

UGANDA / JUDGMENT

Bhagubhai Bhanabhai [1954]

EACA 134 (1 January 1954)

[1954] EACA 134

COURT

East African Court of Appeal

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MISCELLANEOUS CRIMINAL

Before SIR KENNETH O'CONNOR, C. J., and DE LESTANG, J.**Ex parte: BHAGUBHAI BHANABHAI, Applicant**

Habeas Corpus—Immigration Control Ordinance, section 5 (1) \$(h)\$, 9—Defence (Admission of Women and Children) Regulations, 1940. Regulation 3 (c)— Prohibited Immigrant—Deportation Order—Whether adopted child a "child" for purposes of the Regulations—Immigration officer, revocability of decisions by—Affidavits must state source of information and belief.

A deportation order was made under section 9 of the Immigration Control Ordinance (Cap. 51) ordering the applicant to be deported as a prohibited immigrant, on the ground that his entry into the Colony in 1947, was unlawful in that he was not then in possession of a valid entry permit under the Defence (Admission of Women and Children) Regulations, 1940. Regulation 3 and item (c) in the Schedule to those regulations permits an Immigration Officer if he is satisfied that any person is a child under the age of 18 years of any person who is normally resident or employed in the Colony to permit such child to enter the Colony. The applicant had been permitted by an immigration officer to enter the Colony on the ground that he was one of the children of one Somabhai who was normally resident and employed in Kenya. Some years later the immigration authorities obtained a deportation order against the applicant on the ground that he was not a natural child, but merely an adopted child, of Somabhai. There was no evidence as to whether or not the immigration officer in 1947 had been told of the adoption.

The applicant applied for a direction in the nature of habeas corpus under section 388 of the Criminal Procedure Code discharging the deportation order.

Held (2-11-54).—(1) "Children" in item (c) of the Schedule to Defence (Women and Children's) Regulations, 1940, means legitimate issue of the first generation and does not include an adopted child.

- (2) Regulation 3 of the regulations did not say that only women or children who fell within the Scheduled categories might be admitted; but that if an immigration officer was satisfied that any person came within any of the scheduled categories, he might -
permit that person to enter. Once an immigration officer was satisfied and an entry
pursuant to his permit had been made, that entry was circumstance or fraud, and provided that no grounds are shown which would ordinarily be a reason for upsetting a decision reached in the exercise of a statutory discretion, such for instance, as bias, or the declining of jurisdiction because extraneous matters had been taken into account. In the absence of any such ground the decision of the immigration officer made in the bona fide exercise of his discretion could not, years later be upset.
- (3) In the instant case, the immigration officer must be taken to have been "satisfied" and there was no evidence of misrepresentation, wilful concealment or fraud, or any suggestion of bias or of an improper exercise of his discretion by the
immigration officer, in granting the applicant permission to enter the Colony. Accordingly, the applicant's entry was a lawful entry.
- (4) It followed that the deportation order was illegal: the applicant's imprisonment pending deportation was illegal and must be released.
- (5) Affidavits made on information and belief must state the grounds of belief. *A. N. Phakey v. World Wide Agencies Ltd.*, (1948) 15 E. A. C. A. 1 followed.

Gledhill for applicant.

O'Beirne, Crown Counsel, for respondent.

Ruling.—On 26th October, 1954, an Order nisi was made by Rudd J. under section 388 Criminal Procedure Code, directing the Superintendent of Prisons, Nairobi, to produce Bhagubhai Bhanabhai before the Court on 30th October and to show cause why he should not be released.

The affidavit of Bhagubhai Bhanabhai in support dated 28th October, 1954. states that the applicant is 25 years old, is a tailor by trade, is an adopted son of Somabhai Bhanabhai, and entered Kenya on 25th May, 1947, as a dependant of Somabhai upon whom he was, in fact, then dependant.

The applicant alleges that he is a permanent resident, that he was lawfully resident in the Colony at the date of the coming into operation of the Immigration Control Ordinance, and that he is entitled to have endorsed on his passport a certificate of permanent resident; but a Deportation Order has been made against him by the Chief Secretary acting on behalf of the Governor.

