In the Supreme Court of Judicature of Jamaica

Suit No. M. 44 of 1976

Between : Regina vs. Brigadier Rudolph Green

And

Hon. Keble Munn, Minister of National Security

Ex parte Joseph Williams

Suit No, M. 45 of 1976

Between : Regina vs. Brigadier Rudolph Green

And

Hon. Keble Munn, Minister of National Security

Ex parte Earl Spencer

F.M.G. Phipps, Q.C. and A. Dabdoub for Applicants

Lloyd Ellis, R. G. Langrin and Allan Alberga of the Attorney General's Chambers, instructed by Mrs. Majorie Harrison, Deputy Crown Solicitor for Respondents.

1976: August 12, 13, 16, 17, 18, 25

Rowe, J, :

The applicants are detained at Up Park Camp. They say their detention is unlawful and unjustifiable. They move this Court for immediate discharge from detention, in the alternative that a Writ of Habeas Corpus be issued directing the production of their bodies before the Court to show cause why they should not be discharged from custody.

A proclamation was issued by the Governor-General on the 19th June, 1976, declaring that a state of emergency exists. On the same day the Governor-General made and published in the Jamaica Gazette Supplement the Emergency Powers Regulations (1976). This he did under powers conferred upon him by section 3 of the Emergency Powers Act. Under these regulations an "authorised person" includes any

/.....

member of the armed forces of the Crown and any constable and "Minister" means the Minister responsible for internal security. The regulations give power of arrest and detention to authorised persons and authorise the Minister to make detention orders.

The applicant Earl Spencer was detained on the 20th June, 1976, and he admits in his affidavit that on the 24th June, 1976, he was served with a Detention Order bearing date 24th June, 1976. Nothing turns on that detention order as on the 2nd July, 1976, he was served with a document entitled "The Emergency Powers EARL SPENCER (Detention) Order 1976." The other applicant, Joseph Williams, was detained by virtue of a detention order signed by the Minister on the 15th July, 1976. Williams alleges that he was detained on the 21st June, whereas the respondents claim that he was detained on the 20th June. Nothing turns on this difference in the dates. Both applicants say that they are still being detained and the respondents say that by virtue of the detention orders both men are still being detained at Up Park Camp.

At the hearing of the applications before me, Mr. Phipps took the preliminary point that the respondents had no right of audience as they had not produced the original Order of Detention. He argued that on the basis of the affidavits filed on both sides, the applicants were entitled to immediate discharge from detention. The fact of detention was not in dispute. He contended that what the first respondent, Bridadier Green, was saying amounted to no more than that detention orders were made against each applicant and that the detention orders were served on the respective applicant. In his contention a person holding another in custody must have authority so to do and must produce the original authority to the Court when the imprisonment is challenged. He denied that it could be enough for the first respondent to produce a copy of the detention order with the explanation that the original was in the hands of the applicant. The Emergency Powers

/.....

Regulations 1976, said he, did not empower the first respondent to serve the detention orders upon the applicants and the applicants did not in terms admit that detention orders had been made against them. In support of his argument he relied on the dicta in Regina v. Home Secretary ex parte Green (1941) 3 AER. 104. After hearing Mr. Ellis I ruled that the preliminary point failed.

Joseph Williams exhibited to his affidavit (what he said was) a photocopy of "The Emergency Powers JOSEPH WILLIAMS (DETENTION) Order 1976 dated 15/7/76 made by Minister of National Security" and Earl Spencer exhibited to his affidavit (what he said was) a photocopy of "The Emergency Powers EARL SPENCER (DETENTION) Order 1976." Brigadier Green swore that each applicant had been served with the respective detention order and all that he had in his possession was a copy thereof. The regulations are silent as to the procedure to be followed between the making of a detention order by the Minister and the taking of the person named therein into custody. The service of the original detention order upon each of the applicants brings to his mind the authority of an authorised officer to take him into custody. A more readily understandable procedure would be the service of a copy or a duplicate of the order on the detainee the original being jealously guarded by the first respondent. I do not find the non=production of the original a fatal defect to the return.

The production of the original order of detention is not the only way in which the first respondent can make a return good ex facie. In this case there was no real contest that a detention order has been made in respect of each applicant. What was being challenged was the nature of the return. I rely upon a passage from the speech of Lord Wright in ex parte Green (1941) 3 AER. 338 at 402, 403 (H.L.) to show that it has never been considered always necessary to prove the original warrant or order:

> " In Watson's case there was no Warrant to the actual gaoler. The return consisted of a long statement of facts, not put on affidavit or affirmation. The Court held that no affidavit was necessary. There must be many cases in which the return was not a Warrant or official order but a narrative of facts. Such a case was R. v. Jackson where it appears that in the first instance the return was in the form of a statement of the facts, though affidavits were filed on the subsequent inquiry. Until there emerges a dispute of facts into which the Court feels it should inquire I think the defendant's statement is enough, though no doubt if the Court is proceeding to inquire into the merits, it may order affidavits.

I note in passing that the respondents in their affidavits did not admit that they were served with detention orders and each applicant omitted the word "Detention" from his affidavit when he came to describe the order served on him. So much for the preliminary point.

The applicants sought my guidance as to who should begin and in keeping with the recent practice of the Courts in Jamaica I decide that the applicants should begin.

THE ISSUES

Mr. Phipps for the applicants made certain broad submissions.

(1) Anything done by the Executive is subject to review by the Court as long as Chapter III of the Constitution has not been suspended.

(2) The fundamental rights and freedoms of each citizen have not been suspended by the declaration of a state of public emergency, consequently each citizen;

  (a) still has the right of access to the Courts in the quest of justice;

  (b) still has his protection from arbitrary arrest and detention.

(3) Assuming that a state of public emergency has been lawfully proclaimed and now exists certain laws have been passed to be of the duration only for the period of public emergency and whereby the Minister may detain persons on condition that certain pre-requitites exist.

(4) The "condition" is that the Minister must be satisfied that the detainee has been concerned in the acts prejudicial to public safety or public order or in the preparations or instigation of such acts.

(5) The authorities both in the Privy Council and the House of Lords, indicate that the Court has a duty to inquire and ascertain if the pre-requitites for the exercise of the executive power exist, whether called "acts," "status," "condition precedent" or "body of facts" i.e. it must appear to the Court that the detainee was concerned in some act prejudicial to public safety or public order. This inquiry is undertaken not on the applicant's mere ascertion that he does not know why he has been detained, but on the applicant adducing a sufficiency of evidence alleging that it is unlikely he could be concerned in any acts prejudicial to the public safety or public order.

(6) If the Minister fails to prove to the Court beyond a reasonable doubt that the detainee was in fact so concerned the detainee must be released.

(7) When the Minister has established the body of facts to the satisfaction of the Court, the Court will then inquire under the provisions of section 15(5) of the Constitution as the Minister's exercise of the power. If no reasonable justification for the measure of detention can be shown by an objective test, the detainee must be released.

(8) The Governor-General had no power under section 26(4) of the Constitution to declare a state of emergency and the decision of Smith, C.J., in re Grange et al M.27/76 and M.29/76 should not be followed.

The principal submissions made by Mr. Ellis on behalf of the respondents are

.....

1. A Writ of Habeas Corpus does not run to grant relief if the detention is lawful.

2. Both applicants in their affidavits expressly allege that the Minister acted in bad faith in making the respective detention orders. The affidavits contain mere allegations of bad faith and no single fact in proof of such allegations. The onus of proving bad faith in the Minister rests upon the applicants and they have made no attempt to discharge that burden. Indeed the applicants' attorney stated that he was not challenging the bona fides of the Minister.

3. In the case of the applicant Williams the order for detention was made by the Minister four days before the trial and eventual acquittal of Williams in the Gun Court. That fact controverts Williams' allegation as to the Minister's reason for ordering his detention.

4. The failure on the part of the applicants to apply to cross-examine the Minister on his affidavit, gives rise to the inference that the applicants accept the truth of the Minister's affidavit.

