[1991–92 Gib LR 179]

BEGDOUI, ZOULAIRE and GRIMAJ MOHAMMED v. R.

SUPREME COURT (Kneller, C.J.): November 19th, 1991

Immigration—detention and removal—"unauthorized person"—magistrates' court has discretion whether to order removal of unauthorized person under s.59(1)—removal to be in addition to other penalty, even if nominal

Immigration—appeals—removal of "unauthorized person"—appeal lies to Supreme Court from s.59(1) order of removal by magistrates' court, under Criminal Procedure Ordinance, s.278(1) and (3), since court has discretion in making order—Immigration Control Ordinance, s.23 precludes appeal from Governor's order for removal

Statutes—interpretation—mandatory and permissive provisions—"may" to be construed as "shall," i.e. imposing duty on court to act rather than mere power to do so, where no justification for court failing to exercise power—onus lies with proponent to show that "may" intended to be mandatory, not permissive

The appellants were charged in the magistrates' court with being found in Gibraltar as non-Gibraltarians without valid permits or certificates, contrary to s.62(a) of the Immigration Control Ordinance.

The appellants were convicted on guilty pleas and orders were made under s.59 of the Ordinance for their removal from Gibraltar. The Stipendiary Magistrate ruled that he had no discretion in the matter, since it was the established practice of the court to construe the word "may," in s.59(1) (conferring power on the Governor or magistrates' court to remove unauthorized persons from Gibraltar) as meaning "shall." Since s.12 of the Ordinance required that a non-Gibraltarian be in possession of

a valid entry permit, a valid permit of residence or a valid certificate, and the appellants had been convicted as unauthorized persons under s.62(a), their removal was automatic under s.59(1). The appellants were detained pending their removal.

The appellants appealed against the orders for their removal. They submitted that (a) the word "may" was permissive rather than obligatory, since the magistrates' court had a genuine discretion as to whether to order their removal as well as imposing any other penalty, and it was for the Crown to show otherwise; (b) since s.59(2) of the Ordinance permitted the removal of persons recommended for deportation by the court, being unauthorized persons and having committed an imprisonable criminal offence, and provided for an appeal to the Supreme Court, (i) the order for removal under s.59(1) had also to be discretionary, and (ii) was liable to reversal by the Supreme Court on appeal, under s.278 of the Criminal Procedure Ordinance, as part of the sentence imposed; and (c) the appellants had committed no offence other than failing to hold a valid permit or certificate.

The Crown submitted in reply that (a) the word "may" in s.59(1) was to be construed as meaning "shall," since the Immigration Control Ordinance was a statute whose provisions were for the public benefit; (b) the decision to order removal under s.59 could be taken either by the Governor or by the court, and since under s.23 no right of appeal lay from a decision of the Governor, the court's decision was also not appealable; and (c) accordingly, the magistrates' court had properly made the removal orders and the Supreme Court had no jurisdiction to set them aside.

Held, allowing the appeal:

(1) When s.59(1) was read together with the remaining sub-sections of s.59 and the other provisions of the Immigration Control Ordinance, it was clear that the magistrates' court had a genuine discretion as to whether to order the removal of the appellants in addition to any other penalty it imposed. The word "may" in a statute was to be construed as imposing on a court a duty rather than a power to act only where there could be no justification for its failing to exercise the power. The onus lay with the Crown, as the proponent of a mandatory interpretation, to show that "may" should be read as "shall," and it had not done so. The discretion was to be exercised judicially according to the circumstances of each case and removal was to be made in addition to a fine or imprisonment, even if the other penalty was nominal (paras. 13–16; para. 21).

(2) The Immigration Control Ordinance gave the Principal Immigration Officer and the Governor very wide powers to deal with non-Gibraltarians wishing to enter and remain in Gibraltar. Although there was a right of appeal to the Governor from the decision of the Principal Immigration Officer, under s.23 of the Ordinance, no right of appeal lay to the courts from a decision of either. However, the Ordinance also provided for other common penalties such as fines and imprisonment, which neither the

Principal Immigration Officer nor the Governor could impose, and which were generally sufficient for the court to deal with unauthorized persons who did not pose a threat to security. If the magistrates' court had no discretion under s.59(1), there would be no need for the Governor to have the same power under the same sub-section. Furthermore, it would be anomalous if no discretion existed in relation to unauthorized persons under sub-s. (1), whilst s.59(2) made it clear that the court had a discretion in relation to a recommendation under s.174 of the Criminal Procedure Ordinance to deport an unauthorized person over 17 who had committed an imprisonable offence (paras. 18–20; para. 22).

