1948 *Present:* **Dias J.**

FRANCIS DE SILVA, Appellant, *and* WIJENATHAN, Respondent

S. C. 1,146—Appeal from a decision of an Elections Officer, Trincomalee

Local Authorities Elections Ordinance, No. 53 of 1946—Appeal—Computation of appealable period—Meaning of "residence"—Sections 7 (1) and 21 (1).

When a person objects to the insertion of a claimant's name in the electoral list for a ward, the objector has a legal right to be notified of the decision of the Elections Officer, and, if he appeals, the appealable period referred to in section 21 (1) of the Local Authorities Elections Ordinance commences to run from the date when the decision is communicated to him.

The "residence" contemplated in section 7 (1) can be either actual or constructive. In order to constitute constructive residence two elements must co-exist, viz., (*a*) intention to reside at a particular house or place, and (*b*) unfettered power or ability at one's own will and pleasure, without committing a breach of any legal obligation, to go to that house or place and take up residence there at any time.

APPEAL from a decision of an Elections Officer appointed under the Local Authorities Elections Ordinance.

H. V. Perera, K.C., with *H. W. Tambiah*, for the objector-appellant.

C. S. B. Kumarakulasinghe, with *A. I. Rajasingham* and *T. W. Rajaratnam*, for the claimant-respondent.

Cur. adv. vult.

December 15, 1948. DIAS J.—

The claimant respondent desired to have his name inserted in the Electoral List for Ward No. 4 of the Urban Council of Trincomalee. It is alleged that the claimant's father set up the objector-respondent to oppose his application. When the claimant succeeded in persuading the Elections Officer that he had the necessary residential qualification to be regarded as a qualified voter, his father manifested his paternal affection towards his son by inducing the objector-appellant to prefer this appeal.

The respondent's preliminary objection to the hearing of this appeal must be disposed of first. If it succeeds there is no point in considering the "point of law" raised in the appeal. Section 21 (1) of Ordinance No. 53 of 1946 provides as follows:—

"If any claimant or objector . . . . is dissatisfied with the decision of any Elections Officer on any claim or objection relating to the electoral lists of the wards of any electoral area, he may, *not later than ten days from the date of such decision*, appeal therefrom to the Supreme Court on any question of law involved in such decision, but not on any other ground".

1*——J. N. A 92665—1,044 (10/49)

It is not in dispute that all the steps preliminary to the summary investigation of the respondent's claim and the appellant's objection have been duly observed. The inquiry was held on August 26 and 27, 1948. Section 19 (2) (*a*) of the Ordinance requires the Elections Officer to hold a " summary inquiry " into the matter. What he did—possibly because counsel who appeared did not permit him to do so—was to hold a kind of state trial, the recorded evidence of which runs into no less than forty-seven pages. After the legal advisers on both sides made speeches on the facts and the law, the Elections Officer, who apparently is not a judicial officer, appears not to have given his decision forthwith, but adjourned the proceedings to think about it. He then put his decision into writing on September 6, 1948. His decision, however, was only communicated to the objector appellant by the Elections Officer's letter X4, dated September 20, 1948. The appellant filed his petition of appeal four days later, namely, on September 24, 1948. It is contended on behalf of the respondent that the appealable time began to run against the appellant as from September 6, and that, therefore, he is out of time. The appellant argues that, not being a prophet, he was unable to know what the Elections Officer had recorded in the secrecy of his residence or office, and that " the date of the decision " referred to in section 21 (1) of the Ordinance is September 20, and that he preferred his appeal " not later than ten days from the date of such decision ", and that he is therefore in time.

Counsel for the respondent has seen me in chambers and has urged some further reasons. He submits that there are four classes of persons who can appear before the Elections Officer in terms of section 18 (1), namely (*a*) the person who claims to have his name entered, (*b*) the person who claims to have his name transferred to another list, (*c*) the person who objects to the name of a person being entered and applies to have that name erased, and (*d*) Mr. Barr Kumarakulasingham argues that there is a fourth class of person, namely, the person whose name is objected to by an objector, and he refers to section 19, sub-section 1 (*c*). Assuming for purposes of argument that Mr. Barr Kumarakulasingham's contention is correct, in this case the claimant comes within both categories (*a*) and (*d*). He is the claimant who claims that his name should be entered in the list, and he is also the person against whom the objection has been made. Mr. Barr Kumarakulasingham argues that there is no necessity for the Elections Officer to promulgate his decision to an objector because, he argues, under section 19 (2) sub-section (*b*), the Elections Officer has no duty cast upon him to give notice to the objector. He argues that the only persons who are entitled to be given notice under section 19 (2) (*b*) are the claimant and the person objected to but not the objector. I am unable to read any such meaning into that section. In this case notice was given to the claimant in a dual capacity—both as the claimant and as the person against whom an objection had been lodged. Notice was also given to the person " who desires to oppose the claimant " and " to the objector and the person in regard to whom the objection is made ". Therefore, Mr. Barr Kumarakulasingham's contention that the objector had no legal right to be notified of the decision is, in my opinion, unsound.

