[HIGH COURT OF AUSTRALIA.]

LLOYD . . . . . APPELLANT;

AND

WALLACH . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1915.

MELBOURNE, *Sept.* 7, 17.

Griffith C.J., Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

War Precautions—Arrest of naturalized person—Regulations—Validity—Habeas corpus—Return—Warrant—Recitals—"Reason to believe"—Conclusiveness of warrant—Authority of Minister of Defence—War Precautions Act 1914-1915 (*No.* 10 *of* 1914—*No.* 2 *of* 1915), *sec.* 4—*Habeas Corpus Act* 1816 (56 *Geo. III. c.* 100), *sec.* 3—*War Precautions Regulations* 1915 (*Statutory Rules* 1915, *No.* 130), *reg.* 55.

Reg. 55 (1) of the *War Precautions Regulations* 1915 provides that "Where the Minister" for Defence "has reason to believe that any naturalized person is disaffected or disloyal, he may, by warrant under his hand, order him to be detained in military custody in such place as he thinks fit during the continuance of the present state of war."

Held, that the regulation was a valid exercise of the power conferred by sec. 4 of the *War Precautions Act* 1914-1915.

To a writ of habeas corpus issued out of the Supreme Court of Victoria in respect of W. who had been naturalized and was detained in military custody, the military officer in whose custody W. was returned a warrant under the hand of the Minister of Defence which recited that the Minister, upon information furnished to him, had reason to believe and did believe that W. was disaffected or disloyal. W. stated by affidavit that he was not disaffected or disloyal. The Minister being called as a witness refused on the ground of public policy to state the grounds of his belief. The Supreme Court having ordered the discharge of W., on appeal to the High Court,

Held, by the whole Court, that, assuming that the fact of the Minister's belief and the grounds for his belief were examinable, and that the Minister was properly called as a witness, the Minister was entitled to refuse to answer

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questions as to his belief; that there was no evidence to challenge either the fact of his belief or the grounds for it; and therefore that the detention of W. under the warrant was justified.

Semble, per Higgins J., that under the Act 56 Geo. III. c. 100, sec. 3, though the truth of the facts alleged in the return to the habeas may be inquired into by the Court, the Court has no right to inquire into the truth of the facts recited in the warrant which is referred to in the return.

Decision of the Supreme Court of Victoria: *R.* v. *Lloyd*; *Ex parte Wallach*, (1915) V.L.R., 476; 37 A.L.T., 75, reversed.

APPEAL from the Supreme Court of Victoria.

On 26th July 1915 a writ of habeas corpus issued out of the Supreme Court of Victoria commanding Major Archibald Lloyd, an officer charged with the duty of detaining persons ordered to be detained in military custody in Victoria, to have the body of Franz Wallach before the Supreme Court together with the cause of his taking and detainer. To this writ Major Lloyd made the return that Wallach was detained by him in military custody under the authority of two warrants under the hand of the Minister of State for Defence.

One of the warrants, dated 9th July 1915, was in the following terms:—"Whereas Franz Wallach of the Australian Metal Co., Victoria, a person naturalized in the Commonwealth of Australia is believed by me to be disaffected or disloyal: Now, therefore, I the undersigned Minister for Defence do hereby, in pursuance of the *War Precautions Act* 1914-1915 and of the regulations made thereunder and of all other Acts and powers enabling me in this behalf, order you to take the said person into your custody and detain him in military custody at the place appointed for the custody of alien enemies until you receive a further order from me, but not longer than the continuance of the present state of war, and for so doing this shall be your warrant."

The other warrant, dated 31st July, contained the following recital:—"Whereas upon information furnished to me I have reason to believe and do believe that Franz Wallach of the Australian Metal Co. Melbourne Victoria a person naturalized in the Commonwealth of Australia is disaffected or disloyal." The

operative part of this warrant was in the same terms as that of the warrant of 9th July.

On the return of the writ the Full Court by a majority (*Madden* C.J. and à*Beckett* J., *Cussen* J. dissenting) ordered Wallach to be discharged: *R.* v. *Lloyd*; *Ex parte Wallach* (1).