(3) The appellants had a right of appeal from the magistrates' court's decision under s.59(1). A recommendation for deportation was treated as a sentence for the purposes of appeal (Criminal Procedure Ordinance, s.174(4)) and s.278(1) and (3) provided for an appeal to the Supreme Court from an order of the magistrates' court unless the court had no discretion as to the making of the order or its terms. Since the court did have that discretion, an appeal lay to the Supreme Court (paras. 25–26).

Cases cited:

(1) *Annison* v. *St. Pancras District Auditors*, [1962] 1 Q.B. 489; [1961] 3 All E.R. 914, referred to.
(2) *Eyre & Leicester Corp.*, *In re*, [1892] 1 Q.B. 136; (1891), 61 L.J.Q.B. 438, referred to.
(3) *Julius* v. *Lord Bishop of Oxford* (1880), 5 App. Cas. 214; 49 L.J.Q.B. 577; [1874–80] All E.R. Rep. 43, *dictum* of Earl Cairns, L.C. applied.
(4) *Macayan & Pabia* v. *Saxby*, Supreme Ct., Crim. App. No. 5 of 1988, October 24th, 1988, unreported, referred to.
(5) *MacDougall* v. *Paterson* (1851), 15 J.P. 803; 11 C.B. 755, referred to.
(6) *R.* v. *Roberts*, [1901] 2 K.B. 117; (1901), 65 J.P. 359, referred to.
(7) *R.* v. *Tithe Commrs.* (1849), 14 Q.B. 459; 19 L.J.Q.B. 177, referred to.
(8) *Shuter (No. 2)*, *In re*, [1960] 1 Q.B. 142; [1959] 3 All E.R. 481, referred to.

Legislation construed:

Criminal Procedure Ordinance (1984 Edition), s. 174(4):

"Where a court recommends or purports to recommend a person for deportation, the validity of the recommendation shall not be called in question except on an appeal against the recommendation or against the conviction on which it is made, but the recommendation shall be treated as a sentence for the purpose of any enactment providing an appeal against sentence."

s.278: "(1) A person convicted by the magistrates' court may appeal to the Supreme Court—

(*a*) if he pleaded guilty, against his sentence;
(*b*) if he did not, against the conviction or sentence.

. . .

(3) In this section the expression 'sentence' includes any order made on conviction by the magistrates' court, not being—

. . .

(*d*) an order made in pursuance of any law under which the court has no discretion as to the making of the order or its terms."

Immigration Control Ordinance (1984 Edition), s.12(1): The relevant terms of this sub-section are set out at para. 4.
s.23(1): The relevant terms of this sub-section are set out at para. 6.
(2): The relevant terms of this sub-section are set out at para. 25.
s.59(1): The relevant terms of this sub-section are set out at para. 18.
(2): The relevant terms of this sub-section are set out at para. 18.
s.59(3): The relevant terms of this sub-section are set out at para. 18.
s.62: "A non-Gibraltarian who—

(*a*) being a person required by this Ordinance to hold a permit or certificate, is found in Gibraltar without a valid permit or certificate . . .

is guilty of an offence . . ."

C. Finch for the appellants;
P. Dean, *Senior Crown Counsel*, for the Crown.

1 **KNELLER, C.J.:** The first issue in these appeals, which were consolidated, is whether the word "may" in s.59(1) of the Immigration Control Ordinance means "shall." The second is whether there is a right of appeal from the magistrates' court to the Supreme Court if the magistrates' court makes an order of removal under that section. It might be thought that the answer to the second should precede the first, but it should not, as I shall show.

2 These three appellants are, as their names might suggest, Moroccan males, and they are all adults. On October 24th this year they appeared before the Stipendiary Magistrate of Gibraltar and each pleaded guilty to being a "non-Gibraltarian" and a person required by the Immigration Control Ordinance to hold a permit or certificate, and who was found on October 23rd this year in Gibraltar without such a valid permit or certificate, all contrary to s.62(a) of the Immigration Control Ordinance. Each was represented by Mr. Finch and pleaded guilty to each element of the charge, and was thereupon convicted of the offence set out in it.

