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RUDOLF SCHMUEL
v.
THE OFFICER IN COMMAND, ILLEGAL JEWISH IMMIGRANTS' CAMP, KARAOLOS.

[JACKSON, C.J., AND MELISSAS, J.]

(October 1 and 9, 1948)

RUDOLF SCHMUEL, *Applicant*,

v.

THE OFFICER IN COMMAND, ILLEGAL JEWISH IMMIGRANTS' CAMP, KARAOLOS,

Respondent.

(*Civil Application No. 7 of* 1948.)

Habeas corpus—Jurisdiction of Supreme Court—Courts of Justice Law, 1935 (as amended by Law 19 of 1940), sections 12, 16, 49 and 51—English Common Law.

Illegal immigrants—Detention Order—The Detention (Illegal Immigrants) Law, 1946—The Illegal Immigrants Detention (Removal of Doubts) Law, 1948.

The applicant was brought to Cyprus from Haifa, Palestine, against his will, by His Majesty's Forces, in a ship, on the 15th March, 1947, and since that date he had been detained at an Illegal Jewish Immigrants' Camp at Karaolos, Famagusta District, by virtue of a detention order made by the Acting Governor under the provisions of section 3 of the Detention (Illegal Immigrants) Law, 1946. On the 17th September, 1948, the Illegal Immigrants Detention (Removal of Doubts) Law, 1948, came into operation. Section 2 provides that "for the removal of doubts it is hereby declared that every person who has been detained in a place established for the detention of persons under the principal Law, has been lawfully detained under the provisions of that Law, and any person detained in any such place at the commencement of this Law is lawfully detained under the principal Law: Provided that this section shall not affect the determination of any legal proceedings instituted before the commencement of this Law."

On an application made after the date of the last-mentioned Law for a writ of *habeas corpus* to be directed to the Officer in Command, Illegal Jewish Immigrants' Camp, Karaolos, on the ground that the applicant's detention was illegal—

Held: (i) That, by virtue of sections 49 and 51 of the Courts of Justice Law, 1935, as amended by Law 19 of 1940, both the substantive Law from which the writ of *habeas corpus* derives and the procedural Law governing its issue were in operation in Cyprus. And there could be no doubt of the existence of the legal right which it was the function of the writ to enforce, for that was the right to personal liberty.

(ii) It was well established that in England jurisdiction to issue a writ of *habeas corpus* was exercised by the High Court, and there was no doubt that the Court in Cyprus in which the corresponding jurisdiction lay was the Supreme Court and not the District Court.

(iii) Section 12 of the Courts of Justice Law, 1935, which conferred certain original jurisdiction on the Supreme Court, was not exclusive.

(iv) In view of the extremely wide terms of the Illegal Immigrants Detention (Removal of Doubts) Law, 1948, it had not been shown that the applicant's detention was illegal.

Application dismissed.

Application, by summons, for a writ of *habeas corpus* by a person detained at a place in Cyprus by order made by the Acting Governor under the Detention (Illegal Immigrants) Law, 1946.

L. Weston for the applicant.

The Solicitor-General (*C. Tornaritis*), and *G. N. Chryssafinis*, for the respondent.

The facts of the case are fully set forth in the judgment of the Court which was delivered by :

JACKSON, C.J. : This is an application, by summons, for a writ of *habeas corpus* by a person detained at a place in Cyprus by order of the Acting Governor made under the Detention (Illegal Immigrants) Law No. 15 of 1946.

There has been no decision by this Court on the jurisdiction of the Court, or of any other Court in Cyprus, to issue a writ of the nature of *habeas corpus* in the absence of specific statutory authority and, as far as we are aware, no such writ has ever issued from any Court in the Island. Accordingly the first question which arises for decision is whether or not this Court has jurisdiction to issue the writ for which application is made. We directed that the application should be made by summons in order that this question might be fully argued before us and, at the same hearing and by consent of both parties, we also heard argument upon the merits of the application in order that, if we took the view that this Court had jurisdiction to issue the writ, we could decide, without further proceedings, whether it should issue in this particular case or not.

The applicant's advocate, Mr. Weston, inclined to the view that jurisdiction lies in the District Court for the area in which the applicant is detained and he had in fact made a similar application to the District Court on behalf of a different applicant. That application is still pending and Mr. Weston said that he had felt obliged to apply also to the Supreme Court, on behalf of the present applicant, because he understood that the Crown took the view that the District Court had no jurisdiction to issue a writ of this nature and that if jurisdiction lay in any Court in the Island, it lay in the Supreme Court.