From that decision Lloyd now, by special leave, appealed to the High Court.

Mann, for the appellant. The *War Precautions Act* 1914-1915, which was passed under the power conferred by sec. 51 (VI.) of the Constitution to make laws with respect to naval and military defence, has as its primary purpose the making of regulations for the safety of the Commonwealth during the present state of war. The Act is a delegation of legislative power under peculiar circumstances and for special purposes, and its object is to provide means of legislating freely and quickly on all sorts of matters as they may arise and whether Parliament is sitting or not. The power to make regulations is limited only by the words in the title and by the introductory words in sec. 4 (1). The word "thereto" in the last part of sec. 4 (1) refers to the public safety and the defence of the Commonwealth, and not to regulations in respect of the matters mentioned in pars. (*a*) to (*f*) in sec. 4 (1).

Reg. 55 of the *War Precautions Regulations* 1915 is what is usually called a regulation. Regulations constantly confer powers. Under reg. 55 the Minister is given power in his discretion to issue a warrant, and his judgment on the matter is final and conclusive and is not examinable in any Court. The words "has reason to believe" mean only "believes." They indicate that the Minister is to act on materials before him, but they do not show that his reasons are examinable.

The grounds of the Minister's belief are no more examinable than they were in *R.* v. *Arndel* (2). Even if pars. (*a*) to (*f*) in sec. 4 (1) limit the purposes in respect of which regulations may be made, reg. 55 is within pars. (*a*) and (*f*).

This Act does not repeal or infringe upon the *Habeas Corpus Act*, but authorizes the issue of a warrant which, like other warrants

(1) (1915) V.L.R., 476; 37 A.L.T., 75. (2) 3 C.L.R., 557.

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issued under the authority of a Statute, is a good answer to a writ of habeas corpus. The warrant in this case is a good answer, and the recitals in it cannot be inquired into on habeas corpus. If the warrant can be inquired into at all, the inquiry is ended when the Minister refuses to answer. If the recitals are untrue, the remedy is by other proceedings.

There was no appearance for the respondent.

Cur. adv. vult.

The following judgments were read :—

Sept. 17.

GRIFFITH C.J. The respondent was arrested and held in custody by virtue of a warrant signed by the Minister of Defence under authority purporting to be conferred on him by regulations made by the Governor-General under the *War Precautions Act* 1914-1915. A majority of the learned Judges of the Supreme Court were of opinion that the particular regulation relied upon was *ultra vires*. *Madden* C.J. was further of opinion that the return to the writ of habeas corpus, which merely recited the warrant, was bad. The first question to be determined is as to the validity of the regulation. This depends upon the proper construction of the Statute under which it purports to have been made.

Sec. 4 of the *War Precautions Act* 1914, as amended by the Act of 1915, enacts that " The Governor-General may make regulations for securing the public safety and the defence of the Commonwealth, and in particular with a view to "—then follows an enumeration of six particular objects to which the regulations may be directed. The section goes on : " and for conferring such powers and imposing such duties as he thinks fit, with reference thereto, upon the Naval Board and the Military Board, and the members of the naval and military forces of the Commonwealth, and other persons." It is suggested that this interposition of a list of special or particular objects so interrupts the enacting provision that the second limb of the sentence must be read as distinct from and independent of the first, and must be construed accordingly. In my opinion the interposed words are in

the nature of a parenthesis, and do not interrupt the continuity of the grammatical construction.

The term "regulations" has of recent years been much used to denote ordinances having the force of law made by subordinate authorities under delegated powers, and in my opinion it is used in that sense in the *War Precautions Act*. The power now in question is therefore a delegated power to make laws for (1) securing the public safety and the defence of the Commonwealth, and (2) conferring such powers and imposing such duties as the Governor-General thinks fit with reference thereto upon the persons designated. A question was raised whether the words "with reference thereto" mean "with reference to securing the public safety and the defence of the Commonwealth" or "with reference to the regulations." The second construction involves, perhaps, an awkward repetition in the phrase "regulations for conferring powers and imposing duties with reference to the regulations," but the general sense is, I think, sufficiently plain, whichever of the two suggested meanings is adopted. The power conferred is to make laws to be observed by subjects, and also to prescribe the mode of enforcing the laws so made and designate the persons on whom the duty of enforcement is to be imposed.

