1952 *Present :* **Choksy A.J.**

SUDALI ANDY ASARY, *et al.*, Petitioners, *and* VANDEN DREESEN (Inspector of Police), Respondent

Habeas Corpus Applications Nos. 1566—1570 (Hatton)

Habeas corpus—*Deportation Order—Power of Court to examine whether it was made on sufficient material—Malice—"Citizen of Ceylon"—"British subject in Ceylon"—Citizenship Act, No. 18 of 1948—Ceylon (Constitution) Order in Council, 1946, Art. 29 (2) (b)—British Nationality Act of 1948—Immigrants and Emigrants Act, No. 20 of 1948, ss. 30, 31 (1) (d), 41, 50.*

Certain persons, alleged to be illegal immigrants, were arrested and produced before a Magistrate and remanded, pending prosecution on a charge of illicitly entering Ceylon in contravention of the Immigrants and Emigrants Act, No. 20 of 1948. On their being brought before the Court on a later date, the Police informed the Court that they had not sufficient evidence for a prosecution under the Act but that the alleged immigrants would be arrested, upon their discharge from Court, under Deportation Orders made by the Minister of Defence and External Affairs under s. 31 (*d*) of the Immigrants and Emigrants Act between their production in Court and their discharge. Upon their being so arrested and detained—pending deportation from Ceylon—applications were made for writs of *habeas corpus* in respect of the detenues on the grounds, *inter alia,* that the police had acted *mala fide* in producing and remanding them under cover of the Criminal Procedure Code, not with genuine intent to prosecute them under the Immigrants and Emigrants Act but wrongfully and maliciously with the object of abusing the provisions of the Criminal Procedure Code and thus keeping the persons under the Court's custody until the Police were able to obtain Deportation Orders from the Minister under that Act, and that therefore the entire proceedings commencing with the arrest and production before the Magistrate, the remand from time to time and the discharge of the detenues by the Magistrate upon the application of the prosecution, the obtaining of the Deportation Orders meanwhile, the subsequent arrest under these Orders—after the discharge by the Magistrate—and the detention thereunder pending deportation were "a fraud upon the Statute" and an abuse of the powers of the Magistrate's Court.

Held : (i) The Court could not, under *Habeas Corpus,* deal with the regularity or validity of the arrest and detention of the detenues under the Criminal Procedure Code as that custody had already terminated and come to an end by order of the Magistrate made prior to the application for *habeas corpus.*

(ii) As far as the arrest and detention under the Deportation Orders were concerned, if the Court was satisfied that there had been a competent exercise of the lawful authority vested in the Minister, then the Court would not go into the further question whether the Minister had material before him which a Court of law would consider sufficient for exercising that power. If however it was demonstrated to the Court that the power was being used for any purpose other than the legitimate one which the law had in contemplation, i.e., if it were being used for a collateral or indirect purpose, or were only a colourable exercise of the power, or if it were a mere sham to cover up something extraneous to the statute, then the exercise of the power would be "a fraud upon the Statute" and could not be upheld.

(iii) Where the power to make a Deportation Order is given to the Minister if he "deems it to be conducive to the public interest" to make it, the condition is a subjective and not an objective one and it is for the Minister to decide whether or not the public interest requires the Deportation Order to be made,

and not for the Court to decide whether or not there was reasonable cause or ground for the Minister to " deem it to be conducive to the public interest " to make the order—*Liversidge's case* [1] applied.

(iv) The expression " Citizen of Ceylon " in the Immigrants and Emigrants Act, No. 20 of 1948, must be given the same meaning as in the Citizenship Act, No. 18 of 1948. It is not equivalent to a " British subject resident in Ceylon ", although a " Ceylon Citizen " is a " British subject ".

(v) After the British Nationality Act of 1948 was passed a " British subject " is one who, in addition to owing allegiance to the Sovereign is a " citizen " either of " The United Kingdom and Colonies " or of any of the self-governing units of the British Commonwealth of Nations specifically mentioned in that Act. There is also a transitory class of " British subjects without citizenship " The detenues in the present case could not claim to be " citizens of Ceylon " merely by virtue of owing allegiance to the Sovereign and long residence, or even domicile, in Ceylon, unless they had each acquired " the status of a citizen of Ceylon " created for the first time by the Citizenship Act of 1948, and the onus of proving that status was on them.

APPLICATIONS for writs of *habeas corpus*.

C. Suntheralingam, with *Christie Fernando*, in support.

R. R. Crossette-Thambiah, Q.C., Solicitor-General, with *H. A. Wijemanne*, Crown Counsel, for the respondent.

Cur. adv. vult.

February 22, 1952. CHOKSY A.J.—

Five petitions for writs of *habeas corpus* were filed by Sudali Andy Asary against the Inspector of Police, Hatton, for the production in Court of the bodies of five persons, three of whom are said to be cousins of the petitioner and two his nephews. All matters were listed for argument together and by consent of parties the arguments urged in the first application No. 1566 for the production of the body of Nadarajah *alias* Pitchakara Asari were to be treated as arguments in all the cases. In view of the consolidation of the proceedings I am making one order which is to be treated as an order in each on the five cases.

The petitioner avers that the five persons in respect of whom he has made these five applications were all goldsmiths resident at No. 1, Main Street, Dickoya, until 6th September, 1951. All five individuals were arrested on 6th September, 1951, and produced before the Magistrate of the Magistrate's Court at Hatton on 7th September, 1951, and thereafter remanded again until 25th September on which date each of them was allowed to stand on bail to appear on 9th October, 1951. The Serial Reports which were submitted to the Magistrate on 7th September when each of the detenues was produced before him, stated that the respective persons had been arrested by the Police " on a charge of illicit landing ". On the 9th October, however, the Inspector of Police stated to Court that the Police found that they did not have sufficient evidence for a prosecution under the Immigrants and Emigrants Act, No. 20 of 1948, and that therefore the Controller of Immigration and

[1] *(1941) A. E. R. 338.*

Emigration had declined to sanction a prosecution, and the police officer accordingly moved that the accused in the several cases be discharged. He also informed the Court that he had with him five Deportation Orders signed by the Minister of Defence and External Affairs ordering him to detain the respective detenues in Police custody until such time as each was placed on board a ship or aircraft about to leave Ceylon. He concluded his statement by saying that once the accused were discharged he would have to act under the deportation orders issued by the Minister of Defence and External Affairs. Counsel appearing for the accused, as they were called in the proceedings before the Magistrate, thereupon made several submissions with a view to the accused not being taken into custody under the Deportation Orders upon their discharge from Court until after they had returned home from Court. He also urged that the provisions of the Criminal Procedure Code had been abused by the Police and that they had " practised a fraud on the Court " by using the processes of the Court to have the suspects remanded until the Police were able to secure Deportation Orders under Section 31 of the Immigrants and Emigrants Act. In the end the Magistrate directed the Police not to arrest the detenues in the premises of the Court. This order was duly observed and the suspects were arrested under the Deportation Orders immediately after they had gone beyond the Court premises. The petitioner thereupon filed the present applications in this Court on the 9th October, 1951. The detenues were released on bail to attend this Court pending the final decision of the various applications.

The grounds on which the present applications have been made are that the arrests were illegal, that the process of the Magistrate's Court had been utilised improperly and the detenues unlawfully arrested and kept in custody pending the issue of the Deportation Orders, that the Police had acted maliciously under cover of the Criminal Procedure Code in not producing the detenues before the Magistrate with any genuine intent to charge them for any offence, that the Inspector of Police, who is the respondent in these proceedings, had acted *mala fide*, that the re-arrest and detention of the detenues in pursuance of the Deportation Orders was illegal and that the Deportation Orders themselves were *ultra vires* of the powers under section 31 of the Immigrants Act and were a "fraud upon the statute ". The petitioner further contends that the Immigrants and Emigrants Act and connected Acts such as the Citizenship Act, No. 18 of 1948, the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, are *ultra vires* of the legislature of Ceylon under Article 29 (2) (*b*) of the Ceylon (Constitution) Order in Council 1946, in so far as these Acts or any of them make the respective detenues liable to the disability of not being allowed to continue to reside in Ceylon and carry on their occupation.

