

IN THE SUPREME COURT OF JUDICATURE  
COURT OF APPEAL (QUEENS BENCH)  
APPEAL OF DEFENDANTS FROM ORDER OF  
MR. JUSTICE GATEHOUSE

No. OBENI 93/1561/E

Justice,

Royal Courts of

Strand, London WC2.

Thursday 23rd June

1994.

Before:

LORD JUSTICE KENNEDY

and

LORD JUSTICE MILLETT

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MOHAMMED ULLAH

-v-

HOME OFFICE AND SIMON ROSE

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(Handed-down judgment of John Larking, Chancery House,  
Chancery Lane, London WC2.  
Telephone No. 071 404 7464  
Official Shorthand Writers to the Court)

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MR. F. JAY (instructed by the Treasury Solicitor, Queen Anne's  
Chambers, 28 Broadway, London SW1H 9JS) appeared on behalf of  
the Appellant

MR. L. PUCE Q.C. and MR. M. LIVING (instructed by Messrs. W.H.  
Matthews & Co., 31 Church Street, Staines, TW18 4EN) appeared  
on behalf of the Respondent

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J U D G M E N T  
(As approved by the Court)

Thursday 23rd June 1994.

JUDGMENT

**LORD JUSTICE KENNEDY:**

1. This is an appeal from a decision of Mr. Justice Gatehouse who on 20th October 1993 allowed the defendants' appeal against a decision of Master Hutt. On 15th September 1993 the Master had ordered that the Defence be struck out as not disclosing a reasonable defence, and had further ordered that judgment be entered for the Plaintiff against the First Defendant. In consequence of his finding in relation to the defence the Master did not find in favour of the defendants on their summons seeking an order that the Writ and Statement of Claim be struck out as disclosing no reasonable cause of action, being frivolous or vexatious, or being otherwise abusive of the process of the court (see RSC Order 18, Rule 19). The Judge also refused to strike out the Writ and Statement of Claim, but he granted leave to appeal to both parties.

2. RELEVANT HISTORY

Mr. Ullah is a native of Bangladesh. On 22nd May 1987 he arrived in the United Kingdom and was granted leave to enter for 6 months. That leave expired on 22nd November 1987, and Mr. Ullah then became liable to be deported as an over-stayer in accordance with Sec.3(5)(a) of the Immigration Act 1971. Between June 1988 and January 1992, 5 applications were made by Mr. Ullah, or on his behalf, for him to be permitted to remain

in the U.K. either indefinitely or for a limited period. There was also an application for political asylum which was withdrawn. The Secretary of State for the Home Department did not respond to any of the applications until 29th September 1992 when there was served upon Mr. Ullah a notice in standard form of the decision of the Secretary of State to make a deportation order. The manuscript part of the notice read thus:

"You were last given leave to enter the United Kingdom on 22nd May 1987 for 6 months as a visitor. The Secretary of State is satisfied that you have since remained without leave. You submitted a late application for leave to remain on 6th January 1992 which was refused on 29th September 1992. Full account has been taken of this application but nothing in it has persuaded the Secretary of State that deportation is not the appropriate course in all the circumstances."

The application said to have been made on 6th January 1992 was in fact made on the 2nd January 1992, and it will be observed that the notice makes no reference to any earlier application. At the same time that Mr. Ullah was given notice of the decision to make a deportation order he was also given notice that under para. 2(2) of Sch 3 to the 1971 Act he was liable to be detained pending the making of the deportation order, and that the Secretary of State had decided to authorise his detention. The second defendant was the immigration officer who took Mr. Ullah into custody on 29th September 1992.

On 7th October 1992 Mr. Ullah served notice of appeal to an adjudicator and his grounds of appeal referred to the various applications for leave to remain. That, no doubt, is what prompted Mr. Cockerell of the Home Office to write to Mr. Ullah on 16th October 1992 in these terms:

"The purpose of this letter is to inform you that the Secretary of State has further considered the matter and has decided that the decision to deport was not in accordance with the law due to the fact that full consideration was not given to all your applications prior to service of the deportation notice. Accordingly you should regard the notice as withdrawn and you are to be released immediately."

On the same day Mr. Cockerell wrote to the Governor of the institution at which Mr. Ullah was detained enclosing a copy of his letter to Mr. Ullah and adding:

"Since the lodging of the appeal against the decision to make a deportation order, Mr. Ullah's case has been reviewed and it has been established the decision was not valid."

### 3. PLEADINGS

On 14th January 1993 Mr. Ullah commenced this action for damages for false imprisonment. The period of which he complained was that which extended from 29th September 1992 to 16th October 1992. On 9th February 1993 the defendants served a Defence in which they contend that the detention was lawful notwithstanding that the deportation notice was withdrawn on 16th October 1992 given that:

(a) The Plaintiff was a person liable to be deported under Sec 3(5) (a) of the Immigration Act 1971;  
(b) the First Defendant had power to detain the Plaintiff pursuant to paragraph 2(2) of Sch.3 of the 1971 Act.

