

Case Comments

Decisions of International and Foreign Tribunals

MALCOLM W. MONROE,* Departmental Editor

India

Anwar v. The State of J. & K., (1970) II S.C.W.R. 276, 10 INDIAN J. OF INT'L L. (July 1970) 373. Anwar, a Pakistani, was arrested and detained for having entered India illegally in violation of provisions of the Foreigners Act (1946). In his petition for a writ of habeas corpus, he asserted that he had been brought from Pakistan to Kashmir by his uncle who was working for Indian Intelligence, and that he had crossed the cease-fire line into India for the purpose of taking back to Pakistan the necessities of life; that, after crossing the cease-fire line, his uncle, who was inimical to him, had had him arrested for being a smuggler and possessing opium, for which he was tried and convicted; and that after his sentence had expired in January, 1970, he was again arrested and detained, which detention he attacked in his petition. The State showed that petitioner had been informed of the grounds of his detention and his right to make a representation which he did not do. After the court issued its rule nisi on the petition, the State revoked the order of detention, and on June 9, 1970 ordered petitioner to leave India within ten days. The Supreme Court observed that it must consider the question whether it should order petitioner's release forthwith because of the revocation of the impugned order of detention, or should dismiss the petition for a writ as moot and send petitioner back to Jammu to be released from detention and leave it to the Government to deal with petitioner in accordance with the law, petitioner not being a citizen of India by the date of his ordered expulsion.

*B.A. (1940) and LL.B. (1942), Tulane University School of Law; partner, Deutsch, Kerrigan & Stiles, New Orleans; member, American, Inter-American, Louisiana State, New Orleans, and Federal Bar Associations, American Judicature Society and Maritime Law Association; president (1957-1959), Phi Delta Phi International Legal Fraternity.

After reviewing provisions of the Constitution, the Jammu & Kashmir Preventive Detention Act (1964), the Foreigners Act (1946) and the Foreigners Orders (1948), the court held that since petitioner, who had illegally and clandestinely entered India, could not stay in any part of its territory, and had to leave the country by June 19, an order of release by the court would not only have resulted in his presence in a part of India in contravention of the statutory provisions, but would, in addition, have rendered it difficult for the authorities to enforce compliance with the order of his expulsion; and that, therefore, the restraint on his personal liberty for the purpose of taking him to the border to expel him from India could by no means be considered to be illegal custody justifying an order of release by the court.

The court also noted that in such cases, "one cannot ignore the historical fact of Pakistan's extremely hostile attitude towards the State of Jammu & Kashmir," and that "regulations governing the entry into and departure from India, as also the presence in this country of Pakistani infiltrators from across the cease-fire line on the Jammu & Kashmir border, demand strict enforcement, and the claim to personal liberty made by unlawful infiltrators from Pakistan cannot be placed above the security of the country and maintenance of law and order. Habeas corpus, though a writ of right, is not a writ of course. Its scope has grown to achieve its purpose of protecting individuals against erosion of the right to be free from wrongful restraint on their rightful liberty. But when, in the present case, the petitioner has no right to move about freely in this country without a proper legal sanction, the restraint exercised on him for expelling him from India by June 19, 1970, cannot be constructed on the facts and circumstances of this case to amount to his custody being illegal so as to require this court to direct his immediate release." The court dismissed the writ on June 18, 1970, and petitioner was permitted to be sent out of India.

M/s. Filmistan Private Ltd., Bombay v. M/s. Bhagwandas Santprakash and Anr, (1970) II S.C.W.R. 434, 10 INDIAN J. OF INT'L L. (July 1970) 376. An appeal by special leave was directed against an order issued by the High Court of Judicature at Bombay, directing issuance of a letter of request to the Indian ambassador at Kabul to examine certain witnesses residing in Kabul on commission. Appellant contended that the Commissioner cannot compel the witnesses to appear before him for examination, and therefore the attempt to examine him was futile, but the court found this to be irrelevant as it was not known whether the witnesses were willing to be examined by the Commissioner, and it was the defendant's respon-

sibility to produce the witnesses before the Commissioner if he wished to examine them. Appellant also urged that, because there was no reciprocal agreement between India and Afghanistan, the witnesses could not lawfully be examined in Kabul. The court held, however, that the Code of Civil Procedure empowers the court to issue a letter of request to any person other than a court, to examine witnesses residing at any place outside India, and that "this power of the court is not subject to any reciprocal agreement between the governments."