The respondent has filed an affidavit from himself and one from the police officer who arrested the respective detenues, to the latter of which are annexed copies of the statements said to have been voluntarily made by the respective detenues either to the Police or to a Justice of the Peace. The position taken up by the respondent, as resulting from these affidavits, is that the respective persons concerned did not have valid passports bearing endorsements in the form required, that on information

received from an informant these five persons were suspected of having illicitly entered Ceylon, that they made statements admitting that they had all entered Ceylon illicitly within a period ranging from four to six months prior to the date of their arrest, and that they had all reached Ceylon by a sailing vessel and landed at Mannar which was not an approved port of entry to Ceylon.

Counter-affidavits, from each of the detenues, have been filed by the petitioner wherein they state that they immigrated to Ceylon in or about the years 1941, 1942 or 1943 respectively, and that each of them became a member of the " community of inhabitants and citizens of Ceylon known as the Indian Tamil Community in the Report of the Commission on Constitutional Reform signed by Lord Soulbury, Sir F. J. F. Reeves and F. J. Burrows ". Each takes up the position that since his migration to Ceylon he has been and still is a subject and a citizen of Ceylon continuing to owe allegiance to His Late Majesty King George the Sixth, who was the then reigning Sovereign, that none of them had ceased to be citizens of Ceylon on the grant of Independence to Ceylon or on the enactment of the Citizenship Act, No. 18 of 1948, by the Parliament of Ceylon, that they had not acted or conducted themselves in any manner " not conducive to the public interest ", that the alleged statements made by them were made, in each instance, as a result of assaults by the Police and while under fear of grave bodily harm, and therefore under duress. They all specially deny that they admitted having come to Ceylon illicitly. They all state in common that none of them had left Ceylon since June, 1949, and that the rice ration books in support of their residence in Ceylon had been removed by the police officer who arrested them. They in their turn proceed to set out in detail the events which I have set out as having taken place from the 6th September onwards and end their affidavits by incorporating into them the various legal positions taken up by the petitioner in his original petition and affidavit. They however submit that their arrest and detention in custody not only from the 6th October downwards but from the 6th September downwards were equally illegal. They further allege that when the Police found themselves unable to secure " Removal Orders " under Section 28 (1) of the Immigrants Act, they proceeded to secure Deportation Orders under section 31 of the Act and that the Police did so maliciously, wrongfully, unlawfully and for the collateral purpose of nullifying the order of discharge made by the Magistrate on the 9th October, 1951.

The hearing of these petitions commenced on the 3rd December last, as that was the date convenient to all parties concerned. The notices issued on the respondent in the earlier stage of these proceedings were treated as Orders Nisi. The Solicitor-General sought to justify the arrest made on the 9th October, 1951, under the Deportation Orders made on 26th September, 1951, which were first referred to in the Magistrate's Court proceedings on the 9th October on which date the detenues were discharged by the Magistrate.

The learned Solicitor-General's position was that if Nadarajah was detained on a commitment which was *prima facie* regular and valid on the face of it, that is an answer to the *rule nisi*, which must then be discharged,

unless the other side shows that it was not a *bona fide* exercise of power but was a misuse of it for some ulterior or collateral purpose. He submitted that the deportation order was regular and valid on the face of it with the consequence that the detention is at least *prima facie* presumed to be valid (*vide* sec. 41 of the Immigrants Act). He conceded that for the deportation order to be even *prima facie* valid, it was necessary that Nadarajah should be a person to whom Part VI of the Immigrants Act should apply, and that he should not be a citizen of Ceylon or an exempted person (sec. 30). It was unnecessary, he argued, that Nadarajah should be convicted under the Immigrants and Emigrants Act of having illegally entered Ceylon, but that if the Minister had information that Nadarajah was not a citizen of Ceylon and had illegally immigrated into Ceylon, he could make the deportation order under sec. 31 (1) (*d*) provided the Minister " deems it to be conducive to the public interest " to make a deportation order against that person. The order itself has been produced in these proceedings. It describes itself as a " Deportation Order ", under the main heading reading " The Immigrants & Emigrants Act, No. 20 of 1948 ", and reads as follows :—

" Whereas I, Don Stephen Senanayake, Minister of Defence and External Affairs deem it to be conducive to the public interest to make a deportation order against Nadarajah *alias* Pitchakarai Asari, son of Vala Asari.

Now, therefore, by virtue of the powers vested in me by section 31 of the Immigrants and Emigrants Act, No. 20 of 1948, I do by this Order—

(i) require the said Nadaraja *alias* Pitchakara Asari, son of Vala Asari to leave, and to remain thereafter out of Ceylon ; and

(ii) direct that the said Nadaraja *alias* Pitchakara Asari, son of Vala Asari be detained in police custody until such time as he is placed on board a ship or aircraft about to leave Ceylon.

(Sgd.) D. S. SENANAYAKE,
Minister of Defence and External Affairs.

Colombo, 26th September, 1951. "

On the face of it, therefore, the deportation order purports to be made under the relevant provisions of the Act (although it does not specifically state that Nadarajah is a person to whom Part VI of the Act applies). The learned Solicitor-General, therefore, argued that the *rule nisi* must be discharged as the deportation order was on the face of it a lawful exercise of his powers by the appropriate Minister, and that the papers upon which an application for a writ of habeas corpus had been made did not disclose any *mala fides* or abuse of power such as would entitle the Court to go behind the deportation order.

In view of the contrary submissions by Mr. Suntheralingam it becomes necessary to examine the provisions of the Immigrants and Emigrants Act and also of the Citizenship Act, No. 18 of 1948.

[After dealing with the earlier provisions of the Immigrants and Emigrants Act, His Lordship continued :—] Part VI deals with the deportation from Ceylon of persons other than citizens of Ceylon or exempted persons. Section 30 enacts that Part VI applies to every person unless he is a citizen of Ceylon or unless he has been exempted from the provisions of Part VI. Section 31 then proceeds to provide the different classes of cases in which the Minister may make a Deportation Order requiring the person named in it to leave Ceylon and to remain thereafter out of Ceylon. [His Lordship then referred to the provisions of Section 31, and continued :—] Parts V and VI, and certain provisions of the Citizenship Act to which I shall refer later, were the storm-centres of the controversy in Court and gave the greatest scope for the dramatic indignation which Mr. Suntheralingam, with all the vigour of his personality, was able to command.

Various other provisions of the Immigration Act were referred to such as section 41, under which any person who is detained in the exercise of any powers conferred by or under the Act shall while so detained be deemed to be in lawful custody ; section 46, which makes all offences under the Act cognizable and triable summarily by a Magistrate ; section 47, under which the burden of proving any allegation by any person that, *inter alia*, he is not a citizen of Ceylon, or that he is a citizen of Ceylon, shall lie upon that person ; and lastly, section 50, because the expression " Citizen of Ceylon " is defined as meaning a citizen of Ceylon under any law for the time being in force.

The Solicitor-General's position was that the expression " Citizen of Ceylon " in the Immigration Act (which came into operation on November 1, 1949) must be given the same meaning as is contained in the Citizenship Act, No. 18 of 1948, which came into operation on 15th November, 1948. He relied on Craies on Statute Law to support his contention that words used in a later statute must be presumed to have the same meaning as that attached to them in an earlier statute. He also stated that the definition of the expression " Citizen of Ceylon " in section 50 necessarily pointed to the meaning attached to that expression by the Citizenship Act which was enacted earlier and which deals with matters relating to citizenship.