The defendants also contended that insofar as it might be said that the Secretary of State exercised the discretion to serve the deportation notice and to authorise the Plaintiff's detention unreasonably such a complaint " is not justifiable herein; it properly arises (if at all) within the exclusive province of judicial review".

On 18th March 1993 the Plaintiff served a Reply. It alleged that the Secretary of State could, and by his actions or inactions did authorise Mr. Ullah to remain in the United Kingdom otherwise than by extending his leave. Particulars of that allegation were given which it is unnecessary for me to set out here.

On 6th July 1993 Mr. Ullah's solicitors issued a summons for an order that the Defence be struck out as not disclosing a reasonable defence and that there be leave to enter judgment against the First Defendant. On 23rd August 1993 the solicitor for the Defendants retaliated with a summons seeking an order that the Writ and Statement of Claim be struck out and thus the matter came before Master Hutt on 15th September 1993 when he made an order to which I have already referred

#### 4. STATUTORY PROVISIONS

Before I turn to the submissions made by counsel it is necessary to look at the relevant statutory provisions. Sec.3(5)(a) of the 1971 Act, so far as relevant, provides that "a person who is not a British citizen shall be liable to deportation from the United Kingdom if having only a limited leave to enter or remain he..... remains beyond the time limited by the leave." Subject to what is said in the Reply it is not disputed that at all material times after 22nd November 1987 Mr. Ullah was liable to deportation. If he was to be deported the first step was for the Secretary of State to decide to make a deportation order and, before actually making the order, to give notice of his decision to Mr. Ullah, so as

to give Mr. Ullah an opportunity to appeal against that decision. Once notice had been given to Mr. Ullah, as it was on 29th September 1992, he was liable to be detained because paragraph 2(2) of Sch. 3 of the 1971 Act, so far as relevant, provides that:

" Where notice has been given to a person in accordance with regulations under Sec 18 of this Act of a decision to make a deportation order against him..... he may be detained under the authority of the Secretary of State pending the making of the deportation order."

In the present case it is accepted that the notice dated 29th September 1992 complied with the formalities and was in accordance with the regulations under Sec. 18, but the simple submission advanced by Mr. Price for Mr. Ullah is that once the notice was withdrawn on 16th October 1992 it could no longer be relied upon by the Secretary of State as satisfying the requirements of paragraph 2(2) in relation to the period when Mr. Ullah was detained. If that is right then, submits Mr. Price, the detention was unjustified, and Mr. Ullah is entitled to maintain his action for false imprisonment to which there is no arguable defence.

#### 5. SUBMISSIONS

Mr. Jay contends that the period of detention was and remained lawful because the 2 conditions precedent to its legality were satisfied, namely:

- (1) By reason of the provisions of Sec. 3(5)(a) Mr. Ullah was at all material times a person liable to deportation, and -
- (2) notice had been given to him of a decision to make a deportation order against him.

Mr. Jay accepts that if Mr. Ullah did not fall within

the

scope of Sec. 3(5)(a), or if the notice could be shown to have been given in bad faith, then Mr. Ullah would be entitled to seek redress, but in the present case bad faith on the part of the defendants is not even alleged. Although the letters of 29th September 1992 were not happily worded, the fact is that the notice was withdrawn because there was recognised to be a procedural irregularity in failing to have regard to all of the submissions made by Mr. Ullah and on his behalf (see Immigration Rules 162, 164 and 166). As Mr. Jay points out, there is nothing in the wording of paragraph 2(2) of Sch. 3, or elsewhere in the statute, to suggest that where a notice is withdrawn or set aside by the court as a result of proceedings for judicial review the arrest and the period of detention will be retrospectively rendered unlawful. Such an interpretation would cause serious problems not only for the Secretary of State, but also for those like the Second Defendant who are instructed to act on his behalf.

In this context Mr. Jay submits that if Mr. Ullah had whilst detained tried to seek damages for false imprisonment or moved for a writ of Habeas Corpus he would have failed in limine because the court would have regarded the detention as lawful. Mr. Price's response to that submission is that whilst detained, and until he received the letter of 29th September 1992, Mr. Ullah was unaware of the extent to which it was possible to challenge the validity of the deportation notice, and no doubt that is right even though it is clear from the wording of the notice that the Secretary of State had not had

regard to most of the applications to remain which had been made by or on behalf of Mr. Ullah.

In order to support his main submission Mr. Jay invited our attention to Sch. 2 of the 1971 Act, which is concerned with control on entry. Like Sch.3 it authorises detention, but, as Mr. Price points out, the provisions are very different. An intending entrant may be detained at the port of entry on the authority of an immigration officer (see paragraph 16(2)). In R. v. Secretary of State for the Home Dept. Ex parte Muboyayi (1992) Q.B.244 this court was concerned with an applicant who had been detained under Paragraph 16(2) of Sch.2, and Mr Jay invited our attention to part of the judgment of Lord Donaldson M.R. in that case, but on reflection Mr. Jay has come to the conclusion that for present purposes we are unlikely to derive much assistance from Muboyayi's case, a conclusion with which I agree.

