THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

GRENADA

GDAHCVAP2019/0020

BETWEEN:

THE ATTORNEY GENERAL OF GRENADA

Appellant

and

MUHAMMED EHSAN

Respondent

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mr. Frank Walwyn with Ms. Dia Forrester, Solicitor General and
Ms. Kayla Theeuwen for the Appellant
Mr. V. Nazim Burke for the Respondent

2020: October 16;
November 27.

Civil appeal – Constitutional law – Section 8(8) of the Constitution of Grenada – Right to protection of the law – Certificate of Registration as citizen of Grenada issued consequent to marriage to Grenadian citizen – Section 9(2)(b) of Citizenship Act of Grenada – Power of Minister to deprive citizen of citizenship in the interest of national security – Revocation of respondent's citizenship by Minister pursuant to section 9(2)(b) of Citizenship Act – Whether section 9(2)(b) of Citizenship Act, by excluding the right to be heard and informed of the grounds for revocation of citizenship, infringes section 8(8) of the Constitution and violates right to natural justice – Whether learned judge erred in concluding that Minister's revocation of respondent's citizenship, without affording him a hearing was unlawful – Whether the learned judge erred in concluding that the respondent's constitutional rights were breached by the State of Grenada due to his deportation, arrest, detention and seizure of his passport – Constitutional redress – Nature of constitutional redress to be awarded – Whether constitutional redress granted

by the judge can be sustained – Whether there was sufficient evidential basis to support making awards for damages – Whether judge erred in quantum of damages awarded

In February 2015, Mr. Muhammed Ehsan ("Mr. Ehsan"), a Pakistani by birth, married a Grenadian woman, who was a citizen of Grenada by birth. Mr. Ehsan was living and working in Grenada and applied pursuant to section 98 of the Constitution of Grenada ("the Constitution"), to become a naturalized citizen on the basis of his marriage to a Grenadian. Before approval was granted, the Permanent Secretary in the Ministry of National Security, Disaster Management, Home Affairs, Information and Implementation ("the Permanent Secretary") wrote to Mr. Ehsan's then counsel stating that his application for citizenship had not been granted as a consequence of an adverse due diligence report regarding Mr. Ehsan. This caused Mr. Ehsan's legal representative to formally write the Permanent Secretary, indicating that Mr. Ehsan was unaware of the due diligence report, or from where it emanated, and that Mr. Ehsan had a constitutional entitlement to citizenship consequent to his marriage. The Ministry of National Security then responded, by letter, that Mr. Ehsan's application was approved and a Certificate of Registration as a citizen of Grenada, dated 22nd March 2018, was issued to him.

Subsequently, the Minister responsible for Citizenship, received confidential information on which he determined that Mr. Ehsan presented a real risk to the State of Grenada, and without any communication to Mr. Ehsan in relation to the issue of national security, purported to act pursuant to section 9(2)(b) of the Citizenship Act (or "the Act") and revoked Mr. Ehsan's citizenship. Thereafter, the Minister for Immigration issued the Deportation Order and Mr. Ehsan was detained by the police for several days with a view to his pending deportation from Grenada.

Mr. Ehsan challenged his arrest and impending removal from Grenada and successfully applied for an *ex parte* injunction in the High Court which prohibited his removal from the State of Grenada. At the *inter partes* hearing of the application, on 27th April 2018, the judge discharged the injunction. Mr. Ehsan filed a constitutional claim on that same day seeking a number of declarations, orders and damages including vindicatory damages.

Mr. Ehsan contended that the actions of the Minister responsible for citizenship and the Minister for Immigration breached the principles of natural justice as he was given no opportunity to be heard prior to his citizenship being revoked; and his constitutional rights to due process and protection of the law under section 8(8) of the Constitution. He further challenged the constitutionality of section 9(2)(b) of the Citizenship Act to the extent that it derogated from the principles of natural justice in cases where the Minister is satisfied that it is in the interest of national security to deprive a person of citizenship, and therefore that section 9(2)(b) infringed section 8(8) of the Constitution.

The learned judge granted a number of declarations including a declaration that the specific wording contained in section 9(2)(b) of the Citizenship Act excluding subsections (5) and (6) infringed section 8(8) of the Constitution and is therefore null and void. The judge also awarded Mr. Ehsan damages for loss of earnings, wrongful arrest and detention together with vindicatory damages.

The Attorney General being dissatisfied with the decision of the learned judge appealed to this Court. The issues that arose for this Court's determination were: (i) whether the learned judge erred in concluding that section 9(2)(b) of the Citizenship Act contravened section 8(8) of the Constitution of Grenada and also violated Mr. Ehsan's right to natural justice; (ii) whether the learned judge erred in concluding that the Minister's revocation of Mr. Ehsan's citizenship, without affording him a hearing was unlawful; (iii) whether the learned judge erred in concluding that Mr. Ehsan's constitutional rights were breached by the State of Grenada due to his deportation, arrest, detention and the seizure of his passport; (iv) whether the learned judge erred in awarding damages for wrongful arrest, detention and the seizure of Mr. Ehsan's passport; and (v) whether the learned judge erred in awarding Mr. Ehsan vindicatory damages.

Held: dismissing the appeal; affirming the decision of the judge below save and except that the awards of $25,500.00 for loss of earnings and $155,000.00 in vindicatory damages is set aside and in its stead, a total sum of $50,000.00 in vindicatory damages for the breaches of Mr. Ehsan's constitutional rights is substituted; ordering costs to Mr. Ehsan in the sum of two-thirds of the amount awarded in the court below; and making the orders set out in paragraph 140, that:

1. It is settled law that the fundamental rights and freedom guaranteed under the Constitution are not absolute. The constitutional framework of Grenada provides for a limitation of the fundamental rights and freedoms, in appropriate circumstances, by legislation where: (i) the objective is of sufficient importance to justify limiting the right; and (ii) there is proportionality between the objective and the measure used to achieve it. Accordingly, while national security is a legitimate basis to curtail the fundamental rights and freedoms of citizens, Parliament has a duty to enact laws that are prudently limited to the extent necessary to protect the public good and national security without unnecessarily undermining the essential fundamental rights of others.

   R v Oakes [1986] 1 SCR 103 applied; **de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Land and Housing and Others** (1998) 53 WIR 131 applied; **Bank Mellat v Her Majesty's Treasury (No.2)** [2013] UKSC 39 applied.

2. Pursuant to the power conferred on Parliament by section 99(2) of the Constitution to legislate for the deprivation of citizenship of persons who obtained citizenship by marriage, section 9(2)(b) of the Citizenship Act was enacted. This provision permits the Minister responsible for Citizenship to deprive a citizen by naturalization of his or her citizenship, if the Minister is satisfied that it is in the interest of natural security to do so and in those circumstances, exclude the right to be heard and to be informed of the grounds for revocation of citizenship as provided for in subsections (5) and (6). The effect of section 9(2)(b) therefore is that there is no obligation on the part of the Minister responsible for Citizenship, before making an order under this section, to give the person against whom the order is proposed to be made, notice in writing informing him or her of the ground on which he proposes to act, of his or her right to an enquiry and to refer the case

before a committee where the person applies for an enquiry. Further, the Minister is not required by section 9(2)(b) to provide any hearing to the person who is likely to be affected.

Section 99(2) of the **Schedule to the Grenada Constitution Act**, S.I. 2155 of 1973 considered; Section 9(2)(b) of the **Citizenship Act**, Cap. 54 of the Laws of Grenada applied.

3. Mr. Ehsan, having been issued a Certificate of Registration, acquired rights as a citizen and was entitled to the protections afforded by the Constitution, including the right to protection of the law or due process of the law enshrined in section 8(8) of the Constitution. The Minister responsible for Citizenship, by exercising his powers under section 9(2)(b) of the Citizenship Act, engaged the application of section 8(8), which, by virtue of its expansive nature, includes the right of the citizen to be afforded adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power. Having assessed section 9(2)(b) of the Act against section 8(8) of the Constitution, it is clear that section 9(2)(b), without any qualification or due process mechanism built in, does not meet the condition that it is reasonably required in a democratic society to protect national security. Instead, section 9(2)(b) completely curtails the right to due process of law. Furthermore, the State adduced no evidence as to the policy, socio-economic and procedural reasons which would support this draconian provision in the interest of national security. Given the totality of the circumstances, section 9(2)(b) of the Act contravened section 8(8) of the Constitution and violated Mr. Ehsan's right to due process and natural justice. Therefore, the learned judge did not err in so holding.

   Section 99(2) of the **Schedule to the Grenada Constitution Act**, S.I. 2155 of 1973 applied; **Maya Leaders Alliance and others v Attorney Genera**l [2015] CCJ 15 (AJ) applied; **Jamaicans for Justice v Police Service Commission and Another** [2019] UKPC 12 applied; **Sam Maharaj v Prime Minister** [2016] UKPC 37 applied; **R v Oakes** [1986] 1 SCR 103 applied; **de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Land and Housing and Others** (1998) 53 WIR 131 applied; **Bank Mellat v Her Majesty's Treasury (No.2)** [2013] UKSC 39 applied; **Brandt v Attorney General and Austin** GY 1971 CA 2 applied; **Council of Civil Service Unions and others v Minister for the Civil Service** [1984] 3 All ER 935 applied; **A (FC) and others v Secretary of State for the Home Department** [2004] UKHL 56 applied.

4. It is trite law that the court will not strike down a statutory provision if it can be brought into conformity with the Constitution by making reasonable adaptations, additions or modifications. In these circumstances, the court must identify the element of unconstitutionality in the impugned provision and, having done this, seek to determine whether the provision can be amended, adapted or modified to bring it into conformity with the Constitution without affecting the meaning or purport of the provision. Applying this principle, it is clear that the words 'and in that case subsections (5) and (6) shall not apply', which infringe section 8(8) of

the Constitution, are severable from section 9(2)(b) of the Citizenship Act and are therefore struck down as null and void. It follows then that the actions of the state relating to the revocation of Mr. Ehsan's citizenship, deportation, arrest and detention and seizure of his passport, in so far as these matters take life from section 9(2)(b) of the Act, are unlawful.

Greene Browne v The Queen [2000] 1 AC 45 applied.

5. The Constitution empowers the court to provide redress to litigants whose fundamental rights have been breached. The court is clothed with the jurisdiction to fashion the requisite means of redress to remedy the breaches. These can include compensation and declaration.

