M. A. F. DE MARIGNY (PETITIONER).....APPELLANT;

AND

J. M. LANGLAIS (RESPONDENT).....RESPONDENT.

1948

*Mar. 8, 9.
*April 7.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

*Habeas corpus—Immigrant—British subject—Temporary permit—Application to remain in Canada permanently—Board of Inquiry—Right to be present or represented on appeal to the Minister—Deportation*

*PRESENT:—Rinfret C.J. and Kerwin, Taschereau, Rand and Kellock JJ.

(1) [1947] 2 W.W.R. 799.
(2) 4 Beav. 115; 49 E.R. 282.
(3) [1895] A.C. 186 at 198.

1948

DE MARIGNY v. LANGLAIS

*order—"To the place whence he came or to the country of his birth or citizenship"—Service of order on transportation company—Extra-territoriality—Immigration Act, R.S.C. 1927, c. 93—Orders in Council P.C. 23, 695, 1413, 3016—Statutes of Canada, 1932-33, c. 39.*

The appellant, a British subject, born on the Island of Mauritius, landed in Canada from Cuba on or about 15 March, 1945, as member of a crew of a ship which went into dry-dock and was ultimately sold in Canada. He was granted a temporary permit to enter Canada which expired on 15 May. A Board of Inquiry, on 17 May, 1945, refused him permanent admission on grounds which were read and explained to him. An appeal taken to the Minister was dismissed. On 10 August, 1945, he was allowed thirty days in which to arrange his departure voluntarily and on 27 September, 1945, he was granted an extension of stay until October 13. He did not leave Canada as he says that he could not find shipping accommodation to either England or Cuba and in the meantime he made application to the Department of Immigration for further indulgence but without success. Finally, on 29 April, 1947, the Commissioner of Immigration issued a warrant for his "arrest, detention and deportation" upon which he was detained. He obtained a writ of habeas corpus and the Superior Court, affirmed by the Court of King's Bench, Appeal Side, refused to order his discharge. He appealed to this Court.

*Held:* The appeal should be dismissed with costs.

*Per* The Chief Justice and Kerwin, Taschereau and Kellock JJ.:—The *Immigration Act* does not lay down any requirements as to form in the case of a warrant.

The contention that the order for deportation was incapable of being acted upon because it did not contain the reasons for the decision and was not served upon the transportation company, cannot be upheld. The order, although in two documents, was served upon appellant. The transportation company is the one to raise the objection of lack of service upon it.

In the circumstances here present, the only country authorized by the *Act* to which he could be deported was the country of his birth or citizenship and not whence he came.

There is nothing in evidence to support the argument that the right to enforce the order has been lost by failure to act upon it immediately.

An appellant has no right to appear personally or to be represented on the appeal to the Minister.

*Per* Rand J.:—The contention that the order for deportation was not sufficient, cannot be upheld. In the administration of the *Immigration Act,* what is to be looked for and required is a compliance in substance with its provisions.

APPEAL from the judgment of the Court of King's Bench, Appeal Side, Province of Quebec (1), affirming the judgment of the Superior Court, Lazure J., and quashing

(1) Q.R. [1947] K.B. 741.

and dismissing a writ of Habeas Corpus issue against a warrant of the Immigration authorities for appellant's detention and deportation.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

*M. Gaboury, K.C.* and *John E. Crankshaw,* K.C. for the appellant.

*Gustave Adam, K.C.* and *Guy Favreau* for the respondent.

*Charles Stein, K.C.* for the Attorney-General of Canada.

The judgment of the Chief Justice and of Kerwin, Taschereau and Kellock JJ. was delivered by

KELLOCK J.:—This appeal arises upon the refusal of the Superior Court, affirmed by the Court of King's Bench, Appeal Side (1), to order the discharge of the appellant on the return to a writ of habeas corpus. The appellant, a British subject, born on the Island of Mauritius, arrived in Canada on or about the 15th of March, 1945, from Havana, Cuba, as a member of the crew of a ship which, because of the necessity of repairs, went into dry-dock and was ultimately sold in Canada. On arrival in Canada the appellant was granted a temporary permit to enter which expired on the 15th of May. Desiring to gain permanent admission to the country he, on May 17th, 1945, presented himself before a Board of Inquiry under the provisions of the *Immigration Act* and was refused entry. An appeal taken to the Minister pursuant to the provisions of the *Act* was dismissed. Notification of this decision was given to the appellant by letter of the 10th of August, 1945, in which he was also told that he would be allowed thirty days in which to arrange his departure voluntarily. Subsequently, on September 27th of the same year, a letter was written to him by the immigration inspector in charge at Montreal advising him that he had been granted an extension of stay in Canada until October 13th.

