

KERALA HIGH COURT

Francis Manjooran

Vs

Government of India

(M Menon, C.J. P R Nayar and V G Nambiyar, JJ.)

22.09.1965

JUDGMENT

M.S. Menon, C.J.

1. (O. P. 1135/65): The petitioner is a young graduate in medicine and surgery. He obtained facilities for higher training and study in the United States of America and applied for a passport. The application was rejected. This petition challenges the validity of that rejection.

2. There is no statute in this country governing the issue of a passport or a refusal thereof. Any legislation in that behalf under entry 19 of List I of the Seventh Schedule to the Constitution--admission into, and emigration and expulsion from India; passports and visas--is still a matter for the future.

3. There is, however, a statute taking power to require passports of persons entering India, the Indian Passport Act, 1920. Rules, the Indian Passport Rules, 1950, have been framed under Section 3 of that enactment.

4. V. G. Row v. State of Madras, AIR 1954 Mad 240, took the view that there is no provision forbidding an Indian citizen from entering India without a passport. That view was not accepted in Abdul Rahim v. State of Bombay, AIR 1958 Bom 115. The Bombay decision was affirmed by the Supreme Court in Abdul Rahim v State of Bombay, AIR 1959 SC 1315. The Supreme Court said:

"We have no hesitation in saying that the words used in Section 3 of the Act and Rr. 3 and 4 of the Rules make it quite clear that they apply to every person including an Indian citizen. Under Section 3(1) of the Act the word 'persons' has been stated without any qualification. Under Section 3(2)(a) the words employed are 'any person and in Rule 3 the words employed are 'no person'. Clause (b) of Rule 4 obviously applies to Indian citizens

but those mentioned in that clause have been specifically exempted from the operation of Rule 3. Clause (h) of Rule 4(1) can apply to Indian citizens who are by religion Mohomedans. They have been exempted. Therefore, on a reasonable interpretation of Section 3 of the Act and Rr. 3 and 4 of the Rules there can be no manner of doubt that these provisions apply to all persons including Indian citizens."

5. Rule 26 of the Defence of India Rules, 1962, also has a bearing on the subject. Sub-rule (2) of that rule provides that if any person enters India in contravention of the provisions of, or of any rule or order made under, the Indian Passport Act, 1920, he shall, without prejudice to any other proceedings which may be taken against him, be punishable with imprisonment for a term which may extend to five years, or with fine, or with both.

6. in the light of the above provisions and the general insistence on passports by all countries, it will certainly be an act of foolishness if the petitioner left this country without a passport on the basis of paragraph 11 of the affidavit filed on behalf of the Union of India in O. P. No. 1888 of 1965 which was heard along with this petition. That paragraph reads as follows:

"The requirement of a passport under the Indian Passport Act, 1920 arises only in the case of a person desiring to enter India from abroad. A person like the petitioner may have no difficulty for getting a passport for that purpose, if occasion arises and he applies for it. The apprehension that the petitioner may find it difficult to enter India, unless he has got a passport is baseless."

Choithram v. A. G. Kaiti, 67 Horn LR 544: (AIR 1966 Bom 54), a decision in which the contentions urged before us on behalf of the petitioner were urged and accepted, also indicates that there are instructions by the Government of India to the carriers and travel agencies to the effect "that they should not take on board passengers leaving India without valid passports."

7. The passport system, as it obtains at present, is the product of a long and interesting growth its story is traced by Weis in his book in the Library of World Affairs, Nationality and Statelessness in International Law, on pages 219-29. He points out that while the term passport has been used for centuries, its meaning has undergone considerable changes in the course of time, that its first use in an English statute was in 1548, where it was applied to a licence given by a military authority to a soldier to go on furlough, and deals with its use in this century and the last as follows:

"The use of passports issued by the authorities of the country of nationality to nationals travelling abroad became more frequent in the nineteenth and the beginning of the twentieth century. The possession of a passport was, however, not as a rule requirement for the crossing of frontiers.

Only since the First World War has the passport system in its modern sense been introduced in most countries, i.e. the system whereby aliens who wish to enter a foreign territory are required to produce a passport issued by the authorities of their country of nationality."

8. in 1906 Lord Alverstone, C. J. had occasion to consider the nature of a British passport. He said:

"It is a document issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the Governments of foreign nations, and to be used for that individual's protection as a British subject in foreign countries." (Rex v. Brailsford. (1905) 75 LJKB 64). Ballentine's Law Dictionary defines an American Passport as follows.

"A document issued on behalf of a citizen of the United States by the secretary of state, addressed to foreign powers and purporting to be a request that the bearer of it may pass safely and freely. It is to be considered as a political document by which the bearer is recognised in foreign countries as an American citizen, and which by usage and the law of nations is received as evidence of the fact."

The definition in the Shortar Oxford Dictionary is:

" document issued by competent authority, granting permission to the person specified in it to travel, and authenticating his right to protection "

9. For the purposes of tin's case it is enough to say that an Indian passport is an Identify and travel document issued to an Indian national and essential for his travel outside India and for his return to this country.

The usual wording is "These are to request and require in the name of the President of the Republic of India all those whom it may concern to allow the bearer to pass freely without let or hindrance, and to afford him or her every assistance and protection of which he of she may stand in need."

10. The freedom to travel has been part of the mystique of the freedom of man in the long and discontinuous debate between him and his sovereign or political authority. Clause 42 of the Magna Carta of 12)5 provided :

"In future it shall be lawful for any man to leave and return to our kingdom unharmed and without fear, by land or water, preserving his allegiance to us, except in time of war, for some short period, for the common benefit of the realm. People that have been imprisoned or outlawed

in accordance with the law of the land, people from a country that is at war with us, and merchants---who shall be dealt with as stated above--are ecepted from this provision."

11. The passport, wrote Peuchet, a French revolutionary of 1791, "Is a police 'disorder' so much the more odious that it employs all the arts of tyranny and deprives man of the first, the most well-founded of his rights, that of breathing the air which pleases him without asking the permission of one who can refuse it". In the same year the Declaration of the Rights of Man guaranteed the natural right to wander at will.

12. The freedom to travel, like all other freedoms couched in universal terms, however, has never remained absolute or untrammelled in any state or society for any length of time. Clause 42 of the Magna Carta of 1215 was not repeated in the Great Charter of Henry III which is the version of the Magna Carta engrossed in the Statute-Book of England. France, in less than a year after the Declaration, had to restore a system of control even more thorough-going than that of the monarchy.

13. Article 13 of the Universal Declaration of Human Rights provides:

" Everyone has the right to freedom of movement and residence within the borders of each State.

2. Everyone has the right to leave any country, including his own, and to return to his country "

The wording of the Draft Covenant on Political and Civil Rights which followed is different:

"Article 12(sic) Subject to any general law of the Stale concerned which provides for such reasonable restrictions as may be necessary to protect national security, public safety, health or morals or the rights and freedoms of others, consistent with the other rights recognized in this Covenant:

(a) Everyone legally, within the territory of a State shall, within that territory have the right to (i) liberty of movement and (ii) freedom to choose his residence;

(b) Everyone shall be free to leave any country, including his own."

