8th October, 1960

Judge:—

The Hon. Mr. Justice W. Harding, C.B.E., K.M. B. Litt., LL.D.

Vivian De Gray, M.V.O., B.B.E., B.E.M., ne.

versus

Jean Sybil Palmer

Aliens — Removal — Prohibited Immigrant — Wife — Divorce — Personal Separation — Section 5 (a) of Ordinance No. I of 1948.

The wife of a person who has been born in Malta and is a British subject is a person who, in terms of the Immigration Ordinance, 'belongs to the Island". Hence, the wife of such a person is not a prohibited immigrant.

But if there has been a divorce between that person and his wife, and the latter has been living apart from her husband, the wife cannot claim that she is not a prohibited immigrant. For although a judgment of divorce given by a Court outside Malta, cannot be executed here, in regard to the dissolution "a vinculo matrimonii" it can be given effect to as a judgment of personal separation, if it is based on some cause which is recognised by the law of Malta as a ground of personal separation, and if the cause, under Maltese law, gives rise to the particular consequence which is being debated.

The order of the Commissioner of Police for the removal from these Islands of such a woman cannot be resisted by her on the ground that she is the wife of a person belonging to the Island, and that she is not, therefore, a prohibited immigrant.

This is an appeal entered by defendant against a judgment given by the Criminal Court of Magistrates of Judicial Police for the Island of Malta on the 22nd August, 1960, whereby an Order was made for the removal of defendant from the Island and for the issue of a warrant

of seizure for the levy of the amount required for repatriation;

The grounds of appeal are the following:—

1. Defendant is still, legally, the wife and dependant of Harry Bonavia, who in terms of the relevant law is "a person who belongs to the Island"; consequently she is not a "prohibited immigrant";-

2. In any case, the right of the Immigration Officer to ask for a Removal Order is barred by lapse of time;-

3. Subordinately, the wording of the law is such that it lies within the discretion of the Court whether to make the Order or not, and in the present case there are circumstances on the strength of which such discretion falls to be exercised in favour of the appellant;-

With regard to the first plea, the facts are the following. On the 2nd June, 1938, the appellant married Harry Bonavia (exh. p. 21), who, having been born in Malta (exh. p. 84), and being, as has not been contested. a British subject, is, in terms of Ord. No. I of 1948, sec. 5 (a), a person "belonging to the Island". The appellant and Harry Bonavia were divorced in 1947 or 1948. The contention of the appellant is to the effect that, as Harry Bonavia is a Roman Catholic (exh. 85), and as the marriage was celebrated according to the rites of the Roman Catholic Church and in a Church of that Religion, that is, in Brompton Oratory, London, consequently the judgment of divorce is not operative, and she is still to be deemed, in terms of the Ordinance "belonging to the Island". The appellant and Harry Bonavia. As such, she does not fall to be considered as a prohibited immigrant (sec. 5(e). The appellant, further, argues that, although she is living apart from the said Bonavia, nevertheless she has not forfeited her status as his dependant, in as much as the judgment of divorce, in virtue of which she is so living apart, is not, as required by sec. 2 (a), a judgment of a competent Court, because no

Court can pronounce a divorce where a Roman Catholic is concerned;

It is, of course correct to state that the marriage of a Roman Catholic, with regard to substance and form, is regulated by Canon Law. For a Roman Catholic, marriage, in addition to being a contract, is a sacrament; and the bond of marriage cannot be dissolved except by the death of one of the spouses. Divorce is not admitted, and no judgment of divorce can be executed in Malta, in as much as it would be a matter contrary to public policy (vide English authorities quoted in Vol. XIII, p. 87). These principles have been laid down in a long series of decisions given by the Courts of Justice in Malta (vide Law Reports, Vol. XIII, p. 243; Vol. XVI-II-134; Vol. XXIV-II-496; Vol. XXV-I-636; Vol. XXV-II-442; Vol. XXVI-II-387; "et alia");

Counsel for the Prosecution has argued, in rebuttal of this plea, that the principles afore-stated apply to Henry Bonavia, a Roman Catholic, but not to the appellant, who does not belong to that religion. This point, were it to be examined, would not be so simple as it appears in the form in which it has been put forward, because other questions, such as that of the applicability of the personal or national law of the husband would have to be examined (Lwa. Rep. Vol. XXV-II-442). However, this Court does not deem it necessary to go into these other questions, in view of what is about to be stated;

It has been held by the Court of Appeal (C.J. Sir Adrian Dingli, and Sir Salv. Naudi and Ganado, J.J.) that a judgment of divorce given by a Court outside Malta, although it cannot be executed here as such, and in regard to the dissolution "a vinculo matrimonii", may however be given effect to as a judgment of personal separation "a thoro et mensa", if it was based on some cause which is recognised by the law of Malta as a ground for personal separation, and if the cause, under Maltese Law, gives rise to the particular consequence which is being debated. This principle is also quoted in the judgment reported in Vol. XXV-II-387;