5. If the Emergency Powers Regulations confer a subjective discretionary power on the Minister, a Court has no jurisdiction to inquire into the merits of the case except to satisfy itself that the Minister has applied his mind to the necessary matters set out in the regulations and has so applied his mind to the particular case of the applicant.

6. If it is shown that the Minister has followed the procedure laid down in the Emergency Powers Regulations (1976) and has made an order for detention and has stated that he has **bona fide** so done in the belief that the necessary grounds as stated therein existed for the detention of the detainee, the Court has no jurisdiction to entertain a complaint from the

/.....

detainee on habeas corpus proceedings.

7. Where there are conditions precedent to the making of an order the Court can inquire into whether or not those conditions precedent have been fulfilled. In the instant proceedings the conditions precedent are:

   (a) the identity of the detainee i.e. whether the facts or information supplied to the Minister relate to that detainee;

   (b) that there is in existence a state of emergency;

   (c) if the order is bad on its face;

   (d) that the regulations are strictly complied with.

8. That the instant case is on all fours with the case of R, v. Secretary of State for Home Affairs ex parte Lees (1941) 1 K.B. 72 and that this Court should accept the principles laid down in that case.

9. The respondents in this case although alleging that the Minister received confidential information are not relying on Crown privilege and have filed affidavits for the use of the Court.

10. The Governor-General had power under the Emergency Powers Act make regulations and he had power under that Act to authorise the Minister to exercise subjective discretionary powers. Those regulations were approved by Parliament and ought to be deemed to be reasonably justifiable.

11. The measures which section 15(5) of the Constitution requires to be reasonably justifiable are the law and the regulations made for the purpose of dealing with a state of public emergency and not to the individual and actual activities carried out in compliance with the law and regulations.

12. Both section 26(4) of the Constitution and section 2 of the Emergency Powers Act confer power upon the Governor-General to declare a state of public emergency and consequently the judgment of Smith, C.J. in re Grange ought to be followed.

THE AFFIDAVIT

The applicant Joseph Williams in his affidavit said that on the 13th March, 1976, he was shot by Constable Julye and as a result of the injuries he received he was hospitalized at Kingston Public Hospital for approximately two months. After his discharge from hospital he was kept in police custody until 19th July, 1976, when he was tried in the Gun Court on two charges of unlawful possession of a firearm and shooting with intent. Constable Julye it was who prosecuted him and at his trial in the Gun Court he was acquitted without being called upon to answer. Williams said that he never shot at the police or any other person and at no time he had ever been in possession of a firearm. He said Constable Julye unlawfully and unjustifiably detained him at the Gun Court on the same day that the charges against him were dismissed.

Williams admitted that he was served with the following documents:

(a) Notice required under section 39(8) of the Emergency Powers Regulations 1976.

(b) Notice required under Regulation 40 of the Emergency Powers Regulations 1976.

(c) "The Emergency Powers JOSEPH WILLIAMS Order 1976."

(d) Particulars required by Regulation 39(9) of the Emergency Powers Regulations 1976.

For completion each document is reproduced below:

(a) NOTICE REQUIRED UNDER REGULATION 39(8) OF THE EMERGENCY POWERS REGULATIONS (1976)

Whereas an Order under Regulation (23) or (34) or (35) has been made against you JOSEPH WILLIAMS Notice is hereby given that:

(a) The aforesaid orders has been made on the following grounds: - concerned in the preparation and instigation of acts prejudicial to public safety and public order.

/.....

(b) You may make objections to the Order to the Tribunal established under Regulation 39 of the Emergency Powers Regulations 1976.

Dated this 15th day of July, 1976

Signed by Minister of National Security.

(b) NOTICE OF ORDER REQUIRED UNDER REGULATION 40 OF THE EMERGENCY POWERS REGULATIONS 1976

TAKE NOTICE that an Order under Regulation 35(1) of the Emergency Powers Regulations has been made against Joseph Williams.

Signed Basil Robinson

Competent Aughtoity

(c) THE EMERGENCY POWERS ACT

THE EMERGENCY POWERS REGULATIONS 1976

THE EMERGENCY POWERS JOSEPH WILLIAMS (DETENTION) ORDER 1976

Whereas I am satisfied that Joseph Williams of ..... has been concerned in (the preparation of) and (the instigation of) acts prejudicial to (public safety) and (public order) and by reason thereof it is necessary to exercise control over the said Joseph Williams NOW, THEREFORE, in the exercise of the powers conferred upon me by Regulation 35 of the Emergency Powers Regulations (1976) and of every other power hereunto enabling, the following Order is hereby made:

(1) This Order may be cited as the Emergency Powers (Joseph Williams) (Detention) Order 1976.

(2) It is hereby directed that the above-mentioned (Joseph Williams) be detained.

Dated this 15th day of July, 1976.

Signed Minister of National Security.

(d) Particulars required by Regulation 39(9) of The Emergency Powers Regulations 1976

Whereas an Order under Regulation 35 has been made against Joseph Williams.

/.....

I set out hereunder the following particulars:

> " That you are an active member of a criminal gang in Western Kingston/
>
> That on the 13th March, 1976, you were found unlawfully in possession of a home made firearm by members of the Security Forces.
>
> That you have terrorised citizens in the Western section of Kingston, such act being inimical and prejudicial to Public Safety. "
>
> Signed: Minister of National Security

Having regard to the ground given in the Notice under Regulations 39(8) and the particulars under regulation 39(9) the applicant Williams says in his affidavit at paragraph 9:

> " That I am not and have never been a member, active or otherwise of a criminal gang in Western Kingston or anywhere else and that I have never terrorised citizens in the Western Section of Kingston or anywhere else whatsoever and that on the 19th day of July, 1976, I was tried in the Gun Court and found Not Guilty of being in possession of a home made firearm on the 13th day of March, 1976. That my detention is an act of bad faith on the part of the Honourable Keble Munn, Minister of National Security and I verily believe that were it not for the occurance of the incident on the 13th day of March, 1976, in which I was unlawfully shot and detained by the Police I would not have been detained. That on the 13th day of March, 1976, I was never in possession lawfully or unlawfully of any firearm home made or otherwise. "

Williams gave a statement to the Attorney assigned for his defence in the Gun Court cases. That statement dated the 30th April, 1976, was exhibited to an affidavit of Miss Nosworthy, Attorney-at-law. In that statement, Williams alleges that on the 13th March, 1976, three policemen accosted him, beat him and then Constable Julye shot him. He had known Constable Julye since 1973 when he (Williams) was living at a policeman's home at 123 Charles Street. " A policewoman by the name of 'Sonia" was also there living in one of the rooms. Julye used to visit her there. She and I were also friendly. One night he came to see her and 'kicked up a noise' and was trying to beat her off and Sonia ran into my room. He never liked me since then and he always said to me that I should leave Sonia alone and I

/.....

"shouldn't keep friend with a policeman's woman. He threatened me many times over it. He never told me the same thing before he shot me."

Earlier in his statement, Williams said that Constable Julye had addressed him thus before Julye shot him:

> " So you wahn deh wid policeman's woman what a way you have ambition."

Constable Alverne Julye filed an affidavit in reply to those put in by the applicant Williams and Miss Nosworthy and he denied expressly and emphatically the allegations made against him by the applicant Williams. A request was made for the cross-examination of Constable Julye. Under cross-examination he said he took the home made shot gun from the applicant Williams together with a spent cartridge and gave those items to Detective Deputy Superintendent Wray, the ballistics expert. He said that the certificate which he got from Mr. Wray said that the home made shotgun he had handed over could not be fired. He did not remember if the certificate also said that Mr. Wray got an unexpended cartridge with live ammunition. Constable Julye said he did not know the applicant Williams before the 13th March, 1976, that he did not know a policewoman by the name of Sonia and in fact that he did not join the police force until in January 1974. In 1973 he was attending school in Saint Elizabeth. Constable Julye was not an impressive witness.