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In fact the Solicitor-General opposed the present application on the ground that the Supreme Court itself has no jurisdiction and that the applicant's proper course is to apply to the High Court in London. If, as the Solicitor-General argued, no Court in Cyprus has jurisdiction to issue a writ of *habeas corpus* in circumstances like those of the present case, the limitations imposed on courts in England by the Habeas Corpus Act, 1862, would not apply. But while the Solicitor-General maintained that it is beyond doubt that no jurisdiction lies in any District Court in Cyprus, he conceded that it is not equally clear that none lies in the Supreme Court.

In the course of his argument the Solicitor-General reviewed the successive legislative enactments by which the various courts have been established, and their jurisdiction defined, since the beginning of the British occupation of Cyprus in 1878. He did so in order to show that while it may well be that jurisdiction in the matter of *habeas corpus* lay in the Supreme Court for a certain period of years, it had been lost at a particular stage and could not be said to have been transferred from any earlier Supreme Court to the present one, however unlikely it may seem that the legislator could have intended to take it away.

We agree with that argument up to a certain point and consequently we have not thought it necessary to examine in this judgment the effect of legislation now repealed. For the purposes of this case the principal Law which now regulates the constitution of the courts and their jurisdiction is the Courts of Justice Law, 1935, and we agree that, whatever may be said of the position up to the date when that Law came into operation, it cannot be held that the Law transferred to the present Supreme Court any jurisdiction in the matter of *habeas corpus* as deriving from any earlier court. If that jurisdiction is now to be found in any court in Cyprus it must be based on the provisions of the Law of 1935.

The section of that Law which deals with the transfer of jurisdiction from earlier courts is section 57. This section transfers to the courts which the Law established "all jurisdiction, civil or criminal, vested by any Law" in the courts established by certain earlier Laws. We think that the phrase "vested by any Law" cannot be taken to include laws which, like the relevant parts of the Order in Council of 1927, namely, sections 26 and 28, were repealed by section 60 of the Law of 1935. In our opinion, the phrase must be taken to refer only to Laws which remained in operation after the Law of 1935 took effect, or were enacted subsequently.

The jurisdiction of the Supreme Court, original and appellate, is set out in sections 12 and 13 of that Law and it can be said at once of these sections that, taken by themselves, they include no provision from which jurisdiction to issue a writ of *habeas corpus* could be deduced. They are of the nature of those neat lists which are such a dangerous trap for draftsmen, since the question must often arise whether they are exclusive or not.

But an important section is section 49 by which, as re-enacted by section 4 of Law 19 of 1940, the common law of England is, once again, brought into operation in the Island. And section 51, which relates to practice and procedure, prescribes that, in the absence of local provision, the jurisdiction of all courts shall be exercised, so far as circumstances permit, "in accordance with the practice and procedure observed by the courts in England."

We need cite no authority for the proposition that the writ of *habeas corpus* derives from the common law of England, but we quote, on the subject of the nature of the writ, the following passage from the judgment of Lord Wright in the case of *Greene* v. *The Secretary of State for Home Affairs* (All England Reports, 1941, Vol. 3, at p. 399). "It is clear, said Lord Wright, that the writ of *habeas corpus* deals with the machinery of justice, not the substantive Law, except in so far as it can be said that the right to have the writ is itself part of the substantive Law. It is essentially a procedural writ, the object of which is to enforce a legal right."

Now, by virtue of sections 49 and 51 of the Law of 1935 we have in operation in Cyprus both the substantive Law from which the writ derives and the procedural Law governing its issue. And there can be no doubt of the existence of the legal right which it is the function of the writ to enforce, for that is the right to personal liberty. The question, therefore, appears to us to be, not whether jurisdiction to issue the writ exists in the Island, but in what court it lies.

Upon this point we must turn for guidance to the English common law and the English rules of practice and procedure. It is well established that in England jurisdiction in this matter is exercised by the High Court and we feel no doubt that the Court in Cyprus in which the corresponding jurisdiction lies is the Supreme Court. To hold otherwise would seem to us to be contrary both to the English common law, from which the writ derives, and to the rules of practice and procedure of the English courts by which we feel that we are bound in this particular matter.

It follows that we are unable to accept the argument of the appellant's advocate that jurisdiction is given to a District Court by section 16 of the Law of 1935, which empowers a District Court, when constituted as prescribed, to hear and determine "any action."

It follows also that we do not regard section 12 of that Law, which confers certain original jurisdiction on the Supreme Court, as exclusive. If we did, we would be unable to give what we consider to be due effect to one of the most vitally important provisions of the English common law and the English rules of practice and procedure which that Law imports into the Island.

