

## **Citizenship, Immigration, Deportation and Asylum**

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It is indeed quite new for me to be sitting at this side of the lecture room with Marc addressing my colleagues today on a topic that is so real to me in practice and in real experiences.

It was in 1971 that a young widow returned to the land of her birth after the sudden death of her Guyanese husband. She returned with four children, all having being born overseas. She was told that her children could only remain in the island for a maximum of six months. She defied this directive and kept them in the island for the next 6 continuous years. During this period she was visited on one occasion by officers of the Immigration Department and was told that her children had to leave the island as they had overstayed their time. She told the officials in no uncertain terms that her children were not leaving the island, as they are her children and she was a born Jamaican and they will remain with her and they could try their next best!

That situation was the sad state of the law, as it existed at that time. It remained the law of Jamaica until March 1993 when an amendment was made to the constitution. Prior to this time, the Constitution had provided that unless a child born outside of Jamaica was born to a Jamaican father or an unwed Jamaican mother, they would not be entitled to Jamaican citizenship and residence status upon birth. Sadly, over the years as a result of this hindrance in the law (as my parents were married to each other) my mother and I had to deal with the hassle of immigration officials.

One such occasion was upon a visit to the United States to view a Gold Cup soccer game between Brazil and the Reggae Boyz in Miami, I travelled on my Guyanese passport, and omitted to take with me, my Jamaican citizenship card or passport. On landing I was told by the female immigration officer "Me nah land yuh! Mi nah land yuh! Yuh have fi go back a foreign." I told her that not only am I now a Jamaican resident and a citizen who simply forgot to take her documents but she could ask any of the several persons in the immigration line including my business partner to verify this. She refused and promptly told me to wait in a corner until her supervisor returned to decide what to do with me. Luckily for me the supervisor was more willing to listen to reason. He had in his office a copy of the Daily Observer newspaper, which had a report on the Agana Barrett case that I was involved in and this report had my name. I brought this to his attention and after realizing that I knew so much about Jamaica and especially the legal profession he allowed me entry into the country.

In our presentation this morning, we will be giving you an overview on the law as it relates to citizenship, immigration, deportation and asylum. In doing so we will be examining various pieces of legislation, international conventions, case law and bilateral agreements, which Jamaica has entered into with other countries. It is our expectation that this will give you an understanding as to what is now the current state of the law.

## Citizenship

In Jamaica, the law as it relates to citizenship is found in Chapter II of the Constitution. Chapter II deals with the acquisition/granting and deprivation of citizenship. The provisions of this Chapter have been amended 3 times- in 1993, 1994 and then in 1999.

The amendments provided, amongst other things, for the derivation of Jamaican citizenship by persons born outside of Jamaica through either parent. More specifically, in 1993 the amendment provided that persons born outside of Jamaica before August 6, 1962, who before 1993 were not entitled to Jamaican citizenship, but whose fathers or mothers, on the sixth day of August 1962, became or would become, but for their death, a citizen of Jamaica, shall become a citizen of Jamaica on the 1st day of March 1993.

The 1999 amendments however, were far more substantial. (Please refer to Act No. 18-1999)

In relation to acquisition of citizenship, this is provided for in section 3. This section states that a person may become a citizen of Jamaica either by *birth, descent, or registration as a citizen of Jamaica based on marriage to a citizen of Jamaica*.

### 1. Citizenship by birth-section 3(B)

Every person *born in Jamaica* after August 6 1962 automatically becomes a citizen of Jamaica on the date of his or her birth, and for those born before that date, they became citizens on August 6, 1962.

Also, persons are deemed to be born in Jamaica if they are born on a ship or aircraft registered in Jamaica or belonging to the Government, or if at the time of their birth, their mother: —

- (i) is a citizen of Jamaica residing in a country other than Jamaica by reason of her employment in the diplomatic service of Jamaica; or
- (ii) whether or not a citizen of Jamaica, is residing in a country other than Jamaica by reason of her being married to a citizen of Jamaica who is residing in that country by reason of his employment in the diplomatic service of Jamaica.

