MIFIBOSHE WALULYA v ATTORNEY-GENERAL OF ZAMBIA (1984) Z.R. 89 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND MUWO, J.J.S
18TH JULY, AND 9TH NOVEMBER, 1984
(S.C.Z. JUDGMENT NO. 15 OF 1984)

Flynote

Immigration and Deportation - Detention - Grounds for detention - Immigration and Deportation Act - Detainee under - Whether entitled to written grounds.

Headnote

The appellant, a Uganda National, was detained under the Immigration and Deportation Act of the Laws of Zambia. After the commencement of his detention he was neither informed of the reasons of his detention as required by section 35 (1) of the Act nor served with written grounds for his detention as required by Article 27 (1) (a) of the Constitution.There was an irregularity in the document which accompanied him to his place of detention. He applied to the High Court for an order that the detention was wrongful. His application was dismissed. He appealed.

Held:

(i) The only explanation to which a person detained under the Immigration and Deportation Act is entitled is provided for in Article 15 (2) of the Constitution namely that he shall be informed as soon as reasonably practicable in a language that he understands of the reasons of his detention.

(ii) The provisions of Article 27 (1) (a) of the Constitution do not apply to a. person who is detained under the provisions of the Immigration and Deportation Act as such no written grounds are required.

(iii) Provided there is in existence a valid authority for detention, an irregularity in the document accompanying a detainee to his place of detention is a breach of the provisions of the Prison Act but does not render the detention unlawful.

(iv) For purposes of detention, the Immigration and Deportation Act is not an Act which comes into force only during periods of emergency, it is an Act which is in force at all times.

Cases cited:

(1) R. v Secretary of State for Home Department Ex-parte Iqbal, [1979] 1 All E.R. 675.
(2) Puta v The Attorney-General, (1983) Z.R. 114.
(3) In the matter of Lekoma, High Court Judgment No. 1973/HP/972.

Legislation referred to:

(1) Constitution of Zambia, Cap. 1, Arts 15 (1) (i) (2), 24 (1) (b) (2) (3), 26 (1), 27 (1) (a), 30.
(2) Immigration and Deportation Act, Cap. 122, ss. 9, 22 (2), 23, 24, 26 (2) (4) (5), 34, 35 (1) (2).
(3) Prisons Act, Cap. 134, s. 35.

For the appellant: S.S. Zulu, Zulu and Company.
For the respondent: A.G. Kinariwala, acting Parliamentary Draftsman.

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Judgment

GARDNER, J.S.: delivered the Judgment of the court.

This is an appeal against a judgment of the High Court dismissing an application for an order that the appellant's detention by Immigration officials was wrongful and illegal under the Immigration and Deportation Act, Cap. 122, and that he be released forthwith.

The appellant is a Uganda national and entered Zambia in 1962. In 1970 he obtained a resident's permit. On the 31st of August, 1982, he was arrested and detained.

In the court below it was argued on behalf of the appellant that he had not been informed of the reason for his arrest and detention as required by section 35 (1) of the Immigration and Deportation Act, Cap. 122 (hereinafter referred to as the Act) and that he had not been served with written grounds for his detention in accordance with the provisions of Article 27 of the Constitution.

The requirement for informing a person of the reason for arrest and detention is set out in section 35 (1) of the Act which reads as follows:

> "35. (1) Every person arrested or detained under the provisions of this Act shall be informed as soon as reasonably practicable in a language that he understands of the reason for his arrest and detention."

The relevant law relating to prohibited immigrants and deportation is contained in sections 22 and 26 of the Act.

Section 22 provides that any person whose presence in Zambia is declared in writing by the Minister to be inimical to the public interest shall be a prohibited immigrant. Section 23 provides that any immigration officer may or, if so directed by the Minister in the case of a person to whom section 22 (2) relates, shall by notice served in person on any prohibited immigrant require him to leave Zambia.

Section 26 (2) provides that any person who in the opinion of the Minister is by his presence or his conduct, likely to be a danger to peace or good order may be deported pursuant to a warrant under the hand of the Minister.

On the 17th of june, 1981, the Minister of Home Affairs issued a warrant for the deportation of the appellant under section 26 (2) of the Act and a notice was published in the Government Gazette on

the 13th of October, 1981, purportedly in accordance with the provisions of section 34 of the Act as service of the declaration that the appellant was a prohibited immigrant. At the time of the arrest and detention of the appellant a warrant signed by an immigration officer was directed to the officer n charge of the remand prison in Lusaka to the effect that the appellant was a person to whom sub-section 5 of section 26 of the Act referred.