(1) Q.R. [1947] K.B. 741.

1948

DE MARIGNY v. LANGLAIS

Kellock J.

The appellant did not in fact leave the country. He says in his evidence that he endeavoured to find shipping to England in 1945 but could not do so. He also says that there was no transportation to Cuba available in either 1945, 1946 or 1947. In the meantime he made application to the *Department of Immigration* for further indulgence but without success. Finally, on the 29th of April, 1947, the Commissioner of Immigration issued a warrant for his "arrest, detention and deportation" upon which he was detained. This detention gave rise to these proceedings.

On the 18th of June, 1945, the Board of Inquiry embodied its findings in the following document, Exhibit 6:

MOVED BY MEMBER DEMERS.

SECONDED BY MEMBER LEFEBVRE.

WHEREAS THE EVIDENCE SHOWETH that MARIE ALFRED FOUQUEREAUX DE MARIGNY was born at Mauritius Island, British Colony, on the 29th day of March, 1910, and is not a Canadian citizen or a person having Canadian domicile, but is a citizen of Mauritius and a British subject of the French race.

WHEREAS THE EVIDENCE FURTHER SHOWETH that MARIE ALFRED FOUQUEREAUX DE MARIGNY came to Canada, having arrived at the port of Halifax, Nova Scotia, approximately on the 10th or the 12th day of March, 1945, ex the S.S. "Kelowna Park", as a member of the crew, and is now being examined as to his right to land in Canada.

WHEREAS THE EVIDENCE FURTHER SHOWETH THAT MARIE ALFRED FOUQUEREAUX DE MARIGNY does not comply with the provisions of P.C. 695 of the Immigration Act which prohibits the entry to Canada of immigrants of all classes and occupations, with certain exceptions, he not coming within the admissible classes as defined therein.

WHEREAS THE EVIDENCE FURTHER SHOWETH THAT MARIE ALFRED FOUQUEREAUX DE MARIGNY does not comply with the provisions of P.C. 23 of the Immigration Act as he came to Canada otherwise than by continuous journey from the country of his birth or citizenship and upon a through ticket purchased in that country or prepaid in Canada.

WHEREAS THE EVIDENCE FURTHER SHOWETH that MARIE ALFRED FOUQUEREAUX DE MARIGNY does not comply with the provisions of P.C. 3016 of the Immigration Act as he is not in possession of a passport bearing the visé of a Canadian Immigration Officer or the visé of a British Diplomatic or Consular Officer.

WHEREAS THE EVIDENCE FURTHER SHOWETH that MARIE ALFRED FOUQUEREAUX DE MARIGNY does not comply with the provisions of P.C. 1413 of the Immigration Act as he is seeking a landing in Canada for the purpose of working as Sales Manager for the Industrial Wares Limited, 705 Drummond Building, 1117 St. Catherine Street, West, Montreal.

WHEREAS THE EVIDENCE FURTHER SHOWETH that MARIE ALFRED FOUQUEREAUX DE MARIGNY is prohibitive of entry to Canada under Section 3, subsection "C" of the Immigration Act as he has been certified by Dr. R. D. Gurd, Immigration Medical Officer, as suffering with post operative abdominal adhesions.

THEREFORE, I do hereby, in accordance with the provisions of the Immigration Act, reject the said MARIE ALFRED FOUQUEREAUX DE MARIGNY and order his deportation to the place in the country whence he came or to the country of his birth or citizenship.

DISSENTING—NIL.

The transcription of the proceedings contain the following:

The above decision was explained to Marie Alfred Fouquereaux de Marigny, who was advised of his right of appeal:

Q.—Do you wish to appeal?

A.—Yes.

A further document, Exhibit 4, as follows, was also issued:

DEPARTMENT OF MINES AND RESOURCES
IMMIGRATION BRANCH

Montreal, June 18th, 1945.

