

## VICTOR BOKOVSKY, PETITIONER, VS. THE COMMISSIONER OF IMMIGRATION AND THE DIRECTOR OF PRISONS, RESPONDENTS.

*G. R. No. L-4352. September 28, 1951*

Ponente: TUASON, J.

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### TUASON, J.:

This is a second petition for habeas corpus filed by the petitioner with this Court, the first having been denied in a decision promulgated on June 30, 1949.

Victor A. Borovsky, the petitioner, claims to be a stateless citizen, born in Shanghai, China, of Russian parentage. He came to the Philippines in 1936 and had resided therein ever since, if the period of his detention be included.

On June 24, 1946, by order of the Commissioner of Immigration, the petitioner was arrested for investigation as to his past activities. Following his arrest, a warrant for his deportation was issued by the Deportation Board, which is said to have found him an undesirable alien, a vagrant and habitual drunkard. The petitioner protests that he was not given a hearing, nor informed of the charges preferred against him. This point however is unimportant in this proceeding.

In May, 1947, the petitioner was put on board a ship which took him to Shanghai, but he was not allowed to land there because he was not a national of China and was not provided with an entry visa. He was therefore brought back to Manila and was confined to the new Bilibid Prison in Muntinlupa until December 8, 1947, when he was granted provisional release by the President through the Secretary of Justice for a period of six months. Before the expiration of that period, namely, on March 20, 1948, the Commissioner of Immigration caused his rearrest and he has been in confinement in the abovementioned prison ever since.

In his return to the writ, the Solicitor General in behalf of the respondents alleges that the Commissioner of Immigration "has availed of every opportunity presented to carry out the deportation order as shown by the fact that when the petitioner was enjoying his provisional release after the unsuccessful attempt to deport him to Shanghai, China, he was again re-arrested and flown to Cebu for the purpose of placing him on board a Russian vessel which had called at the port, with a view to carrying out the deportation order issued against him, but said deportation was not carried out for the reason that the captain of the said boat refused to take on board the herein petitioner on the ground that he had no permission from the Russian government to take on board the petitioner." It is further alleged that "the immigration officials have taken steps regarding the disposition of those foreigners subject to deportation while awaiting availability of transportation or arrangements to the place where they may be sent."

In this Court's majority decision on the first application it was observed that the applicant's detention was temporary, and it was held that "temporary detention is a necessary step in the process of exclusion or expulsion of undesirable aliens and that pending arrangements for his deportation, the Government has the right to hold the undesirable alien under confinement for a reasonable length of time." It took note of the fact that "this Government desires to expel the alien, and does not relish keeping him at the people's expense \* \* \* making

efforts to carry out the decree of exclusion by the highest officer of the land." No period was fixed within which the immigration authorities were to carry out the contemplated deportation beyond the statement that "The meaning of 'reasonable time' depends upon the circumstances, specially the difficulties of obtaining a passport, the availability of transportation, the diplomatic arrangements with the governments concerned and the efforts displayed to send the deportee away," but the Court warned that "under established precedents, too long a detention may justify the issuance of a writ of habeas corpus."

Mr. Justice Paras, now Chief Justice, Mr. Justice Feria, Mr. Justice Perfecto, and the writer of this decision dissented. Mr. Justice Feria and Mr. Justice Perfecto voted for outright discharge of the prisoner from custody. Mr. Justice Paras qualified his dissent by stating that he might agree "to a further detention of the herein petitioner, provided that he be released if after six months, the Government is still unable to deport him." This writer joined in the latter dissent but thought that two months constituted reasonable time.

Over two years having elapsed since the decision aforesaid was promulgated, the Government has not found ways and means of removing the petitioner out of the country, and none are in sight, although, it should be said in justice to the deportation authorities, it was through no fault of theirs that no ship or country would take the petitioner.

Aliens illegally staying in the Philippines have no right of asylum therein (*Soewapadji vs. Wixon*, Sept. 13, 1946, 157 F. ed., 289, 290), even if they are "stateless," which the petitioner claims to be. It is no less true however, as impliedly stated in this Court's decision, *supra*, and numerous American decisions, that foreign nationals, not enemy, against whom no criminal charges have been formally made or judicial order issued, may not indefinitely be kept in detention. The protection against deprivation of liberty without due process of law and except for crimes committed against the laws of the land is not limited to Philippine citizens but extends to all residents, except enemy aliens, regardless of nationality. Whether an alien who entered the country in violation of its immigration laws may be detained for as long as the Government is unable to deport him, is beside the point and we need not decide. There is no allegation that the petitioner's entry into the Philippines was not lawful; on the contrary, the inference from the pleadings and the Deportation Board's findings is that he came to and lived in the country under legal permit.

