

Reg. v. Wheatley (C.A.)

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withdraw this issue from the jury and to tell the jury that the substances to which count 4 of the indictment related were explosive substances. A

Accordingly, the appeal against conviction is dismissed. The application for leave to appeal against sentence was withdrawn.

Appeal dismissed.

Solicitors: Registrar of Criminal Appeals; Director of Public Prosecutions. B

L. N. W.

[QUEEN'S BENCH DIVISION] C

* REGINA v. SECRETARY OF STATE FOR THE
HOME DEPARTMENT, *Ex parte* RAM

1978 July 27

Lord Widgery C.J., May
and Tudor Evans JJ. D

Habeas Corpus—Onus of proof—Commonwealth immigrant—Passport mistakenly stamped with indefinite leave to remain in United Kingdom—No fraud or misrepresentation by entrant—Entrant detained by order of immigration officer—Whether permission invalidated by immigration officer's mistake—Whether illegal entrant—Immigration Act 1971 (c. 77), s. 4 (1), Sch. 2, para. 16 (2) ¹ E

The applicant first came to the United Kingdom from India in September 1970. Until January 1974, when he went to Canada, he remained in this country either in anticipation of employment with the Indian High Commission, or seeking from the Home Office permission to stay here. In November 1974 he returned from Canada, telling the immigration officer he had come to attend a wedding. He made no misrepresentation to the officer, but his passport was stamped with leave to enter the United Kingdom and remain for an indefinite period. He left for Canada a fortnight later, and subsequently returned to the United Kingdom on three occasions—in July 1976, November 1976, and February 1977. On the last occasion he again tendered his passport without making any misrepresentation, and again he was given leave to remain in the United Kingdom for an indefinite period. Considering himself lawfully in this country because of the stamp in his passport, he set up a business to which he attended until, in June 1978, he was interviewed by immigration officers, and then detained in prison pursuant to paragraph 16 (2) of Schedule 2 to the Immigration Act 1971. F

On his application for a writ of habeas corpus on the ground that he was a legal entrant and could not therefore be detained under paragraph 16 of Schedule 2: — G

Held. allowing the application (Lord Widgery C.J. dubitante), that, since the immigration officer had not been misled H

[Reported by KATE O'HANLON, Barrister-at-Law]

¹ Immigration Act 1971, s. 4 (1): see post, p. 151H.
Sch. 1, para. 16 (2): see post, p. 152C-D.

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- A** by the applicant into stamping the passport with leave to enter indefinitely, the onus was on the Secretary of State to show that the applicant was an illegal entrant; that the fact that the immigration officer had mistakenly stamped the passport of the applicant, who did not come within the categories of lawful entrants defined in the Statement of Immigration Rules for Control on Entry: Commonwealth Citizens, did not vitiate the officer's authority under section 4 (1) of the Immigration Act 1971 to grant leave to enter the United Kingdom, and the applicant was lawfully in the United Kingdom pursuant to that grant of leave to remain indefinitely stamped on his passport.

B Dictum of Geoffrey Lane L.J. in *Reg. v. Secretary of State for the Home Department, Ex parte Hussain* [1978] 1 W.L.R. 700, 707, C.A. applied.

Reg. v. Secretary of State for the Home Department, Ex parte Choudhary [1978] 1 W.L.R. 1177, C.A. distinguished.

- C** The following cases are referred to in the judgment:

Reg. v. Secretary of State for Home Affairs, Ex parte Badaiki, The Times, May 4, 1977, D.C.

Reg. v. Secretary of State for the Home Department, Ex parte Choudhary [1978] 1 W.L.R. 1177; [1978] 3 All E.R. 790, C.A.

- D** *Reg. v. Secretary of State for the Home Department, Ex parte Hussain* [1978] 1 W.L.R. 700; [1978] 2 All E.R. 423, D.C. and C.A.

Reg. v. Secretary of State for the Home Department, Ex parte Nasir Ali, July 12, 1978; Court of Appeal (Civil Division) Transcript No. 421 of 1978, C.A.

The following additional cases were cited in argument:

- E** *Howell v. Falmouth Boat Construction Co. Ltd.* [1951] A.C. 837; [1951] 2 All E.R. 278, H.L.(E.).