Now, in the course of her evidence before this Court, the appellant stated that the divorce between her and Bonavia was given on the ground of adultery committed by her. Adultery is one of the causes of personal separation recognised by Maltese Civil Law (sec. 45-45 Chap. 23 Rev. Edit.). It, therefore, follows that, notwithstanding that the appellant cannot be said (for the purposes of sec. 2(a) of Ord. I of 1948) to be living apart from Harry Bonavia, a person belonging to the Island, under a judgment of a competent court, as far as the divorce pronounced by that Court is concerned, nevertheless she is living apart from him under a judgment which can be given effect to under Maltese Law as a judgment of personal separation. Consequently, she cannot be deemed to be a dependant of the said Bonavia in terms of sections 5(e) and 2(a) of the Ordinance; and her first plea fails;

The second plea set up by the appellant is that any action, which it may have been competent for the Immigration Officer to exercise against her, is now barred by lapse of time. Briefly, the argument pressed upon the Court by the appellant is this:— She did not enter Malta in accordance with leave granted under any of the sections mentioned in sec. 27(1) (a) of the Ordinance, and therefore only sec. 27(1) (b) (which refers generally to "other causes") would apply to her case; and this provision bars any action if six months have elapsed from the date of her arrival in the Island; the appellant entered Malta on 30th April, 1959, and proceedings were taken after lapse of six months from that date, that is, on the 18th June, 1960;

Counsel for the Prosecution argued in reply that the appellant entered the Island as a tourist, and consequently her case comes within sec. 27(1)(a) of the Ordinance, according to which the period of six months is prescribed to run from the expiry of the leave granted to her to remain in the Island. In the case of the appellant, her leave expired on the 29th March, 1960, and proceedings taken against her in June, 1960, that is, within the limitation period;

The evidence of Police Inspector Grech at page 42 et seq., and the exhibits at pages 47 and 48, show that the appellant entered Malta as a tourist. Maybe she did not make any explicit declaration to that effect to the Immigration Officer at Luqa Airport, but it does not appear that she made any declaration to the contrary. She was evidently required, in terms of regulation 3 of the Immigration (British Subjects) Regulations, 1948, to complete the form now shown at page 47 of the record (which is a modified version of Form "C" attached to those Regulations), and there the matter ended for the time being. As a tourist, she was entitled to stay in the Island for three months, without the necessity of an entry permit. The appellant must have accepted this situation, because on the 9th of August, 1960 (nine days after the expiration of the three months allowed to her) she applied for an extension of twelve months (exh. at page 60). In reply to her application, an extension of six months was granted to her by letter of the 29th September, 1959 (exh. at page 57). Her request for a further extension was not accepted; and by letters of the 14th March and 5th April, 1960 (pp. 55-56), she was informed that no further extensions beyond the 29th March would be granted to her; and she was moreover advised to make arrangements to leave Malta with her children prior to that date;

Now, the legal point is whether, in the light of the afore-said facts, the appellant entered Malta in accordance with leave granted under any of the sections referred to in sec. 27(1)(b) of the Ordinance, in which case the time limit for the taking of proceedings has not elapsed, as the Prosecution contends, or whether, as is argued by the Defence, none of those sections apply to the case of appellant and therefore her case falls under section 27(1)(b), under which the action would be barred by lapse of time;

It is a fact that the appellant went through the immigration clearance formalities at Luqa Airport. It is also a fact that she was given leave to enter by the immigration officials at Luqa (representing the Immigration Officer) as a tourist, and consequently and impliedly for a period of three months, under the condition of no employment.

Her case, therefore, comes under section 15 of the Ordinance, as held by the Magistrate in the Court below. Section 15 is one of the sections mentioned in sec. 27(1)(a), and therefore the proceedings against the appellant were taken within the period therein prescribd;

In the third place, "in subordine", the appellant has asked the Court of exercise its discretion in favour of granting her leave to remain in the Island, in view of the circumstances which she has put before the Court;

These circumstances, briefly, are the following. The appellant has two sons, one Christopher, about 13 years of age, and the other Timothy, aged 10. Both are actually in Malta with her. They are day-boarders at Stella Maris College, in Gżira, run by the Brothers of the Christian Schools, that is, the De La Salle Brothers. Brother Dominic Rossi, the Rector of the College, in his evidence before this Court, stated that the two boys have made excellent progress. Christopher, in one year at the College, has managed to be at the top of his class, and he should start secondary education very soon. Timothy, too, backward at first, is now quite good. The two boys also showed a disposition to be received in the Roman Catholic Church, and they are now converts. Brother Rossi thinks that their education would be prejudiced if it were to be interrupted at this stage. With regard to Timothy, unfortunately he suffers from rheumatic fever, and has just recovered from a serious attack. Doctor Azzopardi, who signed the medical certificate at page 25 of the record, and who gave evidence before this Court, was very emphatic in stating that there is always the danger of a relapse, and that the climate in Malta is much more adapted to prevent a recurrence of the illness than the climate in England. The doctor added that the boy shows signs of having been rickety in the past, and a sunny climate would be also helpful in that respect. The appellant in her evidence confirmed that since he came to Malta, Timothy has not had the chest troubles which he suffered from in England. The two boys have also the advantage of an educational allowance of £91 per annum, paid by the Ministry of Pensions in England, which, it appears from the evidence, would be stopped if they re-

turn to England. The appellant, if removed from the Island, will have to take the children with her, as she has nobody to take care of them. Counsel for the appellant has also stressed, as a ground of equity, which should incline the Court to exercise its discretion in favour of the appellant, the fact (apparently not contested by the Prosecution) that, throughout the whole proceedings, no reason whatsoever was alleged for removing the appellant from the Island;