Moreover, by its Constitution (Art. II, sec. 3) the Philippines "adopts the generally accepted principles of international law as part of the law of Nation." And in a resolution entitled "Universal Declaration of Human Rights" and approved by the General Assembly of the United Nations of which the Philippines is a member, at its plenary meeting on December 10, 1948, the right to life and liberty and all other fundamental rights as applied to all human beings were proclaimed. It was there resolved that "All human beings are born free and equal in degree and rights" (Art. 1); that "Everyone is entitled to all the rights and freedom set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, nationality or social origin, property, birth, or other status (Art. 2); that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law" (Art. 8) ; that "No one shall be subjected to arbitrary arrest, detention or exile" (Art. 9) ; etc.

In *U. S. vs. Nichols*, 47 Fed. Supp., 201, it was said that the court "has the power to release from custody an alien who has been detained an unreasonably long period of time by the Department of Justice after it has become apparent that although a warrant for his deportation has been issued, the warrant can not be effectuated;" that "the theory on which the court is given the power to act is that the warrant of deportation, not having been able to be executed, is *functus officio* and the alien is being held without any authority of law." The decision cited several cases which, it said, settled the matter definitely in that jurisdiction, adding that the same result had been reached in innumerable cases elsewhere. The cases referred to were *United States ex rel. Boss vs. Wallis*, 2 Cir. 279 F.

401, 404; Caranica vs. Nagle, 9 Cir., 28 P. 2d 955; Saksagansky vs. Weedon, 9 Cir., 53 F. 2d 15, 16 last paragraph; Ex parte Matthews, D.C.W.D. Wash., 277 F. 857; Moraitis vs. Delany, D.C. Md. Aug. 28, 1942, 46 F. Supp. 425.

The most recent case, as far as we have been able to find, was that of Staniszewski vs. Watkins (1948), 80 Fed. Supp. 132, which is nearly foursquare with the case at hand. In that case a stateless person, formerly a Polish national, resident in the United States since 1917 and many times serving as a seaman on American vessels both in peace and in war, was ordered excluded from the United States and detained at Ellis Island at the expense of the steamship company, when he returned from a voyage on which he had shipped from New York for one or more European ports and return to the United States. The grounds for his exclusion were that he had no passport or immigration visa, and that in 1937 had been convicted of perjury because in certain documents he represented himself to be an American citizen. Upon his application for release on habeas corpus, the Court released him upon his own recognizance. Judge Leibell, of the United States District Court for the Southern District of New York, said in part:

"When the return to the writ of habeas corpus came before this court, I suggested that all interested parties \* \* \* make an effort to arrange to have the petitioner ship out to some country that would receive him as a resident. He is a native-born Pole but the Polish Consul has advised him in writing that he is no longer a Polish subject. This Government does not claim that he is a Polish citizen. His attorney says he is stateless. The Government is willing that he go back to the ship, but if he were sent back aboard ship and sailed to the port (Cherbourg, France) from which he last sailed to the United States he would probably be denied permission to land. There is no other country that would take him, without proper documents.

"It seems to me that this is a genuine hardship case and that the petitioner should be released from custody on proper terms \* \* \*

"What is to be done with the petitioner? The government has had him in custody almost seven months and practically admits it has no place to send him out of this country. The steamship company, which employed him as one of a group sent to the ship by the Union, with proper seaman's papers issued by the United States Coast Guard, is paying \$3.00 a day for petitioner's board at Ellis Island. It is no fault of the steamship company that petitioner is an inadmissible alien as the immigration officials describe him \* \* \*

"I intend to sustain the writ of habeas corpus and order the release of the petitioner on his own recognizance. He will be required to inform the immigration officials at Ellis Island by mail on the 15th of each month stating where he is employed and where he can be reached by mail. If the government does succeed in arranging for petitioner's deportation to a country that will be ready to receive him as a resident, it may then advise the petitioner to that effect and arrange for his deportation in the manner provided by law."

