1932

*Oct. 13, 14.
*Nov. 28.

ARVO VAARO, STEFAN WOROZCYT, AND OTHERS ..... } APPELLANTS;

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Aliens—Immigration Act, R.S.C., 1927, c. 93, ss. 41, 42, 21—Complaint—Warrant—Examination by Board of Enquiry—Resolution for deportation—Appeal to Minister—Detention—Habeas corpus—Sufficiency of complaint—Examination of evidence.

Each of the appellants was taken into custody under a warrant or order issued under s. 42 of the *Immigration Act* (R.S.C., 1927, c. 93), pursuant to a complaint, by the Commissioner of Immigration, expressed to be "made under section 41 of the Immigration Act and Regulations that (appellant) is a person other than a Canadian citizen, who advocates in Canada the overthrow by force or violence of the Government of Canada, the overthrow by force or violence of constituted law and authority and by word or act creates or attempts to create riot or public disorder in Canada." A Board of Enquiry found each appellant guilty of the acts alleged in the complaint and passed a resolution for his deportation. Each appellant appealed to the Minister of Immigration and Colonization, and also, before the Minister's decision, applied for discharge from custody under the *Liberty of the Subject Act*, R.S.N.S., 1923, c. 231, and obtained *ex parte* an order *nisi* in the nature of *habeas corpus* with *certiorari* in aid. To this order the Board made its return. Carroll J. refused the applications (5 M.P.R. 151), his decision was affirmed by the Supreme Court of Nova Scotia *en banc* (*ibid*), and appellants appealed to this Court.

Held: Appellants were entitled to apply to the court. Broadly speaking, every alien who has been admitted into and is actually in Canada and who has been taken into custody on a charge for which he may be deported, is entitled to the benefit of the writ of *habeas corpus* to test in court if his detention is according to law.

Appellants' detention was authorized under the *Immigration Act*, and their applications for release were rightly dismissed.

The complaint was sufficient, notwithstanding that it did not state the date when, or the particular place where, the acts charged had been committed. All that is necessary is that it makes known with reasonable certainty to the person against whom the investigation is directed his alleged conduct, in violation of the Act, to which objection is taken. (*Samejima* v. *The King*, [1932] Can. S.C.R. 640, distinguished). There is no analogy between a complaint under the *Immigration Act* and an indictment on a criminal charge (*The King* v. *Jeu Jang How*, 59 Can. S.C.R. 175, *Immigration Act*, ss. 33 (2), 42 (2), referred to). Moreover, the objection of insufficiency in the complaint was not open to appellants because (1) they did not challenge the return, which stated that the case was considered by a Board of Enquiry con-

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

stituted under the provisions of the *Immigration Act*, and, under English law, the facts stated in a return to a writ of *habeas corpus* or order in lieu thereof are taken to be true until impeached; and (2) in the proceedings before Carroll J. and the Court *en banc* they did not question the regularity or sufficiency of the complaint or the warrant; and, before this Court, they stated they were not impeaching the validity of the warrant.

After the Board's decision, and pending the Minister's decision on the appeals to him, the appellants were lawfully detained under s. 21 of the *Immigration Act*.

The court was not entitled to examine the evidence as to its sufficiency to justify the Board's decision (*McKenzie* v. *Huybers*, [1929] Can. S.C.R. 38; *Samejima* v. *The King*, [1932] Can. S.C.R. 640, referred to).

APPEALS (consolidated) from the judgment of the Supreme Court of Nova Scotia *en banc* (1) dismissing the present appellants' appeals from the judgment of Carroll J. (1) refusing the appellants' applications, on the return of an order *nisi* in the nature of *habeas corpus* under the provisions of the *Liberty of the Subject Act*, R.S.N.S., 1923, c. 231, to discharge them from custody. They were kept in custody under the provisions of the *Immigration Act*, R.S.C., 1927, c. 93. The material facts of the case are sufficiently stated in the judgment now reported. The appeals to this Court were dismissed.

L. A. Ryan and *M. Garber* for the appellants.

C. B. Smith K.C. for the respondent.

The judgment of the court was delivered by

LAMONT J.—This is an appeal by Stefan Worozcyt and seven others from the judgment of the court *en banc* of *Nova Scotia* (1) affirming the judgment of Mr. Justice Carroll (1) who refused the appellants' application for their discharge from custody. The facts briefly are as follows:—

Each of the appellants was taken into custody by virtue of a warrant or order issued by the Deputy Minister of Immigration and Colonization under the provisions of section 42 of the *Immigration Act* (R.S.C., 1927, ch. 93) pursuant to a complaint by the Commissioner of Immigration. The complaint in the case of Stefan Worozcyt reads as follows:—

To the Minister of Immigration and Colonization.

Complaint is hereby made under Section 41 of the Immigration Act and Regulations that Steve Worozcyt, Montreal, is a person other than a

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Canadian citizen, who advocates in Canada the overthrow by force or violence of the Government of Canada, the overthrow by force or violence of constituted law and authority and by word or act creates or attempts to create riot or public disorder in Canada.

Sgd. A. L. Joliffe,
Commissioner of Immigration.

