MOOSA v. REGISTRAR OF ASIATICS AND MINISTER OF JUSTICE.

1915. *March* 31. DE VILLIERS, J.P., CURLEWIS and GREGOROWSKI, JJ.

Asiatics.—Registrar's refusal to issue certificate of registration.—Decision by magistrate. — Grounds of interference by Supreme Court.—Proc. 14 *of* 1902, *sec.* 19.—*Act* 36 *of* 1908, *sec.* 6 (2).

An appeal was brought before a magistrate under sec. 6 (2) of Act 36 of 1908 from the decision of the Registrar of Asiatics refusing to issue a certificate of registration. The appeal was dismissed and application was now made to the Supreme Court for an order directing the magistrate to allow the appeal, *Held*, that in order to interfere with the magistrate's decision it was necessary for the applicant to show either that the magistrate had not done his duty or had acted dishonestly or *mala fide*, or that there had been an irregularity in the proceedings. A mere mistake of law or fact on the part of the magistrate afforded no ground for relief.

The procedure in the case of *Chotabhai* v. *Minister of Justice* (1911, A.D. 13) not followed.

Application for an order restraining the Minister of Justice from carrying out a deportation order against the applicant and authorising and compelling the Registrar of Asiatics to issue a certificate of registration under sec. 4 (3) (*b*) of Act 36 of 1908.

B. A. Tindall, for the applicant: The Registrar refused the certificate under sec. 6 (1). This is an application for a mandamus compelling him to issue the certificate as the applicant was resident and actually in the Transvaal on the 31st May, 1902. The Registrar has not carried out his duty. The magistrate decided on the facts in favour of the applicant, but refused to draw the legal inference which applicant was entitled that he should draw.

The procedure followed has been that approved of in *Chatabhai's* case (1910, T.P.D. 1151; 1911, A.D. 13); see also *Ho Ying* v. *Minister of Justice* (1911, T.P.D. 33); *Naran Dala* v. *Minister of Justice* (1911, T.P.D. 639).

As to the meaning of the word "residence" see *Witwatersrand Township & Estate Co.* v. *Ritch* (1913, A.D. 423, at p. 425). One must have regard to the intention of the legislature in each particular statute; *Buck* v. *Parker* (1908, T.S. 1100, at p. 1104).

[CURLEWIS, J.: In this Act, "residence" is used as opposed to the case of a person who is here only temporarily.]

I submit not. The mere fact that his presence here is only temporary does not prove that he is not resident here, otherwise

residence would be identical with domicile; see *Findlay* v. *Wessels* (25 S.C. 37).

I. Grindley-Ferris, for the respondent: The Court will only interfere with the decision of the Registrar if there is an irregularity. Unless the applicant can make out a case for review, he has no remedy. Where a magistrate makes an administrative order, no appeal lies; see *Magda and Another* v. *Registrar of Asiatics* (1909, T.S. 397); *Ex parte Hertzberg* (1903, T.H. 1). In *Chotabhai's* case (*supra*) this point was taken in the court below, but specifically waived on appeal. As to grounds of review, see *Johannesburg Consolidated Investment Co.* v. *Johannesburg Town Council* (1903, T.S. 111, at p. 115).

Here the Registrar of Asiatics has made a statutory order in accordance with sec. 4 of Act 36 of 1908. The applicant has to satisfy the Registrar of Asiatics; see *Nathalia* v. *The Registering Officer* (1912, A.D. 23); *Judes* v. *Registrar of Mining Rights* (1907, T.S. 1046, at p. 1051). An analogous case under the Workman's Compensation Act is *Doyle* v. *Shenker & Co.* (1915, A.D.), where it was held that a mere mistake of law cannot be relied upon as constituting such a gross irregularity as could be reviewed by the Supreme Court. See also *Liquidator of the Langlaagte Proprietary Mines* v. *The Crown Mines and Mining Commissioner* (1915, A.D.), where the decision of the Mining Commissioner was challenged and an appeal taken to the Minister of Mines. It was held that no appeal lay from the Minister's decision. See also *Roux and Others* v. *Hugo and Others* (1915, A.D.); *Jooste* v. *Witwatersrand Licensing Court* (1909, T.S. 33); *Colonial Government* v. *Joubert* (4 S.C. 211); and the following English cases: *Regina* v. *Bird* (3 M.C. 129); *Queen* v. *Holl and Others* (7 Q.B.D. 575); *Board of Education* v. *Rice* (1911, A.C. 179); Halsbury's *Laws of England* (Vol. X, pp. 95, 96 and 97); *Allcroft and Others* v. *Bishop of London and Others* (1891, A.C. 667, at p. 675).