14. According to Blackstone the liberties of Englishmen consist primarily of the right to the free enjoyment of personal security, of personal liberty, and of private property. In dealing with the right to the free enjoyment of personal liberty, he says:

"Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation,

or removing one's person to whatsoever place one's own inclination may direct : without imprisonment or restraint, unless by due course of law" (Commentaries, Volume I, page 105) He adds:

"The sovereign indeed, by his royal prerogative, may issue out his writ ne exeat regno, and prohibit any of his subjects from going into foreign parts without licence. This may be necessary for the public service and safeguard of the commonwealth. But no power on earth, except the authority of Parliament, can send any subject of England out of the land against his will; no, not even a criminal."

Commentaries. Volume I, Page 108.)

15. Dennis Lloyd in his recent book, *The Idea of Law*, groups the main values expressed in legal freedom under ten heads:

- (1) Equality and Democracy;
- (2) Freedom of Contract;
- (3) The Right of Property;
- (4) The Right of Association;
- (5) Freedom of Labour;
- (6) Freedom from Want and Social Security;
- (7) Freedom of Speech and of the Press;
- (8) Freedom of Religion;
- (9) Personal Freedom; and (10) The Rule of Law.

He places the freedom to travel under the ninth head--personal freedom--and says;

"Freedom to travel, both within and outside the confines of the territory of the State, raises important issues of personal freedom. This type of freedom has largely been regarded as axiomatic in modern times in Western Europe, but certainly not in Eastern Europe, where restrictions on travel and residence in particular cities or territories have been traditionally severely restricted." (Page 160).

16. Harry Street in his recent book, *Freedom, the individual and the Law*, says:

"The freedom to travel is of course an Important freedom; men want to travel abroad on business, for family visits, to consult with experts in their profession for educational and recreational purposes (Page 273). and regards the fact that no British citizen is entitled to a passport as a matter of right even though his British nationality is beyond all doubt. He characterises the absence of the right as startling, and deals with the matter as follows:

"Granting a passport is entirely a matter of royal prerogative which is exercised on behalf of the Queen by the Foreign Office. The subject has no legal right to a passport the Crown can refuse him one without giving any reasons, he is not entitled to a hearing in order to argue his case for the grant of one, there is no Court to which he can appeal if he is refused one, he is not entitled to compensation for any loss suffered because of the refusal." (Page 273).

"The Crown has had prerogatives in foreign affairs and retains those which Parliament has not taken away Passports are treated as falling within that prerogative domain of foreign affairs, and have been left untouched." (Page 273) "Nor do the Crown's arbitrary powers stop there. In other parts of the Commonwealth it has been held that a Minister was not entitled to insist on a subject's handing back his passport. The passport issued in Britain is worded so that it remains the property of the Crown who can demand its return at any time for any reason.

Its withdrawal may be insisted upon whenever it suits the whim of the Crown--for instance, to restrain the movements of a former member of the royal household who may wish to enjoy in the United States the fruits of his articles in American Newspapers on the doings of the royal family." (Page 274)

17. The passport problem, according to Louis L. Jaffe in his article, The Right to Travel; The Passport Problem, in Foreign Affairs, has two distinct facets. He deals with them as follows:

"The more traditional one has to do with enabling the citizen to make his way abroad, with putting at his disposal an identifying document which in the past has been useful and which today may be indispensable. The latter-day problem has to do with the citizen's power to leave his country, however welcome he may be elsewhere. Quite different considerations may obtain. We might under the former refuse a passport lest the citizen become a nuisance, a persona non grata to a sister State. We might under the latter refuse a passport lest he work up among our sisters an assault on our bastion or our peace of mind. Somewhat different legal considerations, too, will be in play when the question concerns the 'right' of the citizen who is being cribbed, cabined and confined. But in the last few years it has not been easy to keep disentangled the legal and political threads of these two situations. Surely the predominant motivation has been not the protection of our sister states nor friendly course of our foreign relations as, such. Nearly every

passport denial has been a decision do> keep the dozen here within the right walled fortress where he can be isolated, neutralized, kept, let us say to his accustomed and observable routines of made action. It has been simply one facet of our Lactic of domestic security, and only incidentally a matter of foreign policy. Legally, too, doctrine sidles from one truck to the other: a denial of passport, though motivated essentially by a policy of security, is still justified on the ground that the passport is 'Veally' (as indeed it once was) a kind of good 'reference1 to our sister states abroad and no one, the argument runs, has a 'right' [o lie recommended whose character or intentions are questionable. From this the conclusion would follow that he can go, but without our blessing. But, of course, he can't go. Thus the passport problem centres around the power to forbid our citizens to leave the country for travel." (Volume 35. pages 17-28).

There can be other fare as well, as for example the one presented in this case: the need of a country for the presence of a national within the confines of that country because of the qualifications he possesses and the training he has undergone.

18. The story of the freedoms also show.-. that many of them cannot co-exist in the fullness of their plenitude, and that tailoring is essential for even a partial survival of all of them. Liberty, Equality and Fraternity were the watchwords of the French Revolution. "We hold these truths to be self-evident", said the earlier Declaration of American Independence, "that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are Life, Liberty and the Pursuit of Happiness" it was not long before it was realised that there was a basic incompatibility between liberty and equality, as each of them presupposed an entirely different theory of the purpose of a state. The emphasis on liberty at the expense of equality produced the laissez faire of Victorian times; and the emphasis on equality at the expense of liberty produced the communism of the present day. What a welfare state like that of this country really attempts is a compromise between liberty and equality, sacrificing a part of both, so that neither of them will completely disappear from the life of our nation.

19. The freedoms in any state, the right to travel across its frontiers or any other, are essentially dependent on the municipal law of that State. The question for determination, therefore, is: Has the petitioner a right to get a passport under the law of this country? His submission is that he has; and the submission is based on Article 21 of the Constitution.

20. Article 21 of the Constitution provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. The contentions of the petitioner are that the freedom to travel is part of his personal liberty, that the refusal of a passport amounts to a deprivation of that liberty, and that such a deprivation cannot be sustained in the absence of any procedure established by law.

21. it is Article 15 of the Draft Constitution that became Article 21 of the Constitution of India. The note of the Drafting Committee in that Article says:

"The Committee is of opinion that the word 'liberty' should be qualified by the insertion of the word 'personal' before it, for otherwise it might be construed very widely so as to include even the freedoms already dealt with in Article 18."

Article 13 of the Draft Constitution referred to in the Note is Article 19 of the Constitution of India which provides that all citizens shall have the right-(a) to freedom of speech and expression: (b) to assemble peaceably and without arms:

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India;

(f) to acquire, hold and dispose of property; and

(g) to practise any profession, or to carry on any occupation, trade or business.

22. According to Sir Ivor Jennings in his recent book, *Magna Carta and its Influence in the World Today*, Article 21 of the Constitution of India represents Clause 29 of the Magna Carta of 1225 which provides "that no man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of Law" That Article 21 reflects Clause 29 is true; but that is not the whole story, it reflects other concepts as well.

23. The expression "personal liberty" is not defined in the Constitution. It is certainly capable of two interpretations, one narrow and the other wide. The Supreme Court sketched the ambit of the narrow interpretation as follows in Kharak Singh v. State of U. P., AIR 1963 SC 1295:

"We shall now proceed with the examination of the width, scope and content of the expression 'Personal liberty', in Article 21. Having regard to the terms of Article 19(1) (d), we must take it that that expression is used as not to include the right to move about or rather of locomotion. The right to move about being excluded its narrowest interpretation would be that it comprehends nothing more than freedom from physical restraint or freedom from confinement within the bounds of a prison; in other words, freedom from arrest and detention, from false imprisonment or wrongful confinement."

