DASWANI v PARODY

Supreme Court
Bourke, Ag. C.J.
25 November 1965

Residence — British subject refused permit of residence.
Statute law — whether Immigration Control Ordinance repugnant to British Nationality Act, 1948 — *Colonial Laws Validity Act,* 1865, s. 2.

The Immigration Control Ordinance (Cap. 74, 1964 Ed.) is not repugnant to the British Nationality Act, 1948.

Note. It is suggested that the reference to *Thornton v The Police* as a binding authority may have been made per incuriam and that a decision of the Privy Council in an appeal from another colony, although demanding the highest respect, is not strictly binding in Gibraltar.

Case referred to in the judgment.

Thornton v The Police, [1962] A.C. 339.

Appeal by case stated

The appellant was convicted by the magistrates' court of an offence contrary to s. 38(a) of the Immigration Control Ordinance. The facts appear in the judgment.

A.V. Stagnetto for the appellant
The Attorney General for the respondent.

3 December 1965: The following judgment was read—

This appeal arises by way of case stated by the justices of the peace sitting as a magistrates' court at Irish Town.

According to the statement of facts the appellant was born in Hyderabad, India, in 1912 and is a British Subject by birth and a Citizen of the United Kingdom and Colonies. He has resided with his family in Gibraltar for nearly 35 years by virtue of an annual permit issued to him by the immigration authorities; three of his five children were born in Gibraltar. On 5 February 1965, his annual permit was cancelled on termination of his employment. He was then issued with short term permits of residence, an application for a more permanent permit having been refused. On 16 February 1965, he was informed that he had to leave Gibraltar by 23 February. On 11 March 1965, a further short term permit was granted pending consideration of the appellant's application for a permit of residence on the ground that he was obtaining further employment. This application was refused and on 23 June he was informed that he must leave Gibraltar by 30 June 1965. At some stage of his residence the appellant had applied to be registered as a Gibraltarian and this application was refused. On 2 July 1965, he was found in Gibraltar without a permit or certificate of residence and was charged with an offence contrary to s. 38 (a) of the Immigration Control Ordinance. He was convicted and sentenced to a fine of £1.

Turning to the record of the evidence, which is incorporated with the case, the appellant testified, and there is no dispute about it:—

> "In 1948, time of partition of India, I was a British Subject by birth. I immediately became a British Subject, Citizen of the United Kingdom and Colonies. In 1948 when I was given a choice, I opted to remain a British Subject. I have made Gibraltar my home. I hold no connection with India nor any other place. If I had to leave Gibraltar I would have to find a place to go to."

According to the evidence of Joseph Payas, the Deputy Commissioner of Police, who exercises by lawful delegation the powers of the Principal Immigration Officer, there was no suggestion that the appellant was an undesirable person or had been involved in the commission of any criminal offence. This witness went on to say:

> "I am not aware of his (appellant's) financial position but everything seems to indicate that he would not be a burden on the community if allowed to stay in Gibraltar."

On the face of it the action of the authorities concerned in all the circumstances might fairly be described as harsh and, indeed, drastic;

a feature that may well have led the justices to inflict a nominal fine and to comment when passing to conviction — "This court must administer the law as it finds it." However, that is not a consideration that enters into the matter on the determination of this appeal.

The short point is whether the Immigration Control Ordinance is repugnant to the British Nationality Act, 1948, and is void and inoperative having regard to the provisions of the Colonial Laws Validity Act, 1865.

A precisely similar question was examined in *Thornton v The Police* [1], in which it was held by their Lordships of the Privy Council, to quote from the head note:

> "There is not, within the meaning of the Colonial Laws Validity Act, 1865, any repugnancy between the Immigration Ordinance, 1947, of Fiji, and the British Nationality Act, 1948, which extends to the colony. Accordingly, the petitioner, a British-born subject, who has been issued with a permit to enter the colony and had subsequently refused to leave when ordered to do so on the expiration of the period for which the permit had been granted, had been rightly convicted of an offence pursuant to the provisions of the Immigration Ordinance."

It is conceded by Mr. Stagnetto for the appellant that his argument cannot hope to succeed unless he can distinguish that binding authority. This he seeks to do by maintaining that the decision turned upon the time of the coming into force of the Fiji Ordinance, which was a year prior to the enactment of the British Nationality Act, 1948. He urges that there is significant emphasis supporting his contention to be found in the words in the judgment "which was enacted in 1947" referring to the Immigration Ordinance of Fiji.

I do not find it necessary to set out the further argument as to why a material difference should arise in the legal position according as to whether the local Ordinance was enacted before or after the promulgation of the British Nationality Act, 1948. I reach this conclusion because it appears to me to be perfectly clear what the ratio decidendi was in *Thornton v The Police*. It is a question of status and of rights. The British Nationality Act, 1948, was concerned with status and the Immigration Ordinance regulated rights of entry and residence. As was put forward in the argument for the respondents before the Privy Council — "There is nothing inconsistent with status in saying that a British subject shall not be permitted to enter the territory." Nothing in the submissions as given in the report turned upon the respective dates of the enactments or upon the line of argument now advanced before this court founded upon such dates. It seems to me to be evident that their Lordships accepted as at least substantially correct the statement of the law as rendered by Hammett J. in his judgment under appeal. It is as well to quote the excerpt from that judgment that appears in the report:

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[1] [1962] A.C. 339

> "It is submitted that all citizens of the United Kingdom and colonies have, by virtue of the British Nationality Act, 1948, the free and unfettered right to enter and to reside in any place in the United Kingdom and colonies. I have examined the British Nationality Act, 1948, with some care and I can find no provisions in it to this effect. This statute merely governs the status of persons and does not lay down what rights of movement or residence are granted by or attach to that status . . . .I know of no provision in the British Nationality Act, 1948, which precludes either the United Kingdom or any of the colonies from enacting such legislation they chose to regulate and control the entry into their territory or residence therein of persons whatever their status may be. I cannot accept the contention that the parts of the Immigration Ordinance, 1947, referred to are repugnant to the British Nationality Act, 1948."

In my judgment the point at issue is governed by *Thornton v The Police* and the learned Justices arrived at a correct conclusion in holding that the Immigration Control Ordinance is not repugnant to the British Nationality Act, 1948, and is therefore not void and inoperative by virtue of s. 2 of the Colonial Laws Validity Act, 1865.

The appeal is dismissed.