

A perspective on revoking citizenship obtained by investment through underselling in Citizenship by Investment/Investment Migration Programmes in the Eastern Caribbean

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In the Eastern Caribbean, the islands of Grenada, St. Kitts & Nevis, Antigua, Dominica and St. Lucia are all active participants in the Investment Migration Industry. In each island, there is legislation and regulation allowing individuals to obtain citizenship by investment. The investment options are centred around investments in approved real estate projects or one-off monetary donations to the State. There have been reports of abuses in some islands to the Citizenship by Investment programme in particularly the approved real estate option of the industry wherein individuals are alleged to have contracted to obtain citizenship for sums less than the amount stipulated as the minimum required investment in the governing legislation or regulations. These allegations have recently resulted in the commencement of lawsuits related to respectively the St. Kitts and Nevis and St. Lucia Citizenship by Investment Programmes against the developers and operators of some approved real estate projects likewise Government officials in an attempt to hold them accountable for the alleged underselling of the programme.² Amid the allegations of underselling has arisen the issue of whether individuals who obtained citizenship by investment wherein they have not paid the legislatively stipulated minimum investment are liable to have their citizenship revoked. This issue has not previously been litigated in the jurisdiction of the Eastern Caribbean, but it is certainly one that warrants an examination of potential outcomes.

In all the participating Citizenship by Investment countries in the Eastern Caribbean, on being granted citizenship, an individual obtains the full spectrum of constitutional rights afforded to a citizen of a country. That means, the rights of those individuals as citizens are equivalent and identical to that of individuals who are citizens by birth in those countries. It is notable though inconsequential, that individuals who obtain citizenship through Citizenship by Investment programmes may never visit their new country of citizenship, some may not even actually know where the country is and or have any interest or intention to change that state of affairs with the exception of citizens in Antigua and Barbuda who are required to spend at least 5 days

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² Investment Migration Insider, "*MSR Media files RICO Suit against Khan, Emmanuel, Harris, Galaxy, in US, Publishes Whatsapp screenshots*", <https://www.imidaily.com/caribbean/msr-files-rico-suit-against-khan-emmanuel-harris-galaxy-in-us-publishes-whatsapp-screenshots/>, Last Accessed 3rd July 2024

in Antigua after obtaining Citizenship by Investment.³ Never visiting the country of which you are now a citizen, does not make an individual any less entitled to the upholding of their constitutional rights which in all the Eastern Caribbean states are enshrined in written constitutions. That puts any challenge related to citizenship within the realm of public law.

A State has the power to deprive or revoke citizenship. By legislation and regulations⁴, the State has a discretion to revoke citizenship where citizenship was obtained by false representation or fraud or wilful concealment of material facts. Participating in an underselling scheme contrary to the statutory provisions applicable for obtaining citizenship by investment is certainly a matter that may be fraudulent or have resulted in false representation and or wilful concealment of material facts which can result in citizenship being deprived or revoked. If a State decides to initiate steps to deprive or revoke citizenship, it is salient that it ensures that it follows a proper lawful procedure wherein a citizen is informed of the potential deprivation or revocation of citizenship, is given a reasonable opportunity to be heard, and is given full reasons for any decision taken particularly if the decision does indeed lead to deprivation and or revocation of citizenship. Whilst there is a dearth of case law with respect to specifically citizenship by investment in the Eastern Caribbean, there is a wealth of case law confirming that procedural fairness is a salient and determining factor for Courts in public law matters when the rights of a citizen is being negatively interfered with by the State.⁵

A private individual or body may also opt to challenge the decision of a State to grant citizen. That decision of a State can properly be subjected to judicial review. Judicial Review involves an examination of the decision making method of public bodies insofar as it relates to how a decision was made to determine whether it was irrational, procedurally unfair, unreasonable and if it warrants being overturned or in some instances, warrants compulsion to ensure certain steps are taken. It is salient to note that for a private individual or body to commence judicial review proceedings against a State, they must be able to establish that they have standing to pursue a suit. The Eastern Caribbean Supreme Court Civil Procedure Rules⁶ is said to provide a very liberal and relaxed test of standing in judicial review proceedings as applicants

³ Section 4 Citizenship By Investment (Amendment) Act 2016 Antigua & Barbuda

⁴ See: St. Lucia Citizenship by Investment Act 2021 Revised Laws Section 38 Revocation of citizenship by investment; Antigua & Barbuda Citizenship by Investment Act No. 2 of 2013 Section 4 Deprivation of Citizenship; Commonwealth of Dominica Citizenship Act CAP 1.01 Revised Laws 1991 Section 10 Loss of Citizenship; Grenada Citizenship By Investment Act No. 15 of 2013 Section 12; St. Christopher and Nevis Citizenship Act CAP 1.05 Section 8 and Saint Christopher and Nevis Citizenship by Substantial Investment Regulations, No. 26 of 2023 Regulation 23