The Citizenship Act commences by stating that from the appointed date, namely 15th November, 1948, " there shall be a status to be known as 'the status of a citizen of Ceylon' ". Section 2 (2) proceeds to enact the two ways in which a person " shall be or become entitled to the status of a citizen of Ceylon ", namely by right of descent as provided in the Act, or alternatively, by virtue of registration, also as provided by this Act or by any other Act authorising the grant of such status by registration in any special case. Every person who is possessed of that status is referred to in the Act as a " Citizen of Ceylon " (section 2 (2)). A citizen of Ceylon may for any purpose in Ceylon describe his nationality by the use of the expression " citizen of Ceylon ". [His Lordship then referred to certain other provisions of the Citizenship Act, and continued :—]

Mr. Suntheralingam argued that the expression " citizen of Ceylon " in section 50 of the Immigration Act means not only a citizen under the

Citizenship Act but any person who can claim to be a citizen " under any law for the time being in force ". His contention is that there was a status larger than that created by the Citizenship Act, attached to all British subjects resident in Ceylon prior to the enactment of the Citizenship Act, which status he said was not taken away by the Act, that that larger status still subsists, and those claiming that larger status had all the rights and privileges, duties and obligations, which attach to the status of a citizen of Ceylon, as created and defined by the Citizenship Act. In other words, his position is that those persons who come within the expression " citizen of Ceylon ", as defined in the Citizenship Act, form only a section of the inhabitants of Ceylon from among those who were British subjects, previously resident in Ceylon, that those not within that definition are not outside the pale of citizenship, but that they are still possessed of all such rights of citizenship as they previously had and enjoyed except such as have been taken away or specially conferred by statutes. He said that the expression " citizen of Ceylon " as defined in the Act is only a part of the connotation conveyed by the expression " British subject in Ceylon ". Indeed, his contention was that the status of a " British subject in Ceylon " is equivalent to that of a " citizen of Ceylon ", the word " citizen " being in modern terminology the equivalent of the word " subject ". He relied on the definition of the term " citizen " in Volume 3 of the Encyclopaedia of the Laws of England (2nd edition, page 85) which states that " citizen " is a term employed under the republican form of Government as the equivalent of the term " subject " in monarchies of feudal origin. He also relied on the fact that the expression " British subject " was still to be found in our laws. For example, he referred to Article 13 of the Ceylon (Constitution) Order in Council of 1946 which disqualified any person from election or appointment as a Senator " if he is not a British subject or is by virtue of his own act under any acknowledgment of allegiance, obedience or adherence to a foreign power or state "— " British subject " being defined by Article 3 as " any person who is a British subject according to the law for the time being of the United Kingdom, and any person who has been naturalised under any enactments of any of His Majesty's Dominions, and any person who is a citizen or subject of any of the Indian States . . . . . ". He contrasted this with the provisions of the Ceylon (Parliamentary Elections) Order in Council of 1946 where the expression " British subject " occurred earlier but was removed and replaced by the expression " citizen of Ceylon ". He utilised these provisions in support of his argument that both the status of a citizen of Ceylon and of a British subject resident in Ceylon co-existed today and that any " British subject " who is resident in Ceylon—he said later he meant by " resident " one who is domiciled in Ceylon—has nowhere been deprived of his rights as such and that, therefore, all the rights connoted by the expression " British subject " continued intact except such rights as have been expressly taken away by statute. Neither the Ceylon Independence Act (George VI, Ch. 7) nor the Ceylon Independence Order in Council of 1947 nor the Citizenship Act of 1948 had made any difference to that position, he said. The status and rights of a natural born British subject or of a naturalized British subject, in Ceylon, continued unaffected, he submitted.

It cannot be gainsaid that the status of a British subject continues to attach down to the present day to all those born in any of Her Majesty's territories and under allegiance to Her Majesty, but does it therefore follow that every British subject has all the rights and privileges created or afforded by the civil laws of any dominion in which he may have acquired a domicile or in which he may be resident for the time being ?

Strictly speaking the term " British subject " is used to describe the nationality to which the person belongs, in the sense in which that term is used in international law. The nationality of a person in the broad sense describes the particular State which has jurisdiction over a person attached to that State by ties of allegiance to it ; that nationality adheres to the person whether he is a resident within or outside the territory of that State, so long as he does not alter his subjection to that State and transfer his allegiance to another. The nationals of a State are all those persons which that State is under duty to protect abroad. At English common law the basis of nationality was permanent allegiance to the Sovereign. All those born within any part of the territories of the British Crown and under allegiance to the Sovereign were called British subjects by birth. No distinction was made between persons born or naturalized in the United Kingdom, or descended from persons born in the United Kingdom, on the one hand, and those acquiring British nationality in similar ways in other British possessions, on the other hand.

The British Nationality Act of 1948 was adverted to in the course of the argument but was not gone into as it did not appear to have a very direct bearing on the case. On an examination of its provisions it would appear as if they are of some assistance in considering the argument put forward by Mr. Suntheralingam that those British subjects resident in Ceylon, who are not " Citizens " of Ceylon within the Citizenship Act, have still a status which has not been taken away and which status enables them to claim and exercise all the rights and privileges attached to " Citizens " of Ceylon within the Citizenship Act, except of course such rights or privileges as may expressly be given by legislation only to those who are " citizens " under the Citizenship Act. His argument was that wherever " citizens " as defined by the Citizenship Act are intended to be referred to, then words would be used to explicitly say so, and that if the Immigrants Act had intended to refer to such " citizens " only it would not have defined the expression " Citizen of Ceylon " by saying that it " means a Citizen of Ceylon under any law for the time being in force ". The last words, he said, clearly indicated that the legislature had in mind not only " Citizens " under the Citizenship Act but also " Citizens of Ceylon " in the broader sense, which status, he maintained, continued to exist, and under which his client was in the same legal situation as a " Ceylon Citizen " under the Citizenship Act and consequently not at all liable to deportation.

The British Nationality Act creates citizenship of the United Kingdom as a sub-class within the status of a British subject and it would appear as if possession of that citizenship automatically confers the status of a British subject on such a person. With the progress of the larger overseas colonies towards complete self-government the maintenance of

the universal common status of a British subject became less and less practicable. Canada introduced the concept of a Canadian nationality and the Union of South Africa that of a Union nationality. There began to grow up distinct nationalities attached to each of the countries now forming members of the British Commonwealth, as they gained progressively greater and wider internal and external independence. From and after 1st January, 1949 (that being the date on which the British Nationality Act came into force), the term " British subject " seems to me to describe a person who enjoys the new status of a citizen of the ' United Kingdom and colonies ', or alternatively, the status of a citizen of any of the specified British Commonwealth countries, according to the laws thereof. Indeed, section 1 (2) of that Act equates the expression " British subject " with the expression "Commonwealth Citizen" in express terms and states that both expressions shall have the same meaning. The status of " British subject " is also retained by certain residents of the Republic of Ireland, under certain circumstances, but others are purely and solely citizens of that Republic. Until citizenship laws are enacted and put into operation in every one of the specified Commonwealth countries there will exist a class of British subjects possessing no citizenship corresponding to the different communities within the British Commonwealth and such a person is designated " a British subject without citizenship " and continues to remain such until he becomes a citizen either of " the United Kingdom and Colonies " or a citizen of any of the Commonwealth countries referred to in section 1 (3) of the Act. The result appears to be that the term " British subject " is equated to, and involves the possession of, the status of " a citizen of the United Kingdom and Colonies " or of any of Commonwealth countries specified in the Act, except in the case of the transitional class of those who are British subjects without citizenship because of the absence of laws in any particular territories of Her Majesty enabling them to qualify for citizenship in those respective territories.

It will therefore be seen that as from 1949 the term " British subject " takes on a new meaning. A person has thereafter the status of a British subject not merely by virtue of allegiance to Her Majesty but also because of the additional qualification that he is either a citizen of " the United Kingdom and Colonies " or a citizen of any one of the Commonwealth countries mentioned in the Act—unless he falls within the temporary category of a " British subject without citizenship ". In other words, citizenship of either " the United Kingdom and Colonies " or of any of the above Commonwealth countries is an essential qualification for being a British subject, unless the person is within the transitional class of " British subject without citizenship " which had to be specially created to provide for those who are " potential " citizens of a country until they blossom into actual citizens of that country when laws of citizenship are passed in that country. The distinction that existed before 1949 between a person who was not a natural-born British subject and other British subjects was removed by section 31 of the Act which assimilates the rights of a natural-born British subject to those of persons who have become British subjects by other ways than birth within the territory and allegiance of Her Majesty. Under the present

state of affairs the status of a British subject cannot be claimed apart from the citizenship of either the " United Kingdom and Colonies " or of any of the specified Commonwealth countries, except of course in the case of the special class of " British subject without citizenship ".

