

[2007 CILR 240]

**VANDERWERFF v. ROYAL CAYMAN ISLANDS POLICE**

GRAND COURT (Henderson, J.): June 1st, 2007

*Administrative Law—habeas corpus—scope of enquiry—court to determine objectively whether police officer has reasonable grounds to detain suspect—insufficient that officer subjectively believes, in good faith, that suspect committed offence*

*Criminal Procedure—bail—bail before charge—suspect released on bail but required to surrender passport only to be detained in Cayman Islands for reasonable time—reasonableness depends on (i) nature and seriousness of allegations; (ii) time required to investigate them; (iii) difficulty in extraditing suspect if he returns home; (iv) extent of his ties to Cayman Islands; and (v) difficulty and expense in his remaining against his will*

The plaintiff, who was held on police bail without charge on condition that he remain in the Cayman Islands, applied for a writ of habeas corpus.

The plaintiff was a Canadian citizen who had been living and working in the Cayman Islands. He was accused of theft by his employer and arrested at the airport, under s.36(a) of the Police Law (2006 Revision), while attempting to return to Canada. A police officer informed him that although he was under investigation, he would not yet be formally charged and he was released on bail for a week on condition that he surrender his passport. The plaintiff alleged that this restriction on his liberty was not lawful and applied for a writ of habeas corpus.

The plaintiff submitted that (a) the court should enquire into the nature and strength of the evidence obtained by the defendant to determine, objectively, whether the police officer had reasonable grounds to believe that he had committed theft; and (b) he could only be held on bail without charge for a reasonable time.

The defendant submitted in reply that (a) under the Bail Law, s.7, an arresting officer could impose such conditions as necessary to ensure the suspect surrendered to custody, and the court's enquiry was limited to whether the police officer had formed a subjective belief, in good faith, that there were reasonable grounds for the arrest; and (b) as long as it continued to investigate the allegations in good faith, the plaintiff could be held indefinitely.

**Held**, ordering that the defendant file a further return to the writ:

(1) The defendant should provide sufficient evidence to enable the court to determine, objectively, whether the arresting officer had sufficient grounds to conclude that the plaintiff might have committed theft, and it would be required to file a further return to the writ within 10 days setting out the evidence relied upon. Although the plaintiff was not detained in the usual sense, the court could nevertheless enquire into the legality of the restriction on his liberty under a habeas corpus application. The presence of reasonable cause was a condition precedent to the officer's power to make a lawful arrest without warrant under the Police Law, s.36(a), which was a question of fact that a court could determine, and therefore the court's enquiry was not confined to the narrow question of whether the arresting officer had the required state of mind, but extended to the broader issue of whether the evidence in her possession amounted to reasonable grounds for arresting the defendant (para. 5; paras. 17-21).

(2) In the absence of any time limit in the legislation, an intention should be attributed to the legislature that the plaintiff could only be held in the Cayman Islands for a reasonable time, since holding his passport as a condition of bail was a restraint on his liberty and this power was to be construed restrictively. The defendant was therefore also required to file, within 10 days, a statement setting out its view, with reasons, of what constituted a reasonable time. In deciding what was reasonable, the court would consider, *inter alia*, (i) the nature and seriousness of the allegations; (ii) the period of time required to investigate them; (iii) the difficulty in extraditing the suspect, were he allowed to return home; (iv) the extent of his ties to the Cayman Islands; and (v) the difficulty and expense suffered by him in remaining here against his will (paras. 22-24; paras. 27-28).