The regulation now in question is in these words:—"55. (1) Where the Minister has reason to believe that any naturalized person is disaffected or disloyal, he may, by warrant under his hand, order him to be detained in military custody in such place as he thinks fit during the continuance of the present state of war."

In my judgment this regulation falls within both branches of the enacting section. It lays down certain conditions under which persons may be detained in military custody, and imposes on the Minister of Defence the duty, first, of considering whether those conditions exist with respect to a particular person, and, secondly, if he has reason to believe that they do exist, of issuing a warrant ordering his detention.

I think, therefore, that the regulation is within the power conferred by the Act, and is valid. It was suggested that the words "other persons" in sec. 4 of the Act, which are general words, ought to be limited by reference to the particular words which

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precede them, and should therefore be construed as not including a superior officer, such as the Minister. But, having regard to the nature of the power to be exercised, and the extent of the territory in which it may be exercised, I do not see any sufficient reason for so limiting them.

The next question to be considered is as to the validity of the return. This question arises upon the construction of the regulation itself. The return set out that the respondent was detained in military custody under the authority of a warrant under the hand of the Minister of Defence which recited that he had reason to believe and did believe that the respondent, being a person naturalized in the Commonwealth, was disaffected or disloyal. The learned Chief Justice thought, as I understand his judgment, that this return did not show a good cause of detention, inasmuch as the warrant did not set out on its face the facts on which the Minister founded his belief, and further that the foundation of his belief was examinable by the Court on the return of the writ. In my opinion the regulation, upon its proper construction, means that the Minister, while required to satisfy himself of the facts, is permitted to do so by any means of which he chooses to avail himself.

Having regard to the nature and object of the power conferred upon the Minister and the circumstances under which it is to be exercised, I think that his belief is the sole condition of his authority, and that he is the sole judge of the sufficiency of the materials on which he forms it. If this be so, the only inquiry which could possibly be made by the Court on the return to the writ with respect to the statements in the warrant would be whether the Minister had in fact a belief arrived at in the manner I have indicated. That belief is a matter personal to himself, and must be formed on his personal and ministerial responsibility. It is quite immaterial whether another person would form the same belief on the same materials, and any inquiry as to the nature and sufficiency of those materials would be irrelevant. Further, having regard to the nature of the power and the circumstances under which it is to be exercised, it would, in my opinion, be contrary to public policy, and, indeed,

inconsistent with the character of the power itself, to allow any judicial inquiry on the subject in these proceedings.

As to the fact of the Minister's belief, I am of opinion that the same principles are applicable as in the case of a claim of privilege against disclosure of documents or facts on the ground that such disclosure would be injurious to the public interests, in which case the statement of the public officer making the claim is conclusive, if the case is within the rule. So in this case the Minister cannot, in my judgment, be called upon to answer any question on the point, nor can any evidence be given to controvert his statement on the face of the warrant. It follows that for all practical purposes the statement is not examinable on the return of the writ (even if the case is within the Act 56 Geo. III. c. 100, which I doubt), but must be treated as conclusive. If it could be established *aliunde* in other proceedings that the statement was not true, that is, that the Minister had not in fact formed any such belief, the person aggrieved might perhaps have other means of redress against him.

We are told that on the return of the writ the Minister at the request of the Court attended and was sworn as a witness, but refused to answer any questions as to his reasons for forming his belief. Apart from grounds of public policy, which would undoubtedly justify his refusal, the proposed inquiry was, as already pointed out, irrelevant to any matter which it was within the competence of the Court to determine.

For these reasons I am of opinion that the return was good, and that the respondent should have been remanded to custody.

I agree with *Cussen* J. in regretting that the ordinary practice of granting a rule *nisi* was not followed in this case.

The appeal should, therefore, be allowed.

