

Re ZAGHLUL PASHA

Supreme Court

Tudor, C.J., in chambers.

26 September 1922.

Habeas corpus — detention authorized by act of state

Constitutional law — statute excluding habeas corpus — whether unconstitutional — *Political Prisoners Detention Act, 1922.*

Royal Instructions — whether court competent to inquire into compliance with.

The applicant was tried by court martial in Egypt, taken under military escort to Aden, thence to the Seychelles and finally to Gibraltar, where he was detained under the Political Prisoners Detention Act, 1922 (No. 9 of 1922). He applied ex parte for a summons to bring the proper officer of the Crown to assist the court in determining whether the Ordinance was lawfully passed.

¹ (1916) P. Cas. 322.

Held: (i) The court was not competent to look behind the Ordinance to see whether there had been due compliance with the Royal Instructions.

(ii) The detention was authorized by an act of state and therefore privileged from enquiry.

Per curiam. Section 4 of the Political Prisoners Detention Act, 1922, which excluded habeas corpus, was declaratory of existing law.

Note. The Political Prisoners Detention Act, 1922, was repealed by the Statute Law Revision Ordinance, 1935, (No. 8 of 1935).

Case referred to in the order.

Musgrave v Pulido, (1879) 5 App. Cas. 102.

Application

This was an application for a summons under habeas corpus process.

G.M.T. Hildyard, K.C., for the applicant.

27 September 1922: The following order was read—

This is in effect an ex parte application for the issue of a summons directed to the proper Officer of the Crown at Gibraltar to show cause why Saad Zaghul Pasha, an Egyptian subject detained as a political prisoner at "Glen Rocky", Europa Road, should be longer detained.

Mr. G.M.T. Hildyard K.C. appeared on behalf of Zaghul Pasha and after detailing the circumstances leading up to the prisoner's present detention, proceeded to submit that the local Ordinance No. 9 of 1922 passed on 1 September 1922, whereunder such detention is claimed to be justified, is so extraordinary in its provisions, particularly those of s. 4, that it should be held by the court (apart altogether from the other reasons urged by counsel) to be absolutely unconstitutional.

Dealing, first, with his contention that s. 4 of the Ordinance is extraordinary and unconstitutional, it was pointed out to counsel at once that this section, which provides that no writ of habeas corpus should lie in relation to prisoners detained under this enactment, is in fact merely declaratory of a provision in the Habeas Corpus Act and embodies the result of many judicial decisions thereon making it clear that "persons convict or in execution

of legal process" are not entitled to any privileges under that Act. Zaghlul Pasha was arrested, convicted and deported from Cairo on 23 December 1921 when Egypt was under martial law; and it would be impossible, as learned counsel conceded, for a court of this Colony to review any of the circumstances connected with a political prisoner's conviction by a court martial in Egypt. Mr. Hildyard, however, submitted on the authority of *Musgrave v Pulido*¹, that, inasmuch as he contended the local Ordinance No. 9 of 1922 was passed illegally for the reasons to be adduced, it is within the province of this court to ascertain and determine whether the action of the Governor, in passing this unusually framed Ordinance, was within the limits of his authority. Counsel therefore urged that the proper Officer of the Crown should be served with a summons and should be required to assist the court in determining whether Ordinance No. 9 of 1922 was passed lawfully and in accordance with the provisions of the Royal Letters Patent or Royal Instructions constituting the office and delimiting the authority and powers of the Governor and Commander-in-Chief of Gibraltar. Learned counsel contended that he was in a position to show that there existed considerable doubt on this point, and the only means whereby the court could settle this doubt was to grant his application for the summons under habeas corpus process.