#### Cases cited:

- (1) *Associated Provncl. Picture Houses Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223; [1947] 2 All E.R. 680; [1948] L.J.R. 190; (1947), 177 L.T. 641; 63 T.L.R. 623; 45 L.G.R. 635; 112 J.P. 55; 92 Sol. Jo. 26, referred to.
- (2) *Cartwright v. Prison Superintendent*, [2004] 1 W.L.R. 902; [2004] UKPC 10, referred to.
- (3) *Eleko v. Nigeria (Officer administering Govt.)*, [1931] A.C. 662; [1931] All E.R. Rep. 44, applied.
- (4) *Ghani v. Jones*, [1970] 1 Q.B. 693; [1969] 3 All E.R. 1700; (1969), 134 J.P. 166; 113 Sol. Jo. 854, referred to.
- (5) *Greene v. Home Secy.*, [1942] A.C. 284, distinguished.
- (6) *Holgate-Mohammed v. Duke*, [1984] A.C. 437; [1984] 1 All E.R. 1054; [1984] Crim. L.R. 418; (1984), 79 Cr. App. R. 120; 128 Sol. Jo. 244, applied.
- (7) *Liversidge v. Anderson*, [1942] A.C. 206; [1941] 3 All E.R. 338, distinguished.
- (8) *Nazary v. R.*, 2001 CILR 371, followed.

- (9) *R. v Brixton Prison (Governor), ex p. Ahsan*, [1969] 2 Q.B. 222; [1969] 2 All E.R. 347; (1968), 133 J.P. 407; 112 Sol. Jo. 422, followed.
- (10) *R. v. Home Secy., ex p. Launder (No. 2)*, [1998] Q.B. 994; [1998] C.O.D. 301; (1998), 95 (11) L.S. Gaz. 36, followed.
- (11) *Tan Te Lam v. Tai A Chau Detention Centre (Superintendent)*, [1996] 4 All E.R. 256, followed.
- (12) *Young v. Gordon*, 1994–95 CILR 445, referred to.

**Legislation construed:**

Bail Law (2006 Revision), s.7: The relevant terms of this section are set out at para. 8.

Police Law (2006 Revision), s.36: The relevant terms of this section are set out at para. 6.

s.37: The relevant terms of this section are set out at para. 6.

*J. Stenning* for the plaintiff;

*G. Keightley* for the Crown.

1 **HENDERSON, J.:** How long may a foreigner who wishes to leave the country be detained in the Cayman Islands because he is under police investigation? To what extent may the court enquire into the strength of the evidence against him on a habeas corpus application? These important questions have been raised for the first time on the present application.

**The facts**

2 The plaintiff, Daniel Peter Frank Vanderwerff, is a Canadian citizen who has lived for some time in the Cayman Islands with his family. Until recently, he was employed here by K-Coast Construction Ltd. On April 28th, 2007, Mr. Vanderwerff was accused by his employer of misappropriating company funds in excess of US\$230,000. His employment was terminated and the allegation was reported to the Financial Crime Unit of the Royal Cayman Islands Police Force (“RCIP”) for investigation.

3 Mr. Vanderwerff decided to return to Canada with his family. On April 30th, 2007, he was arrested at the Owen Roberts International Airport while attempting to leave the Islands. He was taken to the Financial Crime Unit and told by Det. Sgt. Betty Ebanks that he was under investigation for theft. Detective Sgt. Ebanks said that the investigation was in an early stage but was continuing, and that she was not in a position to interview Mr. Vanderwerff “formally” at that time. Her affidavit continues:

“I informed him that to allow for further investigations to be conducted, I would grant him bail to return to the Financial Crime

Unit on Monday, May 7th, 2007. I also informed him that as a condition of his bail, he would be restricted from travelling and requested that he surrendered his passport to me. I believed these conditions were necessary to secure that Mr. Vanderwerff surrender to custody at the appointed time given the serious nature of the charges and his attempt to leave the jurisdiction that morning.”

She says that she has reasonable grounds for believing that Mr. Vanderwerff has committed an arrestable offence (theft is such an offence). There is insufficient detail in her affidavit to permit a court to determine objectively whether that is so.

4 Mr. Vanderwerff says in his own evidence that “any allegation of theft is totally unwarranted.” His wife and daughter have now returned to Canada. He believes that he would be unable to find employment in the Cayman Islands in the present circumstances and says that his “liquid assets are non-existent.” He continues to live here by relying on his credit cards, a situation which cannot last indefinitely.