In response to the affidavit of the applicant Williams, the Minister of National Security filed an affidavit in which he said at paragraphs 4, 6-8:

> " 4 - That the Emergency Powers Regulations (1976) and particularly Regulation 35(1) empower the Minister responsible for Internal Security to make an Order for the detention of any person if he is satisfied that that person has been concerned in acts prejudicial to public safety or public order in the preparation or instigation of such acts and by reason whereof it is necessary to exercise control over that person. "

" 6 - That in my capacity as the Minister in charge of Internal Security, I, on the 15th day of July, 1976, made an Order for the detention of the applicant Joseph Williams. "

" 7 - That before I made the orders referred to in paragraphs 5 and 6 hereof, I received confidential reports and information from responsible persons whose duty it is to make investigations into the activities of persons whose behaviour gives reasonable ground for suspecting them to be acting or have acted in prejudice to the public safety. "

onsidered such reports and information
satisfied that the persons named
d referred to in para-
to say Earl Spencer
prejudice

Trade union — Trade dispute — controversy between union and employer - Union act furthering appropriate help to secure bargaining rights — whether Trade dispute in existence — Trade Union Act ss 24, 35 Em. Pwrs. Regs. 1976

The particulars ru
Emergency Powers Regulations 1976 in respe
are as follows:

" That between 1975 and 1976 you have been known to be an organiser of youth in Western Kingston area and that you have used this position to teach violence and subversion. That you have led mobs of violent persons in Western Kingston in attacks on the police.

That you are closely associated with and give succour and advice to notorious gunmen in Wilton and Tivoli Gardens in Western Kingston. "

Earl Spencer made an affidavit in which he swore in paragraphs 9 and 10 that up to 13th March, 1975, he was directly employed to the Social Development Commission, a department of Government as a Senior Youth Officer. He left Jamaica for the United Kingdom on the 5th April,

1975, and returned to Jamaica on the 22nd April, 1976. When he went to England he was on leave from the Social Development Commission and while there he resigned his office. In paragraphs 11-18, Spencer said:

" 11 - That I have never used my position as Senior Youth Officer while employed to the Social Development Commission or at any time in the Western Kingston area or any other area to teach violence and subversion. That my position as Senior Youth Officer was with the Social Development Commission a Department of Government from which I voluntarily resigned in June, 1975, whilst I was in England. "

" 13 - That I have never led mobs of violent persons in Western Kingston or elsewhere in attacks on the Police and it is malicious and deceptious for anyone so to state. "

" 14 - That I deny that I am or have ever been closely associated with and give succour and advice to gunmen notorious or otherwise in Wilton and Tivoli Gardens in Western Kingston or in any other area. "

" 15 - That I have never committed any act which is inimical and prejudicial to public safety nor have I ever been concerned in the preparation and/or instigation of any such act. "

" 16 - That on or about the 10th day of May, 1976, I commenced to work for the Jamaica Labour Party and I honestly and sincerely believe that my detention has been ordered by the Honourable Keble Munn, Minister of National Security solely on account of my involvement with the Jamaica Labour Party which is a party at present in opposition. That in ordering my detention, the Honourable Keble Munn, Minister of National Security acted in bad faith. "

" 17 - That my belief as stated in paragraph 16 above is based upon questions asked in interrogation which have been mainly concerned with my membership in the aforesaid Jamaica Labour Party and that no questions were asked of me pertaining to the allegations made against me by the Honourable Keble Munn, Minister of National Security as set out in the document hereto and marked with the letter 'G'. "

" 18 - That my involvement with the Jamaica Labour Party has never involved me in any act prejudicial to public safety and public order or in the preparation and instigation of any such act. That my detention is arbitrary and cannot be reasonably justified and therefore a breach of my constitutional rights as provided in section 15 of the Constitution Order in Council, 1962. "

/.....

Two further affidavits were filed in support of Spencer's application. The first by Mr. Conrad Ball is to the effect that Mr. Ball accompanied the applicant to the airport on 5th April, 1975, and met him on his return to Jamaica on the 22nd April, 1976, and that to his knowledge Spencer was in England between 5th April, 1975, and 22nd April, 1976. Mr. Ball who is a Senior Guidance and Employment Officer with the Social Development Commission swears that during the time that the applicant Spencer was employed to the Social Development Commission he did not know Spencer to teach violence and subversion to anyone or to associate with gunmen, notorious or otherwise. Further that since Spencer's return to Jamaica on 22nd April, 1976, he has not to Mr. Ball's knowledge been involved in any similar activities. In fact, the applicant has since his return to Jamaica been living at the home of Mr. Ball.

The second affidavit from Mrs. Doreen Williams, a former Director of Youth and Community Services at the Social Development Commission states that she was responsible for supervising the work of the applicant Spencer while he was employed to the Social Development Commission. It was never reported to her that the applicant used his position to do any of the things set out in the Particulars and that to her knowledge he has never led mobs of violent persons nor associated with gunmen as alleged or at all and that had he done the acts alleged such conduct would have been reported to her. That while the applicant Spencer worked with the Social Development Commission his work was exemplary and there were no complaint whatsoever concerning him.

An affidavit, in reply, was put in by the Minister in exactly the same terms as that filed in respect of the applicant Williams. In fact, the Minister filed one affidavit in which he dealt with the matters concerning both applicants.

/.....

THE ARGUMENTS

Regulation 35(1) of the Emergency Powers Regulations 1976 provides as follows:

> " The Minister, if satisfied that any person has been concerned in acts prejudicial to the public safety or public order/in the preparation or instigation of such acts and that, by reason thereof, it is necessary to exercise control over that person, may make an order (hereinafter referred to as a Detention Order) against that person directing that he be detained. "

It is the contention of the applicants that before a detention order can be made there must be in existence acts in which the applicant was concerned and that by reason thereof the applicant should be detained. Therefore, before the Minister can be satisfied that by reason of the conduct, the person ought to be detained, there must be proof that the applicant was concerned in the act. An illustration, so the argument runs, is the statement:

> " A is in possession of B in which the necessary pre-requisite is the existence of B."

The applicants say that the proof which the Minister is required to bring is to place before the Court the evidence on which he relies and not merely his conclusion, based on information which he says he has recieved. Mr. Phipps further submitted that in the case of the applicant Williams it was a necessary pre-requisite for the Minister to satisfy the Court that Williams was found in possession of a firearm on the 13th March, 1976. That allegation was heard by a Court of competent jurisdiction and the applicant Williams specifically dismissed from the charge. The applicant Williams has been in police custody continuously since the 13th March, and he has sworn that the Constable who shot him and who was present when he was detained has malice against him over a woman. In addition, he has denied all the allegations of the Minister and in those circumstances, the applicant having alleged facts, there is a duty on the Court to inquire into those facts as they constitute a condition precedent to the making of the detention

order.

It was contended that the first condition precedent in the case of the applicant Spencer is that he was in Jamaica over the relevant period. Spencer has shown that for two-thirds of the period alleged he was out of Jamaica. The second condition precedent is that he was concerned in the acts alleged and he has shown by the several affidavits that he was not. In answer to the facts put forward by the applicant the Minister, so it is said, has replied with allegations and consequently has not discharged the onus which is on him to show that the conditions precedent have been complied with.

Mr. Phipps relied on the judgment of Lord Atkin in Privy Council case of Eshugbayi Eleko vs. Officer of Government of Nigeria et al (1931) AC. 662; (1931) AER. (Rep.) 44, to show what are conditions precedent and the proper approach of the Court when faced with the determination of conditions precedent. In that case the Governor of Nigeria made an order sanctioning the deposal and removal from office and the deportation of the applicant. He contended that:

(i) he was not a native Chief and did not hold an office;

(ii) he was not deposed or removed from this office and the Govenor's sanction was therefore irrelevant;

(iii) there was no native law or custom which required him, or any other chief or native, whether deposed in the manner alleged against him or in any other way, to leave the area in question.

