1955 *Present :* Sansoni, J., and Fernando, J.

FAKRUDEEN, Appellant, *and* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, Respondent

S. C. 858—In the Matter of an Appeal under Section 15 of the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949

Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Section 6 (2) (ii) as amended by Act No. 45 of 1952—Difference between "non-residence" and "occasional absence"—Residence of wife or child—Need not necessarily commence prior to the period exempted owing to war conditions.

The failure of a wife or child of an applicant for citizenship to commence residence in Ceylon within twelve months of marriage or birth, as required by section 6 (2) (ii) of the Indian and Pakistani Residents (Citizenship) Act, if shown to have been attributable to the war conditions mentioned in the clause added to that section by Act No. 45 of 1952, comes within the scope of the exception granted by that clause. In that clause the Legislature had in mind, not merely interruptions of residence, but *non-residence*, which includes a failure to commence residence within the stipulated time.

APPEAL under Section 15 of the Indian and Pakistani Residents (Citizenship) Act.

S. Sharvananda, for the applicant-appellant.

R. S. Wanasundera, Crown Counsel, for the respondent.

Cur. adv. vult.

[1] *(1925) 69 S. J. 311 K. B.*

September 8, 1955. FERNANDO, J.—

The appellant is an applicant for registration as a citizen under the Indian and Pakistani Residents (Citizenship) Act. His application has been refused on the ground that he failed to prove :—

(*a*) that his wife was resident in Ceylon, without absence exceeding 12 months on any single occasion, during the period January 1, 1939 to September 1950 ;

(*b*) that his child Luchmanjee was resident in Ceylon during the period November 1942 to September 1950 ; and

(*c*) that his child Esufally was resident in Ceylon during the period May 1946 to March 1950.

The appellant married in 1927 ; according to him, his wife made a visit to Ceylon in 1929 returning to India in 1932 and again came to Ceylon in 1938 and returned to India in 1941. Thereafter the wife returned again to Ceylon in January 1946, having remained in India until then owing to difficulties arising from war conditions. The elder child was born in India on November 29, 1941, and the younger child on May 17, 1945, also in India : both children came to Ceylon in 1946 with their mother.

In regard to the residence of the wife the Deputy Commissioner did not believe " that the wife came to Ceylon on 1st January 1939 and left Ceylon for India in June or July 1941 ". Dr. Subramaniam, retired Provincial Surgeon, Jaffna, issued a certificate to the effect that the applicant's family were treated by him between 1938 and 1941, but, in giving evidence, he stated that he could not say that the family received treatment from him continuously during that period and could not be precise about their visits to his Dispensary. But he clearly remembered that the wife had been in Ceylon before 1941 and " went to India for her first confinement "—a piece of evidence which entirely escaped the notice of the Deputy Commissioner. An Accountant and Auditor, Mr. Ram Moorthy, vouched for the presence of the applicant's wife in Jaffna during the years 1939 to 1941, but his evidence is not even referred to by the respondent. In the circumstances, Crown Counsel could make no attempt to support the finding that the wife was not resident during the qualifying period.

In so far as the children are concerned, there is nothing to contradict the applicant's evidence that they first came to Ceylon in January 1946 and that they have been in Ceylon " uninterruptedly " since then. But Crown Counsel has argued that, in the case of the elder child, the fact that he did not commence to reside in Ceylon on a date earlier than November 29, 1942, is fatal to the application. The point thus raised is apparently of first instance, and requires considered examination.

Paragraph (ii) of sub-section 2 of Section 6 of the Act (as amended in 1952) requires the applicant to prove that " each minor child was uninterruptedly resident in Ceylon from a date not later than the first anniversary of his birth ", and the requirement was clearly not satisfied in the case of the elder child of the applicant. But this paragraph

has to be read together with the relevant interpretation clauses in the same section :—

> " For the purposes of the preceding paragraph (2) (ii), the continuity of residence of the wife or a minor child of an applicant shall notwithstanding her or his occasional absence from Ceylon be deemed to have been uninterrupted if such absence did not on any one occasion exceed twelve months in duration.
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> For the purposes of the preceding paragraph (2) (ii), the continuity of residence of the wife or a minor child of an applicant shall not be deemed to have been interrupted by reason that she or he was not resident in Ceylon during the period commencing on December 1, 1941, and ending on December 31, 1945, or during any part of that period, if the Commissioner is satisfied that she or he did not reside in Ceylon during that period or part thereof owing to apprehension of enemy action in or against Ceylon or owing to special difficulties caused by the existence of a state of war."

The contention of Crown Counsel is that these two clauses are intended only to excuse interruptions of a period of residence which has already commenced and provide no excuse for any delay in commencing residence at or before the beginning of the qualifying period : hence, in the case of the elder child, there is no excuse under sub-section (3) for the failure to commence a residence on or before November 29, 1942. Crown Counsel's contention is clearly correct in regard to the availability of the first of these clauses. Section 6 (2) (ii) postulates commencement of residence within twelve months of marriage (in the case of a wife) and within twelve months of birth (in the case of a child). Since an interval of twelve months is already allowed in that section during which the wife or child should have arrived in Ceylon, it would be unreasonable for the Legislature to permit further delay in arrival without there being some special reason for the further delay. The first of the " interpretation " clauses which I have set out above contains a concession for which no reason is assigned, and does not afford an excuse for delay additional to the delay permitted in the substantive requirement. The language of the first provision makes the matter clear : the continuity of residence shall be deemed to be uninterrupted notwithstanding *occasional absence* " if such *absence* did not on any occasion exceed twelve months in duration ". While an interruption of residence by a visit to India would clearly be " occasional absence " from Ceylon, the circumstance that a wife or child did not arrive in Ceylon and commence residence before the stipulated date cannot properly be referred to as *absence*, and still less as *occasional absence*.

To turn now to the second " interpretation " clause :—" The continuity of residence . . . . of a minor child shall not be deemed to have been interrupted by reason that he *was not resident* in Ceylon during . . . . (the war period) if the Commissioner is satisfied that he *did not reside* in Ceylon during that period owing to (war conditions) ". The legislature here has in mind not *occasional absence* or mere interruptions of a period of residence, but *non-residence*

during the war period, an expression which can fairly include *any* failure to reside attributable to war conditions, *whether or not* the period of non-residence constituted an interruption of a period of residence.

The matter can in my opinion be expressed in another way. In order that the requirement in Section 6 (2) (ii) can operate against the present applicant, the Commissioner has to say to him "your child was not uninterruptedly resident during the period November 1942 to September 1950, *for the reason that the child did not reside in Ceylon from November 1942 until January 1946*". But the second interpretation clause prevents the Commissioner from assigning such a reason, because it expressly provides that *for the purposes of Section 6 (2) (ii)* that is not a reason on account of which the continuity of residence can be treated as interrupted. I am therefore of opinion that the concession granted by the second interpretation clause set out above is available in the case of a wife or child where the failure to commence residence before the first anniversary of marriage or birth is to be excused on the grounds set out in that clause.

The appeal has therefore to be allowed, and the case remitted to the Commissioner solely for the purpose of satisfying himself whether the non-residence of the wife and minor child of the applicant between 1941 and 1946 was due to circumstances specified in the second interpretation clause. If he is so satisfied, the Commissioner will make the necessary order under Section 10 of the Act.

The applicant is entitled to costs fixed at Rs. 105.

SANSONI, J.—I agree.

Appeal allowed.