In view of this, it does not seem to be possible to maintain that from 1949 Nadarajah continued to enjoy the status of a British subject with whatever rights or privileges such a status may have connoted before that date (and as to which I express no opinion), because from 1949 a " British subject " is only one who in addition to owing allegiance to the Sovereign is a citizen either of " the United Kingdom and Colonies " or of any of the specified self-governing units of the British Commonwealth of Nations, unless he falls within the transitory class. Nadarajah would not, in the submission of Mr. Suntheralingam, fall into the transitory class. It is therefore unnecessary to consider that position further. His counsel however maintained that Nadarajah was a " citizen of Ceylon " in the broader sense for which he contended, by virtue of the mere fact of his having been born in British India in 1923 within the allegiance of His Majesty the late King George VI and his continued residence in Ceylon from 1943, in the same allegiance. That position, as it seems to me, is not maintainable. Nadarajah has not been proved to be a " citizen of Ceylon " within the Citizenship Act, and not having been so proved, he was not, in my opinion, a " citizen of Ceylon " to exempt himself from the provisions of the Immigrants Act to which those who are not " citizens of Ceylon " are subject. Mr. Suntheralingam stated generally, in aid of his argument that Nadarajah was a " Ceylon citizen ", that his client was not a citizen of India either, as on 6th September, 1951, the date of his arrest, in view of the provisions of the Constitution of India, since the people of India formed themselves into " a Sovereign Democratic Republic " as from 26th November, 1949. A cursory view shews that Article 5 of this Constitution declares who were citizens of India as at the commencement of the Constitution. Article 8 affords rights of citizenship to certain persons ordinarily resident outside India, as at the date of the Constitution. Article 11 expressly reserves to the Parliament of India the power to make provisions with respect to the acquisition and termination of citizenship and other matters relating to citizenship.

The question whether or not he was a citizen of India on the date of his arrest in September was not really discussed or gone into at the extended hearing of the arguments. However that may be, it does not follow that because he may not have been a citizen of India at the date of his arrest, in September last, he was necessarily a citizen of Ceylon on that date. If he was therefore not a citizen of either India or Ceylon, at the material date, then as he was not entitled in my view to call himself a British subject at all after 1st January, 1949, it may well be that he was an " alien " within section 26 of the Citizenship Act of 1948. If that be the resulting position then he was certainly liable to be dealt with under the provisions of the Immigrants Act.

As an alternative argument Mr. Suntheralingam submitted that it had not been established that the detenues were not citizens of Ceylon. Firstly he pointed to the omission of any statement in the Deportation

Order that Nadarajah was not a citizen of Ceylon. The omission was stated to be a significant one which had prejudiced his client in that if the Deportation Order had expressly said that his client was not a citizen of Ceylon his client would have been confronted with that position upon the Deportation Order being shown to him and that it would then have occurred to his client, it is said, to immediately assert his Ceylon citizenship and request the police officer, who sought to detain him under the Deportation Order, to take him to a Court of law so that his client could request the Court to release him on the ground that he was a citizen of Ceylon, and therefore could not be deported from Ceylon. It is of course theoretically possible that had those words occurred in the Deportation Order they would have evoked the succeeding train of thought in Nadarajah's mind, but from the practical point of view it does not appear to me that any prejudice has in fact been caused to Mr. Suntheralingam's client by the omission to which he attached so much importance.

The learned Solicitor-General contended that the Deportation Order is not required to have all the particularity which one expects to find in an indictment, or even a charge, against a person accused of an offence. If, on the face of it, there was sufficient material to show that there had been the competent exercise of a lawful authority by the person in whom that power and authority had been reposed by the Legislature, that would be a sufficient answer to the rule nisi under habeas corpus proceedings. The omission to state some particulars in the Form which may be utilised for the purpose of exercising that power, he argued, was immaterial. The real question that the Court had to consider was whether the power sought to be exercised had been given, and whether that power had been *prima facie* duly exercised by the competent authority. He relied on the case of *Rex v. Governor of Brixton Prison, ex parte Pitt Rivers* [1]. In that case the applicant was detained in prison under an Order made by the Secretary of State for Home Affairs under Defence Regulations which empowered the Secretary of State to make a detention order against a person where by reason of the existence of the circumstances specified in the relevant regulation the Secretary of State believed it to be " necessary to exercise control over that person ". The Order made against the applicant did not contain a recital by the Secretary of State of the fact that he believed it to be " necessary to exercise control over " the applicant and the applicant accordingly claimed that by reason of this omission the order of detention was bad on the face of it. The Court rejected this contention. In that case too the applicant was a British subject by birth who had been detained without any charge having been preferred against him and without trial, from 27th June, 1940. It was not till 12th October, 1940, that he was informed in writing of the grounds on which Sir John Anderson made order against him. It seems to me that the reasons for upholding that order of detention despite the omission of words which are said to be vital to its validity could be applied in the present case.

I would say that the position that the detenues were not citizens of Ceylon was implicit in the Deportation Orders even though not explicitly stated to be so. The deportation orders purport on the face of them to

[1] *(1942) All England Law Reports, Vol. 1, 207.*

be made under the Immigrants and Emigrants Act, and by virtue of the powers vested in the Minister by section 31 of the Act. Those recitals would have given the detenues sufficient notice of the provisions of the law under which the Deportation Orders were made. The absence of the statement that the detenues were not Ceylon citizens does not necessarily warrant the inference that the Minister acted without having reasonable grounds for coming to the conclusion that the cases before him were ones where the power could be invoked. Whether or not the detenues were citizens of Ceylon could not depend on a recital of that fact in the Deportation Orders. The want of Ceylon citizenship was a condition precedent to any order of deportation, and the absence of a statement to that effect cannot be made the basis of an inference that the Minister acted completely without jurisdiction. " A right exercise of the powers must, of course, be made, but the exact form of the order for detention is immaterial . . . . provided that enough clearly appears from the order of the Secretary of State to show what powers the latter was using ". That statement from the judgment of Viscount Caldecote, the Lord Chief Justice, applies to the present case. Humphreys J. pointed out that the Courts never allow a mere irregularity on the face of a commitment to prevail over the substance of the matter. I therefore hold that the omission in the present cases of the statement that the detenues were not Ceylon citizens has not been in any way prejudicial to the detenues and that had the words appeared in the Deportation Orders it would not in any way have materially added to their information or assisted the detenues in obtaining their release.

There was a second aspect to his argument that it had not been established that the detenues were not citizens of Ceylon, and that was a denial of any opportunity to the detenues to prove that they were citizens of Ceylon before the Deportation Orders were made.

Every person, unless he is a citizen of Ceylon or is an exempted person, is liable to be dealt with under Part VI of the Immigrants Act. Once the Deportation Order is made and the person against whom it is to operate is detained in Police custody he is deemed under the Act to be in legal custody—section 41. The burden therefore of proving that the Deportation Order itself was illegal is on the person affected by that Deportation Order. Furthermore, section 47 expressly indicates that with reference to any proceeding under the Act or with reference to anything done under the Act, if it is alleged by any person that he is or he is not a citizen of Ceylon the burden of proving that fact shall lie upon that person. Therefore the mention, or the omission, in the Deportation Order, of the fact that the person concerned is not a citizen of Ceylon leaves the position unaltered ; the burden of proving that he is a Ceylon citizen still remains on him. Mr. Suntheralingam admitted that the Deportation Order is an act or proceeding under the Immigrants Act. He stated therefore that his client should have had the opportunity of proving that he was a citizen of Ceylon at the date of the Deportation Order and that the failure to afford his client such an opportunity vitiates the Deportation Order and all consequential steps taken upon that order. Quite apart from the fact that the mere omission of the alleged words of great

import from the Deportation Order could not by itself have deprived detenues of that opportunity, it is to be observed that no procedure is laid down to be followed by the Minister when acting under section 31 (1) (*d*), nor is there any indication that the person to be deported by action under that provision is to have an opportunity of showing cause anterior to the order being made. Even in the cases where the Minister has to have evidence before him prior to making a Deportation Order—such as the four cases dealt with by section 31 (1) (*a*)—there is no provision requiring or entitling the person against whom the section is being invoked to be noticed to be present, or to show cause against any order being made. It is of some significance in this connection that while the Minister has the right to delegate any power, duty or function vested in or imposed or conferred upon the Minister by the Act, he is expressly precluded by Section 6 from delegating to anyone the power of making a Deportation Order conferred by section 31. In entrusting such a power to the Minister and to the Minister alone, the legislature appears to have assumed, as anyone would be entitled to assume in the first instance, that such a high executive officer of the Dominion would act with a sense of responsibility before exercising such a power in the course of his executive functions. For it is purely as the executive that he acts when discharging his functions under this section and in no sense as a Court of law. Any danger to the subject from any arbitrary or capricious exercise of such power is conserved by the right which the subject has of questioning or challenging the action of the Minister by *habeas corpus* proceedings. If the subject can place before this Court facts which *prima facie* show that the Minister acted in bad faith (with all that that expression connotes in the context of *habeas corpus* proceedings) then the Court is entitled to go behind the writ or warrant of commitment, and examine all the facts which led up to it. In the absence of such a *prima facie* case, one cannot assume that the Minister has acted irresponsibly but would rather be entitled to go on the presumption of the regularity of all official acts. The matter does not however end there. There is no material to show that even up to the date of the hearing of these applications any representations had been made to or material placed before the appropriate Minister to demonstrate that the detenues were citizens of Ceylon. Even the opportunity afforded by these Applications was not made use of to prove that the detenues were Ceylon citizens. Reliance was placed on the mere statements in the counter-affidavits of the detenues that they became citizens of Ceylon since their migration to Ceylon and that they did not cease to be citizens of Ceylon on the grant of Independence to Ceylon, or on the enactment of the Citizenship Act. In the petition and affidavit filed on the 9th October by the petitioner, who claimed to be a cousin of the detenues, the petitioner has been content with the bare assertion that the arrest and prosecution and the Deportation Order were illegal and that the detenues could not be dealt with under section 31 (1) of the Immigration and Emigration Act. Counsel for the petitioner rested his case on the contention that the detenues were citizens of Ceylon in the larger sense in which he said every British subject who had been resident in Ceylon prior to the Ceylon Independence Act and subsequent legislation, was a