He said these were conditions precedent to any authority to make an order of withdrawal, and their existence can and must be investigated by the Court whenever the validity of the order or a deportation order founded on it is the subject of contest in judicial proceedings. The Solicitor General for the respondent agreed that these were conditions precedent but his argument was that on inquiry by the Court the evidence of the Governor was conclusive that the facts were as stated.

/ ....

Delivering the judgment of the Board, Lord Atkin said at page 49 (of AER Report):

> " Their Lordships are satisfied that the opinion which has prevailed that the Court cannot investigate the whole of the necessary conditions which prevail is erroneous. The Governor, acting under the Deportation 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. "

At page 50 after dealing with the various contentions raised, Lord Atkin said:

> " It is only necessary for this Board to decide that it it is the duty of the Court to investigate the whole of the questions raised and come to a judicial decision. "

In my view, Eleko's case is clear authority for the proposition that it is for the Court to inquire into and to decide:

(a) whether there are conditions precedent which must be complied with before the executive take action under a statute;

(b) what, if any, are those conditions precedents;

(c) whether they have in fact been complied with.

Mr. Phipps submitted that on the authority of Eleko's case it is competent for the Court to inquire into the following matters as conditions precedent:

(a) was the applicant Spencer in Jamaica at all;

(b) was the applicant Williams in possession of a firearm.

Eleko's case was considered by the Court of Appeal in R. v. Home Secret ry ex parte Green (1941) 3 AER. 104. Liversdige v. Anderson in H.L. (1941) 3 AER. 388; R. v. Governor of Briston Prison ex parte Ahsan (1969) 2QBD. 222.

The applicants submitted that none of the judges in Green's case either in the Court of Appeal or in the House of Lords attempted to differ from what was said in Eleko's case. Indeed in the judgments of the Court of Appeal there seems to be an affirmation of the Eleko case. They say that Lord Atkin in Liversidge v. Anderson purports to go further than he did in Eleko by saying not only is there a duty on the court to inquire into the existence of conditions precedents but a further duty to inquire into the exercise of the discretion by the executive authority.

The headnote to R. v. Home Secretary ex parte Green (C.A.) 1941 3 AER. 104 reads:

> " The applicant was arrested on May 22, 1940, in pursuance of Defence (General) Regulations reg. 18(b). The order stated that the applicant was a person of hostile associations and that, by reason thereof, it was necessary to exdrcise control over him. The applicant applied for an order for his release under R.S.C. Order 59. By Clause 3 of the regulation the applicant is given the right to appeal to the advisory committee. It appeared that the notice by the chairman to the applicant stating the grounds of his detention was inaccurate in certain particulars."

Held: (i) In such a case an affidavit by the Home Secretary stating his belief in the reason given for the applicant's detention in the order was suffidient and it was not necessary that it should state his grounds for such belief.

(ii) Where the return or affidavit showing cause, exhibits an order of commitment regular on its face, an affidavit from the Home Secretary is unnecessary.

(iii) Where an order regular on its face is produced the onus is on the applicant to prove facts necessary to controvert it.

(iv) Where a person having the custody of the prisoner makes an affidavit showing cause, the original order signed by the Home Secretary should be exhibited thereto.

Scott, L.J. stated the matter in [illegible] thus at p. 106 G:

> " It is under clause (1) that the Home Secretary purported to make his order. The chief issue in the appeal turns on the question of jurisdiction of the Home Secretary and that in the main depends on whether he had 'reasonable cause to believe' the applicant 'to be of hostile associations' for it is contended both that the existence of such reasonable cause is a condition precedent to his jurisdiction and that the facts constituting the reasonable cause are for the court to find and appraise, and not for the Home Secretary. "

These are two of the issues raised in the instant application.

After Scott, L.J. had given the history of Reg. 18B and referred to some authorities at p. 109 he said:

> " With that preface for the purpose of [illegible] the air around the problem of the interpretation, I come to the crucial point. Who is to decide the issue of reasonable cause, the Secretary of State or a Court? If a Court is to decide how could the question itself be brought before the Court? By certiorari to quash the order or by mandamus to hear and determine according to law? Obviously neither. It cannot be by habeas corpus, because the High Court does not sit as a court of appeal in such proceedings. If it be said that these are [illegible] reasons, I reply that the answer is equally plain on the grounds of national interest stated in R. v. Halliday ex parte Zadig which we ought to presume guided the present delegated legislation of His Majesty in Council. The whole regulation deals with a topic which is necessarily of a highly confidential character. It invites a decision, at least as a preliminary to action by an executive Minister of the Crown who occupies a position of utmost confidence, who has at his disposal much secret information which ought not to be made public - above all during a war - who is under a duty to keep that information and its sources secret, and, finally, who cannot be compelled in any Court to divulge what he considers ought not in the national interest to be divulged. All the King's courts recognise that inhibition and enforce it. "

At letter H he continued:

/.....

" Even if the issue could properly be brought before a Court, it would be futile to ask the court to decide it unless the material evidence could also be brought before it, and of that the impossibility seems to me self-evident. For these reasons, I do not think that the crucial words 'reasonable cause' can properly be construed as imposing an objective condition precedent of fact on which a person detained would be entitled in any legal proceedings to challenge the grounds for the Secretary of State's honest belief, either by requiring disclosure of the confidential information which he had received in the course of his official duty or by tendering evidence that there was in fact no reasonable cause. "

In dealing with the judgment of Lord Atkin in the Eleko case, Scott, L.J. distinguished that case on the basis that the issues were quite different from those in Green's case. On p. 112 B he said:

" On none of the three was the governor given by the ordinance any power of discretionary decision, nor did any question of confidential information arise. The decision of the Privy Council that each condition created a justifiable issue, to be solved before the governor's jurisdiction could arise, therefore does not touch the present case. "

When Mr. Ellis came to treat with Eleko's case he distinguished it from the instant applications on similar grounds.

Goddard, L.J. made it abundantly clear in his judgment that what was decided in the Eleko case meant no more that it is always open to the subject to controvert a return which on the face of it is good and in those circumstances the onus of proof is on the applicant. At p. 119 A, Goddard, L.J. said:

" Counsel for the appellant accordingly relies on the advice of the Judicial Committee, ... in Eleko ... at p. 670. In my opinion, however, that passage does not mean that where the executive has detained a person under statutory authority (and the regulations have the force of statute), he can merely by saying "I don't know why I have been detained" oblige the executive to prove that every condition necessary to the making of the order has been fulfilled. In my opinion, once it is shown that he is detained under a warrant or order which the executive has power to make, it is for the applicant for the writ to show that the necessary conditions for making of the warrant or order do not exist. "

Earlier in his judgment, Goddard, L.J. had considered the judgments in ex parte Lees (1941) 1 K.B. 72 and was prepared to

.....

follow that judgment. He said at p. 117 letter A:

> " It might be enough to say that in R. v. Home Secretary ex parte Lees, this Court upholding the King's Bench Division were satisfied with an affidavit from the Secretary of State in precisely the same form so far as this matter is concerned, as that sworn by him in the present proceedings. "

It is to be recalled that Mr. Ellis for the respondents places implicit reliance upon the decision in ex parte Lees.

Mr. Phipps' further submission in relation to Green's case is that the applicants in the instant case have not merely said they do not know the reason for their detention but have done what Goddard L.J. required them to do, i.e. to adduce facts to controvert the return. At this stage of the proceedings Mr. Phipps expressed the view that he accepted that in these proceedings the onus is on the applicants to show that the acts do not exist. When Ashan's case came to his attention he adopted the reasoning of the majority judgments on the question of the burden of proof.