Although not binding upon this Court as a precedent, the case *aforecited* offered a happy solution to the quandary in which the parties here find themselves, solution which we think is sensible, sound and compatible with law and the Constitution. For this reason, and since the Philippine law on immigration was patterned after or copied from the American law and practice, we choose to follow and adopt the reasoning and conclusions in the *Staniszewski* decision with some modifications which, it is believed, are in consonance with the prevailing conditions of peace and order in the Philippines.

It was said or insinuated at the hearing of the petition at bar, but not alleged in the return, that the petitioner was engaged in subversive activities, and fear was expressed that he might join or aid 'the disloyal elements if allowed to be at large. Bearing in mind the Government's allegation in its answer that "the herein petitioner was brought to the Philippines by the Japanese forces," and the fact that Japan is no longer at war with the United States or the Philippines nor identified with the countries allied against those nations, the possibility of the petitioner's entertaining or committing hostile acts prejudicial to the interest and security of this country seems remote.

If we grant, for the sake of argument, that such a possibility exists, still the petitioner's unduly prolonged detention would be unwarranted by law and the Constitution, if the only purpose of the detention be to eliminate a danger that is by no means, actual, present, or uncontrollable. After all, the Government is not impotent to deal with or prevent any threat by such measure as that just outlined. The thought eloquently expressed by Mr. Justice Jackson of the United States Supreme Court in connection with the application for bail of ten Communists convicted by a lower court of advocacy of violent overthrow of the United States Government is, in principle pertinent and may be availed of at this juncture. Said the learned Jurist:

"The Government's alternative contention is that defendants, by misbehavior after conviction, have forfeited their claim to bail. Grave public danger is said to result from what they may be expected to do, in addition to what they have done since their conviction. If I assume that defendants are disposed to commit every opportune disloyal act helpful to Communist countries, it is still difficult to reconcile with traditional American law the jailing of persona by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it, even as a discretionary Judicial technique to supplement conviction of such offenses as those of which defendants stand convicted.

\* \* \* \* \*

"But the right of every American to equal treatment before the law is wrapped up in the same constitutional bundle with those of these Communists. If in anger or disgust with these defendants we throw out the bundle, we also cast aside protection for the liberties of more worthy critics who may be in opposition to the government of some future day.

\* \* \* \* \*

"If, however, I were to be wrong on all of these abstract or theoretical matters of principle, there is a very practical aspect of this application which must not be overlooked or underestimated—that is the disastrous effect on the reputation of American justice if I should now send these men to jail and the full Court later decide that their conviction is invalid. All experience with litigation teaches that existence of a substantial question about a conviction implies a more than negligible risk of reversal. Indeed this experience lies back of our rule permitting and practice of allowing bail where such questions exist, to avoid the hazard of unjustifiably imprisoning persons with consequent reproach to our system of justice. If that is prudent judicial practice in the ordinary case, how much, more important to avoid every chance of handing to the Communist world such an ideological weapon as it would have if this country should imprison this handful of Communist leaders on a conviction that our own highest Court would confess to be illegal. Risks, of course, are involved in either granting or refusing bail. I am not naive enough to underestimate the troublemaking propensities of the defendants. But, with the Department of Justice alert to the dangers, the worst they can accomplish in the short time it will take to end the litigation is preferable to the possibility of national embarrassment from a celebrated case of unjustified imprisonment of Communist leaders. Under no circumstances must we permit their symbolization of an evil force in the world to be hallowed and glorified by any semblance of martyrdom. The way to avoid that risk is not to jail those men until it is finally decided that they should stay jailed."

If that ease is not comparable with ours on the issues presented, its underlying principle is of universal application. In fact, its ratio decidendi applies with greater force to the present petition, since the right of accused to bail pending appeal of his ease, as in the case of the ten Communists, depends upon the discretion of the court, whereas the right to be enlarged before formal charges are instituted is absolute. As already noted, not only are there no charges pending against the petitioner, but the prospects of bringing any against him are slim and remote.

Premises considered, the writ will issue commanding the respondents to release the petitioner from custody upon these terms: The petitioner shall be placed under the surveillance of the immigration authorities or their agents in

such form and manner as may be deemed adequate to insure that he keep peace and be available when the Government is ready to deport him. The surveillance shall be reasonable and the question of reasonableness shall be submitted to this Court or to the Court of First Instance of Manila for decision in case of abuse. He shall also put up a bond for the above purpose in the amount of P5,000.00 with sufficient surety or sureties, which bond the Commissioner of Immigration is authorized to exact by Section 40 of Commonwealth Act No. 613. No costs will be charged.

