H.C.J 155/53

SALEM AHMED KIWAAN

v.

MINISTER OF DEFENCE AND OTHERS

In the Supreme Court sitting as the High Court of Justice
[March 9,1954]
Before Cheshin J., Goitein J., and Berinson J.

Nationality - Nationality Law, 1952, *s. 3(a) - When nationality acquired - Petitioner forced to leave country as result of enemy action - Lawful return - Identity card - Whether holder entitled to remain in country - Deportation order set aside.*

An order of deportation was issued against the petitioner who had lived in Palestine and who in the year 1948 had been registered in the Register of Inhabitants. He had been compelled in 1949 to leave the country as a result of army action and had lived for a while in a neighbouring Arab country. He returned to Israel without permission and as a result of subsequent court proceedings was held to be entitled to receive and did receive an identity card. The petitioner now contended that as he was the holder of an identity card and had become an Israel national in terms of S. 3(a) of the Nationality Law 1952[1)] the deportation order was illegal.

Held : that the mere possession of an Identity Card did not give the holder a right to stay in the country ;
that the petitioner was entitled to be regarded as an Israel national having satisfied the conditions of S. 3(a) of the Nationality Law and as such could not be deported.

Israel cases referred to:

(1) *H.C.* 8/52, *Mustafa Saad Bader v. Minister of the Interior and Others;* (1953), 7 P.D. 366.

[1)] The text of this section appears infra p. 322.

(2) *H.C.* 227/52, *Jamil El-Khalil v. Minister of Police and Others;* (1953), 7 P.D. 49.

(3) *H.C.* 145/51, *Sabri Hassan Moustafa Abou Rass and Others v. Military Governor of Galilee and Others;* (1951), 5 *P.D.* 1476.

(4) *H.C.* 138/51, *Ahmed El-Taha and Others v. Minister of the Interior and Others;* (1953), 7 P.D. 160.

Nakkara and *Wachsman* for the petitioner.

Kwart, Deputy State Attorney, for the respondents.

CHESHIN J. (giving the judgment of the court). The subject of the proceedings before us is an order nisi dated July 29, 1953, calling upon the Minister of Defence, the first respondent, to show cause why a deportation order made against the petitioner should not be set aside. The reply filed on behalf of the fourth respondent, the Inspector of Police of the Zevulun Division, Acre, who was authorized to execute the order referred to, confines itself mainly to points of law. It is submitted that the deportation order, which was made in accordance with section 10(1)(f) of the Immigration Ordinance, was lawfully made. It is also contended that the arguments advanced by the petitioner should not be entertained since he is not an Israel national, and that the identity card issued to him does not in itself confer upon him the right of residence in this country.

2. Before dealing with the merits of the petition we shall state some of the important facts which are not in dispute. The petitioner does not deny that he lived for some time beyond the borders of the State - in one of the neighbouring Arab countries - at the beginning of 1949, and that he returned to Israel without having obtained permission to do so. He contends, however, that he was expelled from the country by force and that his short stay outside the country, therefore, was the result of compulsion. He submits that as the conditions entitling him to nationality have been fulfilled, he may not again be deported from the country. Counsel for the respondents admits that the petitioner was already registered in the Register of Inhabitants in 1948 and that as a result of previous proceedings in this court, the petitioner was given an identity card. Counsel submits, however, that the issue to a person of an identity card does not in itself entitle him to reside in the country,

and that the authorities are entitled to deport any person who is not a citizen of the State on the grounds laid down by law.

The decisive question which arises in these proceedings, therefore, is the status of the petitioner from the point of view of nationality, and in regard to this question opinion is divided.

3. Israel nationality is acquired in one of the ways set forth in the Nationality Law, 1952, that is to say by return[1)] (section 2 of the Law), by residence in Israel (section 3), by birth (section 4) and by naturalisation (sections 5-9). It is not disputed that three of the four ways mentioned do not apply to the petitioner, and that his status must be tested in the light of those provisions which entitle a person to be regarded as a national under section 3(a) of the Law, namely by residence in Israel. This section, in so far as it applies to the matter before us, provides as follows:

> "3(a) A person who, immediately before the establishment of the State, was a Palestine citizen... shall become an Israel national with effect from the day of the establishment of the State if -
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> (1) he was registered on March l, 1952, as an inhabitant under the Registration of Inhabitants Ordinance, 1949;
> (2) he was an inhabitant of Israel on the day of the coming into force of this Law;
> (3) he was in Israel ...from the day of the establishment of the State to the day of the coming into force of this Law, or entered Israel legally during that period."

