asylum in Trinidad and Tobago. They arrived in Trinidad and Tobago on 17 November 2020 and were apprehended. On 22 November 2020 they were escorted out of Trinidadian waters by the Trinidad and Tobago Coast Guard in the boat on which they had arrived. However, on 24 November 2020 the appellants again returned to Trinidad and Tobago by boat and were arrested by members of the Trinidad and Tobago Police Service and detained. Their initial detention was under quarantine orders in connection with the Covid-19 pandemic. They were detained first at a health facility, then at the Erin Police station and finally at the Chaguaramas Heliport, which is a military facility also used for the purpose of Covid-19 quarantine measures and for the detention of persons under section 16 of the Immigration Act.

8. On 2 December 2020, the appellants commenced the Constitutional proceedings against the Attorney General (Claim No CV2020-04193 *Jesus Alexander Rodriguez Martinez (by his kin and next friend Luisa Del Valle Martinez Hernandez) and Luisa Del Valle Martinez Hernandez v Attorney General of Trinidad and Tobago*) seeking relief, including interim relief, under section 14 of the Constitution.

9. Following an ex parte hearing on the same date, the appellants were granted interim relief by the High Court (Charles J) restraining the State from "from taking any

steps to remove the [appellants] from the jurisdiction during the period on quarantine fixed by the Chief Medical Officer."

10. On 8 December 2020, the quarantine orders were extended to authorise the detention of the appellants until 15 December 2020.

11. On 15 December 2020, Ms Martinez Hernandez was interviewed by an Immigration Officer. Following the interview, the respondent determined that the appellants' entry into Trinidad and Tobago was not in accordance with the Immigration Act. There is no dispute in relation to that determination and there is also no dispute in relation to the respondent's assertion that the appellants' entry was also in breach of Trinidad and Tobago's Covid-19 regulations under the Public Health Ordinance Chapter 12 No 4.

12. The quarantine orders expired on 15 December 2020, but the appellants remained in detention at the Chaguaramas Heliport.

13. Furthermore, on 15 December 2020 upon an inter partes hearing in the Constitutional proceedings, the appellants were granted further interim relief by the High Court (Rahim J) restraining the State from "from taking any steps to remove or from removing the [appellants] from the jurisdiction until the hearing and determination" in the case of *Valeria De Los Angeles Leon v Attorney General of Trinidad and Tobago* No P326 of 2020 ("*Valeria De Los Angeles Leon*"). This case concerned an application for interim relief in respect of a child by her mother as next friend. The child had entered Trinidad and Tobago on the same boat as the appellants and sought identical interim relief to the appellants in the Constitutional proceedings.

14. On 22 December 2020, the Court of Appeal (Boodoosingh and Aboud JJA) determined the civil appeal *Valeria De Los Angeles Leon*, allowing it, remitting the matter for substantive hearing before a different judge and restraining the State from removing the child claimant in that case from the jurisdiction in the interim.

15. On 12 January 2021, the appellants by their Attorney-at-Law sent the respondent pre-action letters stating that there was no lawful justification for their continued detention and that unless they were released by 8.00 am on 14 January 2021, Habeas Corpus proceedings would be issued.

16. Also on 12 January 2021, the Minister of National Security issued a deportation order against Ms Martinez Hernandez pursuant to section 11 of the Immigration Act.

The deportation order was addressed to "Luisa Del Valle Martinez Hernandez" and it ordered *her* "to be detained and to be deported to the Bolivarian Republic of Venezuela." It also ordered *her* to remain out of Trinidad and Tobago while it was in force. There is no mention in that deportation order of Jesus. In fact, no deportation order was issued against Jesus until 16 March 2022, on the eve of the hearing before the Board. That deportation order was addressed to "Jesus Alexander Rodriguez Martinez", and it ordered *him* "to be detained and to be deported to the Bolivarian Republic of Venezuela." It also ordered *him* to remain out of Trinidad and Tobago while the order was in force.

17. On 14 January 2021, the respondent replied to the appellants' Habeas Corpus pre-action letters. In respect of Ms Martinez Hernandez, the respondent stated that as a person against whom a deportation order had been made, she was and continued to be lawfully detained pursuant to section 16 of the Immigration Act. In respect of Jesus the respondent stated that he was detained pursuant to an unwritten policy that in accordance with the United Nations Convention on the Rights of the Child, the Immigration Division operates as far as is reasonable to avoid the separation of parents and children.

18. The prohibition contained in the order dated 15 December 2020 restraining the State from removing the appellants from the jurisdiction had expired upon the determination of the civil appeal in the case of *Valeria De Los Angeles Leon*. Accordingly, on 15 January 2021 the appellants made an application in the Constitutional proceedings for the restraint of their deportation pending the hearing and determination of those proceedings.

19. On 18 January 2021 upon an inter partes hearing in the Constitutional proceedings, the High Court (Quinlan-Williams J) by its 18 January 2021 Order, continued Rahim J's interim Order of 15 December 2020 so as to restrain the State "from taking any steps to remove the [appellants] from the jurisdiction … until the hearing and determination" of the Constitutional proceedings or further order.

20. On 28 January 2021, the appellants made an application to issue a Writ of Habeas Corpus ad Subjiciendum in respect of their continued detention.