6. The judge, in awarding compensation, ought to pay regard to the evidence adduced to advance a claim for damages. Where the evidence is scant or non-existent to support an award of compensation or damages, the judge may make a nominal award so as to vindicate the person's rights. In this case, given the unsatisfactory quality of the evidence in relation to the losses suffered as a consequence of the State's unlawful conduct, there was very little or no evidential basis upon which the learned judge could have made the awards which he did and it is appropriate for this Court to award Mr. Ehsan compensation only for the breaches and resultant loss that he has pleaded and proven.

Harrikissoon v Attorney General of Trinidad and Tobago [1979] 3 WLR 62 applied; **Maharaj v Attorney General of Trinidad and Tobago (No 2)** [1978] 2 All ER 670 applied; **Merson v Cartwright and Another** [2005] UKPC 38 applied; **Attorney General v Ramanoop** [2005] UKPC 15 applied; **Subiah v Attorney General of Trinidad and Tobago** [2008] UKPC 47 applied.

JUDGMENT

Introduction

[1] **BLENMAN JA:** This is an appeal by the Attorney General of Grenada against the decision of a learned judge in which the judge held that section 9(2)(b) of the **Citizenship Act of Grenada**[1] ("the **Citizenship Act**" or "the Act") offended section 8(8) of the **Constitution of Grenada**[2] ("the Constitution") which is the due process and protection of the law provision, and was therefore unlawful. There is also an appeal against the judge's decision that a deportation order dated 4th April 2018 ("the Deportation Order"), which was made against Mr.

[1] Cap. 54 of the Laws of Grenada.
[2] Schedule to the Grenada Constitution Order, S.I. 2155 of 1973.

Muhammed Ehsan "Mr. Ehsan") pursuant to section 4(1)(f) of the **Immigration Act**,[3] was null and void. Additionally, the State appeals against the judge's award of damages, including the vindicatory damages awarded on the basis of breaches of Mr. Ehsan's constitutional rights.

[2] Mr. Ehsan vigorously resists the appeal. He argues that the judge was correct to make the decision for the reasons that he did.

Background

[3] Mr. Ehsan is a citizen of Pakistan by birth. He married Lyndonna Elizabeth Newton, who is a citizen of Grenada by birth. He was living and working in Grenada, and pursuant to section 98 of the Constitution, applied to become a naturalized citizen of Grenada. His application was approved and a Certificate of Registration as a citizen of Grenada was issued to Mr. Ehsan by the Minister responsible for Citizenship.

[4] However, before the approval was granted, the Permanent Secretary in the Ministry of National Security, Disaster Management, Home Affairs, Information and Implementation ("the Permanent Secretary") had written to then counsel for Mr. Ehsan adverting that his application for citizenship had not been granted as a consequence of an adverse due diligence report regarding Mr. Ehsan. The report stated that he was a terrorist. This caused Mr. Ehsan's legal representative to formally write the Permanent Secretary indicating that Mr. Ehsan was unaware of the due diligence report or from where it emanated. His then lawyer also indicated that Mr. Ehsan had a constitutional entitlement to citizenship consequent on his marriage and required that his client be issued with citizenship. The Ministry of National Security then appeared to have continued the background checks conducted on Mr. Ehsan.

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[3] Cap. 145 of the Laws of Grenada.

[5] The Minister responsible for Citizenship thereafter issued citizenship to Mr. Ehsan and he was registered as a citizen of Grenada on 22nd March 2018, being granted a Certification of Registration, even though the State said that he continued to be under covert surveillance by the security services. Mr. Ehsan was required, by the requisite Ministry, to comply with certain procedures, including the payment of the fees, with which he complied.

[6] The Minister responsible for Citizenship is said to have received confidential information upon which he determined that Mr. Ehsan presented a real risk to the State of Grenada. Without any communication to Mr. Ehsan in relation to that, the Minister responsible for Citizenship purporting to act pursuant to section 9(2)(b) of the **Citizenship Act** revoked Mr. Ehsan's citizenship. Thereafter, the Minister for Immigration issued the Deportation Order and Mr. Ehsan was detained by the police for several days, with a view to his deportation.

[7] Mr. Ehsan ultimately challenged his arrest and filed a without notice application for an injunction in the High Court and obtained the injunction to restrain his removal from Grenada. At the *inter partes* hearing of the application, on the return date, the trial judge discharged the injunction that had been granted which prohibited Mr. Ehsan's removal from the State of Grenada.

Case Below

[8] On the same date, being 27th April 2018, on which the injunction was discharged, Mr. Ehsan filed a constitutional motion in which he challenged, among other things, the legality of the revocation of his citizenship, the Deportation Order, his arrest and detention in police custody and the alleged prevention by the police officers to allow him to communicate with his lawyer. He also took issue with the alleged seizure of his passport.

[9] In his constitutional motion, Mr. Ehsan contended that the actions of the Ministers responsible for Citizenship and Immigration abrogated his constitutional rights to

due process and protection of the law as provided by section 8(8) of the Constitution and, is therefore void. He also complained that the deprivation of his citizenship without giving him an opportunity to be heard is in breach of natural justice and his constitutional right to due process and protection of the law as stipulated by section 8(8) of the Constitution. He further challenged the constitutionality of section 9(2)(b) of the **Citizenship Act** to the extent that it derogated from the principles of natural justice and infringed section 8(8) of the Constitution.

[10] Mr. Ehsan also complained that his arrest and detention by the members of the police force were unlawful and asserted that the seizure of his Pakistani passport was unlawful. He asserted further that the decision of the Minister responsible for Citizenship to revoke his citizenship was irrational, unreasonable, arbitrary and a breach of section 8(8) of the Constitution.

[11] On the bases of those alleged breaches, Mr. Ehsan sought numerous declarations which need not be recited. Importantly, in the constitutional motion, Mr. Ehsan sought damages against the State of Grenada for alleged breaches of his constitutional rights. Mr. Ehsan deposed to affidavit evidence in which he made complaints, all aimed at substantiating his grievances with the State of Grenada in relation to its treatment of him. The constitutional motion was strenuously resisted by the State of Grenada.

Issues in the High Court

[12] Five main issues arose for the judge to resolve:

(i) Whether section 9(2)(b) of the Act contravenes the right to natural justice, due process of law and the right to a fair hearing as

guaranteed by section 8(8) of the Constitution of Grenada and was thereby null and void;

(ii) Whether section 8(8) of the Constitution guarantees Mr. Ehsan a right to be heard prior to the revocation of his citizenship notwithstanding section 9(2)(b) of the Act;

(iii) Whether the Deportation Order that was issued by the Minister for Immigration was unlawful, null and void;

(iv) Whether the arrest and detention of Mr. Ehsan and the retention of his passport violated his constitutional rights; and

(v) If so, what, if any, damages ought to be awarded to him.

Judgment Below

[13] Having given deliberate consideration to the competing positions, the judge made a number of findings of law and fact, all favourable to Mr. Ehsan, which need not be rehearsed. Of significance is the fact that the learned judge in a reasoned written judgment made the following declarations and orders:

(1) A Declaration is granted that the words "and in that case subsections (5) and (6) shall not apply" appearing at section 9(2)(b) of the **Citizenship Act** of Grenada infringes section 8(8) of the **Grenada Constitution** and is therefore null and void.

(2) A Declaration is granted that the revocation of the claimant's citizenship without giving him an opportunity to be heard is in breach of his right to equal protection of the law under section 8(8) of the **Grenada Constitution**.

(3) A Declaration is granted that the Citizenship (Deprivation) (Muhammad (sic) Ehsan) (Order) dated 4th April 2018 is null and void.

(4) A Declaration is granted that the arrest, detention and retention of (sic) [the] passport of the claimant were in breach of sections 3, 6, 8 and 12 of the **Grenada Constitution**.

(5) Damages are awarded in the sum of $25,500 as compensation for the Claimant's loss of earnings.

(6) The Government of Grenada is ordered to procure an economy class ticket for the claimant for his repatriation from Pakistan to Grenada.

(7) Vindicatory damages are awarded in the sum of $155,000.00 for the various breaches of the Claimant's constitutional rights.

(8) Interest at the statutory rate of 6% is awarded on the damages from date of judgment until payment.

(9) Prescribed costs are awarded to the Claimant.[4]

Grounds of Appeal

[14] The Attorney General is aggrieved by the reasoning, decision and declarations of the learned judge and has filed six (6) grounds of appeal together with several sub-grounds. In contradistinction, Mr. Ehsan has implored this Court to affirm the decision of the learned judge on the basis that there was no error of law or fact and critically that the learned judge's reasoning and conclusion cannot be impugned. During the oral arguments, and based on the written submissions, several condensed issues emerged for this Court to resolve.

Condensed Issues on Appeal

[15] The following condensed issues arise to be resolved as a consequence of the refined oral arguments and a careful reading of the written submissions:

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[4] See para. 48 of the judgment in the court below.

(i) Whether the learned judge erred in concluding that section 9(2)(b) of the **Citizenship Act** contravened section 8(8) of the Constitution of Grenada and violated Mr. Ehsan's right to natural justice.

(ii) Whether the learned judge erred in concluding that the Minister's revocation of Mr. Ehsan's citizenship, without affording him a hearing was unlawful.

(iii) Whether the learned judge erred in concluding that Mr. Ehsan's constitutional rights were breached by the State of Grenada due to his deportation, arrest, detention and the seizure of his passport.

(iv) Whether the learned judge erred in awarding damages for wrongful arrest, detention and the seizure of Mr. Ehsan's passport.

(v) Whether the learned judge erred in awarding Mr. Ehsan vindicatory damages.

Appellant's Submissions

[16] Learned Counsel Mr. Frank Walwyn argued that the judge made several fatal errors. He argued that the Constitution allowed Parliament to legislate for a carve out in relation to the fundamental rights provisions. He was adamant that the learned judge approached the case from an entirely wrong perspective. He sought to persuade this Court that it was correct for the Minister responsible for Citizenship to have determined that Mr. Ehsan was a security risk and therefore revoke the Grenadian citizenship which had been conferred on Mr. Ehsan, without affording him a hearing.

