

SUPERINTENDENT OF H.M. PRISON v. DUYONOV

COURT OF APPEAL (Fieldsend, P., Davis and O'Connor, JJ.A.):
October 3rd, 1996

Immigration—detention and removal—“unauthorized person”—under Immigration Control Ordinance, s.59(1), only Governor may order detention and removal of unauthorized person not convicted of offence—similar order by magistrates’ court requires conviction for immigration offence, e.g. entry without valid permit contrary to ss. 12 and 62

The respondent applied to the Supreme Court for a writ of habeas corpus to secure his release from detention as an illegal immigrant.

The respondent arrived in Gibraltar from Russia with no entry permit or other document authorizing him, as a non-Gibraltarian, to enter or remain in Gibraltar, and surrendered himself to the immigration authorities, claiming asylum. Since he was not a political refugee within the meaning of the Immigration Control Ordinance, s.55, the Governor ordered that he be removed from Gibraltar as an “unauthorized person” and that he be detained in custody pending his removal from the colony, under s.59(1) of the Ordinance. This detention was renewed several times.

The respondent appealed to the Supreme Court on the ground that the Governor’s order was unlawful since (a) under s.59(1), his detention and removal could be ordered only if he had been convicted in the magistrates’ court of an immigration offence, and (b) the order had unfairly deprived him of his liberty contrary to the Constitution. The Supreme Court (Pizzarello, Ag. C.J.) ordered his release.

On appeal, the Crown submitted that (a) the Governor’s order did not conflict with the safeguard of personal liberty in s.3(1) of the Constitution since the authority conferred on him by the Immigration Control Ordinance, s.59(1) to remove or detain unlawful entrants to Gibraltar was unconditional and fell within the specific exception to that Constitutional provision, set out in s.3(1)(i); (b) the Supreme Court had wrongly construed s.59(1) as limiting the Governor’s power to order the respondent’s removal or detention to a case in which he had first been convicted and sentenced in the magistrates’ court, since it was only the magistrates’ own power to make such an order that was limited in this way; (c) consequently the order was lawful since the respondent had nevertheless committed an offence under ss. 12(1) and 62 of the Ordinance of entering Gibraltar without a valid entry permit; and (d) this approach was supported by the fact that s.53(4) conferred power on the Governor to deal with any person declared by the Principal

Immigration Officer under s.52(1) of the Ordinance to be a “prohibited immigrant” as if he were an unauthorized person within the meaning of s.59, allowing detention or expulsion without any prosecution under s.62.

The respondent submitted in reply that (a) since the power of the Governor to deal with unauthorized persons under s.59(1) was conditional, it did not fall within the exception to s.3(1) of the Constitution, and s.59 must in any event be strictly construed in favour of the respondent against depriving him of his personal liberty or of any of the rights set out in s.3; (b) there was no justification either on the face of s.59(1) or in the Constitution for distinguishing between the powers of the Governor and those of the magistrate; (c) therefore, on the proper construction of s.59(1), and in accordance with the provisions of s.3(3) of the Constitution dealing with detention without trial, the respondent should have first been convicted in the magistrates’ court of an offence under the Ordinance before he could be detained or expelled, and the Governor’s order was unlawful; and (d) since, at the time of the order, the respondent had not in fact been declared a prohibited immigrant under s.52 of the Ordinance, the Governor had no power under s.53(4) to deal with him as he was permitted to deal with unauthorized persons under s.59(1) following conviction.

Held, allowing the appeal:

(1) Whilst the Supreme Court had adopted the most internally consistent construction of s.59(1) and that which accorded with the provisions against detention without trial in the Constitution—namely that an unauthorized person must first be convicted of an offence under ss. 12(1) and 62 before his removal or detention could be ordered—the other provisions of the Immigration Control Ordinance showed that the Governor’s powers to deal with unauthorized persons differed from those of the magistrates’ court in this respect (page 381, lines 8–39).

