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PEN COURT

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO. 316/01

BETWEEN: Nez Nazar Nezary, Mohammad Raza Hussani & Ali Sha Yusufi — Plainitffs

AND: The Queen — Defendant

Appearances:
Marcus Thompson and Lawrence Aiolfi of Walkers and
David McGrath of Quin & Hampson for the plaintiffs

muel Bulgin, Solicitor General and Adam Roberts, Senior Crown Counsel for the defendant

Before Graham, J.

JUDGMENT

1. On the 22nd August 2000 the police at Central Police Station, George Town received a telephone call from a resident of the South Sound area of George Town to the effect that the plaintiffs had knocked on his door and told him that they had just arrived on the Island by ship from Turkey. They had believed that they had arrived in Canada! The police took the men to Central Police Station, George Town and contacted a senior

official of the Immigration Department. There they were interviewed by the Chief Immigration Officer and his Deputy. Of the three men the one who claimed to be aged 17, Nez Nezary, spoke good English. I am bound to say he looks rather more than the 17 years he claims. The other two men were interviewed on a preliminary basis using Nazari as an interpreter. They were later interviewed with the help of a visitor, an Iranian Doctor, and it was established that their native tongue is a dialect of Farsi (the national language of Iran) spoken by the minority Hazari people of Afghanistan. These men claimed to be Shia Muslims, a minority group in Afghanistan where the majority are Sunni. The Taliban "government" is composed of Sunni Muslims and persecute the minority Shia as heretics. Hazari are particular targets for brutal persecution in that land.

2. These men have since the 5th December 2000, claimed to be refugees from the Talilban regime in Afghanistan. As I have indicated they belong to a minority group both in terms of their adherence to the Shia variety of Islam and because of their ethnicity. To a Westerner they do not look like Afghans: they are of mongoloid appearance with pale yellow skin and eyes more slanted and narrow than those of Indo-European or African

people. They claim that family members have been killed by the Taliban. Their ethnic and national status was confirmed about one month after their arrest by the Consulate General of the Islamic Republic of Afghanistan in the United States. That Consulate-General is maintained by the ousted regime which, however, is almost universely recognised as being the lawful one. One of the officials of that Consulate spoke to each of the plaintiffs on the telephone and came to the conclusion that each of them spoke the language and dialect they claimed and were Afghans. Therefore, on the balance of probabilities, I find that they are indeed of the ethnic and religious background they assert. There is a question as to the authenticity of the names which they are presently using. There must be a real temptation by people who have fled a regime like that in Afghanistan to travel under assumed names for fear of reprisals against their kinsmen who remain in the home country. However, as they have satisfied the Afghan Consulate in the United States as to their general identity, albeit on information supplied by them and the Cayman authorities and that Consulate has issued travel documents in the names they claim are theirs I am just persuaded on the balance of probabilities that those names are genuine. I say that despite my reservations as to the true age of Nez Nazar Nezary who, as I have indicated rather looks

older than 17. Any one who follows test cricket will know, Pakistani cricketers, especially their bowlers, often appear to be much older than their claimed age. It is a fact that in countries such as Pakistan and Afghanistan true records as to births are not kept and age can be a matter of recollection and assertion. This factor has proved a significant problem to the immigration authorities in the United Kingdom and is nothing new. I therefore conclude that their claim to be refugees from Afghanistan on the basis of a well founded fear of persecution on the grounds of their religion or ethnicity is genuine. This court naturally deplores persecution of any kind and does its best, within the law, to deal with matters in as humane a way as possible.

3. As adumbrated above, it was and is the claim of the plaintiffs that after an overland trip from Afghanistan to Turkey they embarked on a Turkish ship en route for Canada. (There is a considerable Afghan diaspora in that country) They claimed that the journey from Turkey to "Canada" took 15 or 16 days. They claimed that they were confined to a room for the whole of the voyage, being fed once per day. When they arrived at this country they were told that they had arrived off the coast of Canada. They were taken ashore by a small boat with the ship lying one and a half mile out to

sea. They set off walking along the beach towards George Town eventually joining the road and knocking on the door of the resident who telephoned the police. In their possession was found US$600 and, significantly, as I shall demonstrate, 74 Cayman Island dollars.

