1955 *Present :* **Gratiaen J. and Sansoni J.**

K. DURAISAMY, Appellant, *and* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, Respondent

S. C. 517—Application No. J 514

Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Citizenship by registration—Sections 6 and 22 (as amended by Section 4 of Act No. 37 of 1950)—"Permanently settled in Ceylon"—Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949, s. 4 (1) (a)—Citizenship Act, No. 18 of 1948, ss. 4, 5—Ceylon (Constitution and Independence) Orders-in-Council, 1946 and 1947, s. 29.

In an application by an Indian Tamil to register him and his wife and minor children as citizens of Ceylon—

Held, that under Section 6, read with Section 22, of the Indian and Pakistani Residents (Citizenship) Act, an Indian or a Pakistani residing in Ceylon is entitled as of right to exercise the privilege of being registered as a citizen of Ceylon if at the time of his application (made within the requisite period of time)

(1) he and his family (if any) possess the residential qualifications respectively prescribed for them by the Act, and he demonstrates his intention to settle permanently in Ceylon by electing irrevocably to apply for registration ;

and (2) he satisfies all the other relevant conditions laid down in Section (2) of the Act ;

and (3) the requirement as to "origin" in paragraph (*a*) of the words of the definition is satisfied, or, he is at least a descendant of a person whose origin was as aforesaid.

Although the concept of "permanent settlement" involves two elements—the fact of residence and the intention permanently to remain in Ceylon—the requisite intention is satisfactorily established by the applicant's positive decision to claim registration with a "clear understanding" of its implications. Once the practical tests prescribed by the Act have been satisfied, it is not necessary to decide inferentially whether or not the applicant may be presumed to have acquired a domicil of choice in Ceylon.

APPEAL under Section 15 of the Indian and Pakistani Residents (Citizenship) Act. Listed before two Judges upon a reference by Fernando A. J.

H. V. Perera, Q.C., with *Walter Jayawardene* and *S. P. Amerasingham*, for the applicant-appellant.—The Commissioner for the Registration of Indian and Pakistani Residents says, "You must first prove that you have abandoned your domicil of origin". The text books say this is not

2——J. N. B 13508-1,597 (4/55)

an easy matter to prove. The intent of this piece of legislation was to deprive some people of certain rights. It does cause a great deal of hardship to certain people. The Privy Council said in the case of *Kodakan Pillai v. Mudanayake* [1], " If there was a legislative plan, the plan must be looked at as a whole and when so looked at it is evident in their Lordships' opinion that the legislature did not intend to prevent Indian Tamils from attaining citizenship provided that they were sufficiently connected with the island ".

The expression " permanently settled " is one that has been previously used—Donoughmore and Soulbury Elections Orders-in-Council. A mere declaration by a person that he intended to stay in Ceylon entitled him to a certificate.

In this case the condition of uninterrupted residence has been satisfied. Sections 3 and 6 referred to. The applicant cannot then be told " Show me first that you have abandoned your domicil of origin ". Section 6 (4) next referred to. The legislation, if fairly administered, is a very benevolent measure, of which no one can complain.

Section 22 referred to. The words " permanently settled " in subsection (*b*) discussed. See also amending Act 37 of 1950, Section 4. This is a definition and cannot be said to include a highly complex legal concept such as domicil of choice.

The words " permanently settled " have been used in previous legislation—Nationalisation Ordinance, No. 21 of 1890, Chapter 243, Section 2 ; Order-in-Council 1931—State Councils Elections (Donoughmore Constitution)—Section 9 and also Section 7. These indicate that permanent settlement is something less than domicil.

In giving the expression " permanently settled " a meaning, it is permissible to consider the earlier use of this expression. The word " permanent " is used as opposed to the term temporary. It is not reasonable to expect a person to give his mind for all time and to decide to stay permanently. A person can permanently be resident in Ceylon although he may not have changed his domicil of origin.

The facts were next dealt with.

Counsel then referred to the signing of the " B " forms in applying to the Exchange Controller for authority to transfer money to India. This question has been considered in *Thomas v. Commissioner for Registration of Indian and Pakistani Residents* [2] and in *Poravia Pillai v. Commissioner for Registration of Indian and Pakistani Residents* [3].