(2) Persons such as the defendant, who had contravened s.12(1), could be declared prohibited immigrants by the Principal Immigration Officer under s.52(1)(i), and under s.53(4) could be dealt with by the Governor as he would deal with unauthorized persons under s.59(1). Since the legislature could not have intended that a prohibited immigrant should not only have the right to appeal to the Governor, but also need to be convicted, before he could be removed or detained, it followed that an order made under s.59(1) *by the Governor* could be valid without there being a prior conviction. (page 381, line 38 – page 382, line 27).

(3) Furthermore, since s.59(1) conferred unconditional power on the Governor to order the detention and removal of unauthorized persons it fell squarely within the exception to the provisions safeguarding personal liberty set out in s.3(1)(i) of the Constitution and did not conflict with them (page 382, lines 38–41).

(4) Whilst the extent of the Governor’s powers under s.53(4) and s.59(1) was justified on public policy grounds by the need to deal rapidly with entrants to Gibraltar who posed a threat to the public, it was desirable that his specific powers to deal with unauthorized persons should be laid down more clearly in the legislation (page 382, lines 27–38).

Legislation construed:

Immigration Control Ordinance (1984 Edition), s.12(1):

“Subject to the provisions of section 14, 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.”

s.52: The relevant terms of this section are set out at page 381, line 42 – page 382, line 2.

s.53: The relevant terms of this section are set out at page 382, lines 4–6.

s.55(3): “The Governor may—

- (a) order the removal from Gibraltar of any political refugee;

...

- (c) order that he be detained in such place and in such manner and for such period as the Governor may specify.”

s.59(1): The relevant terms of this sub-section are set out at page 379, lines 27–34.

(4): “An order of the Governor or of the magistrates’ court under subsection (1) or subsection (2) shall not authorize the detention of an unauthorized person for a period exceeding twenty-eight days, but such an order may be renewed from time to time.”

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; or
- (b) being a prohibited immigrant is found in Gibraltar, is guilty of an offence”

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p. 3602), Annex 1, s.3: The relevant terms of this section are set out at page 380, lines 4–19.

A.V. Stagnetto, Q.C. and *G.S. Stagnetto* for the appellant;
C.A. Gomez and *S. Bossino* for the respondent.

FIELDSEND, P.: This appeal concerns five Russians and their detention under s.59(1) of the Immigration Control Ordinance. The proceedings are in the name of one of them—German Duyonov—but the facts in each case, so far as this appeal is concerned, are identical. It is agreed that the decision in this case will be binding on the others.

Duyonov left Abkhasia on November 1st, 1995 by sea to seek asylum in Canada, paying US\$2,000 for his passage. He was put ashore in Gibraltar on November 17th, having been given the impression they had arrived in Canada, and the ship carrying him left. He at once surrendered to the immigration authorities. He told them that he had landed from a ship and had no money or papers and said he was seeking asylum. This was not asylum as defined in s.55 of the Ordinance so the Governor could not act under s.55(3) of the Ordinance, which gives him power to order the removal and detention of a political refugee who claims or seeks asylum.

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Instead the Governor at once issued the following order:

“By virtue of the power vested in me under s.59(1) of the Immigration Control Ordinance, I order Geman [sic] Duyonov, Alexia Mirza, Anatolu Mirza, Vladislav Sprygin and Nikolay Ivanou to be removed from Gibraltar and until the time of their removal I order their detention at H.M. Prison.

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I order the removal of Geman [sic] Duyonov, Alexia Mirza, Anatolu Mirza, Vladislav Sprygin and Nikolay Ivanou, who being a non-Gibraltarian and a person who, requiring a permit or certificate, is in Gibraltar without holding such permit or certificate and is therefore unlawfully in Gibraltar.”

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This order has been renewed from time to time and alleviated in certain ways to allow some freedom of movement from the prison during the day-time. It was the lawfulness of the order and its renewal which was successfully challenged in the Supreme Court, whose decision is now challenged here.