Reg. v. Chief Immigration Officer, Heathrow Airport, Ex parte Salamat Bibi [1976] 1 W.L.R. 979; [1976] 3 All E.R. 843, C.A.

Reg. v. Secretary of State for the Home Department, Ex parte Bhajan Singh [1976] Q.B. 198; [1975] 3 W.L.R. 225; [1975] 2 All E.R. 1081, D.C. and C.A.

- F** *Reg. v. Secretary of State for the Home Department, Ex parte Mughal*, [1973] 1 W.L.R. 1133, D.C.; [1974] Q.B. 313; [1973] 3 W.L.R. 647; [1973] 3 All E.R. 796, C.A.

Robertson v. Minister of Pensions [1949] 1 K.B. 227; [1948] 2 All E.R. 767.

APPLICATION for a writ of habeas corpus.

- G** The applicant, Tirath Ram, applied for a writ of habeas corpus directed to the Governor of H.M. Prison, Winson Green, Birmingham, where he had been detained pursuant to an order of an immigration officer under paragraph 16 of Schedule 2 to the Immigration Act 1971. The grounds of the application were that the applicant had indefinite leave to stay and remain in the United Kingdom; and that the Secretary of State had no reasonable grounds to believe that the applicant was an illegal entrant.

- H** The facts are stated in the judgment of May J.

Alan Campbell Q.C. and *Gulam Yazdani* for the applicant.

Robert Owen for the Secretary of State.

LORD WIDGERY C.J. May J. will give the first judgment.

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MAY J. In these proceedings Mr. Campbell moves on behalf of the applicant, Tirath Ram, at present in custody in Winson Green Prison in Birmingham, for the issue of a writ of habeas corpus directed to the immigration officer at Birmingham Airport and to the governor of the prison to release the applicant from detention. The grounds upon which the applicant seeks this relief are, in brief, that he has leave to enter and remain in the United Kingdom. This is an unusual case and similar facts have not arisen in any previous decided case.

The applicant is a citizen of the Republic of India, and was born in October 1942. He first came to the United Kingdom on September 1, 1970, having been issued with the appropriate visa by the entry certificate officer at Delhi. Between then and 1974 the applicant was in the United Kingdom either anticipating working in the Indian High Commission or as an appellant to the Home Office for permission to remain for various purposes in this country. Ultimately, on January 26, 1974, he left the United Kingdom for Canada.

On November 1, 1974, he came back to Heathrow Airport from Canada and, in so far as the evidence before this court is concerned, tendered his Indian passport openly and without any misrepresentation to the immigration officer on duty at Heathrow. The latter asked him various questions and then stamped the applicant's passport with the stamp that can be seen on the copy of the passport, which is one of the documents before the court, to the effect that the applicant was given leave to enter the United Kingdom for an indefinite period. On that occasion the applicant told the immigration officer that he was returning to the United Kingdom to attend a wedding. In those circumstances, in so far as the general immigration provisions are concerned, and particularly the Statement of Immigration Rules for Control on Entry: Commonwealth Citizens 1973 (H.C. 79), the category, if categories strictly there be, of entrant under which the applicant then fell would have been that of visitor. As such, in the normal course, he would have been granted leave to enter not for the indefinite period stated in the stamp in the passport, but for a limited period to cover the purpose of his visit.

Mr. Campbell, on the applicant's behalf, I think accepts that the fact that his client's passport was then stamped with leave to enter for an indefinite period was a genuine mistake on the part of the relevant immigration officer, a mistake however in no way induced by any fraud or dishonesty on the part of the applicant.

Having entered in November 1974 in that way, a fortnight later the applicant left England for Canada. He has since returned on three separate occasions: on July 31, 1976, on November 26, 1976, and ultimately on February 27, 1977. When seeking entry in February 1977, the applicant again openly and without any misrepresentation presented his passport to the immigration officer, and, as one can see, on this occasion from the stamp on p. 7 of his passport, he was again given leave to enter the United Kingdom and remain here for an indefinite period.

In order to get one matter out of the way at the start, it is, I think, well settled that when this applicant left the United Kingdom on November 14, 1974, the leave to enter that he had been given on November 1 lapsed, and he was not thereafter entitled to rely upon it. Accordingly, if and in so far as he is legally within the United Kingdom at the present time, he must rely, and does rely, upon the leave which was given to him on February 27, 1977.