ORDER FOR DEPORTATION

The Immigration Act, Section 33

To Marie Alfred Fouquereaux de Marigny of Mauritius

This is to certify that you have this day been examined by a Board of Inquiry at Montreal, Quebec, a port of entry, and it having been established that you are not a Canadian citizen or a person holding Canadian domicile, you have been rejected (ordered deported) for the following reasons:

P.C. 23—Continuous Journey Regulation,
P.C. 695—Occupational Regulation,
P.C. 3016—Passport Regulation,
P.C. 1413—Contract Labour Regulation,
Section 3, ss. "C"—Physically Defective—

(Immigration Act and Regulations)
L. A. Chevrier
Chairman of the Board of Inquiry

Dated at Montreal, Que.,
this 18th day of June 1945.

This bears at its foot the following:
Received Order for Deportation
M. A. F. de Marigny.

In proceedings such as this the court is precluded from reviewing the findings of fact made by the Board of Inquiry; section 23; *Samejima* v. *The King* (1), per Lamont, J., at 650. But equally the applicant for a writ of habeas corpus may show that the proceeding of which he complains "has not been had, made or given in accord-

(1) [1932] S.C.R. 640 at 650.

1948

DE MARIGNY v. LANGLAIS

Kellock J.

ance with the provisions of the Act"; ibid, page 647. Appellant before us attacked the above mentioned section on the ground that it was ultra vires Parliament, but we intimated on the argument that this submission was not, in our view, well founded.

It was contended for the appellant that if, as to any one of the five grounds mentioned in the above documents, such ground had no basis in fact or law, regardless of the validity of any other ground, it must be held that his detention is illegal. This contention is without weight. In my opinion if any ground exists which disentitles the appellant to entry, upon which the Board based its decision, this is sufficient.

By section 3 of the Act it is provided that:

> No immigrant, passenger, or other person, unless he is a Canadian citizen, or has Canadian domicile, shall be permitted to enter or land in Canada, or in case of having landed in or entered Canada shall be permitted to remain therein, who belongs to any of the following classes, hereinafter called "prohibited classes":—
>
> (i) Persons who do not fulfil, meet or comply with the conditions and requirements of any regulations which for the time being are in force and applicable to such persons under this Act;

By section 38 the Governor in Council is authorized whenever deemed necessary or expedient to:

> (*a*) prohibit the landing in Canada or at any specified port of entry in Canada of any immigrant who has come to Canada otherwise than by continuous journey from the country of which he is a native or naturalized citizen, and upon a through ticket purchased in that country, or prepaid in Canada;

By *P.C. 23,* passed on the 7th of January, 1914, it was provided that:

> From and after the date hereof the landing in Canada shall be and the same is hereby prohibited of any immigrant who has come to Canada otherwise than by continuous journey from the country of which he is a native or naturalized citizen and upon a through ticket purchased in that country or prepaid in Canada.

Upon the expiration of his temporary permit appellant became an "immigrant" within the meaning of section 2 (h) of the statute.

It is not pretended that the appellant could comply with the provisions of this Order-in-Council or that he was a Canadian citizen or had Canadian domicile. In my opinion, therefore, the Board of Inquiry had good ground for ordering the deportation of the appellant.

Appellant attacks the warrant under which his arrest was actually made on the ground that it is an informal document and does not comply with the formalities of the *Criminal Code*. No effect can be given to this contention. The *Immigration Act* does not lay down any requirements as to form in the case of a warrant.

The main contention on behalf of the appellant before us was that the document delivered to the appellant on the 18th of June, 1945, (Exhibit 4) is alone to be considered as the order for deportation and that it is in form insufficient and incapable of being acted upon for that reason as well as for the reason that it was not served upon the transportation company which brought the appellant to Canada as required by the provisions of section 33, s.s. 5, of the Act.

The subsection referred to provides that an order for deportation by a Board of Inquiry may be in form C in the schedule to the *Act* and that a copy of the order shall forthwith be delivered to the person affected and a copy served upon the representative of the transportation company which brought such person to this country. It is manifest that the document delivered to the appellant does not sufficiently contain the reasons for the decision, but when taken together with Exhibit 6, as I think may be done, the want is supplied.

It is objected however, although this ground was not pleaded, that as the one document only was delivered to the appellant, this was not sufficient service under the statute.

