

## Yasmin Ali Shah v. Attorney-General

High Court  
Tuivaga C.J.  
26 September 1988

*Administrative law—application for writ of habeas corpus ad subjiciendum—Internal Security Decree 1988—whether detention for more than three months justified by s. 74 Internal Security Decree.*

*Constitutional law—paramourcy of internal security laws in absence of a constitution for Fiji—whether powers of detention under internal security laws absolute.*

10 *Evidence—burden of proof—onus on detained person to establish that detention illegal or unlawful.*

The applicant's husband, a barrister and solicitor, was arrested and detained by the police under the Fiji Internal Security Act 1988. The charge was concealing unlawfully imported arms and ammunitions, and also neglect to prevent a felony. A day later, a successful application for bail was made to the High Court. A week after the grant of bail, he was re-arrested and taken into police custody. No clear reasons were given for his arrest, but it was apparently in connection with further investigations, the true nature of which was not possible to ascertain. The detention was in the form of house arrest. He was not allowed to go outside the boundary of his residence, he was not allowed visitors to his home, nor was he allowed to see his  
20 solicitors. His house was under police guard around the clock; and members of his family were restricted to stay within their compound between 6 p.m. and 6 a.m. He was under these conditions for three months and six days.

The applicant made this application to the High Court for a writ of *habeas corpus ad subjiciendum* seeking the release of her husband from detention.

### HELD:

- (1) In the absence of a constitution of Fiji the paramourcy of the internal security laws as the supreme law is unquestioned.
- 30 (2) Reasonableness and fairness in the exercise of detention powers are inherent in the various safeguards which have been built into the Internal Security Decree. If these safeguards are disregarded, the costs in human freedoms and liberty would be heavy. Such a situation would work to the detriment of social order and harmony.
- (3) Under the detention powers conferred by section 74, any detention effected under that section is deemed lawful, until the contrary is proved. The onus or burden of proof is therefore on the applicant to satisfy the Court that the detention is illegal or unlawful. The burden may be discharged by showing that the exercise of the power of detention by the police was either *mala fide* or improper or made for a collateral or ulterior purpose.
- 40 (4) "Pending enquires" referred to in section 74(1) are narrow in scope; and the police can only invoke that power for continued detention if there is

evidence to show that there were at the time other matters of security importance and concern involving the detainee that were still in need of police investigation. Even in those circumstances the time-limit for any such further investigation is limited to twenty-eight days and no more. The length of the instant detention (three months and six days) was well in excess of the limit of twenty-eight days prescribed under section 74(4) of the Fiji Internal Security Decree 1988.

- 50 (5) On the evidence before the Court, the police did not exercise their powers of detention *mala fide*. However, the evidence established that the detention was made for a collateral purpose, that is, a purpose not authorized by or within the intendment of the Internal Security Decree.

**Legislation referred to in judgment:**

Internal Security Decree 1988 (Fiji)

**Counsel:**

*K. Bulewa* and *A. Singh* for the applicant

*A. Qetaki* for the respondent

**TUIVAGA C.J.**

**Judgment:**

60 This is an application brought by Yasmin Ali Shah, daughter of Rehmat Ali, for a writ of *habeas corpus ad subjiciendum* seeking the release from detention of her husband, Haroon Ali Shah, son of Roshan Ali Shah, a barrister and solicitor of Lautoka who was arrested and detained by the police under the Internal Security Decree 1988.

After hearing of the application last week the Court ordered Shah to be released immediately from detention. The reasons for this decision were reserved to be given on notice in a substantive judgment. This I now proceed to do.

70 The circumstances that have given rise to the application for the writ are these. On 7 June 1988 Shah was arrested and charged under section 23 of the Arms and Ammunitions Act (cap. 188) with concealing unlawfully imported arms and ammunitions, and also charged under section 384 of the Penal Code with neglect to prevent a felony. On 8 June following an application for bail in the High Court at Lautoka the application was granted and Shah was released from custody in his own recognizance in the sum of \$1000 with a surety of a similar amount. He was also required to surrender his passport.

On the evening of 15 June Shah was re-arrested and taken into police custody. No clear reasons were given for his arrest but it was apparently made in connection with further investigations, the true nature of which was not possible to ascertain.

