IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

S.C. Misc. 102/91 R.v. The Keeper of the Central Police Station Lock-up
Ex Parte Cornelio Ramos

S.C. Misc. 103/91 R.v. The Keeper of the Central Police Station Lock-up
Ex Parte Antonio Falco

S.C. Misc. 104/91 R.v. The Keeper of the Central Police Station Lock-up
Ex Parte David Blasco.

BEFORE: PATTERSON, J.

PANTON, J.

MORRIS, J. (AG.)

Dennis Daly Q.C., & Donald Gittens, instructed by Suzann Dodd, for the applicants.

Lennox Campbell, Sharon Service and Andrew Irving instructed by the Director of State Proceedings for the respondent.

December 2 & 4, 1991

PATTERSON, J.

The applicants, Cornelio Ramos, Antonio Falco and David Blasco each moved the Full Court for the issue of a Writ of Habeas Corpus ad Subjiciendum. The motions were all of a similar nature and were heard together.

Each applicant has been detained in the lock-up at the Central Police Station in Kingston, after serving a term of imprisonment. Ramos and Falco completed their sentences of imprisonment on or about the 27th February 1987, and they have been detained since then. Blasco completed his sentence of imprisonment on or about the 24th September 1990, and he has been detained since then. All three applicants are aliens who committed crimes within the jurisdiction. They did not land in Jamaica in accordance with the provisions of the Aliens Act, and so, on the completion of their sentences of imprisonment, each was detained to be removed from the island. No charge has been laid nor has a deportation order been made in respect of any of the applicants. All three applicants are of Cuban Nationality, but it appears

that they had been residing in the United States of America for sometime before their arrival in Jamaica.

The steps taken by the Jamaican Government to remove each of the applicant from Jamaica are set out in affidavits filed by the Ambassador of Jamaica to the Republic of Cuba, the Senior Superintendent of Police in charge Immigration Division and the Director of the Security and Immigration Division of the Ministry of National Security.

The Ambassador states that in 1988 he was the Director of Protocol and Consular Division in the Ministry of Foreign Affairs, and in that capacity, he learnt of the detention "in protective custody" of Ramos and Falco. On the 29th June, 1988 the Jamaican Embassy in Washington was requested to seek permission, through diplomatic channels, for these two applicants to re-enter the United States of America. The United States Government, by diplomatic note dated 26th September, 1988 communicated its repeated refusal of the request of the Jamaican Government. Nothing further was done by the Ambassador until the week of the 14th January, 1991, when he made his first visit to Cuba. The question of the repatriation of these two applicants was discussed with the Director of Consular Affairs in the Cuban Foreign Ministry. He was informed that the Cuban Government would not allow them to be repatriated if they are persons who fled Cuba in 1980 and entered the United States of America and were granted temporary permission to stay pending permanent status. However, if they are on a list of returnees agreed on between the United States of America and Cuba, then they would be repatriated but only if they are returned by the United States Government. The Cubans will not accept them from any third country. This information was communicated to the Director, Protocol and Consular Division of the Ministry of Foreign Affairs of Jamaica by letter dated 19th February, 1991. The United States Government subsequently advised the Jamaican Government that Ramos and Falco were not on the list of returnees referred to above. By letter dated July 10, 1991, the Ambassador made certain suggestions to the Director as to a possible procedure that could be adopted to deport the applicants, and as far as the evidence disclosed, the matter rests there. The Director of the Security and

Immigration Division of the Ministry of National Security contacted the Consul General in the Embassy of the United States of America in Jamaica by letter dated April 2, 1991 (with a reminder of July 26, 1991) seeking to obtain travel documents for those two applicants and also for Blasco, so that they could re-enter the United States, but this has not borne fruit up to the present time. So, these two applicants have been detained since 27th February 1987 awaiting deportation, and the position at this time is that neither the United States of America, where they resided prior to coming to Jamaica, nor Cuba, their native country, is prepared to accept them. They cannot re-enter the United States of America, and the Cuban Government will not approve their repatriation from any country but the United States of America. No other country is willing to accept these applicants.

David Blasco was detained on the 24th September, 1990. His detention was reported to the Director of Security and Immigration in the Ministry of National Security in November, 1990 by Suzann Dodd, Attorney-at-law. On the 11th December 1990, the Director requested a report from the Chief Immigration Officer and that was supplied on the 4th February 1991. Representations were made on his behalf to the American Consul General as stated above, but without any success to date.