T. S. Fernando, Q.C., Acting Attorney-General, with *M. Tiruchelvam*, Deputy Solicitor-General, *H. A. Wijemanne* and *R. A. Wanasundera*, Crown Counsel, for the respondent.—The words " provided they were

[1] *(1953) 54 N. L. R. 433 at 439.* [2] *(1953) 55 N. L. R. 40.*
[3] *(1953) 54 N. L. R. 407.*

sufficiently connected with the island" in *Kodakan Pillai v. Mudanayake* are important. See also Section 22 of Act No. 3 of 1949, Section 4 of Act No. 37 of 1950 and Sections 7 and 9 of the Order-in-Council of 1931.

The expression "permanently settled" cannot be given a meaning without any reference to domicil. See *Lord v. Colvin* [1]. It is impossible to acquire a domicil of choice without permanent residence.—Cheshire's Private International Law (4th edn.) page 160; *Hodgson v. De Beauchesne* [2]; *Drevon v. Drevon* [3]. The applicant must prove not merely that he has acquired a domicil of choice, but also that he is permanently settled.—Dicey: Conflict of Laws (6th edn.) pages 89 to 97; *Bell v. Kennedy* [4]; *Udny v. Udny* [5]. The lowest that an applicant must show is that he has acquired a domicil of choice—in addition he must show as a matter of fact that he is permanently settled.

The Indian Courts will not accept the position that one can acquire citizenship by something less than a domicil of choice. See Maxwell: Interpretation of Statutes (10th edn.) page 148. Permanent settlement cannot certainly be anything less than domicil of choice—*Winans v. Attorney-General* [6]; *Huntley v. Gaskell* [7]; *Ramsay v. Liverpool Royal Infirmary* [8]; *May v. May & Leiman* [9]; Dicey; Conflict of Laws (6th edn.) pages 89 to 97.

The statements made by the applicant in the "B" Forms must be explained by him; otherwise it must be taken as a factor against him.

The Commissioner has not misdirected himself. He has rightly applied the test of domicil of choice.

H. V. Perera, Q.C., replied.—It is wrong to substitute for "permanent settlement", "domicil". The expression "permanent settlement" is a simpler expression than "domicil".

With regard to the cases cited concerning domicil, the question of domicil is tested by some more or less technical rules. The approach is completely different. In the context, "permanent settlement" means, "he is residing here in Ceylon with the intention of making Ceylon his permanent home—for an indefinite period". I have not got to begin by rebutting a presumption. The mode of approach is: are you permanently settled? In proving a domicil of choice one must displace a domicil of origin. In this case it is not necessary for me to prove that I have abandoned my domicil of origin.

Deputy Commissioners cannot be expected to be aware of the concepts of domicil. The legislature has used a simpler term.

[1] *(1859) 28 L.J. (N.S.) Equity 361 at 365 et seq.*
[2] *(1858) 12 Moore's Privy Council Cases page 286 at page 330.*
[3] *(1864) 34 L.J. (N. S.) Equity 129.*
[4] *(1868) L. R. 1 Scottish Appeals 307 at 319.*
[5] *1869 L.R. 1 Scottish Appeals 441 at 449.*
[6] *1904 A. C. 287 at page 290.*
[7] *1906 A. C. 56 at page 68.*
[8] *1930 A. C. 588.*
[9] *1943 All E. R. 146.*

The object is to give citizenship rights. A naturalised person does not necessarily change his domicil. He gets only citizenship rights, e.g., the right to vote.

Counsel then referred to Section 6 (4) (*b*). The scheme of the Act contemplates a postponement of certain rights which are acquired by a change of domicil. This indicates that change of domicil and permanent settlement are not the same. Otherwise the legislature could have easily said so.

Cur. adv. vult.

February 18, 1955.