Under section 9 of the Immigration Control Ordinance the Governor may make an order directing that any prohibited immigrant or any person whose presence within the Colony is under the provisions of the Ordinance unlawful shall be deported. The applicant is now in prison awaiting deportation under the Deportation Order.

The Chief Secretary in an affidavit dated 29th October, 1954, says that he made the Deportation Order under powers conferred on him by the delegation of the Governor dated 21st August, 1954 (G. N. 1252/54). Under that delegation the Chief Secretary has power to make Deportation Orders under section 9 of the Ordinance.

The Order was made on the grounds that the applicant was a prohibited immigrant by virtue of section 5 (1) (h) of the Ordinance. Section 5 (1) (h) provides:

"The following persons other than permanent residents are prohibited immigrants and their entry into and presence within the Colony is unlawful except in accordance with such provisions as may be prescribed:

\$(h)\$ any person whose presence in or entry into the Colony is, or at the time of his entry was, unlawful under this or any other law for the time being in force."

The Chief Secretary's affidavit avers that the applicant's entry into the Colony on 25th May, 1947, was unlawful in that he was not in possession of a valid entry permit under the Defence (Admission of Women and Children) Regulations, 1940. There is an affidavit by the senior immigration officer who produces an Emergency Certificate dated 9th May, 1947, issued to one Bhagubhai Somabhai who is admitted to be the applicant. This has upon it a note to the effect "Auth: Entry Permit No: \$A.5/1/22/97\$ dated 13.2.47 valid for so long as he (word obliterated) under 18 years of age". It was not alleged in the Chief Secretary's affidavit that the ground for making the Deportation Order was that the applicant had entered the Colony upon an entry permit valid only for a limited time and which had since expired and that, therefore, his presence in the Colony was unlawful. The only ground for making the Deportation Order was that the entry of the applicant into the Colony on 27th May was unlawful, because at the time of his entry he was not in possession of a valid entry permit under the provisions of the Defence (Women and Children) Regulations, 1940. The entry permit was not produced. Each side says that the other has, or should have, it. The duplicate is alleged to have been destroyed with other records held in the Immigration Office at Mombasa.

The regulation relied upon by the Principal Immigration Officer is regulation 3 and item \$(c)\$ of the Schedule which read respectively:

"3. Notwithstanding the provisions of the Ordinance, but subject to the provisions of these Regulations, no woman, or child who has not attained the age of 18 years (either of whom is hereinafter referred to as a "person") may enter the Colony whether by land, sea or air:

Provided that, if the immigration officer is satisfied that any person comes within any of the categories specified in the Schedule hereto and is not a prohibited immigrant within the meaning of section 5 of the Ordinance, he may permit such person to enter the Colony either unconditionally or for such period and subject to such conditions as the Governor may direct."

The relevant item of the Schedule is item \$(c)\$:

"(c) The children who have not attained the age of 18 years, of any person who is normally resident or employed in the Colony.

Mr. Gledhill first submits that the applicant came within category \$(c)\$ of the Schedule because, although not a natural son, he was an adopted son, validly adopted under Hindu law, of Somabhai, a person normally resident and employed in the Colony: that the result of Hindu adoption is to make an adopted son equivalent to a natural son for all purposes: and that "children" in the Schedule to the 1940 Regulations, therefore, includes adopted children.

Mr. O'Beirne submitted \$(a)\$ that the question of valid adoption under Hindu law was a question of foreign law and should have been proved by a lawyer versed in Hindu law and that the affidavit filed by Keshavlal Kuberji Shastri, a Hindu Priest, was insufficient to prove the legal effect of a Hindu adoption; \$(b)\$ that even if the adoption is proved and was valid by Hindu law, it would not be recognized by the Kenya courts, unless both parties were domiciled in India, and that there was no evidence of where Somabhai was domiciled; and \$(c)\$ that "children" in category (c) of the Schedule to the 1940 Regulations did not include adopted children.

It is not necessary for us to decide whether there was a valid adoption of the applicant by Somabhai or whether such an adoption would be recognized by the Kenya courts because, even if the applicant is an adopted son of Somabhai, we are not prepared to hold that "children" in item \$(c)\$ of the Schedule of the 1940 Regulations include adopted children. The word "child" in an Act of Parliament (and presumably in a statutory rule) *prima facie* applies to a legitimate as against an illegitimate child. (*The Queen v. Totley* (Inhabitants) 7 Q. B. R. 596, 599; 115 E. R. 614), unless there is something to the contrary in the statute or a wider meaning is more consonant with its object (*Woolwich Union v. Fulham Union*, (1906) 2 K. B. 240, 247). The same principle applies as regards an adopted child. (*In re Fletcher*, (1949) Ch. 473) *Prima facie* "child" means legitimate issue of the first generation.