Liversidge v. Anderson (1941) 3 AER. 338 was a case of false imprisonment arising from detention under Reg. 18B. The majority of the House of Lords held that the onus was on the plaintiff to show that the defendants acted without reasonable cause. All the judges held that the phrase "if the Secretary of State is satisfied" gives to him a subjective discretion. Lord Atkin who dissented, but not on this point, said at 353H - 354A:

> " The wording is sometimes varied with the same result. 'If the Secretary of States is satisfied ' 'Satisfied that it is necessary or expidient" ..... In all these cases it is plain that uulimited discretion is given to the Secretary of State assuming, as everyone does, that he acts in good faith. "

Because Lord Atkin was satisfied that in Green's case the Home Secretary had supplied sufficient information in his affidavit to discharge whatever onus,there was on him, Lord Atkin did not dissent from the decision in that case.

/.....

In a memorable passage (one much used by Mr. Phipps in this case), Lord Atkin at 350 letter F. said:

> " It is surely incapable of dispute that the words, "If A has X" constitute a condition the essence of which is existence of X and the having of it by A. If it is a condition to a right (including a power) granted to A, whenever the right comes into dispute, the tribunal, whatever it may be, which is charged with determining the dispute must ascertain whether the condition is fulfilled. In some cases the issue is one of fact. In others it is one of both fact and law. In all cases, however, the words indicate an existing something the having of which can be ascertained and the words do not mean, and cannot mean, 'If A thinks that he has". "

This approach of Lord Atkin has been approved by the Privy Council in Nakkuda Ali vs. Jayaratne (1951) A.C. 66. Mr. Phipps submitted that this Court is bound by the decision of the Privy Council, and the majority decision of the House of Lords in Liversidge v. Anderson would then be only of persuasive authority.

Lord Radcliffe in delivering the advice of the Board in Ali's case at p. 76-77 in commenting on Liversidge v. Anderson said:

> " It was not a case that had any direct bearing on the court's power to issue a writ of certiorari to the Home Secretary in respect of action taken under that regulation: but it did directly involve a question as to the meaning of the words "If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations ..." which appeared at the opening of the regulation in question. And the decision of the majority of the House did lay down that those words in that context meant no more than that the Secretary of State had honestly to suppose that he had reasonable cause to believe the required thing. On that basis, granted good faith, the maker of the order appears to be the only possible judge of the conditions of his own jurisdiction.
>
> Their Lordships do not adopt a similar construction of the words in reg. 62 which are now before them. Indeed, it would be a very unfortunate thing if the decision of Liversidge's case came to be regarded as laying down any general rule as to the construction of such phrases when they appear in statutory enactments. It is an authority for the proposition that the words "if A.B. has reasonable cause to believe" are capable of meaning "if A.B. honestly thinks that he has reasonable cause to believe" and that in the context and attendant circumstances of Defence Regulations 18B they did in fact mean just that. But the elaborate consideration which the majority of the House gave to the context and circumstances before adopting that construction itself shows that there is no general principle that such words are to be so understood; and the dissenting speech of Lord Atkin at least serves as a reminder of the many occasions when they have been treated as meaning "if there is in fact reasonable cause for A.B. so to believe."

I read Lord Radcliffe's speech to mean that each enactment must be construed against its own circumstances and context to discover whether an objective or a subjective meaning ought to be given to the statement, "if A. has reasonable cause to believe" and not that it lays down the principle

/.....

that the common law rule is that as a matter of construction those words require the application of the objective test.

There is an interesting editorial note to the Liversidge case which I will do well to include especially as both attorneys referred to it in the course of their arguments.

EDITORIAL NOTE:

> " In these notes it has been stated that it was well settled that it is sufficient for the Minister concerned to state his honest belief that there are reasonable grounds for the detention. The opinion of Lord Atkin, although it is duly dissentient opinion shows, perhaps, that the statement should have been more cautiously worder for that great lawyer clearly takes the view that if that belief is founded on facts capable of proof - in this case, that the applicant was a person of hostile associations - those facts should be proved to the Court. This view he has based, not on decisions in previous cases, but upon the construction of the regulation. The majority of the House, however, have not so construed the regulation. It is agreed that the words, 'if the Minister has reasonable cause to believe' postulate two conditions (a) if there is in fact reasonable cause for believing, and (b) if the Minister believes it, but there are other factors governing the proper construction of these words. In cases under the regulation the facts are peculiarly within the knowledge of the Minister, public policy and the national safety require that they shall not be made public and the matter is one for the Minister's exclusive discretion. These factors have been taken into account by the majority of the House in construing the regulation and the result has been to confirm the previous decisions of the courts in cases of this nature. "

On the authorities reviewed above, Mr. Phipps submitted that in every case it has been made manifestly clear that there is a duty on the court to inquire into the existence or non-existence of the factual situation as distinct from the exercise of discretion based upon such factual situation. In his submission the effect of the affidavits filed by the applicants is to shift to the respondents the burden to adduce acceptable evidence before the court by way of reply. In the final analysis it is for the court to decide:

(a) Has each applicant established a prima facie case in that he has controverted the return by evidence?

(b) Is the reply of the respondents, if any, a sufficient answer to the applicants' allegations in the sense that the respondents have provided the court with evidence of the existence of the factual basis which disposes of the applicants' affidavits?

/.....

Mr. Phipps conceded early in his argument that if one looks at the regulations alone, especially reg. 35(1), the result is that the applicants cannot challenge the grounds for the Minister being satisfied, but stressed that they can still challenge and do challenge the existence of the facts. However, on the basis of section 15(5) of the Constitution, he contends that it is open to the applicants to show that irrespective of the view taken of the regulations, neither the regulations themselves nor the law under which the regulations were made can go outside the ambit of the constitution. He submitted that section 15(5) of the Constitution provides that any law or anything done under the authority of any law must always be reasonably justifiable if done in deprivation of the citizen's fundamental right to be protected from arbitrary arrest. His contention runs thus: all the measures taken under the law must be justified before a court when challenged by a person detained. In his submission section 15(5) of the Constitution enshrines what was contended for by Lord Atkin in Liversidge's case. If regulation 35(1), says he, Emergency Powers Regulation gives an absolute power to the Minister to exercise his discretion but the Construction requires that any such power must be reviewed by the court, it would follow that the regulation would be ultra vires.

He submitted it is for the court to decide whether reg. 35(1) was a measure reasonably justifiable for the purpose of dealing with the situation of the Emergency. Further, the test of what is reasonably justifiable is an objective one and by reason thereof the exercise of the power of detention is open to review by the court. In order, therefore, for the court to review the exercise of this power, it is necessary for the respondents to show to the Court the grounds upon which the power was exercised and such grounds must be accompanied by sufficient particulars whenever the exercise of the power is challenged.

Section 15(5) of the Constitution in the submission of Mr. Phipps, is intended to secure that not only the law itself including the regulations, passed during a period of public emergency can be reasonably justified but also whatever is done under the authority of that law. The word "measures" in the section cannot refer to sections of the law but acts done under the law.

/.....

The final authority relied on by Mr. Phipps on this aspect of his presentation was that of Regina v. Governor of Briston Prison ex parte Ahsan (1969) 2 Q.B. 222. There British subjects had landed clandestinely in England. There were served with notices refusing their admission. They applied for writs of habeas corpus to secure their release and it was conceded that, in accordance with paragraph 2(3) of the Schedule, one of the conditions precedent to the validity of the issue of a notice on which the jurisdiction to detain in custody depended was that the examination had to take place within 24 hours of landing.

The majority of the Divisional Court **held that:**

> " since the court was inquiring into a claim by the executive to detain in custody a British subject and the applicants had alleged that a condition precedent to the validity of the notice of refusal had not been performed, the onus was on the executive to negative the challenge and prove beyond reasonable doubt that the condition precedent had been performed. "

Mr. Phipps adopted the decision in this case and submitted that the Minister's affidavit in the instant cases fall considerably below the standard of proof necessary, i,e. proof beyond a reasonable doubt.