4. The Immigration Department began an enquiry into recent landings of persons of middle eastern origin and discovered that three men travelling on Pakistani passports had landed at Owen Roberts Airport on the 20th August for a stated period of eight days. Their flight had originated in Havana, Cuba. There was no record of any those persons having left the Island at the end of the eight day period. They had indicated that they intended to stay at Adams Guest House from where the three "Pakistanis" checked out on the 21st April 2000". These three plaintiffs were later taken before the staff of the guest house and were identified as the three Pakistanis who had stayed there on the 20th August 2000. Whilst certain criticisms might be made of such an identification by confrontation in a criminal trial on the basis of the guidelines set out in *The Queen v. Turbull 63 C.A.R. 132.* It is to be borne in mind that this is a civil suit, and that in any event the finding of the Cayman Island dollars in the possession of one of them provides powerful corroboration of the

identification made by the staff of the guest house. It is inconceivable that the 74 dollar notes could be obtained in any of the countries in which the plaintiffs claimed they travelled through. I do not rule out the possibility of obtaining Cayman Island dollars in Cuba in view of the frequent tourist flights to that Island by residents of Grand Cayman. It is however, much more likely that the Cayman Island dollars were obtained on the Island when they stayed at the Adams Guest House. When US dollars are proffered for the payment of goods or services change is usually given in Cayman Island dollars. Accordingly, I find as a fact that the "three Pakistanis" are the same persons as those who checked into the Adams Guest House and are the three plaintiffs in this case. It follows that they are the three Pakistanis who obtained entry into the Islands by posing as Pakistanis and by proffering false Pakistani passports. No doubt they obtained those whilst travelling through Pakistan. It follows therefore that if, as they do, claim political asylum they should do so at the first safe country that they arrive at. On the evidence before me that country appears to be the Republic of Cuba, if it is deemed safe by the Foreign and Commonwealth Office. I note that there is evidence, which I accept, that there appears to have been a previous trip to Cayman from Cuba by one of the three proffering the false passport of Abdul Waheed on the

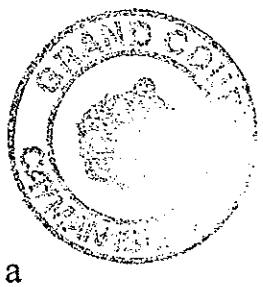
12th July, 2000. That appears to have been an evaluation exercise. It is apparent that he left the Island and was readmitted to the Republic of Cuba. I observe of course, that he did so by means of a deceit upon the Cuban Immigration Department in that he pretended to be a Pakistani with a valid Pakistani passport when he in fact was an Afghan.

These men were detained, after the initial period of detention in the Central Police Station at HMP Northward. This was done on the authority of an order made by an Immigration Officer under Section 52 (2) of the Immigration Law (2001) Revision. This is confirmed in paragraph 7 of the affidavit of the Chief Immigration Officer Mr. O.C. Connor. I accept this is a fact and reject the submission, made late in the case, by the Solicitor General that the legal basis for detention was actually under Section 53 of that Law. The detention order itself demonstrates that the detention was to commence on the 21st August 2000 and that the detainees were to be held until the 6th December 2000. Under Section 53 there is no limitation as to the period during which detention can take place whereas in Section 52 that detention must be temporary. Section 52 (2) provides:

> *"A person liable to detention or detained under subsection 1 may, with the leave of an Immigration Officer be temporarily*

granted permission to land without being detained or, if detained under that subsection may be released from detention, pending a decision whether to grant him permission under Section 47 but this shall not prejudice a later exercise of the power to detain him."

I read that section as placing an obligation upon the Immigration Officer constantly to keep under review the question of the detention of the detainee and deciding in the circumstances of the case whether or not that person shall continue to be detained or can be released upon such terms as are appropriate. Mr. Forster, the Prison Director, has made two affidavits. His second affidavit tells me that the detention orders made on the 23rd August 2000 were never renewed as such but that he had spoken to senior officials of the Immigration Department who informed him that it was still their intention that the three should continue to be detained at Northward. In my judgment that is not an adequate operation of the requirements of Section 52(2) of the Law. A conscious decision should be made and it should be evidenced in writing.