This Court cannot interfere. The applicant's only remedy is to go to Parliament. The question of residence is a pure question of fact upon which this Court is not in a position to express an opinion.

(He was stopped on the merits.)

Tindall, in reply: If an officer takes a wrong view of the law, the Court can upset his decision; see *Struben* v. *Minister of Agriculture* (1910, T.P.D. 903, at p. 926); *Khotas & Co.* v. *The Colonial Treasurer* (1909, T.S. 180).

DE VILLIERS, J.P.: We have come to the conclusion that this application must be dismissed with costs.

The applicant claims to be entitled to a certificate of registration under sec. 4 (3) (*b*) of Act 36 of 1908, in that, on the 31st May, 1902, he was resident and actually in this Colony. And if he had been able to establish that fact before the proper authority he would no doubt have been entitled to what he claims. But he applied to the Registrar of Asiatics, who, under section 6 (1), came to the conclusion that as he had failed to establish that he fell within the terms of the sub-section, and accordingly refused the application. Now section 6 (2) provides that in such a case, if the applicant is dissatisfied with the decision of the Registrar, he can appeal to the magistrate specially assigned to hear such appeals, and that such magistrate shall be deemed, when hearing such appeal, to be an inferior court, within the meaning of sec. 19 of the Administration of Justice Proclamation, 1902. The appeal was lodged and the magistrate accordingly heard the application and also dismissed it. In his reasons he says: "I heard the appeal and found as a fact that the applicant was actually in the Transvaal Colony on the 31st May, 1902, but I also found that he was not resident therein on that date."

Now it has been decided in *Magda's* case (1909, T.S. 397) that in such a case a magistrate is acting not in a judicial but in an administrative capacity, and therefore when he has dismissed the application no appeal lies from his decision. He is enjoined, when he has dismissed the application, to give an order in writing for the removal of the applicant, and this has been done. If everything has been done according to law then, in the ordinary course, the applicant has exhausted his remedies, and he must submit to the order of deportation. In this case, however, the applicant is not satisfied, and he comes to the Court by way of application and asks for an order restraining the Minister of Justice from carrying into effect the deportation order, declaring such order null and void, and also for an order authorising and compelling the Registrar of Asiatics to issue to him a certificate of registration as an adult Asiatic under Act 36 of 1908.

It is admitted by Mr. *Tindall*, who has appeared on behalf of the applicant, that this application was not made under the powers granted to the Court under section 19 of the Administration of Justice Proclamation, and the application itself is very vague as to the grounds upon which the applicant asks the Court to interfere

with the order given by the magistrate. He claims to be entitled to remain in the Transvaal by reason of the fact that he proved he had lived in the Transvaal for a period of four or five months, commencing in April, 1902, but he does not allege either that the magistrate has not done his duty, or has not acted honestly, or *bona fide*, or that there has been gross irregularity in the proceedings. The application therefore would have occasioned us no difficulty whatever had it not been for the case of *Chotabhai* (1911, A.D., p. 13), which went to the Appellate Division and in which the procedure adopted seems to have been the procedure followed in this case. The point was there specifically raised in the first instance before WESSELS, J., who said: "Applicant asks for a *mandamus* on the ground that his expulsion would be an illegal act inasmuch as he is by law entitled to reside in this Province. This Court has the inherent right to prevent the Government or any official from interfering with the liberty of any resident within its jurisdiction. The person who claims the right to interfere with the liberty of a citizen must shew that he has been given that right by the legislature. If he can shew that he possesses that right this Court will not interfere with his action, but every person resident within the jurisdiction of this Court is entitled to bring any official before the Court to justify his act of interfering with applicant's liberty." When the case came on appeal before the Appellate Division these words were approved of by the late CHIEF JUSTICE of South Africa. If they are taken to be general, if they enunciate merely a principle of law, without any reference to the particular statute, then I entirely agree, but I cannot agree that it applies in the present case, for here it seems to me perfectly clear that the *onus* is not upon the repondent, but upon the applicant to shew that some ground for the interference of the Court exists; that one of the officials has not done his duty or has not done it honestly, or that there has been some gross irregularity.

Mr. *Tindall* has argued that the grounds of review are not exhausted by section 19 of the Administration of Justice Proclamation, and that is so, because it was laid down in the case of the *Johannesburg Consolidated Investment Company* v. *The Johannesburg Town Council* (1903, T.S. 111) that there is another ground of review. In that case the CHIEF JUSTICE said: "Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity, or clear illegality in the performance of its duty, this Court

may be asked to review the proceedings complained of, and set aside or correct them." There is of course no dispute about that, but, apart from that, I am not aware of any jurisdiction in this Court to set aside the proceedings. The Court will issue a *mandamus* upon an officer upon whom a statutory duty rests, to perform certain functions, to do his duty, if he refuses to do so and, if he exceeds his duty the Court will restrain him and keep him within the limits of the statute, or, if he acts dishonestly, the Court will correct him. But, in the absence of any irregularity or dishonesty of that kind, the Court cannot interfere.