This is an appeal by an Indian Tamil against an order refusing to register him and his wife and minor children as citizens of Ceylon under the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949. The judgment of this Court upon a reference by Fernando A.J. is as follows :—

Sections 4 and 5 of the Citizenship Act, No. 18 of 1948 and Section 4 (1) (*a*) of the Ceylon (Parliamentary Elections) Amendment Act No. 48 of 1949 had the effect of disfranchising many Indian Tamils (and indirectly their descendants) in spite of their long residence in Ceylon. In enacting these laws, however, Parliament was exercising " the perfectly natural and legitimate function of the legislature of a country to determine the composition of its nationals " on *bona fide* considerations which did not violate Section 29 of the Ceylon (Constitution and Independence) Orders-in-Council 1946 and 1947. *Kodakan Pillai v. Mudanayake* [1]. The complaint of unfair discrimination against a community as such was negatived, *inter alia*, by the provisions of the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949, whereby an Indian Tamil could by application obtain citizenship by registration and thus protect his descendants, " *provided that he had a certain residential qualification* " and was " *sufficiently connected with the Island* ". The Judicial Committee pointed out in this connection that the migratory habits of most Indian Tamils in this Island were facts " directly relevant to the question of their suitability as citizens of Ceylon ".

The main provisions of the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949 (hereinafter called " the Act ") must now be examined with special reference to the qualifications prescribed for acquiring citizenship by registration. Bearing in mind the legislative plan as a whole, we conclude generally that the intention was to admit any Indian or Pakistani residing in Ceylon to the privilege of Ceylon citizenship (if claimed within a stipulated period of time) provided that he satisfied *certain tests prescribed by statute for establishing that his association with the Island could not (or could no longer) be objected to as possessing a migratory or casual character.*

[1] (1953) *54 N. L. R. 433.*

The main question before us relates to the meaning of the words " permanently settled in Ceylon " in Section 22 of the Act (as amended by Section 4 of Act No. 37 of 1950) which defines an " Indian or Pakistani resident ". The Section in its amended form reads as follows :—

> " 22. An Indian or Pakistani resident means a person (*a*) whose origin was in any territory which immediately prior to the passing of the Indian Independence Act 1947 of the Parliament of the United Kingdom formed part of British India or any Indian State and (*b*) who has emigrated therefrom and *permanently settled in Ceylon.*
>
> and includes (1) a descendant of any such person and (2) any person, *permanently settled in Ceylon*, who is a descendant of a person whose origin was in any territory referred to in the preceding paragraph (*a*). "

The preliminary requirement as to " origin " in paragraph (*a*) presents no difficulty.

It has been suggested that an applicant must always prove that he " emigrated " from his country of origin in the sense that he had left it from the very outset with a firm resolve to abandon his domicil there. This could not have been the intention of an enactment designed to achieve a realistic purpose. Be that as it may, the language of the amending Act has virtually dispensed with the qualification of having " emigrated " in the strict sense suggested. An applicant who cannot come within the ambit of paragraph (*a*) is now invariably " included " in the definition because his father was of Indian or Pakistani " origin " ; so that " emigration " has ceased to be, even if it ever was, a vital qualification.

Section 6 (1), read with Section 22, directly raises the question whether an applicant is " permanently settled in Ceylon ". We therefore propose to postpone our discussion of Section 6 (1) until we have first examined the other special qualifications and conditions for registration prescribed by the Act :

(1) the applicant must possess a minimum qualification of " uninterrupted residence " as defined in *Section 3* ;

(2) his wife (if he is married) and his minor dependent children (if any) must also possess certain residential qualifications—*Section 6 (2) (ii)* in its recently amended form ;

(3) he must establish a reasonable degree of financial stability—*Section 6 (2) (i)* ;

(4) he must be free from any disability or incapacity of the kind referred to in *Section 6 (2) (iii)* ;

(5) he must " clearly understand " the statutory consequences of registration—*Section 6 (2) (iv)*.

One observes in all these requirements an underlying decision to deny Ceylon citizenship to non-nationals whom Parliament for one reason or another would consider unsuitable for that privilege. Hence the insistence on the long and " uninterrupted residence " of the applicant himself and on the residential qualifications of his immediate family (if any) regarded as a unit ; and the further safeguard that his prospects of useful citizenship were not likely to be endangered by poverty or other handicaps. Each of these requirements, if satisfied, would guarantee a more enduring quality to the tie between the new citizen and the country which he has elected to adopt, " for better, for worse ", as his own.