There is however, a peculiar proviso to this section, in that, a person shall not become a citizen of Jamaica if at the time of their birth, their father or mother possesses such immunity from suit and legal process as is accorded to an envoy of a foreign sovereign power accredited to Her Majesty in right of her government in Jamaica and neither of their parents are citizens of Jamaica, or if their father or mother is an enemy alien and the birth occurs in a place then under occupation by the enemy.

2. Citizenship by descent- section 3(c)

Every person born outside of Jamaica becomes a citizen of Jamaica on August 6, 1962, in the case of someone born before that date; or on the date of their birth, in the case of someone born on or after August 6, 1962, if, at that date, their father or mother is a citizen of Jamaica by birth, descent or registration by virtue of marriage to a citizen of Jamaica.

3. Registration based on a marriage to a citizen –section 4

Section 4 states as follows:

- (1) Any man or woman who, **on August 5, 1962**, is or had been married to a person-
  - (a) who becomes a citizen of Jamaica by virtue of birth, descent, or based on marriage to a citizen of Jamaica. or
  - (b) who, having died before the sixth day of August 1962 would but for that person's death, have become a citizen of Jamaica by virtue of that section,

shall be entitled, upon making application in such manner as may be prescribed and, if he or she is a British protected person or an alien, upon taking the oath of allegiance, to be registered as a citizen of Jamaica.

- (2) Any person who, **on August 5, 1962**, is a citizen of the United Kingdom and Colonies-
  - (a) having become such a citizen under the British Nationality Act, 1948, by virtue of his having been naturalised in the former Colony of Jamaica as a British subject, before that Act came into force; or
  - (b) having become such a citizen by virtue of his having been naturalised or registered in the former Colony of Jamaica under that Act,

shall be entitled, upon making application before August 6, 1964, in such manner as may be prescribed, to be registered as a citizen of Jamaica.

*The proviso to this subsection is that a person who has not attained the age of twenty-one years (other than a woman who is or has been married) may not make an application under this subsection himself but an application may be made on his behalf by his parent or guardian.*

- (3) Any man or woman who **on August 5, 1962** is or has been married to a person who subsequently becomes a citizen of Jamaica by registration above shall be entitled, upon making application in such manner as may be prescribed and, if he or she is a British protected person or an alien, upon taking the oath of allegiance to be registered as a citizen of Jamaica.
- (4) Any man or woman who, **after August 5, 1962**, marries a person who is or becomes a citizen of Jamaica shall be entitled, upon making application in such manner as may be prescribed and, if he or she is a British protected person or an alien, upon taking the oath of allegiance, to be registered as a citizen of Jamaica.

#### 4. Marriage to citizen of Jamaica- section 7

Section 7(1) states as follows:

- (1) Any man or woman who, after August 5, 1962, marries a person who is or becomes a citizen of Jamaica shall subject to subsection (2), be entitled, upon making application in such manner as may be prescribed and, if he or she is a British protected person or an alien, upon taking the oath of allegiance, to be registered as a citizen of Jamaica.

Importantly however, subsection 2 then goes on to state that:

- (2) A person may be denied registration under this section if—
  - (a) there is satisfactory evidence that—
    - (i) the marriage was entered into primarily for the purpose of enabling that person to acquire Jamaican citizenship;
    - (ii) the parties to the marriage have no intention to live permanently with each other as spouses, after the marriage;
  - (b) the person has been convicted in any country of a criminal offence specified in any law which makes provision for such denial on the ground of such conviction.

And then finally subsection 3 states:

- (3) Subsection (2) shall not affect the right of any person who, before the coming into operation of this Act, was entitled to apply for Jamaican citizenship by virtue of any provision of this Constitution in force before that date.

In relation to the deprivation of citizenship, this is dealt with in section 8. It provides that no person who is a citizen of Jamaica by virtue of becoming a citizen either by birth, descent, or registration as a citizen of Jamaica based on marriage to a citizen of Jamaica, shall be deprived of his citizenship.

However, any person who is a citizen of Jamaica other than those means, cannot be deprived of their citizenship except by or under the provisions of a law—

- (a) specifying the grounds on which such deprivation may take place and the procedure for such deprivation; and
- (b) securing to any person affected thereby a right of access to the Supreme Court for the purpose of reviewing the decision to deprive him of his right to such citizenship.