The arguments of Mr. Phipps were illuminating and interesting. Mr. Ellis for the respondents rose to the challenge. Mr. Ellis submitted that the allegations of bad faith contained in the affidavits of the applicants did not avail them. The onus of proof was on the applicants and they could not rely on mere allegations. It was the duty of the applicants to require the Minister for cross-examination if they were challenging his bona fides and this the applicants did not do. In support of this submission, he relied on a number of cases. I will refer to two of them.

Franklyn v. Minister of Town and Company Planning (1947) 1 AER. 612 at 616: Lord Oaskey L.J, said:

> " In my opinion, the judge was right as a matter of l w in saying that the onus rested on the objectors to show that the Minister had not an open mind when he made the order. "

Jessel, M.R. said in Errington v. Metropolitan District Rly, (1882) 19 Ch. D. 559 at 571:

> " Now of course, you can show want of bona fides in two ways. You may show it by proving that the lands are wanted for some collateral purpose as a fact, or you may show it by proving that the alleged purpose is so absurd under the circumstances that it cannot possibly be bona fide. As regards the first ground, there was an attempt made here, but it was unsupported by evidence. It was the belief of a gentleman without any facts, and was not admissible in evidence at the trial of the cause. That, therefore, must be put out of the case. "

A passage from the Franklyn case, supra, dealt with the necessity for cross-examination. Lord Oaskey said at p. 616:

> " Notwithstanding that the Minister had made that affidavit and that the objectors were charging the Minister with bias and with not having fairly considered the objections and report, no application was made to cross-examine him, which, in my opinion, would have been the fair way in which to substantiate allegations that the speech made on May 6, 1946, showed that his mind was already made up and that what he had said in his affidavit was not true. "

To the same effect, is the speech of Lord Green, M.R. in re Smith v. Faweett Ltd. (1942) Ch. 304 at 308-309:

> " If it is desired to charge a deponent with having given an account of his motives and his reasons which is not the true account, then the person on whom the burden of proof lies should take the ordinary and obvious course of requiring the deponent to submit himself to cross-examination. That does not mean that it is illegimate in a proper case to draw inferences as to bona fides or mala fides in cases where there is on the face of the affidavit sufficient justification for doing so, but where the oath of the deponent is before the court, as it is here, and the only grounds on which the court is asked to disbelieve it are matters of inference, many of them of a doubtful character, I decline to give to those suggestions the weight which is desired. "

As Mr. Phipps addressed no arguments to me to support mala fides in the Minister, there was no live issue on this point. I desire to say, however, that it is an entirely wrong practice for an appellant to make an allegation of bad faith against the Minister when he has no intention of adducing any evidence in support thereof. I accept Mr. Ellis' submissions that it was for the applicants to prove bad faith in the Minister and this they made no attempt to do.

The next broad submission of Mr. Ellis is that in a case of this nature a court has no jurisdiction to inquire into the merits of the case except

to satisfy itself that the Minister has applied his mind to the necessary matters set out in the regulations and has so applied his mind to the particular case of the applicant. The jurisdiction of the court in a case of this kind is not an appellate jurisdiction to hear the case as an appeal from the decision of the Minister, Mr. Ellis says that if it is shown that the Minister has followed the procedure laid down in the Emergency Powers Regulations, 1976, and has bona fide made an order for detention and has stated that he has so done in the belief that the necessary ground as stated therein existed for the detention of the person detained, then there is nothing of which complaint can be made to the Court and if a complaint is made on the authority of Lees' case, the court has no jurisdiction to hear such complaint.

Reg. v. Secretary of State for Home Affairs ex parte Lees (1941) 1 K.B. 72 was heard first by a Divisional Court and then the Court of Appeal.

In that case the Home Secretary made an order for the detention of a person under Reg. 18B as he had reasonable cause to believe that that person was a member of or was active in the furtherance of the objects of a certain organisation. In reply to an application for a Writ of Habeas Corpus the Home Secretary swore an affidavit in which he said that before he made the order for detention he received confidential reports and information from persons in responsible positions whose duity it was to make investigation, and that, having considered such reports and information, he had come to the conclusion, that there was ground for believing and he did in fact believe that the person detained was a member of and had been active in the furtherance of the objects of the organisation.

The writ was refused. Although the applicant was released before the case reached the Court of Appeal, the appeal was considered on its merits. I quote a long passage from the judgment of MacKinnon, L.J. at p. 83. That judge after referring to the text of reg. 18B. (1A) went on:

> " It is, I believe, obvious from the terms of that regulation that if the Home Secretary honestly believes or has reasonable cause to believe, that a person is within this category he is authorised to make an order for his detention, and that makes his detention legal and not subject to review or inquiry under the Habeas Corpus Act 1816. The sole question is whether the Secretary of State had reasonable cause to believe and did honestly believe. The Secretary of State has by affidavit sworn that he received a number of reports from persons whom he regards as reliable in regard to this man, 'persons in responsible positions who are experienced in investigating matters of this kind and whose duty it is to make such

/.....

" investigations and to report the same to me confidentially. I carefully studied the reports and considered the information and I came to the conclusion that there were clear grounds for believing and I did in fact believe that Mr. Aubrey Trevor Oswald Lees was a member and was and had been active in furtherance of the objects of the organisation." If Gardiner says that the Home Secretary does not bring before the Court what was the nature of those reports, and as he has not done so, the Court ought to hold that he has not satisfied it that he had reasonable cause to believe, as he has sworn that he had. That seems to me to suggest that in every case of this sort this Court can be made to act as a court of appeal from the discretion of the Secretary of State and inquire into the grounds upon which he has come to the belief, and can consider whether there were any such grounds for belief, or, if there were any grounds whether it was reasonable belief. I do not think it is the function of the Divisional Court or this Court in any way to act as a court of appeal from the discretionary decision which has to be made by the Secretary of State. He has sworn that he had grounds in the nature of those reports which were confidential and that he did come to the conclusion that there were clear grounds for believing and did in fact believe. I have his affidavit and I have no reason to think that it was otherwise than strictly honest and correct. Therefore, he has proved to my satisfaction that he had reasonable cause to believe and did honestly believe, in the terms of the regulation, and that being so, the order was validly issued pursuant to this regulation..... "

With this opinion, Goddard and DuPareq L.JJ. agreed.

Mr. Ellis was careful to point out that in the instant case the affidavit of the Minister was in form identical to that of the Secretary of State in the Lees case. In his submission the conditions precedent in a case of this nature into which the court can inquire are:

(I) The identity of the detainee;

(II) Whether the order is bad ex facie;

(III) Whether there was in fact a state of emergency;

(IV) Whether the regulations have been strictly complied with.

The applicants contend that those four points only go to the validity of the return and do not go towards answering the case made out by the applicants.

One further case must be looked at before I come to consider the Jamaican legislation and that is Stuart v. Anderson (1941) 2 AER. 665, at 670. Tucker, J. was considering the proper construction of reg. 18B. although in a false imprisonment case. He said:

" It is quite clear, of course, that when the regulation was made ..... those persons who made this regulation had to consider to whom they were going to entrust this very difficult and troublesome matter, and they decided, as is clear from the regulation, that the person to make the decision in these matters was not to be one of His Majesty's Judges. It was not to be any ad hoc tribunal set up for the purpose, but it was to be the Home Secretary and the Home Secretary alone. It also makes it clear, I think - and in fact it has been so held by the courts - that the court has no jurisdiction to sit as an appellate tribunal upon any the decision to which the Home Secretary has come, and has no court any power to try any such case itself in order to ... whether

" it would have come to the same conclusion if the legislature or those having powers to legislate, had entrusted this matter to a judge. Nonetheless, the court at any rate exercising its powers of habeas corpus has power, as has been clearly laid down in the cases which have arisen under this regulation to ensure that the powers conferred upon him have been exercised honestly, and bona fide, and not merely under some pretence of using the regulation for the purpose of detaining some person on some other grounds altogether. Similarly, complaints would no doubt be properly made if a person was detained who was not the person aimed at by the order made by the Home Secretary - that is to say - if a different man altogehter was being detained. Similarly, also, there have been cases which has been held, or at any rate, there has been one case where it/has been held - that the detention was unlawful and illegal because the Home Secretary had not at all stages of the proceedings adhered to the procedure and the necessary requirements laid down by this code which governs his powers in the matter. "

It is clear that it was on the basis of this judgment that Mr. Ellis framed his submissions as to conditions precedent cognizable by the court, when the court is considering habeas corpus proceedings under The Emergency Powers Acts.