The Elections Officer is not a judge who sits in his court from day to day. He is an officer who is appointed for the purpose of hearing and adjudicating upon claims and objections, for which purpose he fixes the *venue* and appoints the time at which he will be present for that purpose. After attending to this duty he departs, one does not know where. The parties concerned have no place to go to where they can obtain information as to what the Elections Officer decided.

The word "decision" as used in the Ordinance has not been defined. Stroud points out that "decision" is a popular and not a technical term, and means little more than a concluded opinion. I would hold that the word "decision" as used in section 21 means the determination of or the verdict on the questions at issue raised at the summary inquiry before the Elections Officer, and which he has reached after considering the evidence and the arguments before him. An unpromulgated decision reached by the Elections Officer cannot in the context be regarded as a "decision". Section 19 (4) provides that the decision of the Elections Officer becomes final and conclusive subject to the right of appeal on questions of law conferred by section 21 (1). How is an appellant to know on what points of law he should appeal unless the "decision" is communicated to him? The matter becomes quite clear if we regard it from the point of view of a claimant appellant. He applies to have his name inserted in the register or to transfer it from one list to another. He goes to the Municipal Office or the Urban Council Office where the inquiry was held, and finds a revised list exhibited in which his name does not appear. That fact is not proof that the Elections Officer has decided his claim adversely to him. The omission may be due to a mistake or to the negligence of the clerk who compiled the revised list. Is he expected to go interviewing underlings in order to ascertain what the "decision" is? Does the law expect that members of the public should have to write to the Elections Officer to ascertain what his "decision" is? From what point of time does the appealable period commence to run against the claimant appellant? Obviously, it is the duty of the Elections Officer, as he did in this case, to promulgate his decision publicly, or to intimate to the parties concerned what his decision was. The appealable time begins to run from that date and not before. Therefore, in my opinion the appeal has been preferred in time and must be heard.

The appellant is entitled to appeal only on "a question of law involved in the decision", and not on any other grounds. The only ground of appeal urged is that the Elections Officer has misdirected himself on the question whether in terms of section 7 (1) of the Ordinance, the applicant had been resident within the electoral ward "and has been resident within the limits of that or any other ward of the area for a continuous period of at least six months in the period of eighteen months immediately preceding that date", i.e., the date of the commencement of the preparation or revision of the electoral list—*vide* section 13. What this means is that the applicant, besides having the qualifications enumerated in section 6, must also have a residential qualification by being resident within the relevant area for a period of eighteen months immediately preceding the date when the list was prepared or revised (in this case

May 1, 1948), and also continuously resided within the area for six months at some stage of the period of eighteen months. In other words, it is for the claimant to show that between December, 1946, and May 1, 1948 (eighteen months), he not only resided within the ward, but also that for a period of six months within that period he was continuously resident within the ward.

" Residence " can be (*a*) either actual, or (*b*) constructive. It is common ground that either kind of " residence " will satisfy the provisions of this Ordinance. It is also conceded that the respondent did not have actual residence within the ward for the requisite periods. It is however contended that he did have " constructive " residence which satisfies the requirements of the law.

The law on the question of " constructive " residence has been settled by local and English authorities. In order to constitute " constructive " residence two elements must co-exist. (*a*) There must be the *intention* to reside at a particular house or place, *and also* (*b*) that person must have the *unfettered power or ability* by his own will and at his pleasure, without committing a breach of any legal obligation, to go to that house or place and take up his residence there at any time. If these two elements co-exist, that person has " constructive " residence at that house or place. If both elements do not co-exist, there is no " constructive " residence —see *Ford v. Drew* [1] and *Soysa v. Perera* [2]. Thus, a Ceylonese residing at Cotta went to England—not under a contract of service to do work abroad, but for a holiday. Such a person is residing at Cotta, because not only has he the intention to return to his home, but he also has the power at his mere whim and caprice, without committing a breach of any legal obligation, to return home. A man imprisoned for a civil debt does not lose his residence, because by paying the debt he can forthwith go home. The case of a man incarcerated for a criminal offence is different, because, although he may have the intention of residing at his home, he cannot give effect to that intention until he is set free. A public servant whose home is in Colombo is stationed at Jaffna to do some work. If he has not obtained authority to leave Jaffna and to go to Colombo whenever the spirit moves him, he cannot leave Jaffna without committing a breach of a legal obligation. Therefore, such a person cannot be said to be residing in Colombo.

The appellant contends that the Elections Officer has misdirected himself on these legal principles in deciding whether the claimant had the requisite " constructive " residence at Trincomalee. Is this a " question of law " within the meaning of section 2 (1) ? I think it is. In *R. v. Seeder de Silva* [3] the Court of Criminal Appeal held that where the misdirection consists of a wrong direction as to the law in general which obtains in the class of cases to which the particular case belongs, or as to the law which is applicable to the special facts of the case—that would clearly involve " a question of law ". I have, therefore, decided to hear the appeal.

