1953

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HER MAJESTY THE QUEEN and D. N. McDONELL ..... APPELLANTS;

AND

LEONG BA CHAI ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Immigration Regulations—"Child", meaning of—Entry refused—Mandamus—Crown, Servant of—Child's status as to legitimacy governed by law of father's domicile—Immigration Act, R.S.C. 1927, c. 93—P.C. 2115, Sept. 16, 1930, P.C. 6229, Dec. 28, 1950.

If it be established that a child has been legitimated in China, while his father has his domicile there, the law of Canada will recognize such child as legitimate within the meaning of the regulation (Order in Council P.C. 2115 of Sept. 16, 1930 as amended by P.C. 6229 of Dec. 28, 1950) passed under the authority of s. 38 of the *Immigration Act*, R.S.C. 1927, c. 93, because the personal status of such child as to his legitimacy is governed by the domicile of his father. Dicey's *Conflict of Laws*, 6th Ed. p. 86; *Wahl* v. *Attorney General*, 147 L.T. 382; *In re Goodman's Trust*, 17 Ch. D. 266; *Shedden* v. *Patrick*, 1 Macq. 535, at 538, 568; *Khoo Leong* v. *Khoo Hean Kwee*, [1926] A.C. 543; *Trottier* v. *Rajotte*, [1940] S.C.R. 203, at 208; *Stephens* v. *Falchi* [1938] S.C.R. 354.

The Courts do not issue commands to the Crown, (*The Queen* v. *Lords Commissioners of the Treasury* 7 Q.B. 387 at 394) but the admission of the child having been refused because of an error in law, and legitimacy having been established, mandamus will lie directing the Immigration Officer, appointed to fulfil a particular act, to carry out his statutory duty to determine whether the child otherwise complies with the provisions of the *Immigration Act*. *Drysdale* v. *Dominion Coal Co.*, 34 Can. S.C.R. 328; *Minister of Finance* v. *the King*, [1935] S.C.R. 278 at 285; *Joy Oil* v. *the King*, [1951] S.C.R. 624 at 642.

Judgment of the Court of Appeal of British Columbia, affirmed.

APPEAL from a judgment of the Court of Appeal of British Columbia (1), dismissing appellant's appeal from a judgment of Clyne J. (2), who in mandamus proceedings directed the Immigration Officer-in-Charge at Vancouver to consider the application of Leong Hung Hing, a native of China who acquired Canadian citizenship in 1951, for the admission to Canada as an immigrant of his son, the respondent.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.

(1) [1953] 2 D.L.R. 766; 105 Can. C.C. 136.

(2) [1952] 4 D.L.R. 715; 103 Can. C.C. 350.

F. P. Varcoe Q.C. and *L. A. Couture* for the appellants.

R. P. Anderson for the respondent.

The judgment of the Court was delivered by:—

TASCHEREAU J.:—The relevant facts of this appeal are the following:—On the 5th of March, 1952, the respondent, a Chinese temporarily living at Hong Kong, made an application through his father, Leong Hung Hing, for an order directing D. N. McDonell, Acting District Superintendent for the Pacific District of the Immigration Branch of the Department of Citizenship and Immigration, to show cause why he has refused and continues to refuse to consider the application of the respondent for his admission to Canada, and why an order should not be made ordering him, the said D. N. McDonell, to consider the application. Mr. Justice Clyne before whom the application was made, directed the issue of a writ of mandamus ordering the Immigration Officer forthwith to consider the said application, and the Court of Appeal of British Columbia unanimously confirmed this decree.

Under the authority of s. 38 of the *Immigration Act* (c. 93, R.S.C. 1927) which allows the Governor-in-Council, by proclamation or order, to prohibit or limit in number, for a stated period or permanently, the landing in Canada of immigrants belonging to any nationality or race, the Governor-in-Council made the following regulation:—

> From and after the 16th August, 1930, and until otherwise ordered, the landing in Canada of any immigrant of any Asiatic race is hereby prohibited, except as hereinafter provided:
>
> The Immigration Officer-in-Charge may admit any immigrant who otherwise complies with the provisions of the Immigration Act, if it is shown to his satisfaction that such immigrant is,—
>
> The wife, the husband, or the unmarried child under twenty-one years of age, of any Canadian citizen legally admitted to and resident in Canada, who is in a position to receive and care for his dependents.

It will therefore be seen that, if the immigrant *otherwise complies with the provisions of the Immigration Act,* he may be admitted if he is the unmarried child, under twenty-one years of age of any Canadian citizen, legally admitted and resident in Canada.

The father Leong Hung Hing was born in China in 1884 and he married his first wife Fong Shee in June, 1911, in China, and she died in 1936. Hung Hing came to Canada

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and was admitted in September, 1911, and visited China in 1926 and also in 1932. Having had no children of his union with Fong Shee, he contracted in 1926, on his first visit to China, an alleged second marriage with a Chinese woman in accordance with local custom. To Hung Hing and this woman, two children were born, one of whom was the applicant respondent in the present case, and whose admission to Canada is now applied for.

Hung Hing maintained not only his wife but the children and their mother, by forwarding annually from $500 to $600, while he was here employed as a cook in Vancouver. In fact, he lived some two years with them in the one establishment from 1932 to 1934. Hung Hing was granted a certificate of Canadian citizenship in February, 1951, and it was during the following month that he applied to the Immigration Officer-in-Charge in Vancouver for the admission to Canada of Ba Chai. In April of the same year, he was advised by the Immigration Officer that his application had been rejected since Ba Chai was, in the view of the Officer, an illegitimate child.