I extract the following principles from the cases I have referred to herein:

(a) Where the words "if the Secretary of State (Minister) has reasonable cause to believe any person to be hostile origin or associations" appear in a statute they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power.

(b) It will depend upon the context and surrounding circumstances whether the true meaning of the clause "If A.B. has reasonable cause to believe" is either:

(i) "If A.B. honestly thinks that he has reasonable cause to believe; or

(ii) "If there is in fact reasonable cause for A.B. so to believe."

(c) Where the term "if the Secretary of State (Minister) is satisfied" is used in Defence Regulations, it is plain that unlimited discretion is given to the Secretary of State (Minister) assuming that he acts in good faith. In other words, he has a plenary discretion to make the particular order (detention) against the detainee, if he has in his own mind and according to his own judgment, reasonable cause to believe that the state of affairs exist, by reason whereof, it is necessary for him to make the order (detention).

.....

(d) The words "if the Minister has reasonable cause to believe" postulates two conditions:

(i) that there is in fact reasonable cause for believing;

(ii) and if the Minister believes it.

In the context of regulation 18B of the Defence Regulations, the court is not the proper forum to decide (i) above and the matter is one for the Minister's exclusive discretion.

(e) The Divisional Court in Ahsan's case did not doubt the correctness of Green's case but distinguished it on the ground that in Green's case there were no facts in dispute the existence of which were conditions precedent. The mere challenge of the bona fides of the Minister in affidavits, which challenge found no place in the arguments, (indeed the bona fides of the Minister was accepted throughout the arguments) did not raise an issue of fact.

I have spent a very long time quoting from the cases which were concerned with the interpretation of Regulation 18B of the U.K. Defence Regulations. My purpose is to demonstrate that it is likely that the framers of the Constitution must have known of those decisions when they came to draft section 15(5) and 15(6) of the Constitution. Is is far-fetched to presume that the framers of the Constitution were familiar with the famous regulation 18B of the Defence Regulations (U.K.) of the second World War and of the numerous decisions of the Courts on the interpretation of that Regulation? Did the framers of the Constitution envisage that there would be times of national crisis when it would take sharp, drastic measures, even to the extent that those measures might impinge upon the sacred fundamental right of personal liberty to correct the situation? It is self-evident that they had, hence the provisions in sections 15(5), 15(6), 20(9) and 26(4), 26(5), 26(6), 26(7) of the Constitution.

Mr. Phipps has asked me to say that when the term "reasonably justifiable" was written into section 15(5) of the Constitution the framers of the Constitution must have known of Lord Atkin's great judgment in Liversidge vs. Anderson and of the approval which it received from the Privy Council in Ali's case. I think it is more to the point that the framers of the Constitution were being mindful of what steps could properly be taken in a time of grave national crisis to preserve the safety of the nation.

Section 15(6) of the Constitution envisages that during a period of public emergency a person who was not convicted of any offence could be detained indefinitely i.e. for a period of the emergency under a law passed in accordance with section 15(5). Section 20(9) envisages that the elaborate provisions contained in that section to secure to a person the protection of trial by an independent and impartial court, established by law, may be derogated from during a period of public emergency.

Any measure taken under section 15(5) must be reasonably justifiable for dealing with the situation that exists during the period of public emergency. An exactly similar requirement as to reasonable justification is made in s. 20(9).

Section 15(5) of the Constitution is as follows:

> " Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the taking during a period of public emergency of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period of public emergency. "

There is here set out the framework of emergency legislation. In the first place, there must be a law and it is conceded by the parties that regulations may be a law for these purposes. In the second place, the law must authorise the taking of measures. In the third place, these meagures must be reasonably justifiable. I do not agree with the contention of the applicants that measures in that context may mean the physical acts done by members of the security forces or the act of the Minister in making a detention order. For the section, 15(5), to bear this meaning it would have to be re-worded and truncated on the following lines:

> " Nothing contained in any law or nothing done under the authority of any law, shall be held to be inconsistent with or in contravention of this section to the extent that the law in question or the thing done under the authority of that law during a period of public emergency is reasonably justifiable ..... "

In this formulation, all reference to the law authorising the taking of measures would be omitted. It could never have been the intention of the framers of section 15(5) of the Constitution that every individual action taken during a period of public emergency could be tested in the Court where it would be for the Court to determine objectively whether such action taken was reasonably justifiable. How would this possibly work if

/.....

under section 20(9) of the Constitution it is possible to derogate from the Court's jurisdiction?

It is provided in section 26(4) that during a period when Jamaica is at war a period of public emergency comes into being. Is it not more likely then, that the framers of the Constitution knowing of the English decisions under Reg. 18B. of the Defence Regulations, constructed a section which would empower Parliament and the Executive in the first instance to determine what general measures should be taken in the time of emergency and then leave it to the Court when challenge is made to determine whether a particular measure can be reasonably justified?

I hold that under section 15(5) of the Constitution what ought to be reasonably justifiable are the powers conferred by the emergency legislation and the actual provisions of the emergency legislation. Section 15(5) does not admit of the extended meaning that particular actions, i.e. an act of detention, must itself be reasonably justifiable. Under this section the Court's power is limited to a consideration of the vires of the legislation after a consideration of the factual situation existing in the period of emergency. If emergency regulations provide for search of person or premises without warrant, or curfew by day or night, or detention without charge or trial, or for the deliberate maiming of adult males or compulsory separation of all wives from their husbands, all such regulations could be enquired into by the court to determine if any one of them is reasonably justifiable for purposes of dealing with the emergency situation.

No argument whatsoever was addressed to me on the question as to whether regulation 35(1) of the Emergency Powers Regulations 1976, which provides, for the detention of persons, was reasonably justifiable. The argument was directed to the proper construction of the regulation and its relationship to section 15(5) of the Constitution.

I think I am supported in my interpretation of sec. 15(5) by Atkin, J. (as he then was) in Lipton v. Ford (1917) 2 K.B. 647 and 654.

Under the Defence of the Realm Act 1914 certain regulations were made and acting under these regulations a quantity of raspberries were requisitioned for supply to the troops. In his judgment Atkin, J. said:

/.....

760

" In any case, it was further contended that taking possession of a crop of raspberries could not be necessary for the public safety or defence of the realm. I do not think those arguments well founded. I think that all that I have to see is whether the regulation is one that is reasonably capable of being a regulation for securing the public sefety and defence of the realm. If it is, I do not think the Court is entitled to question the discretion of the Executive, to whom Parliament has entrusted powers in such wide terms. "

In Beckles v. Dellamore 9 W.I.R. 299 Wooding, C.J. said at page 308:

" There was little, if any, dispute that if regulation 7(1) of the regulations was shown not to be reasonably justifiable for dealing with the situation then existing, it must be held to be void. That this is so I have amply demonstrated, I think. The question therefore is - did the applicant upon whom the onus admittedly rested, show that the regulation was not so justifiable and that it ought accordingly be avoided? "

The learned C.J. then reviewed the facts of that situation as disclosed to the Court, and held at p. 309E:

" Accordingly, it is in my judgment impossible to hold that reg. 7(1) was shown not to be reasonably justifiable for the purpose of dealing with the situation which then existed. "

In these applications there was no evidence whatever before the Court of the circumstances leading up to the proclamation of the state of public emergency or the situation existing when the detention orders were made and I was never called upon to decide whether Reg. 35(1) of the Emergency Powers Regulations 1976 was reasonably justifiable.

