H.C.J 199/53

A.B.

v.

1) THE MINISTER OF THE INTERIOR;

2) THE INSPECTOR GENERAL OF THE ISRAEL POLICE;

3) THE POLICE COMMANDER.JERUSALEM DISTRICT.

In the Supreme Court sitting as the High Court of Justice.
[February 24, 1954]
Before Cheshin J., Sussman J., and *Berinson J.*

Deportation order - Detention prior to execution of order - Detention contrived for different purpose - Continued detention illegal - Intervention by High Court of Justice.

The petitioner, who had entered Israel unlawfully, was detained by the police pursuant to an order of deportation issued by the police commandant of the Jerusalem District under section 13 of the Entry into Israel Law, 1952[1], who also directed that he be held in custody until the order was executed. The police, who suspected the petitioner of having engaged in

[1] Entry into Israel Law, 1952, section 13 :

Deportation. 13(a) In respect of a person other than an Israel national or an *oleh* (immigrant) under the Law of the Return, 5710-1950, the Minister of the Interior may issue an order of deportation if such person is in Israel without a permit of residence.

(b) A person in respect of whom an order of deportation has been issued shall leave Israel and shall not return so long as the order of deportation has not been cancelled.

(c) Where an order of deportation has been issued in respect of any person, a frontier control officer or police officer may arrest him and detain him in such place and manner as the Minister of the Interior may prescribe, until his departure or deportation from Israel.

(d) The Minister of the Interior may direct that an order of deportation shall be carried out at the expense of the person in respect of whom it has been issued.

espionage activities, and who had previously begun enquiries in regard thereto, continued the detention of the petitioner while these enquiries were being pursued without taking any steps to execute the order of deportation.

Held : Assuming that the order of deportation was originally issued with the genuine intention of deporting the petitioner the use to which it was subsequently put, namely, as a means of holding the petitioner in custody for the purpose of completing the police investigations was unlawful, and the petitioner should therefore be released.

Israel case referred to:

(1) *H.C.* 100/53 *A.B. v. Military Commander of the Northern District, Nazareth, and other;* (1953), 7 P.D. 1034.

Marash for the petitioner.

Toussia-Cohen, Deputy State Attorney, for the respondent.

BERINSON J. giving the judgment of the court.

This is the return to an order nisi issued by this court on October 11, 1953, calling upon the first and third respondents to show cause why the first respondent should not grant the petitioner a permit to remain in Israel, and why the third respondent should not release the petitioner from custody and be restrained from deporting him from Israel.

The facts forming the background and basis of this application are as follows:

The petitioner was born in a village in the Jerusalem district. He lived there permanently with his family until a short time before the capture of the village by the Israel army. He then sent his wife to her parents beyond the borders of Israel. He said that he himself remained in the village, though he used to go secretly from time to time to visit his wife across the border and return to Israel. Thereafter (it is not clear exactly when, but this was apparently at the beginning of 1949) the petitioner began to assist the defence authorities - first the army and later the police - and to work for them when called upon to do so from time to time. This employment continued sporadically for three years. The petitioner stopped serving the police altogether about 21 months ago. He then went, of his own free will, to enemy territory and did not return to Israel in spite of directions of the police to do so. During this time, however, he visited Israel secretly on a number of occasions, and returned to enemy territory without getting in touch with the police either before reaching there or during his stay in this country.

The petitioner reached his village in July, 1953, and at once informed his acquaintances in the police, through a go-between, of his arrival and that he was ready to report to the authorities if he were promised a permit to remain in Israel since, on this occasion, he had escaped from the enemy, at risk of his life, in order to settle in Israel. The police did not accept these terms and demanded that he report to them unconditionally. After the petitioner had remained in hiding for 25 days, he surrendered himself to the police and was detained. On the day following his detention, the petitioner's mother applied to the Minister of the Interior for a permit allowing him to remain in Israel. The Minister did not accede to this request since an inter-Ministerial committee had considered the application and had recommended its rejection on grounds of security. In the meantime, on August 23, 1953 - that is to say two days after the detention of the petitioner - the third

respondent, by virtue of the powers delegated to him by the first respondent, issued an order of deportation against the petitioner under section 13 of the Entry to Israel Law, 1952, and directed that he be held in custody until the execution of the deportation order. On the basis of the facts set out above, this application was brought before us. It was filed on October 11, 1953, and on the same day an order nisi was issued by the court against the respondents as prayed, together with an interim order directing that the petitioner be not deported from the country until the final determination of the petition.