The complaint in the case of each of the other appellants was to the same effect.

The warrant described the offence practically in the terms of the complaint and directed that the person charged therein "be taken into custody and detained for examination and an investigation of the facts alleged in" the complaint. The examination was to be made by a Board of Inquiry or officer acting as such.

On arrest each appellant was conveyed to the immigration station at Halifax and there brought before a Board of Inquiry and informed of the complaint against him. He was given the opportunity of having counsel and three of them in fact had counsel at the hearing. Each was separately examined by the Board of Inquiry as to the charges alleged in the complaint and each was found guilty of the acts therein stated, and a resolution for his deportation was passed. After the resolution had been carried the Chairman of the Board stated to each of the appellants that he had a right to appeal from the decision of the Board to the Minister of Immigration and Colonization. They all appealed and the appeals are still pending before the Minister. Section 20 of the Act provides that notice of appeal shall act as a stay of all proceedings until a final decision is rendered by the Minister.

Instead of waiting for the decision of the Minister, each of the appellants made an application to Mr. Justice Carrol in Chambers for his discharge from custody under and by virtue of the provisions of the *Liberty of the Subject Act* (R.S.N.S., 1923, ch. 231), and obtained *ex parte* an order *nisi* in the nature of *habeas corpus* with *certiorari* in aid. The order in the Worozcyt case directed that the Board of Inquiry "do have before me or such other Judge of the Supreme Court as may be presiding in chambers at the County Court House, Spring Garden Road in the City of Halifax, on Monday, the 16th day of May, A.D. 1932, at the hour of 11 o'clock * * *."

(*a*) the body of Stefan Worozcyt with the cause of his detention;

(*b*) the warrant of the Deputy Minister, and

(*c*) the depositions, minutes of evidence, minutes of proceedings and all such other orders and proceedings had and taken before the Board of Inquiry respecting the detention of said Stefan Worozcyt.

To this order the Board certified a return which, *inter alia,* set out:—

2. That the applicant is now detained in custody by virtue of the warrant or order of the Deputy Minister of Immigration and Colonization under the provisions of the *Immigration Act.*

3. That Exhibit "A" is a true copy of the said warrant or order.

4. That Exhibit "B" is a true copy of the complaint upon which the warrant or order was granted.

5. That on May 2nd, 1932, the case of the said applicant was considered by a Board of Inquiry constituted under the provisions of the said *Immigration Act,* and that Exhibit "C" is a copy of the record of the proceedings and the decision of the Board.

6. That the said applicant has appealed from the said decision of the Board to the Minister under the provisions of section 19 of the said Act, and the Minister has not yet rendered decision in the said appeal.

7. Pending the decision of the Minister the said applicant is kept in custody at the Immigration Station at Halifax aforesaid under the provisions of section 21 of the said Act.

On perusing the return made by the Board, Mr. Justice Carroll dismissed the application of each of the appellants and his decision was unanimously affirmed by the court *en banc.* The appellants now appeal to this court.

Although the applications were made by the appellants individually, they have been consolidated and this appeal includes them all.

That the appellants were acting within their rights in making their applications to the court is, I think, not open to dispute. Broadly speaking, every alien, who has been admitted into and is actually in Canada and who has been taken into custody on a charge for which he may be de-

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ported, is entitled to the benefit of the writ of *habeas corpus* to test in court if his detention is according to law. If it is not, the applicant may be released. If, however, his detention is authorized by law his application must be refused.

It is generally considered that by the law of nations the supreme power in every state has the right to make laws for the exclusion and expulsion of aliens and to provide the machinery by which these laws can be effectively enforced. In the distribution of legislative powers between the Dominion and the provinces made by the *B.N.A. Act,* 1867, the exclusive legislative jurisdiction over " naturalization and aliens " was given to the Dominion (section 91 (25)). In the exercise of the power thus given Parliament passed the *Immigration Act.* The question, therefore, in this appeal, is whether the *Immigration Act* authorizes the detention of the appellants.

Section 41 of the Act provides that any person guilty of the acts therein described (among which are those alleged against the appellants in the complaints) shall, for the purposes of the Act, be considered and classed as an undesirable immigrant, and that it is the duty of every officer becoming cognizant thereof, and the duty of the officials of the municipality wherein such person may be, to forthwith send a written complaint thereof to the Minister, *giving full particulars.* Then section 42 provides:—

> 42. Upon receiving a complaint from any officer, or from any clerk or secretary or other official of a municipality against any person alleged to belong to any prohibited or undesirable class, the Minister or the Deputy Minister may order such person to be taken into custody and detained at an immigrant station for examination and an investigation of the facts alleged in the said complaint to be made by a Board of Inquiry or by an officer acting as such.
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> 3. If upon investigation of the facts such Board of Inquiry or examining officer is satisfied that such person belongs to any of the prohibited or undesirable classes mentioned in the two last preceding sections of this Act, such person shall be deported forthwith, subject, however, to such right of appeal as he may have to the Minister.

Up to the decision of the Board of Inquiry there can be no question that the appellants were properly detained under the warrant of the Deputy Minister provided the conditions precedent called for by the Act had been complied with.