21. On 29 January 2021, the High Court (Mohammed J) permitted the issue of the writ of Habeas Corpus and directed a return date of 1 February 2021. The writ was duly issued and served on the respondent.

22. On 1 February 2021 Mr Abdul Mohammed, Legal Officer 1 of the Immigration Division of the Ministry of National Security, filed a return to the writ of Habeas Corpus on behalf of the respondent. In the return he referred to and exhibited the deportation order which was issued by the Minister of National Security on 12 January 2021 in respect of Ms Martinez Hernandez and asserted that she was "currently being detained by the Immigration Division" under section 16 of the Immigration Act. He stated that Jesus (who is a boy), "is the minor daughter (sic) of the second named [appellant] and remains in her care at the Heliport, Chaguaramas." Accordingly, in respect of the detention of Jesus the respondent did not rely on any deportation order made in relation to him but on his relationship with his mother against whom a deportation order had been made and the fact that he was in her care. There was no explanation in the return for the detention of either of the appellants between 15 December 2020 when the quarantine orders had expired and 12 January 2021 when the deportation order was made against Ms Martinez Hernandez.

23. Also, on 1 February 2021 there was an inter partes hearing of the Habeas Corpus application before Mohammed J.

24. On 15 February 2021 Mohammed J dismissed the appellants' Habeas Corpus application and on 18 February 2021 she delivered her reasons for doing so.

25. On 21 July 2021 the Court of Appeal (Moosai, Lucky and Dean-Armorer JJA) dismissed the appellants' appeal against the Order of Mohammed J for reasons given in a judgment delivered by Dean-Armorer JA with which the other members of the court agreed. As the Board has indicated, the appellants now bring this appeal in the Habeas Corpus proceedings.

26. To date, the appellants remain in detention at the Chaguaramas Heliport.

27. It is necessary to give some further details in relation to the various steps taken in the Constitutional proceedings, as one of the circumstances relied on by the respondent as justifying the reasonableness of the period of the appellants' detention pending deportation is the time taken to determine the Constitutional proceedings, which proceedings were commenced by the appellants on 2 December 2020.

28. On 18 January 2021 Quinlan-Williams J gave directions for their hearing and determination. Those directions provided for a decision on evidential objections on 5 March 2021 and a substantive oral hearing on 31 March 2021 to be conducted remotely in the light of the Covid-19 pandemic, with a decision on 12 April 2021. It did not prove possible to adhere to this timetable for several reasons.

29. On 24 February 2021 the State's Attorneys-at-Law in the Constitutional proceedings wrote to Quinlan-Williams J requesting that she recuse herself. A hearing took place in the judge's chambers on 2 March 2021, at which the judge declined to recuse herself based on the State's correspondence and indicated that if the State persisted in seeking her recusal it would need to make an application.

30. On 26 February 2021 the appellants filed evidential objections in the Constitutional proceedings seeking to strike out large portions of the respondent's affidavit evidence.

31. On 1 March 2021 the respondent filed evidential objections in the Constitutional proceedings with respect to the affidavit evidence of the appellants.

32. The State then made a formal recusal application on 8 March 2021. On 15 March 2021 the Court informed the parties that the application filed on 8 March 2021 would be heard on 22 March 2021.

33. On 22 March 2021 the Court informed the parties that the decision on the evidential objections would be delivered before the determination of the recusal application. The Court gave further directions in relation to evidential objections with the Court's decision on the objections fixed for 19 May 2021.

34. Both parties filed submissions and replies in support of their evidential objections. On 19 May 2021 the Court informed the parties that the decision on the evidential objections was not ready for delivery and adjourned that decision to 28 June 2021. On 28 June 2021 there was a further adjournment. No information has been provided to the Board as to the date for the delivery of the decision on the evidential objections or the recusal application. As at 17 March 2022, the date of the hearing before the Board, there has been no hearing or determination of the Constitutional proceedings.

The judgments of the High Court and of the Court of Appeal in the Habeas Corpus proceedings

(a) The judgment of Mohammed J in the High Court

35. It was apparent from the respondent's return to the writ of Habeas Corpus that the deportation order related only to Ms Martinez Hernandez, and not to Jesus. However, the judge stated that she was satisfied that:

> "the Return of the Writ demonstrated that the respondent had set out a lawful basis for the [appellants'] detention as there is a valid Deportation Order which was issued by the Minister of National Security pursuant to section 11 of the Act."

Accordingly, the judge must have been satisfied that the deportation order against Ms Martinez Hernandez provided a lawful basis not only for her detention but also for the detention of Jesus.

36. The judge rejected the appellants' contention that the 18 January 2021 Order meant that there was no prospect of them being deported so that their detention was unlawful as they could not be said to be detained pending deportation. The judge explained that:

> "the order of Quinlan-Williams J made on the 18 January 2021 restraining the deportation of the [appellants] pending the determination of the substantive constitutional proceedings concerning the [appellants] did not invalidate the Deportation Order but temporarily prevented the Respondent from taking any further steps to give effect to it."

Accordingly, she refused to order the release of either of the appellants.

(b) The judgment of the Court of Appeal

37. The two principal issues which arose in the appeal were identified at para 5 of the judgment of Dean-Armorer JA as being (a) whether the Chief Immigration Officer was empowered by section 16 of the Immigration Act to detain the appellants; and (b) whether their continued detention is unlawful.

