

UGANDA / JUDGMENT

Abdou v Attorney General and Others (Civil
Case
No. 10 of 1951) [1951] EACA 345 (1 January 1951)
[1951] EACA 345

COURT
East African Court of Appeal

BEFORE
Bourke J

CASE / FILE NUMBER
Civil Case No. 10 of 1951

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JOHANNES ABDOU, Plaintiff

Before BOURKE, J.

\$\nu\$.

THE ATTORNEY GENERAL and MEMBER FOR LAW AND ORDER OF THE COLONY OF KENYA,
Defendants

Civil Case No. 10 of 1951.

Immigration (Control) Ordinance—Deportation of prohibited immigrant— Article XI of Ethiopian
Agreement.

The plaintiff was a prohibited immigrant under the Immigration (Control) Ordinance, section 5
(1) (j) and a deportation order was made under the Immigration (Control) Regulations, regulation
36. He was taken into custody for deportation to Ethiopia.

The plaintiff prayed: \$-\$

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Cases cited: King v. Superintendent of Chiswick Police Station, ex parte Sacksteder, (1918) 1 K. B. D., 578; Rex v. Governor of Brixton Prison (1916) 2 K. B. 742, 752; Rex. v. Home Secretary ex parte Chateau Thierry (1917) 1 K. B. D. 922; Eleko v. Officer Administering the Government of Nigeria (1931)

Salter for plaintiff.

J. B. Hobson, Ag. Attorney General for defendants.

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JUDGMENT.—This decision is given pursuant to an Order of this Court made under Order VI, rule 27 by which the points of law raised by the defendants in paragraph 10 of the defence were set down for hearing and disposal before the trial of the issues of fact in the suit. If such points are to be decided in favour of the defendants the result will be a dismissal of the proceedings. The plaintiff prays: \$-\$

\$(1)\$ For a declaration—

- (a) that the plaintiff is not a member of the said Ethiopian forces or a deserter or absentee without leave therefrom;
- \$(b)\$ that the said Imperial Ethiopian Government has no valid claim for the plaintiff to be handed over to the said Government.
- (2) For an injunction restraining the defendants their servants and agents. from handing the plaintiff over to the said Imperial Ethiopian Government or to their servants or agents or to the military authorities of the said Ethiopian forces and from deporting him to Ethiopia by reason of any request from or claim by the said Government."

It is as well to set out paragraph 10 of the defence: \$-\$

"10. The defendants say further that the plaintiff is about to be lawfully deported in pursuance of statutory powers conferred upon the Governor by sections 9 and 10 of the Immigration (Control) Ordinance (Cap. 51), because the plaintiff entered the Colony illegally, and will object-

- (a) that the averments contained in paragraphs 3, 6, 7 and 8 of the \$(a)\$\$ plaint are irrelevant to such deportation;
- (b) that the Court has no jurisdiction to consider, or, alternatively, if it has jurisdiction that it ought not to consider, the matters pleaded in the said paragraphs of the plaint or any of them or to grant the relief prayed: and

- (c) that the question of whether or not the plaintiff must be returned to Ethiopia under the agreement mentioned in paragraph 6 of the plaint is not a question of municipal law which can be decided by a Kenya Court."

It is not in dispute that the plaintiff was a prohibited immigrant under section 5 (1) (i) of the Immigration (Control) Ordinance (Cap. 51) and that a valid order to leave the Colony within 30 days, namely by 15th October, 1950, was made by the Principal Immigration Officer under regulation 36 of the Immigration (Control) Regulations, 1948. On 22nd October, 1950, the Governor's Deputy in exercise of the powers conferred under section 9 of Cap. 51 made an order for the deportation of the plaintiff out of the Colony. Following the said Order the plaintiff was taken into custody on 23rd October, 1950. It is not in contest that, as matters stand, under section 10 of the Ordinance the plaintiff will be deported pursuant to the order for deportation to the "place whence he came", namely, Ethiopia, from which country it is averred by paragraph 3 of the plaint that he fled in fear of his life and sought refuge in this Colony as a political refugee.