Mr. Gledhill then submitted that even if the applicant was not a "child" of any person normally resident in the Colony within item \$(c)\$ of the Schedule to the 1940 Regulations, he had still entered the Colony lawfully. The proviso to regulation 3 says:

"Provided that if the immigration officer is satisfied that any person comes within any of the categories specified in the Schedule hereto and is not a prohibited immigrant within the meaning of section 5 of the Ordinance, the may permit such person to enter the Colony...."

Mr. Gledhill argued that it must be assumed from the fact that the immigration officer issued an entry permit that he was satisfied that the applicant came within one of the scheduled categories and was not a prohibited immigrant: there was no evidence of misrepresentation or fraud on the part of either the applicant or Somabhai and, in the absence of such evidence, all that had to be shown to establish a lawful entry was, not that the applicant was, in fact, entitled to enter, but that the immigration officer had been satisfied that he was. If the immigration officer made a mistake and afterwards discovered it (Mr. Gledhill argued), he could not correct it years later to the detriment of an individual against whom no misrepresentation or fraud could be shown. Mr. O'Beirne (contra) submitted that the maxim "*omnia præsumentur rite ac solemniter esse acta*"

would apply: that we must not assume that the immigration officer acted illegally, and that to admit an adopted child as a child would have been illegal. We do not think, however, that we can apply the **omnia præsumentur** maxim to the extent of assuming that the immigration officer was incapable of being satisfied for erroneous reasons or that we can impute to him infallibility on legal questions. According to **Broome's Legal Maxims**, 9th Ed., page 611, what we are to presume is that the immigration officer as a public officer was properly appointed and duly authorized to act, and that, in the absence of proof to the contrary, credit should be given to him as a public officer who has acted *prima facie* within the limits of his authority, for having done so with honesty and discretion. All this we freely concede; but it still falls far short of imputing to him infallibility in a matter of law.

The regulation does not say that only women or children who fall within the scheduled categories may be admitted. If it did, the applicant would be out of Court. It says that if the immigration officer is satisfied that any person comes within any of the scheduled categories, he may permit that person to enter. We think that once the immigration officer is satisfied and an entry pursuant to his permit has been made, that entry is lawful; provided that the permit has not been induced by misrepresentation, wilful concealment of a material circumstance or fraud, and provided that no grounds are shown which would ordinarily be a reason for upsetting a decision reached in the exercise of a statutory discretion such, for instance, as bias, or the declining of jurisdiction of the improper exercise of jurisdiction because extraneous matters have been taken into account. In the absence of any such ground, the immigration officer cannot come seven years later and say, "I have looked up my law, or I have reconsidered my reasons, and I think I was wrong to permit you to enter: you must now be deported". If it is afterwards discovered that the immigrant has got in on some material misrepresentation, wilful concealment or fraud, or that there was an improper bias on the part of the immigration officer, that would be very different. There is, however, no such allegation here, and it is not shown in this case that the immigration officer was not informed that the applicant was an adopted son. We may suspect that he was not; but suspicion is not enough without any evidence at all in support. The immigration officer may have taken the view (now contended for by Mr. Gledhill) that "children" in category (c) of the Schedule to the 1940 Regulations include adopted children. For us to hold that immigration officers (or customs, or licensing, or other ministerial authorities upon whom the duty of making discretionary decision is conferred by statute, or their superiors) can revoke decisions made in the bona fide exercise of a discretion and upon information supplied without misrepresentation, wilful concealment of material circumstances or fraud, because such decisions are afterwards found to have been wrong in law, would open up a frightening vista of insecurity for the public.

In this case we must infer from the fact that the immigration officer permitted the applicant to enter the Colony that he was satisfied that the applicant came within one of the scheduled categories and was not a prohibited immigrant. The permission must be taken to show that the applicant discharged the burden which was upon him of satisfying the immigration officer. There is nothing to show that there was not full disclosure of all relevant facts. "It is a well-established rule that the law will presume in favour of honesty and against fraud, and this presumption acquires weight from the length of time a transaction has subsisted." (Broome, page 612.)