There was evidence front two immigration officers that they informed the appellant that he was prohibited immigrant and that he was being taken to the remand prison whilst arrangements were made for him to leave the country.

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Before this court Mr Zulu on behalf of the appellant put forward three grounds of appeal. The first ground was that the learned trial judge was wrong in finding that the appellant was informed of the reasons for his detention pursuant to section 35 (1) of the Act. The second ground, which, with the consent of counsel for the respondent, Mr Zulu was given leave to argue, although it had not been raised in the court below or in the memorandum of appeal, was that there was a defect in the warrant delivered to the remand prison as the authority for the detention of the appellant, and the third ground was that the learned trial judge was wrong in finding that the provisions of Article 27 of the Constitution as to the service of grounds of detention did not apply in the case of a detention under the Act.

In support of his first ground of appeal Mr Zulu argued that although the appellant was informed that he was arrested and detained because he was a prohibited immigrant he was not served with any document to that effect, and was not told under which section of the Act he had been declared a prohibited immigrant.

There is no dispute that apart from the notice in the Gazette there was no service of any warrant or notice on the appellant and he was not told under what section of the Act he was detained. Mr Zulu pointed out that it was possible for a person to be detained either under section 22 or 26 of the Act, and he argued that there were different remedies available.

There is under section 24 a provision that any person served with a notice under section 23 requiring him to leave Zambia may make representations to the Minister. In this case no such notice was issued or served because the provisions as to such notice only apply to a person who is declared to be a prohibited immigrant under the provisions of section 22 (2). The appellant was in fact the subject of a warrant issued by the Minister under section 26 (2) and there is no statutory provision for service of such a warrant on a detained person. It follows therefore that as the appellant, was not the subject of a declaration under section 22 (2) no notice could be issued under section 23 and consequently there was nothing in writing to serve on the appellant.

We agree with Mr Zulu that the publication of a notice in the Government Gazette was unnecessary and inappropriate. Section 34 of the Act provides that any written notice required under the Act to be served may be published in the Gazette. This provision would apply to a notice under section 23, but as we have indicated, no such notice was or could be issued. In the event and in default of any notice under section 23, the only method of deportation which could be applicable

to the appellant was under section 26 (2). There is no statutory right for representations to be made to the Minister by a person who is the subject of a warrant under section 26 (2) and the appellant suffered no disadvantage by not being specifically told under which section he had been declared a prohibited immigrant.

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We are satisfied that the learned trial judge did not misdirect himself when he found that the appellant had been informed that he was being arrested and detained because he was a prohibited immigrant, and that this was in compliance with section 35 (1) of the Act. This ground of appeal must therefore fail.

As to the second ground of appeal, the immigration officer prepared a warrant of detention purportedly under section 26 (4) of the Act and this warrant accompanied the appellant to the remand prison. Section 26 (4) reads as follows:

> "(4) An immigration officer may without warrant arrest, detain and deport from Zambia any person whom, within seven days of such person appearing before an immigration officer in accordance with section nine, he reasonably believes to be a prohibited! immigrant . . . "

Section 9 of the Act provides that every person who arrives in Zambia shall forthwith appear before the nearest immigration officer.

The appellant came to Zambia in 1962 and, being on a resident's permit, it is quite clear that section 9 did not apply to him, consequently section 26 (4) was inapplicable and Mr Zulu is quite correct in saying that the immigration officer should not have issued a warrant with reference to that section. The appellant was detained by virtue of a warrant issued by the Minister under section 26 (2), and it is provided in section 26 (5) that any warrant issued under that section shall be sufficient authority for the detention and removal from Zambia of the person mentioned therein. Mr Zulu argued that, because the warrant which accompanied the appellant to the remand prison was an improper warrant which referred to section 20 (4) instead of the Minister's warrant issued under section 26 (2), the detention at the remand prison was illegal.

Section 55 of the Prisons Act, Cap. 134, provides that no person shall be admitted into a prison unless under the authority of and accompanied by inter alia (a) an order of detention under the hand of any person authorised to sign such order, or (c) a warrant of an immigration officer issued under the provisions of the Act. In this case the appellant was accompanied by a warrant issued by an immigration officer under the Act. As we have indicated, that warrant was inappropriate and should not have been issued; the appellant should have been accompanied by the Minister's warrant under section 26 (2).