The criteria and procedure for an application for citizenship are as follows: -

1. Residence in Jamaica for a continuous period of 5 years immediately preceding the application.
2. Applicant should be of good character and financially solvent.
3. Applications are to be made in duplicate on Form N1, which is available at the Government Printing Office, and they are to be signed in the presence of a Justice of the Peace.
4. Four references are required to sponsor the application and they MUST be Jamaican by birth and NOT civil servants, attorneys, relatives, or agents.
5. Prior to submitting the application, notice must be given in the press of the intention to apply for Naturalisation and it must be published twice, at least on week apart. (At the bottom of the N1 form is a precedent of an advertisement). The entire page with the advertisement must be submitted with the application.
6. The following other documents must accompany the application: -
  - a. Birth certificate or other evidence of identity.
  - b. Passport on which you originally entered Jamaica.
  - c. Current passport (if different).
  - d. Work Permit or work exemption certificate.
  - e. Evidence of community activities e.g. service clubs etc.
  - f. Two passport size photographs certified by a Justice of the Peace.
  - g. Pay the required fee of \$550.00 payable as follows:-
    - i. Non-refundable deposit of \$100.00
    - ii. \$400.00 payable to Accountant General if application approved.
    - iii. \$50.00 Stamp Duty
    - iv. Registration of minors \$50.00

## Immigration

Immigration and deportation are governed mainly by the following pieces of legislation:

1. The Immigration Restriction (Commonwealth Citizens) Act;
2. The Aliens Act;
3. The Foreign Nationals and Commonwealth Citizens Employment Act;
4. The Caribbean Community (Free Movement of Skilled Persons) Act; and
5. The Deportation (Commonwealth Citizens) Act

### 1. *The Immigration Restriction (Commonwealth Citizens) Act:*

The Immigration Restriction (Commonwealth Citizens) Act was enacted in 1945 primarily to facilitate the free movement and entry of British and other Commonwealth Citizens to Jamaica to resettle and to impose restrictions on immigration of Commonwealth citizens. This Act has been amended on three occasions. It allows Commonwealth citizens to enter and remain in Jamaica for a maximum of twelve months in the first instance (section 13). However, section 4 of the Act names certain categories of persons to be prohibited immigrants and the Minister has the power under subsection (2) to exempt any person from this provision.

The Ministry of National Security and Justice has no system of keeping a record to provide statistics on the number of person who have entered the island or have been refused leave or land over any particular period of time. Similarly there is no record of how many persons the Minister has exempted (if ever) from any of the provisions of this Act.

The practice is that every Commonwealth citizen who arrives in Jamaica must have a passport, a return or onward ticket, and sufficient funds to maintain themselves during the period of their stay. If they manage to secure employment while in Jamaica then the restriction on their period of stay is automatically lifted.

Any Commonwealth citizen's leave to remain in the island may be revoked by the Minister or an Immigration officer acting on the Minister's direction (Section 25). In these circumstances the person is arrested and placed before the Resident Magistrate's Court to be dealt with for an infringement of the Act for which he will be charged. These cases are uncommon, as in most circumstances these persons have violated some other law such as the Dangerous Drugs Act and the Resident Magistrate upon conviction then makes a recommendation for deportation. The Resident Magistrate will then sign and submit to the Ministry of National Security and Justice a Certificate of Conviction and Recommendation for Deportation. At this stage it is still theoretically up to the Minister to accept or reject this recommendation. We have not been able to find out if a Minister has ever rejected such a recommendation. What we were able to discover is that there are times when the Minister may allow the person an option to go to another

country and not be deported to their country of origin. At this stage arrangements are made with the Ministry and the third country for that person to be accepted.

A case that one of the writers hereof had to deal with recently in the Half Way Tree Resident Magistrate Court involved a national from Bangladesh. He came to Jamaica in 1995 to visit and remained. He stayed with his cousin who has been here for over 25 years. That cousin and another cousin who lived in the United States supported him. He got married to a Jamaican and established a business. He sought and obtained a work permit exemption from the Ministry of Labour and they advised him to go the Immigration Department to regularise his stay in Jamaica. He went and was promptly arrested by them for overstaying his time. He was initially charged under the Aliens Act and after giving a geography lesson to the prosecution his charge was changed to breaches of section 31(e) of the Immigration Restriction (Commonwealth Citizens) Act. We submitted that the matter ought not be before the court and appealed to the Ministry for their intervention. The Ministry advised that the Court should decide the issue and after the matter bouncing from one Magistrate to another we were able to convince a Magistrate of our contention who persuaded the prosecution to withdraw the matter.