citizen of Ceylon ; and on that basis be asserted that every British subject had rights and immunities equal to those enjoyed by persons who are citizens of Ceylon within the narrower sense of the Citizenship Act. He did not seek to take up the alternative position that if that contention failed the detenues should be permitted to place evidence before the Court that they were citizens of Ceylon within the Citizenship Act. He did not at any stage move to call evidence on any point.

It was then said that the want of a due sense of responsibility and of personal regard for the personal freedom of the individual was manifest from the fact that only the confessions were before the Minister and that he must have acted entirely upon the confessions which the detenues are alleged to have made while in Police custody, one directly to a Police officer and the others to a Justice of the Peace, but whilst they were within the sphere of influence of the Police. These confessions have been challenged as having been obtained by duress and physical violence exercised by officers of the Police whilst the detenues were in their custody. The Solicitor-General stated that the papers in Court showed that there was at least one other source of information which presumably would have been available to the Minister, namely, the informant referred to in the affidavit tendered on behalf of the respondent. There is no reason to suppose that the Minister must necessarily have acted exclusively upon the impugned confessions. It is however unnecessary to speculate as to the adequacy or the sufficiency or otherwise of the material which was available to the Minister before he made the Deportation Orders. It is sufficient to say that if the necessary conditions, which entitle a Court to go beyond the writ or warrant under which detention has taken place, had been fulfilled, the Court would be under duty to investigate the facts which led up to the detention. It therefore becomes necessary to examine and ascertain the circumstances in which the Court should undertake that task. Many authorities were referred to on both sides and as the ultimate issue involved is the liberty of the subject it becomes necessary to consider them in some detail.

Before I proceed to do that it is desirable that I should deal with and get out of the way certain submissions made on matters which, it was argued, did bring these cases within the ambit of the conditions under which the Court is bound to go behind the orders of commitment.

Much warmth was manifested as counsel for the petitioner dealt with the allegations of assault made against the Police. I do not think that, even if true, the allegations that the confessions were obtained by illegal assaults and duress bring these cases within the principles upon which the Court can go behind the *prima facie* authority for the arrests and detentions. It is however to be noted that no complaint whatsoever had been made either by Nadarajah or by the petitioner or by anyone else, of the duress and violence alleged against the Police until these proceedings commenced. No representations were made to the Minister by or on behalf of the detenues between the date of the first arrest on 6th September, 1950, and the date of their discharge by the Magistrate on the 9th October, 1951.

It was next argued that the " public interest " in support of which the Deportation Order is made must be stated on the face of the document; or that it must at least appear from the document that the interest to be sub-served is in fact of a public nature. Had the words been " deems the public interest to be sub-served . . . . ", then Mr. Suntheralingam argued it might be stated that what was contemplated was a subjective state of mind of the Minister, which could not be demonstrated on the face of the order, but that as the words are " where the Minister deems it to be conducive to the public interest . . . . " then something objective is contemplated and that therefore the order itself must show what is the public interest in aid of which the Deportation Order is made. Hi. contention was that the public interest to be served by the deportation order should be either of a pecuniary nature or of a kind where the legal rights or liabilities of a class or section of the general community at large are affected. I do not think that the " public interest " contemplated by section 31 (1) (*d*) has to be narrowed down or restricted in the manner suggested, for it may well be that the public interest may be affected by considerations other than those portrayed by Mr. Suntheralingam. For example, it would be apparent that it is in the public interest that illegal immigration should be put a stop to because if it is allowed to continue unchecked it is bound in the long run to affect the economic condition of the citizens of Ceylon. It may also be that undesirable elements will thus enter the community at large, and affect the health, morals, or general welfare of the country. The other provisions of section 31 give an indication of the " mischief " at which the deportation provisions are aimed. These, each in their own way, affect the public interest, and give an indication that the expression public interest in the context is not to be narrowed down or confined to the types indicated by counsel for the petitioner. There may well be other factors which may affect the public safety or public welfare which it is not possible to envisage and enumerate and for that reason the Minister was given the very wide powers in the last clause of section 31 to catch up cases which it would not be possible to specifically adumbrate.

Dealing more direcly with the Deportation Orders and the steps which had been taken for obtaining them Mr. Suntheralingam contended that the Immigration Act provided specific remedies for different types of cases. In the present instance the arrests were on the footing that the detenues were illegal immigrants. They were remanded as such, and should therefore have been proceeded against on that footing, and if the prosecutions were likely to fail on the ground of want of sufficient evidence the detenues should have been discharged. No exception could have been taken if such a course had been followed. But what Mr. Suntheralingam vehemently protested against was that the authorities, having failed to obtain Removal Orders because of the insufficiency of evidence, then invoked the provisions of section 31 to obtain the Deportation Orders which, in effect, were very little different from the Removal Orders which they failed to obtain. He admitted that although the detenues were discharged on the ground of insufficiency of evidence to satisfy a court of law that the detenues were illegal immigrants, nevertheless, deportation orders could be issued against such persons. What

he strongly pressed was that in such cases the Minister cannot act on the very material on which proceedings had been initiated for illegal immigration and been abandoned, and make deportation orders on the self-same insufficient material. This argument is based on the supposition that there was no other information on which the Minister acted in making the Deportation Orders. He supplemented his contention on this aspect by stating that the Minister cannot deal under section 31 (1) (*d*) with cases which fall within sub-sections (*a*) to (*c*). I fail to see why this necessarily should be so. It may be that the Minister may not choose to act, but there does not appear to be anything to prohibit the deportation, under section 31 (1) (*d*), of persons who fall within any of the classes of persons categorically mentioned in section 31 (1) (*a*) or (*b*) or (*c*). It is however unnecessary to specifically decide this point.

Mr. Suntheralingam went still further and contended that the procedure provided for the prosecution of an offender for illegal immigration was used with the indirect object of getting information for deportation orders. He charged the Minister and the other officers, in particular the police, with bad faith and with having abused the processes of the law to get evidence on which to deport the detenues. It had never been the intention of any one concerned to prosecute the detenues for illegal immigration he said, but only an intention to covertly use that machinery with the ulterior object of deporting the detenues. He characterized the entire proceedings commencing with the information said to have been furnished by the informant, up to the ultimate confession of the police officer to the court of the insufficiency of the evidence for the successful maintenance of the charges of illegal immigration, as a mere mockery and a sham and a " fraud on the statute " entitling the court to go behind the deportation orders and tear asunder the veil which concealed the ugly episode and penetrate into the true motives which underlay the farce which culminated in the Deportation Orders. He accused them all not only of want of good faith but imputed to them " malice in law " as well as " malice in fact ". He would not content himself with alleging " malice in law ", which according to the dictum of Lord Haldane in *Shearer v. Shields* [1] is nothing more than an assumption that a person who inflicts a wrong or an injury upon any person in contravention of the law is taken to have done so knowing the law, although so far as the state of his mind was concerned he may have acted with innocence and without any intention to inflict that wrong or injury. Indeed it would have availed the petitioner's purpose only a little were he able to establish merely malice in law, for that would not involve the indirectness of motive required to be demonstrated before a Court would go behind the writ or warrant of commitment. He therefore had to rely on " malice in fact " both in the Minister and other officers who had been engaged in the various steps which ultimately resulted in the Deportation Orders being made. The direct imputation of malicious intent was levelled at the police officers and vicariously at the Minister of Defence and External Affairs, the Right Hon. D. S. Senanayake, who in that capacity has signed the Deportation Orders, malice in his subordinates being referred to and imputed ultimately to the Minister.