As I have already said, it is admitted by counsel for the respondents that the petitioner is deemed to have been registered as an inhabitant under the Registration of Inhabitants

[1)] This is the technical term for the right of a Jew, from any part of the world, to "return" to Israel. The theory is that throughout the ages he has not been able to "return" to Israel but with the rise of the State he is entitled to "return" and settle there.

Ordinance from the year 1948, that is to say, that the first of the conditions mentioned has been fulfilled in regard to the petitioner. The petitioner contends in his affidavit that he was a Palestine national immediately before the establishment of the State and that on July 14, 1952, - the day of the coming into force of the Nationality Law - he was a resident of Israel. These facts were not denied by the respondents in the only affidavit filed on their behalf - or, more accurately, on behalf of the fourth respondent - and we must assume, therefore, that these conditions too have been fulfilled in regard to the petitioner. The only question that remains, therefore, is whether the last condition mentioned in the Law has been satisfied, namely, whether he was in Israel or entered Israel legally during the period from the day of the establishment of the State (May 14, 1948) to the day of the coming into force of the Nationality Law (July 14, 1952).

4. As I have said, the petitioner admits that he was beyond the borders of the State - in one of the neighbouring Arab countries - for a short time in January, 1949, but he contends that he was driven there forcibly and unlawfully by the army. This allegation is denied by counsel for the respondents according to whom the petitioner originally left his village willingly and was only subsequently captured by the army and expelled after he had returned to the village without permission. It follows that it is of the utmost importance in these proceedings to determine the exact facts, for if the petitioner was indeed expelled from the country unlawfully, then his enforced residence outside the country and his return thereto - even without permission - were lawful. These principles have been laid down by this court on a number of occasions and have become firmly entrenched in the law of this country. It is sufficient to refer to *Bader v. Minister of the Interior* (1), and *El-Khalil v. Minister of Police* (2). It was said in *Bader's case,* at page 373:

> "It has been emphasised time and again by this Court that a person who has been unlawfully expelled from the country is entitled to return without permission. Such a person is deemed never to have left the country and he therefore requires no entry permit in order to return to it".

and in the case of *El-Khalil* (2), it was said (at page 51):

> "In a number of decisions dealing with identity cards it has been laid down by this court that, in regard to residents of Israel, the authorities may not rely upon unlawful entry into the country where such entry follows upon the unlawful expulsion of such residents from the country by the authorities."

5. Counsel for the petitioner submitted in the course of his argument that since as a rule the authorities only issue an identity card to a person who entered the country legally and who is permitted to reside therein, the very fact that an identity card was issued to the petitioner shows that he did not leave the country willingly, and that his residence therein is lawful. We cannot accept this argument. An identity card is not a talisman against deportation from the country and the possession of such a card does not indicate lawful entry into the country or lawful residence therein. The opinion has already been expressed in the case of *Abou Rass v. Military Govenlor of Galilee* (3), at page 1478, that the Registration of Inhabitants Ordinance confers no special rights upon a person who is registered under its provisions - except, of course, the right to receive an identity card, and that in view of the very wide definition in that Ordinance of the expression "inhabitant" it cannot be maintained with certainty that the Ordinance was intended to refer to lawful residents alone. It follows, therefore, that an identity card cannot always be regarded as a permit of residence. It has indeed often been argued before us in this court that the authorities do not usually deport a person who holds an identity card. This, however, refers only to administrative practice, which is not decisive in interpreting the law. The matter before us proves that even the administrative authorities do not regard themselves as bound by the custom alleged, for in one of the deportation orders made against the petitioner the Minister of Defence says quite clearly that "I have considered the fact that the person mentioned (that is to say, the petitioner) is the holder today of an identity card but I nevertheless order his deportation...".

In short, the very fact that the petitioner holds an identity card does not in itself invalidate the deportation order against him. Even this, however, does not bring us to a final conclusion, for in the circumstances of this case it is of great importance to ascertain how the petitioner came to receive an identity card. It is desirable therefore at this stage to review shortly the previous proceedings which were conducted in this court between the petitioner and the respondents, other than the first respondent.

6. The petitioner has already been deported by the authorities on a number of occasions and has been accustomed to return to the country after such deportations without permission. In 1952, when the authorities sought to deport him for the third or fourth time, he applied to this court[1)] for an order directing the Minister of the Interior - the second respondent - to issue him an identity card, and preventing his deportation from the country. A number of facts, inter alia, which were set out then by the petitioner in his application have been repeated and relied upon by him in these proceedings, namely, that he was resident in his village at the time of its capture by the Defence Army of Israel on October 30, 1948; that he was registered in the Register of Inhabitants on December 12, 1948; that he was expelled by the army on January 14, 1949, and that in these circumstances he should not be deported but should be given an identity card.