It is apparent that strictly limited detention is mandated by that section and a period of 10 months must be looked at with the greatest care. As I have indicated a conscious decision, weighing the relevant considerations must be made before the liberty of any person is taken away.

6. In or about the 6th December 2000, these three plaintiffs applied for political asylum in the Cayman Islands. It is to be noted that the provisions of the 1951 Convention Relating to the Status of Refugees requires those who have applied for political asylum to be at liberty if that is reasonably possible whilst their application for political asylum is being considered. The website of the United Nation High Commission for Refugees (UNHCR) suggests that "asylum-seekers should not be detained as a general rule. This is the more so when those detained are very vulnerable (one of these plaintiffs claims that he has been the personal victim of brutality) they are not criminals; they have already suffered great hardships and jailing them is wrong"..... "Detention is only acceptable if it is brief, absolutely necessary and instituted after other options have been implemented. Acceptable purposes include verification of identity, the protection of public order and, if necessary in cases where refugees have destroyed documents or used fraudulent ones. Detainees should always been informed of their rights including the right to challenge their imprisonment. All asylum-seekers must maintain the possibility of contacting the local UNHCR office, other agencies, and a lawyer". It is true to say that no Order in Council has been made extending the provisions of that convention to the Cayman Islands.

The United Kingdom is, of course, a signatory to it. The general position with regard to the terms of the convention are that they are a persuasive guide to conduct within the Islands save where they conflict with existing legislation. See *Elsworth Grant & Cherry Chin and the Principle of John A. Cumber Primary School and the Chief Education Officer*, a decision of the Court of Appeal delivered in February 2001, but as yet unreported. In the course of that judgment Collett JA adopted the decision of the Court of Appeal in England in *Regina v. The Ministry of Defence ex parte Smith [1996], 1 All.E.R. 257* the court indicated that it might interfere with the exercise of an administrative decision if satisfied that it was unreasonable as being beyond the range of responses open to a reasonable decision maker and in judging whether or not this was so it could take into account the human rights context; The more substantial the interference with such rights the more the court would require by way of justification before being satisfied that the decision was not unreasonable". The deprivation of liberty is the most "substantial" interference with normal human rights which can take place in a democratic society. The longer it takes place the more "substantial" it is. If one places the continuing failure to consider release in the context of the obligations imposed by the section and the human rights imperatives then the nature of the continued detention of the plaintiffs can

only be seen as illegal although not with malicious intent on the part of the authorities. There is nothing in Section 52 which offends the general scheme of the Convention. That is not the case with Section 53 which contemplates unlimited administrative detention.

7. The affidavit of Mr. Kevin Lewis Mowbray, the Governor's staff officer, sets out the efforts that he has made to establish the identity of these people and to liaise with international authorities to see what could be done for the plaintiffs. It is apparent that government of Canada would not consider granting them political asylum and he received no co-operation from the Embassy of Pakistan in Washington. After they had been released by this Court on the 31st May 2001 on an application for *Habeas Corpus*, the Home office in the United Kingdom advised Mr. Mowbray that the three plaintiffs could apply for an asylum visa to enter the United Kingdom at the British High Commission in Kingston, in Jamaica. There is of course no guarantee that such an application would be successful and the plaintiffs would have to show some connection with the United Kingdom, for example that they have relatives who live there. Consistent with my findings of fact as to the false information which these plaintiffs felt obliged to rely upon and the deception practiced by them on the Immigration authorities it is of little surprise to this

court that it took a considerable time for the relevant facts to be clearly established. I am bound to say however, that after the Afghan Consulate had issued travel documents on the 25th September 2000 the Immigration Department might well have come to the conclusion that they were indeed Afghans and not Pakistanis and were therefore deportable to an appropriate and safe country. After the 6th December 2000, when an application for political asylum had been made, different considerations applied. Although it is said that there is no legal structure for the granting of political asylum, it is apparent from the comments of Mr. Connor in an internal memorandum that such a concept is not unknown in the Cayman Islands. Indeed it is an established fact that a number of Cuban refugees have been granted political asylum in the past. The relevance of that is to underline the necessity of applying strictly the provisions of 52(2) which, as I read them, place upon the Immigration Officer the duty of constant review of detention orders. I am not satisfied that this took place in the way that it should have been in accordance with Law.