[1] *(1914) A. C. 808.*

There can be no question that if those concerned acted in contravention of the law, however innocent may have been their state of mind and free of ulterior intention or motive, the detenues should be discharged. Except for the irregularity on the face of the Deportation Order, which I have already dealt with, it was not contended that there was any other *ex-facie* defect or irregularity in the proceedings culminating in the deportation orders which would have entitled the detenues to be forthwith discharged. What then is the " malice in fact ", which actuated either the Minister or those subordinate to him ? Mr. Suntheralingam was not able to refer to any personal ill-will by which any of the officers were motivated. For all that one could gather from the whole scope of his argument one got the impression of a suggestion that there was an undercurrent of desire, from the Minister downwards, to somehow ensure a deportation of any and everyone against whom there was the slightest suspicion of being an illegal immigrant or of whose citizenship of Ceylon, under the Citizenship Act, there was the slightest doubt. Obviously any such alleged general desire cannot be regarded as malice in fact against the particular detenues concerned in these applications. Nor has there been placed before the Court any evidence of any extraneous circumstances, or any relationship between the detenues and anyone concerned in the steps resulting in the Deportation Orders from which one could infer any motives of revenge, or any intention to seek satisfaction for any personal grievances either between the officers and detenues or between the detenues and any third parties sheltering behind these public officers to whom the latter lent themselves and their powers for the satisfaction of any personal revenge or spite of those behind the scenes. The plea of " malice " therefore fails and so it is unnecessary to consider whether if malice had been proved in fact, the Court can go into the question as to whether the Deportation Orders and the consequent arrest and detention of the detenues had been justifiably made.

In the case of *An Application for a Writ of Habeas Corpus re Thomas Perera* [1], it was held by this Court that its powers to issue writs of habeas corpus were conferred by the Courts Ordinance and that these provisions are founded upon English law in consequence of which it would be helpful to refer to the law of England on questions relating to habeas corpus proceedings.

The Bracegirdle Case [2] was also referred to by both sides. There the Attorney-General contended that the Courts had no authority to inquire into the circumstances under which an Order of Detention was issued by His Excellency the Governor under the Order-in-Council of 1896. Chief Justice Sir Sidney Abrahams pointed out the danger (if the argument was sound) to the fundamental principle of law enshrined in Magna Carta (that no person can be deprived of his liberty except by judicial process), and to the predominance of the rule of law which distinguishes the systems of government prevalent throughout the British Empire. After examining the position his view was that the Court was under a duty to inquire as to whether the conditions which must be satisfied

[1] *(1926) 29 N. L. R. 52.*

[2] *(1937) 39 N. L. R. 193*

before the extraordinary powers given to an executive officer can be exercised, have been fulfilled. He sought support from the judgment of the Privy Council in a case where the Governor of Nigeria issued an order requiring a person of the country to remove himself from one part of Nigeria to another, and where the Privy Council reversed the decision of the Supreme Court of Nigeria which held that the judges of that Court had no power to go into the question whether or not certain conditions that had to be fulfilled before the Governor could issue such an order, had or had not been fulfilled. It does not go to the length of deciding whether, if those conditions had been satisfied, there was or was not sufficient material on which the particular executive officer concerned should have acted. In *Liversidge's Case*[1] Lord Atkin expresses the same view (at page 358) when he says that the duty of the Court is to see whether the conditions of the power are fulfilled but that a judge has no further duty of deciding whether he would have been of the same view, any more than if there is reasonable evidence to go to a jury, the judge is concerned to decide whether he would have himself come to the same verdict on such evidence. He points out that the Minister may have reasonable cause on the information before him to believe that a person should be dealt with under his powers. If so, no remedy in the Courts, either by an action for false imprisonment or by way of habeas corpus, is available even though it should subsequently be proved beyond doubt that the Minister's information was wrong. It seems to me to be important to keep clearly before one's mind the distinction between the fulfilment of the conditions which are a pre-requisite to the exercise of the power on the one hand, and on the other, the sufficiency or otherwise of the material upon which the officer concerned has acted. Applying the principle to the present case the questions here would be : did the Minister have the power to deport ; under what conditions could the power be exercised ; were the detenues persons to whom Part VI of the Immigrants Act applied ; has the Minister purported to exercise the power of deportation given by that part of the Act ; is the Order of Deportation valid on the face of it ? In other words, the question is, has there been a competent exercise of a lawful authority ? If there has been such, I do not think that the Court has the power to go further and say whether the Minister had material before him which a Court of law would consider sufficient for exercising that power. If the Court did that it would be virtually stepping into the Minister's place and exercising the power which the legislature has entrusted to him.

In *Rex v. The Officer Commanding the Depot Battalion, R.A.S.C., Colchester, Ex-parte Elliott*[2] Lord Goddard, Chief Justice, said (at page 379) " on an application for habeas corpus the Court does not go into the merits so far as the offence is concerned ", which means, in terms of this case, that the Court on an application for habeas corpus does not go into the question whether the Minister should or should not have " deemed it to be conducive to the public interest " to deport those detenues. To do so would be to go into the merits or demerits of the cases for deportation. The proper forum for discussing the question as to whether

[1] *(1941) 3 All England Law Reports, 338.* [2] *(1949) 1 A. E. R. 373.*

or not the Minister should or should not have exercised his discretion and used such administration powers in a given set of circumstances is Parliament and not the Courts.[1]

Since the decision in *Liversidge's case* there has been hardly any application for habeas corpus of any importance where the excursions of the Law Lords into the subjective and objective realms of the mind are not recalled. Sir John Anderson, the Home Secretary, issued an order of detention against Jack Perlzweig *alias* Robert Liversidge under the Defence Regulations which enacted that " If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations . . . . and that by reason thereof it is necessary to exercise control over him he may make an order against the person directing that he be detained. " The question which was mainly discussed was whether the words " if the Secretary of State has reasonable cause to believe. . . . ", in the context in which they are found, point simply to the belief of the Secretary of State founded upon his view of there being reasonable cause for the belief which he entertains or whether those words in the context require that there must be an external fact which gives reasonable cause for the belief and one therefore capable of being challenged in a court of law. Four of the noble Lords were of the view that, in the context, and unencumbered by any leanings in favour of the liberty of the subject or otherwise, the words meant that it was for the Secretary of State to decide whether or not he had reasonable grounds ; in other words, that the condition was subjective and not objective. In this they departed from the view of Lord Atkin, who in a classical judgment, protested, though alone, against the subjective meaning contended for. Lord Atkin stated that he knew " of only one authority which might justify the suggested method of construction, namely the subjective test and not the objective one, and that authority was only of Humpty Dumpty in Chapter 6 of ' Alice Through The Looking Glass ' ". It is best to keep clear of any controversy where there is even the suggestion of so much as a broken ankle and I therefore do not propose entering the lists and venturing to say whether Lord Atkin's view that reasonable cause for an action is just as much a positive fact as a broken ankle, is correct ; or whether that observation is sufficiently countered by Lord Romer's rejoinder that while it was perfectly true that the words " if a man has a broken ankle " do not and cannot mean " if a man thinks he has a broken ankle " and that the regulation in question was not dealing with the state of a man's body but with the state of his belief or, in other words, with the state of his thoughts. It is sufficient to say that the words in the Immigrants Act take us more firmly into subjective realms than the words of the famous regulation in *Liversidge's case*, as the words we have to deal with are " where the Minister deems it to be conducive to the public interest ", and not " where there is reasonable cause for the Minister to deem it to be conducive to the public interest ".

It is interesting to note that it was admitted in *Liversidge's case* that " the Home Secretary could act on hearsay and is not required to obtain any legal evidence . . . . and clearly is not required to summon a person whom he proposes to detain and to hear his objections to the

[1] *(1950) Wade and Phillips on Constitutional Law, 276.*

proposed order ". Viscount Maugham's view was that there was no onus thrown on the Secretary of State who made the order to give evidence to show that he had reasonable cause to believe that the appellant was a person of hostile associations, &c. His view was that as the order on its face purported to be made under the regulations and stated that the Secretary of State had reasonable cause to believe the facts in question the well known presumption *omnia praesumuntur rita esse acta* can apply and that the order must prima facie—that is, until the contrary is proved—be presumed to have been properly made, and it must be taken that the requisite as to the belief of the Secretary of State was complied with. That action itself was for false imprisonment, but the principle is of wide application and is not peculiar to any particular class of action. In that particular case no affidavit had been filed on behalf of the respondent the Home Secretary setting out any of the circumstances leading to the reasonable cause for his belief.