ISAACS J. This is an appeal against an order of the Supreme Court of Victoria in a non-criminal matter, discharging from custody a British subject by naturalization.

The first question any Court has to ask itself is whether it has jurisdiction to do what the applicant requests.

In ordinary cases the jurisdiction is so well recognized that no one stops to question it, and so it is tacitly assumed. But where

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a novel position arises, as is frequently the case in this Court, it must be examined. In *Snow's Case* (1) elaborate argument was addressed to us by which it was urged that our appellate jurisdiction does not extend to cases where juries have acquitted a prisoner, even if it does to cases of conviction, on the special ground that finality in acquittal was a doctrine so firmly rooted in English law, that express words were necessary to include such a case in our appellate power.

The perfectly universal but general words of sec. 73, it was said, could not be construed so as to include a case so fundamental. Personally I do not agree with that view, but, as it seemed to me that this is a case where the principle might be tested with absolute certainty, I invited Mr. *Mann* to indicate any instance where an appeal had ever been entertained in any other Court from an order discharging a person on habeas corpus. At the time he was not prepared with an instance, but he has since favoured me with one: *R.* v. *Mount* (2). That case, however, does not really touch the point, as will be seen presently.

There can be found instances in English law where new trials have been granted in cases of acquittal, as for the prisoner's fraud or irregularity in relation to the trial, certainly a long time ago. And writers of eminence have down to a comparatively recent period recognized the power to do this (see *Chitty's Criminal Law*, p. 656). But in the case of habeas corpus, the doctrine that, once a man is set free, that is final in the sense that no appeal lies, has never been departed from; the judgment of Lord *Halsbury* L.C. in *Cox* v. *Hakes* (3) is clear on the point, and the Lord Chancellor explained why *Mount's Case* (2) is not really an exception. Nevertheless, as the judgments of the majority in that case show, and—if I may particularize—the judgment of Lord *Herschell*, the mere statutory words conferring on the Court of Appeal the "jurisdiction and power to hear and determine appeals from any judgment or order" would in themselves, notwithstanding their absolute generality, or rather I should say by reason of it, be ample to embrace even so fundamental a case at common law. In the English section,

(1) 20 C.L.R., 315.
(2) L.R. 6 P.C., 283.
(3) 15 App. Cas., 506, at p. 514.

however, other express words follow, which in the opinion of the House did cut down the generality of the earlier words.

In our Constitution there are no such subsequent words, and therefore I am confirmed in my view that the powers granted to this Court in sec. 73 of the Constitution are those of a general Court of Appeal, and not a Court of Error, not of a Court bound by the practice, however clear and long sustained, of any other Court of the Empire. I am therefore clearly of opinion that we have jurisdiction.

As to the case itself, the majority of the Supreme Court thought the return insufficient in law, because of the invalidity of reg. 55. I think that regulation perfectly valid. It is made under sec. 4 of the *War Precautions Act* 1914-1915. That section, as I read it, enacts that the Governor-General may make regulations, (1) for securing the public safety and the defence of the Commonwealth, and this in perfectly general terms, but while he is not confined within any prescribed limits his attention is directed to six particularly mentioned objects which Parliament thinks it desirable to attain as means to the great end of safety and defence ; and (2) for conferring such powers and imposing such duties as he thinks fit with reference to such regulations upon the Naval Board, and the Military Board, and the members of the naval and military forces of the Commonwealth, and other persons. There is nothing to prevent the Governor-General from combining in one regulation the exercise of both powers. This has been done in reg. 55. The essence of that regulation is the power of detention in military control of naturalized persons when there is reason to believe they are disaffected or disloyal. Along with that is the power conferred on the Minister of determining that question. These two provisions, instead of being contained in separate regulations are combined in one.

If, then, the Minister comes within the words "and other persons," the return is clearly sufficient in law. Primarily those words do include him, and there is nothing to exclude him unless the *ejusdem generis* rule applies. Obviously that rule does not apply, because "other persons," must include all individuals in Australia who are not members of the naval or military forces, and so there is no

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genus to which all the terms can be assigned, except the whole population. There is no reason why the Minister as well as any other person cannot be selected.

