

**IN THE SUPREME COURT OF BELIZE, A.D. 2022**

**CLAIM No. 125 of 2022**

**BETWEEN:** (NOLAISY FERNANDEZ ARENCIBA **APPLICANTS**  
(CLAUDIA LISET PEGUERO DIAZ  
(HECTOR LUIS DIAZ GONZALEZ  
(ZENaida GONZALEZ SOCARRAS  
(ADRIAN CARRASCO GARCIA  
(KEILAN CALDERIN GONZALEZ  
(YOAN LAZARO SANCHEZ DELGADO  
**AND**

(SUPERINTENDENT OF PRISONS **RESPONDENTS**  
(MINISTER OF FOREIGN AFFAIRS,  
(FOREIGN TRADE, AND IMMIGRATION  
(THE ATTORNEY GENERAL

BEFORE THE HONORABLE MADAM JUSTICE PATRICIA FARNESE

Hearing Date: March 17, 2022

Appearances:

Mr. Leo Bradley, for the Applicants

Ms. Agassi Finnegan together with Ms. Alea Gomez for the Respondents

**DECISION RE APPLICATION FOR A WRIT OF *HABEAS CORPUS AD***  
***SUBJICIENDUM***

**Introduction**

(1) An application for a writ of *habeas corpus ad subjiciendum* (“*habeas corpus*”) has been made on behalf of 7 Cuban nationals currently being held in the Belize Central Prison pending repatriation to Cuba. The applicants were apprehended on February 7<sup>th</sup>, 2022 and held at the police station in San Ignacio until they were transferred to the Belize Central Prison on February 9<sup>th</sup>, 2022, where they remain. The court finds that the applicants’ detention is unlawful because

they have been denied the constitutionally protected rights they are entitled to during detention. The application for a writ of *habeas corpus* is issued against the respondents.

## **Legal Framework**

(2) That *habeas corpus* is enshrined in subsection 5(2)(d) of the *Belize Constitution* confirms that a person's right to personal liberty is fundamental. The *Belize Constitution*, however, also outlines specific circumstances where a person can be deprived of this right if it is authorized by law including:<sup>1</sup>

for the purpose of preventing his unlawful entry into Belize, or for the purpose of effecting his expulsion, extradition or other lawful removal from Belize or for the purpose of restraining him while he is being conveyed through Belize in the course of his extradition or removal as a convicted prisoner from one country to another.

That the *Belize Constitution* authorizes the detention of persons pending deportation does not end the matter. The court must be satisfied that the detention complies with the procedures prescribed by law including the specific law authorizing the detention and the *Belize Constitution*.

(3) The writ of *habeas corpus* provides detained persons with the right to question the lawfulness of the detention. The burden is placed on the respondents to prove on a balance of probabilities, that the detention is lawful.<sup>2</sup> In a 2020 decision from the Court of Appeal of Turks and Caicos, the majority recognized that the legal principles used to assess whether immigration detention is lawful are well established.<sup>3</sup> The Hardial Singh Principles require that the detention be for the purpose outlined in the statute and only for as long as is reasonably necessary to deport. The government must act expeditiously to ensure that all avenues are taken to deport the detainees within a reasonable time.<sup>4</sup>

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<sup>1</sup> *Belize Constitution* at s.5(1)(i)

<sup>2</sup> *R v. Davey; Ex parte Freer* [1936] 56 CLR 381 (HCA), at 385.

<sup>3</sup> *Kajeepan and others v Director of Immigration and Attorney-General* (Civil Appeal No: CL 4/20) at para 39.

<sup>4</sup> *R. v. Governor of Durham Prison, ex p. Hardial Singh* [1984] 1 W.L.R. 704.

(4) *R. (Q.) v. Secretary of State for the Home Department and Governor of H.M.P. Long Martin*<sup>5</sup> outlines that the reasonableness of the detention is a question of fact and includes consideration of:<sup>6</sup>

...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.

The court's analysis, therefore, considers more than the duration of the detention when assessing reasonableness.

### **The Parties' Submissions**

(5) The respondents assert subsection 5(2) of the *Belize Constitution* allows for immigration detention for the purpose of deportation. Consequently, the applicants have been lawfully and reasonably detained and *habeas corpus* ought to be denied. The applicants admit to having entered Belize without authorization and pled guilty before a Magistrate to the charge of "Failure to present herself to the Immigration Officer at the nearest port or place of arrival via the Belize Western Border" contrary to subsections 24(3) and 34(3) of the *Immigration Act*. Removal orders were obtained for each applicant from the Magistrate's court under the authority of subsection 30(1) of the *Immigration Act* which provides:

Subject to this Act, and to the terms of any permit granted hereunder, a summary jurisdiction court may, on application made to it by an immigration officer, order any prohibited immigrant to be removed from Belize and to be detained in custody until such removal...