3 Mr. Finch then made a submission in which, according to the Clerk's notes, he alleged that there was a blanket effort to rid Gibraltar of Moroccans which was something which raised "racialist overtones" and amounted to a disregard of their constitutional rights. Mr. Finch then went on to say that each man's case should be examined on its own merits and, in particular, that of one of the appellants who had been in Gibraltar a

very long time. He submitted that the court should use its discretion. All this must have been in relation to whether or not the learned Stipendiary Magistrate should make an order for the removal of one or more of the appellants from Gibraltar. The Magistrate adjourned the matter to October 25th, when he gave his ruling, which was that the appellants would each be the subject of a removal order. They had to be returned to Morocco.

4 His reasons for this ruling were these: The practice of the court was to treat the word "may," in s.59, as meaning "shall," and it would continue to be so until he was persuaded that it was wrong. He believed that s.59 could not be interpreted in isolation. He went on, therefore, to point out that s.12(1) of the Ordinance states that—

> ". . . no non-Gibraltarian shall enter or remain in Gibraltar unless he is in possession of—
>
> (*a*) a valid entry permit;
>
> (*b*) a valid permit of residence; or
>
> (*c*) a valid certificate."

He then asked rhetorically if there could be anything clearer than that? He acknowledged that there were special provisions affecting EEC nationals but they did not apply in the case of these appellants.

5 The issue of permits, he continued, is regulated by s.18, and under that the Principal Immigration Officer may issue a certificate of residence. He meant, I think, a permit of residence. If the Principal Immigration Officer refused to issue a permit (and the Stipendiary Magistrate assumed that that would include the extension of an existing or expired one) there was an appeal which lay to the Governor. He thought it was important to note that the appellant was not entitled to enter, or to remain in, Gibraltar whilst that appeal was being heard.

6 From there he moved to s.23(1), which provides that "no court shall question and no appeal shall lie to any court from any decision of the Principal Immigration Officer under this Ordinance or from any decision of the Governor hereunder." The provisions of s.52 related to prohibited immigrants and, in his view, did not appear to apply so far as these appellants were concerned.

7 He then declared that it was quite clear that under the provisions of the Ordinance, a person without a permit could not be in Gibraltar and therefore it followed that until such time as that person was removed from Gibraltar in the manner provided for in the Ordinance, he must remain in detention. He came to this conclusion with distaste, he indicated, because he was forgoing any residual discretion that he might otherwise have had,

and "the humanities of any particular case," as he put it, had to be dealt with by the Principal Immigration Officer in the exercise of his discretion. All he could do was to ask the Principal Immigration Officer himself to look once more into the cases of these appellants individually. At least one of them merited special consideration.

8 The learned Stipendiary Magistrate suggested that judicial review might lie against any arbitrary decision of the Principal Immigration Officer, but it was something which his court did not have the jurisdiction to consider.

9 He turned to the provisions of the Constitution of Gibraltar to discover if there was anything in his ruling which was unconstitutional in whole or in part, because if there were then he would have to strike it out. He had gone through the Constitution of Gibraltar Order and he could not find how his order could be said to be unconstitutional in view of the terms of s.3(1)(i). He then quoted the beginning of that section, and the provision of that particular paragraph.

10 Leaving aside the Stipendiary Magistrate's ruling for the moment, I should add that these appellants may be employed here, have homes here or friends with whom they can live, according to Mr. Finch, although so far as two of them are concerned, the memoranda of conviction describe them as unemployed.

11 I turn to the law. The long title of the Ordinance reads as follows: "AN ORDINANCE TO MAKE PROVISION FOR THE CONTROL OF ENTRY AND IMMIGRATION INTO GIBRALTAR AND FOR MATTERS INCIDENTAL THERETO OR CONNECTED THEREWITH." Anyone who is not a Gibraltarian is forbidden to enter or remain in Gibraltar without a valid entry permit, a valid permit of residence or a certificate of permanent residence (s.12(1)). If he is found here without a valid permit or certificate he is guilty of an offence and is liable on summary conviction to imprisonment for three months or to a fine of £50, and, on a second or subsequent conviction, to imprisonment for six months and to a fine of £100 (s.62). If he is "found in Gibraltar or attempting to enter Gibraltar contrary to the provisions of [the] Ordinance," he is called "an unauthorized person," and is liable not only to a fine and/or imprisonment, but in addition he "may . . . be removed from Gibraltar by order of the Governor or of the magistrates' court" (s.59(1)). It is the meaning of that word "may" that is the first issue to be resolved in this appeal.