[17] Mr. Walwyn was respectful yet strident in his view that it was constitutional for the Minister responsible for Citizenship to deprive Mr. Ehsan of his citizenship without affording him an opportunity for a hearing since this was clearly permissible by section 9(2)(b) of the **Citizenship Act**. He took issue with what is said to have amounted to the learned judge going behind the determination of

the Minister of National Security that Mr. Ehsan was a security risk to Grenada based on intelligence information that had been obtained by the State of Grenada which indicated that Mr. Ehsan was a terrorist.

[18] Mr. Walwyn sought to rely on **Council of Civil Service Unions and others v Minister for the Civil Service**[5] ("**CCSU**") in arguing that it was impermissible for the judge to seek to interrogate the determination that was made by the Minister of National Security, in the manner in which he did. Accepting that Mr. Ehsan was not afforded a right to be heard before his Grenadian citizenship was revoked, nevertheless, Mr. Walwyn maintained that Mr. Ehsan was not entitled to be heard. To buttress his argument, Mr. Walwyn said that since section 9(2)(b) of the **Citizenship Act** indicated that there was no such right, the Minister's decision cannot be criticised since there was no breach to section 8(8) of the Constitution.

[19] Mr. Walwyn reminded this Court that the right to a fair hearing can be curtailed in the public interest and matters of natural security are clearly within the public interest. He maintained that the Minister responsible for Citizenship was clothed with the power to deprive a naturalized citizen of citizenship without affording him or her a hearing, and this accords with the intention of the Parliament of Grenada as provided by section 9(2)(b) of the **Citizenship Act**. Accordingly, he submitted that the act of revocation by the Minister responsible for Citizenship was constitutional.

[20] Alternatively, and to complement the State's position, Mr. Walwyn stated that the conduct of the Minister responsible for Citizenship was in any event rational and proportionate. Any constitutional violation would thereby be saved from being unlawful. He reiterated that it was constitutionally permissible to deprive Mr. Ehsan without giving him a hearing since the legislature specifically provided for

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[5] [1984] 3 All ER 935.

this. He urged this Court to hold that, in any event, the deprivation of Mr. Ehsan's citizenship was rational, proportionate and constitutional.

[21] Next, Mr. Walwyn complained that given the underlying factual context, the learned judge was required to determine whether the **Citizenship Act** accorded with section 8(8) of the Constitution. He said that if the judge had properly done so he would have concluded that it did, and he sought to rely on the well-known principle of the constitutionality of legislation to undergird his argument. In this regard, he referred this Court to the well-known authority of **Ramesh Dipraj Kumar Mootoo v Attorney-General of Trinidad and Tobago**.[6]

[22] In oral submissions, Mr. Walwyn, though not in any way conceding that the judge was correct in determining that section 9(2)(b) was unconstitutional, posited that even if the judge was correct in finding that Mr. Ehsan's constitutional rights as provided by section 8(8) were violated, the judge should not have struck down the offending parts of section 9(2)(b) generally, but should only have struck down the State's conduct specifically in relation to Mr. Ehsan. He therefore urged this Court to set aside the judge's decision in so far as it was held that section 9(2)(b) is violative of section 8(8) of the Constitution.

[23] In so far as he took the view that the revocation of Mr. Ehsan's citizenship and his subsequent arrest and detention were lawful and in accordance with the Constitution, Mr. Walwyn argued that the judge erred in awarding damages to Mr. Ehsan. He pointed out that the judge committed errors of principle in his determination that Mr. Ehsan was entitled to the damages which the judge ordered the State of Grenada to pay to him.

[24] Turning to the question of the quantum of damages, Mr. Walwyn submitted that even if the Court were to conclude that there were indeed breaches of Mr. Ehsan's constitutional right, the quantum of damages that the judge awarded to

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[6] (1979) 30 WIR 411.

Mr. Ehsan was exorbitant and could not be sustained. He said that the evidence before the learned judge was very scant and that the judge could not have relied upon that to make the awards that he did.

[25] Mr. Walwyn took the Court through the affidavit evidence which he complained was made of conjecture and the majority of which was inadmissible. He said that the decision on damages, on any view of the facts, was plainly wrong. He also submitted that the judge in his determination of the appropriate level of compensation did not advert his mind to the duty that Mr. Ehsan owed and his legal requirement to mitigate his losses. Mr. Walwyn pointed out that there was no evidence emanating from Mr. Ehsan upon which the judge could have awarded the damages that he did. Most of the judge's observations, Mr. Walwyn opined, were pure conjecture. He therefore urged this Court to set aside the awards of damages that were made by the judge on the main issues.

[26] Mr. Walwyn criticised the judge for awarding Mr. Ehsan vindicatory damages in factual circumstances where it clearly was unwarranted. He urged this Court to hold that the judge, in so doing, committed errors in principle and he was adamant that there was no basis upon which the learned judge could have properly awarded Mr. Ehsan vindicatory damages. Accordingly, he implored this Court to set aside that award in its entirety.

Respondent's Submissions

[27] Learned counsel Mr. V. Nazim Burke argued that the learned judge did not err in striking down the offending words of section 9(2)(b) of the **Citizenship Act** as being in contravention of section 8(8) of the Constitution. He disagreed that the limitations on the right to be heard were not violative of Mr. Ehsan's constitutionally protected right.

[28] Mr. Burke insisted that the judge was very careful in his reasoned judgment and conclusion that the limitations that section 9(2)(b) imposed were disproportionate

and irrational. He asserted that the judge did the requisite evaluation and undertook the requisite balancing exercise all aimed to ascertain whether the infraction against a citizen's right to due process before their citizenship could have been properly revoked was proportionate. He emphasised that on no view of the facts could section 9(2)(b) withstand the scrutiny of the court.

[29] Mr. Burke maintained that the judgment in the lower court illustrated that the judge was alive to all of the relevant principles of law and the constituent stream of jurisprudence evidenced by cases from the Caribbean Court of Justice such as **Maya Leaders Alliance and others v Attorney General**[7] and decisions of the Privy Council such as **Jamaicans for Justice v Police Service Commission and another**,[8] all of which underscore the requirement of due process.

[30] Mr. Burke also highlighted the fact that the judge scrutinised the evidence that was adduced by the State and he further indicated that the judge faithfully applied the principles in **CCSU** to the facts of the case in supporting the conclusion to which he arrived.

[31] He urged this Court to uphold the decision of the judge that the revocation of Mr. Ehsan's citizenship by the Minister responsible for Citizenship, without giving him a hearing, violated section 8(8) of the Constitution. Consequentially, he advocated that the judge did not err in concluding that the purported deprivation of Mr. Ehsan's citizenship was unlawful, null and void and therefore, by extension, the Deportation Order had to be struck down. Mr. Burke disagreed with the State and asserted that there is no basis upon which this Court could properly impugn the decision of the judge.

[7] [2015] CCJ 15 (AJ).
[8] [2019] UKPC 12.

[32] Turning to the question of damages, Mr. Burke underscored the fact that Mr. Ehsan was arrested and detained in police custody for several days. In so far as this was in breach of the constitutional right as provided by section 8(8), Mr. Burke submitted that Mr. Ehsan was entitled to be compensated for the breach and all of the conduct that affected him and flowed therefrom. Mr. Burke, however, accepted that there was very little or no evidence before the judge in relation to Mr. Ehsan upon which the judge could have concluded that Mr. Ehsan was emotionally distressed and desired to return to Grenada, save for the information emanating from Mr. Ehsan's former employer.

[33] Mr. Burke submitted that at the very least, Mr. Ehsan was entitled to be compensated for breach of his constitutional rights by the State of Grenada. The judge, he argued, was correct to compensate Mr. Ehsan for the wrongful arrest and detention. Mr. Burke was of the view that the damages that were awarded by the judge were not exorbitant, and he referred the Court to a few cases in which he sought to take comfort in advocating his position. These are **Merson v Cartwright and another**[9] and **The Attorney General of Trinidad and Tobago v Ramanoop**.[10]

[34] In relation to the vindicatory damages, Mr. Burke sought to defend the correctness of the award but without as much stridency for reasons which will become evident shortly. He nevertheless argued that Mr. Ehsan was entitled to be awarded vindicatory damages even though it was open to this Court to reduce the quantum. Mr. Burke quite professionally accepted that the evidential basis in relation to the quantum of damages was very thin since by this time Mr. Ehsan had returned to Pakistan and had not provided any further evidence to assist the court. Quite properly and professionally, Mr. Burke also acknowledged that Mr. Ehsan had the legal obligation to mitigate his losses and that there was no evidence forthcoming from him to assist the Court in that regard.

[9] (2005) 67 WIR 17.
[10] [2005] UKPC 15.

[35] Finally, Mr. Burke urged this Court to uphold the decision of the judge in relation to the constitutional breaches and to fashion an appropriate remedy for damages for the constitutional breaches.

Discussion and Conclusion

[36] As the legislative and constitutional provisions are of sufficient importance to the resolution of this appeal, I shall recite the relevant provisions in some detail.

The Constitution

[37] Section 3 of the Constitution states:

> "(1) No person shall be deprived of his or her personal liberty save as may be authorised by law in any of the following cases, that is to say -
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> …
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> (i) for the purpose of preventing the unlawful entry of that person into Grenada, **or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Grenada** or for the purpose of restricting that person while he or she is being conveyed through Grenada in the course of his or her extradition or removal as a convicted prisoner from one country to another; or
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> …
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> (6) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that other person or from any other person or authority on whose behalf that other person was acting.
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> …"

[38] Section 8(8) of the Constitution provides:

> "Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time."

[39] Section 12 of the Constitution provides:

"(1) No person shall be deprived of his or her freedom of movement, that is to say, the right to move freely throughout Grenada, the right to reside in any part of Grenada, the right to enter Grenada, the right to leave Grenada and immunity from expulsion from Grenada.

(2) Any restriction on a person's freedom of movement that is involved in his or her lawful detention shall not be held to be inconsistent with or in contravention of this section.

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

…

(b) for the imposition of restrictions on the movement or residence within Grenada or on the right to leave Grenada of persons generally or any class of persons in the interest of defence, public safety, public order, public morality or public health and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society;

…

(d) for the imposition of restrictions on the freedom of movement of any person who is not a citizen of Grenada;

…"

[40] Section 98 of the Constitution States:

"Any person who is married to a citizen of Grenada or who has been married to a person who was, during the subsistence of the marriage, a citizen of Grenada shall be entitled, upon making application in such manner as may be prescribed by or under a law enacted by Parliament, and if he or she is a British protected person or an alien taking the oath of allegiance, to be registered as a citizen of Grenada."