Mr. Gittens argued that the fundamental rights and freedoms of these individuals are being violated in that their continued detention is arbitrary and does not fall within any of the exceptions contained in Sec.15(1) of the Constitution of Jamaica. He readily admitted that the applicants were legally detained in the first instance, and that the Aliens Act provides means whereby Jamaica may deport unwanted aliens. He said that no efforts were made to deport the applicants in accordance with the provisions of the said Act, but instead, the Government has sought to take the diplomatic channels through "good offices" to resolve what he admits is a unique and difficult situation. Although the Aliens Act provides for the deportation of aliens and for their detention before deportation, it does not prescribe any time frame within

which the alien must be deported. Nevertheless, this does not mean that the alien can be subjected to indefinite detention pending deportation. He referred to the case of R.v. Governor of Durham Prison ex parte Singh [1984] 1 ALL ER 983 where Wolfe J. had this to say (at page 985):-

> "Since 20 July 1983 the applicant has been detained under the power contained in para. 2(3) of Sch.3 to the Immigration Act 1971. Although the power which is given to the Secretary of State in para.2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Second, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend on the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention."

This is a case where a deportation order was in force against Singh, and he was detained under the authority of the Secretary of State pending his removal from the United Kingdom. Mr. Gittens submitted that "the power to detain an alien in Jamaica under the Aliens Act is subject to the requirement that such detention be only for such time as is reasonably necessary to effect the deportation, and more importantly, where it appears from the facts of a particular case that the deportation procedures will not take a reasonable time, then the power of detention should not be exercised at all. This submission takes even greater force when, as in the case of these applicants, they have all been able to produce people willing and able to accommodate them in the society."

He argued that on the facts, a stalemate exists and there is no opening for any further progress being made towards deporting the applicants,

and so the situation is tantamount to their being permanently detained. He urged the Court to order the release of the applicants on conditions that will be truly protective of the society. Even though it is conceded that the applicants entered Jamaica illegally, the State must either act promptly to deport them or act in a way so as not to deprive them of their liberty. The original detention may not be illegal, but the passing of more than reasonable time to deport them makes the detention illegal.

Mr. Campbell opposed the issue of the writ. He argued that the applicants, not having entered the island in accordance with the Aliens Act, are deemed to be illegal aliens and as such, shall not be given permission to land. He referred to S.6 of the Aliens Act and submitted that the applicants have not satisfied the preconditions and are deemed to be in lawful custody whilst detained awaiting their deportation. He said that "the authorities have pursued, are pursuing and shall continue to pursue diplomatic efforts and other means to secure the deportation of the applicants to their homeland, Cuba, or the United States of America or whichever country will be willing to accept them."

He argued that S.15 of the Constitution of Jamaica sanctions the detention of the applicants, and when the committal is made with legal authority, then the Court cannot "discharge or bail" the party committed. The Court may only interfere by the issue of a writ of habeas corpus if, dispite the reasonable efforts of the State acting in the interest of the applicants, there appears to be no reasonable solution within a foreseable time. He concluded his arguments by submitting that "in the unique circumstances of these cases, where the State has demonstrated a willingness to return the applicants to the land of their choice, the period that they have been in custody ought not to be deemed at this point to be unlawful." He urged the Court to impose strictures on the duration of time that the applicants may be further held.

The writ of habeas corpus ad subjiciendum may be issued to secure the release of the subject from unlawful or unjustifiable detention, whether such person is being held at the instance of the executive or by

a private person. It is issuable at the instance of all persons within the realm who are under the protection of the Crown, inclusive of friendly aliens. The Constitution of Jamaica protects the rights and freedoms of the individuals, and in particular S.15(1) provides that:

> "No person shall be deprived of his personal liberty save as may in any of the following cases be authorised by law:-
>
> (j) "for the purpose of preventing the unlawful entry of that person into Jamaica, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Jamaica or the taking of proceedings relating thereto;"

There is no doubt that States are generally recognised as possessing the power to expel, deport or remove aliens from its jurisdiction; it is an incident of the State's territorial sovereignity, and in my opinion, the exercise of such a power is not in issue in these cases. What seems to be in question is the manner in which the State has chosen to exercise the power to remove the applicants from the jurisdiction. It is said that the applicants are being held "in protective custody" pending their removal from the jurisdiction. But it seems to me that although the power of detention prior to expulsion, extradition or lawful removal is authorised by law, nevertheless, such detention should be avoided unless the alien is a threat to the national security or if he refuses to leave the State, or if he is likely to evade the authorities when the time comes for him to leave. In the instant cases, the respondent has offered no such proof. The alien should not be subjected to unreasonable or unnecessary harsh treatment pending his repatriation. Where an alien is detained pending expulsion, extradition or lawful removal from the State, then it is the duty of the State to act expeditiously to secure the desired end, and in my view, any unreasonable delay renders the detention unjustifiable, and accordingly, the alien should be released from detention, unless it is shown that he is a person falling within one or more of the categories of persons whom I have stated should be detained. Common sense dictates that an alien should not be detained indefinitely or for an unreasonable length of time before being repatriated. What is an unreasonable length of time depends on the

circumstances of each case, but where it is shown as in these cases, that repeated unsuccessful efforts have been made, and there is no immediate prospects of an early resolution of the matter, any continued detention may be considered unreasonable.