Incarceration pending removal is reasonable because the applicants are unwilling to consent to repatriation to Cuba and pose a flight risk. The applicants are being held at the Belize Central Prison because no other suitable location exists. Belize does not have an immigration detention

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<sup>5</sup> [2006] E.W.H.C. 2690 (Admin).

<sup>6</sup> *Ibid.* at 48.

facility. Finally, the respondents contend that repatriation efforts have proven challenging because there are no direct flights to Cuba and the applicants do not have the necessary visas to transit through third countries. Nonetheless, seats have been confirmed for each applicant on a charter flight returning to Cuba at the end of March.

(6) The applicants raise four arguments to challenge the lawfulness and reasonableness of the detention. First, the applicants assert that they wish to make asylum claims and have not been given the opportunity to do so because they have not been provided timely or sufficient access to legal counsel. Incarceration of asylum seekers is contrary to the *Refugee Act* and Belize's international commitments. Continued detention of the applicants is unreasonable because the applicants have expressed a willingness to be removed to Nicaragua, a country that does not require a visa. Detention in a prison is unreasonable because Progress, a non-governmental organization that provides humanitarian assistance to refugees and asylum seekers has adequate space to house the applicants. Finally, two of the applicants have been separated from their children who were traveling with them and only granted the opportunity to speak to them via video conferencing on the day before the *habeas corpus* hearing.

## **Analysis**

(7) Because the fundamental right to liberty is at risk, the legal authority relied upon to justify detention must be strictly construed.<sup>7</sup> Subsection 5(1) of the *Belize Constitution* allows detention for removal, but that detention is subject to the provisions outlined in subsection 5(2):

- (2) Any person who is arrested or detained shall be entitled-
  - (a) to be informed promptly, and in any case no later than twenty-four hours after such arrest or detention, in a language he understands, of the reasons for his arrest or detention;
  - (b) to communicate without delay and in private with a legal practitioner of his choice and, in the case of a minor, with his parents or guardian, and to have adequate opportunity to give instructions to a legal practitioner of his choice;
  - (c) to be informed immediately upon his arrest of his rights under paragraph (b) of this subsection; and
  - (d) to the remedy by way of *habeas corpus* for determining the validity of his detention.

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<sup>7</sup> *Tan Te Lam and ors v. Superintendent of Tai A. Chau Detention Centre* [1997] A.C. 97 at para 23.

The applicants' affidavits state that they were not read a charge in a language they understood and were not provided access to a lawyer until after the Magistrate issued the removal order and the warrant of commitment. The applicants were also not provided with a copy of the removal order. These claims are uncontested.

(8) The applicants' detention is not authorized by law because the respondents have failed to comply with subsection 5(2)(a), (b), and (c) of the *Belize Constitution*. The applicants were interviewed by the police, charged, arraigned, and appeared before the Magistrate where they pled guilty to a charge under the *Immigration Act* and received a removal order without the opportunity to speak with a lawyer. Much of this also occurred without the right to translation being afforded to the applicants. It is not clear to this court that the applicants fully understood the legal significance of these events or the options available to them to challenge the removal order.

(9) These constitutional protections are not discretionary. The respondent is only permitted to deprive a person of their liberty if the requirements of subsection 5(2)(a), (b), and (c) are satisfied. The remedy of *habeas corpus* arises as a constitutional right. This court has no discretion, but to grant the application if the detention is found unlawful as I have found. The detention is unlawful and must immediately come to an end. This finding does not mean that the removal order is of no effect. The validity of the removal order is not properly before me. The applicants are free to initiate other proceedings if they wish to challenge the removal order.

(10) Because I have found that the detention is unlawful, I do not need to complete the analysis to decide whether the detention complies with the requirements of the *Immigration Act* and is reasonable. I do find it necessary to comment that, as a general rule, this court may have difficulty finding detention reasonable in circumstances where detainees are unable to avail themselves of their constitutional rights.

(11) Finally, the hearing focused on the lawfulness of the detention due to the urgent nature of this application. Having now found that the detention is unlawful, the question of whether the applicants are entitled to damages remains. I will briefly adjourn that matter to allow the parties to provide submissions on that point.

### **The Order**

(12) The orders of the court shall be as follows:

1. The writ of *habeas corpus ad subjiciendum* is issued.
2. The applicants be immediately released from custody and detention at the Belize Central Prison, at Hattieville, Belize.
3. That the children of the applicants currently in the custody of the Department of Human Services be returned to the custody of their parents by 4pm, March 19, 2022.
4. That the parties are invited to file written submissions on the issue of damages by 4pm, March 25, 2022. A decision on damages will be forthcoming.
5. That the applicants shall have prescribed costs.

DATED THIS 18<sup>TH</sup> DAY OF MARCH, 2022

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**PATRICIA FARNESE**  
**JUSTICE OF THE SUPREME COURT**