80 On 8 July whilst in detention Shah was served with a summons to appear in court to answer a charge under section 131(a) of the Penal Code for conspiracy to pervert the course of justice. On 11 July he appeared under police escort in the Lautoka Magistrate's Court. No question was raised in the Magistrate's Court as to bail. This was probably because it was thought that the bail granted earlier in the High Court, i.e., on 8 June, was still operative.

Shah's detention was in the form of house arrest.

Shah was not allowed to go outside the boundary of his residence at Simla,

Lautoka. He was not allowed visitors to come to his home nor was he allowed to see his solicitors.

90 His home was under police guard around the clock. Members of his family were restricted to stay within their compound between 6 p.m. and 6 a.m.

As a lawyer Shah was unable to practise his profession which is his main source of livelihood. As a result he sustained financial loss.

Those were the circumstances which caused the applicant to bring this application before the Court.

Counsel for the respondent submitted that in detaining Shah as they did, the police were exercising the powers conferred by section 74 of the Internal Security Decree. The section states as follows:

**Power to detain suspected persons**

- 100 73.— (1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe—
- (a) that there are grounds which would justify his detention under section 8; and
  - (b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Fiji or any part thereof.
- (2) Any police officer may without warrant arrest and detain pending enquiries any person, who upon being questioned by the officer fails to satisfy the officer as to his identity or as to the purposes for which he is in the place where he is found, and who such officer suspects has acted or is about to act in any manner prejudicial to the security of Fiji or any part thereof.
- 110 (3) No person shall be detained under this section for a period exceeding 24 hours except with the authority of a police officer of or above the rank of assistant superintendent of police or, subject as hereinafter provided, for a period of 48 hours in all.
- (4) If an officer of or above the rank of superintendent of police is satisfied that the necessary enquiries cannot be completed within the period of 48 hours prescribed by sub-section (3) he may authorise the further detention of any person detained under the section for an additional period not exceeding
- 120 (5) Any officer giving any authorisation under sub-section (4) shall forthwith report the circumstances thereof to the Commissioner of Police; and where such authorisation authorises detention for any period exceeding 14 days the Commissioner of Police shall forthwith report the circumstances thereof to the Minister.
- (6) The powers conferred upon a police officer by sub-sections (1) and (2) may be exercised by any member of the security forces, by any person performing the duties of a guard or watchman in a protected place.
- (7) Any person detained under the powers conferred by this section shall be
- 130 deemed to be in lawful custody, and may be detained in any prison, or in any police station, or in any other similar place authorised generally or specially by the Minister.

The Internal Security Decree was promulgated as part of the laws of Fiji on 17 June 1988 and made retrospective in effect to 1 March 1988. It would appear that this

drastic action by Government was prompted mainly by the illegal shipment of sophisticated military arms and weapons into Fiji last April and its ramifications on the security of the State. The Government was most concerned at what it saw as a development against the public interest. The need to strengthen and reinforce the internal security laws of the land may therefore have been inevitable under the circumstances. The object of the Internal Security Decree was twofold:

- 140 1. to give increased and wider investigative powers to the police and the security forces; and
2. to control persons who pose or may pose a threat to the national security.

In common with similar laws in other countries the new internal security laws in Fiji are draconian in nature. They override the laws of the land guaranteeing fundamental rights and freedoms of the individual. In the absence of a Constitution of Fiji the paramountcy of the internal security laws as the supreme law is unquestioned. This is made clear by section 85 of the Internal Security Decree which states:

150 85. Where there is any conflict or inconsistency between any of the provisions of this Decree and the provisions of any law, the provisions of this Decree shall prevail.

The severity of the internal security laws can to a large extent be ameliorated if they were used reasonably with a strong sense of responsibility for fair play as no doubt was intended by the President and the Cabinet when these laws were enacted and promulgated. Reasonableness and fairness in the exercise of detention powers are inherent in the various safeguards which have been built into the Internal Security Decree. It is essential that those who bear the responsibility of enforcing the decree keep this firmly in mind. It cannot be denied that the sheer scope and sweeping nature of the decree renders it highly susceptible and vulnerable to misuse and abuse. This must be prevented at all costs if the rule of law is not to give way to despotic rule.

160 In approaching this application I have had to take account in particular of the safeguards in the decree against abuse and misuse of powers. If these safeguards are disregarded, the costs in human freedoms and liberty would be heavy. Such a situation would work to the detriment of social order and harmony. It is important, therefore, for all concerned to exercise the highest degree of self-control and guard against falling into the human trap which is aptly cautioned in the aphorism "power tends to corrupt, and absolute power corrupts absolutely".