We are supported in the view that we have expressed by the opinion that we formed from a review of the successive legislative enactments relating to the courts since the beginning of the British occupation. Though it is unnecessary for us to say so for the purposes of this case, we came to the conclusion that since the first Ordinance was passed in 1878, jurisdiction in the matter of *habeas corpus* has always existed in the Supreme Court, and in its predecessor the High Court, and it is hardly to be conceived that any legislator had intended to take it away, either in 1935 or at any earlier date. If individuals in Cyprus who believed themselves to be unlawfully detained were obliged to go for relief to the High Court in London, all but a very few would be deprived of the benefit of *habeas corpus* proceedings and all would be deprived of the principal benefit of the writ, immediate release if detention is unlawful.

We turn now to the merits of this application and we preface our remarks with a further quotation from Lord Wright's judgment in the case which we have already cited, *Greene* v. *The Secretary of State for Home Affairs*. "The applicant must show," says Lord Wright, "a prima facie case that he is unlawfully detained. He cannot get (the writ) as he would get an original writ for initiating an action, but, if he shows a prima facie case, he is entitled to it as of right. The first question, therefore, in any *habeas corpus* proceeding is whether a prima facie case is shown by the applicant that his freedom is unlawfully interfered with . . ." (p. 400).

The Detention (Illegal Immigrants) Law, 1946, provides for the detention of illegal immigrants, as defined in the Law, by order of the Governor, in a place specified in the order. The term "illegal immigrant" is defined by section 2 to mean "any person certified, as in this Law provided, to be a person who intends to enter Palestine contrary to the Palestine Immigration Ordinance, 1941, or any

Ordinance amending or substituted for the same." In fact the Law provides no procedure for certifying that any person fulfils the precise conditions specified in the definition and we were informed by the Solicitor-General that in practice no certificates in those terms are given in relation to any persons detained under the Law. But section 3 (1) empowers the Governor to order the detention, in a specified place, of any person brought (or accompanied) to the Colony by any Naval, Military or Air Force escort and certified by the officer in charge of the escort to be an *illegal immigrant*. Sub-section (2) of the same section provides that the certificate of the officer in charge of the escort that the person named therein is an illegal immigrant shall, for the purposes of making a detention order, be conclusive evidence of the fact.

The applicant filed an affidavit, dated the 21st September, 1948, in support of his application for a writ of *habeas corpus*. In that affidavit he states that he is 23 years old and was brought to Cyprus from Haifa (Palestine), against his will, by His Majesty's Forces, in a ship named the *Empire Rival* on the 15th March, 1947, and that since that date he had been detained at an Illegal Jewish Immigrants' Camp at Karaolos and was still detained there at the date of his affidavit. As far as we are aware, he is detained there now. His affidavit went on to state that he is not a person who intends to enter Palestine contrary to the Palestine Immigration Ordinance, 1941, or any Ordinance amending or substituted for the same. The applicant further stated that neither his true name nor any name by which anyone might have had any reason to believe he was called was known to the officer in charge of the escort which brought him to the Colony and that no certificate purporting to have been made by the officer in charge of the escort, for the purposes of section 3 (1) of the Law quoted, referred to the applicant by his true name, or by any name.

The applicant's advocate made plain at the hearing the meaning of the applicant's statement that he is not a person who intends to enter Palestine contrary to the Palestine Immigration Ordinance, 1941. His contention was that the British Mandate for Palestine ended in May of the current year and that all British authority in that country was terminated by section 1 of the Palestine Act, 1948. Consequently all laws made in Palestine by the British High Commissioner had ceased to have effect and the applicant could no longer be held to fall within the definition of "illegal immigrant" in the Cyprus law, even if he had ever done so.

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We have already indicated, on the admission of the Solicitor-General, that no certificate to the effect contemplated in the Cyprus definition of "illegal immigrant" was given in the case of the applicant. It was also a fact that the applicant was not "named" in the certificate given under section 3 (2) of the Cyprus law upon which the detention order was based. That certificate was produced. It is dated the 27th March, 1947, and referred to 259 men and 63 women who had been brought by the ship *Empire Rival* and it certified, over the signature of the officer in charge of the escort who had brought them, that they were illegal immigrants. No names were given but only the numbers mentioned above. An order for the detention of these 259 men and 63 women was made by the Acting Governor on the date of the certificate, the 27th March, 1947, and the persons to be detained are identified in the order by a statement that they had been brought to Cyprus in the ship *Empire Rival* and had been certified in the certificate of the 27th March by the officer in charge of the escort, whose name was given, to be illegal immigrants. We note here that, by section 3 (4) of the Cyprus law already cited, a detention order may be made with reference to a class of illegal immigrants.