38. In relation to the first issue, it was held at para 31, that a deportation order had been made against Ms Martinez Hernandez so that by virtue of section 16 of the

Immigration Act "there was a lawful ground for her detention *and the minor in her care*" (emphasis added). The Court's view that the deportation order extended to include a minor in the care of his mother can also be discerned from para 66 where it was stated that the "appellants", that is both appellants, "were detained and continue to be detained pursuant to the deportation order which had been made against *them* on January 12, 2021" (emphasis added). It can also be discerned from para 71 where it was stated that the "*appellants* … were … detained … pursuant to a deportation order" (emphasis added). Accordingly, the first issue was decided against both appellants.

39. In relation to the second issue the court, in agreement with the judge, rejected at para 33 the appellants' contention that the 18 January 2021 Order meant that there was no prospect of them being deported so that their detention was unlawful.

40. Also, in relation to the second issue the court identified the "more complex" question as being whether in all the circumstances the length of the appellants' detention was unreasonable. In identifying that question the court was faithfully applying the principle derived from several authorities including amongst others, the judgment of Woolf J in *R v Governor of Durham Prison, Ex p Hardial Singh*, that the power of detention under section 16 of the Immigration Act is impliedly limited to such period of time as is reasonably necessary to carry out the process of deportation and that the period which is reasonable will depend upon the circumstances of the particular case as assessed by the court rather than according to *Wednesbury* principles. The Court of Appeal considered at para 34 that the judge fell short in failing to explore whether in all the circumstances the period of detention was unreasonable. It was therefore necessary for the court to make its own assessment of its reasonableness.

41. In carrying out that assessment the court considered the impact of the Constitutional proceedings on the period of time reasonably necessary to carry out the process of deportation.

42. At para 73 the court stated that:

> "[the] reason for the delay in deportation and consequently, their continued detention, is that the appellants invoked the court process and obtained injunctive orders preventing their return. The evidence and the Return of the writ suggest that it is within the power of the appellants to end their detention. This will clearly end their restraint as they return

> to their country and their liberty is restored. The appellants are therefore subjected to self-induced restraint."

Having determined that the appellants were subject to self-induced restraint the court went on at para 74 to enter the qualification that:

> "The factor of self-induced restraint does not in itself end the matter. The court recognises that by invoking the court's process, the appellants are exercising rights to which they are entitled under the Constitution. They are guaranteed access to the court under section 4(b) of the Constitution and this right is a pillar of our constitutional democracy."

43. At para 76 the court stated that "what is reasonable must be seen in the context of the Constitutional proceedings" and at para 79 that "reasonableness must be measured by the Court proceedings." The court continued at para 79 by stating that:

> "The appellants have deliberately and willingly embarked on the Constitutional Motion. *Unless it can be shown that the proceedings are unreasonably protracted*, this court must facilitate the hearing and determination of the Constitutional Motion. *As long as the Constitutional Motion is receiving the attention of the Courts of Trinidad and Tobago it seems that the detention is within the band of a period which is reasonable*." (Emphasis added)

44. The court also carried out a forward-looking assessment as to when deportation might take place, which in turn was dependent on the determination of the Constitutional proceedings. The court stated, at para 84, that it was confident that the judge who is seized of the Constitutional Motion will both hear and dispose of the application with all possible dispatch and that a decision will be forthcoming by the end of 2021.

45. Having concluded that "reasonableness must be measured by the Court proceedings" in the Constitutional proceedings the court went on to consider, at para 80, the additional circumstance that the appellants' "release may however result in their absconding with the consequent frustration of the valid deportation order." The court held, at para 81, that there was a real possibility that the appellants would abscond based on their capacity to breach the laws of Trinidad and Tobago and of their

own country when considered against the appellants' desire to remain in Trinidad and Tobago.

46. Accordingly, in all the circumstances the court held that the continued detention of the appellants was not unreasonable, and the appeal was dismissed.

The first ground of appeal

47. On behalf of Jesus, it is contended that it is a condition of detention under section 16 of the Immigration Act that the person detained is the subject of a deportation order. Because no deportation order was made in respect of Jesus until 16 March 2022, it is contended that his detention from 15 December 2020 until 16 March 2022 was unlawful.

48. The respondent contends that this ground of appeal was not advanced on behalf of Jesus before the Court of Appeal. However, the Board notes that in the respondent's written case no objection was made to the point being taken before the Board but rather it was observed that it was unfortunate that the Board did not have the decision of the Court of Appeal on this point. The Board, whilst noting that observation, considers that this ground of appeal involving as it does a question as to the lawful detention of a person which turns on the proper interpretation of section 16 of the Immigration Act, is an issue which the Board should decide.

49. On the hearing of the appeal before the Board the respondent contended that the deportation order against Ms Martinez Hernandez also had effect in respect of Jesus as he was a child in her care who had illegally entered Trinidad and Tobago with her. On this basis it is contended that Jesus is a person in respect of whom a deportation order has been made within section 16 of the Immigration Act. In support of these submissions the respondent relies on the policy and practice of the Ministry that when the parent and child have together entered Trinidad and Tobago illegally, the deportation order against the parent is also to be taken as a deportation order against the child. Accordingly, it is contended that the deportation order in respect of Ms Martinez Hernandez covered Jesus as well and that "he stands in the same position as her."