The petitioner, who was examined before us by virtue of a notice submitted by the respondents, stated in evidence that during the War of Liberation, in the period of the first cease-fire, he sent his wife with other persons to her parents who lived beyond the borders of Israel, and that he himself remained in his village. It follows from what the petitioner has said - although he did not state this specifically either in his petition to this court or in his evidence before us - that he was in the village in which he was born in Israel when that village was captured by the Israel army, and that he continued to live there and regard himself as a resident of Israel at least until the time he ceased to work for the Israel authorities and went over to enemy territory, approximately 21 months ago, and that until then he used only to leave the country for the purpose of discharging the duties imposed upon him by the authorities. We are not satisfied that that was in fact the case. It seems to us more correct to hold that the permanent place of residence of the petitioner during all that time was in an enemy country, and that he only came here pursuant to a summons from the defence authorities in connection with the performance of the duties which he was carrying out for them. We have reached this conclusion upon the basis of the following facts and considerations: a census was taken in the district where the petitioner resided on two occasions, the first in November, 1948, and the second in March, 1949, and the

petitioner was not registered as an inhabitant on either occasion nor on any other date. In a statement made by the petitioner to the police after his detention, in August of last year, he said that he had already left his village in 1947 (the intention, apparently, is to 1948) and went over to his family beyond the border - a statement which contradicts his version before us, according to which he sent his wife to her parents beyond the border with other persons, while he himself remained all the time in his village. The petitioner himself unthinkingly stated in his evidence before us that "he came here on a few occasions because of his work for Israel authorities". This statement is strengthened by the fact that during all those years his wife remained in an enemy country with their two children who were born to them there, and the petitioner made no real attempt to bring his wife and children to Israel with the permission of the authorities. It is true that according to the petitioner he left his wife and children in enemy territory in accordance with the instructions of the officers of the army with whom he was in contact in connection with his work during the years 1949-50, so that the fact of their being there could make it easier for him to fulfil his duties in the service of the Israel army. We have no reason for not accepting this evidence as true. However, he continued to keep his wife and children in enemy territory even after he broke off his association with the army, and finally, when he refused at the beginning of 1952 to continue his work for the forces, he went to his wife and children and lived with them there for about sixteen months. In any event, whatever the truth may be in regard to the period until the beginning of 1952, it cannot be disputed that the petitioner then left Israel of his own free will - not as an agent nor on duty - and that from then until he appeared in his village and informed the police of that fact in July of last year, he lived permanently in an enemy country.

There is a grave difference of opinion as to the reasons which induced the petitioner to come to Israel and request permission to reside here. The petitioner contends that he was promised by officers of the army, and later by members of the police with whom he worked, that if he found himself in danger as a result of action by the enemy authorities, he could come here at any time and that they would arrange for the residence of himself and his family in Israel. It is on the strength of this promise, so he contends, that he has come to Israel now, because he has been subjected all the time in enemy territory to pressure by the authorities as he is suspected by them of maintaining contact with Israel and working for Israel, and that in recent days the pressure upon him has increased to such an extent that he became unwilling to withstand it, and decided to seek in Israel the protection which had been promised him. He states that he did not report to the police immediately upon returning to Israel for fear that he would immediately be arrested and returned to the border without being able to communicate with the person who gave him the promise referred to. This fear, the petitioner states, was based upon what had already happened to him previously when he come to Israel for a meeting with one of the officers referred to, and despite this was arrested by the police and deported. As against this, Inspector Yarkoni, who made an affidavit on behalf of the third respondent and was cross-examined before us at length by counsel for the petitioner, has denied that the police ever gave the petitioner any such promise, though he can say nothing, of course, in regard to a promise by officers of the army. In this connection we are inclined to accept the evidence of the petitioner, but here two questions immediately arise:

a) Is it true that the petitioner was exposed to danger in an enemy country because of his activities in the past for our security authorities?