170 Normally while the burden of proving lawful justification for the detention of any person rests on the detaining authority, in this case the police were using the powers of detention conferred by section 74(1). Under these powers and by virtue of section 74(7) Shah's detention would be deemed to be lawful. This status of lawfulness of police action will remain until the contrary is proved. The onus or burden is therefore on the applicant to satisfy this Court that his detention was illegal or unlawful. The applicant may do so by showing that the exercise of powers of detention by the police was either *male fide* or improper or made for a collateral or ulterior purpose.

Counsel for the applicant has adduced oral and affidavit evidence in support of the claim that Shah's detention was unlawful.

180 It was also submitted that under section 74(4) the longest period a person may lawfully be held in detention for purposes of security investigation was twenty-eight days but this would have to be authorized by a police officer of the rank of superintendent or above. Indeed under section 74(3) such authorization by a police officer of or above the rank of superintendent was required for the first forty-eight hours of detention.

The point obviously is that when a person has been in detention for forty-eight hours there should be a serious stocktaking and review of the state of investigation in relation to the detainee. Such review of the position should be conducted with a high sense of personal responsibility and constructiveness by the officer in charge of the case. It would be a sorry day for Fiji if a practice should develop whereby any person 190 may be held in detention on nothing more than equivocal and fanciful reasons.

Shah was in police custody for three months and six days up to the time of his release last week. This was well in excess of the limit of twenty-eight days prescribed under section 74(4). The police may have felt justified in their action because of an error in the decree which persisted for over three months in relation to the wording of section 74(4). Thus instead of saying, as was plainly intended, "for an additional period not exceeding 28 days" the original text had it as "for an additional period not less than 28 days".

200 It was also submitted on behalf of the applicant that before the police may arrest without warrant and detain a person under section 74(1) certain conditions were required to be observed. In the present case these were:

1. that enquiries affecting Shah must in a real sense have been pending at the material time;
2. the police must, again in a real sense, have had reason to believe that there were grounds which would have justified the detention of Shah under section 8 of the Internal Security Decree (for being involved in activities which were subversive and adverse to the interests of national security); and
3. that Shah has acted or was about to act or was likely to act in any manner prejudicial to the security of Fiji.

210 It was argued that as far as Shah was concerned the police had for all intents and purposes exhausted their enquiries arising from the "arms cases" so that it could not be said that any *pending enquiries* were still at large against him. It is said that all security enquiries pertaining to Shah had been completed as shown by the fact that he had already been charged and was now awaiting trial in the High Court.

So far as I am required to make a finding upon the matter I am satisfied and hold as a fact that there were no pending enquiries afoot affecting Shah after he was charged so as to require his continued detention. I am fortified in this conclusion by the fact that no evidence to the contrary was adduced on behalf of respondent.

220 The pending enquiries referred to in section 74(1) are necessarily narrow in scope in that before the police can exercise their powers of detention they must first have a reasonable belief that there were grounds which would have justified Shah's detention under section 8 of the decree (relating to preventive detention up to two years which only the Minister is empowered to order) or that he was a person who has acted or was about to act or was likely to act in a manner prejudicial to the security of Fiji. It is difficult to see how the police could have found any justification for Shah's continued detention after he had been charged for offences arising out of

230 the "arms cases" and the matter having become the subject of judicial process under the court's ordinary jurisdiction. The police have in this regard clearly misapprehended their powers under section 74(1). They could only have been justified in exercising their powers of detention if there was evidence to show that there were at the time other matters of security importance and concern involving Shah that were still in need of police investigation. However, the time-limit for any such further investigation was limited to twenty-eight days and no more.

In any event, in the absence of any evidence supporting the need for any further investigation, I have no alternative but to conclude that after Shah was charged and taken to court, and thereby came within the ordinary jurisdiction of the court, there were no grounds upon which he could have been kept in detention.

240 While on the evidence before this Court I am unable to find that the police exercised their powers of detention *mala fide*, i.e., in bad faith, there is however more than sufficient material for me to hold that the detention of Shah was made for a collateral purpose, that is, for a purpose not authorized by or within the intendment of the Internal Security Decree.

In these circumstances I am satisfied that Shah's detention was unlawful and an order for his release was amply indicated.

The application for a writ of habeas corpus is therefore granted. The applicant is awarded his costs of these proceedings to be taxed, if not agreed.