50. The statutory power to detain is contained in section 16 of the Immigration Act. It is appropriate at this stage to set out the relevant parts of the Immigration Act together with section 16.

51. Section 2 defines “deportation” as meaning:

> “the removal under this Act of *a person* from any place in Trinidad and Tobago to the place whence he came or to the country of his nationality or citizenship or to the country of his birth or to such other country as may be approved by the Minister under this Act, as the case may be.” (Emphasis added)

52. Section 2 defines a “deportation order” as meaning:

> “an order requiring *the person in respect of whom it is made* to leave and remain outside of Trinidad and Tobago.” (Emphasis added)

53. The power to make a deportation order which is vested in the Minister responsible for immigration is contained in section 11 of the Immigration Act which in so far as relevant provides:

> “Nothing in this Part shall be construed as conferring any right to be or to remain in Trinidad and Tobago on *any person* who (a) either before or after the commencement of this Act has come into Trinidad and Tobago otherwise than in accordance with … this Act, … and the Minister may make a deportation order against *such person* and such person shall have no right of appeal therefrom and shall be deported as soon as possible.” (Emphasis added)

54. Finally, the power to detain pending deportation is contained in section 16 which in so far as relevant provides:

> “*Any person* in respect of whom … a deportation … order has been made may be detained pending … deportation at an immigration station or other place satisfactory to the Minister.” (Emphasis added)

55. As emphasised, deportation within section 2 of the Immigration Act is restricted to the removal “of a person”. It does not cover the removal of “a person” together

with the removal of some other person, such as a child in their care. A deportation order within the statutory meaning set out in section 2 requires *the person in respect of whom it is made* to leave and remain outside of Trinidad and Tobago. It does not require any other person, such as a child in the care of his parent, to leave and remain outside Trinidad and Tobago. A deportation order under section 11 can be made against "any person" who has come into Trinidad and Tobago otherwise than in accordance with the Immigration Act. This provision requires the Minister to give separate consideration in relation to each person as to whether that person has come into Trinidad and Tobago otherwise than in accordance with the Immigration Act. Accordingly, it would require separate consideration in relation to both a parent and a child in their care. If a person has come into Trinidad and Tobago otherwise than in accordance with the Immigration Act, then the Minister may make a deportation order against "such person". Finally, the power to detain in section 16 is limited to "*any person* in respect of whom … a deportation … order has been made". The Board considers that the ordinary linguistic meaning of section 16 of the Immigration Act, read in the context of the section as a whole and in the wider context of sections 2 and 11 of the Immigration Act, is that it is a condition of the power to order detention that the person detained is the subject of a deportation order.

56. In support of the interpretation that the power to order detention is subject to the condition that the person detained is the subject of a deportation order the appellants rely on the governing principle informing statutory interpretation set out in *Naidike v Attorney General of Trinidad and Tobago* [2005] 1 AC 538, para 48 that "a person's physical liberty should not be curtailed or interfered with except under clear authority of law." *Naidike* is authority for the "canon of construction that Parliament is presumed not to enact legislation which interferes with the liberty of the subject without making it clear that this was its intention". Plainly the application of that canon of construction to section 16 supports the interpretation that the power to detain only arises in respect of any person if that person is the subject of a deportation order.

57. In support of a wide reading of the statutory power contained in section 16 of the Immigration Act the respondent relied on the practice or unwritten policy to permit the detention of a child in the care of a parent if there is a deportation order in respect of the parent. A policy is not a legitimate external aid to statutory interpretation. Rather, a policy might be relevant to the exercise of a statutory power to detain but the anterior question is whether section 16 contains a statutory power to detain a person absent a deportation order in relation to him or her. The correct interpretation of section 16 is that absent such a deportation order there is no power to detain. Lawful authority to detain cannot be derived from the respondent's policy.

58. In *Chief Immigration Officer v Navarro and Gobin (Claim No* CV2021-00402/Civil Appeal No P-31/2021) 16 December 2021 the Court of Appeal of Trinidad and Tobago also endorsed the interpretation of section 16 of the Immigration Act that the power to detain only arises in respect of any person if that person is the subject of a deportation order. The case concerned two children who had been determined to have entered Trinidad illegally, albeit not accompanied by a parent. No deportation order had been made in relation to either of the children. On their application for release from detention the immigration authorities sought to justify their detention on the basis that were being held until they could be placed in the care of the Children Authority. The Court of Appeal considered the power to detain in section 16 of the Immigration Act and stated that:

> "Section 16, …, authorizes the detention of persons pending deportation. This [is] a non-judicial detention. It is a statutorily conferred power and must be exercised with meticulous adherence to the statute. An examination of the facts of this appeal confirms that no deportation order was made in respect of the [children]. The precedent fact for the detention was absent. There was no pending deportation, and therefore there was no trigger for the exercise of the power conferred by section 16."

The Board agrees with that reasoning and considers that it applies with equal force to this appeal.

59. It is also appropriate to observe that each of the deportation orders in this case correctly followed the statutory scheme under the Immigration Act as each of them is addressed to a person, requiring that person, rather than that person and any other person, to be deported and to remain out of Trinidad and Tobago; see para 16 above.