5 On May 2nd, 2007, Mr. Vanderwerff applied to me *ex parte* for a writ of habeas corpus *ad subjiciendum*. (Order 54 of the Grand Court Rules sets out the procedure on an application for a writ of habeas corpus.) I determined that he had satisfied the limited initial burden upon him to justify an enquiry into the legality of the restraint upon his liberty. The fact that Mr. Vanderwerff is not detained in the usual sense but is at large on bail is no bar to the court’s ability to consider a habeas corpus application: see *R. v. Home Secy., ex p. Launder (No. 2)* (10) ([1998] Q.B. at 1000–1001). The return to the writ was presented on May 11th, 2007. The hearing was then adjourned to May 17th, 2007 to provide counsel further time to review the authorities.

### What is the scope of the enquiry?

6 Mr. Vanderwerff was arrested under s.36 of the Police Law (2006 Revision), which reads in part:

“36. Any officer may, without an order from a Justice of the Peace and without a warrant, arrest any person—

- (a) whom he suspects on reasonable grounds to have committed or to be about to commit an arrestable offence.”

The procedure to be followed after such an arrest is described in s.37:

“37. (1) When any person has been taken into custody without a warrant for an offence, the officer in charge of the police station or other place for the reception of arrested persons to which such person is brought shall at once enquire into the case, and if, when the enquiry is completed, there is no sufficient reason to believe that

the person has committed any offence such person shall be released forthwith.

(2) If, upon such enquiry, there is reason to believe that the person arrested has committed an offence such officer being of the rank of sergeant or above may release the person on bail.

(3) Where the constable arresting a person determines that he does not have sufficient evidence to charge but has reasonable grounds for believing that the detention of that person without being charged is necessary—

- (a) to secure or preserve evidence relating to an offence for which he is under arrest;
- (b) to obtain such evidence by questioning him; or
- (c) to complete the investigation,

he may place that person in police detention for a period not exceeding seventy-two hours from the time of arrest.

(4) Where a constable of the rank of Superintendent or above has reasonable grounds for believing that—

- (a) the detention of that person without charge is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him;
- (b) an offence for which he is under arrest is a serious arrestable offence; and
- (c) the investigation is being conducted diligently and expeditiously,

he may authorise the keeping of that person in police detention for a further period of seventy-two hours after the period referred to in subsection (3).

(5) Where the Commissioner of Police has reasonable grounds for believing what is set out in subsection (4), he may authorise the keeping of that person in police detention for a further period of seventy-two hours after the period referred to in that subsection.

(6) No person may be kept in police detention after the period referred to in subsection (5) except upon the order of a summary court made on the application of a constable.

(7) The application made under subsection (6) shall be heard in chambers, and the court shall consider whether there are reasonable grounds for believing the matters set out in subsection (4) and, if it

is so satisfied, it may order further detention for a further period of seventy-two hours.

(8) If, at the end of the period of seventy-two hours referred to in subsection (7), the person is not charged, he shall be released without further reference to the court, but may be re-arrested for the offence for which he was previously arrested if new information justifying a further arrest has come to light since his release."

7 Thus, in the Cayman Islands, a person suspected of having committed an arrestable offence may be detained in custody without charge for up to 12 days. The arresting officer must believe the suspect has committed an arrestable offence and that belief must be held "on reasonable grounds." If the arresting officer also believes that there is insufficient evidence to justify a charge, he may (subject to the other preconditions in s.37(3) being satisfied) detain the suspect for up to 72 hours. A further 72 hours of detention may be imposed if a police officer of the rank of superintendent or above agrees that the offence is a "serious arrestable offence" (s.37(4)) and that the other preconditions are satisfied. A third period of 72 hours of detention can be justified if the Commissioner of Police decides that he has reasonable grounds. Finally, the fourth and final 72 hours of detention can be justified by order of a summary court.