By paragraph 9 of the plaint it is alleged that: "The defendants threaten and intend, unless restrained from so doing, wrongfully to hand the plaintiff over to the said Imperial Ethiopian Government or the military authorities of the Ethiopian forces." The particulars given of the word "wrongfully" in the paragraph just quoted are as follows:—

"The plaintiff relies upon the facts pleaded in paragraph 7 and 8 thereof (the plaint), and contends that it would be wrongful for him to be handed over to the Imperial Ethiopian Government or the military authorities of the Ethiopian forces in accordance with Article 11 of the Agreement mentioned in paragraph 6 of the plaint."

Reference has been made to paragraph 3 of the plaint and I now set out the three other paragraphs of the pleading to which exception is taken in point of law through paragraph 10 of the defence.

"6. Since the plaintiff left Ethiopia as aforesaid, representations have been made by the Imperial Ethiopian Government to His Majesty's Government of the United Kingdom that the plaintiff may be handed over to the Imperial Ethiopian Government as a deserter or absentee without leave from the Ethiopian forces, in accordance with Article XI of the Agreement made on 19th December, 1944, between His Imperial Majesty the Emperor of Ethiopia and His Majesty the King of Great Britain and Northern Ireland, etc.

7. The plaintiff denies that he is or ever has been a member of the Ethiopian forces or a deserter or absentee without leave therefrom. He further states that there is no military authority competent to request that he may be handed over as a member of the said forces or to claim him as a deserter or absentee without leave therefrom, as mentioned in the said Article or at all.

8. The plaintiff further denies that the said Agreement is applicable to his present circumstances or is now or at all enforceable against him in the said Colony or that the said Imperial Ethiopian Government has any claim in respect of him under the said Article or at all."

Article XI of the Agreement referred to in the particulars quoted above and in paragraph 6 of the plaint reads as follows:—

"The High Contracting Parties undertake to carry out all reasonable steps to search for, apprehend and hand over any member of the British or Ethiopian forces who is claimed as a deserter or absentee without leave, upon request made in writing by the competent military authorities of the forces from which he has deserted or absented himself, and transmitted through the diplomatic channel."

To my mind on the authorities the key to the whole problem lies plainly in this, that admittedly the plaintiff was a prohibited immigrant and that there is an order of deportation valid on its face as to which there is no averment or suggestion in terms that it is illegal or a sham or not made bona fide or that it is in abuse of power. It is contended for the defendants that given such valid order this Court cannot go behind it to inquire into the motives for its making unless it can be shown to be a mere sham. Granting all the allegations for the purpose of argument contained in paragraphs 3, 6 7 and 8 of the plaint, what connexion or relevance, it is asked, can they have in face of a legal order to deport a prohibited immigrant under the law devised for dealing with such class of persons, material though the facts might be were the action taken, which it is not, to deport the plaintiff under Article XI of the Agreement of 19th December, 1944. It was accepted in argument by learned counsel for the plaintiff that the deportation of his client would rest upon the order made under section 9 of Cap. 51 and not upon Article XI of the Agreement, though it is to be noted that the particulars given in explanation of the allegation "wrongfully" occurring in paragraph 9 of the plaint are that it would be wrongful to hand over the plaintiff in accordance with Article XI of the Agreement. Since that article is not being resorted to for the purpose of deporting the plaintiff it is indeed difficult to see what bearing the allegations questioned by the defendants can have. As I understand it, though perhaps I may be putting it too broadly, the contention of the plaintiff really comes to this that it is material for him to show that he is a political refugee and so on because the order for the deportation when acted upon will have the same effect, and the object is that it should have the same effect, as if he were handed over in pursuance of Article XI of the Agreement; accordingly if it would be wrong to act under Article XI, a proposition that he seeks to establish, then it would be wrong to proceed under the order which, though valid on its face, should be rendered ineffective by the granting of the relief sought.