60. Accordingly, the detention of Jesus from 15 December 2020 to 16 March 2022 was unlawful.

61. The deportation order made on 16 March 2022, which is valid unless quashed, would provide a lawful basis for the detention of Jesus, unless the period of his detention has exceeded that which is reasonable in all the circumstances. Mr Ramdeen on behalf of Jesus, relying on *Chief Immigration Officer v Coralza Del Valle Marin Torres* (Claim No CV 2021-00364/Civil Appeal No P-24/2021) 16 December 2021, at paras 100 and 101, sought to argue before the Board that the deportation order against Jesus was invalid as being a step towards removing him from Trinidad and Tobago, which

step would have been prohibited by the 18 January 2021 Order. However, this is not a matter which is properly before the Board. It may require consideration as to whether the purpose of the 18 January 2021 Order was to prevent deportation, in the context that there could be no appropriate objection to steps being taken towards deportation if deportation itself did not occur. It is for counsel on behalf of Jesus to make whatever application is considered appropriate in the courts of Trinidad and Tobago in relation to the deportation order dated 16 March 2022, and for those courts to determine whether that order should be quashed.

62. Based on the issues before the Board the appropriate relief in relation to the first ground of appeal is a declaration that the detention of Jesus between 15 December 2020 and 16 March 2022 was unlawful. Any question as to the validity of the deportation order dated 16 March 2022 is for the courts in Trinidad and Tobago to decide.

The second ground of appeal

63. The appellants contend that because the 18 January 2021 Order restrained the State from taking any steps to remove the appellants from Trinidad and Tobago, there was no prospect of them being deported so that they could not be said to be detained pending deportation. Accordingly, the appellants contend that since the date of that order their detention has been unlawful.

64. It is correct that the power in section 16 of the Immigration Act to detain individuals is subject to the limitation that it can only authorise detention if the individual is being detained, in this case, pending their deportation. However, the existence of a temporary impediment to deportation by way of an interim injunction until determination of the Constitutional proceedings does not by itself mean that there is no prospect of them being deported so as to prevent their detention being characterised as “pending deportation” or “for the purpose of deportation”. There is every prospect of them being deported if the appellants’ Constitutional challenge is unsuccessful. As it stands, deportation is still pending, though it may not be imminent. Furthermore, there was no suggestion that Quinlan-Williams J intended by her 18 January 2021 Order not only to prevent deportation but also to bring the detention of the appellants to an end. It would be an absurd consequence if an injunction granted to prevent the implementation of a deportation order, by a side wind, also had the unintended consequence of bringing the detention of the individual to an end. The absurdity of such a consequence would be even more apparent if there was a short period of detention up to the date of the injunction and there was a clear risk of the person absconding or committing further offences.

65. The Board, in agreement with the judge and the Court of Appeal dismisses this ground of appeal.

The third ground of appeal

(a) An outline of this ground of appeal

66. The power of detention under section 16 of the Immigration Act is impliedly limited to such period of time as is reasonably necessary to carry out the process of deportation. The determination of what is a reasonable period will depend upon the circumstances of the particular case as assessed by the court, rather than according to *Wednesbury* principles (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). The issue is whether, in all the circumstances, the period of detention of either or both of them to date or the likely period of detention of either or both of them in the future has exceeded or will exceed that which is reasonable so that the continued detention of either or both of them is unlawful.

(b) Legal principles

67. There was no disagreement between the parties as to the legal principles applicable to the power of detention under section 16 of the Immigration Act so that it is not necessary to extensively review the case law but rather to set out the Hardial Singh principles as encapsulated by the Supreme Court in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245 ("*Lumba*") and to identify some of the circumstances and principles relevant in this case.

68. In *Lumba* at para 22 the Hardial Singh principles were encapsulated as follows:

> "(i) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose; (ii) the deportee may only be detained for a period that is reasonable in all the circumstances; (iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention; (iv) the Secretary of State should act with reasonable diligence and expedition to effect removal."

69. In *Lumba* at para 104 Lord Dyson stated that it is not possible or desirable to produce an exhaustive list of all the circumstances that are or may be relevant to the question of how long it is reasonable in any particular case for a person to be detained pending deportation. However, he stated that those circumstances:

> "include at least: 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 person 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 offences."

It is appropriate for the Board to say something about some of the circumstances identified by Lord Dyson.

70. As Lord Dyson indicates one of the circumstances is "length of the period of detention". In any analysis of this circumstance, it must be determined both when detention commenced and for how long it is likely to continue. The question as to when detention commenced is usually straightforward. The question as to how long it is likely to continue was identified by Lord Dyson in *Lumba* at para 103 as a forward-looking assessment. He stated that in determining what is a reasonable period it is appropriate to "determine whether, *and if so when*, there is a realistic prospect that deportation will take place" (emphasis added). He went on to explain that even though a reasonable time has not yet expired, if it becomes clear that the respondent will not be able to deport the detained person within a period that is reasonable in all the circumstances, having regard in particular to the time that the person has already spent in detention, then continued detention is unlawful. That is the third Hardial Singh principle set out at para 22 of *Lumba* (see para 68 above). Accordingly, even if a reasonable period, in all the circumstances, including for instance any risk of absconding, has not yet expired in this case the appellants should no longer be detained under section 16 of the Immigration Act if it becomes clear that the respondent will not be able to deport them within what is in all the circumstances a reasonable period.