The next case to be considered is *Rex v. Governor of Brixton Prison, Ex-parte Sarno.*[1] Sarno was alleged to have fled from Russia, for political reasons, in 1900. He was arrested under the Aliens Restrictions (Consolidation) Order of 1914 but was set free upon habeas corpus on the ground that the order was irregular and invalid as it had not been signed by the Secretary of State. He was however immediately rearrested upon a regular and valid order of the Secretary of State deporting him to Russia in consequence of which a further rule was issued under a habeas corpus application. The grounds upon which the order was challenged were, *inter alia*, that the regulation framed under the Aliens Restrictions Act of 1914 was *ultra vires* for Sarno was never given any opportunity of leaving the United Kingdom, and that as Sarno had been released under an order of Court it was illegal to rearrest him on the same or similar grounds to those upon which he had been discharged, and that he having left Russia for political reasons ought not in any event to be deported to Russia but, if at all, to some friendly or neutral country other than Russia. In opposition to the rule an affidavit was filed from the Assistant Secretary of the Home Office which stated that it was part of the comity of nations that undesirable aliens should be sent back to their own country and not to other countries. It was stated further that according to information supplied by the Police, Sarno was a man with no regular occupation, that he lived in a house which was the resort of thieves, bullies, and prostitutes, and that he was suspected of theft and living on the immoral earnings of women. The Act and Regulations under it had reference to a state of war and the order was in fact made during the first World War.

It was argued for the applicant that the Deportation Order was bad for either of two reasons, firstly because the Regulation was *ultra vires*, or secondly because it was intended to make an improper use of the powers granted to the Secretary of State. The contention that the Regulation under which Sarno was dealt with was *ultra vires* was dismissed in the briefest terms by Chief Justice Lord Reading. On the second point, namely, that it was intended to make an improper use of the powers

[1] *(1916) 115 Law Times Reports, 608.*

granted to the Secretary of State in that, counsel for the applicant submitted, deportations should not be ordered unless the safety of the realm was in question and that nothing of that kind had been shown in the case of Sarno, who was, at most, simply an undesirable alien, and that if he was guilty of any of the offences of which he was suspected Sarno could have been dealt with by the Courts of England in the ordinary way but that he could not be deported for any of those reasons, especially in the absence of any suggestion that his presence in England constituted a danger to the State, the Lord Chief Justice stated that in the event of the Court being of opinion that there was a misuse of the extraordinary powers given to the executive the Court would be able to deal with the matter if the misuse was imminent and some act had been done with the intention of misusing the powers. He was satisfied, however, that upon the materials before him, he could not conclude that there had been any misuse of the power. While the evidence against Sarno was only evidence of suspicion on the part of the Police and therefore evidence upon which clearly no action could have been taken in the Criminal Courts, it appeared to the Lord Chief Justice that that was no justification for asserting that the Secretary of State was not entitled to get rid of Sarno. He also expressed the view that although in time of peace it might be an exaggeration to describe suspicion of a crime as a danger to the safety of the realm, nevertheless, suspicion may justify action during a time of war which would not be justified in a time of peace. The case is of importance, in that all the three judges made it clear that the Court has the power to intervene and prevent any misuse of the power of deportation. All of them also made it clear that they were not going into many questions which had been raised and many matters which had been touched upon in the course of the argument, on which the Court was not called upon to decide, amongst them being the question raised as to the power of the Secretary of State to send back to his own country an alien who had sought refuge in England from some political offence which he had committed, or which he had been suspected to have committed in his own country. All three judges expressly refrained from expressing any views on what a Court would do if an attempt had been made, by the exercise of the powers conferred upon the Secretary of State by the Regulations, to compel a real political refugee to return to his native land. Mr. Justice Low made it quite clear that upon the material before him he was not satisfied that Sarno was a political refugee at all and he therefore did not venture to forecast what his conclusion might have been if the evidence on that point had been full and satisfactory. Nevertheless, the principle was laid down that the Court would interfere if satisfed that the power was being used for any purpose other than the one which the law had in contemplation in giving the power of deportation.

The question regarding the next step, so to speak, in a deportation order under the Aliens' Restriction (Consolidation) Regulation 1916, arose in Sacksteder's case, *Rex v. Superintendent, Cheswick Police Station*[1]. The Regulation there in question enacted that where an alien was ordered to be deported he may be detained in such manner as the Secretary of State directs until the person to be deported could be " conveniently

[1] *(1918) 118 Law Times Reports, 165.*

conveyed to a place on board a ship about to leave the United Kingdom . . . . " and while so detained shall be deemed to be in lawful custody. The Home Secretary had given general instructions that any person named in a deportation order which was intended to be enforced immediately should be arrested and conveyed by ship from the United Kingdom and that he should be detained between the time of his arrest and the sailing of the ship selected for the passage. The Home Secretary made an order for deportation in the case of the applicant who was a French subject of military age. He further directed that the order for deportation should be immediately enforced in the case of the applicant. The appeal was from an order made by Lord Reading C.J., and Darling and Low JJ., discharging a Rule Nisi for a writ of habeas corpus. The Court of Appeal considered it necessary to scrutinise carefully whether the requirements and procedure of the Regulations had been satisfied and followed because the legislation under which the Secretary of State acted in the particular case did not appear to have as an objective the carrying out of an agreement between England and one of her allies during the War by which Great Britain had agreed to place the subjects of that country who were liable to military duty under the laws of that country, within the jurisdiction of that country by the use of the Regulations in question; but the object of those Regulations appeared to be simply to get rid from the United Kingdom of aliens whom the Secretary of State thought it was not right to allow to remain. Lord Justice Pickford stated it was not for him to say whether it was better in a case of this kind (to fulfil a reciprocal agreement between France and Britain that each country should return to the other country persons subject to military service) to obtain direct authority to do what was wanted, or to take advantage of indirect means when there is no direct authority for doing it, if the indirect means would enable one to attain the same object. That, he said, was for the Government to consider. The Court was satisfied that this deserter from the military service of France was not dealt with under a general order of deportation and transhipment without separate and individual consideration of the circumstances of each case by the Secretary of State himself. Lord Justice Pickford was not prepared to go behind the order of deportation and transhipment although he stated that while he was not prepared to go as far as Low J. was inclined to go in *Sarno's case*, yet if the Lord Justice was satisfied that the deportation order was " practically a sham, if the purpose behind it is so illogical as to show the order is not a genuine or *bona fide* order, the Court could go behind it ", although he was not prepared to say that in every case where there is an order of detention or imprisonment the Court is entitled to go behind that and see what the motives were for making that order. He did not think the fact of the motive being to carry out the agreement between Frace and Britain was sufficient to show that the order of detention until the applicant could be put upon some ship going to France was enough to entitle the Court to say that the Order was invalid and that the custody was not a good custody. Lord Justice Warringtom also expressed himself in very similar terms except that he added that though on the face of it the order may be a valid one yet the Court would be entitled to go behind that

valid order and say that it was no order at all, if it were a mere sham to cover up something which would be illegal or to enable some subsequent act to be done which would itself be illegal. What happened after the ship left the shores of Britain was not a matter which would concern the authorities in Britain. The Lord Justice did not think it was necessary for the Court to consider what may have been the ultimate motive with which the Secretary of State made the order. Lord Justice Scrutton prefaces his judgment by expressing the hope that His Majesty's Judges will always give the same anxious care as he had given to the particular case, to cases where it was alleged that the liberty of the subject had been interfered with, and none the less because the person is not by birth, or naturalisation, a subject of the King, but a foreigner temporarily living within the King's protection. At the same time he made it clear that there was not much room for sympathy in the particular case as the applicant was a French subject who desired to avoid helping France in her time of national emergency. In the result, he contented himself with the observation that the Court of Appeal had decided in an earlier case that the Court is not a Court of Appeal from the Secretary of State in making an order for deportation, and that the Regulations gave the latter power to select the ship on which the alien should be deported. So that whilst the Court in the earlier case was of the view that the Secretary of State could not in terms make an order that an alien shall be deported to a specific country yet he had the power to select the ship on which the alien may be placed, " and the result may be that, unless he jumps overboard, or manages to get overboard on to some other ship, he will go to the country to which the ship on which he is placed is sailing. That has been decided by the Court of Appeal and I am bound by it . " That was the only comfort the applicant received at the hands of Lord Justice Scrutton. Happily it was not necessary for the applicant to adopt the suggestion of that learned and noble Lord Justice and consign himself to the tender mercies of the deep, because he offered to serve in His Majesty's armed forces, an alternative which relieved the applicant from the dilemma in which Lord Justice Scrutton had left him.