I turn now to the facts of the instant cases, and I underscore the fact that no deportation order has been made in respect of any of the applicants, nor have they been charged for illegal entry. The diplomatic channels pursued by the authorities have all proven fruitless. Counsel for the respondent has not pointed me to even a faint light at the end of the tunnel. In the meanwhile the applicants remain in detention for what I consider to be unreasonably long periods of time. Consequently, I am of the view that the motion succeeds in each case and accordingly, I would order that writs be issued forthwith to the Keeper of the Central Police Station Lock-up to secure the release of all three applicants.

PANTON, J.

These applications for writs of habeas corpus are by three aliens who were born in Cuba and have been resident in the United States of America for several years.

The applicants Cornelio Ramos and Antonio Falco were arrested in Jamaica on February 26, 1986, on charges of possession of ganja. They were convicted on June 30, 1986, by the Resident Magistrate for St. Mary and sentenced to six (6) months imprisonment. They served their sentences and were released on or about February 27, 1987. They have been in the custody of the police since the expiration of their sentences.

The Resident Magistrate for Kingston, in which parish they are being held, ordered their release on October 17, 1990. As soon as they were released, the immigration authorities re-arrested them.

No charge has been laid against them; and none is contemplated.

In November, 1990 two individuals resident in Jamaica wrote to the Ministry of National Security offering to provide housing and employment for these two applicants if they were released. The Permanent Secretary in that Ministry responded on December 11, 1990 that diplomatic initiatives were being undertaken and that the request to release the applicants could not be "pursued" until the diplomatic "avenue" had been exhausted.

The applicant David Blasco apparently had not heard of the fate of the other applicants. He was arrested at Rocky Point, Clarendon, on August 3, 1987, for breaches of the Dangerous Drugs Act. He was convicted on August 18, 1987, by the Resident Magistrate for Clarendon, and sentenced to one year's imprisonment as well as to pay a fine of One Million Dollars ($1m) or four (4) years' imprisonment. The fine was not paid. His sentence of imprisonment was completed on or about September 24, 1990. He has been in the custody of the police since then. No further charges have been laid against him; none is contemplated. A resident of Salt Spring, Saint James, is willing to offer him work. Up to a year ago, the Ministry of National Security had no record of him.

On December 11, 1990, the Permanent Secretary in the Ministry of National Security informed Mr. Blasco's attorney-at-law that his (Blasco's) case was "being investigated" and that as soon as there were any "further developments"

she (the attorney-at-law) would be advised. To date, no further information has been received by the attorney-at-law from that Ministry.

At this stage, it is important to repeat that the applicants were all born in Cuba - Falco, in 1932, Ramos, in 1944, and Blasco in 1964. Falco and Ramos have been residing in the United States since 1980 when they were part of the thousands who were allowed by the Communist authorities in Cuba to leave from the port of Mariel for the United States of America. In diplomatic language, they are referred to as "Marielitos". They have United States Social Security cards, and reside in Miami, Florida. Blasco entered the United States at the age of 5. He has an Alien Registration Card issued in 1972 in Key West, Florida. He is married and has three children resident in the United States.

Since June, 1986, the Ministry of Foreign Affairs and Foreign Trade has been aware of the presence of Ramos and Falco. The Embassy of the United States of America has also been aware of their situation as in diplomatic Note No. 345 dated September 5, 1986, the Embassy of the United States referred to the Ministry's Note dated August 21, 1986 in relation to their conviction. In their Note, the Embassy of the United States pointed out that the applicants had violated the status under which they were permitted to enter the United States by failing to obtain the permission of the United States Immigration and Naturalization Service prior to their departure from the United States. In Note No. 487 dated December 19, 1986, the Embassy reiterated that under United States law, the applicants were "permanently ineligible for admission to the United States ... because of their conviction on drug trafficking charges".

On September 26, 1988, the State Department of the United States Government, in a diplomatic note to the Jamaican Ambassador to the United States, reaffirmed its position that these applicants could not be readmitted to the United States of America.

At the time of the arrival of the applicants in Jamaica, Cuba and Jamaica had no formal diplomatic links. Since then, diplomatic relations have been resumed. Since the resumption, the Jamaican Ambassador to Cuba has made contact with the Cuban authorities in relation to the applicants. The Cuban position, simply stated, is that the applicants - though born in Cuba - cannot be returned to Cuba.

Since March of this year when the Minister of National Security wrote to the Consul General at the Embassy of the United States of America, nothing significant

has happened to relieve the plight of the applicants.

There is no charge against them. No charge is contemplated. There is no deportation order made against them. No such order is contemplated.