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Section 59(1), upon which the Crown relies, reads:

“Any person found in Gibraltar or attempting to enter Gibraltar contrary to the provisions of this Ordinance and any person unlawfully within Gibraltar (hereinafter in this section called ‘an 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 or such court until so removed.”

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Duyonov has never been charged with any offence under the Ordinance, such as being a non-Gibraltarian having entered Gibraltar without a valid entry permit (ss. 12(1) and 62), though it is not disputed that he fell within those provisions, nor has he been declared a prohibited immigrant under s.52.

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The short point for decision is whether the Governor was entitled to make the order for removal and detention under s.59(1). The answer turns upon the proper interpretation of that section. The approach to the interpretation of a section of this nature, which affects the liberty of the subject, is that it must be interpreted strictly—that is, against the deprivation of liberty. No authority is needed for such a proposition. This

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approach is, if anything, reinforced by the provisions of the Gibraltar Constitution contained in Annex 1 to the Gibraltar Constitution Order 1969, s.3. So far as is relevant to this case the section reads:

- “(1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say 5
- ...
 (i) for the purpose of preventing the unlawful entry of that person into Gibraltar, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Gibraltar or the taking of proceedings relating thereto. 10
- (2) Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.
- (3) Any person who is arrested or detained— 15
- ...
 (b) upon reasonable suspicion of his having committed, or being about to commit a criminal offence,
 and who is not released, shall be brought without undue delay before a court”

Section 55(3) of the Immigration Control Ordinance is an example of a law clearly falling within s.3(1)(i). It gives the Governor express and unconditional power to remove and detain a non-Gibraltarian seeking political asylum. 20

The issue in this appeal is whether s.59(1) gives a similar unconditional power over “any person found in Gibraltar or attempting to enter Gibraltar contrary to the provisions of this Ordinance and any person unlawfully within Gibraltar.” In effect this means a non-Gibraltarian who has no valid entry permit, no valid permit of residence or no valid certificate entitling him to remain (see s.12(1)). Section 62 penalizes such a person who is liable on summary conviction to 3 months’ imprisonment or a fine at level 2 on the standard scale. 25 30

As I read the section, what it provides for primarily is the ordering of the removal, and detention pending removal, of persons entering or being in Gibraltar unlawfully, *i.e.* without having the permit or certificate required by s.12(1). Without the section, neither the Governor nor the magistrates’ court has a power of removal or detention. 35

Mr. Gomez for the respondent submits that the use of the words “may in addition to any fine or imprisonment authorized hereunder” means that before either the magistrates’ court or the Governor may order removal and detention there must have been a conviction under the Ordinance for in effect contravening s.12(1). For the appellant, Mr. Stagnetto contends that so far as the magistrates’ court is concerned, there must be not only a conviction but also the imposition of a fine or imprisonment before that court can make an order for removal, but he says that the Governor can act without any prior conviction or sentence. 40 45

It is clear that Mr. Stagnetto's concession so far as the power of the magistrates' court is concerned, is correct. Whether or not conviction alone would entitle the court to order removal is largely an academic question. If there were a conviction some at least nominal penalty would almost invariably be imposed. I only point out that the section refers to "in addition to any fine or imprisonment authorized hereunder." It does not say any fine or imprisonment "imposed" and, of course, the fine or imprisonment is authorized only in the event of a conviction. One starts, therefore, with the position that the magistrates' court can only make an order for removal if there has been a conviction.

On its face, the structure of the section is such that it requires a very strained interpretation to hold that it should be read in such a way as to make different provisions as between the Governor and the magistrates' court. The words "in addition to any fine or imprisonment authorized hereunder" apply equally to the Governor and the magistrates' court. There is nothing to separate or distinguish the powers of the one from those of the other. In each case the person being removed and detained is a person who has in effect contravened the law—almost certainly s.12(1) of the Ordinance. When the magistrate exercises his power he will have determined that question judicially. One is entitled to ask why the same determination should not have been made before the Governor acts. To allow the Governor to act without such a determination is contrary at least to the spirit of s.3(3) of the Constitution. In my view there is nothing in s.59(1) which compels one to reach a conclusion that the powers of the Governor and the magistrates' court should be treated separately.