b) If so, what is the law applicable to the promise, and what is its value?

a) Inspector Yarkoni answers the first question raised with an emphatic negative. Not only this, but he contends that all the pressure which was apparently exerted upon the petitioner by the enemy authorities, and the distress in which he found himself, as it were, are nothing more than an illusion, since the fact is that he works not for us, but for our enemies. Admit, says Mr. Yarkoni, that the petitioner once assisted us, he was nothing but an agent provocateur serving the enemy, and only gave us information which was of no importance or value.

Mr. Yarkoni adds that when, as a test, the petitioner was required about two years ago to perform something important and of value, he went there, and only returned secretly to do some job for the enemy and without informing the Israel authorities. This opinion of Mr. Yarkoni is based upon reliable information which reached the police during the last two years from three separate and independent sources. And it was only a few days before the petitioner reached Israel on this last occasion that information was received as to his intention to come here, and the informer advised that he be arrested at all costs. It is obvious that if this is the way matters stand, the petitioner cannot expect any help from the authorities, nor is he deserving of any assistance from this court. It is not easy to decide between these two utterly contradictory versions. but there is no need for us to make this decision in the case before us. We merely wish to say that the version of the petitioner is somewhat strengthened by the undisputed fact that when he tried to cross the border to Israel in the darkness of night only a little time before he last came here, he was caught by the border control of the enemy, and sentenced there to imprisonment. How does this tally with the contention of the respondents that the petitioner was in the service of the enemy against Israel? However, if the police really possess decisive proof against the petitioner of

his having committed the offence of spying for the benefit of the enemy. as they have argued before us, then they should hold the petitioner in their custody until he is brought to trial before a court which will be able to examine all the facts available, and deliver judgment.

b) If we assume, for the purpose of this case, that the respondents are in fact mistaken about the petitioner serving the enemy against Israel, and that he is in fact exposed to danger in enemy territory because of his former relations with the Israel authorities, and that he came here on the strength of the promise referred to, alleged to have been given him by officers of the army, it is still necessary to answer the question what is the law relating to that promise, and what is its value today in the light of the developments that have taken place, and the behaviour of the petitioner from that time until now.

This court has already said (in *A.B. v. Military Commander of the Northern District* (1), at p. 1036), that it will not close its doors when a petitioner is in need of assistance as against the authorities who refuse to recognise him,. and who refuse to recognise a right which has accrued to him because of his efforts on their behalf. This principle only applies, however, when the petitioner does not thereafter turn his back on the authorities, proceed to an enemy country, and return to Israel unlawfully. It is in fact true as submitted by the petitioner, that he was called upon to return to Israel on behalf of the police, and it is admitted by the police that this was done in order to test whether the petitioner still obeyed their instructions, and to apprehend him on suspicion of espionage. But the petitioner has himself told us that he did not come here the last time upon the demand of the police. He returned secretly and hid himself from the police. From this it follows that his last return to Israel was contrary to law.

It seems to us that the case of the petitioner was examined and weighed by the respondents with both fairness and care. In view of the fact that the petitioner really ceased cooperating with the Israel authorities for about sixteen months, and chose of his own free will to remain for all this time in an enemy country, there can be no complaint against the respondents for having decided not to accede to his application to allow him to remain in Israel. This is so even if we take no account of the serious suspicion entertained by the security authorities as to the duplicity and disloyalty of the petitioner in regard to the State of Israel.

The order issued by the third respondent on August 23, 1953, under sections 13[1]) and 16(a) [2]) of the Entry into Israel Law, 1952, for the deportation of the petitioner and his detention in custody until the deportation should be effected, was lawful, therefore, at that time. Mr. Yarkoni stated in his oral evidence before us, however, that although the petitioner was held in custody until the filing of his petition in this court on October 11, 1953, as if for the purpose of his deportation, the fact of the matter is that it was the desire of the police to examine him in connection with the suspicion that he was a spy for the enemy. and since the police enquiry in that regard has not yet been concluded, they have held the petitioner in custody for all that period of 50 days upon the basis of the order for the temporary detention of the petitioner until his deportation is effected, without anything

1) See p. 1 supra.