8. As a matter of fact it seems to me that in view of the difficulties created by the plaintiffs themselves the initial period of detention was not unreasonable and could be described as temporary in that context. It was fixed in terms of

time to expire on the 6th December 2000. Efforts were still being made to establish the true identities of these men even though travel documents had been issued in their claimed names. It was quite reasonable for the Immigration authorities and the Governor's executive officer seriously to query whether those names were genuine or not. The establishment of the true identity of a claimant for political asylum is a *sine que non* of granting it. What should have happened after the 6th December 2000 was consideration of a further formal order for detention and if appropriate a decision to that effect made. I am satisfied that this did not take place. Mr. O.C. Connor's affidavit does not deal with this critical matter. The only evidence I have comes from the second affidavit of Mr. Forster. Paragraph 4 (1) of his affidavit reads:

> *"During the period that the detainees were held in Northward I confirmed on several occasions with the Chief andf Deputy Chief Immigration Officer that it was still their INTENTION that the three continue to be detained in Northward. I wanted this detention to cease as soon as practical as the Prison had an accommodation problem at that time.*

Paragraph 5 reads:

> *"Whilst the Immigration Department normally provides a detention order to the Prison this is not invariably the case nor are extension times always confirmed in writing. This is because there is no requirement under the laws of the Cayman Islands for a written authorisation in Immigration cases".*

I am bound to say that is not the appropriate practise. When a decision is taken to deprive a person of his liberty or to extend a period of deprivation of liberty a conscious decision must be taken within the framework of subsection 2. An order must be made which should be communicated not only to the Prison Director but to the detainee as well. The evidence Mr. Forster put before me that it was the *intention* of the Immigration Officer that the three should be detained is not the proper carrying out of the duty imposed by Section 52(1) which permits the temporary detention of a person who has been refused permission to land. It has to be read with Section 52(2)as well where release pending adjudication is contemplated. This court would expect that in future formal orders would be made in the way that I have indicated above. It follows that the initial detention of these men was in accordance with the Law but from the 6th December 2000 until the date of their release by this court it was unlawful.

9. I would like to indicate that I have a considerable sympathy for the authorities in dealing with this novel and difficult matter. No one has acted in bad faith and there is clear evidence that Mr. Connor, his Deputy and Mr. Mowbray have all been acting with a view to securing the welfare and future

of these three men. Although I have found that they have been unlawfully detained since the 6th December 2000 I attribute that to what appears to me to be a failure by the Immigration Department to seek appropriate legal advice.

10. Now that certain legal and factual issues have been resolved by this court it is to be hoped that outstanding issues can be determined in the very near future. As I am ordering the immediate release of the plaintiffs I note that they are liable to further detention under Section 52(1)(b) and (2) of the Law. If that were to take place the court invites the Immigration Department to consider their release on appropriate terms after proper consideration. There is before me no evidence that they are a danger to the public and fears as to their possible links with a terrorist organisation have long since been dispelled. Since their release by the court they have behaved in a model fashion and have arrived at court on time. It is to be noted that from the time of their release by the court until today no restrictions have been imposed upon them. It is hoped that a decision is able to be made whether or not to grant them political asylum or, if not, to deport them to the first safe port through which they passed. I am told that the United Kingdom authorities propose to offer assistance in coming to that conclusion.

.Although I have found that these men have been in unlawful detention since the 6th December 2000, and despite the fact that they have succeeded in obtaining a final and absolute order from me in these proceedings I make no order for costs against the defendant.

12. I order a legal aid taxation and certify that it was proper to engage the services of three counsel in this complex matter.

5th June, 2001

H.G.D. Graham
Judge of the Grand Court