An interesting case that the Ministry has to deal with is that of a quite elderly woman who originated from Central America and had lived in Jamaica and apparently acquired property in the 1950's. She left the island sometime before independence and only recently returned to reside in Jamaica. Her case was brought to the attention of the Ministry officials by the Immigration Department as to her status in the island. She produced a certificate that was issued to her by the colonial government granting her permission to leave the country and re-enter. By virtue of section 7 of the Act if she was originally a Commonwealth citizen she would be perfectly within her rights to return to Jamaica to reside. It will be interesting to see how the Ministry handles that case.

To date the reports we have received is that in recent times the only Commonwealth citizens that have been ordered to leave the island without having committed an offence are two Guyanese men who were not employed and who had blatantly overstayed their time and had attempted to resolve their situation by seeking to get married. They were ordered out of the Country by the Immigration Department, without the Courts having to become involved.

There are certain Commonwealth citizens who have been described as an Immigration Officer's nightmare! These are nationals of Nigeria, Pakistan, China and Sri Lanka. The Minister has imposed visa restrictions on these Commonwealth nationals. For example a Nigerian travelling to Jamaica will have to apply to the Jamaican High Commission for permission to travel to Jamaica. They have to provide our authorities with proof of employment in Nigeria, a letter of invitation from Jamaica, indicate their purpose of travel, have a valid passport, and have sufficient funds for their stay in Jamaica. The Ministry will look at the recommendation made by the High Commission and do checks on the person who issued the invitation in Jamaica before agreeing to the grant of a visa. If they are living out of Nigeria, then they will have to provide evidence of their legal status in their country of residence/domicile. More persons have been rejected in comparison to those who have been granted visas. These restrictions were

imposed approximately five years ago at the time when there was internal turmoil and upheaval in Nigeria and mass exodus. These restrictions were imposed temporarily but have to date not been lifted. Visa requirements for Pakistan and Sri Lanka nationals have existed for quite a while.

Although there are no visa requirements, Indian nationals are only permitted to land for a maximum of ten days. Since most of visitors from India arrive in the island via England, British Airways assists us by scrutinising their passenger list and administering tickets wisely to all who board on a flight to Jamaica.

It is the practice in the airline industry that if your airline allows a prohibited immigrant or someone who does not fulfil the visa requirement or is refused leave to land in a country, then you are financially responsible for returning that person to their port of origin. Unfortunately, an open gateway to enter Jamaica is to arrive from Cuba where there is no administration on persons leaving the island who are not nationals of Cuba. Thus, what has been happening lately is that persons from third countries make their way to Cuba and then come across to Jamaica, as they cannot be returned. Unfortunately our own airline Air Jamaica is not as scrutinising of its passengers and often times persons arrive without proper documentation and the Immigration Officers have to issue temporary permits or process visas upon arrival.

The legislation does not in itself impose any restriction on persons convicted of offences in other countries from landing. There is no mechanism to prevent this from occurring but if convicted of an offence within the island the Act provides for their expulsion.

Canadian nationals are, by virtue of the Immigration Restriction (Canadian Visitors) (Exemption) Direction 1980, which is a subsidiary legislation to the principal Act, exempt from the provisions of section 5(1). A Canadian citizen does not need a passport to travel to Jamaica. They may travel using a return ticket or round trip ticket, with either an expired passport (not exceeding one year in age), a certificate of Citizenship of Canada with a photograph, or a birth certificate along with an identity card. It is quite obvious that this provision was enacted simply for tourism purposes.

Cruiseship passengers and flight crewmembers are also exempt from the requirements of section 5(1) to have a passport to enter the island. They may remain in the island only during the period of stay of the vessel. [See the Commonwealth Citizens (Cruise Passengers) Regulation 1946 and the Immigration Restriction (Airline Flight Crew) Directions 1951.]

The other subsidiary legislation that compliment this principal Act are: -

1. The Immigration Restriction (Commonwealth Citizens) Order 1959,
2. The Commonwealth Citizens Identification (Photography and Measurement) Regulation 1948,
3. The Commonwealth Citizens (Ports of Entry) Regulations 1951,
4. The Recruited Workers (Exemption) Direction 1953, and



5. The Immigration Restriction (Commonwealth Citizens) (Chartered Aircraft Passengers) (Exemption) Direction 1990.

## 2. Aliens Act

The Aliens Act of 1946 imposes restrictions on the landing of aliens and provides for the supervision and deportation of aliens. An Alien is defined as any person who is not a Commonwealth Citizen, a British protected person or a citizen of the Republic of Ireland (see the Interpretation section of the Constitution). Almost all aliens need visas and passports to enter Jamaica. So long as they do not possess any communicable disease requiring quarantine and are able to financially maintain themselves during their stay and are of good conduct they will be permitted entry.

All alien visitors have to specify their intended length of stay upon arrival and will be granted permission to land for a specified period based on this. The visa requirement is similar to that specified by the Ministry for the Nigerians as stated previously. Section 6 of the Act deals with the conditions for entry.

United States, Germany, Venezuela, and Japan Citizens are exempt from visa requirements by virtue of the following subsidiary legislations; The Aliens (Exemption) Directions 1946, the Aliens (Citizens of the Federal Republic of Germany) Directions 1964, The Aliens (Citizens of the Republic of Venezuela) Directions 1981, and the Aliens (Citizens of Japan) Directions 1987 respectively. Similarly, flight crew and cruise passengers; The Aliens (Cruise Passengers) Directions 1946 and the Aliens (Airline Flight Crew) Directions. The Aliens (North American Visitor) (Exemption) Direction 1980 is almost the same as the Immigration Restriction (Canadian Visitors) (Exemption) Direction 1980.

The Government also has in place bilateral visa abolition agreements with different countries, which exempt the need for visas for entry. These agreements are reciprocal in nature and the exemption periods are granted for specific periods. These period range between 14 days and 90 days.

No abolition agreement exists for Korea, all Middle Eastern countries, e.g. Iran, Iraq etc. Only certain categories of persons from China are granted this status and they are usually diplomats. These immigration policies were influenced mostly by the cold war era.

The other subsidiary legislations are the Aliens Regulations 1946, the Aliens (Forms) Regulation 1946, the Aliens Identification (Photography and Measurement) Regulation 1948, and the Aliens (Ports of Entry) Regulations 1951.

More persons are deported under the Aliens Act than the Immigration Restriction (Commonwealth Citizens) Act. This could be because it is easier to find an Alien in breach than a commonwealth citizen and more discretion is given to a Commonwealth citizen. The detention of an Alien does not have to be in the prison or police lock ups but can be anywhere in the discretion of the Minister where he may think appropriate. Once in breach of the Act for overstaying their time an alien is put before the court and

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charged, and if found guilty, the Magistrate issues a Certificate of Conviction and Deportation.

Section 15 of the Aliens Act provides for circumstances under which a Deportation Order is made. Sub-section 6 of section 6 provides for specific offences in which a court can make a Deportation Order. These are any offence for which the Court has power to impose imprisonment without the option of a fine and any offence under the Seditious Meetings Act, The Riot Act, The Libel & Slander Act, the Bankruptcy Act, sections 38 or 44 of the Betting Gaming and Lotteries Act, Dangerous Drugs Act or Pharmacy Act.

In one case that one of the writers hereof has dealt with, a Cuban couple had attempted to leave Jamaica to go to the United States on false passports that they purchased while on a visit to Jamaica. They were held at the departure gate at the airport, and arrested and charged with uttering false documents and put before the Half Way Tree Resident Magistrate's Court. Several attempts were made to prevent what was thought to be their inevitable deportation to Cuba. We sought asylum to a third country, the Ministry refused to entertain an application for asylum as we had no grounds upon which to raise such a case for persons seeking to exit Jamaica illegally. All avenues were exhausted and we were facing the inevitable. We suggested to our clients to seek voluntary repatriation to Cuba and avoid deportation and the cost of same to the Jamaican Government. This suggestion was put to the Court and was accepted. Our client purchased return tickets to Cuba and handed their Cuban passports to the Jamaican immigration officials. They pleaded guilty to uttering forged documents and were given a week to leave the country voluntarily which they did after 3 days. This benefited our clients as if deported they could not return to Jamaica and may have to suffer other consequences on their return to Cuba for having been deported.

In another case with similar facts but involving 4 Cuban nationals, the same Magistrate was not so lenient. Firstly, she refused to grant them bail pending attempts for asylum to another country and appeals to the Ministry. Secondly, in this case, these clients in trying to disguise their identity destroyed their Cuban passports, identity papers and return tickets to Cuba. This meant that there were no travel documents for the same approach to be taken. Their Cuban American relatives were attempting all sorts of efforts, and a couple of United States Senators and other officials sought to assist them. The court accepted their guilty plea and ordered them to be continuously detained pending their deportation despite all our pleas. However, upon further appeals to the Ministry they were released into the custody of a Jamaican family who undertook to deliver them upon on completion of the process to have them returned to Cuba. For two of the Cubans that process took one week and they returned to Cuba. Another Cuban left after spending 6 months awaiting her papers and the other Cuban is still in Jamaica waiting the processing of his papers.

To understand this delay we have to explain the process. Any Cuban who desires to leave Cuba MUST obtain an invitation letter from someone to visit somewhere for a reason. You cannot leave Cuba as a tourist to go on vacation to another country.

That invitation letter costs US \$140.00, which has to be paid to the Cuban Embassy by the person inviting the Cuban or by that person at the Cuban Immigration Department.

At the Cuban Immigration Department an application for an exit permit is processed with and on the basis of the invitation letter. This permit costs US \$100.00. Thereafter the Cuban will apply for a passport at a cost of US\$50.00. All of these charges must be paid in United States Currency. Thereafter they go to the Embassy of the country they are invited to and apply for a visa. The Jamaican Government charges US \$15.00 for this visa. (The same amount the Cuban embassy charges for a Jamaican to obtain a visa to visit Cuba.) Once you leave Cuba for every month that you remain out of Cuba you have to pay US \$30.00 as a tax. If you remain out of Cuba for more than 11 months you are deemed to have defected and are considered an illegal immigrant and cannot return to Cuba without permission. If you do not pay the tax you cannot return to Cuba. If you cannot present your exit card on re-entry you will be arrested or may not be permitted to re-enter. Children are not granted exit visas to leave Cuba and return. If an invitation letter for permission to exit Cuba is sought for a child the Government grants them a permanent exit card and they are not allowed to return. Thus, when the Jamaican Government has to deport Cubans they have all this to consider and have to negotiate with the Cuban Embassy for the permission in certain circumstances.

In is very evident from talking to officials at the Ministry that there is an international smuggling ring of aliens and Jamaica is not exempt. The Ministry is moulding the law to accommodate the changes that are occurring and the result is apparent.

### 3. *The Foreign Nationals and Commonwealth Citizens (Employment) Act 1964*

The Foreign Nationals and Commonwealth Citizens (Employment) Act 1964, the Foreign Nationals and Commonwealth Citizens (Employment) Exemption Regulations 1964, and the Foreign Nationals and Commonwealth Citizens (Employment) (Work Permit Fees) Regulations 1973 govern the control of employment of foreign persons in Jamaica. Section 3 prohibits their employment without a work permit. Often times the Ministry of Labour and the Ministry of National Security and Justice are not on the same page with regard to this matter. The Labour Ministry may grant a work permit to someone that the Security Ministry may be seeking to deport and who has been refused an extension of time to remain in the island.

In the case of *R v Jacqueline Chenowith Resident Magistrate's Court Appeal No. 42/97*, an American citizen was charged before a Resident Magistrate with the offence of operating a villa without having a valid work permit, contrary to section 3(3)(a) of the Foreign Nationals and Commonwealth Citizens (Employment) Act. She pleaded guilty to the charge and the learned Magistrate subsequently sentenced her to a fine and recommended that she be deported from the island. The sentence as it related to the recommendation for deportation was appealed.

The Court of Appeal in arriving at its decision found that the Magistrate in exercising his powers in recommending deportation, purportedly acted under paragraph 1 of the Second Schedule of the Aliens Act that lists the offences for which a Court may recommend a deportation order.

The Court allowed the appeal and held that on an examination of the nature of the offences set out in the Second Schedule of the Aliens Act, and the sanctions imposed for breaches of section 3(3)(a) of the Foreign Nationals and Commonwealth Citizens (Employment) Act, the offence of working without a work permit, does not fall within the class of offences set out in the Schedule so as to attract the added sanction of a recommendation for a deportation order.

The Court also held that the offences circumscribed by section 1 of the Schedule are only related to offences for which the Court has power to impose imprisonment without the option of a fine and that this excludes offences under section 3(3)(a) for which the penalty is a fine and in default imprisonment, or, both a fine and imprisonment.

Also, in the case of R v Minister of Labour and Employment and Ocean Textiles Limited (1989) 26JLR, the Honourable Minister of Labour and Employment, at the time, cancelled the work permits of 2 Filipino nationals who were employed at East Ocean Textiles Limited and informed them that the "Immigration Authorities were being advised". The defendants applied for an Order of Certiorari to quash the decision of the Honourable Minister on the ground, inter alia, that their work permits were cancelled without them being given an opportunity to be heard, contrary to the rules of natural justice.

The Full Court granted the Order of Certiorari and quashed the decision of the Minister. The Court found that the Minister was under a duty to grant a hearing to the legal representatives of the dismissed workers before seeking to invoke his statutory power to cancel their work permits. The Court also held that insofar as the Minister came to his decision without affording the applicants a hearing it amounted to a procedural impropriety giving rise to the relief sought.

#### 4. Caricom Nationals the Caribbean Community (Free Movement of Skilled Persons) Act (1997)

In relation to Caricom Nationals the Caribbean Community (Free Movement of Skilled Persons) Act (1997) was enacted to facilitate the movement of University Graduate from the region into the Jamaican workforce.

The Caricom website on the Internet states as follows: -

"In July 1995 it was agreed by Member States that with effect from January 1996 Caricom Nationals, who are University Graduates, should be allowed to move freely in the Region for work purposes, thereby eliminating the need for work permits.

In order to give legal effect to this mandate Member States must enact and proclaim legislation. The Secretariat tried to facilitate this process by providing Member States with model legislation for adoption and enactment.

To date nine Member States have completed the legislative process to give effect to this decision.

Suriname, Montserrat and Belize must still enact and proclaim legislation, while Trinidad and Tobago is yet to complete the process by issuing the proclamation.

If you are a University Graduate you should be welcome in all the other Member States, except in The Bahamas, which decided not to join the CARICOM Single Market and Economy and Haiti, which is in the process of becoming a full member of CARICOM.

In July 1996 the free movement for work purposes was extended to artistes, sports persons, musicians and media workers.

For these approved categories legislation must also be enacted or amended. Currently only in Guyana and Jamaica have legislation been enacted, while in St. Vincent and the Grenadines the competent Minister is authorised to include additional occupations in their free movement of skills act.

Finally it is good to note that Protocol II : Establishment, Services and Capital, which is one of the Protocols amending the Treaty establishing the Caribbean Community, is in effect providing for the movement of persons as service providers and /or to establish businesses, including management, supervision, technical staff and their spouses and immediate family members."

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The fact is that almost all of the territories except the Bahamas (who have refused to be party to the treaty) has enacted the relevant legislation. The countries that have legislation are as follows: -

Antigua & Barbuda –The Caribbean Community Skilled Nations Act 1997

Barbados – The Immigration (Amendment) Act 1996

Dominica – The Caribbean Community Skilled Nationals Act 1995

Guyana - The Caribbean Community (Free Movement of Skilled Person) Act 1997

Saint Lucia - The Caribbean Community Skilled Nationals Act 1996

Saint Vincent and the Grenadines - The Immigration (Caribbean Community Skilled Nationals) Act 1997.

Trinidad and Tobago – The Immigration (Caribbean Community Skilled Nationals) Act 1996

In Jamaica the requirements to qualify are: -

1. A certified copy of the University Degree
2. A certified copy of Birth Certificate
3. A deed poll to support notice of change (if any)
4. Three certified passport size photographs
5. Copies of relevant pages of passport showing name, nationality and passport number.
6. Indicate marital status.

If the person is applying for their dependants as well, the following is required for the dependants: -

1. A certified copy birth certificate.
2. If Applicant's name is not on birth certificate, a Declaration signed before a Justice of the Peace/Notary Public by two persons who knew of the birth stating that he (Applicant) is the Parent.
3. Adoption Papers (for adopted children)
4. A marriage certificate (for spouse)
5. A copy of Decree Absolute certified by a Justice of the Peace/Notary Public if either or both spouse previously divorced.
6. A certified copy of the death certificate if former husband or wife had died.
7. In the case of an unmarried couple, an affidavit signed in the presence of a Justice of the Peace/Notary Public stating that they have co-habited for a period of not less than five years immediately preceding the of application.
8. Three certified passport size photographs.
9. Copy of the relevant pages of passport showing name, nationality and passport number.

The attachment is a schedule of the requirements for entry into Caricom member states.

### **Refugees, Illegal Immigrants and/or Asylum**

Refugee status, on the universal level, is governed by the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. These two international legal instruments have been adopted within the framework of the United Nations. They are applicable only to persons who are refugees as therein defined.

The Convention seeks to protect all persons deemed to be refugees under earlier international conventions and its mandate includes any person who:

"... as a result of events occurring before January 1, 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality,

membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

The Convention also establishes the principle of non-refoulement, according to which, no refugee may be returned against his or her will to a territory where he or she may be exposed to persecution. It also sets standards for the treatment of refugees, including their legal status, employment and welfare.

The scope of the Convention, however, was confined to people who had become refugees as a result of events that took place before January 1951. Signatory states were given the option of limiting its geographical application to Europe. However, with the passage of time and the emergence of new refugee situations, the need was increasingly felt to make the provisions of the Convention applicable to such new refugees.

Consequently, in 1967 the Protocol was introduced which, abolished the dateline and expanded the definition to include refugees from all regions of the world.

Jamaica acceded to the Convention and the Protocol, but has not yet enacted the relevant legislation to incorporate the two Instruments into domestic law. Consequently, there is currently no domestic legislation dealing with refugees.

Notwithstanding the absence of the domestic legislation, Jamaica has since accession, applied the procedures provided for in both instruments; and in some instances granted refugee status to applicants from Sierra Leone, Haiti and Cuba.

It would be remiss, in a discussion on refugees not to briefly mention the principle of “Internally Displaced Persons”. Internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.

Jamaica currently does not have any domestic legislation dealing with displaced persons nor is it a party to any such Convention.

All illegal immigrants are treated the same regardless of nationality. Once you enter Jamaica illegally you are interviewed. If asylum is being sought, the Ministry of Foreign Affairs and Foreign Trade, the Attorney General’s Department and the Ministry of National Security and Justice put together a committee of persons to examine each case/claim individually.

Once the case is determined the person is either permitted to remain or removed from the country without any court process. In most cases the persons turn out to be economic refugees. If they are to be removed arrangements are made between the



Ministry and the embassy of the country involved for them to be accepted. If they appeal another committee is set up to hear the appeal. In most cases the original decision is endorsed and refugee status is not given. Most often when there is a public outcry (as in the recent case of the Cubans who landed in Montego Bay) the Ministry allows some of the persons to regularise their stay in Jamaica or allow them to find another host country. There have been about five nationals from various countries in Africans who were given this option.

In conclusion we would like to thank Ms. Carol Charlton of the Ministry and National Security, Immigration Department, for her assistance and help in the preparation of this paper. As is noticeable in this paper, there is not a wealth of reported case law or precedents to rely on or refer to on this subject matter. Each matter or case can be decided on different considerations and circumstances. In dealing with this area of the law we urge practitioners to seek dialogue with the Ministry as we have found them to be quite understanding and helpful.

May 2000

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