⁵ See: Claim No. GDAHCVAP2019/0020 The Attorney General of Grenada v Muhammed Ehsan judgement dated 27th November 2020; Claim No. SKBHCV2021/0196 Khaled Awad and another v The Minister of National Security of St. Christopher and Nevis and another judgement dated 17th November 2022; Claim No. ANUHCV2016/0039 Lihua Tian and another v The Attorney General and others judgement dated 11th May 2016;

⁶ Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023

are required to show they have “sufficient interest” in the subject matter and a non-exhaustive list of persons who will be accorded standing are set out in those rules of Court.⁷ Given the liberal test applied for determining standing, and that the permission of the Court is no longer required to commence judicial review proceedings⁸, it is possible for numerous parties who deem that the decision of the State to grant citizenship to individuals who did not pay the required statutory minimum is one their wish to pursue. However, initiating judicial review against a State to examine a government’s process to grant citizenship may not be sufficient to revoke the citizenship status of individuals who obtained citizenship without paying the requisite statutory minimum sum as those citizens are entitled to the full complement of constitutional rights which includes a right to be heard prior to any decision to their detriment being made. That means, again, that each individual who allegedly obtained citizenship using an underselling scheme must be given an opportunity to be heard prior to any step being taken to revoke their citizenship and, may well need to be made parties to any judicial review action that may result in an Order of the Court to their detriment.

A few facets at play within the context of revoking or depriving citizenship due to underselling are:

1. The contractual terms between developers, applicants and the government: Each CBI programme has mandatory documentation that must be provided by Applicants which includes evidence of a purchase and sale agreement or its equivalent confirming the intention of an Applicant to invest in an approved real estate project. Proof of the actual investment in the approved real estate project must be given prior to that individual being issued a citizenship certificate, for example, a copy of the title deed for property purchased to make one eligible. A government processing an application for citizenship by investment may not be privy to all the contractual agreements between developers and applicants but only that which its laws deemed as mandatory to be provided. That means agreements relating to how payment between an applicant buying approved real estate from a developer is settled, may not be a document provided to a government as part of its application process.
2. The intent of applicants at the time of contracting: Did an applicant intend to commit fraud by not paying the statutory minimum? Alternatively, was an applicant of the genuine belief having obtained for example, legal advice, that he or she was lawfully participating in a

⁷ John Mussintgon and another v Development Control Authority [2024] UKPC 3

⁸ The Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023 removed the prior obligation for parties to apply for leave or permission from the Court to initiate judicial review proceedings against the State.

permitted scheme wherein they may not be required to pay upfront the full statutory minimum to obtain citizenship but, based on the provisions of their contractual agreement, they would pay the full statutory minimum over a period of time? Those types of questions must be answered because fraud is a question of fact which has a high threshold to be established.

3. Legislative constraints: Did the legislative framework actually prohibit individuals from obtaining financing, or making alternative arrangements for payment of the minimum investment sum such that what is being termed “underselling” was actually prohibited as a matter of law?
4. The sovereign rights of an independent state to make decisions as to whom may be granted citizenship: Granting citizenship is the exercise of the sovereign power of a State which is within its absolute discretion to determine. Further, that decision is a matter that falls under the rubric of national security and traditionally, the judicial arm of Government is reluctant to venture into decision making that affects national security issues given that the Executive is responsible for national security and not the judiciary and the principles of separation of powers have to be respected.

There may be a plethora of additional intricacies that may arise if there is indeed a judicial challenge advanced with respect to alleged underselling in Citizenship by Investment programmes and whether individuals who obtained citizenship through any such improvisation media should have their citizenship revoked. Putting in place legislation and regulation to stop future participants in Citizenship by Investment programmes from engaging in activities that may be viewed and or deemed as underselling is a most practical and feasible way to control and suppress those seeking to improvise and or misuse those programmes. Those legislative measures must be consistent with the requirement of the constitution to have laws that are reasonably justifiable in a democratic society.

The reality now in the Eastern Caribbean is that the playing field in Citizenship by Investment States programmes have been levelled with all participating islands having entered into a mutual agreement where there is a common though not identical price point and provisions for regulating and operating their respective programmes⁹ which confirm that these are new and

⁹ OECS Media Release, “*Caribbean Countries Pressing Forward With The Implementation Of The Memorandum Of Agreement On Citizenship By Investment Programmes*,” <https://pressroom.oecs.int/caribbean-countries-pressing-forward-with-the-implementation-of-the-memorandum-of-agreement-on-citizenship-by-investment-programmes>, last accessed 3rd July 2024

encouraging days of transparency and integrity ahead. The shortfalls of the past are therefore historic matters to learn from and indeed, the continued evolution, development and enhancement of the Citizenship by Investment programmes in the Eastern Caribbean are doing well to boldly tackle and surpass those issues.