In the *King v. Superintendent of Chiswick Police Station, ex parte Sacksteder*, 1 K. B. D. (1918), 578, the Home Secretary made an order under the Aliens Restriction Act, 1914, and article 12 of the Aliens Restriction (Consolidation) Order, 1918, that a certain alien, who was a French subject of military age, should be deported from United Kingdom and should remain out of the United

Kingdom during the continuance of the war. The order was made in consequence of an arrangement between the French and British Governments by which French subjects resident in the United Kingdom who were liable to military obligations in France were sent to France. The alien was arrested for conveyance by ship which was going to France. On an application for a writ of habeas corpus, it was argued, inter alia, that the Home Secretary intended to do an illegal act, namely, to hand the defendant over to the French military authorities and that the Court had power to go behind the order for arrest and see if "what was really in contemplation was the exercise of an abuse of power": per Low J. in *Rex v. Governor of Brixton Prison*, (1916) 2 K. B. D. 742, 752. I quote from the judgment of Pickford L. J. at pages 584 and 586:—

"It seems to me that one has to scrutinize the matter carefully for this reason. This legislation had not in view a case of this kind when it was passed. It had in view simply the deportation from this country of aliens whom the Secretary of State thought it was not right to allow to remain here; it had not in view the purpose of carrying out an agreement between this country and an allied country, by which this country agreed to place subjects of that allied country of military age within its jurisdiction. There was an agreement made with the Republic of France to the effect, that we should return to them persons subject to military service and that they should return to us British subjects subject to military service. Such an arrangement seems a very proper one, but such a procedure was not contemplated by this Act, and this Act does not give, as we decided in *Ex parte Duke of Chateau Thierry* (1917) 1 K. B. D. 922, power to do that, but it did give a power which we thought enabled the Secretary of State indirectly to attain the object. It is not for me to say whether it is better in cases of this kind to obtain direct authority to do what the Government want to do, or to take advantage of indirect means if those indirect means enable the same object to be attained. That is for the Government to consider I wish to guard myself in this way. I am not prepared to go quite so far as I think Low J. was inclined to go in the case of *Rex v. Governor of Brixton Prison*. I am not prepared to say that in every case where there is an order of detention or imprisonment the Court is entitled to go behind that and see what the motives for making that order were. But I certainly am not inclined to say that in no case can the Court go behind an order which on the face of it is valid ordering detention or custody. If that order is, if I may say so, practically a sham, if the purpose behind it is such as to show that the order is not a genuine or bona fide order, it seems to me the Court can go behind it. Therefore I wish to guard myself against being supposed to say there are no circumstances in which the Court can go behind an order for detention valid on the face of it. In this case I do not think there are any grounds for doing so. I do not think the fact of the motive being to carry out the agreement between France and this country is sufficient to show that this order to detain the appellant until he can be placed on board a ship, even though that ship may be going to France, is enough to entitle us to say it is an invalid order and that the custody was not a legal custody."

And *per* Warrington L. J. (page 589): \$\\rightarrow\$

"Then can the Court in this case go behind the order, which is a legal order, for arrest? I am far from saying that there may not be cases in which that can be done. If, for example, the order, though on the face of it a valid order, was a mere sham to cover up something which would be

illegal or to enable some subsequent act to be done which would itself be illegal. In the first case I am far from saying that the Court could not go behind the apparently valid order and say that it was no order at all. In the second case I am far from saying that the Court might not find means of preventing the subsequent illegal act from being done. But in the present case there is nothing of that sort. The order is on the face of it valid, and there is no pretence for saying that it is a sham order or anything of the kind, nor is there any pretence for saying that under it or in consequence of it something illegal is going to be done by any of the officers of the Executive Government. As soon as a ship leaves these shores the functions of the Executive Government come to an end. What happens after that is no concern of theirs, and I think it is not for us to consider what may be the ultimate motive with which the Secretary of State may make the order. The intention with which he makes the order is the intention that the man shall be placed on board a ship going to France. It may be that the motive actuating that intention was that the man shall be landed in France. In my judgment in the present case, at all events, we cannot go behind the order made; that order is a valid order, and for these reasons the appeal must be dismissed."