71. Another of the circumstances adumbrated by Lord Dyson in *Lumba* at para 104 is "the nature of the obstacles which stand in the path of the [respondent] preventing a deportation". The main obstacle in this case is the Constitutional proceedings brought by the appellants aimed at protecting the appellants' right to seek asylum

combined with the restraint imposed by the 18 January 2021 Order. How then does a court assess whether a period of detention is reasonable, where, as here, the appellants have instituted proceedings and have thereby created an obstacle in the path of the respondent preventing their deportation? In *Lumba* it was contended on behalf of the Secretary of State that there was an exclusionary rule, so that the time taken to resolve legal challenges brought by an individual against deportation should generally be left out of account in considering whether a reasonable period of detention has elapsed. Given that the appellants commenced the Constitutional proceedings on 2 December 2020, if the exclusionary rule applied then the entire period since that date would be left out of account in considering whether a reasonable period of detention had elapsed. However, the exclusionary rule was rejected by the Supreme Court in *Lumba* at para 121. The reasoning of Lord Dyson, at para 116 as adapted to the facts of this case was that an exclusionary rule would:

> "require the exclusion of consideration of the individual circumstances of an applicant pending what may be a long [constitutional challenge]. Suppose two [applicants] who both embark on a meritorious [Constitutional challenge] which takes a number of years. The only difference between them is that A poses a very high risk of absconding and reoffending and B poses a very low risk. If the exclusionary rule is applied, no difference can be drawn between them from the time proceedings are commenced. In both cases, the several years during which they are detained while the [the Constitutional proceedings are] continuing are to be disregarded in assessing whether the period of detention is reasonable. Or suppose that the effect of detention on A is to cause serious damage to his health or that of members of his family, whereas there is no such effect in the case of B. I can see no warrant for such a mechanistic approach to the determination of what is reasonable in all the circumstances."

72. Lord Dyson also reasoned at para 117 as adapted to the facts of this case that an exclusionary rule would:

> "involve the exclusion from consideration of any delays occurring within the [Constitutional proceedings] which are not the fault of the [applicants] or … the [respondent]. I see no reason why such delays, for example, delays on the part of

> the … court, should be disregarded in a determination of whether the period of detention is reasonable."

73. Whilst the time taken to resolve a legal challenge brought by an individual against deportation should be taken into account the weight to be attached to that time depends on an assessment of how meritorious the challenge may be. As Lord Dyson stated at para 121:

> "If a detained person is pursuing a hopeless legal challenge and that is the only reason why he is not being deported, his detention during the challenge should be given minimal weight in assessing what is a reasonable period of detention in all the circumstances. On the other hand, the fact that a meritorious appeal is being pursued does not mean that the period of detention during the appeal should necessarily be taken into account in its entirety for the benefit of the detained person. Indeed, Mr Husain does not go so far as to submit that there is any automatic rule, regardless of the risks of absconding and/or reoffending, which would compel an appellant's release if the appeals process lasted a very long time through no fault of the appellant. He submits that the weight to be given to time spent detained during appeals is fact-sensitive. This accords with the approach of Davis J in *Abdi* and I agree with it. The risks of absconding and reoffending are always of paramount importance, since if a person absconds, he will frustrate the deportation for which purpose he was detained in the first place. But it is clearly right that, in determining whether a period of detention has become unreasonable in all the circumstances, much more weight should be given to detention during a period when the detained person is pursuing a meritorious appeal than to detention during a period when he is pursuing a hopeless one."

74. As the Court of Appeal indicated in its judgment at para 73 (see para 42 above) the appellants could gain immediate release by forgoing the Constitutional proceedings which would inevitably lead to their deportation. In this way the Court of Appeal considered that the appellants have it in their own hands to secure their release from detention. The Court of Appeal termed this "self-induced" restraint on the appellants' liberty because it was the appellants' choice to bring the Constitutional proceedings. The Board agrees with the Court of Appeal at para 74 of its judgment that

by bringing the Constitutional proceedings "the appellants are exercising rights to which they are entitled under the Constitution". That is why, in the circumstances of this case, the Board considers that the fact the Constitutional proceedings were commenced by the appellants is not helpful in computing a reasonable period of detention. Rather, in the circumstances of this case, the focus should have been placed on the relative merits of the Constitutional proceedings. In accordance with the observation of Lord Dyson set out at para 73 above, more weight will be attributed to a period of detention during which a litigant is pursuing a meritorious challenge, rather than when he or she is pursuing a hopeless one. For instance, in computing a reasonable period of detention little weight would be given to the time taken in relation to the Constitutional proceedings if they are hopeless so that they are being used as a device to frustrate the respondent's efforts to the deport the appellants.

75. Another circumstance adumbrated by Lord Dyson in *Lumba* at para 104 is "the effect of detention on him and his family". Therefore, the court must consider the effect of detention on both Ms Martinez Hernandez and on Jesus. In relation to Jesus that also requires consideration of the effect of detention on a child so that any assessment of the reasonableness of the period of his detention must take his welfare into account. The period of time which is reasonable for a child or teenager in their formative years to be detained is fact sensitive, but it is likely to be different from the period for an adult. Any consideration of Jesus's welfare not only includes consideration of his age, his needs, and the impact on him of being detained. It must also consider, if he is to be released and it is proposed that his mother is to remain in detention, the impact on him of separation from his mother whilst she continues to be detained together with the impact on her of being separated from him.