[41] Section 99(2) of the Constitution states:

"Parliament may make provision for depriving of his or her citizenship of Grenada any person who is a citizen of Grenada otherwise than by virtue of section 94, 96 or 97 of this Constitution."

The Citizenship Act

[42] Section 5 of the **Citizenship Act** states as follows:

"(1) Upon application made to the Minister in the prescribed manner, the Minister may cause any person of full age and capacity who is a

Commonwealth citizen or a citizen of the Republic of Ireland to be registered as a citizen if the Minister is satisfied -

(a) that the person is of good character;
(b) that he or she has an adequate knowledge of the English language;
(c) that he or she has either resided in Grenada or has been in service under the Government, or has had partly such residence and partly such service throughout a period of five years or such shorter period (not being less than twelve months) as the Minister may in the special circumstances of any particular case accept, immediately preceding the date of his or her application; and
(d) that he or she intends, if registered, to reside in Grenada or to enter or continue in service under the Government.

…

(3) A person married to a citizen shall be entitled, on making application therefor to the Minister in the prescribed manner, and, if that person is a British protected person or an alien, on taking the oath of allegiance, to be registered as a citizen whether or not that person is of full age and capacity."

[43] Section 9(2)(b) stipulates that:

"The Minister may by Order made under this paragraph deprive a citizen of his or her citizenship if he or she is satisfied that it is in the interest of national security to do so and, in that case, subsections (5) and (6) shall not apply."

[44] Section 9(5) of the **Citizenship Act** states:

"Before making an Order under this section the Minister shall give the person against whom the Order is proposed to be made notice in writing informing him or her of the ground on which it is proposed to be made and of his or her right to an inquiry under this section."

[45] Section 9(6) of the **Citizenship Act** provides that:

"If the person against whom the Order is proposed to be made applies for an inquiry, the Minister shall refer the case to a committee consisting of a chairman being a barrister or solicitor appointed by the Minister and such other members appointed by the Minister as he or she thinks proper."

The Immigration Act

[46] Section 4(1) of the **Immigration Act** states that:

"Except with the authority of the Minister and subject to such conditions as to duration and place of residence, occupation, or any other matter

or thing as the Minister may think expedient, an immigration officer shall not grant leave to an alien to enter Grenada if the alien is a prohibited alien that is to say -

…

(f) a person who, from information or advice received from the government of any other country through official or diplomatic channels, is deemed by the Minister to be an undesirable inhabitant of or visitor to Grenada;…".

[47] Section 26(1) states that: 'The Minister may in any of the cases mentioned in subsection (2) make a deportation order requiring an alien to leave or to be removed from and to remain out of Grenada.'

[48] Section 26(2) stipulates that:

"Subject to the provisions of this Act, the Minister may make a deportation order in the case of an alien who is-

…

(b) an undesirable person;

… or

(d) a prohibited alien."

Issues on appeal

[49] I now turn to issues (i), (ii), and (iii) which I repeat for convenience:

(i) Whether the learned judge erred in concluding that section 9(2)(b) of the **Citizenship Act** contravened section 8(8) of the Constitution of Grenada and violated Mr. Ehsan's right to natural justice.

(ii) Whether the learned judge erred in concluding that the Minister's revocation of Mr. Ehsan's citizenship without affording him a hearing was unlawful.

(iii) Whether the learned judge erred in concluding that Mr. Ehsan's constitutional rights were breached by the State of Grenada due to his deportation, arrest, detention and the seizure of his passport.

[50] I propose to address issues (i), (ii) and (iii) together since they are inextricably linked. Contrary to what has been urged on this Court, the appeal has greater significance than Mr. Ehsan. Its significance extends to all naturalized citizens of Grenada. At the heart of this appeal is the important question of whether it is constitutional to deprive a person of citizenship, who has obtained citizenship by naturalization in Grenada, without affording that person a hearing once it is deemed necessary in the interest of natural security to revoke that citizenship.

[51] The material part of the **Citizenship Act** was introduced on 5th October 1984.[11] This acknowledgment suffices for present purposes. It is common ground that Mr. Ehsan was a naturalized citizen and that his citizenship was revoked by the Minister responsible for Citizenship, on the basis that it was in the interest of the natural security of Grenada to so do since he was identified as a terrorist. For the purposes of this discussion, the starting point must be whether Mr. Ehsan, having acquired citizenship through section 98 of the Constitution and having been registered as a citizen, is entitled to the constitutional protections that are afforded to persons by the Constitution. The answer to that question is in the affirmative.

[52] However, it is settled law that constitutional rights are not absolute. Indeed, the State, in appropriate circumstances through legislation, can restrict or abrogate the constitutional rights of persons. Any such restriction or abrogation of constitutional rights by Parliament is subject to the judicial review of the court in order to determine their constitutionality. All of this is undergirded by the well-known doctrine of supremacy of the Constitution. This is well settled, and there need be no detailed recitation of these trite principles.

[53] Section 99(2) of the Constitution enables Parliament to legislate for the deprivation of citizenship of persons who have obtained citizenship through

[11] The court acknowledged the candour and professionalism of Ms. Dia Forrester, Solicitor General who furnished this Court with the relevant date during oral arguments.

marriage. It is not in dispute that the Parliament of Grenada, acting pursuant to the power conferred on it by section 99(2) of the Constitution, enacted section 9(2)(b) of the **Citizenship Act**, which permits the Minister responsible for Citizenship to deprive a citizen by naturalization of his or her citizenship, if the Minister is satisfied that it is in the interest of natural security to do so and in that case subsections (5) and (6) shall not apply.

[54] As alluded to earlier, subsections (5) and (6) respectively require that, before making an order under the section, the Minister responsible for Citizenship shall give the person against whom the order is proposed to be made notice in writing informing him or her of the ground on which it is proposed to be made, of his or her right to an inquiry and to refer his or her case before a committee where the person applies for an inquiry. The effect of section 9(2)(b) therefore is that there is no obligation on the part of the Minister responsible for Citizenship to notify the person to be affected of the ground on which he proposed to act, and no opportunity for inquiries is afforded to such a person. This is clearly in contradistinction to the rights of the other naturalized citizens whose citizenship is open to revocation on bases other than national security.

[55] In my view, Mr. Ehsan is the conduit through whom the constitutional challenge is launched. However, the issue is wider than him, and his constitutional claim. Indeed, the appeal brings into sharp focus the issue of whether there is a right to be heard before the deprivation of a person's right to citizenship which was acquired through naturalization.

[56] As a starting point, it is indisputable that section 8(8) of the Constitution provides for the protection of the law or due process of law. The modern approach to the right to protection of the law and its expansive nature has received judicial recognition in a strong stream of jurisprudence both from the Judicial Committee of the Privy Council and the Caribbean Court of Justice. Indeed, in **Maya**

Leaders Alliance the Caribbean Court of Justice (CCJ), speaking through the learned Anderson JCCJ stated at paragraph 47:

> "The law is evidently in a state of evolution but we make the following observations. The right to protection of the law is a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property. It encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights. However the concept goes beyond such questions of access and includes the right of the citizen to be afforded, 'adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power.' The right to protection of the law may, in appropriate cases, require the relevant organs of the state to take positive action in order to secure and ensure the enjoyment of basic constitutional rights. In appropriate cases, the action or failure of the state may result in a breach of the right to protection of the law. Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the citizen's rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy."

[57] In **Sam Maharaj v Prime Minister**[12] the appellant appealed to the Privy Council against the decision of the Court of Appeal to award him declaratory relief but not damages on his claim for judicial review of the failure of the government of Trinidad and Tobago to provide him with a response to his request for reappointment as a member of the Industrial Court. The appellant alleged that the failure of the government to verify certain allegations made against him, which were instrumental in preventing his reappointment, constituted a breach of his right to the protection of the law. Allowing the appeal and endorsing the expansive approach to the application of the right to protection of the law, the Board stated the following:

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[12] [2016] UKPC 37.

> "On the issue of possible assistance which might have been derived from "learning the opinions of the judges of the local courts", the Board is satisfied that this is not a reason to refuse to allow the appellant to advance the constitutional argument. In a series of cases where the protection of the law provision in constitutions in various Caribbean countries was considered, an expansive approach to its potential application has been taken. In *Attorney General of Barbados v Joseph and Boyce* [2006] CCJ 3 (AJ) de la Bastide P and Saunders J said at para 60 of their joint judgment for the Caribbean Court of Justice:
>
> > '… the right to the protection of the law is so broad and pervasive that it would be well nigh impossible to encapsulate in a section of a Constitution all the ways in which it may be invoked or can be infringed.'

[58] In **Jamaicans for Justice v Police Service Commission and Another**,[13] the Board reinforced the approach of the CCJ in **Maya Leaders Alliance** thusly:

> "…The court went on to say, of the right to the protection of the law, that it "affords every person…adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power' (para 45). This is an echo of the words of the Caribbean Court of Justice in *Maya Leaders Alliance v Attorney General of Belize* [2015] CCJ 15 (AJ), para 47, in turn citing *Attorney General v Joseph and Boyce* [2006] CCJ 3 (AJ), (2006) 69 WIR 104, 226, para 20."

[59] Cognisance must be paid to the fact that the Constitution clothes persons with fundamental rights. These rights are protected and cannot be abrogated except in very clear cases and, critically, this must be in accordance with the law in order for any encroachment on these fundamental rights to withstand scrutiny for unconstitutionality.

[60] Looking a bit closer at the underlying facts, Mr. Ehsan, having been issued a Certificate of Registration, evidently acquired rights based on his marriage to a Grenadian by birth pursuant to section 5(3) of the **Citizenship Act**, and he was deprived of his rights to due process of the law by the Minister responsible for Citizenship pursuant to section 9(2)(b) of the **Citizenship Act**. He was, as a consequence of the revocation of his citizenship, deemed to be a prohibited alien

[13] [2019] UKPC 12 at para. 22.

by the Minister for Immigration. Ultimately, the Minister for Immigration issued a Deportation Order.