In this case there are no grounds for interference. As I have pointed out, no grounds are set out in the petition, but it has been said that the reasons of the magistrate are unsatisfactory. I do not know that the magistrate was bound to give any reasons; he is not a party to the proceedings here, and if he had been called upon no doubt he would have given his reasons at length. But the argument which has been addressed to us runs somewhat as follows: There is evidence upon the record of the presence of the applicant in the Transvaal during a period of four months. As this evidence is uncontradicted, and as the magistrate does not say he does not believe the evidence, we must come to the conclusion that the magistrate acted improperly in not saying that that amounted to residence. In my opinion that is a conclusion which is not warranted. The magistrate has informed us that he found it proved that the applicant was present in the Colony on the 31st May, 1902, but he has not said whether he believes or disbelieves anything else, and we cannot therefore say that, because the magistrate does not specifically say that he does not believe the witnesses, that the evidence must be taken to have been believed by him. I have, therefore, come to the conclusion that there is no ground for the court to interfere with the decision arrived at.

Mr. *Tindall* has further argued that the magistrate has made a mistake in law in not construing the presence of the applicant here as residence, but even if it could have been construed as residence we are bound by the decision in the case of *Doyle* v. *Shanker* (1915, A.D.), where it was laid down that a mere mistake of law, in adjudicating upon a suit which the magistrate has jurisdiction to try, cannot be called an irregularity in the proceedings, because that would virtually amount to this that there would in every case be an appeal on law, which could never have been the intention of the legislature. For

these reasons I have come to the conclusion that the application must be dismissed with costs.

CURLEWIS, J.: It was laid down in *Magda's* case that there is no appeal from the decision of the magistrate in a case of this kind. Mr. *Tindall* has not called that decision into question and has not brought this matter before the court by way of appeal, but he contends the applicant is entitled to come before us by way of review and that the application in this case has followed the form adopted in the case of *Chotabhai*. Just as the court in that case found it possible to deal with the matter and practically to reverse the decision of the magistrate, he asks the court to do so in this case.

With regard to the remark made by my brother WESSELS, that the court has an inherent right to prevent the Government or any official from interfering with the liberty of any resident within its jurisdiction, I quite agree with the observation, but where the legislature deems fit to confer upon any person or persons authority or power to limit or restrain the liberty of the subject, and does not grant the subject a right of appeal to the ordinary courts of law, I do not see how we can interfere so long as that person acts honestly and regularly in accordance with the procedure prescribed for him. It is entirely a question for the legislature, which, in this case, has deemed fit to confer, firstly, on the Registrar of Asiatics, and, secondly, on a certain magistrate to be appointed by the Government, certain specific powers. The Registrar has to refuse or grant the application. If he refuses there is an appeal to the magistrate. If that magistrate acts purely as an administrative officer and there is no appeal, as was laid down in *Magda's* case, then, even though his decision would be an infringement of the liberty of the subject, I do not see how we can interfere, unless on the general grounds on which the court has jurisdiction to interfere with any public body or official, as laid down in the case of the *Johannesburg Consolidated Investment Company* v. *The Johannesburg Town Council* (*supra*), or on the grounds set out in sec. 19 of the Administration of Justice Proclamation. It is provided by sec. 6 (2) that the magistrate, when hearing an appeal from the decision of the Registrar, shall be deemed to be an inferior court within the meaning of sec 19 of the Proclamation, from which I conclude that the legislature intended that that magistrate should not be regarded as an ordin-

ary judicial officer acting in an inferior court of justice, but as an administrative officer, and that if he, or his decision, can be attacked on any of the grounds set out in sec. 19, the proceedings before him can be brought into review as those of an inferior court.

The application before us contains no grounds whatever for review of the magistrate's decision. There is no allegation of irregularity, misconduct, or any of the other grounds on which the decision can be attacked. The petition as presented practically amounts to an appeal against the decision of the magistrate. No new facts are alleged; no allegation is made which was not before the magistrate, but we are asked to reverse his decision, and it is suggested that, though this is not an appeal, the court can do it on application. It appears to me that, if we can do it on this application, without any of the grounds being alleged, as set out in sec. 19, or on the general grounds as stated in the *Johannesburg Consolidated Investment Company* v. *The Johannesburg Town Council*, we should be practically sitting in appeal on the decision of the magistrate, and, in my opinion, it makes no difference whether the decision sought to be attacked is one on fact or on law. This Court has no jurisdiction to inquire whether the magistrate decided rightly or wrongly in coming to the conclusion to which he did, viz.: that the applicant was not resident within the Transvaal on the 31st May, 1902.