Paras, C. J., Feria, Bengzon, Padilla, and Reyes, JJ., concur.

Jugo, J., concurs in the result.

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### DISIDENTE

PABLO, M., disidente:

La primera causa de Habeas Corpus (G. R. No. L-2852) presentada por el hoy recurrente ha sido denegada por este Tribunal en 30 de junio de 1949. Las conclusiones de hecho de dicha decision son las siguientes:

"In December, 1946, the President of the Philippines ordered petitioner's deportation as undesirable alien, after a proper investigation by the Deportation Board upon charges of being a vagrant and habitual drunkard, engaged in espionage activities, whose presence and conduct endangered the public interest. Pursuant to such order, Borovsky was placed aboard a vessel bound for Shanghai; but the authorities there declined to admit him for lack of the proper visa, which the Chinese consulate in this country had refused to give. Wherefore he was brought back to the Philippines. Thereafter he was temporarily released pending further arrangements for his banishment. And when subsequently a Russian boat called at Cebu, Borovsky was re-arrested and transported to Cebu for deportation; however, the captain of the boat declined to take him, explaining he had no permission from his government to do so. Wherefore the petitioner is now confined in the premises of the New Bilibid Prisons—not exactly as a prisoner—while the Government is exerting efforts to ship him to a foreign country."

Por segunda vez el recurrente reclama que tiene derecho a ser puesto in libertad. En mi opinion, esta segunda solicitud debe denegarse. Hay una orden de deportacion contra el y si esa orden no se ha realizado aim, no es porque el gobierno no lo quiera, sino porque no ha encontrado hasta ahora medios para efectuarlo.

Un vago, borracho y espia no debe permanecer ni un minuto en Filipinas; es un elemento indeseable no solamente aqui sino tal vez en su propio pais. Si las autoridades de Shanghai de donde el habia procedido al venir aqui, le habian rechazado cuando alii fue deportado, debian tener buenas razones; y si el capitan del barco ruso no quiso recibir al recurrente alegando que no tenia permiso de su gobierno, sera porque el recurrente no debia merecer ninguna clase de consideracion. El capitan del barco hubiera podido ingeniar cualquier medio para repatriar al recurrente si este merecia la pena de tal esfuerzo.

El recurrente no tiene derecho a estar aqui libre por sus defectos personales, especialmente hoy en que elementos malguiados desean destruir la sociedad matando a mansalva viejos, nifios y mujeres embarazadas. El recurrente seria otro elemento mas que empeoraria la situacion. Si esta hoy detenido provisionalmente en Muntinglupa no es porque lo quiera el Gobierno; tan pronto como haya transports disponible o en cuanto el encuentre medios de salir de Filipinas, se le pondria en libertad.

Citaremos un caso hipotetico: Si al anoecer, el duefio de una casa encuentra en el portico de ella un borracho, vago y andrajoso, suplicando se le de pan y, por compasion, se le alimenta y se le cede una habitacion en la cochera, y durante su estaneaia se dedica a actividades de espia, se emborracha y da mal ejemplo a la servidumbre,

esta obligado el dueño de la casa a retenerle y dejarle libre a deambular por donde quiera? Creemos que el intruso ha abusado de los privilegios de un huésped. El dueño de la casa tiene perfecto derecho a echarle y que vaya con sus unpertinencias a otra parte. La hospitalidad nacional no debe ser menos que la doméstica o individual. El extranjero puede permanecer en un territorio mientras se porta bien, pero en cuanto se dedica a actividades de espionaje, en cuanto se deja llevar por el vicio de la borrachera y no busca trabajo honrado, desde ese momento pierde su derecho a permanecer. De ahí es que el ingenio humano inventó la deportación como un instrumental de que se vale el gobierno para expulsar del territorio a extranjeros indeseables.

Se invoca la "Universal Declaration of Human Rights", una de cuyas disposiciones establece que "no one shall be subjected to arbitrary arrest, detention or exile." (Art. 9). El recurrente no tiene derecho a invocar a su favor esta disposición puesto que no se le arrestó arbitrariamente ni se le detiene sin ningún motivo. Su arresto y detención están justificados por su conducta. Un beodo empedernido, un espía, un vago, es peor que un microbio del cólera morbo; debe ser desechado para que no cause males a la sociedad. Su deportación es un medio necesario e indispensable para preservar la salud de la nación.