24. Apparently the Supreme Court, in the case above-mentioned, was in favour of a wider interpretation. It went on to say:

"We feel unable to hold that the term was intended to bear only this narrow interpretation but on the other hand consider that 'personal liberty' is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue."

Alan Gledhill in his book, *Fundamental Rights in India*, says.

"The Right to move freely through the territory of India in Article 19(1) (d) must be distinguished from the Right to personal liberty, protected by Articles 20-22, and the general right of locomotion included in it." (Page 62).

25. in the light of all that is stated above, I think it should be held that the right to travel, except to the extent provided in Article 19(1)(d) of the Constitution, is within the ambit of the expression "personal liberty" as used in Article 21 of the Constitution and that as a passport is essential for the enjoyment of that right, the denial of a passport amounts to a deprivation of that right. It is true that Article 21 permits a deprivation by procedure established by law. The hurdle in the path of the Union of India is the absence of any such procedure.

26. The Drafting Committee substituted the expression "procedure established by law" for the expression "due process of law". Sir Alladi Krishnaswami Ayyar, speaking in the Constituent Assembly, explained the reason for the change as follows:

"The expression 'due process' itself as interpreted by the English Judges connoted merely the due course of legal proceedings according to the rules and forms established for the protection of rights, and a fair trial in a court of justice according to the modes of proceeding applicable to the case. Possibly, if the expression has been understood according to its original content and

according to the interpretation of English Judges, there might be no difficulty at all. The expression, however, as developed in the United States Supreme Court, has acquired a different meaning and import in a long course of American judicial decisions. Today, according to Professor Wills, the expression means, what the Supreme Court says what it means in any particular case." (Debates of the Constituent Assembly, Volume 7, Page 853).

27. There can be no doubt that the expression "procedure established by law" means no more than procedure laid down by statute or procedure prescribed by the law of the State. In *Gopalan v. State of Madras*, AIR 1950 SC 27, Kania, C. J. said:

"A perusal of the report of the drafting committee to which our attention was drawn shows clearly that the Constituent Assembly had before it the American Article and the expression 'due process of law' but they deliberately dropped the use of that expression from our Constitution.

No extrinsic aid is needed to interpret the words of Article 21 which in my opinion, are not ambiguous. Normally read, and without thinking of other Constitutions, the expression 'procedure established by law' must mean procedure prescribed by the law of the State".

28. it is common ground that no procedure prescribed by the law of this country sustains the refusal of a passport to the petitioner. I have already indicated that in my view the refusal of a passport in such circumstances amounts to an unauthorised deprivation of the personal liberty guaranteed by Article 21 of the Constitution. It follows that the appropriate authority should be directed to reconsider the refusal and grant a passport in the light of what has been stated in this judgment. I direct accordingly. Time allowed: Two months from this date.

29. There may be statutory provisions under which the petitioner's right to cross and recross the frontiers of India may properly be inhibited in accordance with the law in spite of the fact that he has been granted a passport and is in possession thereof. I make it clear --especially in view of the decision of Sri-uivasan J. In *Writ Petn. No. 2477 of 1965 (Mad)* and the reversal of that decision by a Division Bench of the High Court of Madras --that this judgment has nothing to do with such inhibitions. I also make it clear that any procedure established by law for the refusal of a passport between now and the expiry of the two months mentioned in the last preceding paragraph will control the direction that I have given above.

30. The petition is allowed as above. No costs.

M.S. Menon, C.J.

31. (O. P. Nos. 1097, 1720 and 1883 of 1965): These petitions were heard along with O. P. No.

1135 of 1965 and must share the same fate. I have allowed O. P. No. 1135 of 1965 in the manner indicated in paragraph 28 of the Judgment in that petition. There will be a similar direction--without any order as to costs--in these petitions as well.

32. A copy of my judgment in P. O. No. 1136 of 1966 will be appended to this judgment and treated as part of it.

Raman Nayar, J.

33. (O. P. Nos. 1097, 1135, 1720 and 1883 of 1965) I have reached much the same conclusion as my Lord (except with regard to the precise nature of the relief we ought to afford) but by a somewhat different approach.

34. The petitioners are citizens of India who wish to go abroad, the petitioner in O. P. No. 1097 of 1965 to the United Kingdom, and the rest to the United States, to take up paid appointments offered to them in hospitals there--they are medical graduates--and to pursue post-graduate studies so that, it is said, they may come back as better doctors, the better to serve their country not to speak of themselves. But their applications for passports have been turned down by the 2nd respondent Regional Passport Officer not, as is clear from the affidavits filed by the 2nd respondent and the 1st respondent Union of India, because their character, conduct, associations or proclivities render them unworthy of a passport, but because they are such worthy and useful members of society that, in the public interest, they should not be allowed to leave the country. This is what is stated in paragraph 3 of the affidavit of the 1st respondent:

"3. There has been recently a growing tendency among Indian doctors to go abroad for purposes of employment or higher training. Our country can ill afford to spare the services of these doctors in view of the acute shortage of trained medical personnel in India. The Government of India have laid down certain conditions regarding issue of passports to doctors desiring to go abroad. According to these conditions, doctors who are in the employment of Governments or Semi-government institutions are granted passports for going abroad for higher studies, on their undertaking to return and serve their employers for a minimum period of three years. Other doctors are granted passports for going for higher studies only if they satisfy any of the following conditions:

(a) The doctor holds M.B.B.S. degree and has seven years' experience

(b) The doctor holds M.B.B.S. degree with not less than 60 per cent marks and has three years' experience.

(c) The doctor holds a post-graduate degree like M.D. or M.S. of an Indian University."

The petitioners do not satisfy any of the conditions mentioned and therefore they have been denied passports. This denial is, according to the petitioners, on an improper ground, a ground that is not germane to the grant or refusal of a passport, and is an infringement of their fundamental rights under Articles 14, 19 and 21 of the Constitution. (It was however conceded at the hearing that, so long as the proclamation of emergency under Article 352 of the Constitution is in operation, as it now is, Article 368 makes the rights under Article 19 unavailable, and the petitioners were content to rest their case on Articles 14 and 21, their right to move the court for the enforcement of those rights being unaffected by the Presidential order issued under Article 359). And the petitioners pray for a writ of mandamus or other appropriate order compelling the respondents to grant them passports.

35. The respondents contend that, in law, no passport is necessary for leaving the country and that therefore the refusal of passports to the petitioners does not prevent them from doing so : that freedom of movement, in particular freedom of exit from or entry into the country is not a personal liberty within the meaning of Article 21 : that the petitioners have no legal right to a passport and that therefore the denial cannot attract Article 14; and that the grant or refusal of a passport is a political function entirely within the discretion of the 1st respondent and immune from judicial review.

36. The avowed object of the denial of passports being to stop the petitioners from leaving the country, the plea that there is nothing to prevent the petitioners from going abroad without a passport strikes me as disingenuous. For myself, I am satisfied that by reason of executive action taken by the 1st respondent, the petitioners will be physically prevented from leaving the country unless they have passports. In fact so much seems to have been conceded in the affidavit filed on behalf of the 1st respondent in the case reported in 67 Rom LR 544: (AIR 1966 Bom 54). That apart, although it is true that there is no law prohibiting a person from leaving India without a passport, entry into India without a passport, even by a citizen, is prohibited by Rule 3 of the Indian Passport Rules, 1950 made under Section 3 of the Indian Passport Act, 1920 and is an offence punishable under Rule 6 of those rules with imprisonment which may extend up to three months, now, by reason of K 28(2) of the Defence of India Rules to imprisonment which may extend up to five years. (See AIR 1959 SC 1315).