The facts of this case are that there was authority for the detention of the appellant under the Minister's warrant. There was therefore legal authority in existence for the detention of the appellant, but he was accompanied by the wrong document when he was taken to the remand prison. We have to consider whether that renders his detention unlawful.

In the case of *R. v Secretary for the Home Department, ex parte lqbal* (1)' the Divisional Court held (Boreham J. dissenting) as follows:

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> "When on a return to an application for habeas corpus the person having custody of the applicant produced as justification for the detention a. document, which, though valid on its face, was subsequently found to contain some material error, the court was entitled, as part of its enquiry under section 3 of the Habeas Corpus Act 1816 into the truth of the facts stated in the return, to go behind the wording on the face of the return and see whether there were in fact good grounds for the detention of the applicant and was not restricted to merely examining the reasons for the detention given in the return. Since the immigration officer had in fact had valid grounds to authorise the applicant's detention, and since the applicant had suffered no injustice or prejudice by the error, the application would be dismissed."

The facts of that case were that the applicant was taken into custody as an illegal immigrant under a detention order issued by an immigration officer pursuant to paragraph 16 (2) a Sch. 2 to the Immigration Act 1971. By mistake the order stated that the applicant was to be held 'pending his further examination under the Act' instead of for the reason appropriate for detention under paragraph 16 (2), namely 'pending the completion of arrangements for dealing with him under the Act'. At the time the order was issued the immigration authorities' enquiries had finished and examination of the applicant was complete. The applicant, who maintained that he was a lawful entrant, applied for a writ of habeas corpus contending, inter alia, that the immigration officer had no right to detain him for the reason stated in the order. Boreham, J. dissented on the grounds that the proper procedure for detention must be strictly followed and he saw no reason why a fresh and valid detention order should not have been served on the Prison Governor. In the event there was an appeal against the Divisional Court's decision but when the matter came before the Court of Appeal it was disclosed that at the time of the Divisional Court hearing a fresh and valid order had in fact been served on the Prison Governor. The appeal and the reasons for the dissenting judgment therefore fell away. The majority of the judges in the Divisional Court came to the conclusion that the detention in that case was lawful on the grounds that although the order for detention was in the wrong form, the detention could be justified for another reason and it was the duty of the court to inquire into all reasons for the detention.

In the case at present before us there was no specific application for habeas corpus but the circumstances are analogous and the same reasoning applies. Furthermore, in this case there was in fact a valid document in existence namely the Minister's warrant, which authorised the detention of the appellant and the irregularity arose out of the fact that the document did not accompany the appellant to the place of detention. In *Puta v The Attorney-General* (2), this court said that there is no statutory requirement for a police warrant of detention to be served on a detainee and the same applies to a Minister's warrant under Section 26 (2). In our view, provided there is in existence a valid authority for detention, an irregularity in the document accompanying a detainee

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to his place of detention is a breach of the provisions of section 55(1) of the Prisons Act but does

not render the detention unlawful. For these reasons the second ground of appeal must fail.

In support of the third ground of appeal Mr Zulu argued that no written grounds of detention had been served on the appellant in accordance with Article 27(1) of the Constitution which reads as follows:

> "27. (1) Where a person's freedom of movement is restricted, or he is detained, under the authority of any such law as is referred to in Article 24 or 26, as the case may be, the following provisions shall apply:
>
> (a) he shall, as soon as is reasonably practicable and in any case not more than fourteen days after the commencement of his detention or restriction, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is restricted or detained . . ."

Article 26 refers to laws authorising the taking of measures during any period when the Republic is at war or when there is a declaration of emergency under Article 30. There is in fact at present a declaration of emergency, but the Immigration and Deportation Act under which the appellant is detained is not an Act which comes into force only during periods of emergency, it is an Act which is in force at all times.