[61] In the court below, it seems as though Mr. Ehsan provided evidence which has not been controverted namely that he lived and worked in Grenada for several years from 2011 before marrying his co-worker Lyndonna Elizabeth Newton on 13th February 2015. He applied in December 2015 to be registered as a citizen of Grenada. In March 2018, after some initial reluctance to register him, on the basis of the State having received an adverse due diligence report in relation to him, he was granted citizenship after the intervention of his then lawyer. It cannot be gainsaid that, quite apart from the constitutional requirement, basic procedural fairness requires that a person be heard before his or her rights can be impacted. There are obvious exceptions which are countenanced by the law but these must be very rare. Indeed the responses must be proportionate and rational in relation to the mischief at which they are aimed. Importantly, it is the duty of the State of Grenada not to restrict or fetter persons' fundamental rights except in so far as the limitations are reasonably justifiable in a democratic society and are proportionate.

[62] The jurisprudence has evolved over decades so as to permit the State to fetter or abrogate the fundamental rights of citizens to the extent that it can be demonstrated by the State that it is reasonably justifiable in a democratic society. The law has further developed over decades to require the State to prove that the responses that it has taken which have the effect of encroaching on persons' fundamental rights are proportionate, failing which, the courts have consistently struck down overreaching and disproportionate responses by the State.

[63] In order to be held to be constitutional, any restriction on a fundamental right to due process must be prescribed by law. In addition, there is the prerequisite that the restriction must serve one of the prescribed purposes recognised as a human or fundamental right and must be necessary to achieve the objective. Generally,

and of great significance is that the onus of proof is on the person who seeks to limit the right. The standard of proof is that of the balance of probabilities.

[64] The limitations on the right to due process of the law need to be necessary or reasonably justifiable in a democratic society. In order to determine whether a limitation meets this required standard, the courts have adopted the proportionality test. Indeed, the requirement of being reasonably justifiable in a democratic society applies an element of proportionality, in the sense that the scope of the restriction imposed must be proportional to the value which the restriction serves to protect.

[65] Perhaps what is widely regarded as the *locus classicus* of the proportionally test can be seen in the Canadian formulation in **R v Oakes**.[14]

> "Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to the objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be proportionality between the effects of the limiting measure and the objective -- the more severe the deleterious effects of a measure, the more important the objective must be."

[66] The **Oakes** test is now well established and has been consistently applied in constitutional challenges to legislation which the State asserts are reasonably

[14] [1986] 1 S.C.R 103.

justifiable.[15] In the Canadian case **Canada (Attorney General) v JTI-Macdonald Corp.**,[16] it was enunciated that most modern constitutions recognise that rights are not absolute and can be limited if this is necessary to achieve an important objective and if the limit is appropriately tailored or proportionate.

[67] Another equally important constitutional principle here is that the fundamental right cannot be limited in such a way that would make the right itself nugatory. In **de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Land and Housing and Others**[17] the Privy Council stated the following:

> "…In two cases from Zimbabwe, *Nyambirai v National Social Security Authority* [1996] 1 LRC 64 and *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation* [1996] 4 LRC 489, a corresponding analysis was formulated by Gubbay CJ, drawing both on South African and on Canadian jurisprudence, and amalgamating the third and fourth of the criteria. In the former of the two cases (at page 75) he saw the quality of reasonableness in the expression 'reasonably justifiable in a democratic society' as depending upon the question whether the provision which is under challenge-
>
> > 'arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the individual.'
>
> In determining whether a limitation is arbitrary or excessive he said that the court would ask itself –
>
> > 'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measure designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'
>
> Their Lordships accept and adopt this threefold analysis of the relevant criteria."

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[15] See Egan v Canada [1995] 2 S.C.R 513 at para 182; Canada (Attorney General) v Hislop [2007] 1 S.C.R 429.
[16] [2007] 2 SCR 610.
[17] (1998) 53 WIR 131.

[68] In **Bank Mellat v Her Majesty's Treasury (No.2)**,[18] Lord Sumption, at paragraph 20, elucidated a revised version of the classic formulation of the proportionality test in **de Freitas** as follows:

> "The requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap. The classic formulation of the test is to be found in the advice of the Privy Council, delivered by Lord Clyde, in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, at 80. But this decision, although it was a milestone in the development of the law, is now more important for the way in which it has been adapted and applied in the subsequent case-law… Their effect can be sufficiently summarised for present purposes by saying that **the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them**." (emphasis provided)

[69] The principles that were enunciated by learned Chancellor Luckhoo, as he then was, in the case of **Brandt v The Attorney General and Austin**[19] are also very instructive for present purposes. In that case, the appellant sought, among other things, a declaration from the court that an expulsion order, which was made against him by the Ministry of Home Affairs without giving him an opportunity to be heard as he had requested, was illegal and unconstitutional. The trial judge dismissed the appellant's claim and he appealed contending mainly that, notwithstanding that he was not a citizen of Guyana, he was entitled to protection under the laws of the country and that his right to be heard under the principles of natural justice ought to have been observed. On appeal to the Court of Appeal of Guyana, the court observed that:

[18] [2013] UKSC 39.
[19] GY 1971 CA 2.

> "[i]n cases of deportation, it is to be expected that a dilemma may occur between the claims of the personal liberty of the individual and what is in the interests of the nation. But, as has been seen, the only remedy which the alien to be affected has, lies in the procedural safeguards which the Legislature has deliberately laid down. Where such procedural safeguards have been fully and properly complied with, the court would have no power or would, in any event, be reluctant, even if it has, to interfere."

Allowing the appeal, the court held that the decision to deport, in the circumstances, was not in conformity with the principles of natural justice since in the absence of reasons for expulsion, the appellant did not know the nature of the accusation against him when he made his representations and he was not given adequate opportunity to state his case. This would naturally affect the fairness of the decision against him, and therefore it nullified and rendered ineffective any enforcement or purported enforcement of the expulsion order.

[70] To say the least in relation to the appeal at bar, the legislative provision enacted in 1984 which permit the Minister responsible for Citizenship to revoke the citizenship of a person without even giving that person the slightest possibility of due process, is draconian. The State's thesis, that once the Minister has received adverse reports about the naturalized citizen, the court's jurisdiction is ousted from enquiring into the constitutionality of this order, is misplaced.

[71] The gravamen of the Attorney General's appeal is not only to uphold the conduct of the Minister responsible for Citizenship, but also to support the wide legislative provision which confers on the Minister the power to revoke the citizenship which has been acquired by a natural citizen through marriage to a Grenadian by birth. The blame in this appeal must be placed entirely at the feet of Parliament for conferring this very wide and unfettered power on the Minister responsible for Citizenship to revoke the citizenship of a naturalized citizen without even affording the person to be affected the barest of the right to be heard. While the courts frown on terrorism and can well appreciate the concerns of governments, in my view, here, fundamental rights are in issue. The courts are required to

protect those fundamental rights by closely reviewing the legislation in order to ensure that offending provisions are impugned. The court is not precluded by any prescription of constitutionality from examining the legislation which seeks to restrict those rights. It is imperative for the court to determine whether Parliament's response to the important matter of national security is proportionate, when viewed in the context of the curtailing of fundamental rights.

[72] The derogation from the adherence to due process of law on the basis of national security without attempting to give the person to be affected notice, nor any semblance of even a modified right to make enquiry, can only be justified as being reasonable and justifiable in a democratic society, in exceptional circumstances. There are no exceptional circumstances present in the appeal as will become apparent shortly.

[73] In all of this, to be clear, I give full weight to the presumption of constitutionality, but I think that this in no way releases the legislation from the scrutiny of the court in order to ascertain its constitutionality. What is glaring, however, by way of omission is the absence of any machinery or mechanism through which a naturalized citizen can even question the decision, of the Minister responsible for Citizenship, to revoke the citizenship if he determines that national security warrants such revocation.

[74] As alluded to earlier and save perhaps in extreme situations of imminent danger, it could never be reasonably justifiable to relieve a citizen of his citizenship, without even affording him an audience or providing even an administrative channel through which he could raise any concerns he or she may have with the proposed revocation.

[75] In a democratic society, it is almost too obvious to need stating even to those who advocate for the total erosion of the right to due process of the law, that this position is unsustainable as a general principle. I am not persuaded that without

any qualification or any due process mechanism built in, such a provision as section 9(2)(b) would meet the condition that it is reasonably justifiable in a democratic society to protect national security. The provision, in my view, is too wide in its scope and application and, as indicated in **de Freitas,** 'excessively invades the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the individual'**.**

[76] I emphasise that it is quite proper for a legislative provision to enable constitutionally protected rights to be partially limited to a specified extent and for certain democratically justifiable purposes. Many rights guaranteed to citizens of democratic countries must be limited or qualified in order to prevent conflicts with other rights or with certain general interests. However, the limitations, qualifications or restrictions should not be taken too far or misapplied. The protection of fundamental rights against arbitrary or excessive infringements is an essential feature of constitutional governments.

[77] Concerns about national security are a legitimate interest of the State and restrictions on citizens' fundamental right are permissible, however they must be proportionate. Cognisance is paid to the fact that the application of the **Oakes** test should not be approached in a mechanistic fashion, rather, it should be applied flexibly having regard to the factual and social context of each case, as was done in **Bank Mellat**.

[78] I am guided by the above enunciations and take the view that a mechanistic approach ought not to be adopted in this case. Let me say straight away, that it is no answer to a challenge to the constitutionality of legislation for the State to assert, as it did, that the citizens have placed elected representatives and not the court at the helm of this matter of high policy – national security. To accept that position as a basis for ousting the court's jurisdiction to scrutinise legislation for constitutionality would violate decades of consistent constitutional jurisprudence, which recognise the supremacy of the Constitution and which

have consistently been interpreted by courts, in the Commonwealth Caribbean, as clothing the court with the jurisdiction to determine the constitutionality of legislation. The principle of supremacy of the Constitution is so well-known and has been reflected in a strong stream of decisions which do not need to be rehearsed, nor recited.

[79] The fact that the constitutional challenge is premised on breaches of Mr. Ehsan's fundamental right as provided for in section 8(8) of the Constitution, effectively dismisses any argument about non-justiciability of the legislation, on the basis that it is a matter of high policy which falls within the remit of Parliament. Nevertheless, it is equally accepted that national security requirements are recognised as bases on which procedural fairness may be displaced, as was enunciated by Lord Diplock in **CCSU**. However, when the challenge is based on allegations of breaches of fundamental rights such as due process (as provided for in section 8(8) of the Constitution), the court cannot do what the State has invited it to do and decline to interrogate the merits of the challenge merely on the basis that it is a matter of national security and therefore falls out with the purview of the court.