The next question is whether, once the sufficiency in law of the return is shown, that is an end of the matter. That is, we have to inquire what is the power of the Supreme Court of Victoria when a person is brought before it on habeas. Its power differs according to the nature of the case. If it is a criminal matter, then, according to well established rules, the truth of the return cannot be traversed. But in a case like the present, which is not criminal, but comes under the Act 56 Geo. III. c. 100, the truth of the return is examinable. It is altogether distinguishable from the cases where a judicial tribunal or officer has acted judicially (see *In re Clarke* (1)).

That Act recites that " Whereas the writ of habeas corpus hath been found by experience to be an expeditious and effectual method of restoring any person to his liberty, who hath been unjustly deprived thereof: and whereas extending the remedy of such writ, and enforcing obedience thereunto, and preventing delays in the execution thereof, will be advantageous to the public," and then it proceeds to enact provisions with respect to cases other than criminal, or of debt, or of process in a civil suit. By sec. 3 it is provided that although the return shall be good and sufficient in law, the judges are to proceed to examine into the truth of the facts set forth in such return, and the Act adds " by affidavit or affirmation." It seems to me the words of the Statute leave no room for doubt on this point.

What is sought to be examined into, is whether the Minister really had " reason to believe " &c.

Construing the regulation in the first place, it means that where the Minister from any circumstance whatever forms the belief that a naturalized person is disaffected or disloyal, that is sufficient. He is the sole judge of what circumstances are material and sufficient to base his mental conclusion upon, and no one can challenge their materiality or sufficiency or the reasonableness of the belief founded upon them. He is presumed to act not arbitrarily nor

(1) 2 Q.B., 619, at p. 635.

capriciously, but to inform his mind in any manner he considers proper.

Theoretically the truth of the statement that he had reason to believe is examinable.

But, in the first place, the Act of Geo. III., as already pointed out, requires this to be done by affidavit or affirmation, and I am not aware of any provision in the Victorian law extending that to *viva voce* evidence not being cross-examination upon an affidavit. But apart from that, and assuming, without deciding, that there was any right to call the Minister, it is clear that, laying aside possibilities so extreme as to be outside real consideration, the only means of disproving the essential fact in this case is the testimony of the Minister himself; and that is subject to the recognized rules of evidence. One of the rules of evidence relevant to such a case is that on grounds of public policy he may decline to answer. This he did, and his objection was properly allowed. His refusal so allowed cannot be construed into a tacit admission of what the party examining him desired him to state.

The matter then stood thus. There was the return itself, which imported verity (*Leonard Watson's Case* (1)) until impeached by proper evidence.

The prisoner said he was in fact not disaffected or disloyal. That was nothing to the point, because the Court was not the appointed tribunal to consider that question, and its opinion on the subject is immaterial. That duty was entrusted by Parliament to the Minister, and to him alone; and the prisoner's assertion was irrelevant as to whether the Minister did his duty, which is the only question to consider.

In the result, my opinion is that the regulation was valid, the Minister did his duty, the warrant was good, and the prisoner should not have been discharged.

HIGGINS J. I am of the same opinion. It is unfortunate that we have not had the assistance of counsel briefed to uphold the order absolute of discharge; but I feel more confidence in coming to a conclusion because we have before us the carefully reasoned

(1) 9 A. & E., 731.

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judgments of the Judges of the Supreme Court stating at length the opposing views as to the legal position.