Very great emphasis was laid by Mr. Suntheralingam on Vimlabai Deshpande's case : *Vimlabai Deshpande v. Emperor* [1]. Deshpande was detained in Police custody under the Defence of India Rules. He was arrested by the Police (under the ultimate orders of the Deputy Inspector-General of Police) and placed in Nagpur jail. He was detained in police custody later from 21st August, 1944, and on the 26th August the Provincial Governor made order that he should remain in police custody for the remaining period of 15 days during which he could be so detained, on the ground that the particular police officer who arrested Deshpande " reasonably suspected Deshpande of having acted or of acting or of being about to act in a manner prejudicial to the efficient prosecution of the war ". Counsel retained by Deshpande's wife to appear on an application for habeas corpus made by the wife, were not allowed to interview Deshpande while in police custody on the ground that he was confined under the Defence Regulations and that in those circumstances he could not be

[1] *(1945) A. I .R. Nagpur 8 ; and A. I. R. (1946) P. C. 123.*

allowed to see anyone. Deshpande was an Advocate of the High Court of Nagpur and was an editor of a Marathi Weekly. One Inamdar was employed as a clerk in the office of the press where Deshpande's weekly paper was printed. Inamdar left the services of the press in 1944 and it was not till August 1944 that the police busied themselves by surrounding the residence of Deshpande searching his house and the office of the press, and then requested Deshpande to attend at the police station where he was interrogated and arrested and put in the lock-up. He was not informed why he was arrested nor was he told what the charge against him was. The High Court was satisfied that the search, arrest and detention were in connection with inquiries which the Bombay police were making in the course of an investigation into offences of dacoity, and the actual enquiries regarding Inamdar which were made from Deshpande suggested an inference that the police suspected Inamdar and that they further suspected that Inamdar was harboured in the office of Deshpande's weekly. The Court pointed out, in unmistakable terms, that the provisions relating to detention contained in the Defence of India Rules related to detention and to nothing else, and that if either the police or the Provincial Governor desired to investigate into any offence, whether under the Penal Code or under the Defence of India Rules, then they were bound to conduct their inquiries in accordance with the provisions of the Criminal Procedure Code and that neither of these authorities could use the powers of detention under the Defence Rules for this purpose and under the guise of exercising those powers conduct a secret investigation into a crime. The Court emphatically expressed itself of the view that if the powers of detention given by the Defence Regulations were utilised not for their legitimate purposes but in order to assist the Police in an investigation which had nothing to do with anything contemplated by the Defence Regulations but which related to crimes committed against the ordinary laws of the country, such a use of the powers under the Defence Regulations was " a fraud upon the Act " and that such action cannot be said to be taken in good faith.

In the present instance there has been no use of the powers of the Minister under the Immigrants Act for any collateral or indirect purpose *Deshpande's case* therefore does not help the petitioner. The case of *Metacalfe v. Cox*[1] was relied on for the proposition that if a person exercises power conferred on him, in bad faith or for a collateral purpose, it is an abuse of the power and " a fraud upon the statute ", and is not really an exercise of the power at all, and a Court can interefere with such a colourable exercise of the power and where an issue is raised whether any particular order has been made in bad faith or for a collateral purpose and therefore not made in exercise of the power, the Court is bound to inquire into the facts. In the case of *In re Banwarilal*[2] the Court held that the Order made by the Provincial Governor superseding the Howrah Municipality under the Defence of India Rules was invalid because it was made for a purpose not contemplated by the Defence of India Act or Rules framed thereunder. That was clearly an instance where the Court would interfere because a power, intended to secure a particular

[1] *(1895) Appeal Cases, 328.*

[2] *48 Calcutta Weekly Notes, 766.*

object, was used to secure another object not within the contemplation of the law giving that power. The Court specifically stated that if a police officer were to detain an accused or a witness supposed to be acquainted with material facts, under the Defence of India Rules in order that he may have the facility of carrying on an investigation unhampered and unrestricted, that would be an abuse of the power conferred by the Defence Regulations. The second proposition culled from *Metacalfe v. Cox* that the Court is bound to inquire into the facts when the issue is raised that any particular order has been made in bad faith or for a collateral purpose means, I presume, as Lord Wright put it in *Green's Case*[1], " until there emerges a dispute the facts into which the Court feels it should inquire, I think the defendant's statement is enough . . . . ". Lord Justice Goddard expressed the same point of view when he said in *Green's case* that where an order which is valid on the face of it is produced " it is for the prisoner to prove the facts necessary to contravert it, and that where all that the prisoner says in effect is 'I do not know why I am interned, I deny that I have done anything wrong' that does not require an answer because it in no way shows that the Secretary of State—within the words of Regulation 18B—had not reasonable cause to believe . . . . ". In *Deshpande's case* too, the Court expressed the view that where the good faith of the authorities was expressly challenged by facts being set out which, if unrebutted and unexplained, were sufficient to support the allegation, then the complete absence of any refutation of those facts and the failure to explain them would lead the Court to conclude that the orders were not made in good faith, that is to say, that the object was not to legitimately carry out the purpose of the statute but to use the powers given by the statute for some indirect purpose, and that in such a situation the use of the extraordinary powers is unjustifiable—*Maledath Bharathan Malyali v. Commissioner of Police.*[2] It would therefore be seen that facts must be set forth which make it apparent, *ex facie*, that the powers were being used not for their legitimate purpose but for some purpose for which the powers were not intended. In other words, if it appears that the detaining authority, instead of directing its mind to the objects of the statute and utilising the extraordinary powers for the purposes contemplated by the statute, has used those powers of arrest and detention, indirectly, or shall I say under cover of the statute, to achieve or facilitate some other object or purpose, beyond or outside the scope of the statute or has been influenced by considerations extraneous to the statute, to use those powers, then the arrest and detention are bad and the person affected by that arrest and detention must be forthwith released and discharged.

I have already dealt with the various allegations made, and the grounds urged in support of the Applications, and it seems to me that they do not disclose any such misapplication or misuse of the powers vested in the Minister of Defence and External Affairs as to justify my holding that the arrests and detentions under the Deportation Orders are " a fraud upon the statute ", or are otherwise illegal or invalid. The petitioner has not, in my view, made out a *prima facie* case that the Deportation Orders, or the arrests and detentions under them, as on and from the 9th October,

[1] *(1941) 3 All England Reports, 388.* [2] *(1950) A. I. R. Bombay, 202 (F. C.)*

1951, were motivated by any collateral or indirect or improper purpose. Whether or not it can be said that the earlier arrests and detentions commencing from the 6th September 1951, and terminating with the discharge of the detenues by the Court on the 9th October, 1951, on the application of the respondent, were made legitimately and *bona fide* for the purposes of and with the intention of prosecuting the detenues for illegal immigration is a matter on which I express no view whatsoever because we are concerned, on the present Applications, only with the arrests and detentions which were effected on and from the 9th October, 1951, onwards after the detenues had been discharged from the proceedings in the Magistrate's Court. One cannot, on these Applications for habeas corpus, deal with a custody which had terminated before these papers were filed.

On the question of *ultra vires* I would follow the ruling in *Mudanayake v. Sivagnanasunderam* [1].

I therefore dicharge the rules nisi issued on the respondent and dismiss the several Applications with costs. There will however be only one set of costs in respect of the arguments which took place in Court on the 3rd, 4th, 5th and 6th December last, and in respect of any appearances in connection with the applications for bail in these proceedings.

In conclusion, I would like to add that the preparation and delivery of this Order were withheld by me pending the hearing of twenty other *habeas corpus* applications where many of the matters of law argued on the present applications were also raised, in the hope that further light may be thrown on them. Those applications were, however, disposed of by me on the 23rd January last after hearing argument, on grounds which made it unnecessary for the points covered by these applications to be argued in those cases.

Rules discharged.