2 Entry into Israel Law, 1952, section 16(a) :

Delegation of powers 16(a) The Minister of the Interior may delegate to anther person all or any of his powers under this Law, except the power to make regulations; notice of any such delegation shall be published in *Reshumot (Official* Gazette).

really having been done to put that order into effect. The petitioner himself was not examined during all that period of 50 days, nor was he examined during the additional period of approximately two months which passed between the date of the issue of the order nisi by this court and the date of the reply to that order.

The State Attorney, moreover, informed us in the course of argument - with commendable frankness and fairness - that should this court not set aside the order of deportation against the petitioner, and should it appear that there is some basis for charging him with the offence of espionage, he will advise the police to request the Minister of the Interior himself to set aside the order of deportation, in order to make it possible to bring the petitioner to trial for that offence. It may well be that the order in question was issued originally with the genuine intention of deporting the petitioner. The use to which that order was subsequently put, however, was unlawful, for it was used as a means of holding the petitioner in custody for the purpose of completing the police investigation against him as a suspect spy. The order of deportation, therefore, serves as a cover for the detention of the petitioner in custody for an unlimited period for a purpose which the police did not trouble to achieve in the ordinary legal way, namely, by bringing the petitioner before a competent court in order to obtain a temporary order of detention against him until the police enquiry should be completed and a decision reached whether to put him on trial or not. We do not hesitate to hold that an order of deportation and arrest such as this, which appears on the face of it to be regular from the legal point of view on the date of its issue, becomes void and loses all force if the detainee is in fact held in custody not for the purpose of deportation but for some other purpose - or if and when it is proved that the authorities responsible for the execution of such an order do not take the necessary steps and measures to effect the deportation honestly, efficiently and energetically, within a reasonable time in the special circumstances of each case. Were this not so, the liberty of

the people of this country would be in real jeopardy, since under the cover of an order of deportation, which in itself is valid and lawful, the authorities could hold a man interminably as if in temporary custody awaiting deportation, without really doing anything to execute the deportation order or at least trying to put it into effect. At the same time it is clear that if the authorities are genuinely interested and try to carry out a valid deportation against a detainee, and are unable to carry out the order for reasons beyond their control, they are entitled to hold the detainee in custody for so long as they do not intend to cancel the deportation.

The result, therefore, is as follows:

(a) The petitioner is neither a citizen nor a resident of Israel. He left Israel of his own free will and returned here without lawful permission, nor are we satisfied that he is entitled to a permit to reside in Israel.

(b)The order of deportation, and of arrest until the carrying out of the deportation, which was issued against the petitioner on August 23, 1953, was issued lawfully, and was at one time valid.

(c) This order became invalid after it was proved that those responsible for its execution intended to hold the petitioner in custody for an unspecified time, not for the purpose of his deportation but for some other purpose, and that they took no real steps to effect his deportation.

We therefore discharge the order nisi against the first and third respondents in regard to the grant to the petitioner of a permit to remain in Israel, and we make the order absolute against the third respondent in regard to the release of the petitioner from detention and the restraining of his deportation from Israel. The third respondent will be restrained from deporting the petitioner from Israel and will release him from his present detention, unless he is otherwise *lawfully* detained.

In order to avoid any misunderstanding, we must add that we see no legal obstacle to the issue of a new order of detention and of temporary detention, until the deportation is effected, against the petitioner, at any time that the Minister of the Interior or someone authorised by him thereto in accordance with law, will see fit to do so, for the genuine purpose of deporting the petitioner from the country unless he has in the meanwhile acquired the legal right to remain here.

Order nisi made absolute against the third respondent regarding the release of the petitioner from detention. Order nisi discharged against the first and third respondents regarding the issue of a permit to the petitioner to remain in Israel. Judgment given on February 24, 1954.