In considering this objection it is important to consider what took place at the conclusion of the taking of evidence before the Board. The appellant called the Chairman of the Board as his witness before the judge of first instance and through him placed in evidence both documents. The witness deposed in direct examination:

Q.—Voulez-vous déposer comme 1-4 une copie certifiée par vous de la décision rendue par le Comité d'enquête dans ce cas-là?

EXHIBIT 6—Decision of Board of Inquiry, dated June 18, 1945.

R.—Oui.

Q.—Maintenant cette décision-là est-ce que les conclusions auxquelles en est arrivée cette cour d'enquête ont été *lues* à de Marigny?

1948

DE MARIGNY v. LANGLAIS

Kellock J.

R.—Oui.
Q.—Est-ce que l'ordre de déportation a été *lu* à de Marigny?
R.—Oui.

The "ordre de déportation" referred to in the last question above, is Exhibit 4. It is to be noted that the appellant's notice of appeal states that "I hereby appeal from the decision of the Board of Inquiry . . . whereby my application to land in Canada has been rejected, and I have been ordered to be deported *to the place in the country whence I came or to the country of my birth or citizenship*". It is Exhibit 6 and not Exhibit 4 which contains the *underlined* words.

It is plain therefore that in addition to the document actually delivered to him, the appellant had before him the second document when preparing his notice of appeal. In these circumstances I think there was sufficient service upon the appellant.

In *Samejima's* case (1) the appellant, a Japanese subject, had been taken into custody under an order of the Deputy Minister of Immigration on a complaint made that the appellant had effected entry "contrary to the provisions of section 33, subsection 7, of the said Act". An inquiry was held by a Board of Inquiry but neither the complaint nor a copy was before the Board or had been served upon the appellant. At the conclusion of the hearing an order of deportation was made, not in the statutory form, the reasons being stated in the same form as in the complaint mentioned above. On habeas corpus proceedings this order was quashed and the appellant released but he was subsequently re-arrested without further hearing on a later order of the Board, sufficient in form. The appellant again took habeas corpus proceedings but it was held by the judge of first instance and the Court of Appeal for British Columbia that he was legally detained. The appeal to this court was allowed and it was held that the Board was without jurisdiction to make the second or amending order once the first order had been quashed, although before that time the original order might have been amended to comply with the actual decision of the Board. In the circumstances of that case the majority of the Court was of opinion that while the appellant was still liable to

(1) [1932] S.C.R. 640.

proceedings under the *Act*, he had suffered prejudice before the Board in not having known what the ground of complaint against him was. The case is therefore obviously distinguishable from the case at bar.

As to the objection of lack of service of the order of deportation upon the transportation company, that, in my opinion, is an objection to be raised by the transportation company and not by the person seeking entry. Failure of such service cannot affect the validity of the order of deportation so far as it affects a person in the position of the appellant.

The appellant next complains that in Exhibit 6 he was ordered "to be deported to the place in the country whence he came or to the country of his birth or citizenship." He contends that by reason of section 39 the only place to which he could legally be deported was Cuba, whereas in fact at the time these proceedings were commenced he was being held for deportation to Great Britain and thence to Mauritius.

As to the alternative form of the order it is sufficient to say that the statutory form, Form C, so provides. Furthermore, by section 46 it is provided that every person ordered to be deported who has been brought to Canada by ship shall be conveyed "free of charge by the transportation company which brought him to Canada to the place in the country whence he was brought or to the country of his birth or citizenship". By section 39 it is provided that when any immigrant or other person is rejected or ordered deported and such person has not come to Canada by continuous journey from the country of which he is a native or naturalized citizen, but indirectly through another country "which refuses to allow such person to return or be returned to it" then the transportation company shall convey him to the country of which he is a native or naturalized citizen whenever so directed by the Minister or other official mentioned. Again, by section 45 it is provided that any person held at an immigrant station pending final disposition of his case and rejected shall "if practicable be sent back to the place whence he came on the vessel, railway train or other vehicle by which he was brought to Canada".

1948

DE MARIGNY v. LANGLAIS

Kellock J.