12 Does the Governor or magistrates' court have to order the removal from Gibraltar of everyone found to be "an unauthorized person" under s.59(1)? In ordinary English, "may" is permissive language and "shall" is imperative or obligatory. Alas, it is not so simple in an Ordinance or statute, for sometimes "may" can be permissive and akin to "it is lawful,"

and at other times it means "shall." No decision of a Gibraltar court was laid before the court on when "may" means "shall" in a Gibraltar Ordinance, and my own researches have not unearthed any. So I go to the principles set out in English decisions on this conundrum.

13 "May" is held to mean "shall" where there is no justification for a court or tribunal failing to exercise a power. A power to exercise a certain jurisdiction is then construed as imposing a mandatory duty to act. "May" does not mean "shall" where a genuine discretion to act or not to act is conferred because there is no compulsion to act. The court or tribunal has a power but no duty to act. "May" for "shall" was sometimes just a typographical or verbal error in an Act (see the County Courts Act 1850, s.13 in *MacDougall* v. *Paterson* (5) (11 C.B. at 773); the Arbitration Act 1889, s.5 in *In re Eyre & Leicester Corp*. (2); and the Weights and Measures Act 1889, s.13 in *R.* v. *Roberts* (6)). See also *Bennion's Statutory Interpretation*, at 27, 141 and 341 (1984).

14 "May," in a statute, is usually empowering and only directory, permissory or enabling, but in a public statute it may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice (see *R.* v. *Tithe Commrs*. (7) (14 Q.B. at 474, *per* Coleridge, J.)).

15 "May" is mandatory language in a statute in certain circumstances if it is assisted by a qualifying phrase such as "unless sufficient cause is shown to the contrary," as in *In re Shuter* (8) ([1960] 1 Q.B. at 147), or "if satisfied there is proper ground for doing so," as in *Annison* v. *St. Pancras District Auditors (No. 2)* (1) ([1962] 1 Q.B. at 497). See also Wade, *Administrative Law*, 5th ed., at 228–231 (1982).

16 The onus is upon a person who puts forwards a proposition that "may" should be read as "shall," to prove that it should be so (see *Julius* v. *Lord Bishop of Oxford* (3) (49 L.J.Q.B. at 579, *per* Earl Cairns, L.C.)).

17 All that, in my respectful view, is good law, and I shall apply it here.

18 Returning now to the Ordinance, s.59(1) provides, as we have heard, that the unauthorized person "may, in addition to any fine or imprisonment authorized hereunder, be removed from Gibraltar by order of the Governor or of the magistrates' court and may be detained in such manner as may be directed by the Governor until so removed." It is important to add its next two sub-sections:

> "(2) A person in respect of whom a court has under section 174 of the Criminal Procedure Ordinance recommended deportation may be removed from Gibraltar by order of the Governor and may be detained in such manner as may be directed by the Governor until so removed.

> (3) An order shall not be made under subsection (2) by the Governor so long as any appeal is pending against the recommendation of the court or against the conviction on which the recommendation of the court was made."

19 So, when may the magistrates' court, under s.174 of the Criminal Procedure Ordinance, recommend deportation? Only in respect of a person to whom s.12 of the Immigration Control Ordinance applies (*i.e.* he is not a Gibraltarian and he has entered or remained in Gibraltar without a valid entry permit or a valid permit of residence or valid certificate of permanent residence), and has attained the age of 17 years, and is found guilty in Gibraltar of any offence which is punishable with imprisonment and is sentenced for that offence. The recommendation to deport can only be made after the offender has had seven days' notice of the court's intention to make such a recommendation. The recommendation is to be treated as part of the sentence and an appeal lies to the Supreme Court against it and against the conviction or finding, if there is one, and any other part of the sentence, but otherwise the validity of the recommendation cannot be called into question.

20 An analysis of the Ordinance reveals that it gives the Principal Immigration Officer and the Governor breathtakingly wide powers to deal with those who are not Gibraltarians who wish to enter and/or remain here. There is a right of appeal from the decision of the Principal Immigration Officer to the Governor. There is no appeal from their decisions to any court, and no court can question those decisions. This might cover a decision of the Governor under s.59 to order the removal from Gibraltar of any unauthorized person. Those powers are particularly appropriate, in my view, for use by the Principal Immigration Officer and the Governor in circumstances where the security of the City is affected, because that is always a matter for action by the executive, and sometimes there should be no dallying in taking action.

