



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017: No. 223

In the matter of a writ of habeas corpus

BETWEEN:-

BILLY ODOCH

Applicant

-v-

THE QUEEN

Respondent

EX TEMPORE JUDGMENT

(In Court)

Writ of habeas corpus – Bermuda Immigration and Protection Act 1956 ss 106(1)(c), 107(2), 110(1) and 110(2) – whether reason given for Applicant’s detention prior to deportation satisfied section 5(1) of the Constitution

Date of hearing: 16th June 2017

Mr Kamal Worrell, Lions Chambers, for the Applicant

Mr Philip Perinchief and Ms Tanaya Tucker, Attorney General’s Chambers, for the Respondent

1. This is the hearing on the return of a writ of habeas corpus issued on behalf of Mr Odoch, a Ugandan citizen. It has been said that the writ of habeas corpus remains of the highest constitutional importance, for by it the liberty of the individual is vindicated and his release from any manner of unjustifiable detention assured.¹ If on the face of its evidence the Respondent shows a valid authority for the detention, it is for the Applicant to show that the detention is prima facie illegal. R v Governor of Risley Remand Centre, ex parte Hassan [1976] 1 WLR 971, DC.²
2. The facts behind this particular application are as follows. On a date which no-one before me seems to know, Mr Odoch was convicted in Bermuda for: (i) using a false instrument (a British passport) with the intent to induce others and (ii) dishonestly obtaining a British Overseas Territories Citizen (Bermuda) passport, contrary to the Criminal Code 1907 (sections 372(1) and 345(1) respectively). He was imprisoned in Westgate, and released on a date which the Applicant says was sometime in January 2017 and the Respondent says was 18th February 2017, although nothing turns on the distinction.
3. Mr Odoch states in his evidence – and this point was not contradicted – that since his release from Westgate he has been living in Bermuda with the full knowledge and consent of the Department of Immigration and has been in contact with them or contactable by them through his counsel. He says that during this time he has abided by the law of the land and has not caused any trouble, and that during the same period the police have entered and searched his residence on at least two occasions but that nothing liable to seizure was ever found.
4. In parallel with the deportation proceedings, to which I shall come shortly, Mr Odoch has sought asylum on the basis that he has, he says, a well-founded fear of persecution should he return (or be returned) to Uganda. On

¹ 1999 Edition of White Book, para 54/1/2.

² 1999 Edition of White Book, para54/7/4.

26th April 2016 according to the Respondent, and in January 2017 according to the Applicant, Mr Odoch applied for asylum on those grounds.

5. On 27th February 2017 according to the Respondent, and in January 2017 according to the Applicant, Mr Odoch was interviewed by the Department of Immigration. Dr Ming, the Chief Immigration Officer, has sworn an affidavit in which she explains that the UN Refugee Convention, and Protocol extended to it, has not been extended to Bermuda and as such the issue of an asylum claim is ultra vires the Bermuda Government. The interview, which took place on behalf of Government House and the UK authorities, was intended to facilitate the asylum process as Mr Odoch was physically present in Bermuda. But although Mr Odoch asserts that he ought to be afforded asylum in Bermuda he cannot be considered for asylum here because the UN Refugee Convention and Protocol extended to it has not been extended to Bermuda.
6. What I take from all that is that the Foreign and Commonwealth Office in the United Kingdom is currently considering his asylum application and that he can expect a decision one way or the other in due course.
7. Mr Worrall, who appears for Mr Odoch, has indicated that, with his client, he is giving serious consideration to issuing judicial review proceedings challenging the deportation order on the ground that the asylum application is still pending. I am not in a position to form a view as to the merits of that prospective challenge so I shall consider the habeas corpus application on the assumption that the deportation order is valid.
8. On 26th May 2017 the Governor signed a deportation order. This stated:

*“**WHEREAS** His Excellency Mr. John Rankin, Governor of Bermuda acting upon the advice of the Hon. Patricia Gordon-Pamplin, a Minister acting under the general authority of the Cabinet, thinks fit to make a Deportation Order in respect of **BILLY ODOCH**, a person charged within the meaning of section 103 of the Bermuda Immigration and Protection Act 1956 and who is a person in respect of whom the Governor considers it conducive to the public good to make a Deportation Order*

***NOW THEREFORE** I, Mr John Rankin, Governor of Bermuda do in exercise of the powers conferred upon me by section 106(1)(c) of the Bermuda Immigration and Protection Act 1956 **HEREBY ORDER** the said **BILLY ODOCH** to leave these islands and thereafter to remain out of these Islands until further Order.*

***AND I DO FURTHER DIRECT** that the said **BILLY ODOCH**, be detained in Her Majesty's Prison until such time as he can be placed on board any ship or aircraft about to leave these Islands, after the service of this Order upon him."*

9. On 29th May 2017 the Department of Immigration received the deportation order and on 2nd June 2017 officers attended at Mr Odoch's residence. He wasn't there, but on a date which the Respondent says was 6th June 2017, and the Applicant says was 7th June 2017, pursuant to the deportation order Mr Odoch was arrested.
10. On 9th July 2017 a writ of habeas corpus was issued. It has been returned before me today. What I have to determine is whether Mr Odoch has been lawfully detained.
11. I turn to the relevant statutory provisions, and first to the Bermuda Immigration and Protection Act 1956 ("the 1956 Act"). The deportation order was made pursuant to section 106(1), which says:

"The Governor may, if he thinks fit, make a deportation order in respect of a person charged –

.....