[80] The State advocated that issues of national security supersede any fundamental right to be heard. However, no authority for that proposition has been provided to this Court and neither am I aware of any. With the greatest respect to the courteous yet careful arguments advanced by the State in support of this proposition that the interest of the public should prevail over the interest of citizens, in relation to national security, this is not an accurate representation of the law. The position that was apparent from the State's argument is misconceived and there seems to be a bit of confusion which might have been occasioned by misconstruing of Lord Hoffman's comments in **Secretary of State for the Home Department v MB; Secretary of State for the Home Department v AF**[20] at paragraph 54:

[20] [2007] UKHL 46.

> "The weight to be given to these competing interests will depend upon the facts of the case, but there can in time of peace be no public interest which is more weighty than protecting the state against terrorism and, on the other hand, the Convention rights of the individual which may be affected by the orders are all themselves qualified by the requirements of national security."

[81] Furthermore, for the State to assert as it did that a review of the legality of the conduct of a Minister is ousted on the basis of the non-justiciability principle is to misapprehend the overarching principles of constitutionalism. The court does not get to evaluate the correctness or otherwise of the acts of a Minister, or their legality, without first ascertaining that the constitutionality of the legislative provisions which empower the Minister to act in the way he did is constitutional. The foundation of the actions of the Minister responsible for Citizenship is section 9(2)(b) of the **Citizenship Act**, which authorised him to revoke the citizenship of Mr. Ehsan without affording him due process of law. It is only if that section of the **Citizenship Act** is held to be constitutional that the court may then go on to examine the lawfulness of the Deportation Order and the resulting arrest and detention of Mr. Ehsan.

[82] With the greatest respect, I am of the view that the arguments that were advanced by the State in prosecuting the appeal indicated that the appeal was approached from an entirely wrong perspective. It has consistently been the approach of the courts, when the constitutionality of actions taken by state officials is brought into question, to determine first whether or not the legislation that confers power on those state officials is constitutional. It must be remembered that the essence of Mr. Ehsan's appeal is that section 9(2)(b) of the **Citizenship Act** is unconstitutional. If the court were to conclude that section 9(2)(b) of the **Citizenship Act** is unconstitutional, everything that flows therefrom will be null and void or unlawful.

[83] It cannot be overemphasised that concerns about terrorism are important matters of national security. However, it is unfair to criticise the judge for assessing the constitutionality of section 9(2)(b) of the **Citizenship Act** in

circumstances where the attack was specifically launched by Mr. Ehsan against the constitutionality of that section. To the contrary, this was precisely what the judge was required to do.

[84] I am of the considered opinion that although the response necessary to protect national security was a matter of political judgment for the Executive and Parliament, where fundamental rights are in issue, especially where they are buttressed by a written constitution, the court is required to afford them effective protection by adopting an intensive review of whether the fundamental right had been impugned. The court is not precluded by any doctrine of deference to Parliament from examining the proportionality of a measure taken which restricts a person's most fundamental rights, and therefore section 9(2)(b) of the **Citizenship Act** is called for close scrutiny.

[85] The essential question this Court has to determine is whether there is any merit in the arguments advanced by the State on the constitutionality of the **Citizenship Act**. In applying the principles on proportionality to the appeal at bar, this Court is required to assess section 9(2)(b) of the **Citizenship Act** against section 8(8) of the Constitution. There is no automatic superiority of legislation that is aimed at promoting or protecting national security over the fundamental rights as provided by the Constitution. To the contrary, the proportionality test mandates the court to undertake an assessment of the impugned legislative provisions and to carry out a balancing exercise in order to determine whether the legislation infringes the fundamental rights provision of the Constitution in an impermissible manner.

[86] Where the State asserts that the legislative response to the issue of national security is proportionate, it behooved the State to provide the court with evidence as to the policy, socio-economic and procedural reasons that undergird the draconian amendment to section 9(2)(b) of the **Citizenship Act**. It is noteworthy and quite surprising that the State did not appear to adduce a scintilla of evidence

from the requisite high officials in order to justify the invasion of persons fundamental rights by section 9(2)(b). Instead, the State relied upon the affidavit evidence of police officer Leroy Joseph who deposed that the State had received intelligence which indicated negatively about Mr. Ehsan. He said that it is this negative information, including that Mr. Ehsan was a terrorist, that caused the Minister responsible for citizenship to revoke his citizenship without giving him even the minimum of a hearing. The Minister for Immigration then issued the Deportation Order which authorised Mr. Ehsan's removal from Grenada.

[87] With no disrespect intended to the police officers, it is strange, where there is a challenge to the constitutionality of legislative provision, for the person who provides the evidence to resist that attack to be a police officer who acted pursuant to the legislation. In my view, the State needed to provide evidence, apart from that of the police officer, upon which the State of Grenada could have relied to show that Parliament, at the date of enacting the legislation, showed fidelity to the relevant principles enunciated in **Oakes**. At the very least, a senior functionary, perhaps such as a Permanent Secretary, ought to have deposed to evidence which provided the policy reasons that influenced the introduction of the limitations imposed in 1984, to the **Citizenship Act**.

[88] In my view, and as foreshadowed, this appeal has very little to do with the actions of the Ministers responsible for Citizenship and Immigration (which is what the police officer's evidence generally spoke to) and everything to do with the actions of the Parliament of Grenada that enacted section 9(2)(b) of the **Citizenship Act**, being the impugned aspect of the statute in 1984. The State did not adduce the evidence as it was required to do in order to substantiate the oral submissions that were made in relation to assertions of policy considerations in relation to national security. The requisite evidence was entirely absent from this case. The judge therefore cannot be criticised in his decision in that regard. He was in fact very generous to the State in his approach to the matter.

[89] Based on all that I have foreshadowed, it is evident that I agree with the judge that a less intrusive method, short of eroding all of the constitutional safeguards, could have achieved the desired purpose even in circumstances where national security is in issue.

[90] There seemed to be undue focus on the actions of the Minister responsible for Citizenship instead of properly scrutinising the legislative provisions which are the genesis of this entire appeal. The actions of the Minister responsible for Citizenship and the conduct of the relevant officials were clearly undertaken on the basis that section 9(2)(b) of the **Citizenship Act** was lawful. In my respectful view, the entire premise of the State in resisting the constitutional challenge was misconceived. The State ought to have focused in the lower court on the policy reasons which undergird the enactment of such draconian legislation in 1984.

[91] While national security is a legitimate basis to curtail the fundamental rights of citizens, Parliament has a responsibility to enact laws that enable rights to be prudently limited only to the extent that it is necessary to protect the public good and national security and without undermining fundamental rights of citizens. An examination of the legislative provisions which permit the revocation of citizenship of naturalized persons, on the basis of national security, reveals that the provision does not seem to require the barest minimum for even a modified form of hearing. It is even more egregious that in all circumstances, no notice is required. Parliament, in drafting the provisions, should have given careful consideration to the wording of the clause.

[92] By way of emphasis, the settled jurisprudence has increasingly relied on the concept of proportionality, that is to say, that the limitation on the right must be proportionate to the effect to be produced by limiting the right. Section 9(2)(b) is rigid and inflexible with no built-in safeguards. It is excessive on any application of the proportionality test.

[93] The draconian nature of that provision could be understood in circumstances of a public emergency or terrorist threat which threatens the life of the nation or in the State. One would expect the existence of exceptional circumstances to justify this sort of extreme response by Parliament. By way of analogy, the circumstances that justify this sort of extreme derogation, as provided for in section 9(2)(b), in international law and human rights law include a war, a terrorist emergency or a severe natural disaster.

[94] It is important to state that in 1969, in **The Greek Case**,[21] the European Commission on Human Rights had cause to consider the lawfulness of serious derogations from constitutional rights, that for example allowed the detention of persons without a court order, in circumstances where provisions of the Greek constitution were suspended. The Commission found that a public emergency that threatened the life of the nation is characterised as follows:

(a) It must be actual or imminent.

(b) Its effects must involve the whole nation.

(c) The continuance of the organised life of the community must be threatened.

(d) The crisis or danger must be exceptional in that the normal measures or restrictions are plainly inadequate.

[95] It is helpful to recognise also that the European Commission on Human Rights accepts that circumstances that justify internal limitation of fundamental rights include the protection of national security. The question however is always one of proportionality.

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[21] (1972) 12 YB 186.

[96] In circumstances where there is an abrogation of the fundamental rights provision of the Constitution, the remedy that is open to the judiciary is either to opine that the limitation is not reasonably justified in a democratic society and exercise its power to achieve a rights-compatible interpretation to ensure that the limitation is justified, or issue a declaration of inconsistent interpretation where a rights–compatible interpretation is impossible. The Parliament can then respond.

[97] Section 9(2)(b) is indeed striking by the fact that Parliament has omitted from the provisions any preconditions, and it does not indicate any exigencies; the safeguards are absent. It is noteworthy that it is usual for those limitations or derogations to have limitations of time (the derogator measures must be temporary); limitations of circumstances (there must be a public emergency threatening the life of the nation) and limitations in effect (the derogating measures must be no more than is strictly required by the exigencies of the situation).

[98] I fail to see how the stark approach taken by Parliament in section 9(2)(b) of the **Citizenship Act**, without providing even the most minimum of safeguard to the naturalized citizen who is in peril of losing his or her citizenship, could satisfy the test of proportionality. I am of the view that to totally curtail the due process of law was not reasonably required or justifiable in democratic Grenada.

[99] From all that I have foreshadowed it is evident that I am of the view that section 9(2)(b) of the **Citizenship Act** unlawfully infringes section 8(8) of the Constitution.

[100] In passing, the approach of the House of Lords to the treatment of nationals in contradistinction to non-nationals, in relation to anti-terrorism, is noteworthy. In **A (FC) and others v Secretary of State for the Home Department**,[22] the

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[22] [2004] UKHL 56.