In the light of this decision, the reasoning on which AIR 1954 Mad 240 proceeds, namely, that in law, a citizen does not require a passport either to leave the country or to return to it, must be regarded as erroneous. Therefore, even if the petitioners can leave the country without a passport, they cannot get back without one, and, if they have the right to get back to the country, I think

they are entitled to an assurance that they will be able to do so even before they leave the country. No doubt the question of returning can arise only after they leave the country but that does not mean that their right to return cannot be threatened before the occasion for its exercise arises. The threat has arisen even now, for, the position is that, although the petitioners may lawfully go without a passport they cannot return without one and I do not think it is necessary that they should burn their boats by leaving the country, making it virtually impossible for them to obtain redress, before ensuring that they will be able to come back.

37. I take the view. In respectful agreement with the view taken in 67 Bom LR 544: (AIR 1966 Bom 54) that the right of free movement whether within the country or across its frontiers, either in going out or in coming in, is a personal liberty within the meaning of Article 21 which says, "No person shall be deprived of his life or personal liberty except according to procedure established by law".

That it is a freedom or liberty cannot be doubted--Article 19 which, among other things, guarantees the right to move freely throughout the territory of India comes under the heading, "Right to freedom" and so does Article 21--and it is nothing if it is not personal. Next to physical assault, restraint of movement is what most intimately affects the human body, and wrongful restraint, which is defined by Section 339 of the Indian Penal Code as obstructing any person from proceeding in any direction in which that person has a right to proceed, comes in the chapter headed, "Of offences affecting the human body" it is agreed on all hands that freedom from arrest and detention, in other words, from confinement, is a personal liberty coming under Article 21. In fact, some commentators incline to the view that that is the principle if not the sole content of the phrase, "personal liberty" appearing in that article; but an attempt to so confine its meaning was repelled in no unmistakable terms in AIR 1963 SC 1295.

Confinement is but a particular form of restraint. While obstructing a person from proceeding in any particular direction of his choice is restraint, obstructing him from proceeding in all directions is confinement, and Section 340 of the Indian Penal Code describes wrongful confinement as wrongfully restraining any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits. Therefore, if freedom from confinement is a personal liberty within the meaning of Article 21. as there can be no doubt it is--that is recognised in AIR 1950 SC 27 as also in AIR 1963 SC 1295. I am entirely at a loss to understand how freedom from restraint in proceeding in any particular direction of one's choice, in other words, freedom of movement. can fail to be a personal liberty--confinement, is. after all. but complete restraint.

38. According to Blackstone (Commentaries on the Laws of England, 4th Edn. Vol. I page 134)

"Personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law." This definition has been bodily incorporated in Stephen's Commentaries and has been reproduced by Cooley in his treatise on Constitutional Limitations (8th Edition Vol. I page 710) Dicey (Law of the Constitution, 9th Edn. page 207) says that the right to personal liberty means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification." And, in Ridges' Constitutional Law, Eighth Edition, it is said (at page 371) "that the right to personal freedom means simply that the citizen may do what he likes or go where he likes provided he breaks no law and does not infringe the rights of others."

39. In *Bird v. Jones* (1846) 7 QB 742 the question was whether to stop a man from going where he had a right to go was false imprisonment. In subscribing to the majority view that it was not, Coleridge J. observed, "Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom; it is one part of the definition of freedom to be able to go whithersoever one pleases x x x x x " Patteson J. was of the view that imprisonment was "a total restraint of the liberty of the person"--a partial restraint was not imprisonment. In taking the opposite view, that such restraint amounted to false imprisonment, Lord Denning C, 1., said that it was "a total deprivation of liberty with reference to the purpose for which he lawfully wished to employ his liberty" and that it was a restraint of the person. In AIR 1350 SC 27 the question was the converse of what we are here considering. It was whether freedom from confinement was freedom of movement so as to come within Article 19 (1) (d) The majority view was that it was not although it was a personal liberty falling within Article 21. But the observations made by at least three of the learned Judges, Kazi Ali, Mukherjee and Das JJ. In discussing the true meaning of the phrase, "personal liberty" go to show that freedom of movement is an attribute of personal liberty Indeed Fazl Ali J. repeatedly stated (See paragraphs 46, 59 and 65 of the report) that there could be no doubt that "freedom of movement is in the last analysis the essence of personal liberty" and that "personal liberty and freedom of movement connote the same thing." in AIR 1963 SC 1295 Subba Rao J. observed (see paragraph 30 of the report) that the expression, "personal liberty" was a comprehensive expression and that the right to move freely was an attribute of personal liberty. His Lordship was no doubt expressing the minority view but even the majority view was that personal liberty as used in Article 21 was a compendious term including within itself all the varieties of rights which go to make up the personal liberties of man other than those dealt with in the several clauses of Article 19(1). While Article 19(1) deals with particular attributes of personal liberty, (among them freedom of movement within the country) Article 21 comprises the residue (See paragraph 17)

40. In the United States, the Fifth Amendment guarantees that no person shall be "deprived of life, liberty or property without due process of law". And in *Kent v. Dulles*. (1958) 357 US 116 2 Law Ed 2d 1204 it was held that the right to travel was part of the liberty of which the citizen could not be deprived without due process of law under the Fifth Amendment. It was further observed that the right of exit was a personal right included within the word, "liberty" as used in the Fifth Amendment. There can be no doubt that in America the right of exit and of entry is regarded as a personal liberty

41. in England, freedom of movement across the frontiers in either direction has long been recognised, and it is one of the liberties enshrined in the Magna Charta, the 42nd clause of which provides that, "It shall be lawful to any person, for the future, to go out of our Kingdom, and to return, safely and securely, by land or by water, saving his allegiance to us, unless it be in time of war, for some short space, for the common good of the Kingdom: excepting prisoners and outlaws, according to the laws of the land, and of the people of the nation at war against us, and Merchants who shall be treated as it is said above."

No one has ever thought of charging this provision with the vice of extra-territoriality and, in my view, the contention that in reading the expression, "personal liberty" in Article 21 of the Constitution as including the freedom to cross its frontiers in either direction, would be to invest the article with that vice must fail. For, to say that a man is free to leave the country or to enter it is not to say anything as to what he will be allowed to do or will not be allowed to do outside the territorial limits of the country. It implies no guarantee whatsoever of any freedom outside those limits; and any restraint against exit or entry would be imposed within and not without the frontiers

42. The Universal Declaration of Human Rights which was adopted by the United Nations in December 1948 and to which India was its party provides for freedom of movement within each state as also across its frontiers in either direction. Article 3 of the Declaration is based on the general principle that, "everyone has the right to life, liberty and security of person." And among the particular applications of this principle is Article 13 which deals with freedom of movement. That Article runs thus:

"Article 13. (1) Every one has the right to freedom of movement and residence within the borders of each state.

(2) Everyone has the right to leave any country including his own. and to return to his country."