In the absence of any evidence of misrepresentation, wilful concealment or fraud, or any suggestion of bias or improper exercise of his discretion by the immigration officer in granting permission, we find that the applicant's entry pursuant to that permission was a lawful entry. He has discharged the burden that lies upon him under section 5(2) of the Ordinance.

Accordingly, as the ground for making the Deportation Order and the justification for the imprisonment given in the return to the Order nisi was that the applicant's original entry was unlawful because his entry permit was not valid, we find that the Deportation Order was not legal and the imprisonment of the applicant was not lawful and he must be discharged.

If the Deportation Order had been applied for and made on the ground that the entry permit issued to the applicant was subject to a condition that it remained valid only until the applicant attained the age of 18, and that the applicant, having admittedly ceased to comply with that condition, had become a prohibited immigrant and liable to deportation by virtue of regulation 7 of the 1940 Regulations and sections 5 (1) (h), 9 and 16 of the Ordinance, the result of these proceedings might have been different. As already mentioned, the Emergency Certificate, a travel document issued to the applicant by the Government of Bombay on 9th May, 1947, in lieu of a passport contains, on the face of it, a note that the applicant's entry permit was valid only for so long as he was under 18 years of age. Mr. Gledhill argued that this note was inadmissible as evidence of the facts stated in it: Mr. O'Beirne did not take the point at all until invited to deal with it by the Court. He then argued that the note was admissible evidence of the facts stated in it. As this note does not fall within any of the categories mentioned in section 63 of the Evidence Act, it seems that it would not be admissible as secondary evidence of the contents of the applicant's entry permit. Whether, as a part of the travel document which has been exhibited, the note could (as contended by Mr. O'Beirne) be looked at in the same way as a visa on a passport is a matter which we do not decide. No effort has been made to bring evidence to the effect (if such be the case) that entry permits, to children entering under the 1940 Regulations were, in practice, only made valid until they attained the age of 18, and, as already stated, the Deportation Order was not made on the ground that the validity of the applicant's entry permit had expired and this point was not raised in the return to the Order *nisi*. Accordingly, we think that we are precluded from taking it into consideration in these proceedings and we should say nothing to prejudice any other action which may, or may not, be taken.

In the result, the return to the Order *nisi* does not show that the applicant was lawfully apprehended on this Deportation Order and he must be discharged and released.

Before leaving the case we desire to draw the attention of the advisers to the Senior Immigration Officer to the form of paragraphs 4 and 6 of his affidavit of 29th October, 1954. These paragraphs are stated to be on information and belief, but the grounds of the belief are not stated. In this connexion the remarks of Sir George Graham Paul, C. J., acting as President of the Court of Appeal in *A. N. Phakey v. World Wide Agencies Ltd.*, (1948) 15 E. A. C. A. 1, at page 2 appear to be apposite:

"Before leaving this case I wish to refer to the affidavit filed in support of the motion. Paragraph 4 of that affidavit is on information and belief and grounds of belief are not stated. This is in gross breach of the rules as to affidavits. I pointed this out to counsel for the appellant who gave me to understand that this breach of the rules was deliberate and not merely slovenly; he seemed to suggest that it was in accordance with local practice. If that is so, the sooner that practice is stopped the better. Lord Justice Rigby dealt very clearly with this matter in the case of J. L. Young Manufacturing Co. Ltd., (1900), 2 Ch. 753 at page 755 and I think it desirable to

quote from the learned Lord Justice's judgment in that case as follows: -"Now, every affidavit of that kind is utterly irregular..."

Lord Alverstone, who presided over the Court of Appeal in that case, said: —

"If such affidavits are made in future it is as well that it should be understood that they are worthless and ought not to be received as evidence in any shape whatever; and as soon as affidavits are drawn so as to avoid matters that are not evidence the better it will be for the administration of justice."

The learned Acting President continued:

"Respectfully and emphatically I agree with these authoritative pronouncements and I trust it will not again be necessary in this Court to draw attention to this very elementary matter of practice."

We trust so too.

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