All these allegations of fact were denied by the representatives of the Minister of the Interior in the affidavit which was then filed on his behalf, and on the return to the order nisi the court entered upon the merits of the matter in order to discover where the truth lay, and to ascertain the facts. The court, however, did not proceed far along this road, for at the conclusion of the cross-examination of the petitioner on his affidavit counsel for the respondents made a declaration before the court that "in view of the decision of this court in *El-Taha v. Minister of the Interior* (4)," he had no objection to the order nisi being made absolute. The court then acted on the basis of this declaration, made the order absolute, and an identity card was issued to the petitioner on the strength of the order of the court.

We now turn to examine the decision of the court in *El-Taha's* case (4), and to ascertain what moved counsel for the authorities to withdraw his opposition to the issue of an identity card to the petitioner.

7. In *El-Taha's* case, a number of Arab residents of the village of Majd-al-Kroum in Western Galilee petitioned this court and submitted that they were entitled to receive identity cards and not to be deported from Israel by reason of the following facts: they were

[1)] In H.C. 81/52 Kiwaan v. Minister of Interior and Others the court made an order for the issue to the petitioner of an identity card.

in their village, Majd-al-Kroum, on the day of its capture by the Defence Army of Israel, and a short time after they were registered in the Register of Inhabitants. In the middle of January, 1949, a unit of the army arrived at the village, arrested some 400 of its residents, including the petitioners, and transferred them across the borders of the State. At the end of January, 1949, the petitioners returned to their village but they were again expelled from the country, and again returned to it without obtaining permission. The representatives of the Minister of the Interior denied these allegations in their reply to the order nisi which had been granted on the petition of the Arabs referred to. They insisted that the petitioners had left the State of their own free will and had thereafter infiltrated into the country. The court, however, after hearing evidence and argument, accepted the version of the petitioners - the Arab residents of Majd-al-Kroum - and held that they had been unlawfully expelled from the country. It was for this reason that the court made an order that identity cards be issued to the petitioners in that case.

This is the background against which the proceedings in *El-Taha's* case were conducted, and "in view of" the decision that was given in those proceedings - to use counsel's expression in the previous proceedings between the petitioner and the authorities in H.C. 81/52 - he withdrew his opposition to the issue of an identity card to the petitioner. We must now ascertain the connection between the petitioner before us and the petitioners in *El-Taha's* case, and the relationship between the decision that was given by the court in that case and the prayer of the petitioner in H.C. 81/52 to be given an identity card. The answer is a very simple one: the petitioner - according to his submission - is one of those very 400 Arabs who were once forcibly driven from the village of Madj-al-Kroum by the army. He made this submission, as I have said, in his first petition which was dealt with in H.C. 81/52, and counsel for the authorities then denied these allegations. However, in the course of the proceedings in H.C. 81/52 the decision was given in *El-Taha's* case. It was because of that decision that counsel for the respondents found it proper to withdraw his opposition to the issue of an identity card to the petitioner. What is the interpretation of that withdrawal in these circumstances, and what is the meaning of the court order which was given upon the basis of that withdrawal? The reply is that the authorities recognised the justice of the contention that the petitioner - as the petitioners in *El-Taha's* case - had been forcibly driven from the State, and that for that reason - and for that reason alone - he was entitled after his return to demand and receive an identity card. It follows that the identity

card was not issued to the petitioner without consideration of the intrinsic factors involved, but after proceedings in court in which the merits of the case were considered. The decision of this court directing the authorities to issue an identity card to the petitioner, was based upon the consent of counsel for the authorities, and was given in the light of the decision in *El-Taha's* case. The court thereby recognised the correctness of the petitioner's submission and of his status as a resident of Israel, or as a person who had entered Israel lawfully. That was a decision in rem, since it determined the status of the petitioner as a lawful resident of the State. This decision binds the authorities and the court in the proceedings now before us. The authorities are now estopped from contending that the entry of the petitioner into Israel was unlawful, or that his leaving the country before that was of his own free will and without obtaining permission. For this reason the court is now obliged to hold that the third condition, too, of the conditions entitling a person to be regarded as a national of the State by reason of his residence therein, in accordance with section 3(a) of the Nationality Law, has been fulfilled by the petitioner.

As has been said counsel for the respondents does not deny - and at the conclusion of his argument he explicitly admitted - that the petitioner may not be deported if it be held that he is a national of the State.

It is decided, therefore, to make the order nisi granted on July 29, 1953, absolute.

Order nisi made absolute.

Judgment given on March 9,1954.