"Article 24 reads (inter alia) as follows:

> "24.(1) No person shall be deprived of his freedom of movement, and for the purposes of this Article the said freedom means the right to move freely throughout Zambia, the right to reside in any part of Zambia, the right to enter Zambia and immunity from expulsion from Zambia.
> (2) Any restriction on a person's freedom of movement that is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this Article.
> (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision . . .
>
> (a) for the imposition of restrictions that are reasonably required in the interests of defence, public safety, public order, public morality or public health or the imposition of restrictions on the acquisition or use by any person of land or other property in Zambia, and except so far as that provision or as the case may be, the thing done under the authority thereof, is shown not to be reasonably justifiable in a democratic society;

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> (b) for the imposition of restrictions on the freedom of movement of any person who is not a citizen of Zambia; . . .' '
> (d) for the removal of a person from Zambia to be tried outside Zambia for a criminal offence or to undergo imprisonment in some other country in execution of the sentence of a court in respect of a criminal offence under the law in force in Zambia of which he has been convicted."

(The other sub-paragraphs are irrelevant to this case).

Mr Zulu's reasoning is that Article 27 requires written grounds of detention to be served on a person detained under any such law as is referred to in Article 24; that, that Article refers to any law imposing restrictions on the freedom of movement of non-citizens; that the appellant's freedom of movement as a non-citizen is affected by the implementation of the provisions of the Act and that it follows therefore that he is a person who must have written grounds of detention served on him. Article 15, reads in part:

"15 (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 . . .

> (i) for the purpose of preventing the unlawful entry of that person into Zambia, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Zambia or for the purpose of restricting that person while he is being conveyed through Zambia in the course of his extradition or removal as a convicted prisoner from one country to another . . ."

There is therefore the same exception to a person's right to liberty and freedom of movement contained in two separate articles. Under one of those articles a person who is detained must be served with written grounds of detention, and under the other no such provision applies; in fact under section 35(2) of the Act the need for notification of grounds for detention is specifically excluded. The question to be decided therefore is whether the appellant, who is undoubtedly a person who is being deprived of his personal liberty for the purposes of effecting his expulsion under Article 14(1) (i), is also a person who is deprived of his freedom of movement under Article 24(1) (b). This question has already been decided in the High Court in the case of *In the Matter of Lekoma* (3), in which Cullinan, J. held that the provisions of Article 15 relating to deprivation of liberty are distinguished from the provisions referring to restriction of movement under Article 24.

Mr Zulu has not advanced any specific argument against that judgement and points out that the Supreme Court has never decided that issue and that is why the matter is now before us.

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Article 27(1) applies to persons whose movements are restricted or who are detained under the authority of any law referred to in Article 24 or 26. Article 26 refers to laws relating to any period of war or emergency and is inapplicable in this case. The only laws referred to in Article 24, and thus coming within the ambit of Article 27, are those referred to in Sub-article (3) and the only two sub-paragraphs which could possibly apply to the appellant are sub-paragraphs (a) and (b). Sub-paragraphs (a) refers to any law making provision for the imposition of restriction reasonably required in the interests of defence, public safety, public order, public morality or public health. The appellant was the subject of a warrant under the hand of the Minister stating that in the Minister's opinion the appellant is a person whose presence is likely to be a danger to peace and good order in Zambia. Further, sub-paragraph (b) refers to any law for the imposition of restrictions on the freedom of movement of any person who is not a citizen of Zambia. The appellant is not a citizen of Zambia. He therefore might be said to be a person referred to in sub-articles (3) (a) and (b) were it not for the fact that sub-paragraphs refer specifically to restrictions and on freedom of movement. Sub-article (2) recognises a distinction between detention and restriction by providing that lawful

detention involving restriction shall not be held to be inconsistent with or in contravention of the Article. The appellant was lawfully detained under the provisions of a law referred to in Article 15; his movements were therefore deemed not to be restricted under the provisions of any law referred to in Article 25.

We agree with the learned judge in the Lekoma case that a prohibited immigrant arrested and detained under the Act is a person referred to under Article 15(1) (i) and the only explanation to which such a person is entitled is provided for in Article 15(2), namely that he shall be informed as soon as reasonably practicable in a language that he understands of the reasons for his arrest or detention. We also agree that, in relation to persons deported under the Act, the provisions of Article 15 are separate and distinct from those of Article 24, so that a person whose detention falls within the exception referred to in Article 15(1) (i) is not to be regarded as a person referred to in Article 24.

We find therefore that the Provisions of Article 27(1) do not apply to a person who is detained under the Provisions of the Immigration and Deportation Act, and the appellant was not entitled to written grounds of detention.

The appellant has been unsuccessful on all the grounds of appeal and the appeal is dismissed.

There will be no order as to costs.

Appeal dismissed