It is true that, "as stated by most of the Governments which voted for its adoption, the Declaration is not an instrument which is legally binding either directly or indirectly," and that as

observed in Oppenheim's International Law. Eighth Edition, Volume I page 745, "this absence of the element of binding obligation probably explains the willingness of Governments to subscribe to the wide terms of the Declaration." But it seems to me clear that the Declaration regards freedom of movement across the frontiers of a country as a personal liberty, and although the Declaration is of no legal force, it supplies "a standard of action and of moral obligation." Of this obligation our constitution makers could not have been unmindful when they framed our Constitution soon after, and I think we must credit them with the intention of honouring rather than evading it. By Article 19(1)(d) they redeemed the pledge in Clause (1) of Article 13 of the Declaration, and by Article 21. among other things, that in Clause (2)

43. To prevent a man from leaving the country or from entering it is to impose a physical restraint on his person. It is to deprive him of a personal liberty, and I am not impressed with the argument that it is at best only a restriction or regulation and not a deprivation of the right of free movement and that a person cannot be said to have been deprived of personal liberty when he is free to roam about at his will throughout the length and breadth of a whole sub-continent. There can be no doubt that, so far as persons who like the petitioners have no passports are concerned, the personal liberty of free movement across the frontiers is taken away, exit by mere executive action and entry by the enforcement of the Pass-port Rules. Nor am I impressed with the argument based on the legislative history of Article 21 that the word, "personal" was inserted in that Article to qualify the word, "liberty" so as to exclude anything that falls short of an assault on the body or its imprisonment. The decision in AIR 1963 SC 1295 is against this contention. What the drafting committee of the Constituent Assembly recommended was "that the word, 'liberty' should be qualified by the insertion of the word, 'personal' before it for otherwise it might be construed very widely so as to include even the freedoms already dealt with in Article 13" (now Article 19).

The utmost that can be derived from the acceptance of this recommendation is what Patanjali Sastry, J. derived from it in A. K. Gopalan's case, AIR 1950 SC 27, namely, that the acceptance shows that whatever may be the generally accepted connotation of the expression, "personal liberty", it is used in Article 21 in a sense which excludes the freedoms dealt with in Article 19. In other words, personal liberty in the context of Part III of the Constitution is something distinct from the freedom to move freely throughout the territory of India. This seems to be the basis of the majority view in AIR 1963 SC 1295. But the exclusion of the freedoms dealt with in Article 19 from the content of personal liberty in Article 21 will not take away freedom of movement across the frontiers of the country since that is not a freedom dealt with in Article 19. With regard to the insertion of the word, "personal" to qualify the word, "liberty" in Article 21, this is what Mukherjea J. said (as in A. K. Gopalan's case, AIR 1950 SC 27 (paragraph 178 of the report);

"It is well known that the word 'liberty' standing by itself has been given a very wide meaning by the Supreme Court of the United States of America. It includes not only personal freedom from physical restraint but the right to the free use of one's own property and to enter into free contractual relations. In the Indian Constitution, on the other hand, the expression "personal liberty" has been deliberately used to restrict it to freedom from physical restraint of a person by incarceration or otherwise."

As I have already said, to stop a man from going out or from entering the country is to impose a physical restraint on his person and it is quite clear from the use of the words, "or otherwise" by the learned Judge that the restraint need not amount to incarceration in order to attract Article 21.

44. From the plain meaning of the words, "personal liberty" from the views of recognised authorities on Constitutional Law, from the judicial decisions bearing on the matter, and from the sources from which our Constitution drew, it seems to me abundantly clear that freedom of movement inside the country as also across its frontiers in either direction is a personal liberty coming within Article 21 unless, of course, the Constitution by express words or by necessary implication excludes it from the scope of the article. Such an exclusion it is said is necessarily implied by Article 19(1) and reliance is placed on AIR 1963 SC 1295 in support of this proposition. Now, it seems to me that there are two ways of looking at Article 19(1) in relation to Article 21. The first is that Article 21 is a general provision with regard to personal liberty. The protection of that article is available to all persons, citizens and non-citizens alike, and all that it requires is that deprivation of personal liberty shall be only in accordance with procedure established by law. The several freedoms enshrined in Article 19(1) are not all personal freedoms, but, some of them, like the right of free movement throughout the territory of India, are personal freedoms. With regard to the personal freedoms included in its scope, Article 19(1) makes special provision and gives special protection available only to citizens. With regard to them, more is required than under Article 21 which is available to all persons.

It is not enough that there is a law providing for the deprivation of the liberty. In addition, that law must pass the test in Clause (5) of Article 10 of being a reasonable restriction in the interests of the general public or for the protection of the interests of any Scheduled Tribe. This is the view taken by the minority in AIR 1963 SC 1295. The second view is the view taken by the majority and that is, as I have already said, that everything covered by Article 19(1) is excluded from the scope of Article 21. In either view, freedom of movement across the frontiers of the country must fall within the scope of Article 21. It is not in Article 19(1) (d) which is restricted to freedom of movement within the country, and there is nothing in the decision that warrants the view that freedoms of the kind comprised in Article 19(1) are excluded from the scope of Article 21.

45. in paragraph 17 of the majority judgment in AIR 1963 SC 1295 there appears the following statement with regard to the expression, "personal liberty" as used in Article 21:

"Having regard to the terms of Article 19(1) (d), we must take it that that expression is used as not to include the right to move about or rather of locomotion."

From this it is argued that that decision lays down that freedom of movement is not within the scope of Article 21. This is to read the statement outside its context. If the statement is read in its context there can be no doubt that that what it means is that the right of locomotion is excluded to the extent it is provided for by Article 19(1)(d) and that this qualification is necessarily implied. This is the passage in which the statement appears :

"We shall now proceed with the examination of the width, scope and content of the expression "personal liberty" in Article 21. Having regard to the terms of Article 19(1)(d), we must take it that that expression is used as not to include the right to move about or rather of locomotion. The right to move about being excluded its narrowest interpretation would be that it comprehends nothing more than freedom from physical restraint or freedom from confinement within the bounds of a prison; in other words freedom from arrest and detention, from false imprisonment or wrongful confinement. We feel unable to hold that the term was intended to bear only this narrow interpretation but on the other hand consider that "personal liberty" is used in the Article as a compendious term to include within itself all the varieties of rights which so to make up the "personal liberties" of man other than those dealt with in the several clauses of Article 19(1). In other words, while Art, 19(1) deals with particular species or attributes of that freedom, "personal liberty" in Article 21 takes in and comprises the residue."

It is clear from this passage that the right of locomotion is a personal liberty, that the expression, "personal liberty" is used in Art, 21 as a compendious term to include all personal liberties, but that, in so far as particular species or attributes of personal liberty are dealt with in Article 19(1), Article 21 comprises only the residue. What the statement on which reliance is placed means is that, having regard to the terms of Article 19 (1) (d) we must take it that the expression "personal liberty" is used in Art 21 "as not to include the right to move about or rather of locomotion" in so far as that is provided for by Article 19 (1) (d), and the (underlined) words I have added are, it seems to me, necessarily implied.

46. There is, as we have seen, no law preventing the petitioners from leaving the country without a passport. And it is said that, even if we are satisfied that the petitioners have the right to leave the country, and that the executive is preventing them from exercising that right by refusing passports, all we can do is to direct the executive to forbear from preventing them from leaving

without passports, or, put in a positive form, to allow them to go without passports. (That would appear to be 80, and the argument that other countries will refuse entry to the petitioners if they have no passports so that they might as well stay at home seems to me neither here nor there. The Constitution cannot and does not guarantee the petitioners any freedom of movement outside the territory of India, and if they choose not to exercise the right of exit because other countries will not allow them entry that is no denial of that right). And, in so far as coming back to the country is concerned, it is pointed out that there is a law, namely, Rule 3 of the Indian Passport Rules which prohibits them from entering the country without a pass port. The constitutional validity of this law has been upheld by the Supreme Court in AIR 1959 SC 1315 and, although the attack in that case was based only on Article 19(1)(d) and (e) it must be assumed that the law has survived the test of Articles 14 and 21 as well. Therefore, if the petitioners are deprived of the right to come back to the country, that deprivation is according to procedure established by a valid law and the petitioners can therefore have no legitimate complaint. Thus, in no view of this matter, can their prayer for the grant of passports be countenanced.