The appellant's return to the habeas, justifying the detention of Wallach, is based on the warrant of the Minister, issued as in pursuance of reg. 55 of the Regulations. The warrant ordered the detention of Wallach until further order, but not longer than the continuance of the war; and it contains the following recital:— "Whereas upon information furnished to me I have reason to believe and do believe that Franz Wallach of the Australian Metal Co. Melbourne Victoria a person naturalized in the Commonwealth of Australia is disaffected or disloyal." The facts so recited cover everything that the regulation requires. But it is said (1) that the regulation itself exceeds the power conferred on the Governor-General by the Act (sec. 4) to "make regulations for securing the public safety and defence of the Commonwealth." This is a mere matter of construction. It is not urged that the Act itself, if it has the meaning for which the appellant contends, exceeds the power conferred on the Parliament by sec. 51 (VI.) of the Constitution—the power to make laws "for the peace, order, and good government of the Commonwealth with respect to . . . the naval and military defence of the Commonwealth" (sec. 51 (VI.)). There is no question as to the power of the Parliament to delegate legislative powers—power to legislate by regulations—to subordinate persons or bodies (*Hodge* v. *The Queen* (1)). A regulation under sec. 4 has the meaning stated in the Standard Dictionary—it means "a rule prescribed for government, management, or the regulating of conduct; an authoritative direction; a governing precept; as, the regulations of a society or corporation; army regulations." The regulation may make illegal that which was legal before, and *vice versâ*; and sec. 6 of the Act provides that any person who fails to comply with a regulation made in pursuance of the Act shall be guilty of an offence. In all countries and in all ages, it has often been found necessary to suspend or modify temporarily constitutional practices, and to commit extraordinary powers to persons in authority, in the supreme ordeal and grave peril of national war. The aphorism *Inter arma silent leges* is that of a Roman violator

(1) 9 App. Cas., 117.

of the laws; but the laws of Rome on many occasions deliberately and organically committed extreme powers to dictators, in great emergencies; and when the office of dictator had fallen into disuse, the Senate used to endow the consuls with similar powers under the *decretum extremum atque ultimum*: *Videant consules ne quid detrimenti respublica capiat.* According to Sallust (*Catiline*, c. 29): "*Ea potestas per Senatum, more Romano, magistratui maxima permittitur, exercitum parare, bellum gerere, coercere omnibus modis socios atque cives, domi militiæque imperium atque judicium summum habere; aliter sine populi jussu nulli earum rerum consuli jus est.*" In most parts of modern Europe, there is the well-known practice of suspending the constitutional guarantees. In England, in times of excitement, the Executive is sometimes similarly armed with arbitrary powers by an Act "suspending" (as the phrase runs) "the *Habeas Corpus Act*," followed by an Act of indemnity in respect of the illegal acts of the Executive. Under the suspension Act, a warrant signed by a Secretary of State prevents a person imprisoned on certain charges from insisting either on discharge or on speedy trial. In Ireland, the Executive has been granted even greater powers by Acts of Parliament. The Lord Lieutenant was empowered (amongst other things) to imprison men without any charge formulated, and on mere suspicion (44 Vict. c. 4; 45 & 46 Vict. c. 25). There is, therefore, no such inherent improbability as is asserted that our Parliament would give extraordinary powers during the present extraordinary war to a Minister responsible to Parliament.

Now, the two first lines of sec. 4 of the Act, if they are not qualified by the context, are sufficient, in my opinion, to justify the regulation in question. There is certainly no express limitation of the power there conferred. The section proceeds to state certain objects or ends that may (amongst other objects or ends) be subserved by the regulations: "and in particular with a view—(*a*) to prevent persons communicating with the enemy," &c. But the objects or ends mentioned are not exhaustive of the power, do not in any way limit its generality; and in my opinion, the regulation in question would even be justified by (*a*) and (*f*). Then the section provides that, not only may there be regulations "for securing public safety"

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&c., but also "for conferring such powers and imposing such duties as he" (the Governor-General) "thinks fit, with reference thereto, upon the Naval Board," &c., "and other persons." The word "thereto" must, I think, refer to the public safety and defence; but I concur with the Chief Justice in the view that it is immaterial for our present purpose if the word ought to be treated as referring to "regulations." It certainly does not refer to the illustrative clauses (*a*) to (*f*). Comparing this branch of the section with clauses (*i*) and (*j*) of the cognate section 5, relating to orders of the Governor-General published in the *Gazette*, one may conjecture that this branch of sec. 4 was meant, in the main, to enable the Governor-General to entrust minor executive details—such as the administration of oaths, arrest, detention, search of premises, &c.—to officers, constables, &c. But even if the words of this branch of sec. 4 ought to be so limited, they do not in any way limit, they tend rather to increase, the scope of the power contained in the two first lines of sec. 4; and if the words ought not to be so limited, I am of opinion that the words "other persons" would include both the Minister issuing a warrant and the military commandant who executes it.

