44/91

FEDERAL COURT OF AUSTRALIA

GRECH v HEFFEY and MINISTER for IMMIGRATION

Ryan J

29 October 1991 — [1991] FCA 504; (1991) 34 FCR 93; (1991) 106 ALR 570

PROCEDURE – IMMIGRATION – PERSON REASONABLY SUPPOSED TO BE AN ILLEGAL ENTRANT – WHETHER DETENTION MUST FOLLOW AUTOMATICALLY – WHETHER DISCRETION TO RELEASE: *MIGRATION ACT* 1958, S92(4).

Where a magistrate is satisfied under s92(4) of the *Migration Act* 1958 (Cth.) that there are reasonable grounds for supposing that a person is an illegal entrant, the magistrate is not automatically bound to authorize detention but has a discretion to order that the person be released from custody.

[Ed Note: In *Re Singh*, MC 51/1986, Kaye J held that the provisions of the *Bail Act* 1977 have no application to the *Migration Act* 1958 (Cth.).]

RYAN J: [*After setting out relevant statutory provisions and part of a judgment of Kaye J,* In Re Singh*, unreported Vic Sup Ct, 18 July 1984, His Honour continued*] **....[6]** To uphold the contention of Counsel for the Minister I have to decide that despite the use of the words "he or she may ... authorize the detention" the legislature intended to impose a mandatory requirement to authorize detention once the prescribed authority is satisfied that there are reasonable grounds for supposing that the person is an illegal entrant. The word "may", particularly when used in indicating a function reposed in a public officer is clearly capable of that effect; see e.g. *Julius v Lord Bishop of Oxford* [1874-80] All ER 43; 49 LJQB 577; 42 LT 546. However, Isaacs and Rich JJ in *Metropolitan Coal Co of Sydney Ltd v Australian Coal and Shale Employees' Federation* [1917] HCA 64; (1917) 24 CLR 85; 24 ALR 170 added, at CLR 96, this footnote to **[7]** *Julius v Lord Bishop of Oxford*:

> "The Rule in *Julius v Lord Bishop of Oxford* is not that wherever the word "may" is used in connection with a public office it means "shall". Nor, if the Legislature confers a right by the same word and states certain conditions, does it necessarily follow that the word imposes a duty on the proper officer, irrespective of all other considerations. The true rule is thus stated by Lindley MR in *Southwark and Vauxhall Water Co v Wandsworth District Board of Works* (1898) 2 Ch 603 at 607, speaking of the words "it shall be lawful": - "These words may, no doubt, under certain circumstances impose a duty as well as confer a power, but it is for those who contend that they do both to make good their contention".

To similar effect, the Full High Court observed in *Ward v Williams* [1955] HCA 4; (1955) 92 CLR 496 at 505:

> "In considering the correctness of this interpretation it is necessary to bear steadily in mind that it is the real intention of the legislature that must be ascertained and that in ascertaining it you begin with the *prima facie* presumption that permissive or facultative expressions operate according to their ordinary natural meaning. "The word 'may' has a compulsory meaning to show, as a matter of construction of the Act, taken as a whole, that the word was intended to have such a meaning" - per Cussen J: *Re Gleeson* [1907] VicLawRp 71; [1907] VLR 368 at 373; 13 ALR 146; 28 ALT 228. "The meaning of such words is the same, whether there is or is not a duty or obligation to use the power which they confer. They are potential, and never (in themselves) significant of any obligation. The question whether a Judge, or a public officer, to whom a power is given by such words, is bound to use it upon any particular in general, or in any particular manner, must be solved *aliunde*, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power" – per Lord Selborne: *Julius v Lord Bishop of Oxford*. One situation in which the conclusion is justified that a duty to exercise the power or authority falls upon the officer on whom it is conferred is described by Lord Cairns in his speech in the same case. His Lordship spoke of certain cases and said of them "(they) appear to decide nothing more than this: that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised"."

In my view an insurmountable obstacle to the contention that the words "may ... authorize the detention" impose a duty and do not confer a discretion is raised by their use in close proximity in the self-same sub-section to phrases using the imperative "shall". It cannot be doubted that the prescribed **[8]** authority is under a duty to inquire into the existence of reasonable grounds for supposing the person to be an illegal entrant. Hence sub-s(4) stipulates that the prescribed authority "shall inquire into the question ...". Likewise if the prescribed authority declines to authorize detention there is no alternative to the release of the person so the sub-section peremptorily concludes "the prescribed authority shall order the person to be released." The use of the word "may" in sub-ss(l) (2) (5) (6) (9) and (10) of s92 can similarly be contrasted with the use of "shall" in sub-ss (3) and (7), and like contrasts are revealed by s93.

I find nothing in the word "otherwise" which precedes the concluding direction for release in s92(4) to contradict the construction which I prefer. In my view, that indicates only the negation of the two prerequisites for authorization of detention, namely satisfaction that there are reasonable grounds for supposing the person to be an illegal entrant, and a positive exercise of the discretion conferred on the Minister or the Secretary by s92(9) to order release either unconditionally or subject to conditions and the stipulation in sub-s(10) of consequences for breach of a condition so imposed, exclude a discretion in the prescribed authority to order release. It is true that there is no express or limited power to incorporate in an order for release conditions which would be legally enforceable. That is not to say that a prescribed authority may not have regard to an undertaking as to future conduct made by a presumptive illegal entrant. However, that is a matter going to the grounds on which the discretion may be **[9]** exercised, not to its existence.

In the same context it should be noted that when s38 became s92 by amendment effected by Act No. 59 of 1989 sub-s(7) was amended to stipulate that the power of the Minister or the Secretary could be exercised either unconditionally or subject to conditions and sub-s(7A) (now s92(10)) was inserted. Before that the power conferred by what was then sub-s(7) was not materially different from that conferred on the prescribed authority by sub-s(3) which was the counterpart of the present s92(4). It can hardly be thought that the Legislature intended by such an indirect mechanism fundamentally to change the nature of the power conferred on a prescribed authority. I am reinforced in the conclusion to which I have come by the fact that the power conferred by s92(4) is reposed by s95 in persons who are or have been judicial officers or legal practitioners of at least five years standing. By application of the approach in *Ward v Williams* (*supra*) at 507 that is a consideration of some weight in favour of the conclusion that authorization of detention is not to follow automatically from a finding that reasonable grounds exist for supposing a person to be an illegal entrant.

For these reasons, I propose to declare that on its proper construction, s92(4) of the *Migration Act* confers a discretion on a prescribed authority to order the release of a person from custody notwithstanding that the prescribed **[10]** authority is satisfied that there are reasonable grounds for supposing such person to be an illegal entrant. The applicant has succeeded on the sole point on which the proceedings in this Court have turned and she should have her costs of Application VG 279 of 1991. However, because the decision of the magistrate is no longer of any operative effect, I decline to make any other order on that application which is otherwise dismissed.

APPEARANCES: For the Applicants Grech: Mr KH Bell, counsel. Juliano Ford and Co, solicitors. For the Respondents: Mr RRS Tracey, counsel. Australian Government Solicitor.