In my opinion that case affords very strong authority in support of the arguments for the defendants. The order for deportation is on the face of it valid—no one disputes that the plaintiff is a prohibited immigrant and the legislation provides for the deportation of such a person. There is no pretence for saying, and indeed it is not said, that it is a sham order or anything like that, nor can it be said having regard to section 10 of the Ordinance that under it deporting the plaintiff "whence he came", that is, to Ethiopia, anything illegal is going to be done. Though paragraph 6 of the plaint has been admitted by paragraph 6 of the defence, it has not been conceded that the order of deportation springs from and is motivated by any representations made as a result of the 1944 Agreement. But even if any such motive were acknowledged it seems to me that there is no vital difference in the legal aspect where in the one place a valid order is made under legislation providing for the deportation of aliens whom the Secretary of State thought it was not right to allow to remain in the United Kingdom, such order being made in consequence of an agreement with France to place subjects of that allied country of military age within its jurisdiction, and in the other where a valid order is made under legislation providing for the deportation of prohibited immigrants in consequence of an agreement with Ethiopia to hand over deserters or absentees without leave from the Ethiopian forces. For the purpose of the argument of course it is admitted that the plaintiff is not such a deserter or absentee and is a political refugee; but it is not in question that he is a prohibited immigrant. Just as in *Rex v. Chiswick Police Station Superintendent*, what happens after the order is carried out is no concern of the Executive Government, and equally it is not for this Court to consider what may be the ultimate motive with which the Governor's Deputy made the order.

The intention with which he makes the order is the intention that the plaintiff shall be, in the words of the order, "placed on board the ship, aircraft, train or other vehicle or conveyance for the purpose of deporting" him out of the Colony, and in accordance with the express provisions of section 10 of Cap. 51, "to the place whence he came"—Ethiopia.

In *Rex v. Home Secretary ex parte Chateau Thierry* 1 K. B. D. (1917) 922, it was held that the jurisdiction of the Secretary of State to make a deportation order under the provisions of section 1 sub-section 1 of the Aliens Restriction Act, 1914, and of the Aliens Restriction (Consolidation) Order, 1916, is not affected by the fact that the alien is a political refugee, though that fact may properly be taken into account by the Secretary of State-in considering whether in the exercise of his discretion he will make a deportation order. In that case the Court refused to make absolute a rule for a writ of certiorari to bring up, for the purpose of quashing it, an order made by the Home Secretary under the above-mentioned Act and order that the alien "shall be deported from the United Kingdom", the order being in form a valid order. It was admitted on behalf of the Secretary of State that the order was made with the intention and for the purpose of sending the respondent to France and thereby putting him within the power of the military authorities in France. As I have pointed out, there is no similar admission in the instant case, though for the purpose of the argument and application of the authorities I have gone so far as to assume that the order of deportation was made in consequence of the arrangement revealed by the agreement of 1944.

At page 928 Swinfen Eady L. J. is reported as saying this: \$-\$

"I am of opinion that the respondent has failed to establish that he is a political refugee, or that he is medically unfit to render to his native country any military service whatever. But, whether this be so or not, these considerations ought not to affect the judgment in the present case. These are matters to be brought before the Home Secretary when he is considering whether or not to make a deportation order, and they are matters which may properly affect his discretion; but his power to make a deportation order is not dependent in any way upon the absence of these or any similar circumstances. By article 12, clause 1, of the Aliens Restriction (Consolidation) Order, 1916, a Secretary of State may order the deportation of any alien. The respondent is an alien, and a Secretary of State has made an order for his deportation. It should, however, be stated that the Attorney General on behalf of the Government expressly stated that the Executive had no intention whatever of taking advantage of their powers over aliens to deport political refugees."

And at page 930-

"If it were intended to do something illegal under a valid order, that would be good ground for restraining and preventing the illegal act, but not for quashing a valid order. A Secretary of State is not required to justify in a Court of law his reasons for making a deportation order in the case of an alien. In the event of it being disputed that the subject of a deportation order is an alien, the matter must be determined by the Court, and unless it be proved that the person is an alien the order must be quashed as made without jurisdiction; but I am not aware of any other ground upon which such an order can be quashed."