But the question remains, (2), even if the regulation is valid, is the return to the writ sufficient? If the regulation is valid, the return follows the words of the regulation, and shows on its face a right on the part of the appellant to detain. It must be borne in mind that Lloyd, as custodian of Wallach under the warrant, knows nothing but what the warrant states. He has only to consider whether the warrant is in fact issued by a competent authority in circumstances which, as stated in the warrant, are sufficient. There is no other party to the application for release on the writ of habeas; and Lloyd knows only that the Minister states in his warrant that he has reason to believe and does believe that Wallach is disaffected, &c. This is all that Lloyd is entitled to know; and it seems to me that this is all that he can be called upon to show on a habeas. It is true that the Act 56 Geo. III. c. 100 (sec. 3) enables the Court to inquire into the truth of the facts alleged in the return; and that Act applies to this case, which is not a criminal case. But the Act does not enable the Court to inquire into the

facts alleged in the warrant which is referred to in the return. The material fact that is examinable is the existence of the warrant; and that fact is not disputed. As at present advised, I am strongly inclined to agree with *Cussen* J. where he says that "the Act does not enable a person to go into the truth of the recitals in the warrant."

As the regulation is valid, and as the warrant is the genuine warrant of the Minister, and states the facts required by the regulation to justify detention, it would seem that no more can be said—the prisoner ought to go back to custody. If the prisoner thinks that he is unjustly treated, he must seek his remedy in an action for false imprisonment or by some other method.

If, however, this view is wrong, and if the statements in the warrant, as distinguished from the return, are examinable at all, it must be the statements that the Minister has reason to believe and does believe, &c. Wallach states in his affidavit that he is not disaffected; but that fact is immaterial for the present purpose. The material issue is not actual guilt or innocence, but the Minister's belief, and (perhaps) whether he has any reason which induces that belief. The use of the awkward phrase, "has reason to believe," in the regulation, certainly creates a difficulty that might have been avoided. The reason may be founded on a mistake; but still it may be a reason which satisfies the Minister's mind for the present. It appears that the Minister, when called by Wallach as a witness (it is doubtful, indeed, whether any oral evidence is admissible under the Act 56 Geo. III. c. 100, sec. 3), declined on grounds of public policy to state what information he had; and, in my opinion, he was justified on the ground of public policy. There is before us no evidence whatever to contradict the statements in the warrant, even if the statements are examinable; and it is clear law that the statements made in a return need not be supported by affidavit or otherwise, that the burden of contradicting them lies on the applicant: *R.* v. *Batcheldor* (1).

For these reasons, I am of opinion that the appeal should be allowed.

(1) 1 P. & D., 516, at pp. 559-560.

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Gavan Duffy J. Rich J.

The judgment of GAVAN DUFFY and RICH JJ. was read by

RICH J. We agree with the judgment which has just been delivered by the Chief Justice, except that we consider it unnecessary to determine whether the accuracy of the statements contained in the Minister's warrant can be challenged in these proceedings. The Minister being justified in his refusal to give evidence, no inference unfavourable to its accuracy should be drawn from that refusal, and there is no other evidence from which such an inference could properly be drawn.

POWERS J. I have read the judgment delivered by the learned Chief Justice in this case. I agree with it, and with the reasons given by him for it so far as they apply to this case. I think that in the case of a warrant by a Minister of State authorized to act—as he is under this Act—*if he has* "*reason to believe*," the warrant, if it shows jurisdiction on the face of it, is practically unexaminable for the reasons given in the judgment.

I agree that the appeal should be allowed.

Appeal allowed. Judgment appealed from discharged. Respondent remanded into custody.

Solicitor, for the appellant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors, for the respondent, *Malleson, Stewart, Stawell & Nankivell.*

B. L.