Again, as with the leave given in 1974, Mr. Campbell accepts that the

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- A 1977 leave was also given to him for an indefinite period by a genuine and honest mistake on the part of the relevant immigration officer, but once more there is no evidence before this court that that leave was obtained by this applicant by any fraud or other dishonesty.

In the course of the years the applicant has invested in a business in Smethwick in the West Midlands, and it seems that between February 1977 and June 16, 1978, he was principally attending to that business, considering himself lawfully in the United Kingdom pursuant to the leave stamped in his passport to which I have referred. On June 16, 1978, however, two immigration officers called at his home and asked him to accompany them to Birmingham Airport; he was there interviewed and consequently transferred to Winson Green Prison where, as I have indicated, he now is.

- C It is in those circumstances, and relying on the leave stamped in his passport, that this applicant contends that his detention is unlawful and that he should have the relief for which he asks. As I have said, this is the first case in which facts of this kind have occurred, and indeed cases such as the present case are likely to be very infrequent. The mistakes which I have outlined, as such they were on the evidence presently before the court, occur only very rarely indeed. Be that as it may, it is appropriate, first, to outline the statutory provisions regulating the immigration of persons such as the applicant. He is not patrial and consequently must obtain leave to enter the United Kingdom pursuant to the provisions of section 1 (2) of the Immigration Act 1971. That provides:

- E “Those not having that right may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act . . .”

By section 3 of the Act it is provided:

- F “(1) Except as otherwise provided by or under this Act, where a person is not patrial—(a) he shall not enter the United Kingdom unless given leave to do so in accordance with this Act; (b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period; . . . (2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter . . .”

It is pursuant to that provision that the Statement of Immigration Rules for Control on Entry: Commonwealth Citizens (H.C. 79) has been made by the Secretary of State. Then section 4 of the Act provides:

- H “(1) The power under this Act to give or refuse leave to enter the United Kingdom shall be exercised by immigration officers, and the power to give leave to remain in the United Kingdom, or to vary any leave under section 3 (3) (a) (whether as regards duration or conditions), shall be exercised by the Secretary of State; . . .”

Then in section 33 of the Act an “entrant” is defined as meaning:

“a person entering or seeking to enter the United Kingdom, and ‘illegal entrant’ means a person unlawfully entering or seeking to

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enter in breach of a deportation order or of the immigration laws, and includes also a person who has so entered; . . .” A

I then turn to the relevant Rules in H.C. 79 to which I have just referred. Rule 7 provides: “Leave to enter will normally be given for a limited period.” The provisions with regard to visitors are in Part II. The subsequent rules deal with different categories of potential entrants into the United Kingdom. Ultimately rule 55 is in these terms: B

“A passenger who does not qualify for admission under the foregoing provisions of these rules is to be refused leave to enter. In addition, the immigration officer has power (subject to the restrictions contained in the next paragraph) to refuse leave to enter on any of the grounds set out in paragraphs 59–63 below.”

Returning to the Act itself and to Schedule 2, the power to detain is given by paragraph 16. It is not contended that the power to detain this applicant is exercisable under paragraph 16 (1) but it is contended that that power is exercisable under sub-paragraph (2), which reads: C

“A person in respect of whom directions may be given under any of paragraphs 8 to 14 above may be detained under the authority of an immigration officer pending the giving of directions and pending his removal in pursuance of any directions given.” D

If one turns to paragraphs 8 to 10 inclusive, which are the only relevant rules in so far as the present case is concerned, briefly one can see that directions may be given, and thus under paragraph 16 (2) detention may be made, only in respect of a person who is an illegal entrant. Thus crystallised is the issue, as I see it, in the present case. E

Mr. Campbell contends that the applicant is a legal entrant, an entrant with leave having regard to the stamp on his passport. On behalf of the Secretary of State it is contended that the applicant is an illegal entrant, and it is so contended on this basis. Unless an entrant can first bring himself within one of the categories of potential entrant within the Immigration Rules H.C. 79, and unless the length of the leave which is then given to that category of entrant is that normally contemplated by the relevant rule for that category, then the immigration officer, even in the absence of any fraud or dishonesty on the part of the entrant, has, it is submitted, no authority to stamp a passport otherwise than in accordance with that category and with the duration of leave normally appropriate to it. Consequently, mistake though it was, though induced by no dishonesty, the stamp in the passport was thus put there by the immigration officer without authority and gave the applicant in the present case no leave to enter. He is, consequently, an illegal entrant and is thus subject to detention and directions for removal under paragraphs 16 and 8 to 10 inclusive of Schedule 2 to the Act of 1971. F G