21 The Ordinance also provides for more common penalties, such as fines and/or imprisonment, to be imposed on offenders against some of its provisions and these may not be inflicted by the Principal Immigration Officer or the Governor or anyone in the City's executive. They are for the courts to impose and to do so judicially. The Principal Immigration Officer might find those powers of the courts sufficient to deal with unauthorized persons whose offences do not affect the City's security: see *e.g. Macayan & Pabia* v. *Saxby* (4).

22 Looking at the terms of s.59(1) together with those of s.59(2) and (3), set against the rest of the Ordinance, I hold that in sub-s. (1) "may" is permissive. The magistrates' court has a discretion to exercise as to whether an order of removal should be made in addition to imposing a fine or term of imprisonment on an offender. It will be exercised

judicially according to the circumstances of each case, when the prosecutor and the offender or his counsel have made their submissions on the point. If one is to be made it should be made in addition to a fine and/or imprisonment, even if the latter penalties are nominal.

23 If the magistrates' court did not have this discretion and an order of removal were mandatory, there would be no need for the Governor to have the same power in the same sub-section. If there were no discretion for the magistrates' court to exercise in s.59(1), when it came to dealing with someone who was found to be "an unauthorized person," it would indeed be strange, since under s.59(2), the same court clearly has such a discretion when dealing with someone who is 17 or above, who is not only an unauthorized person, but who has also been found to have committed an offence punishable with imprisonment.

24 I can now deal with the second issue that arises from the learned Stipendiary Magistrate's ruling, namely: Is there a right of appeal to the Supreme Court from an order by the magistrates' court for the removal of "an unauthorized person" under s.59(1) of the Ordinance? He declared there was none. The Ordinance does not confer one, and s.23 precludes it.

25 It is true that no court shall question, and no appeal shall lie to any court from, any decision of the Principal Immigration Officer under the Ordinance or from any decision of the Governor thereunder (which for this matter, I will presume means the Ordinance and not its ss. 17–23 inclusive, which deal with the issue of entry permits and permits of residence). Under s.23(2), "decision," so far as the Principal Immigration Officer is concerned, in s.23, means one of his decisions relating to the "grant, renewal, refusal or cancellation of any permit which may be issued under this Ordinance." Here, however, no decision of the Principal Immigration Officer or of the Governor is the subject of any appeal to or question by the court.

26 A recommendation by any court under the Criminal Procedure Ordinance that a person be deported from Gibraltar shall be treated as a sentence for the purpose of any enactment providing for an appeal against sentence (s.174(4)). The same Ordinance or enactment provides for an appeal from an order made by the magistrates' court to the Supreme Court (s.278(1) and (3)). There is no right of appeal, however, from an order made by a magistrates' court in pursuance of any law under which the magistrates' court has no discretion as to the making of the order or its terms (s.278(3)(d)). Thus, if the magistrates' court has to make an order of removal under s.59(1) of the Ordinance, no appeal lies from that order to the Supreme Court. If "may" means "may," the magistrates' court has a discretion as to the making of the order of removal, and an appeal from that order lies to this court.

27 All that is the reason for having to consider the two issues in the order I have. I can now answer the two issues. First, the magistrates' court may or may not order the removal of anyone found to be an unauthorized person under the terms of the Ordinance. Secondly, there is an appeal to this court from an order of removal made by the magistrates' court.

28 The Gibraltar Constitution Order 1969 is irrelevant in the context of this appeal.

29 [After further submissions and a ruling on the appellants' applications for bail, the learned Chief Justice continued:]

Order: The appeals against the orders of removal are allowed, the orders of removal are set aside and each case is to be returned to the Stipendiary Magistrate to proceed according to law. Production orders are to be issued by the Supreme Court Registry for each appellant to be produced in the court of the Stipendiary Magistrate at 2.30 p.m. on Tuesday, November 26th, 1991. Social reports on each appellant are to be provided in triplicate. Affidavits, if any, are to be filed and served in the magistrates' court registry by 2.30 p.m. on Monday, November 25th, 1991. Each appellant is to be remanded in custody. There shall be liberty to apply.

Appeals allowed.