If the legislature had wished to give the Governor wider powers it could easily have done so in a separate sub-section. Depending on its wording, this could fall within the exception in s.3(1)(i) of the Constitution which is set out earlier. Section 55(3) is an example of a law authorizing deprivation of liberty for a specifically exempted purpose. As Mr. Gomez submits, s.59(1) should be interpreted as not being in conflict with the Constitution. To allow the Governor to order removal and detention without any form of procedure which allows the person involved to present his case would, in the absence of clear provision, be in conflict with the Constitution. This is avoided if the section is read as allowing the Governor to act only after the person to be removed has been convicted in the magistrates' court.

So far so good, but other sections of the Ordinance, notably ss. 52 and 53, raise other indications. We had not been referred to these initially and we sought further assistance from counsel as to what impact, if any, those sections might have on the interpretation of s.59(1). Section 52(1) empowers the Principal Immigration Officer to "declare to be a prohibited immigrant any non-Gibraltarian who seeks to enter, enters or has entered Gibraltar" and is at the relevant time a "person whose presence in or entry into Gibraltar is . . . unlawful under this Ordinance or any other Law" (see para. (i)).

Sub-section (2) provides that “any person declared to be a prohibited immigrant . . . may appeal to the Governor . . . whose decision shall be final.”

Section 53(3) empowers the Principal Immigration Officer to detain for up to 48 hours “any prohibited immigrant found in Gibraltar” and s.53(4) provides that “any prohibited immigrant may be dealt with in the same manner as an unauthorized person may be dealt with under s.59.”

If one assumes that a person has been declared a prohibited immigrant by the Principal Immigration Officer and that the Governor has confirmed this on appeal, the obvious next step is recourse via s.53(4) to s.59(1). There is no other appropriate way in the Ordinance of securing that person’s removal and interim detention, which under s.59(4) can be only for successive periods of 28 days. Reading ss. 52, 53 and 59(1) together it cannot have been the intention of s.59(1) that before the Governor could act under it he had to await the conviction of the prohibited immigrant in the magistrates’ court. There has in the postulated circumstances been a final determination by the Governor that the person is a prohibited immigrant and, *ex hypothesi*, he is in Gibraltar. Section 59(1) cannot have contemplated that there should now be a further enquiry by the magistrates’ court before the Governor can act to remove and detain. After all, the Governor’s determination that the person is a prohibited immigrant is final and binding on the court.

It is perhaps unfortunate that ss. 52 and 53 do have this impact on s.59(1), because the meaning to be given to s.59(1) that the Governor can act without there having been any conviction in the magistrates’ court must apply not only where the Governor has determined the issue on appeal under s.52(2) but also where a person has been declared a prohibited immigrant by only the Principal Immigration Officer under s.52(1). But illegal immigration into any country is a matter of vital importance to the welfare of the community as a whole. For example, one of the bases for declaring a person a prohibited immigrant is that he has been certified to be suffering from a contagious or infectious disease which makes his presence potentially dangerous to members of the public. Urgent action may then be required for immediate detention for longer than 48 hours.

The Constitution recognizes this need for control and it cannot be said that the provisions of the Ordinance are unconstitutional, but it seems to me that it would have been far better for the Governor’s powers of removal and detention to have been specifically set out, and not left dependent on the ambiguous wording of s.59(1). In my view the order for the removal and detention of Duyonov by the Governor without a prior conviction under the Ordinance was within his powers under s.59(1) and the appeal must be allowed. That order has now elapsed by effluxion of time—see s.59(4)—so there is at present no effective order for the detention of Duyonov.

DAVIS and O’CONNOR, J.J.A. concurred.

Appeal allowed