Ambassador Peter Black, Jamaica's Ambassador to Cuba, has suggested to the Director of the Protocol and Consular Division of the Ministry of Foreign Affairs and Foreign Trade that the plight of the applicants should be discussed with the United Nations High Commissioner for refugees. That suggestion was made as long ago as July 10, 1991. There is nothing before us to indicate that there was any response to that suggestion. There is nothing before us to indicate that there is any intention to proceed in that or any other direction. The evidence before us indicates a strict legalistic approach on the part of the United States of America (the applicants' country of residence), lack of interest on the part of Cuba (the applicants' country of birth), and inexplicable indecision and inactivity on the part of the Jamaican authorities to have the matter resolved in such forum or fora available to countries that have problems of this nature.

The question for this Court is this: can it be said that the applicants are being lawfully held in custody at this time?

In order to answer this question, I turn to the Constitution of Jamaica. It cannot be doubted that every person in Jamaica - whether citizen or alien - is governed by the provisions of the Constitution. Section 15(1) of the Constitution prohibits the deprivation of the personal liberty of anyone in Jamaica except in the cases set out therein as authorised by law. Paragraph (j) of that subsection contains one of the exceptions. It authorises deprivation of liberty -

> "for the purpose of preventing the unlawful entry of that person into Jamaica, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Jamaica or the taking of proceedings relating thereto".

In the instant circumstances, there is no question of preventing the unlawful entry of the applicants. They are already in the country, and they have not been charged with any breach of the Aliens Act such as unlawful entry. The circumstances here show clearly that there is no serious effort being made to expel, extradite, or lawfully remove them. No proceedings have been taken. No proceedings are contemplated. They are merely being held without charge and without the prospect of a trial. In the case of Ramos and Falco, they have been held for nearly five years. There is nothing on the record to indicate that all three applicants will not be held in custody for the rest of their natural lives.

Under Jamaican law, happily, no one can be lawfully detained forever. This seems an obvious statement but it has to be made as that is not the position in some other countries. There is no doubt in my mind that persons such as the applicants can only be held for a reasonable time. That which is a reasonable time depends on the circumstances of each case. There can be no fixed measurement of time that would fit every case.

My learned brother, Patterson, J., has referred to the judgment of Woolf, J. sitting in the Queen's Bench Division in England, in the case R. v. Governor of Durham Prison, ex parte Singh (1984) 1 A.E.R. 983. There, Woolf, J. considered the question of what is a "reasonable time". I shall be content in saying that in the instant circumstances, the applicants have been detained for periods that can only be accurately described as excessive. The time has therefore come for their release.

I should, however, add that I hold the view that it was not only lawful but necessary and appropriate for the applicants to have been taken into custody once they had served their sentences and the necessary formalities had not been completed to ensure their immediate removal from this country. Having taken them into custody, the authorities must then act with despatch to ensure that such detention will only be for a reasonable time. Where, as in the case of the applicant Blasco, the sentence of imprisonment is a relatively long one, prudence dictates that the relevant Ministries should ensure the finalization of the question of expulsion or lawful removal from the country, while the sentence of imprisonment is being served.

Finally, it was submitted that this Court had an inherent power to impose restrictions on the applicants if they were ordered to be released. I do not see how that is possible, and no authority has been referred to on that point. It is my understanding that the nature of the writ of habeas corpus is such that there can be no fetter placed on it. In any event, the question arises as to why should the Court fetter its order when there is not even a deportation order in existence. Section 15(6)(d) of the Aliens Act gives the Minister the power to make a deportation order against an alien "if the Minister deems it to be conducive to the public good". For over five years in relation to Ramos and Falco, and over four years in relation to Blasco, the Minister has had the opportunity to so do. He has not. That ought to be a signal that the Minister has not thought it necessary so to do. Nevertheless, the Minister still has powers under Section 14 of the Aliens Act to impose stated

restrictions on the applicants if he considers it necessary.

I therefore concur in the making of the order that the applicants are to be released forthwith.

The applicants are to have the costs of these proceedings.

MORRIS, J. (AG.)

I have had the opportunity of reading the draft judgments of my learned brothers Patterson and Panton and concur accordingly.

They have dealt so comprehensively with all aspects of this matter that there are only a few observations I wish to make.

The first is that there is no issue as to the legality of the re-arrest of the applicants upon their discharge at the Kingston Resident Magistrate's Court.

Secondly, a stalemate has been reached as to the fate of the applicants.

Thirdly, it is not in dispute that there are Jamaicans willing and able to accommodate and employ the applicants locally.

In the circumstances, I agree that the applications should be granted and the writs of habeas corpus be issued accordingly.

PATTERSON, J.

The judgment of the Court is that writs of habeas corpus ad subjiciendum be issued forthwith to the Keeper of the Central Police Station Lock-up to secure the release of all three applicants.

Costs awarded to the applicants to be agreed or taxed.