76. The penultimate circumstance adumbrated by Lord Dyson in *Lumba* at para 104 is "the risk that if he is released from detention he will abscond". The importance of that circumstance was identified by Lord Dyson in *Lumba* at para 121. He stated:

> "The risks of absconding … are always of paramount importance, since if a person absconds, he will frustrate the deportation for which purpose he was detained in the first place."

Accordingly, the risk of absconding is likely to be a decisive factor in determining the reasonableness of the period of detention. However, there are limits to the impact of this factor as "[t]here must come a time when, however grave the risk of absconding … it ceases to be lawful to detain a person pending deportation"; see *Lumba* at para 144.

77. Two further points can be made about the risk of absconding.

78. First, a risk might be addressed by the imposition of conditions under section 17(1) of the Immigration Act. That section enables the Chief Immigration Officer (rather than the court) to grant conditional release to a person who has been detained under section 16. Section 17(1) provides:

> "Subject to any order or direction to the contrary by the Minister, a person taken into custody or detained may be granted conditional release or an order of supervision in the prescribed form under such conditions, respecting the time and place at which he will report for examination, inquiry, deportation or rejection on payment of a security deposit or other conditions, as may be satisfactory, to the Chief Immigration Officer."

79. Second, as the Court of Appeal held at para 81 of its judgment (see para 45 above), a risk of absconding can be inferred from a person's capacity to breach laws by entering Trinidad and Tobago otherwise than in accordance with the Immigration Act and from a desire to remain in Trinidad and Tobago. However, those factors are likely to be present in most cases so that they may not add materially to the evidence that such risk is present, and they are not the only factors relevant to an assessment of the risk of absconding. In general, it is necessary to have regard to the particular circumstances of the detained persons which may increase or alternatively diminish or eliminate the risk of absconding.

(c) Application of the principles to the facts of this case

80. On behalf of the appellants, it is submitted that there were errors in the Court of Appeal's assessment that the period of detention was reasonable by a failure to correctly apply the Hardial Singh principles as set out in *Lumba*.

81. First, it is submitted that the Court of Appeal incorrectly applied the exclusionary rule which was rejected by the Supreme Court in *Lumba*. In support of this submission the appellants rely on the Court of Appeal's statement at para 79 of its judgment (see para 43 above) that:

> "As long as the Constitutional Motion is receiving the attention of the Courts of Trinidad and Tobago it seems that the detention is within the band of a period which is reasonable."

It is submitted that the practical effect of this statement is to exclude in considering whether a reasonable period of detention has elapsed any period during which the Constitutional proceedings were receiving the attention of the Courts of Trinidad and Tobago. The Board notes that the Constitutional proceedings might be genuinely receiving the "attention" of the courts but nevertheless might still be delayed either because of circumstances beyond anyone's control or because of fault on the part of the appellants or the respondent or by delays on the part of the court. The correct approach in determining the past and likely future period of detention is to take into account the likely period to determine the Constitutional proceedings rather than to assume that the period is reasonable as long as the Constitutional Motion was receiving the "attention" of the courts. Delays to the Constitutional proceedings caused by the appellants should be given minimal weight in the computation of a reasonable period of detention. The weight to be attached to delays caused in other ways will be fact specific, though if the delays are caused by the respondent then one of the circumstances adumbrated by Lord Dyson in *Lumba* at para 104 (see para 69 above) is "the diligence, speed and effectiveness of the steps taken by the [respondent] to surmount … [the obstacles which stand in the path of the respondent preventing a deportation]". In conclusion in relation to this submission the Board agrees that the statement in the Court of Appeal's judgment at para 79 has an equivalent effect to the exclusionary rule which was rejected in *Lumba* (see para 71 above) so that this was an error of law in the assessment that the period of the appellants' detention was reasonable.

82. Second, the appellants submit that the Court of Appeal fell into error by creating a presumption that the Constitutional proceedings were not unreasonably protracted unless the contrary was shown. In support of this submission the appellants rely on the Court of Appeal's statement at para 79 of its judgment (see para 43 above) that:

> "*Unless it can be shown that the proceedings are unreasonably protracted*, this court must facilitate the hearing and determination of the Constitutional Motion."

It is submitted that the period of time to determine the Constitutional proceedings is not based on any presumption that the period is reasonable unless the contrary is shown. Rather, it is submitted that a court should address the past and likely future

period of detention which takes into account the period to determine the Constitutional proceedings.

83. The Board notes that one of the Hardial Singh principles is that "the deportee may only be detained for a period that is reasonable in all the circumstances." All the Hardial Singh principles should be seen in the context that their purpose is to protect personal liberty. Furthermore, it is for the court to assess for itself the reasonableness of the period of detention. The assessment is informed by case sensitive consideration of reasonableness in all the circumstances with each case requiring a value judgment by the court. A presumption of reasonableness undermines the purpose of the Hardial Singh principles which is to protect personal liberty and diverts from the court's judgment based on the particular circumstances of the individual case. On that basis the Board agrees that the period to determine the Constitutional proceedings is not based on any presumption that the period is reasonable unless the contrary is shown. The application of a presumption by the Court of Appeal was an error of law in its assessment that the period of the appellants' detention was reasonable.