The requirement that the applicant must establish a minimum period of residence is easily explained. " *A presumption of domicil grows in strength with the length of the residence* . . . . A residence may be so long and continuous as to raise a presumption that is rebuttable only by actual removal to a new place ". *Cheshire's Private International Law* (4th edition) page 159. Similarly, the fact that a man's immediate family shares his connection with the country of disputed domicil is an extremely relevant factor for consideration. The imposition of these statutory standards relieves the investigating authority of the duty of deciding by mere legal inference whether an applicant's residence bears in the circumstances of any particular case a sufficient degree of permanency. Equally significant is the requirement that an applicant " clearly understands " the serious consequences which automatically flow from registration under the Act—namely (1) a statutory renunciation of the man's former *political status* and (2) the change in *civil status* which automatically results under the rules of private international law from a change of domicil. Here again the legislature has laid down in positive terms another well-established test of permanency (instead of leaving the applicant's intentions to be judicially ascertained by inference).

In ordinary litigation, a man may be held to have acquired a domicil of choice although the far-reaching consequences involving a change of civil status may never have entered his mind. The Court must then decide as best as it can whether the circumstantial evidence justifies a legal inference that " if the question had arisen in a form requiring a deliberate or solemn determination ", the person whose domicil was in dispute would have elected to renounce his former civil status and " to assume a position for the like purposes as a citizen of another (country) " —per Wickens V. C. in *Douglas v. Douglas* [1]. This formula was approved and applied by Lord MacNaghten in his notable judgment in *Winans v. Attorney-General* [2]. The local Act has advisedly taken the precaution of substituting a positive for an inferential test. The necessity of " making an election between the two countries " is directly addressed to the applicant's mind, and his choice must be deliberately and solemnly made with a full appreciation of all that the decision involves. If this positive

[1] *(1872) L. R. 12 Eq. 617.* [2] *1904 A. C. 287.*

test is satisfied, there is neither scope nor necessity for probing further into his state of mind in order to ascertain (by inference or perhaps by guesswork) his actual intentions.

An Indian or a Pakistani residing in Ceylon is in our opinion entitled *as of right* to exercise the privilege of being registered as a citizen of Ceylon if *at the time of his application* (made within the requisite period of time)

(1) he and his family (if any) possess the residential qualifications respectively prescribed for them by the Act, and he demonstrates his intention to settle permanently in Ceylon by electing irrevocably to apply for registration ;

and (2) he satisfies all the other relevant conditions laid down in Section 6 (2) of the Act ;

and (3) the requirement as to " origin " in paragraph (*a*) of the words of the definition is satisfied, *or*, he is at least a descendant of a person whose origin was as aforesaid.

We agree with the Crown that the words " permanently settled in Ceylon " mean nothing less than " having acquired a domicil of choice in Ceylon " ; indeed, they mean something else as well, namely, that the applicant has also made a deliberate decision to renounce his former political status.

Once these exacting statutory tests have all been satisfied, the man's previous residence in this country assumes (unless it has already done so) the requisite degree of " permanency ", and Ceylon has become his " home ". His solemn " election between the two countries " in favour of Ceylon dispels any lurking suspicion that his association with Ceylon may be merely casual or migratory.

The concept of " permanent settlement " doubtless involves two elements, the *fact* of residence as well as the *intention* permanently or at least indefinitely to remain in this country. But in the context of the Act, *the requisite intention is satisfactorily established by the applicant's positive decision to claim registration with a " clear understanding " of its implications. The condition laid down in Section 6 (1) is thus fulfilled.* The gravity of the consequences of registration must be assumed to provide an adequate safeguard against an application by a person who does not genuinely intend to renounce his former status as a citizen of his country of origin.

It is not difficult to find a logical explanation, indeed a justification, for Parliament's decision to prescribe its own tests of " permanency ". In recent years there has been considerable criticism of the difficulties involved in the function of deciding judicially (but without the aid of statutory standards) whether or not a man may be presumed to have

acquired a domicil of choice in the country in which he actually resides. A special Committee appointed by the Lord Chancellor of England in 1952 published a report last year recommending the adoption of certain simple rules contained in a Draft Code (reproduced in the 3rd edition of *Schmitthof's 'The English Conflict of Laws'* pages 491–493.) Until these or similar reforms are introduced, the Courts must continue " to investigate a man's actual state of mind rather than rest content with the natural inference of his long continued residence in a given country ". *Cheshire* (supra) page 162.