8 In contrast, where the suspect is released on bail, the only requirement is that the arresting officer believes, on reasonable grounds, that an arrestable offence has been committed. A release on bail by the arresting officer is governed by the provisions of the Bail Law (2006 Revision) and the Police Law (2006 Revision), s.37(10). The Bail Law, s.7 permits the arresting officer to impose "such conditions as appear to the . . . police officer to be necessary to secure that the person—(a) surrenders to custody . . ." Holding a suspect's passport is a common device for ensuring that he does so. Mr. Vanderwerff now argues that the court should enquire into the nature and strength of the evidence gathered by the authorities for the purpose of determining, objectively, whether Det. Sgt. Ebanks did indeed have reasonable grounds to believe he has committed theft.

9 Mr. Keightley, for the defendant, argues that the only permissible enquiry is a much narrower one—an enquiry into whether Det. Sgt. Ebanks does and did believe, subjectively, that there are reasonable grounds for the arrest. If she has formed that opinion in good faith, that is the end of the enquiry. He rests that submission on the well-known decisions of the House of Lords in *Liversidge v. Anderson* (7) and *Greene v. Home Secy.* (5). *Greene* involved a challenge by way of habeas corpus to a decision made by the Secretary of State for Home Affairs under Reg. 18(B) of the Defence (General) Regulations 1939 made under the Emergency Powers (Defence) Act 1939. The material part of the Regulation stated:

"If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained."

10 *Liversidge* was a similar case, but the action was for false imprisonment. Messrs. *Liversidge* and *Greene* having been detained under the Regulation, they argued that the court should enquire into whether the evidence in possession of the Secretary of State was sufficient to justify the decision taken. In other words, they asked for objective assessment by the court of the sufficiency of the evidence supporting the Secretary of State's subjectively held view.

11 Their Lordships held that there was no need for an affidavit from the Secretary of State. The return to the writ asserted that he held the requisite view, and his good faith was not impugned. Lord Macmillan's speech in *Greene* (5) is representative ([1942] A.C. at 297):

"The Secretary of State is not bound to disclose or to justify to any court the grounds on which he conceived himself to have reasonable cause to believe that the appellant was a person of hostile associations and that by reason thereof it was necessary to exercise control over him. The result, in my opinion, is that the production of the Secretary of State's order, the authenticity and good faith of which is in no way impugned, constitutes a complete and peremptory answer to the appellant's application. It justifies in law his detention in the absence of any relevant challenge of its validity, and there is no such challenge. It necessarily follows that the Secretary of State had no need to submit an affidavit."

These cases were decided in a time of war. There were compelling reasons why the Secretary of State could not and should not have been expected to explain the grounds of his belief. There are no analogous concerns in the present case.

12 An earlier decision of the Privy Council in 1931, *Eleko v. Nigeria (Officer administering Govt.)* (3), is a decision which may, at first glance, appear inconsistent with *Liversidge* (7) and *Greene*. The Deposed Chiefs Removal Ordinance in Nigeria permitted the Governor to exclude a deposed native chief from the area over which he had previously exercised jurisdiction or influence. Before exercising his power under the Ordinance, the Governor had to be satisfied that the subject of his order was a native chief, that he had been deposed, and that native law and custom required that he leave the area over which he had exercised jurisdiction or influence.

13 Eleko argued on a habeas corpus application that he was not a native chief, that he had never been deposed, and that there was no such native law or custom. The Governor said that the court had no power to enquire into those questions of fact; his order (which, of course, embodied his own opinion on those matters) must be taken as final and conclusive.

14 The judgment of their Lordships was delivered by Lord Atkin, who said ([1931] A.C. at 670):

"Their Lordships are satisfied that the opinion which has prevailed that the Courts cannot investigate the whole of the necessary conditions is erroneous. The Governor acting under the Ordinance acts solely under executive powers, and in no sense as a Court. As the executive he can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive. The analogy of the powers of the English Home Secretary to deport aliens was invoked in this case. The analogy seems very close. Their Lordships entertain no doubt that under the legislation in question, if the Home Secretary deported a British subject in the belief that he was an alien, the subject would have the right to question the validity of any detention under such order by proceedings in habeas corpus, and that it would be the duty of the Courts to investigate the issue of alien or not."