It was urged that because the magistrate found as a fact that the applicant was actually in the Colony on the 31st May, 1902, he should, in view of the other evidence before him, have held that applicant was also resident on that date. I take the decision to be that although he was actually here on the 31st May he was not resident here within the meaning of the Act. That being so, whether the magistrate was right or wrong in his decision, whether it was one on fact or on law, I do not think this Court has any jurisdiction to interfere. It is conceivable that a decision may be so glaringly wrong as to suggest misconduct on the part of a magistrate, but that is not the case before us.

GREGOROWSKI, J.: I am of the same opinion. As far as I understand, the only ground upon which the applicant asks the Court to interfere is that the magistrate, in confirming the decision of the Registrar of Asiatics in not granting a certificate, and in issuing the order for the deportation of the applicant, went wrong on a point of law. Mr. *Tindall* contended that in every case

where an inferior court went wrong on a matter of law, this Court even though there was no appeal, had the right to give relief against the wrong decision. I do not think there is authority for that proposition. Where an officer has to decide a matter, which is left entirely to him, and there is no appeal, then I do not think it at all follows that if he were to go wrong upon a question of fact or law, this Court would necessarily have the right to set him right; in fact, I think all the decisions go the other way. There must be some gross irregularity on his part, some refusal on his part to do his duty or the like, not merely a wrong decision, to justify the Court in interfering.

In this case all that is said is that the magistrate was bound to find, on the facts laid before him, that applicant was in the Transvaal and actually resident in the Transvaal on the 31st May, 1902, and that, inasmuch as he has found that, although he was actually in the Transvaal, he was not resident, such a decision was erroneous on the face of it, and this Court should set it right. The doctrine which this Court has consistently laid down is that where a matter is left to an officer to decide, and he decides on the merits, even if that decision appears to be wrong, the Court will not interfere. In this case I am not even satisfied that a *prima facie* case has been made out that the decision was wrong on the matter of residence. The present is a very peculiar case, a case of a minor coming to this country to join his relatives, of his remaining here for two or three months and then going back to India and remaining there for about 13 years. It is admitted that, to form residence, there must be an intention to remain definitely or indefinitely, and that a person should have taken up his abode in the country. It may well be doubted whether the applicant had ever taken up his abode here, considering he was only here for so short a time, that he was still, to all intents and purposes, a minor, that before he could settle himself, he became ill and was advised that the country would not suit him. He then went back to India, where he made his home, married, and brought up a family, coming back here only after 13 years. I do not see how it is possible to say that the magistrate was obviously wrong in holding that residence under such circumstances was not proved.

It seems to me the intention of the legislature must have a great effect in interpreting the meaning of the word "residence" in this particular statute. I think the legislature intended to

secure vested rights and it was thought that, if an Asiatic was here at the time peace was concluded, it would not be fair to deprive him of such rights if he had them. I think "residence" would naturally imply that there was some sort of permanence connected with the vested right which the legislature did not wish to take away. Could it be said, in a case like this, that this minor, who hardly had a mind with which to decide for himself, had residence, in the sense contemplated. I merely refer to these circumstances to shew that, even on the facts, the applicant has a very weak case, assuming the law were not so opposed to granting him relief. Apart from this the evidence given is very unsatisfactory. There is one declaration that the applicant came in by Delagoa Bay and had a return pass, and another that it was at Durban that he made his entrance into South Africa. Under all the circumstances I do not see how the applicant can succeed.

DE VILLIERS, J.P.: The application must be refused with costs.

Attorneys for Applicant: *Clark & Price;* Attorney for Respondent: *The Government Attorney.*

[A. D.]

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*WILLIAMS & ADENDORFF v. JOHANNESBURG MUNICIPALITY.

1914. *June* 24, 25; *August* 10. DE VILLIERS, J.P. BRISTOWE and CURLEWIS, JJ.

Municipality. — Bye-law. — Discrimination between white and coloured persons.—Tramways.—Ord. 2 (*priv.*), 1906, *sec.* 31. *Provincial Councils.—Powers discussed.*

Ord. 2 (priv.), 1906, sec. 31, provided that the Johannesburg Municipality should have the sole and exclusive right to establish, maintain and work electric or mechanically worked tramways for public use within the municipality. The municipality established such a tramway and provided in a bye-law that the council might set apart and licence any carriage for the use of European passengers only and others for the use of coloured passengers only, making it an offence for passengers of the one class to enter or travel in a carriage set apart

* The appeal in this case to the Appellate Division having been withdrawn, the report is now published in this Volume.—ED.