(c) who is a person in respect of whom the Governor considers it conducive to the public good to make a deportation order;".

12. Section 107(2) says:

"A person in respect of whom a deportation order has been made may be detained in such a manner as may be directed by the Governor, and may be placed on board a ship or aircraft about to leave Bermuda, and shall be deemed to be in lawful custody whilst so detained and until the ship or aircraft finally leaves Bermuda:".

13. I note that the making of an order detaining the subject of a detention order is discretionary not mandatory. It is common ground that such a discretion

must be exercised lawfully and reasonably within the meaning of classic judicial review principles.

14. Before leaving the 1956 Act, I should note section 110, which says:

“(1) A person in respect of whom a deportation order is made shall leave Bermuda in accordance with the terms of the order, and shall thereafter so long as the order is in force remain out of Bermuda.

(2) Any person who contravenes subsection (1) commits an offence against this Act.”

15. I do not take that section to criminalise a person who, having being served with a deportation order, uses their best endeavours to comply with it within a reasonable time. That is to say, the mere service of a deportation order on someone does not in itself mean that as long as they remain in Bermuda they are committing an offence.

16. When construing the reasonableness of the Governor’s decision to detain Mr Odoch, regard must be had to section 5(1) of the Bermuda Constitution. Breach of that section would be a freestanding ground on which the lawfulness of the order to detain could be challenged. Section 5(1) says in material part:

“No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases:

.....

(e) upon reasonable suspicion that he has committed, or is committing, or is about to commit a criminal offence;

.....

(h) for the purpose of preventing the unlawful entry of that person into Bermuda or for the purpose of effecting the expulsion, extradition or other lawful removal from Bermuda of that person or the taking of proceedings relating thereto.”

17. To be lawful, the reason for Mr Odoch’s detention must fall within one of the exceptions within section 5(1). The only evidence – and the Court decides this application on evidence not submissions – that I have as to the Governor’s reasoning in taking the decision is to be found in the affidavit of

Dr Ming. She states at paragraph 10, having recited the offences for which Mr Odoch was convicted and imprisoned:

“He is a criminal. He is a person who the Governor and the Minister consider it to be in the public interest that he be incarcerated until deported from Bermuda.”

18. I note in parenthesis that the decision is that of the Governor and not the Minister to make, so the Minister’s views on the subject are not relevant save insofar as the Governor wishes to inform his decision making by taking them into account.
19. The difficulty which Mr Perinchief, who appeared with his customary eloquence and skill for the Respondent, faces is that that reason tracks the wording of the statute justifying a decision to deport a person (ie section 106(1) of the 1956 Act) but it does not on the face of it constitute a valid reason for the person’s detention. It is the fact that the Governor considers it to be in the public interest that Mr Odoch be incarcerated until he is deported from Bermuda does not on the face of it fall within section 5(1)(e) or section 5(1)(h) of the Constitution, or within any of the other exceptions within section 5(1). Nor does the mere fact that he is a criminal: you cannot lawfully punish someone twice for committing the same offence.
20. It would have been open to the Governor to take the decision, assuming that he were minded that the material before him justified him in so doing, on the basis that Mr Odoch has what he (ie Mr Odoch) considers to be a well-founded fear of persecution should he be returned to Uganda and therefore has every incentive to go to ground and make himself scarce should he remain at liberty before the deportation order can be actioned.
21. Further or alternatively, it would have been open to the Governor to conclude, were he minded that the material before him so merited, that given Mr Odoch’s previous convictions there were reasonable grounds to suspect that if he remained at large he would commit an offence. Given that he hasn’t done so since his release, there might have been some difficulty in upholding that potential justification, but it would have been open to the Governor to take the decision on that basis.

22. But neither of those reasons – the fear that Mr Odoch would go to ground or the fear that he would commit a further offence – which would correspond neatly with section 5(1)(h) and section 5(1)(e) of the Constitution respectively, has been given as the ground on which the Governor took the decision. His reason was that Mr Odoch was a criminal and a person whom the Governor considers it to be in the public interest that he be incarcerated until deported from Bermuda. In my judgment that reason does not satisfy the requirements of the carve-outs in section 5(1) of the Constitution, and as the decision does not pass constitutional muster it cannot be considered reasonable in a judicial review sense, besides being in breach of the Constitution in any event.
23. On those grounds the application for Mr Odoch’s release is successful, and I order that he be released accordingly. That decision does not necessarily preclude the Governor from reconsidering the question of his detention in light of the aforesaid requirements of the Constitution, but that is a potential argument for another day. For now, Mr Odoch, you are free to go, once the relevant formalities and paperwork have been completed.
24. [After hearing submissions from counsel, the Court awarded the Applicant his costs on the standard basis, to be taxed if not agreed.]

Dated this 16th day of June, 2017

Hellman J