Elaborate provisions are made by sec. 15(6) of the Constitution whereby a person lawfully detained under emergency legislation can have his case reviewed by an independent and impartial tribunal presided over by an attorney-at-law appointed by the Chief Justice. That tribunal was not given power to order the release of the detainee but only to make a recommendation as to the necessity or expediency of continued detention. A person who is lawfully detained is therefore not left wholly without a remedy.

I wish to introduce specific consideration of Reg. 35(1) of the Emergency Powers Regulations 1976, with a quotation from the speech of Lord McMillan in Liversidge's case at p. 366:

" In the first place, it is important to have in mind that the regulation in question is a war measure. This is not to say that the courts ought to adopt in wartime canons of construction different from those which they follow in peacetime. The fact that the nation is at war is no justification for any relaxation of the vigilance of the courts in seeing that the law is duly observed especially in a matter so fundamental as the liberty of the subject. Rather the contrary. However, in a time of emergency, when the life of the whole nation is at stake, it may well be that a regulation for the defence of the realm may quite properly have a meaning which because of its

/.....

> " drastic invasion of the liberty of the subject, the courts would be slow to attribute to a peacetime measure. The purpose of the regulation is to ensure public safety and it is right to interpret emergency legislation as to promote, rather than to defeat, its efficacy for the defence of the realm, That is in accordance with a general rule applicable to the interpretation of all statutes or statutory regulations in peacetime as well as in wartime. "

This is the rule for which Mr. Ellis contended and which I think is applicable to the construction of reg. 35(1).

Reg. 35(1), in the widest possible terms, confers power upon the Minister to exercise his discretion if he is satisfied if he is satisfied as to the existence of certain facts. I do not think that there is any clearer way to confer a subjective discretionary power. The phrase "by reason thereof" refers to the state of mind of the Minister. They mean that if the Minister has information of the kind which satisfies him and him alone, that the person has been concerned in acts or in the preparation or instigation of acts, prejudicial to public safety or public order, he may detain that person. The words "by reason thereof" do not refer, and cannot refer to a state of affairs which would render it possible for a Court to make an objective determination that the person has in fact been so concerned or was in preparation for or was instigating, as alleged. If this was the true meaning to be given to the words "by reason thereof" no hearsay evidence would be admissible in proof, no confidential information could be given and the plenary subjective discretion conferred by the opening words, "if the Minister is satisfied" would be illusory.

I do not agree on a construction of reg. 35(1). It is a condition precedent, over which a court can pass, for the respondents to establish either beyond reasonable double or on a balance of probabilities that the detainee had in fact been concerned in or in preparation of or in instigation of prejudicial acts.

Nothing said by Lord Atkin in Liversidge v. Anderson and by the Privy Council in Nakkuda Ali, was an interpretation of a clause which contained the words "if satisfied." They were dealing with the phrase "reasonable cause." Everyone agreed in the Eleko case that certain things were true conditions precedent and moreover those conditions precedent could not be determined by the Governor. Eleko's case does not decide anything that touches upon the matters at issue in these applications.

/.....

The phrase used in reg. 18B is "reasonable cause," yet in not one of the reported cases under that section did the court hold that the Home Secretary must show to the court as a condition precedent to his action that the detainee had in fact been so concerned etc. in the particular acts alleged.

What the cases all show is that the Minister must have acted bona fide; that he must have received information; that he honestly believed the information; and that in it was his honest belief that the person ought to be detained.

I agree entirely with Mr. Ellis that the conditions precedent applicable to an application of this nature go no further than the identity of the person detained, the existence of a state of emergency and compliance with the regulations. If those matters are shown then the detention is prima facie lawful.

The affidavits filed by the applicant Williams to controvert the return do not to my mind have the effect contended for by Mr. Phipps. There is nothing in the affidavits to show that the first and third particulars supplied by the Minister are but window dressing and the only real ground was the possession of the firearm. Up to 13th March, 1976, the applicant Williams was at large. He says he was not concerned in any of the matters alleged by the Minister. That does not take his case outside that of Lees' or Green's. They too said they were people of good reputation and were innocent of the allegations made by the Home Secretary. Williams said Constable Juyle had malice against him. This the constable has denied. He was not even a constable in 1973, and he says he knows nothing of the girl Sonia. He made no report to the Minister. If the detention order was made after Williams' case was dismissed in the Gun Court, and on the sole ground, that he was in possession of the very firearm on the said day, quite different considerations might arise.

The applicant Spencer by himself and two deponents say he is a person of good character and quite innocent of the allegations made against him. So said Lees and Green. He says he was not in Jamaica for 12 out of 18 months and for this he has support from Mr. Ball. That by itself does not avail him as by his admission he was in Jamaica up to 10th April, 1975, and between 22nd April and 20th June, 1975. If his case was that he was

/.....

not in Jamaica for the whole of 1975, and up to his arrest in 1976, then the issue of identity would arise. The Minister says he received in respect of each applicant confidential reports and information from responsible persons whose duty it is to make investigations into the activities of persons whose behaviour gives reasonable cause for suspecting them to be acting or have acted in prejudice to the public safety. He says he considered the reports and he is satisfied that each applicant was so concerned and that is why he made the detention orders. The Minister was not cross-examined. I see no reason to disbelieve the Minister. He did not claim privilege, He said his information was confidential and this was not challenged.

Whatever might be the position in immigration legislation or legislation which sets up a punitive regime, I hold that in cases where a court is faced with emergency legislation to which section 15(5) of the Constitution applies, and the respondents have by the return shown that the detention is prima facie lawful, the onus is on the applicant to adduce facts to controvert that return.

In all the cases before Ahsan no court laid it down that the respondent Minister would have to prove beyond reasonable doubt that the executive had authority to detain the subject. In Lees' case and again in Green's case, it seems to me that the prevailing view was a pre-ponderance of probabilities. I do not think that the principle in Ahsan's case is applicable to the present for the reasons given earlier.

With regard to the affidavit evidence of the applicants, I do not think that there can be any distinction between "I do not know why I have been detained" and "I have done nothing wrong for which I can be detained."

I hold further that in his affidavits the Minister has justified the detention of the applicants having regard to the points they raised in their affidavits. Although the Minister is in a much happier position than the Secretary of States was in, Lees' case, I agree with Mr. Ellis that the present case is indistinguishable from Lees' case.

Smith, C.J. decided in M. 27 and 29/76 re Grange re Brown - that the Governor-General had power under section 26(4) of the Constitution to declare a state of emergency. Mr. Phipps pressed upon me to say that the reasoning of the Court of Appeal in Trinidad and Tobago in Beckles case,

/.....

supra, should be preferred to that of Smith, C.J. Mr, Ellis in supporting the judgment of Smith, C.J. argued that section 2 of the Emergency Powers Act, being in the same terms of the Constitution, by parity of reasoning, also provides authority for the declaration of a state of public emergency. I agree with the reasoning of Smith, C.J. in re Grange, re Brown.

Section 26(4) of the Constitution provides that a period of public emergency may arise in three separate ways:

(a) Jamaica is engaged in any war; or

(b) There is in force a Proclamation by the Governor-General declaring that a state of public emergency exists; or

(c) There is in force a resolution of each House supported by the votes of a majority of all the members of that House declaring that democratic institutitions in Jamaica are threatened by subversion.

In my view, it would not be necessary for the Governor-General to make any proclamation if Parlament acted under 26(4)(c) as it is possible for Parliament to act without the concurrence of the Ministers of Government. In those circumstances, a Minister might not be prepared to advise the Governor-General to proclaim a state of emergency. As the Emergency Powers Act stood in 1962, when the Constitution came into force, there was no power given under that Act for the two Houses of Parliament to declare by resolution that democratic institutions in Jamaica were threatened by subversion thereby bringing into effect a state of public emergency. I think that section 26(4)(c) was an enabling power and this strengthens my opinion that section 26(4)(b) contains an enabling power.

In the result the applications are refused with costs to the respondents to be taxed or agreed.
