IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE FULL COURT.

RE IKEZOYA ) JUDGMENT OF

HUNTER, C. J.

On the argument at the original hearing I was of the opinion that the decision in Cox v. Hakes was not conclusive as as the appealability of an order for discharge in habeas corpus, and after consideration I remain of that opinion.

I think ~~there~~ is an essential difference between the Imperial Act on which Cox v. Hakes was decided, and our own Supreme Court Act, the former Act merely constituting a Court of Appeal to hear appeals from any judgment or order save as otherwise provided; while in addition to a jurisdictional section creating the Full Court, our Act contains an express provision by which an appeal shall lie from every judgment, order or decree made by the Court ~~of~~ or a Judge excepting certain specified classes of orders, of which the order made in habeas corpus is not one.

The danger of applying a decision on an older statute to one of a similar, but not identical character, has been often pointed out, notably by Jessel, M.R. in Hack v. London Provident 23 C.D., p.103, and in Ex parte Blaiberg, ib. at p.258; and in the case of an enactment which is evidently intended to be a code, the code should be allowed to speak for itself: see Vagliano Bros v. Bank of England (1891) A.C.,107; Robinson v. C. P. R., (1892) A.C.,481.

The majority of the Lords overruling the Court of Appeal in Cox v. Hakes, felt themselves at liberty to read into the clause constituting the Court of Appeal an implication that the judgments and orders from which the Court was to hear appeals were to be inherently appealable, and as they considered that orders for discharge were not inherently appealable, and that there was no recorded instance where they had ever been appealed against, that it was not intended by the statute to confer jurisdiction to entertain appeals from such orders.

But I am at a loss to understand how such reasoning can be applied to an enactment which in terms makes all orders appealable with a few exceptions. If one were asked to draft a general comprehensive appeal clause whichwould include such orders, I do not see how one could use language more clear or more comprehensive than that found in the statute; and to accede to the respondents argument would be to substitute the conclusion of the Lords as to the meaning of a statute of doubtful import for the plain and unambiguous language of our own code.

So far as concerns the argument that there is a difficulty about making an effective order, I see no good reason why the Court should not make an order that the person discharged, whether before the Court or not, be remanded to the custody out of which <u>ex hypothesi</u> he should not have been taken, and leaving such order to be executed by the sheriff, or any other officer of the Court who may be available. Of course if the person is not within the jurisdiction, the order cannot be carried out, but I do not see what bearing that circumstance can have on the construction of a plain and unambiguous enactment. In the particular case the Court may not make the order for remand if it is for any reason clear that it would be futile, but that has nothing to do with the question of the competency of the appeal.

With regard to the question as to whether the persons apprehended were in fact suffering from disease, it was conceded that it was impossible to successfully assail the learned Judge's conclusion, and the only other question argued was as to the validity of the order in council which purports to empower the Minister of the Interior, or any ~~physician~~ person nominated by him, to pass on the immigrants' condition. The statute merely authorises the deportation of the diseased person, and there is nothing in it which takes away the jurisdiction of the Court to decide the question of fact on a proper application, and the judges are bound to examine into the matter on an application for a habeas corpus. While it is not perhaps necessary to say that the ~~circumstance~~ Order in council is *pro tanto* *ultra vires*, and while it may be conceded that the only rational way of working out the provisions of the statute is by means of medical examination, it is clear that Parliament has not made such examination final and conclusive, and has not barred the immigrant from applying in the ordinary way to the Courts for relief against erroneous decisions of the immigration officers.

I therefore think the appeal should be dismissed.

Victoria, B. C.

G Hunter
C.J.

534

SUPREME COURT

FULL COURT.

RE IKEZOYA.

JUDGMENT.

HUNTER, C. J.

&

VICTORIA
JAN 21 1907
REGISTRY.

541A
541

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE FULL COURT.

CAN.PAC. RLY. CO )
v. ) JUDGMENT OF
IKEZOYA ) THE HONOURABLE MR JUSTICE IRVING

As the decision in this case concerns the liberty of the subject I wish to add a few words.

The object of the writ of habeas corpus is the protection of the liberty of the subject by affording a practical means of effecting the release of persons illegally detained, whether under pretext of public or private authority, or under no pretext at all.

To the ~~Civil~~ Superior Courts of the Sovereign has been committed the power of determining the question whether or not a person is properly detained. Evereday instances of the exercise of this power are to be found in the issue of the writ to keepers of the gaols to bring up a person committed by a Magistrate, or a person held for extradition; In re Castione (1891) 1 Q B 167 or, this is rarer, where a person is detained illegally in military custody;(ex parte Hall, (1887) 13 Q.B.D. 13) or on the ground of lunacy, (R. v. Turlington (1761) 2 Burr. 1115; R. v. Greenwood (1855) 24 L.J. Q.B.D.,148.) to determine whether the functionary committing or holding the applicant has authority to commit or hold.

In all these cases the Court will make an enquiry as to the propriety of the detention, sometimes the ground of complaint is want of authority on the part of the person making the order, or it may be alleged (as in this case) that the detention is made without cause, that is to say, that the officer to whom the duty of making the examination has made a mistake.

The applicants for the writ in the present instance were examined by doctors, other than the Government Health Officer, and upon the evidence of these doctors Morrison, J. came to the conclusion that the applicants were not suffering from any of the diseases mentioned in

Act, and therefore discharged them.

This appeal was taken from that decision. It was firs of all objected that as the men had been released, there was no appeal, but for the reasons given during the argument and since set out in the judgment just read, I agree that we have jurisdiction.

Then it was said that by the Proclamation the power of determining whether or not the applicants came within the Act was for the Minister of the Interior or his officer to determine, and that the decision was not reviewable by this Court. The Proclamation goes beyond the Act, and in so far as it exceeds the statut it is ultra vires. As to so much of the Proclamation as is within the statute, I cannot find anything which purports to take away the jurisdiction of this Court to examine into the causes of the detention of any person under the authority thereof. There is very strong presumption against the intention of Parliament to interfere with the vested rights of the subjects or to disturb the existing jurisdiction of the Superior Courts. As the Act does not contain any expression that the writ was not to issue to examine into the causes of detention of a person held by an officer under this Act, I think the power still remains with this Court and that the learned Judge had jurisdiction.

I think it proper to add that having regard tp the inconvenience and danger which would result from the issue of the writ on a groundless application, a very strong case should be made by the applicant before the rule is allowed to go - see R. v. Clarke (1762) 3 Burr.,1362.

A. Irving

534

# SUPREME COURT

FULL COURT.

CAN. PAC. RLY. CO.

v.

IKEZOYA.

JUDGMENT.

IRVING, J.

---

544A