84. Third, the appellants submit that the Court of Appeal at para 73 of its judgment (see para 42 above) incorrectly referred to the delay caused by the Constitutional proceedings as resulting in "self-induced" restraint on their liberty. It was also submitted that though the Court of Appeal, at para 74 of its judgment, referred to this factor not ending the matter, that still left the factor as a relevant circumstance to be taken into account in the computation of a reasonable period of detention. The Board has indicated at para 74 above that, in the circumstances of this case, the characterisation of the restraint on the appellants' liberty as being self-induced is unhelpful and that the focus ought to have been placed on whether the Constitutional proceedings were meritorious. The relative merits of the Constitutional proceedings were not subject to any detailed analysis in the Court of Appeal's judgment. It is correct that at para 82 of the judgment it is stated that "it is not possible at this time to forecast the final orders that will be made in the Constitutional proceedings" which leaves open the conclusion that the Constitutional proceedings are not hopeless. However, that assessment was made by the Court of Appeal in the context of consideration being given to the decision of Kangaloo J in *Miranda Valentina Velasquez Cedeno v Chief Immigration Officer* (Claim No CV 2021-00400) 16 February 2021 ("*Cedeno*") rather than in forming its own assessment of the weight to be attached to delays caused by the Constitutional proceedings in the computation of a reasonable period of detention by reference to the merits of those proceedings. Accordingly, the Board agrees that the reference to self-induced detention as a factor, albeit not ending the matter, combined with a lack of analysis or determination as to the merits was an error of law.

85. Fourth, the appellant submits that the Court of Appeal failed to take into account the circumstance of the effect of detention on Jesus and on Ms Martinez Hernandez and on their family as identified by Lord Dyson in *Lumba* at para 104 (see para 69 above). At para 83 of its judgment the Court of Appeal concluded that "the continued detention of the appellants is not unreasonable". It was after arriving at that conclusion that the Court of Appeal stated at para 84 that the court was "acutely mindful that the appellants are a young mother and her teenage son". However, no assessment was made as to the welfare interests of Jesus or as to the effect of detention on Jesus or on Ms Martinez Hernandez or as to the impact of those effects on the reasonableness of any period of detention either of him or his mother. Accordingly, the Board agrees that there was an error of law in the Court of Appeal's assessment that the period of the appellants' detention was reasonable by failing to consider the effect of detention on Jesus and on Ms Martinez Hernandez.

86. Fifth, in relation to the Court of Appeal's assessment of the risk of absconding the appellants submit that there was no assessment by the Court of Appeal of their particular circumstances including the impact, if any, of the fact that Maryuris Del Valle Arismendy Taguatigua, who is the aunt of Jesus and the stepsister of the Ms Martinez Hernandez, resides in Trinidad. Furthermore, it is submitted that there was no consideration of the imposition of conditions by the Chief Immigration Officer under section 17(1) of the Immigration Act to address any assessed risk of absconding. The risk of absconding is a very important circumstance which is likely often to be decisive in computing the reasonableness of any period of detention and in this case the Board considers that it required consideration not only of the particular circumstances of Ms Martinez Hernandez and of Jesus but also of the potential for the Chief Immigration Officer to impose conditions in order to address any assessed risk. Accordingly, the Board agrees that there was an error of law in the Court of Appeal's reasoning in failing to consider the impact of the particular circumstances of the appellants together with the potential for the imposition by the Chief Immigration Officer of conditions under section 17(1) of the Immigration Act against the risk of absconding.

(d) Conclusion in relation to this ground of appeal and appropriate disposal

87. The Board allows this ground of appeal and sets aside the Court of Appeal's determination that the period of the appellants' detention was reasonable.

88. The Board considers that it is inappropriate for it to form its own assessment as to whether the period of detention is reasonable for several reasons. First the assessment of what is a reasonable period of detention is informed by the context of the system of legal administration and the economic, social and cultural conditions to

be found in Trinidad and Tobago. Accordingly, the courts in Trinidad and Tobago are best placed to form the assessment. Second, on 21 July 2021, the Court of Appeal in its judgment stated at para 84, that the court was "confident that the Judge, who is seized of the Constitutional Motion will both hear and dispose of the application with all possible dispatch and that a decision will be forthcoming by the end of 2021". As indicated that expectation has proved to be overly optimistic. It might be suggested that the Court of Appeal considered that the end of 2021 was the end of what it considered to be a reasonable period of detention. However, this is not clear, and the Board has no up-to-date information as to the likely duration of the Constitutional proceedings. Further information is required as to the Constitutional proceedings, which will be most conveniently obtained by the courts in Trinidad and Tobago. Finally, the Board is not well placed to form an assessment as to the merits of the Constitutional proceedings. Accordingly, the Board will remit the assessment as to whether the period of the appellants' detention was reasonable to the High Court in Trinidad and Tobago.

Conclusion

89. The Board allows the first ground of appeal brought on behalf of Jesus and grants a declaration that his detention between 15 December 2020 and 16 March 2022 was unlawful.

90. The Board dismisses the second ground of appeal.

91. The Board allows the appellants' third ground of appeal, and that part of the Habeas Corpus proceedings should be remitted to the High Court in Trinidad and Tobago.