Mr. Owen seeks to support this contention on behalf of the Secretary of State by reference to two decisions of the Court of Appeal earlier this year—the first on May 23, 1978, is *Reg. v. Secretary of State for the Home Department, Ex parte Choudhary* [1978] 1 W.L.R. 1177 and the second is *Reg. v. Secretary of State for the Home Department, Ex parte Nasir Ali* (unreported), July 12, 1978 Court of Appeal (Civil Division) Transcript No. 421 of 1978, both of them immigration cases such as the present. H

In order to illustrate and, as Mr. Owen submits, substantiate the contention put forward, I need only refer to a brief passage from

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A *Choudhary's case* [1978] 1 W.L.R. 1177, 1181, where Lord Denning M.R. said:

B “Mr. Choudhary was clearly an illegal entrant. When he came back in 1973 he was an illegal entrant. He was not settled here. The immigration officer had no authority to stamp on his passport the words ‘Indefinite leave to enter’ as he did. That want of authority in the immigration officer is a complete answer to Mr. Choudhary’s claim.”

Similarly in *Nasir Ali's case* Lord Denning M.R. said:

C “A similar situation has been considered in at least two other cases: and it seems to me that it has been established (at least in this court) that, if the man is not lawfully settled here, the immigration officer has no authority to stamp the words ‘indefinite leave to enter’ on to the passport. So it is not necessary to go into what was said at the airport. If he was an illegal entrant, the immigration officer had no authority to stamp those words on.”

D In my judgment, however, both those two cases are distinguishable from the present case because in each of them there was fraud, there were untruths told by the would-be entrant to the relevant immigration officers leading them to believe that each of the two in fact was a person entitled to return to settle within the United Kingdom. In *Choudhary's case* it is apparent from the beginning of Lord Denning M.R.’s judgment that, having lost his passport which would have made the situation perfectly clear had it been presented to the immigration officer, and having obtained a new passport (see pp. 1179–1180), the applicant must have given answers to the immigration officer which were untrue leading the latter to accept that he was entitled to re-enter and settle. It was in those circumstances that Lord Denning M.R., as I think, held that the immigration officer had no authority so to stamp the passport.

E Similarly, in the *Nasir Ali* case, that was a case of a man who did not take advantage of what has been called the 1973 amnesty. When he was interviewed and interrogated on a subsequent occasion he again told untruths to the relevant authorities, and had no right to re-enter to settle as one of the categories under H.C. 79.

F In the present case, however, as I have indicated, the applicant has been guilty of no fraud or dishonesty in so far as the evidence before this court is concerned. Mr. Owen does not contend otherwise. The applicant relies solely on a mistake made by the immigration officer and on the leave consequently stamped in his passport.

G To see where that takes one I refer also to another case which was decided in the Court of Appeal in fact three days after the *Choudhary case*, *Reg. v. Secretary of State for the Home Department, Ex parte Hussain* [1978] 1 W.L.R. 700. It is from the judgment of Geoffrey Lane L.J. in that case, and from a particular dictum in it, that in my experience H the present approach of this court to applications such as this for orders of habeas corpus in respect of allegedly illegal entrants stems. In that case the Court of Appeal had to consider not merely the decision on appeal of this court but also a slightly earlier case, *Reg. v. Secretary of State for Home Affairs, Ex parte Badaiki*, *The Times*, May 4, 1977, in which the leading judgment was given by Peter Pain J. In his judgment in the *Hussain case*, Geoffrey Lane L.J. said this in relation to this type of application, at p. 707:

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“The true view, as I see it, is this. If, on the evidence taken as a whole, the Secretary of State has grounds, and reasonable grounds, for coming to the conclusion that the applicant is here illegally, in contravention of the terms of the Act of 1971 this court will not interfere. Put into terms of the present case, was the indefinite permission given by the immigration officer at Dover in May 1974 a proper exercise of discretion by which the Secretary of State is bound, or was it a decision brought about by deception, misrepresentation or fraud of the applicant? If it was, then the applicant cannot rely upon it and the Secretary of State was entitled to act as he did and this appeal would fail.”