The three questions of fact were described as conditions precedent to the exercise of the Governor's jurisdiction under the Ordinance.

15 In *R. v Brixton Prison (Governor), ex p. Ahsan* (9), the Court of Appeal rationalized these apparently conflicting decisions. It emphasized that *Greene* (5), unlike *Eleko* (3), was not concerned with a challenge concerning a condition precedent upon which jurisdiction depended (*per* Lord Parker, C.J. ([1969] 2 Q.B. at 234)). The position arrived at by the Court of Appeal is that an objective assessment of the sufficiency of the evidence is permissible on any question which is a condition precedent to the exercise of jurisdiction by the decision maker. In contrast, no such enquiry is permitted concerning the ultimate issue. The question which Mr. Vanderwerff says I should address is this: Does the evidence in the possession of Det. Sgt. Ebanks amount, on an objective assessment, to reasonable grounds for believing he has committed theft?

16 Into which category does such a question fall? The question is answered conclusively by the decision of the House of Lords in *Holgate-Mohammed v. Duke* (6). This was an action for false imprisonment which

turned on the wording of s.2(4) of the Criminal Law Act 1967, which reads:

“Where a constable, with reasonable cause, suspects that an arrestable offence has been committed, he may arrest without warrant anyone whom he, with reasonable cause, suspects to be guilty of the offence.”

17 The House of Lords held ([1984] 1 All E.R. at 1057) that the presence of reasonable cause is a condition precedent to a constable having the power to make a lawful arrest without warrant. The presence or absence of this condition precedent is a question of fact which a court may determine. If the constable in question did have reasonable cause, his decision to arrest without warrant amounted to an exercise of “executive discretion” which could not be questioned in a court of law except on *Wednesbury* (1) principles.

18 There is no reasonable basis for distinguishing the *Holgate-Mohammed* (6) decision. It is noteworthy also that in *Ghani v. Jones* (4), the Court of Appeal engaged in an objective assessment of whether certain police officers had reasonable grounds for believing that passports and letters seized from the plaintiffs were material evidence of a murder ([1969] 3 All E.R. at 1705).

19 I am satisfied that the enquiry I must make is not confined to the narrow question of whether Det. Sgt. Ebanks did have the requisite state of mind, but must extend to the broader question of whether the evidence in her possession amounts to reasonable grounds for suspecting an arrestable offence had been committed by Mr. Vanderwerff. The present affidavit from Det. Sgt. Ebanks is inadequate for such an enquiry.

20 Obviously, the defendant does not have to show beyond a reasonable doubt, or even on the balance of probabilities, that Mr. Vanderwerff has committed an arrestable offence. Reasonable suspicion is more than mere suspicion although it cannot be equated with *prima facie* proof: *Young v. Gordon* (12). The defendant’s burden is to show that there existed at the time of the arrest, and there still exists now, a body of evidence which would justify an independent and rational observer in concluding that Mr. Vanderwerff may have committed theft. For this purpose, hearsay evidence may be relied upon.

21 I direct the defendant to file a further return to the writ within 10 days setting out in summary fashion the evidence relied upon. The plaintiff is at liberty to re-list the hearing for a date after that deadline has passed.

**For how long may the plaintiff be kept in the Cayman Islands against his will?**

22 I start with the proposition, too well known to require citation of authority, that a legislative provision which amounts to a restraint on liberty must be construed restrictively. Ambiguities in it must be resolved in favour of the liberty of the subject. Moreover, habeas corpus "is an area where substance rather than form governs": *Cartwright v. Prison Superintendent* (2) ([2004] 1 W.L.R. 902, at para. 17). "Semantics must yield to common sense" (*ibid.*).