Mr. Weston sought to show, by cross examination of the Officer in Command of the Camp at which the applicant is detained, that there was no proof that the applicant is one of the 259 men to whom the detention order of the 27th March, 1947, relates. But it is for the applicant to show that his detention is prima facie illegal and he has not denied that he is in fact one of those men. In any case, he admits in his affidavit that he was brought to Cyprus by the ship named in the detention order on the 15th March and has been detained at Karaolos Camp ever since. It is not in dispute that the ship arrived on that date but when it arrived it carried a considerably larger number of passengers, both men and women. Mr. Weston informed us that some of these were Palestinian citizens who had deliberately mixed themselves up with immigrants trying to land in Palestine. Since it was impossible for the Palestinian authorities to distinguish, on the spot, one class from the other, they were all apprehended and transferred to Cyprus in the *Empire Rival*, which arrived on the 15th March. It took some days to sort them out here and hence the interval between the arrival of the ship, the 15th March, and the date of the certificate and the detention order. The Palestinian citizens were not, of course, detained, but the applicant was and it seems to us that we can draw no other reasonable conclusion but that he is one of the 259 men to whom the detention order relates.

Mr. Weston's main arguments, however, in support of his case that the applicant's detention is illegal may be summarised as follows :—

(1) The applicant is not an illegal immigrant within the meaning of the Detention (Illegal Immigrants) Law, 1946, because (*a*) he was never certified to be one in the manner contemplated by the definition of "illegal immigrant" in section 2; (*b*) if he ever was an illegal immigrant, he cannot be held to have been one since the surrender of the British Mandate in May, 1948, which brought the operation of the Palestine Immigration Laws to an end.

(2) He was not "named", as required by section 3 (2) of the Law in the certificate upon which the detention order was based.

(3) The duration of a detention order is not prescribed by the Law and a detention order cannot be held to justify the continued detention of a person who has ceased to be an illegal immigrant.

Those arguments relate, of course, to the Detention (Illegal Immigrants) Law, 1946, and whatever conclusions we might have reached upon them if that Law had stood alone, we have also to take account of a later Law, the Illegal Immigrants Detention (Removal of Doubts) Law, 1948. The Law contains only one operative section and we quote it in full :—

"2. For the removal of doubts it is hereby declared that every person who has been detained in a place established for the detention of persons under the principal Law, has been lawfully detained under the provisions of that Law, and any person detained in any such place at the commencement of this Law is lawfully detained under the principal Law :

Provided that this section shall not affect the determination of any legal proceedings instituted before the commencement of this Law."

The Law came into operation on the 17th September, 1948, and the applicant applied, *ex parte*, for the issue of a writ of *habeas corpus* on the 25th September. These proceedings are not therefore within the proviso to the section quoted.

Mr. Weston's arguments upon this Law were as follows :—

(1) The Law is not a validating Law and could not be held to cover the case of a person who is accidentally or wrongfully detained. Therefore the expression "is detained" must mean "is lawfully detained".

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It is enough to say of that argument that if the section is read in that sense the whole Law becomes nonsense.

(2) The section refers to any "person" detained but the word "person" must be narrowly interpreted and can only be taken to mean "illegal immigrant."

We find it impossible to accept that contention. The Law is one for the removal of doubts and one of the doubts which the legislator clearly intended to remove was a doubt whether any particular person detained was or was not an illegal immigrant within the meaning of the principal Law.

(3) The Law has no effect beyond the present. It says "is detained": therefore the operation of the Law ceased at the end of the day when it began.

It seems unnecessary for us to give reasons for declining to accept that argument.

As we have already indicated, we have not felt obliged to consider what our decision on this application might have been if the Detention (Illegal Immigrants) Law, 1946, had stood alone.

In view of the extremely wide terms of the later Law that we have quoted, we feel unable to hold that the applicant has shown that his detention is illegal. In our opinion he is not entitled either to a writ of the nature of *habeas corpus* or to an order for his release.

We wish to add one further observation. It was not contended for the applicant that since the objects which the principal Law was designed to serve were objects outside Cyprus, both the principal Law and the later Law supplementing it were laws which it was beyond the authority of the Governor to make under the power given to him by the Letters Patent of the 12th November, 1931, to make laws for the peace, order and good government of the Colony. Indeed when we put this question to Mr. Weston he replied that, in his view, it would have been perfectly lawful for the Governor to make a law for the detention in Cyprus of Jews of military age and his complaint was that the Governor had not declared in the Law, in so many words, that this was what he was doing. Accordingly, in the absence of argument, we have not considered how far, if at all, it is open to a court of ordinary municipal law to examine the limits of so wide a discretionary power of legislation. Nor have we considered to what extent the preservation of peace in a closely neighbouring country may be a matter which concerns the peace of our own.

This application must be dismissed with costs.