Further, in the *Badaiki* case, Lord Widgery C.J. said:

“In my judgment, in the absence of any suggestion that the immigration officer was misled by the applicant, it suffices to shift the onus upon him if he could prove those facts,”

that is to say if he could prove that he was given proper leave to enter.

In my judgment, if one puts side by side the four cases to which I have referred and seeks to apply the principle contained in the dictum of Geoffrey Lane L.J., the situation is this. Where the Secretary of State detains an allegedly illegal immigrant under the powers given to him by the Immigration Act 1971, and that decision is challenged by the entrant, this court merely looks to see whether on the evidence taken as a whole a reasonable Secretary of State, acting upon the information available to the court and to the Secretary of State, could have acted as he did in ordering the detention that he did. But I think it also follows from the judgments, particularly those in the *Hussain* case and that of Lord Widgery C.J. in the *Badaiki* case, that where the allegedly illegal immigrant does put forward an explanation of his entry into the country which is consistent with him being lawfully there, then the onus, if it be such, shifts, and one has to see what the overall situation is.

In my opinion the contention that an entrant can only be a lawful entrant if he comes within one of the categories in H.C. 79, and, if further, he is only allowed in for the usual period appropriate to that type of entrant, but that if by a mistake the immigration officer gives leave to enter otherwise than within those categories, or for that period, then the immigration officer had no authority to do so, is a contention which, where an entrant is *prima facie* lawful and his entry is not induced by any fraud or dishonesty, goes too far and is one which, for my part, I am not prepared to accept.

As I have said, the *Choudhary* case and the *Nasir Ali* case were each cases in which the immigration officer was misled and thus had no authority to allow the particular entrant in as that particular type of entrant for that particular period. This case, on the evidence presently before the court, is, in my judgment, different. As I see this case on the facts which I have outlined and the law to which I have briefly referred, the power of granting or refusing leave to enter has to be exercised by immigration officers under section 4 of the Act. The leave that the applicant was given to enter on February 27, 1977, was given by an immigration officer purporting to exercise the powers given to him under section 4 of the Act on the true facts of the case.

There is no evidence before the court other than that contained in the affidavits of the applicant, and consequently this is not a case in which, in my view, looking at the evidence taken as a whole the Secretary of State

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A has any reasonable grounds for coming to the conclusion that this applicant is here illegally. He is here pursuant to a leave stamped in his passport, to the grant of which he contributed in no way by any fraud or dishonesty on his part. I do not think that it can be said that in the circumstances of the present case the immigration officer had no authority to put that stamp in the passport, nor that in consequence the Secretary of State had any power under paragraph 16 (2) to detain or, under paragraphs 8 to 10 of Schedule 2, to give directions for the removal of this particular applicant.

B In my judgment, for the reasons which I have sought to give, on the facts of the present case I would grant the relief sought.

TUDOR EVANS J. I agree and have nothing to add.

C LORD WIDGERY C.J. I have found this case a little more difficult than May J. and Tudor Evans J., and it is quite clear if one looks at the judgment in *Badaiki*, The Times, May 4, 1977, that at that time I took the view, expressed by May J., that a mere mistake on the part of the immigration officer could not give rise to a vitiation of the permission unless it was induced by fraud of some kind. I said in the last paragraph of my judgment:

D “Of course it may be that the immigration officer was mistaken. It may be that he misread the passport or something in it. It may be he would not have given leave to enter if he had appreciated the true position. But I do not see why a mistake of that kind in the mind of the immigration officer, even if proved, would be fatal to the claim in this case.”

E Since I gave that judgment there are two decisions of the Court of Appeal to which reference has been made which clearly contemplate the possibility that there is a new and further principle here, namely, that if the immigration officer had no authority to grant the particular permission which was granted that vitiates the permission and renders the leave void.

F I would like to wait for another day to consider in greater detail how that doctrine should be included in this fast developing branch of the law. But I am content to say that, despite some doubts, I do not wish to take a different form of view to May J. and Tudor Evans J., and I agree also that, subject to the other matters Mr. Owen wants to raise, the writ of habeas corpus should go in this case.

Application granted with costs.

Solicitors: *Haynes Duffell, Arnold & Co., Birmingham; Treasury Solicitor.*

H