47. This argument seems to me unacceptable. What Article 21 does is to recognise and declare a fundamental right to life and personal liberty and to lay down that no person shall be deprived of this right except according to procedure established by law. The fundamental right is to life and personal liberty, not to procedure established by law, and, although it can be taken away in accordance with such procedure, the right is not exhausted with the provision of such procedure. A law which makes the enjoyment of a legal right by one person dependent on a discretion to be exercised by another necessarily contemplates a proper exercise of that discretion on relevant grounds, and it is not until that is done that the procedure established by the law is complete. As laid down in clear terms in Bheshar Nath v. I.-T. Commr., Delhi and Rajasthan, AIR 1959 SC 149 in paragraph 13 of the report, the injunction in Article 14 of the Constitution is addressed to both the executive and legislative organs of the State and the article protects us from both legislative and executive tyranny by way of discrimination. If by a procedure established by law the petitioners can be deprived of their fundamental right of entry into the country, the procedure being that they can be prevented from entering it they are not in possession of a valid passport, then it seems to me that there is necessarily an obligation cast on the authorities who have the power to grant passports to exercise that power in a proper manner and not arbitrarily or capriciously or whimsically.

There is a corresponding right in the petitioners that their request for passports should be considered on the merits and not suffer rejection on irrelevant or extraneous considerations. The provisions of the Indian Passport Act and the rules made thereunder necessarily imply a power in the concerned public authorities of this country to grant a passport--in the case of authorities in

other countries it recognises the existence of such power--and so far as authorities in the country are concerned, I should think that the position is the same as if there were an express conferment. The law proceeds on the assumption that the power will be exercised in fit cases, and, in view of the circumstance that a refusal would be to deprive a citizen of a fundamental right, I think that the principle laid down in *Julius v. Lord Bishop of Oxford*, (1880) 5 AC 214 at p. 222 and accepted in *Chief Controlling Revenue Authority v. M. S. Mills Ltd.*, AIR 1950 SC 218 at p. 221 and in *Commissioner of Police v. Gordhandas Bhanji*. AIR 1952 SC 1 at p. 21 is attracted.

48. it is true that there is no law regulating the issue of a passport, laying down what conditions have to be satisfied before it can be issued, or on what grounds it can be refused. In that sense it would be right to say that the grant or refusal is a matter within the discretion of the executive but that does not mean that this discretion can be exercised in an arbitrary or capricious manner, especially when the result of a refusal amounts, in effect, to the denial of a fundamental right. That would render Article 21 illusory and would be a denial of the equality before law vouchsafed by Article 14 of the Constitution.

49. That the grant of a passport is a political function, or that in England the power to refuse a passport, being derived from the royal prerogative, is completely immune from judicial review, is no answer if the exercise of a political function infringes legal rights, then the courts are bound to see that the exercise is not on extraneous grounds, although, having regard to the nature of the function, they will not go into the adequacy of the grounds so long as they are relevant grounds. I do not think that our Constitution recognises anything corresponding to the royal prerogative in England. Passports and visas come within entry 19 of List I of the Seventh Schedule. They are matters to which the executive power of the Union extends under Article 73(1) of the Constitution. The exercise of that power is subject to the provisions of the Constitution including the provision in Article 14 which is expressly addressed to the State (which term includes the Government of India) and that in Article 226 which expressly confers on the High Courts the power to issue writs to any Government for the enforcement of the rights conferred by Part III of the Constitution or for any other purpose. So long as passports served the purely diplomatic function of affording the bearer the diplomatic protection of the issuing State and of a request for safe passage to other States, it might be proper to regard the issuance of a passport as a purely discretionary act of the department charged with the conduct of foreign affairs. But the moment a passport becomes necessary for the exercise of a legal right, here the fundamental right of free movement, it ceases to be a franchise or a privilege and becomes a licence making its issuance subject to judicial control. (It is to be noted that the decision in *Nakkuda Ali v. Jayaratna*, 1951 AC 66, which incidentally, has been severely criticised by H. W. R. Wade and other writers, proceeds on the footing that what was there described as a licence was really a privilege, the

refusal of which affected no legal right and imported no judicial duty). That seems to be the basis of the interference in (1958) 357 US 116: 2 Law Ed 2d 1204 and *Perkins v. Elg*, (1939) 307 US 325: 83 Law Ed 1320 and I think that it is as well to bear in mind that in England there would appear to be no law requiring a citizen to hold a passport in order to leave or enter the country.

50. Supposing there were a law, a perfectly good law, prohibiting a citizen from leaving or entering the country without a certificate of health or character issued by a competent public official. Supposing an official, subject to our jurisdiction, were to refuse a passport on the ground that the applicant was of dark complexion. Or supposing, as here, in order to stop the drain of doctors from the country, Government issued a direction that no certificates should be granted to doctors. Would we hesitate to grant a mandamus compelling the official concerned to consider the application on its merits entirely uninfluenced by these extraneous considerations? Would we say that we are helpless to interfere because there is no law regulating the grant of such certificates, defining what health is or what character is, laying down the conditions an applicant has to satisfy for obtaining a certificate, or the grounds on which a certificate can be declined? Would we say that the grant or refusal of the certificate is a medical or a censorial function unregulated by law and therefore within the absolute discretion of the official concerned?

On the contrary, would we not say that if the exercise of a power by a public official is necessary for the enjoyment of a legal right by a subject, then the official is under a duty to exercise that power in a proper way and that an arbitrary or capricious refusal on extraneous considerations is a fraud on the power and therefore a mala fide refusal, or, at the lowest, amounts to a failure to exercise that power? Why should it be different in the case of a passport if there is a refusal on completely irrelevant considerations? Why should the circumstance that the grant or refusal of a passport is a political function, unregulated by law, afford immunity from judicial control? Of course, having regard to the nature of the function, that it involves relations with foreign powers, the courts will be extremely cautious and will not in any manner interfere with the discretion of the authority concerned, or deny that the matter is for its subjective satisfaction, so long as its decision is not based on altogether irrelevant considerations.

51. That takes us to the question whether the sole ground for the denial in these cases, namely, that the country is in great need of doctors and cannot therefore afford to lose the services of the petitioners is a relevant ground having regard to the nature and functions of a passport; and, as I have already indicated, the circumstance that the issue of passports is not regulated by law need not deter us from doing so. What is a passport today, whatever might be its historical origins? It is many things, for it serves many purposes. It is, among other things, an essential document of travel, for, most countries insist on a passport for entry and a good many for exit as well. It serves as a document of identity and is prima facie evidence of nationality. But these are only some of

the many uses to which a passport is put. Essentially a passport remains what Lord Alverstone C. J. said it was in 1905-2 KB 730 at p. 745, of course with special reference to the United Kingdom:

"It will be well to consider what a passport really is. It is a document issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the Government of foreign nations and to be used for that individual's protection as it British subject in foreign countries, and., it depends for its validity upon the fact that the Foreign Office in an official document vouches the respectability of the person named."