It was obviously impossible in view of the disposition of the ship on which the appellant came to Canada, as mentioned above, to return him to Cuba on such ship and therefore section 45 cannot apply. Further, on his own evidence transportation to Cuba was not available and in addition the evidence for the respondent indicates that Cuba refused to accept his return. Accordingly, section 39 cannot apply. In the circumstances here present therefore the only country authorized by the Act to which the appellant could be deported was Mauritius and the instructions to consign him to that country are proper. There can be no room for objection to the statutory provisions themselves on any ground of extra-territoriality; 1932-33, cap. 39; *Co-operative Committee* v. *Atty.-Gen.* (1).

As to the appellant's contention that the right to enforce the order of deportation had been lost by failure to act upon it immediately, reliance is placed upon *In re Poll* (2), and *In re Ferenc* (3). I do not think it necessary to discuss either of these cases. Assuming they were rightly decided the facts in the case at bar do not bring it within anything decided in either of those cases. I see nothing in the evidence which supports the argument, if indeed such an argument would be tenable.

The only other contention of the appellant which requires notice is the submission that the appellant had the right to appear personally on the appeal to the Minister and that this was not accorded him. In my opinion the appellant had no such right. The difference between the statutory provisions as to the original hearing before the Board of Inquiry and those with regard to the appeal demonstrate this. It is clear under section 15 and 16 that the immigrant has the right to appear personally, to be represented by counsel and to adduce such evidence as he desires. When it comes to the appeal, however, it is provided by section 20 that the immigration officer shall forward within forty-eight hours after the filing of the Notice of Appeal, a summary record of the case to the Deputy Minister accompanied by his views thereon in writing. By section 21 the appellant is directed, pending the decision of the Minister, to be kept in custody unless released under bond. It is

(1) [1947] 1 D.L.R. 577 at 588.
(2) [1937] 3 W.W.R. 136.
(3) 71 C.C.C. 58.

quite plain in my opinion that these provisions do not contemplate the personal appearance of the appellant before the Minister.

In the result therefore, the appeal in my opinion fails on all grounds and should be dismissed with costs.

RAND J.:—The applicant is seeking to enter this country and it appears beyond question that his entrance is forbidden by Order in Council P.C. 23 of January 7, 1914 as follows:—

> From and after the date hereof the landing in Canada shall be and the same is hereby prohibited of any immigrant who has come to Canada otherwise than by continuous journey from the country of which he is a native or naturalized citizen and upon a through ticket purchased in that country or prepaid in Canada.

He raises several objections to the steps that have been taken against him, but the only one I think deserving of consideration is that no sufficient order for deportation has been served upon him.

On June 18, 1945 upon the conclusion of the enquiry into his request for admittance, during which the applicant, after declining to avail himself of counsel, disclosed the relevant facts, the Board announced its decision refusing permission on grounds, including that mentioned, which, admittedly, were fully explained to him. At the same time he was served with a formal order in which those grounds were set out in summary headings referring to the authority on which they were based. From that decision he appealed to the Minister, who after consideration on August 10, 1945 dismissed the appeal.

As early as May, 1946, the applicant was represented by counsel. In the pleading presented on the application for habeas corpus the order is challenged not because of any insufficiency in particulars of the grounds but because it did not give the direction for deportation in the precise language of the decision.

In the administration of the *Immigration Act,* what is to be looked for and required is a compliance in substance with its provisions. The case of *Samejima* v. *Rex* (1) shows that this Court will not hesitate to condemn "hugger-mugger" proceedings, as Sir Lyman Duff called them, or proceedings in which a defect in substance appears. In

(1) [1932] S.C.R. 640.

1948

DE MARIGNY v. LANGLAIS

Kellock J.

this case the facts are not in dispute, and in relation to P.C. 23 no answer to the order has been suggested. That order has been at the disposal of counsel for almost two years, during which efforts have been made both to have it rescinded on considerations of "fairness" and to enable the applicant to obtain transportation or entry to the United States or to Great Britain. In these circumstances it would be trifling with the serious administration of such a law to hold that a lack of formal statement of particulars, if there is any, at this time constitutes a defect of substance in the proceedings. I have no hesitation in holding that such a ground is not now open to the applicant.

I would dismiss the appeal.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Marcel Gaboury* and *John E. Crankshaw.*

Solicitors for the respondent: *Gustave Adam* and *Guy Favreau.*

Solicitor for the Attorney-General of Canada: *Charles Stein.*