As has been stressed again and again in the present case there is no dispute at all that the plaintiff is a prohibited immigrant; were that disputed it would rest with the Court to determine the matter.

I quote from the judgment of Pickford L. J. in the same case—at pages \$932 - 933: -\$

"The respondent is a French subject of military age, who has been resident in this country for several years. He alleges that he left France in circumstances which constitute him a political refugee, and that he is medically unfit for military service. We were informed that there exists an agreement between this country and France by which this country undertakes to return to France subjects of that country who are of military age and liable to military service, and that it was by reason of that agreement that the Secretary of State made this order. It was also stated to us by the Attorney General that it was the intention of the Executive to return the respondent to France, and to require him not only to leave this country but to return to his own. The order on the face of it, however, is only an order that the respondent be deported, and if that be a valid order it cannot be quashed I think the order is a perfectly good order. The power given to the Secretary of State is quite unqualified. If the person ordered to be deported be in fact an alien, the Secretary of State has an absolute discretion to order him to be deported, and I do not think that discretion can be questioned in a Court of law. Assuming, therefore, that the respondent proved that he was a political refugee and unfit for military service, these facts would not affect the validity of the order, but only be matters to be considered by the Secretary of State as affecting the exercise of his discretion."

The words of Scrutton L. J. in *Rex v. Chiswick Police Station Superintendent* (sup. page 589) are always to be borne in mind when approaching a case of this kind: -

"I approach the consideration of this case with the anxious care which His Majesty's Judges have always given, and I hope will always give, to questions where it is alleged that the liberty of the subject according to the law of England has been interfered with, and none the less when the person is not by birth or naturalization a subject of the King but a foreigner temporarily living within the King's protection. This jurisdiction of His Majesty's Judges was of old the only refuge of the subject against the unlawful acts of the Sovereign. It is now frequently the only refuge of the subject against the unlawful acts of the Executive, the higher officials, or more frequently the subordinate officials. I hope it will always remain the duty of His Majesty's Judges to protect those people."

Looking at the cases to which I have referred, and which seem to me to be peculiarly in line with the instant matter, I can come to no other conclusion than that the averments contained in paragraphs \$5\$, \$6\$, \$7\$ and \$8\$ are irrelevant. Here is a valid order of deportation made against the plaintiff as a prohibited immigrant. This Court cannot go behind the order to inquire as to the motive for its making. There is no illegality. Whether the plaintiff is a political refugee is a matter for the consideration of the Governor's Deputy in the exercise of his discretion under section 9 of Cap. 51, and much of Mr. Salter's submissions might in my opinion have been more suitably addressed to the Officer of the Executive in the attempt to influence the exercise of such discretion. Given the valid order and the fact that the plaintiff is a prohibited immigrant it cannot be said that because there is in existence the Agreement of 1944, which indirectly the order may have the effect of implementing, this is any ground for interference with the operation of the order in the manner prayed. As to the question raised in paragraph 10 \$(c)\$ of the defence,

namely, that whether or not the plaintiff must be returned to Ethiopia under the agreement mentioned in paragraph 6 of the plaint is not a question of municipal law which can be decided by a Kenya Court, it is merely hypothetical. It does not arise because the deportation of the plaintiff does not take place under the Agreement of 1944 but under the provisions of Cap. 51. The arguments I have heard as to the nature and import of an act of state have no bearing having regard to the circumstances of the case. I do not decide the point. I will, however, quote from the judgment of their Lordships of the Privy Council in *Eleko v. Officer Administering the Government of Nigeria* (1931) A. C. 662, 671:

"This phrase (an 'act of state') is capable of being misunderstood. As applied to an act of the sovereign power directed against another sovereign power or the subjects of another sovereign power not owing temporary allegiance, in pursuance of sovereign rights of waging war or maintaining peace on the high seas or abroad, it may give rise to no legal remedy. But as applied to acts of the executive directed to subjects within the territorial jurisdiction it has no special meaning, and can give no immunity from the jurisdiction of the Court to inquire into the legality of the act."

There is no dispute that having reached the conclusions I do the result must be a dismissal of these proceedings. \$\\cdots\$

The case is dismissed with costs.

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