The only grounds upon which the appellants challenge the judgments below are:

1. That the complaint was bad in that it did not set out full particulars of the offences alleged, that is to say it did not state the date when, and the place where, the appellant had been guilty of the acts charged in the complaint, and

2. That the evidence did not warrant the findings of the Board.

The first of the above grounds is really not open to the appellants, because,

1. They do not challenge the return, which states that the case was considered by a Board of Inquiry constituted under the provisions of the *Immigration Act,* and, under English law, the facts stated in a return to a writ of *habeas corpus* or order in lieu thereof, will be taken to be true until impeached. Short & Mellor's Practice of the Crown Office, 2nd ed., page 326.

2. In all the proceedings before Mr. Justice Carroll and the court *en banc,* they did not question the regularity or sufficiency of the complaint or the warrant of the Deputy Minister, and, even on the opening of the argument before us, the leading counsel for the appellants stated that he was not impeaching the validity of the warrant. If the warrant is valid so also must be the complaint upon which it is founded.

Assuming, however, that the objection had been taken before Mr. Justice Carroll and was still open to the appellants, it cannot, in my opinion, prevail. A perusal of section 41 shews that the particulars called for by that section can only be those in the possession of the officer or official making the complaint. The Act does not call for an investigation by the officer or official to ascertain the particular place where, or the particular time when, the act alleged against the immigrant was committed. These particulars are within the knowledge of the immigrant himself. The very fact that the appellants did not challenge the complaint until now shews that they understood it and did not consider they were prejudiced through lack of particulars. In fact, until near the close of the argument before us, the appellants' objection to the complaint was not that it contained insufficient particulars but that it contained a

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multiplicity of charges—a contention subsequently withdrawn.

All that is necessary, in the complaint, in my opinion, is that the allegation shall make known with reasonable certainty to the person against whom the investigation is directed, the conduct on his part, in violation of the Act, to which objection is taken. There is no analogy between a complaint under the *Immigration Act* and an indictment on a criminal charge. *The King* v. *Jeu Jang How* (1). In the latter case the Crown cannot compel the accused to go into the witness box and answer all questions put to him, while, under the *Immigration Act,* the immigrant is detained "for examination and an investigation" into the facts alleged, and he must answer the questions put to him. (Section 33 (2) and section 42 (2).) The object of making provision for a Board of Inquiry is to have at hand a tribunal which can without delay inquire into the truth of the allegations made in the complaint. In many cases the immigrant himself must necessarily be the chief witness.

It was argued that the complaint in this case brought it within the principle of *Samejima* v. *The King* (2). In my opinion there is no similarity whatever: in the *Samejima* case (2) the complaint was that Samejima "was in Canada contrary to the provisions of the *Immigration Act,* and had effected entrance contrary to the provisions of section 33, subsection (7) of the said Act." Such a complaint did not inform the immigrant of the charge made against him and which he had to meet; while in the case before us the complaint sets out in clear and unambiguous language, in fact in the very words of the statute, the acts charged against these appellants. This ground of appeal therefore fails.

The complaint and other proceedings up to the time the Board gave its decision being valid, there was statutory authority for detaining the appellants under the warrant of the Deputy Minister. After the Board gave its decision the appellants appealed to the Minister. That brought section 21 into play. It reads:—

> 21. Pending the decision of the Minister, the appellant and those dependent upon him shall be kept in custody at an immigrant station, unless released under bond as hereinafter provided.

(1) (1919) 59 Can. S.C.R. 175. (2) [1932] Can. S.C.R. 640.

As the Minister has not yet given his decision the appellants are lawfully detained, as the return states, by virtue of this section. Their applications for release were, therefore, rightly dismissed.

The second ground of appeal—that the evidence does not warrant the finding of the Board, must also, in my opinion, be determined against the appellants.

As a general rule in *habeas corpus* matters we are not entitled to look at the evidence to see if it is sufficient to justify the decision arrived at. In *McKenzie* v. *Huybers* (1), the appellants were imprisoned under the *Collection Act,* R.S.N.S., 1923, c. 232, for fraudulently contracting a debt which formed the subject of a judgment in the Supreme Court of Nova Scotia, they " intending at the time of the contracting of said debt not to pay the same." The appellants made an application to Mr. Justice Mellish for discharge from custody. He refused their application. There was then an appeal to the court *en banc* and, by special leave, to this court. In giving the judgment of this court, Anglin, C.J., said:—

> The evidence cannot be gone into for the purpose of ascertaining whether there was anything in it to warrant the finding of fraud.

See also *Samejima* v. *The King* (2).

Moreover, the appellants having appealed from the decision of the Board of Inquiry to the Minister, the sufficiency of the evidence is a matter with which the Minister can deal in the appeal but unless he reverses the finding of the Board its decision is final.

The appeal must therefore be dismissed.

Appeals dismissed.

Solicitor for the appellants: *L. A. Ryan.*

Solicitor for the respondent: *C. B. Smith.*

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(1) [1929] Can. S.C.R. 38. (2) [1932] Can. S.C.R. 640.