By way of contrast, the administrative machinery provided by the Act has been admirably designed by Parliament to eliminate the tantalising problems which beset the regular Courts in deciding issues of " domicil ". An application for registration is submitted in a prescribed form in which the applicant sets out the particulars on which he relies to establish his special residential qualifications and his compliance with the other onerous conditions precedent to registration. The facts relied on are in the first instance verified by an investigating officer (*not necessarily required by the Act to possess legal qualifications*) who reports thereon to the Commissioner (*who significantly is himself not required to possess legal qualifications*). If " a *prima facie* " *case for registration* has been established, the application is in due course allowed, unless an objector can show that " a *prima facie* case " does not in fact exist. Alternatively, the applicant has a further opportunity to establish " a *prima facie* case " at an inquiry held by the Commissioner (or one of his Deputies) " free from all the formalities and technicalities of the rules of procedure applicable to a Court of law ". In these proceedings, the Commissioner, though " subject to the general direction and control of the Minister " (Section 18), nevertheless performs a judicial function which is confined to the impartial ascertainment (free from administrative direction of any kind) of the uncomplicated questions of fact specified by the Act. The legislative plan works well and expeditiously so long as it is clearly realised that there is no super-added responsibility to investigate extremely difficult mixed problems of fact and law which in most cases would present formidable obstacles even to an experienced Judge trained in the law. Those latter difficulties have been described as follows in *Cheshire* (supra) at page 155 :—

> " Once the relevance of vague hopes or dim expectations of a return to the fatherland is admitted, there is no end to the detail that the judge must consider. Often he must review the whole history of a man's life and examine such elusive factors as his fears and aspirations, his hopes and prejudices, his declarations both written and spoken. It follows that in many cases a practitioner will experience great difficulty in advising his client upon his place of domicil until it has been judicially determined, for the puzzle will be to predict what weight will be given by a judge to the various factors upon which the question turns. There is no common standard, since a fact which appeals to one mind as being of decisive significance seems of trivial importance to another. The desire of Mr. Winans (of *Winans v. Attorney-General*) to return to

America in order to construct anti-British ships impressed Lord MacNaghten, but was discarded by Lord Lindley as immaterial. *The result is that a man's domicil may remain uncertain throughout his life.*"

Fortunately the Commissioner and his Deputies (lacking as they do the judicial experience and equipment of a MacNaghten or a Lindley) need not stray as amateurs into the complex field of human psychology in order to determine the real intentions of an applicant for registration. But, they have no doubt been selected for office because they are sufficiently competent to decide whether an applicant has satisfied the practical but uncomplicated tests prescribed by the Act.

In this view of the matter, the appellant was clearly entitled to succeed in his application. He and his wife have resided in Ceylon since 1934. Their minor children live with them and attend school in this country. He has always enjoyed the benefits of fixed employment in Ceylon; his modest savings have been invested here, and he has no ties with India except those of natural affection for his widowed mother and his two sisters (whom he dutifully wishes to support). He has ultimately made a genuine decision to cement his long association with this country by claiming the privileges of Ceylon citizenship with a clear understanding of the consequences which will result from registration. We can conceive of no better example of the kind of "suitable" person whom Parliament had in mind when the Act passed into law. He has satisfied all the onerous statutory conditions prescribed, and the circumstance that, in a very different context, he incorrectly described his residence in this country as "temporary" in order to facilitate (in violation of the "exchange control" regulations) the forwarding of the usual subsistence allowances to his mother and his sisters abroad cannot disqualify him. Indeed, even if the question had arisen for determination by an "understanding" judge on the issue of domicil, this isolated circumstance would have carried no weight in view of the other compelling factors established in his favour. The decision appealed from seems to us to have been reached in accordance with some *pre-determined departmental formula* (evidenced by preliminary orders made in identical language by different officers of the department in different areas) which is not warranted by the Act. We allow the appeal and direct the Commissioner to take appropriate steps under Section 14 (7) of the Act on the basis that a *prima facie* case for registration has been established to the satisfaction of this Court. The appellant is entitled to the costs of this appeal.

(Sgd.) E. F. N. GRATIAEN,
Puisne Justice.

(Sgd.) M. C. SANSONI,
Puisne Justice.

Appeal allowed.