House of Lords declared section 23 of the Anti-Terrorism, Crime and Security Act 2001 to be incompatible with the right to liberty as provided for in the European Convention on Human Rights. The Anti-terrorism Act provided for the detention of non-nationals if the Home Secretary believed that their presence in the United Kingdom created a risk to national security and where he suspected that they were terrorists who could not be deported at that time due to fears for their safety or other practical considerations. The House held that where Convention rights were in issue, national courts were required to protect those rights by intensively reviewing whether those rights were impugned, and further, the courts were not precluded by any doctrine of deference from examining the proportionality of measures taken to restrict those rights. In circumstances where section 23 only applied to non-national suspects and not to nationals, who were considered to present qualitatively the same threat, it did not rationally address the threat to security and was a disproportionate response. Where there had been no derogation from the prohibition on discrimination, the measure unjustifiably discriminated against non-national suspects based on their nationality or immigration status and such treatment was inconsistent with the United Kingdom's international human rights treaty obligations to provide equality before the law and to protect the human rights of all individuals within its territory.

[101] In **A (FC) and others v Secretary of State for the Home Department**, even in the face of terrorism, the House of Lords found that certain minimum safeguards ought to have been provided. Failure to do so led the House to strike down the relevant Anti-Terrorism Act.

[102] The presumption of constitutionality is applicable to the appeal at bar. The presumption therefore requires that the court refrains from striking down a statutory provision if it can bring the provision into conformity with the Constitution by making reasonable adaptations, additions or modifications. This

principle is borne out in **Greene Browne v The Queen**,[23] at page 50E, where it was stated by Lord Hobhouse that the court must identify the element of unconstitutionality in the impugned provision and, having done this, seek to determine whether the provision can be amended, adapted or modified to bring it into conformity with the Constitution without affecting the meaning or purport of the provision.

[103] Applying the above principle, I have no doubt that the offending words are severable from section 9(2)(b) of the **Citizenship Act**. In accordance with the judge's findings, I too agree that those words should be struck down and the remainder of the provisions can be saved.

[104] The State quite professionally and properly, accepted that if the Court were to conclude that Mr. Ehsan was unlawfully and unconstitutionally deprived of his citizenship, it would therefore follow that the Deportation Order that was made against him was improperly made, since only an alien could have been deported.

[105] It is quite interesting that even though the State had quite properly acknowledged that once the revocation of Mr. Ehsan's citizenship by the Minister responsible for Citizenship was unconstitutional, it followed that the Deportation Order cannot be sustained since, quite ingenuously, the Crown, in its written submissions, sought to persuade the Court that Mr. Ehsan was afforded a hearing before his deportation since he had applied to the High Court to stay that Deportation Order. Moving along, the State posited that since the court had refused to stay the Deportation Order, the deportation was sanctioned by the judiciary. I fail to see how the fact that another judge based on an application for an injunction, refused to stay the Deportation Order can have any relevance to the constitutional claim. In any event, these written arguments were not pursued with any stridency during the oral arguments before this Court and in my view, quite properly so.

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[23] [2000] 1 AC 45.

[106] On any view of the circumstances, once it has been concluded that the legislative provision which enabled the revocation of Mr. Ehsan's citizenship was unconstitutional, it follows that the consequential acts thereafter would be unlawful and null. I can see no prospect of the State persuading this Court that even though the offending words of section 9(2)(b) of the **Citizenship Act** are unconstitutional and therefore struck down as void, the subsequent acts of the Deportation Order, the arrest and detention of Mr. Ehsan together with the seizure of his passport and his ultimate deportation can be saved from being held to have been unlawful. This operates despite the fact that the relevant public officials did not behave high-handedly, given that they acted with the belief that they were clothed by the existing law to do the things they did

[107] The rationale for the approach that is taken in this judgment is self-evident and requires no elucidation. For the reasons which I have foreshadowed it seems that the judge was fully entitled to conclude that the words 'and in that case subsections (5) and (6) shall not apply' as appearing in section 9(2)(b) of the **Citizenship Act,** was unconstitutional.

[108] As indicated earlier and in light of my conclusions on the issue of the constitutionality of section 9(2)(b), it has become unnecessary to consider the issues of the lawfulness of the revocation of Mr. Ehsan's citizenship, his arrest and detention, the seizure of his passport and/or his deportation in any detail.

[109] Indeed, the answer to the crucial question of the constitutionality of section 9(2)(b) of the **Citizenship Act** effectively disposes of the second and third issues. The latter issues raise matters which take their life from section 9(2)(b) of the **Citizenship Act** and in so far as that section has been held to be unconstitutional and violative of section 8(8) of the Constitution, it follows that all of the subsequent acts of the relevant State official will likewise be unlawful.

[110] Having determined that the relevant provision of the **Citizenship Act**, as I have outlined, infringes section 8(8) of the Constitution in an impermissible way, and is therefore null and void, I also conclude that it breaches Mr. Ehsan's right to procedural fairness. Let it be clear that I am not of the view that in all circumstances naturalized citizens who are at risk of losing their citizenship are entitled to any elaborate procedural hearing. This however does not negate the fact that I am of the considered view that a less intrusive manner or a modified hearing should be afforded to naturalized citizens of Grenada. This is so whether or not the question of national security arises. It is apparent therefore that I am in agreement with the judge.

[111] It is evident that I am of the view that the arrest, detention and deportation of Mr. Ehsan were all unlawful, along with the seizure of his passport, due to the fact that their very foundation has been impugned. Consequently, the essential question that must be determined at this juncture is what relief Mr. Ehsan is entitled to for breaches of his constitutional right and for the nominate torts of wrongful arrest and detention together with the seizing of his Pakistani passport.

[112] For the reasons that I have given, the learned judge was fully entitled to come to the conclusions that he did in relation to issues (i), (ii), and (iii) and to make the declarations that he did, which I affirm in their entirety.

Issues (iv) and (v) – Redress

[113] Now that the impugned aspects of the relevant statutory provisions have been struck down as being unconstitutional, this Court has to determine whether the constitutional redress granted by the judge can be sustained or to put another way, what is the appropriate redress that ought to have been granted to Mr. Ehsan pursuant to section 16 of the Constitution, for the breaches of his fundamental rights. Section 16 of the Constitution stipulates as follows:

> "(1) If any person alleges that any of the provisions of sections 2 to 15 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is

> detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress
>
> (2) The High Court shall have original jurisdiction-
>
> (a)to hear and determine any application made by any person in pursuance of subsection (1) of this section; and
>
> …
>
> Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law"

[114] As alluded to earlier, the next question which arises for this Court to resolve is whether the learned judge erred in awarding the type and quantum of compensation to Mr. Ehsan. In answering this question, cognisance must be paid to the fact that it is settled law that the court has a wide jurisdiction to provide redress to a litigant whose constitutional rights have been breached. This is in addition to any remedies that are appropriate for any tortious conduct of the wrongful arrest and detention and the improper seizure of Mr. Ehsan's passport.

[115] It is incontrovertible that once this Court has upheld the learned judge's decision that Mr. Ehsan's fundamental right to due process has been breached, he is entitled to redress. There is a long line of authorities which are well-known and need not be recited in full. It suffices in the circumstances to state that a review of the authorities on constitutional redress, dating back to **Harrikissoon v Attorney General of Trinidad and Tobago**[24] and **Maharaj v Attorney General of Trinidad and Tobago (No 2)**,[25] underscores the principle that where the court has concluded that a litigant's fundamental rights have been impugned, the court has a very wide plentitude of powers to provide redress to the litigant.

[24] [1979] 3 WLR 62.

[25] [1978] 2 All ER 670.

[116] In **Attorney General v Ramanoop**,[26] the Board of the Privy Council set out a number of principles, which were adopted by the Board in **Merson v Cartwright and Another**.[27] In **Ramanoop**, the Board stated as follows:

> "[17] Section 14 recognises and affirms the court's power to award remedies for contravention of chapter I rights and freedoms. This jurisdiction is an integral part of the protection which chapter I of the Constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against misuse of state power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the state's violation of a constitutional right. This jurisdiction is separate from and additional to ('without prejudice to') all other remedial jurisdiction of the court.
>
> [18] When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide, because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.
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> [19] An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award. ."

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[26] [2005] UKPC 15.

[27] [2005] UKPC 38.

[117] Similarly, at paragraph 11 of **Subiah v Attorney General of Trinidad and Tobago**,[28] the Board made the following observations in relation to the assessment of compensation to the victim of a constitutional right violation by the State:

> "The Board's decisions in Ramanoop, paras 17-20, and Merson, para 18, leave no room for doubt on a number of points central to the resolution of cases such as the present. The Constitution is of (literally) fundamental importance in states such as Trinidad and Tobago and (in Merson's case), the Bahamas. Those who suffer violations of their constitutional rights may apply to the court for redress, the jurisdiction to grant which is an essential element in the protection intended to be afforded by the Constitution against the misuse of power by the state or its agents. Such redress may, in some cases, be afforded by public judicial recognition of the constitutional right and its violation. But ordinarily, and certainly in cases such as the present (and those of Ramanoop, and Merson, and other cases cited), constitutional redress will include an award of damages to compensate the victim. Such compensation will be assessed on ordinary principles as settled in the local jurisdiction, taking account of all the relevant facts and circumstances of the particular case and the particular victim. Thus the sum assessed as compensation will take account of whatever aggravating features there may be in the case, although it is not necessary and not usually desirable (contrary to the practice commended by the Court of Appeal of England and Wales for directing juries in Thompson v Commissioner of Police of the Metropolis [1998] QB 498, 516 D-E) for the allowance for aggravated damages to be separately identified. Having identified an appropriate sum (if any) to be awarded as compensation, the court must then ask itself whether an award of that sum affords the victim adequate redress or whether an additional award should be made to vindicate the victim's constitutional right. The answer is likely to be influenced by the quantum of the compensatory award, as also by the gravity of the constitutional violation in question to the extent that this is not already reflected in the compensatory award. As emphasised in Merson, however, the purpose of such additional award is not to punish but to vindicate the right of the victim to carry on his or her life free from unjustified executive interference, mistreatment or oppression."

[118] In light of the above, there remains only for the determination of what is the appropriate redress that should have been awarded by the judge for breaches of

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[28] [2008] UKPC 47.

Mr. Ehsan's constitutional right. During oral arguments, the opposing views had been refined. As foreshadowed, two main questions remain for determination by this Court: firstly, whether the judge erred in awarding Mr. Ehsan vindicatory damages; and secondly, whether the amount of damages the judge awarded Mr. Ehsan as compensation is excessive.