The position in the United States is not different. Hackworth (in his Digest of International Law. Vol. HI, page 436) says:

"The American passport is a document of identity and nationality issued to persons owing allegiance to the United States and intending to travel or sojourn in foreign countries. It indicates that it is the right of the bearer to receive the protection and good offices of American diplomatic and consular officers abroad and requests on the part of the Government of the United States that the Officials of foreign Governments permit the bearer to travel or sojourn in their territories and in case of need to give him all lawful aid and protection. It has no other purpose." And in (1058) 357 US 116: 2 Law Ed 2d 1204 it was held that though the power of the Secretary of State over the issuance of passports was very wide, refusal was and ought to be restricted to two categories. "First, questions pertinent to the citizenship of the applicant and his allegiance to the United States had to be resolved by the Secretary xxxx Second, was the question whether the applicant was participating in illegal conduct, trying to escape the toils of the law, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States.

52. The very terms of a passport issued by the authorities in this country give a clear indication of the considerations that should govern its grant or refusal.

"These are to request and require in the name of the President of the Republic of India all those whom it may concern to allow the bearer to pass freely without let or hindrance, and to afford him or her every assistance and protection of which he or she may stand in need."

In what way have the petitioners forfeited their claim to the protection and good offices of Indian diplomatic and consular officers abroad or to a request to the officials of foreign Governments to permit them to travel sal'elv in their territories, and, in case of need, to give them all lawful aid and protection? They are Indian citizens and their allegiance is not questioned. They are respectable persons and nothing has been said against their character. They have not been guilty of illegal conduct and they are not persons fleeing from the law. It is not said that they will put

the passport, or the protection afforded by it, to improper or unlawful uses and no question of the security of the country is involved. On the contrary, what is alleged against them is that they are such useful members of society that the country can ill afford to lose them. This, it seems to me, is an entirely irrelevant consideration, and, when it is remembered that the legal bar is not against exit but against entry (after the acquisition of greater professional experience and higher qualifications), an absurd consideration. And how is it that the petitioners are to be prevented from leaving the country?

The law does not require that they should have passports for leaving the country, but the law requires they should have passports for entering the country once they have left it. Therefore, by the threat that, if they leave the country they will not be allowed to re-enter it, they must be stopped from going. (I am not unaware of the fact that a more potent deterrent is that the petitioners will not be allowed to enter the United Kingdom or the United States without a passport but I am thinking only of the deterrent provided by the law of this country, not by the laws of other countries.) What is this if it is not executive (sic) a (sic) abuse of power?

53. The petitioners have been refused passports because they are doctors. This is a distinction (distinction) as between doctors and non-doctors -- in the view that I am taking it is a distinction of importance to me to [go into the distinction] of "distinction" as between the different (IM-, (-, ,,f doctors--on "consideration" in relation to the matter of the grant or refusal of a passport. It is true that there is nothing in law to prevent the petitioners from going without passports, and it might be that, so far as exit is concerned, the remedy which the petitioners can claim would only be an injunction against any restraint on their leaving abroad and not a mandamus compelling the issue of a passport. (It is clear, as I have pointed out more than once, there is no necessity of entry for which the law requires that the person concerned should hold a passport. That, as I have said, imposes on the respondents the duty of considering the application made by the petitioners on the merits, entirely uninfluenced by the extraneous considerations that have led to their rejection. Ordinarily, the remedy granted would be a mandamus requiring the respondents to so consider the applications, or, perhaps, an injunction forbidding them from rejecting the applications on the ground on which they have been rejected. In either case that would be tantamount to directing the issue of passports to the petitioners, for, it is quite clear from the affidavits filed by the respondents that passports would have been granted to the petitioners but for the conditions laid down by the respondent regarding the issue of passports to doctors desiring to go abroad. The matter is one of great urgency to the petitioners--they have had to obtain repeated extensions of the time allowed for taking up the appointments offered to them--and I do not see what purpose will be served except a waste of precious time by asking the respondents to reconsider the applications of the petitioners on the merits.

I would therefore issue a mandamus directing the respondents to grant passports to the petitioners within two weeks from this date.

54. in (1939) 307 US 325: 83 Law Ed 1320 Elg had been refused a passport on the ground that she was not an American citizen, She sued the Secretary of Labour, the Commissioner of Immigration and Naturalization, and the Secretary of State for a declaration that she was a citizen of the United States, for an injunction against the Secretary of Labour and the Commissioner restraining them from prosecuting proceedings for her deportation, and for an injunction against the Secretary of State from refusing to issue to her a passport upon the ground that she was not a citizen. The lower courts while decreeing the suit against the two others dismissed it as against the Secretary of State because of his official discretion in the issue of passports. The Supreme Court, however, decreed it as against the Secretary of State as well. Headnote 7 of the report is illuminating:

"7. The granting of an injunction against a refusal by the Secretary of State to issue a passport (or the granting of mandamus to compel the issuance of such a passport by him), at the suit of one determined by the court to be a citizen of the United States, is not an unauthorised interference with the discretion of that official with respect to passports where the bill alleges that the passport is refused solely upon the ground that the applicant has lost 'her United States Citizenship."

There the rejection was solely on the ground that Elg was not a citizen, a decisive ground which the court, however, found to be factually incorrect. Here the case is much stronger. The sole ground of the rejection is that the petitioners are doctors whose services the country needs a good ground no doubt for stopping them from going if there were a law restricting the departure of such persons, but an entirely irrelevant ground for the refusal of a passport. Our powers under Article 226 to mould the relief so as to meet the ends of justice according the requirements of each case-are very wide and are free of the trammels imposed by their origin and history on traditional English remedies like mandamus. And I think it would be a proper exercise of that power to direct a mandamus in these cases.

Gopalan Nambiyar, J.

55. (O. P.

No. 1135 of 1905): I have had the advantage of perusing the judgment of My Lord The Chief Justice, and of my learned brother Raman Nayar J. I agree with the order proposed by My Lord The Chief Justice, but wish to add a few words of my own.

56. The relief sought in this writ petition is one of mandamus against the respondents directing

them to issue a passport to the petitioner, to enable him to travel abroad, and outside India.

57. In order to entitle the petitioner to a writ of mandamus, it must be shown that the respondents are under a legal duty and that the petitioner has a legal right to enforce the performance of the same. The petitioner's right to obtain a passport for leaving India cannot be founded on the provisions of any law or statute. The Indian Passport Act (Act XXXIV of 1920) read with Indian Passport Rules (1950) merely prohibit the entry into India without a valid passport, and punish the contravention thereof (Rules 3 and 6 of the Indian Passport Rules). Rule 3 which prohibits entry without a passport applied to Indian citizens as well as non-citizens and the decision to the contrary in V. G. Row's case, AIR 1954 Mad 240, can no longer be sustained in view of the decision of the Supreme Court in AIR 1959 SC 1315. The right to a passport for leaving India is claimed as a necessary attribute of the fundamental right to "personal liberty" enshrined in Article 21 of the Constitution of India, which provides as follows:

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

According to the petitioner, 'personal liberty' includes a right to travel abroad, or at least a right to cross the frontiers of India, and to re-enter India. The existence of such a right is sought to be made out on the concept of 'liberty' as expounded in England and America; by reference to Clause 42 of the Magna Charta and Clause 13 of the Universal Declaration of Human Rights against the background of which the Constitution of India was framed; and also by reference to the pronouncements of the Supreme Court in A. K. Gopalan's case, AIR 1950 SC 27 and in Kharak Singh's case, AIR 1962 SC 1295.