After reciting these facts, it is proper to consider whether this Court has any discretion in the sense of granting leave to the appellant to remain longer in the Island;

It does not seem to be open to question, looking at the provisions of the Ordinance, that leave to enter and to remain in the Island is a matter within the sole competence of the Governor and/or the Immigration Officer, as designated in the Ordinance (sec. 2). Nor does it seem that there can be any room for doubt that the power thus reserved to the Governor and/or the Immigration Officer is what is legally termed an executive discretion, which is not normally subject to judicial control. This is a principle which has been accepted by the Maltese and English Courts alike (vide, for the Courts in Malta, Crim. App. "The Police vs. Buhagiar", 13th March, 1937; "The Police vs. Farrugia", 21st May, 1938; "The Police vs. Fiteni", 2nd July, 1938; and, for the English Courts, vide the judgments quoted in the Maltese decisions);

It has been observed, in one of the English decisions afore referred to, that the principle of non-interference by the Courts is based on the assumption that the Executive will act "rite et recte";

This Court, therefore, has no power, in the circumstances, to control the decision of the Executive Authorities not to extend further the period of the appellant's stay in Malta. Indeed, this Court has to take as indisputable the fact that the appellant's leave to remain in the Island has expired, and to proceed on that basis. The afore-mentioned

grounds of equity, set out by the Defence, may or may not be a compassionate matter for consideration by the Executive Authority; but they certainly can have no bearing as far as the judicial aspect of the case is concerned;

Counsel for the Defence submitted, in the course of the arguments, that the relevant word in sec. 27 of the Ordinance, on which these proceedings are based, is "may", and not "shall", and that some significance should be given to that distinction in the sense of giving some discretion to the Court;

The provision in question is as follows:— "If any British subject is considered by the Immigration Officer to be a prohibited immigrant, then, subject to the provisions of this Ordinance, and the conditions attached to any leave granted thereunder, a Court of Magistrates of Judicial Police may, on an application made by or on behalf of the Immigration Officer, make an Order (in this Ordinance referred to as a Removal Order) . . . . ";

It is, of course, correct to say that, as a matter of legal phraseology or legislative drafting, the word "may" is, strictly speaking, enabling or permissive, and not mandatory or imperative. It is also correct to say that if the Court of Magistrates, in first instance, or this Court on appeal, in a case like the present one, had, in any hypothesis whatever, no other option but to allow the application of the Immigration Officer, and decide against the immigrant, then the word "may" would be singularly out of place. But, in point of fact, the situation is clearly different. The First or this Court are fully entitled to examine, "inter alia", whether the defendant in similar cases be or not a prohibited immigrant in terms of the Ordinance, and/or whether the period of leave to remain in the Island has expired, and/or whether proceedings have been taken in due time, etc.: and should they find in favour of defendant on any one of these questions, or on any other question, provided it be founded on the provisions of the law, then that Court, or this, would be legally justified in disallowing the demand of the Immigration Officer; and in this sense the word "may" is obviously the appropriate one. But it

is equally correct to state that the word "may", in the provision above quoted, does not fall to be construed in such a way as to empower the Court to travel outside the ambit of the law, and to be at liberty in its discretion to refuse the application on considerations which are extraneous to the law. This would be tantamount to an improper exercise of the discretion implied by the word "may"; and would constitute an undue encroachment on the powers of the Executive Authority;

These principles are fully illustrated in the text-book "Maxwell — On the Interpretation of Statutes" at pp. 239-244. In a case, for instance, where the Justices may issue a summons, it was held that they are not at liberty to refuse it on any extraneous considerations, such as that the prosecution was inexpedient, or that the law would operate unjustly in the particular case. In fact, the word "may" ceases to be facultative, and becomes, like "shall" or "must" imperative, if, when the case arises, and application is made by the competent person for the exercise of the authority conferred on a judicial body by the word "may", proof is duly made that the prescribed requirements of that case are fulfilled, and that no consideration based on the law, as distinct from extraneous considerations, can be lawfully set up against the application;

There is one further point to be commented on. The application contains also a demand for the issue of a warrant of seizure to cover the costs of repatriation. This is in terms of sec. 34 of the Ordinance. This Court is, however, of opinion that it is only fair that an opportunity should be given to the person against whom the Removal Order is made to avoid the seizure and sale of his property by paying the amount likely to be incurred. In the present instance, the sum of £63 represents the cost of repatriation by air to the United Kingdom of the appellant and her two children;

For the foregoing reasons;

This Appellate Court dismisses the appeal and affirms the judgment of the Court below. The warrant of seizure

may not be carried into effect unless it is preceded by a verbal request, made directly to the appellant by the competent Immigration Official, to pay the aforesaid amount within three days from the request and the payment is not effected within such time.