Mr. Jay accepts, in my view rightly, that in this case we should not be tempted to consider whether the decision of the Secretary of State to issue the deportation notice was void or voidable. The action was plainly not ultra vires, but, although Mr. Jay does not concede as much, it may have been irrational and therefore liable to be declared void. Even if that be the case it is his submission that the vulnerability of the decision to issue the notice is of no importance because the condition precedent to lawful detention was not the existence of a valid notice, but simply the doing of an act in relation to a person liable to detention, namely the giving to him of notice of a decision to make a deportation order, and

that was done.

Mr. Jay also submitted that even if the decision to issue the deportation notice was irrational that would not entitle Mr. Ullah to a remedy in private law. Because of my conclusion in relation to his main submission that is not a matter with which I find it necessary to deal.

Mr. Price began his submissions by inviting our attention to a tribunal decision in the case of Irish v. Secretary of State for the Home Dept. (1985) Imm.A.R. 155, in which the tribunal accepted that for the purposes of what is now Rule 166 of the Immigration Rules, a person who does not have leave may nevertheless have "authorisation" to remain. Whether or not that be correct it is unnecessary for us to decide, because in the present case there never was anything which could amount to authorisation by the Secretary of State of Mr. Ullah's continuing presence in the United Kingdom. It was, to say the least, discourteous of the Secretary of State not to have replied to the earlier applications for leave to remain made by Mr. Ullah and on his behalf, but such discourtesy cannot be construed as authorisation, nor can it give rise to any form of estoppel. In my judgment the point made by Mr. Ullah in his Reply has no prospects of success.

Mr. Price then turned to his main submission to which I have already referred. It is simply that having acknowledged that the decision to deport was "not in accordance with the law" and "not valid" the Secretary of State cannot rely on the deportation notice for any purpose whatsoever. In my judgment the fallacy in that argument is that pointed out by Mr. Jay,

namely, that all that is required by paragraph 2(2) of Sch. 3 in order to make detention legitimate is the giving of a notice of intention to make a deportation order. That condition precedent would not be fulfilled if no such intention had been formed, or if the intention had been formed in bad faith, but otherwise once notice is given in accordance with the regulations to a person liable to be deported that person may be detained, and his detention will be lawful even if the notice is later withdrawn or set aside.

6. CONCLUSION

If that is right then, as it seems to me, this is a case which can properly be concluded at this stage. Nothing would be achieved by an order that the matter go for trial, and although my view is not the same as that of the judge from whose decision this appeal lies, I note that he was attracted towards the conclusion which I find to be correct. Accordingly I would allow the appeal and dismiss the cross-appeal. That results in the defendants obtaining the order sought in their summons of 23rd October 1993, namely an order that the Writ and Statement of Claim be struck out, and I would so order.

LORD JUSTICE MILLETT: Statutory power of detention is conferred upon the Secretary of State by paragraph 2(2) of

Schedule 3 to the Immigration Act 1974. That paragraph reads as follows:-

"Where notice has been given to a person in accordance with regulations under Schedule 18 of this Act of a decision to make a deportation order against him ...he may be detained under the authority of the Secretary of State pending the making of the deportation order".

Where the requirements of that paragraph are satisfied, the detention is lawful and no claim for false imprisonment can be maintained.

The only express condition precedent to the exercise of the power of detention is that a notice in the proper form should be served on the person to be detained, and it is not disputed that this was done. Other conditions, however, are implicit in the language of the paragraph. The notice must not only be served, it must obviously also be true; and this imports a requirement that the Secretary of State has made a decision to make a deportation order against the person served with the notice. Further, the Secretary of State is authorised to order that person's detention only "pending the making of the deportation order" (that is to say, a deportation order against him), and this imports the requirement that he should be a person against whom such an order could lawfully be made.

Accordingly, Mr. Jay rightly concedes that if the person served with the notice was not a person liable to deportation, or if the Secretary of State had not made a decision to make a deportation order against him, or had made such a decision in bad faith, then the notice would be bad and the detention would be unlawful. In none of those cases would there have been a

decision of the kind contemplated by paragraph 2(2).

What the paragraph does not require, however, is that the decision should be the right decision, or without flaw, or otherwise impervious to successful challenge by way of judicial review. A decision made by the Secretary of State in good faith against a person liable to be deported is a decision within the contemplation of the paragraph, even if it later appears that it is a decision which he should not have made or which he should not have made without further consideration. If, for whatever reason, such a decision is withdrawn or set aside, the person in question must be immediately released, for he cannot be held "pending the making of the deportation order" until the Secretary of State has reconsidered the matter and made a fresh decision to make a deportation order against him.

Until the decision is withdrawn or set aside, however, it is sufficient to support the notice and authorise the detention.

I, too, would allow the appeal, dismiss the cross-appeal, and order that the Writ and Statement of Claim be struck out.

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(**Order:** Appeal allowed with costs. Cross-appeal dismissed. The Appellant Home Office to have costs, not to be enforced without the leave of the Court. Leave to appeal to the House of Lords was dismissed.)