Se cita el caso de U. S. contra Nichols, en el cual se dice que el Juzgado tiene poder para liberar a un extranjero que ha sido detenido por un tiempo irrazonablemente largo por el Departamento de Justicia, aunque se haya expedido una orden de deportación, cuando aparece que esta no se puede efectuar (47 Fed. Rep. 201). No existen pruebas de que ya es imposible encontrar barcos para la deportación del recurrente. Las condiciones pueden mejorar. El recurrente solamente fue detenido desde diciembre de 1946; no han transcurrido cinco años. En cambio, William Martin Jurgans fue arrestado en 9 de marzo de 1920; en 20 de mayo se decretó su deportación por el Secretario del Trabajo por sus actividades comunistas; solicitó su libertad por medio del recurso de habeas corpus, que se denegó en 16 de febrero de 1927; transcurrieron más de seis años y no se le pudo deportar porque "the necessary arrangements for his deportation could obviously not be made." (District Court of Minnesota, 17 F, 2nd Series, 507).

La duración de la detención no tiene importancia en casos de la misma naturaleza; depende de muchas circunstancias. Así en *Moraitis vs. Delany*, 46 F. Supp. 425, se dijo:

"What constitutes a reasonable time for the detention of the petitioner in custody for deportation depends upon the facts and circumstances of particular cases. This court cannot shut its eyes to the vitally important interests of this country at this time with respect to the bottleneck of shipping, when every available ship, domestic and foreign, must be utilized to the utmost without delay consequent upon the lack of available seamen. Under this present conditions the court should be liberal indeed in aiding the executive branch of the government in the strict enforcement of laws so vitally necessary in the common defense. There is sound authority for this view in *United States ex. rel. Schlamm vs. Howe*, D.C.N.Y. . 222 F. 96, 97, where Circuit Judge Lacombe refused to release an alien who had come here from Germany and was ordered deported in 1915 when, by reason of the then existing war between Germany and England, his deportation to Germany was not possible. It was said:

" 'At the present time there is no regular passenger ocean service to German ports, so the authorities are unable to forward him, and are holding him until some opportunity of returning him to Germany may present itself. His continual detention is unfortunate, but certainly is not illegal. His present condition can be alleviated only by the action of the executive branch of the government. A federal court would not be justified in discharging him.' "

\* \* \* \* \*

"If he is not really fit for sea service, it is not probable that he would be forced into it, although he may be able to serve his government in some other capacity. But however that may be, while this country has no power under existing legislation to impress him into sea service against his will, he has no just cause to be relieved from the

strict enforcement of our deportation laws, and to remain at liberty in this country as a sanctuary contrary to our laws."

Se invoca tambien el asunto de Staniszewski vs. Watkins (80 Fed. Supp., 132) que no tiene similitud con la presente causa. Staniszewski habia estado residiendo en America desde 1911, trabajando como marino en barcos mercantes americanos en tiempos de paz y de guerra, y se ordeno su detencion en Ellis Island cuando volvio a America procedente de un viaje a Europa, por no tener papeles de inmigracion. Staniszewski ya era habitante de los Estados Unidos por bastante tiempo; se dedicaba a la ocupacion de marino, que es un oficio honroso y decente; pero el recurrente, como ya ha dicho este Tribunal, es un borracho habitual, un vago, y se dedicaba al espionaje. No debe confundirse un marino con un vago; el primero se alimenta con el producto del sudor de su frente, el segundo no hace nada, explota la caridad publica, y, si no consigue alimento por las buenas, indudablemente tendra que emplear recursos ilicitos. Un espia, especialmente en estos tiempos criticos por que atraviesa el pais, pone en peligro la seguridad del estado; su libertad representa un peligro para el estado y se le debe denegar. Opino que el recurrente debe ser detenido hasta que se encuentren medios de deportarle.

Poner al recurrente bajo la vigilancia de las autoridades de inmigracion o de sus agentes es aumentar las atenciones y gastos del gobierno por motivos baladies; el Estado no esta hoy en condiciones de emplear policias para el uso exclusivo del recurrente. Tampoco estoy conforme con que se le exija que preste fianza de P5,000. Tal exigencia equivale a una burla. Quien se fiara de un beodo, "vago y espia? Si consigue prestar fianza, sera porque alguien esta interesado en su libertad para que pueda continuar con sus actividades de espia.

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