[119] It is agreed by both sides that the evidence before the judge which undergirded his award of damages was very scant. In addition, it must be indicated that apart from one affidavit that seemed to have been deposed to by Mr. Ehsan, the other affidavits were deposed to by other persons on his behalf. These were affidavits deposed to by Mr. Haji Asghar who is his former employer which were filed in support of Mr. Ehsan's constitutional motion and much of which was inadmissible hearsay evidence that should not have been relied upon. More surprisingly, is the fact that, at the very least, the State did not seek to test the veracity of the evidence by way of cross-examination since most of it was clearly hearsay.

[120] Let me say straightaway that Mr. Burke must be commended for acknowledging that the evidence to buttress the claim for damages was very scant and, in some cases, non-existent. The reason for this was obvious. Mr. Ehsan was in custody and, during the material period, was unable to communicate with anyone. Secondly, after his deportation, it seems as though he had not provided the court with any evidence upon which the court could determine the impact, if any, the acts of the State had on him and his family. Given the personal circumstances of Mr. Ehsan at that time, it is understandable that he may not have been able to depose to any further affidavits in support of his claim for constitutional relief. However, this does not absolve him of the need to provide a proper evidential basis upon which the court could provide the requisite redress. I agree with counsel on both sides that the evidence was markedly lacking.

[121] Much of the State's criticisms of the judge's treatment of the evidence are well-founded. Nothing will be gained from repeating them or from further highlighting

the poor quality of evidence that was before the judge, which he had to utilise to extrapolate losses suffered by Mr. Ehsan. Furthermore, I am of the view that quite a bit of the judge's observations was in the nature of conjecture.

[122] I remind myself that the lynchpin of Mr. Walwyn's argument is that the learned judge committed an error of principle in awarding vindicatory damages. It is well-established that the judge, in seeking to award compensation, must pay particular regard to the evidence that was adduced. Where the evidence is scant or non-existent to support an award of compensation or damages, the judge is usually able to make a nominal award so as to vindicate the person's rights. I am guided by the very helpful pronouncements of Lord Bingham in **Subiah** where he enunciated that '[s]uch compensation will be assessed on ordinary principles as settled in the local jurisdiction, taking account of all the relevant facts and circumstances of the particular case and the particular victim'. **Subiah** and **Ramnaroop** both recognise the court's power to award vindicatory damages even though there is no high-handed or oppressive conduct by the public officials.

[123] Most of the criticisms that were made by Mr. Walwyn about the quality of evidence that was adduced on behalf of Mr. Ehsan are well founded. I accept that Mr. Ehsan had over one year to file affidavit evidence in support of his claim for compensation/damages, yet he failed to do so. It is concerning that no attempt was made to explain these very strange turns of events or to justify why Mr. Haji Asghar, his former employer, was the person who deposed to largely speculative and inadmissible evidence on behalf of Mr. Ehsan. From the record it is unclear whether, if at all, he is any way connected to Mr. Ehsan.

[124] By way of observation, it is stark that Mr. Ehsan's Grenadian wife did not appear to have taken any active part in the proceedings in the court below. The onus was on Mr. Ehsan to provide proof of the losses that he suffered as a consequence of the State's unlawful conduct. His failure to do so undermines

the ability of the court to provide appropriate compensation in relation to any losses based on breaches of his constitutional rights. It must be noted that compensation cannot properly be awarded by the court in a vacuum. There must be a proper evidentiary basis on which the court can fashion appropriate redress.

[125] In my view, and given the totality of circumstances, it is appropriate to award Mr. Ehsan compensation only for the breaches and resultant loss that he has pleaded and proved. I agree with Mr. Walwyn that there was absolutely no evidence before the court below upon which it could have been determined that the State acted highhandedly or with any *mala fides* towards Mr. Ehsan. Neither was that contended. Importantly, the judge made no such adverse finding against the State and, in my view, quite properly so. This however is not the crux of the matter. I am not of the considered view that, in the absence of any such finding, it was not open to the judge to award vindicatory damages as urged by Mr. Walwyn. The settled jurisprudence indicates that an award of vindicatory damages, has nothing to do with mala fides or bad motive on the part of State officials. In this regard, the principles that were enunciated in **Subiah**, **Ramanoop** and **de Freitas** are instructive.

[126] Futher, a close reading of the constitutional motion that was filed by Mr. Ehsan indicates that, in addition to the numerous declarations that he had sought, he specifically claimed 'damages including vindicatory damages awarded against the State of Grenada for the various breaches of the claimant's constitutional rights together with interest'. Among those reliefs, he also sought an order that the State of Grenada ought to pay all travelling expenses of the claimant to procure his return from Pakistan to Grenada. Finally, Mr. Ehsan claimed interests pursuant to section 22 of the **West Indies Associated States Supreme Court (Grenada) Act**.[29]

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[29] Cap. 336, Revised Laws of Grenada 2010.

[127] I must say, the constitutional motion that was filed by Mr. Ehsan is striking by its omission in its pleadings. Mr. Ehsan did not specifically seek to claim damages for the alleged wrongful arrest or wrongful detention or for the seizure and retention of his passport. This may well have been because it was prepared in a hurry. This is however beside the point. The judge could have made awards, based on the facts pleaded in the constitutional motion and the evidence that was led to support them. In so far as there were no pleaded claims for some matters, it was not open to the judge to conclude that there were those breaches and to make awards in relation to those unspecified breaches. I agree with Mr. Walwyn that there was no evidential basis upon which the learned judge could have made some of the awards that he did, and that, in any event, they were excessive.

[128] The question of redress is inherently fact-sensitive. It is interesting to note that the former employer is the one who deposed that Mr. Ehsan's 'deportation from Grenada had caused considerable hardship to the claimant and his wife and daughter Tennisha Newton who was born on September 20, 2016'. There was no indication of the source of this information or his belief in the correctness of the information. Of more significance is the fact, as stated earlier, that his Grenadian wife did not appear to provide any evidence to the court to assist with the determination of the appropriate level of compensation. During oral arguments, there was nothing advanced by Mr. Burke in support of any desire of Mr. Ehsan to return to Grenada.

[129] I am not of the view that there was, nor is any basis upon which the learned judge could have properly ordered the government of Grenada to procure an economy class ticket for Mr. Ehsan's repatriation from Pakistan to Grenada. There was no admissible and reliable evidence that Mr. Ehsan desired to return to Grenada and Mr. Haji Asghar's hearsay and inadmissible postulation of this was hardly a good basis upon which the learned judge should have made that award.

[130] In addition, it must be emphasised that the evidence upon which Mr. Ehsan relied, to ground his claim for loss of earnings, is unsatisfactory. It must be pointed out that there was no specific allegation in his constitutional motion of loss of earnings, or any relief sought in relation to that. I am in agreement with Ms. Forrester, in her written submissions, that it was not open to the learned judge to rely on the written submissions of Mr. Ehsan's then counsel to improperly enlarge his constitutional claim in order to assert other breaches and claims that were not pleaded and to award damages. It was open to Mr. Ehsan, and he had a very lengthy period of time within which to amend his constitutional motion, to include other claims for breaches and relief but he failed to do so. I am persuaded by Ms. Forrester's arguments and accept that the learned judge erred in that regard.

[131] In all these presmises, and bearing in mind that I have already indicated that the breaches for Mr. Ehsan's section 8(8) rights lay squarely at the foot of Parliament, I am of the considered view that the guidance of Lord Nicholls in **Ramanoop** at paragraph 19 is instructive. His Lordship stated that:

> "an additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach and deter further breaches. All these elements have a place in this additional award."

[132] Applying these pronouncements to the appeal at bar, and noting that there was no high-handed conduct by the public officials in this case, I would set aside the award $155,000.00 for vindicatory damages made by the learned for the breaches of Mr. Ehsan's constitutional right, on the basis that the quantum of the award was excessive. I instead award the following sums for vindicatory damages, in relation to the matters which were pleaded and proven on Mr. Ehsan's motion:

(i) wrongful arrest detention – $20,000.00;

(ii) retention of Mr. Ehsan's passport – $10,000.00; and

(iii) breaches of Mr. Ehsan's right to due process of the law as provided by the Constitution - $20,000.00.

These awards are in addition to the declarations, and in my view, provide emphatic vindication for the breaches of Mr. Ehsan's constitutional rights.

[133] As foreshadowed, I would also set aside the award made by the learned judge of $25,500.00 for loss of earnings, on the basis that there was no satisfactory evidence upon which the learned judge could have made such an award.

Costs

[134] Mr. Ehsan, having succeeded in prosecuting the constitutional motion and resisting this appeal, is entitled to prescribed costs in the High Court and, on the appeal, two-thirds of the costs in the court below.

Disposition

[135] In view of the totality of circumstances, the appeal is dismissed save and except that the award of $25,500.00 for loss of earnings and of $155,000.00 in vindicatory damages made by the learned judge is set aside and substituted by a total sum of $50,000.00 for the breaches of Mr. Ehsan's constitutional rights.

[136] The follows orders of the learned judge's judgment below are affirmed:

(i) A Declaration is granted that the words 'and in that case subsections (5) and (6) shall not apply' appearing at section 9(2)(b) of the Citizenship Act of Grenada infringes section 8(8) of the Grenada Constitution and is therefore null and void.

(ii) A Declaration is granted that the revocation of the claimant's (the respondent on appeal) citizenship without giving him an opportunity to be heard is in breach of his right to equal protection of the law under section 8(8) of the Grenada Constitution.

(iii) A Declaration is granted that the Citizenship (Deprivation) (Muhammad (sic) Ehsan) (Order) dated 4th April 2018 is null and void.

(iv) A Declaration is granted that the arrest, detention and retention of passport of the claimant were in breach of sections 3, 6, 8 and 12 of the Grenada Constitution.

(v) Interest at the statutory rate of 6% is awarded on the damages from date of judgment until payment.

[137] Being the successful party on the appeal and having succeeded in prosecuting his case in the High Court, Mr. Ehsan is entitled to prescribed costs in the High Court and two-thirds of the costs in the court below on the appeal.

[138] I gratefully acknowledge the assistance of all learned counsel.

I concur.
Mario Michel
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar