Civil Appeal 2026: No. 6

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS CIVIL JURISDICTION
BEFORE THE HON. JUSTICE SHADE SUBAIR WILLIAMS
CASE NUMBER 2026: No. 41

Before:

THE PRESIDENT, THE HON IAN KAWALEY,
THE HON SIR ANTHONY SMELLIE, JUSTICE OF APPEAL
THE HON NARINDER HARGUN, JUSTICE OF APPEAL

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Between:

ERNEST MCQUEEN **Applicant**

-and-

THE ATTORNEY GENERAL **Respondent**

Victoria Greening of Resolution Chambers for the Applicant

Lauren Sadler-Best of the Attorney General's Chambers for the Respondent

Heard: 18 March 2026

Date of decision: 18 March 2026

Date of Reasons: 27 April 2026 [Delivered remotely]

REASONS FOR ORDER

SIR ANTHONY SMELLIE JA:

1. The Applicant was convicted in November 2015 and sentenced in January 2016 to 15 years imprisonment for offences of sexual exploitation of a young person while being in a position of trust, contrary to section 182B(1)(a) of the Criminal Code. He appealed against conviction and his appeal was dismissed on 1 May 2017. Having served his sentence, and his right to reside in Bermuda pursuant to an Extension of Spouse's Rights Certificate (ESER) having been revoked, he is now the subject of a deportation order made by His Excellency the Governor, acting on the advice of the Minister of Economy and Labour (the Minister responsible for immigration matters), and made on 13 February 2026 pursuant to section 106(1)(c) of the Bermuda Immigration and Protection Act 1956, on the grounds that the Governor considers it conducive to the public good to do so ("the Deportation Order").

2. The Applicant seeks to reopen his appeal against his conviction on the basis of fresh evidence which he claims to have received and which he seeks to adduce for the first time on appeal. In order to do so, he sought a stay of the Deportation Order before the Supreme Court but his application was refused by Justice Subair-Williams in an ex tempore ruling of 13 February 2026 for which she delivered full reasons on 23 February 2026 (the 'Judgment').

3. The Applicant sought leave to appeal against the Judgment and sought an order to stay the Deportation Order pending his appeal. Leave to appeal was refused by Subair-Williams J and so was his application for a stay. He sought to renew his application before this Court and given the urgency of the matter, on 18 February 2026, the President, sitting as a Single Judge of Appeal and treating his application as one for leave to appeal and a stay pending appeal, granted an order adjourning his application to be taken at an *inter partes* hearing before a full panel of the Court in the first week of the March 2026 Session and staying the Deportation Order on an interim basis pending the abovementioned *inter partes* hearing. The stay operated on implementation of the Deportation Order without authorising the Applicant's release from detention.

4. On 6 March 2026, the date notified for the *inter partes* hearing, Ms Greening appeared on the basis that she had been contacted by the Applicant only late the day before and had not yet been properly instructed. She was not sure whether she could act on account of a

possible conflict of interest and in any event, she needed to ascertain whether the Applicant, who said that he had been, had indeed been granted legal aid for her representation of him in respect of his application. She therefore sought an adjournment to take full instructions, to ascertain the status of legal aid and to consider the merits of the application. Ms Sadler-Best properly did not object and an adjournment was granted to 19 March 2026.

5. On 19 March 2026, Ms Greening sought a further short adjournment and interim stay of the Deportation Order. She explained her position in terms of three main considerations.

6. First, while she had seen affidavits from two witnesses, Messrs. Carlton Peart and Craig Abrahams, they contain hearsay accounts of the alleged recantation of evidence by a witness Kenyade McQueen, the Applicant's son, who testified against the Applicant at trial. She had not yet been able to speak to that witness and until she had an affidavit from him, she could not opine that the Applicant had a viable case for an application to adduce fresh evidence on appeal. However, the Respondent's description of the witness as the prosecution's corroborating witness underscores the materiality of the evidence. If the corroborating testimony was false and induced as alleged, that would directly impact the reliability of the prosecution case and therefore the safety of the Applicant's conviction. The fresh evidence could not have been adduced earlier because the recantation relied upon occurred post-trial. The circumstances required the Court to deploy its processes to secure that the best evidence is obtained in the interests of justice. She therefore sought a further adjournment and stay to allow her to undertake the necessary enquiries of the witness and if forthcoming, to obtain his evidence by way of affidavit. She acknowledged that without that evidence, there was no prospect of an application for leave to appeal succeeding.

7. Second, that in the meantime there was however, no basis for the Applicant being kept in prison. He is currently detained on the authority of the Deportation Order which itself would provide no authority for his detention pending the hearing of his application, or if leave is ultimately given, pending his appeal. She therefore proposed that he be ordered by the Court to be held in custody under the immigration laws. She confirmed her client's understanding that the alternative would be that the Deportation Order takes immediate effect, that he would therefore have to pursue his application from abroad in Jamaica whence he would be deported and his preference therefore, that he be ordered to be detained under the immigration laws pending the hearing of his application. She submitted that the Respondent's argument that the appeal can be pursued from abroad in Jamaica is too blunt and fails to take into account the anticipated and realistic difficulties the Applicant would face following deportation. If deported the Applicant would be destitute, with nowhere to live when he arrives in Jamaica, no finances or support and without the means to communicate with herself or the court in Bermuda. The Applicant had also expressed to

her his fear that if press coverage about the nature of his conviction were published in Jamaica, if deported he would be harmed or killed and she was of the view that that can be a ground for challenging deportation. If the Applicant decided to formally instruct her to challenge the Deportation Order itself, she would therefore seek to make such an application.

8. Third, while she had confirmed the availability of legal aid for the current *inter partes* hearing, the question is whether the Applicant would be entitled to legal aid for the presentation of his application for leave to appeal and, if granted, for the elicitation of the fresh evidence and its presentation at the appeal itself. If deported to Jamaica and so obliged to pursue his appeal from there, she was unclear whether any grant of legal aid would remain operative for those purposes.

9. In her helpful response, Ms Sadler-Best expressed her understanding of the scope of section 3 of the Legal Aid Act 1980 as extending to grants for criminal appeal proceedings in Bermuda without reference to the physical or geographical location of the appellant. It would follow that the Applicant need not be in Bermuda to exercise any right of appeal he may be granted. This, she submitted, goes to the core of the issue before the Court, as there would be no obstacle to deportation if the Applicant could exercise his right to a fair hearing from Jamaica with the assistance of legal aid. The notion of intolerance in Jamaica to the offences he committed is unsubstantiated and Ms Greening's supplementary submissions admit to a current lack of a sufficient evidence. There is therefore no credible basis for a stay of deportation. As to whether the Court, as requested by Ms Greening, should itself grant an enlargement of legal aid for the present proceedings generally, Ms Sadler-Best had no observations to offer.

10. As to whether the Applicant should be granted bail pending the determination of his current application or appeal if granted leave, Ms Sadler-Best invited the Court's attention to the findings at [68] and [69] of the Judgment. There, after reciting the factors considered by the Minister for making his recommendation to the Governor, the Judge expressed her decision in terms of the balancing exercise which she found to be suitable, applying the *American Cyanamid v Ethicon* [1] balance of convenience principles, for the grant or refusal of interim injunctive relief :

> "68. *Clearly the risk of injuncting the Deportation Order pending a possible appeal is that Mr Mc Queen, while enjoying his liberty, may cause further criminal harm to a member of the Bermuda public. Should Mr McQueen cause further harm of any nature similar to the previous acts for which he has been held criminally*

[1] *American Cyanamid v Ethicon* [1975] 1 All ER 505.

responsible, that in my judgment would constitute irremediable harm incapable of being compensated by way of damages.

69. Because I found that there was a real risk of irremediable harm occasioned by a stay or temporary injunction against the Deportation Order, it would not have been appropriate to grant temporary injunctive relief based merely on the 'serious question to be tried' test. In the full circumstances of this case, it was necessary for me to look more closely at Mr McQueen's prospects of success in securing a final injunction against the Deportation Order. Mr McQueen's prospects of success in so doing were hinged entirely on his ambitions to have the 2015 convictions quashed on the basis of the proposed fresh evidence. Having found that the proposed fresh evidence would be excluded on the grounds of inadmissible hearsay, I found that his prospects of success on appeal were hopeless."

11. Ms Sadler-Best also emphasized paragraph 70 of the Judgment where the Judge went on, in her conduct of the 'balancing exercise', to consider also the prejudice which the Applicant would suffer in the event of refusal of the interim injunctive relief , that is, the risk of not being able to prosecute his appeal if deported. Recognising that arrangements could be made for his participation remotely by video-link or email, there the Judge declared that "*In the end, I found that the inconvenience of pursuing an appeal from outside Bermuda was far less than the criminal harm any child or young person might suffer at the hands of a freed Mr McQueen, who may fairly be characterised as a prolific sex offender.*"

12. Ms Greening took exception to that characterisation of the Applicant although the Judge no doubt had in mind the fact that he had been previously convicted for a similar offence. If successful on his appeal, the Applicant's wish she explained, is to be reunited with his wife and daughters and to be reintegrated back into Bermudian society. According to an affidavit from Dr Danette Ming, the Chief Immigration Officer, in his letters requesting to be allowed to remain in Bermuda and the restoration of his ESER, the Applicant had apologized and contended that he had "*been able to participate in a number of educational and rehabilitative programs*" including sex-offender treatment which he "*found to be both helpful and transformative*". His wife had written to the immigration authorities confirming her support for his application to remain and so the case therefore also gives rise to concerns about the breach of the right to and respect for private and family life. Nonetheless, the focus at this stage Ms Greening submitted, should be upon ensuring that the Applicant could exercise his right to a fair hearing, not while on bail but while being kept in custody here in Bermuda. Granting him a further adjournment and stay of the Deportation Order to obtain important evidence which could be the basis of his appeal would pose no threat to public security whereas not to do so would cause a material impairment to his right to a fair hearing. He is seeking to pursue a criminal appeal; he should therefore have a right to be present at that appeal. If he is deported it would be

difficult if not impossible for her to have access to her client and to take proper instructions. She therefore sought a further temporary stay of the Deportation Order to be able to see whether there is indeed a case for appeal by way of fresh evidence.

13. The Court granted that application. In doing so, the Court did not find it necessary to conclude upon the merits of the Judgment, nor for that matter, upon the merits of the Minister's recommendation for deportation. The concern at this stage is that the Court is dealing with the right to a fair hearing and how that right might be impacted in respect of an appeal, the precise nature of which and the merits of which it would be impossible to assess as matters stand. The right to a fair hearing is a fundamental right protected by section 6 (8) of the Bermuda Constitution and the Court therefore has a duty to ensure its observance. Moreover, there have been material developments since the hearing before Subair-Williams J, not least the fact that the Applicant who had been unrepresented before her, is now represented by counsel who could speak independently and objectively to the viability or otherwise of his proposed appeal. Counsel's request for a further adjournment and temporary stay of the Deportation Order while the Applicant remained in custody and so could pose no threat to public safety, could not be regarded as unreasonable in light of the available information.

14. While there is indeed a balancing exercise to be undertaken it is not that simply of convenience as proposed in *American Cyanamid* but that which this Court considers is more aptly identified by the Supreme Court of the United Kingdom in *Ex Parte Kiarie, Ex Parte Byndloss* [2017] UKSC 42. This is a case which examined the right of foreigners to pursue their rights of appeal against deportation under the UK Immigration Acts and the UK Borders Act 2007, where the Home Secretary deems their deportation after conviction for crimes to be conducive to the public good and has certified that they can bring their appeals but only after they have returned to their home countries. While the legislative regime is different from that under the Bermuda Immigration and Protection Act 1956, the analogous significance is apparent. There is clearly a parallel between the power of the Home Secretary to certify removal in advance of the determination of an appeal against deportation and the power of the Governor here, acting on the recommendation of the Minister, to order deportation notwithstanding the pendency of the Applicant's application to re-open his appeal against conviction. An obligation on the State to allow for an effective facility to challenge a deportation order would arise equally in relation to a right to challenge by way of appeal, a conviction the reversal of which could result in the setting aside of a deportation order. As the Supreme Court stated at [56], the role of the Court in the context of review of the Home Secretary's certificates for removal pending appeal, is to "*survey punctiliously and above all realistically, whether, if brought from abroad, their appeals would remain effective. For that is what their human rights require*." The same must be regarded as the role of the Court in the present context.

15. The starting point, as the Supreme Court noted at [43], citing with approval Lord Neuberger's dictum from *R(Lord Carlile of Berriew) v the Home Secretary* [2014] UKSC 60 [2015] AC 945, at para 67 : is that while according to it the degree of respect to be afforded the judgment of the primary decision- maker:

> "… *where human rights are adversely affected by an executive decision, the court must form its own view on the proportionality of the decision, or what is sometimes referred to as the balancing exercise involved in the decision.*"

16. And at [78] of its judgment in *Ex Parte Kiarie*, the Supreme Court (per Lord Wilson), identified the burden which the State must discharge where an applicant shows that removal would present a threat to the effective exercise of the right of appeal:

> "*The burden then falls on the Home Secretary to establish that the interference [by way of removal] is justified and, in particular, that it is proportionate: specifically, that deportation in advance of an appeal has a sufficiently important objective; that it is rationally connected to that objective; that nothing less intrusive than deportation at that stage could accomplish it; and that such deportation strikes a fair balance between the rights of the appellants and the interests of the community: see R(Aguilar Quila) v the Home Secretary [2011] UKSC 45, [2012] 1 AC 621, para 45."*

17. As matters stood before this Court on 19 March 2026 at the resumed hearing, the proper analysis did not require a full determination whether, in this case, the State had discharged fully, such a burden. Rather, the question was whether, in the circumstances presented, the immediate deportation of the Applicant would strike a fair balance between his right to a fair hearing and the interests of the community. Having regard to realities of the kind identified by Ms Greening, the Court was not satisfied that there would be an effective facility or opportunity for the Applicant to pursue his present application or any ultimate appeal if granted leave to appeal, from Jamaica.

18. In those circumstances and for the reasons explained above, on the 19th March 2026, the Court ordered that while the Applicant would by his consent, remain in custody pursuant to the immigration laws, the temporary stay of his deportation would be extended to the end of April 2026 to allow him, if so advised, to file an application for a fresh hearing to reopen his appeal against conviction and granted an enlargement of his legal aid certificate to cover the proceedings generally.

NARINDER HARGUN JA

19. I agree.

IAN KAWALEY P

20. I also agree.