In addition to placing before the court the affidavits of Zaghlul Pasha and others detailing the manner in which he had been court martialled in Egypt on 23 December 1921 and taken under military escort on 29 December 1921 to Aden, and thence on 1 March 1922 to the Seychelles where he was kept interned until his embarkation for Gibraltar where he arrived early in this month of September, counsel also brought to the notice of the court a print of the Royal Letters Patent and a print of Royal Instructions which he had obtained from the Attorney-General's office by courtesy of His Excellency the Governor. Both these documents are expressed as having come into operation on 2 February 1910 and presumably comprise all the enabling provisions regarding the constitution of the office of Governor and Commander-in-Chief of the City and Garrison of Gibraltar and his law-making powers and authority; although, as counsel pointed out, there is some little doubt in that connection because, on the print of the Royal Instructions, a note had been written in the margin of this document near its heading to the effect that these Instructions had been cancelled by other Instructions dated 4 March 1921. For the purpose of his argument, counsel asked that the court should, for the moment, accept this print as substantially representing the existing Royal Instructions passed under the Royal Letters Patent; but suggested that this matter might form one of the doubts that the proper Officer of the Crown, when summoned, might help to elucidate.

¹ (1879) 5 App. Cas. 102.

According to Clause III 5 of these Royal Instructions, counsel proceeded to argue, the local Ordinance No. 9 of 1922 would appear to have been passed irregularly and was therefore illegal for two reasons; first, because this Ordinance had been promulgated before a draft of it was published a month previously, or at all, before such promulgation; and, secondly, because this Ordinance, not being an enactment "indispensably necessary for the security of the City and Garrison or the welfare of the residents therein", was not a law which can be promulgated without such prior publication. For these reasons, alone, it was urged that the court would find on enquiry that this Ordinance was ultra vires the Governor's instructions, and would consequently decree that the detention of this political prisoner is unauthorised.

Moreover, counsel further urged, the law-making powers of the Governor are carefully limited by Clause V of the Royal Letters Patent. This clause merely authorises him "to make laws for the peace, order and good government of the City and Garrison." The Royal Letters Patent do not, counsel argued, authorise the Governor to legislate regarding anyone outside the Colony, nor for such a purpose as the present one which would constitute Gibraltar "a penal settlement" where convicts from other parts of the Empire might be deported. Counsel suggested that Clause V had been designedly framed to ensure that any such extraordinary legislation as this should be effected by His Majesty under Order in Council, although similar legislation had been dealt with from time to time by the Imperial Parliament.

On these grounds, counsel submitted that the facts disclosed in these proceedings already presented such grave doubts as to the legality of the circumstances surrounding the passing of Ordinance No. 9 of 1922 that further investigation by the court seemed most necessary and proper. And for these reasons, he contended that his application for a summons to be served on the proper Officer of the Crown should be granted.

The simple answer to this contention is that the courts of this Colony are bound to take judicial notice of all laws passed by His Excellency the Governor; and, with reference to the suggestions submitted by learned counsel that the Governor might possibly have exceeded his authority in passing Ordinance No. 9 of 1922, it is impossible to conceive how this enactment could have been framed, or how Zaghul Pasha could have been deported for detention at Gibraltar as a political prisoner, except under authority and according to instructions in that behalf conveyed to His Excellency through one of His Majesty's Principal Secretaries of State. Clause III of the Royal Letters Patent expressly requires the Governor "to do and execute all things that belong to his said office according to the tenor of these Our Letters Patent..... and according to such Instructions as may from time to time be given to him.....by Us through one of Our Principal Secretaries of State." As already suggested, it is obvious from the circumstances connected with Zaghul Pasha's detention here that such detention is authorised by an act of state, and, therefore, so far as this court is concerned, is privileged from enquiry concerning the form or manner in which such authority or instruction was communicated to His Excellency the Governor. It is not

competent for this court, consequently, to entertain the learned counsel's suggestion that he was prepared to argue as to the insufficiency of the transmission of any such instructions to His Excellency merely by cablegram, nor in any other manner to question the validity of this particular Ordinance.

The application is therefore dismissed; and as the matters involved in Mr. Hildyard's arguments are in the opinion of the court not of "great, general or public importance or otherwise" his application for leave to appeal from this ruling cannot be granted.