23 Neither the Police Law nor the Bail Law imposes any limit on the period of time for which Mr. Vanderwerff may be held in the Cayman Islands against his will, on bail but not charged. At the outset, Mr. Keightley argued that there is no limit at all—as long as the police are continuing to investigate the allegations in good faith, the suspect could be held on police bail indefinitely. During argument, Mr. Keightley retreated to a more defensible position—that he can only be held on bail without charge for a reasonable time. That must be correct. In the absence of any time limit in the legislation, I attribute to the Legislative Assembly an intention that a suspect may be held in the Cayman Islands on police bail only for a reasonable time.

24 What is reasonable will depend on all of the circumstances, including:

- (i) the nature and extent of the allegations;
- (ii) the period of time which a diligent and competent police force acting in good faith might be expected to take to investigate the allegations;
- (iii) the seriousness of the allegations;
- (iv) the degree of difficulty posed by having to extradite the suspect from his home country if he is allowed to return there;
- (v) the nature and extent of the suspect's ties to the Cayman Islands; and
- (vi) the difficulty and expense suffered by the suspect in remaining in the Cayman Islands against his will.

This is not meant to be an exhaustive list.

25 Clearly, the time period will be longer than the maximum period of 12 days during which a suspect may be detained in custody without charge in the Cayman Islands. The period will not, however, necessarily be as long as the usual amount of time taken to investigate similar allegations against suspects who reside here permanently. It is not unreasonable to expect the authorities to expedite an investigation into allegations against someone who finds himself in the same circumstances as Mr. Vanderwerff. Investigative resources available to the police are a factor to be considered but are not determinative. In assessing what is a reasonable time, the court is entitled to assume that adequate resources will be applied to the investigation.

26 In *Nazary v. R.* (8), the Grand Court (*en banc*) heard a habeas corpus application by three detainees who had entered the Cayman Islands illegally and applied for asylum. This court held that the executive was obliged to determine and resolve the immigration status of the detainees within a reasonable time. The court adopted a statement of principle contained in the headnote to the report of the judgment in *Tan Te Lam v. Tai A Chau Detention Centre (Superintendent)* (11) ([1996] 4 All E.R. at 256–257):

“Where a statute conferred power to detain an individual pending his removal from the country, in the absence of contrary indications in the statute, it was to be implied that that power could only be exercised during the period necessary, in all the circumstances of the particular case, to effect that removal, that the person seeking to exercise the power of detention *had to take all reasonable steps within his power to ensure the removal within a reasonable time and that, if it became clear that removal was not going to be possible within a reasonable time, further detention was not authorised.* The courts would construe strictly any statutory provision purporting to allow the deprivation of individual liberty by administrative detention and would be slow to hold that statutory provisions authorised administrative detention for unreasonable periods or in unreasonable circumstances.” [Emphasis supplied.]

The passage includes an acknowledgement that, if it proves to be impossible to resolve the issue giving rise to the detention within a reasonable time, then “further detention was not authorised.” In other words, there may be cases where it is simply impossible to accomplish within a reasonable time what the authorities may wish to achieve.

27 Holding Mr. Vanderwerff’s passport as a condition of his police bail is a restraint on his liberty which the Legislative Assembly has authorized by legislation, but it is authorized only for a reasonable time. If, on the further return to the writ of habeas corpus, the court concludes that the period of time during which the suspect’s passport has been held is unreasonable, the bail order will be set aside and the passport returned to the plaintiff.

28 The defendant is directed to file a further return within 10 days setting out its view of what would constitute a reasonable time for the present investigation and the reasons supporting that opinion. Mr. Vanderwerff is at liberty to file his own affidavit on the subject. If, on the forthcoming continuation of this hearing, I conclude that the arrest was lawful, the reasonable time issue will be addressed.

*Order accordingly.*

Attorneys: *Stening & Assocs.* for the plaintiff; *Government Legal Dept.*