Many important questions have been raised by the Attorney General on behalf of Her Majesty the Queen, but I have come to the conclusion that they need not all be considered and that, if it be established that the respondent has been legitimated in China, while the father had his domicile in China, the law of Canada will recognize this child as legitimate within the meaning of the regulation, because the personal status of the respondent as to his legitimacy, is governed by the law of the domicile of his father. (*Vide Dicey's Conflict of Laws*, 6th ed. page 86; *Wahl* v. *Attorney General* (1); *In Re Goodman's Trust* (2); *Shedden* v. *Patrick* (3); *Khoo Leong* v. *Khoo Hean Kwee* (4); *Rajotte* v. *Trottier* (5); *Stephens* v. *Falchi* (6). In that case, it will be unnecessary to consider if the word "child" found in the regulation includes an illegitimate child.

In order to prove the Chinese law, the respondent called Mr. Harry Fan who lives in Vancouver, and who is a graduate of the University of British Columbia and also a

(1) (1932) 147 L.T. 382.
(2) (1881) 17 Ch.D. 266.
(3) (1854) 1 Macq. 535, 538, 568.
(4) [1926] A.C. 529 at 543.
(5) [1940] S.C.R. 203 at 208.
(6) [1938] S.C.R. 354.

graduate of Chutow University Law School, where he studied during a period of three years, and he is therefore qualified to practise law in Shanghai, China. Mr. Fan explained that in China, where the civil law was codified in 1930, a child born out of wedlock is an illegitimate child, but the law provides for legitimation. This legitimation may take place by the subsequent marriage of the natural parents, and secondly, by acknowledgment. He stated that there are three ways of acknowledgment, but it is necessary to refer to the third only which is by the maintenance by the father of the natural child. Article 1065 of the Civil Code of China reads as follows:—

> A child born out of wedlock who has been acknowledged by the natural father is deemed to be legitimate; where he has been maintained by the natural father, acknowledgment is deemed to have been established.

During the argument, Mr. Anderson acting on behalf of the applicant, was informed by the Court that he did not need to elaborate any further the questions of domicile of the father, of the validity of the second marriage, of the proof of the foreign law, and of the illegitimacy of the child. The Court was of opinion, as the courts below found, that if the father changed his domicile in 1951 when he became a Canadian citizen, he nevertheless had not abandoned his Chinese domicile at the time his child was born in 1933. The Court also thought that whether the second marriage was valid or not, the child had become from the time of his birth a legitimate child, since the law, which was sufficiently proven, had a retroactive effect owing to the fact that the child was legitimated by acknowledgment. It was therefore found unnecessary to discuss the question as to whether the word "child" included an illegitimate child.

It naturally follows that the applicant being the legitimate son, under twenty-one years of age, of a Chinese citizen, legally admitted to and resident in Canada, does not fall within the ban of the regulation, but may be admitted to the country, if he otherwise complies with the provisions of the Immigration Act.

It is claimed by the appellants that a writ of mandamus does not lie, and that no order may be issued directing the Immigration Officer to consider the application for admission of Ba Chai into Canada as an immigrant. With this,

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I disagree. What is asked is not the admission of Ba Chai into Canada, but the consideration of his application which must be examined in the light of the *Immigration Act*. This has been illegally denied.

As the result of an error in law, because he believed that the applicant was not the child of Hung Hing, within the meaning of the regulation, the Immigration Officer refused to exercise his jurisdiction. It was conceded by the Attorney General that there was no right of appeal from this decision in the present case. The more convenient, beneficial and effective mode of redress, is by way of mandamus, as there is no other legal specific remedy for enforcing the applicant's right to a hearing before the Board and the Minister. Now that it is established that Ba Chai is the legitimate child of Hung Hing, the Immigration Officer should determine whether he *otherwise complies with the provisions of the Immigration Act.*

A quite similar case was heard by this Court in 1904 (*Drysdale* v. *Dominion Coal Co.* (1)). The Commissioner of Mines for Nova Scotia had refused to take into consideration an application of the Dominion Coal Company, concerning a dispute between that company and one John Murray, as to their respective rights to certain leases of Crown lands. It was held that the company was entitled to a determination of those rights, and that the remedy was by way of mandamus. It may also be useful to consider what was said by Locke J. in *Joy Oil* v. *The King* (2), where the record, on a petition of right, was returned to the Commodity Prices Stabilization Corporation, so that it could deal with the claims for subsidies advanced in the action.

It has been held several times that when a duty has to be performed by the Crown, the courts cannot claim any power to command the Crown (*The Queen* v. *Lords Commissioners of the Treasury* (3); Short & Mellor, *The Practice of the Crown Office,* 2nd ed. 1908, page 202). This is not the case in the present instance.

Other considerations would have to be taken into account if the Immigration Officer were a servant of the Crown, acting in his capacity of servant and liable to answer only

(1) (1904) 34 Can. S.C.R. 328. (2) [1951] S.C.R. 624 at 642.
(3) (1872) 7 Q.B. 387 at 394.

to the Crown (*The Queen* v. *Secretary of State for War* (1)). But, the Immigration Officer has been designated by statute to fulfil a particular act. He is charged with a public duty which runs in favour of the respondent in whom it created a civil right (*The Minister of Finance* v. *The King* (2)). If he refuses to act and discharge that duty, he is amenable to the ordinary process of the Courts.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the Attorney General of Canada: *F. P. Varcoe.*

Solicitor for the appellants: *W. H. Campbell.*

Solicitor for the respondent: *R. P. Anderson.*