58. it appears to me that the American Authorities ought to be received with some caution: because, while the 5th Amendment of the American Constitution, guarantees that no person shall be "deprived of life, liberty or property without due process of law", the constitutional guarantee of liberty, in Article 21 of our Constitution is subject to two substantial modifications namely;

(1) the liberty is restricted to personal liberty; and (2) the deprivation of the same is prohibited except according to procedure established by law.

There is, besides, the significant provision in the 9th Amendment to the American Constitution, which states:

"the enumeration in the Constitution of certain rights is not to be construed to deny, or disparage others retained by the people."

In (1958) 357 US 116: 2 Law Ed 2d. 1204, Douglas J. speaking for the majority of the Court observed:

"The right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law under the Fifth Amendment. So much is conceded by the Solicitor General. In Anglo-Saxon law that right was emerging at least as early as the Magna Carta. ((1968) 357 US 126). Ghafee, Three Human Rights in the Constitution of 1737 (1956), 171-181, 187 at seq., shows how deeply engrained in our history this freedom of movement is. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be its close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values."

59. Among the English Authorities brought to our notice, and which have been referred to by My Lord The Chief Justice and my learned brother Raman Nayar J., I would content myself by referring to Blackstone's Commentaries on the Laws of England. Book No. 1 al page 134 wherein it is stated:

"Personal liberty consists in the power to locomotion, of changing situation, or moving one's person to whatsoever place one's inclination may direct, without imprisonment or restraint unless by due course of law."

60. These and other materials fell to be considered by the Supreme Court in the two pronouncements referred to supra. Neither of them was specifically concerned with a right to travel abroad or to cross the frontiers of India. Counsel on both sides drew freely from several passages in the judgment in A. K. Gopals case, AIR 1950 SC 27 to emphasise their respective contentions. The observations of Das J. In paragraphs 220 to 222 were stressed by counsel for petitioners. On the other hand, counsel for respondents emphasised paragraphs 102 and 105 in the judgment of Sastri, J. and paragraphs 168, 169, 171, 176 and 178 in the judgment of Mukherji, .1. In paragraph 171) Mukherji, J. observed:

"No State can guarantee to its citizens the free right to do anything outside its own territory. This is true of all the fundamental rights mentioned in Article 19 and not merely of the right of free movement."

In paragraph 177. the same learned Judge recorded:

"In ordinary language 'personal liberty' means, liberty relating to or concerning the person or body of the individual, and 'personal liberty' in this sense is the antithesis of physical restraint or

coercion. According to Dicey, who is an acknowledged authority on the subject, " 'personal liberty' means a personal right not to be subjected to imprisonment, arrest or other physical coercion, in any manner that does not admit of legal justification" (vide Dicey on Constitutional Law, 9th Edn. pp. 207 and 208), it is in my opinion, this negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty, and not mere freedom to move to any part of the Indian territory."

61. It seems to me, with respect, that the above statement of the law does not completely resolve the controversy with which we are concerned. Freedom from physical restraint can well be if a person is stopped from crossing the frontiers of India. The restraint in such a case is again at the frontier and within the territory of India, so that, even upon this narrow construction of personal liberty, a right to cross the frontiers, and leave the territory of India may well be posited. But as against this, it has been suggested that there is no restraint on a person if he is confined within a vast sub-continent such as India. I am not persuaded by this argument to hold against the existence of the right.

62. There is yet another factor to be taken note of, in the language of Article 21 of the Constitution itself. The said Article applies both to citizens of India, as well as to non-citizens. In the case of non-citizens, it cannot be said that they can be confined to the territories of India and have no right to cross its frontiers. (See the discussion of Sastri, J. in paragraph 106 of the judgment in A. K. Gopalan's case, AIR 1950 SC 27). This aspect of the content of the Article seems to me to be another pointer that a right to travel beyond India, or at least to cross its frontiers is within the purview of Article 21.

63. I may now turn to pronouncement of the Supreme Court in Karakh Singh's case, AIR 1963 SC 1295. Ayyangar, J. speaking for the Court observed in paragraph 17 as follows:

"17. We shall now proceed with the examination of the width, scope and content of the expression "personal liberty" in Article 21. Having regard to the terms of Article 19(1)(d), we must take it that that expression is used as not to include the right to move about, or rather, of locomotion. The right to move about being excluded, its narrowest interpretation would be that it comprehends nothing more than freedom from physical restraint or freedom from confinement within the bounds of a prison; in other words, freedom from arrest and detention, from false imprisonment or wrongful confinement. We feel unable to hold that the term was intended to bear only this narrow interpretation but on the other hand consider that "personal liberty" is used in the Article as a compendious term to include, within itself all the varieties of rights which go to make up the "personal liberties" of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that

freedom, "personal liberty" in Article 21 takes in and comprises the residue."

64. As I understand the above pronouncement, it seems to me clearly to indicate that personal liberty in Article 21 was not intended to bear the narrow interpretation of freedom from physical restraint. It also seems to indicate that the "residue" of the fundamental right of personal liberty left after carving out the rights in Article 19(1), is comprised in Article 21. Giving the matter my careful consideration, I am of the view, that the fundamental right to 'personal liberty' in Article 21 includes the right to cross the frontiers of India and to re-enter the country. In 67 Bom LR 544: (AIR 1966 Bom. 54) a learned Judge of the Bombay High Court held that the right to move across the frontiers of India is included in the "personal liberty" guaranteed by Article 21 of the Constitution. I respectfully agree with the said view.

65. If there is such a right, has there been any deprivation of the same, by the refusal of a passport? - is the next question for consideration. The right guaranteed under Article 21 is only not to be "deprived" of personal liberty except according to procedure established by the law. It has been ruled in AIR 1059 SC 1315 that to require an Indian citizen to produce a passport before he can be allowed to enter India may be regarded as a proper restriction upon entering India, and that Section 3 of the Indian Passport Act 1920 and Rule 3 of the Passport Rules, (1950), do not offend Article 19(1)(d) and (e) of the Constitution. That case was not concerned with Article 21. I am here concerned not with the insistence on a passport but with a denial or refusal of the same. It is true that under the law as it stands, a passport is not needed to leave India but it is certainly necessary to re-enter India. It appears also, that having left India, it is difficult, if not impossible, to apply for and obtain a passport from abroad. In such circumstances, I am inclined to hold that without a passport, the fundamental right to cross the frontiers of India and re-enter the country is rendered illusory and ineffective, and in that sense there is a deprivation of the right by refusal of a passport.

66. In the view that I have taken, it is unnecessary to consider the argument of the petitioner, that quite independently of any right under Article 21 he is entitled to relief based on the violation of Article 14 of the Constitution. I express no opinion on the point.

67. Regarding the relief to be granted to the petitioner, I agree with the order proposed by My Lord The Chief Justice.

Gopalan Nambiyar, J.

68. (O. P. No 1097 of 1965): For the reasons stated in my judgment in O P No. 1135 of 1965. I agree with the order proposed by My Lord The Chief Justice Gopalan Nambiyar, J.

69. (O. P. No 1720 of 1965): For the reasons stated in my judgment in O. P No. 1135 of 1965, I agree with the order proposed by My Lord The Chief Justice.

Gopalan Nambiyar, J.

70. (O. P.

No. 1883 of 1965) For the reasons stated in my judgment in O P No 1135 of 1965, I agree with the order proposed by My Lord The Chief Justice.