Chaudhary Jawaharlal v. State of M.P., (1970) II S.C.J. 404, 10 INDIAN J. OF INT'L L. (July 1970) 377. Appellants had constructed buildings for the District Court and the Secretariat in Ambikapur in the former State of Surguja in 1936, against the cost of which the Maharaja of Saraguja, on September 27, 1947, executed a promissory note for Rs. 80,000. On January 1, 1948, the Madhya Pradesh Government took over the administration of the State of Sarguja after the merger of the Chattisharh State, and consequently the two buildings were taken over by the Government. When appellants claimed the money from the State of Madhya Pradesh, it refused to pay, pleading an "act of State," and this suit followed. The trial court held for the plaintiff, but the High Court reversed, holding that the promissory note of the erstwhile ruler could not be enforced against the State of Madhya Pradesh because after the union of the former State, the new State had not expressly or impliedly undertaken to meet that liability, that is, the court upheld the defense of "act of State." On appeal, the Supreme Court affirmed, quoting from *Vaje Singh Ji Joravar Singh and others v. Secretary of State for India in Council*, (1924) 51 I.A. 357; 47 M.L.J. 574; BOM. L.R. 1143; A.I.R. 1924 P.C. 216, as follows:

After a sovereign State has acquired territory, either by conquest, or by cession under treaty, or by the occupation of territory theretofore unoccupied by a recognized Ruler, or otherwise, an inhabitant of the territory can enforce in the Municipal Court only such proprietary rights as the sovereign has conferred or recognized. Even if a treaty of cession stipulates that certain inhabitants shall enjoy certain rights, that gives them no right which they can so enforce. The meaning of a general statement in a proclamation that existing rights will be recognized is that the Government will recognize such rights as upon investigation it finds existed. The Government does not thereby renounce its right to recognize only such titles as it considers should be recognized, nor confer upon the Municipal Courts any power to adjudicate in the matter.

The court went on to say that "an act of State is an exercise of sovereign power over a territory which was not earlier subject to its sway. When such an event takes place, and the territory is merged, although a Sover-

eign might allow the inhabitants to retain their old laws and customs or undertake to honour the liabilities, etc., it could not be itself bound by them until it purported to act within the laws by bringing to an end the defence of 'act of State'."

Kenya

Constitutional Reference No. 2 of 1969 between Republic and Charles Okunda Mushiya, and Constitutional Reference No. 3 of 1969 between Republic and Donald Meshack Ombisi (High Court of Kenya at Nairobi, Nov. 3, 1969), IX International Legal Materials (May 1970) 556. The Attorney General filed two cases in the Resident Magistrate's Court at Nairobi charging two persons with certain offenses against the Official Secrets Act (Act 4 of 1968) of the East African Community. Section 8(1) of that Act provides that a prosecution shall not be instituted without the consent of the Counsel to the Community. No consent of the Community's Counsel was obtained, and it was argued on behalf of the Attorney General that no such consent was necessary, and that insofar as section 8(1) requires the Counsel's consent to prosecutions instituted by the Attorney General, it is invalid in Kenya because it restricts the powers given to the Attorney General by section 26 of the Constitution.

The court held that the "very fact that the Attorney General cannot prosecute an offender without the consent of the Counsel of the Community shows that he is subject to the 'control' of that Counsel. If the consent is refused, then he is effectively stopped from exercising a power given to him by the Constitution. There is, thus, a clear conflict between the provisions of the Constitution and an Act of the Community."

Counsel for the Community asked that the conflict be resolved in favor of the Community's legislation, because the Community's power to legislate springs from the Treaty for East African Cooperation which was freely entered into by the three East African countries. The court observed that "the principles governing the resolution of conflicts between treaties and the municipal law of one of the contracting parties do not apply to the resolution of conflicts between the same municipal law and a law enacted by a body set up by the treaty. The reason is this. A State signs a treaty in the full knowledge of its contents and in the full knowledge of its own laws and legal policy. An international tribunal would be doing the right thing by saying that a State must stand by its treaties. This cannot, however, be said of laws passed by a body established under the treaty. The contents of such laws (which might cover a very wide field) could not have been within the contemplation of the parties at the time of signing the treaty."