[1] *(1879) 49 L. J. C. P. (N.S.) 172.*

[2] *(1921) 22 N. L. R. 464.*

[3] *(1940) 41 N. L. R. at p. 340.*

According to the claimant he is unmarried. His father deserted his mother for a concubine and left his wife and his daughters to fend for themselves. The applicant, therefore, as a dutiful son, had to support them. In 1940, owing to war conditions, he was able to secure employment in the Ceylon Ordnance Department, which, owing to the danger of invasion and air attack from Japan, had its headquarters at Trincomalee till 1946. Between 1940 and 1943 the appellant rented a house for his mother and sisters with whom he lived at "Rosefield", Crow Lane, Trincomalee. In 1944 that house was vacated and his mother and sisters went to live at Sri Kanta, Mosque Lane, Trincomalee. That the applicant is the tenant of these premises is beyond question, but that *per se* does not establish that he resided there. The critical period for the applicant is from December, 1946, to May 1, 1948, and he must also show that for a period of six months within that period he continuously resided within the electoral district. When war conditions ceased to exist in 1946, the headquarters of the Ordnance Department were shifted—probably to Colombo. There was a "branch office" there until 1947. We can presume that the authorities allowed the applicant to work at that branch office until January, 1947. But what happened thereafter? The claimant was transferred to Diyatalawa. He says that this was a "temporary" transfer. The facts indubitably point to a different conclusion. In October, 1947, according to the claimant, he was again "temporarily" transferred to Colombo—probably to the headquarters. He says that from 1947 up to date "I have been having duties at Trincomalee". The letter dated July 12, 1948, addressed by Lt.-Col. J. L. Tredennick, C.R.A.O.C., Ceylon, to the Elections Officer (a highly improper communication for an outsider to write to a judge, but which was admitted as evidence during the inquiry) does not assist the claimant. That officer says "Mr. B. Wijeynathan was employed in the War Department at Trincomalee and was working there until he was posted to Diyatalawa on temporary duty, and from there to Colombo where he is now employed". It is to be noted that the writer does not say that he was temporarily transferred to Colombo. The letter proceeds "In view of the fact that the employment of the above-named employee cannot be considered permanent in Colombo, and his nature of duties is such that he will have to travel to Trincomalee periodically, he has been encouraged to retain his residence in Trincomalee". That this letter has affected the mind of the Elections Officer is obvious, because he refers to it in his decision. The situation envisaged in this letter is that the applicant is now stationed in Colombo, from where he has to proceed on duty to other places including Trincomalee for his work. Such journeys are periodic and are not undertaken at the will and pleasure of the applicant, but in accordance with superior orders. It is fortunate for the applicant that he has got a commanding officer at the head of the Ordnance Department who "encourages" him to go to Trincomalee. But this is not what the law requires. It requires the applicant to be able to go to Trincomalee at any time of the day or night whether he is "encouraged" or "discouraged" or even actually prohibited by his superior officer without committing a breach of any legal obligation. This is not the case here. No doubt the

applicant has the intention of residing at Trincomalee, but the evidence clearly proves that he cannot at his will and pleasure leave his duties at Colombo whenever he feels like seeing his mother and sisters. In dealing with the law applicable to the facts the Elections Officer has misdirected himself. This is what he says :—

> " It appears to me that there are only two main categories where there is ' legal restraint ' upon the power to return. (1) In criminal convictions (even those where option of a fine is not exercised). (2) Militiamen on duty—Mr. Wijenathan does not belong to either of these categories. Mr. Wijenathan has not experienced a conflict between his intention to return home and his official duties. Even if there were such conflicting theory, Mr. Wijenathan is free even more than in the case of the man convicted for debt, to terminate his contract of employment. Mr. W's is a conditional ' restraint '. Mr. W. has a sleeping apartment in B'caloa at Sri Kantha Vasa, his family and servants live there uninterruptedly and he returns there occasionally both on duty and on some weekends. His permanent interests are in Batticaloa and the authorities state (though this is by no means decisive in isolation) that they have encouraged him to retain his residence in Trincomalee. Even if the evidence was weighted equally on the facts, which is by no means the case, I have no alternative but to disallow the objection and to order insertion of his name in the Electoral list of the respective Ward of U. C. Trincomalee to which he belongs ".

Had the Elections Officer correctly applied the law to the facts of this case, he would have reached the conclusion that although the applicant may have the intention of residing at Trincomalee, the evidence does not show that he at his whim and caprice or at his mere will and pleasure can leave Colombo without committing a breach of a legal obligation in order to go to Trincomalee and spend a few days there. He is resident in Colombo and not at Trincomalee.

There is a further point of law which arises in these proceedings, namely, that in allowing an outsider like Lt.-Col. Tredennick to write the letter which he did write and in allowing that letter to be read as evidence without giving the opposing side the right to cross-examine the writer of that letter, there has been an irregularity which has affected the mind of the Elections Officer. As the objector appears to have condoned this irregularity I shall say nothing more about it, but it is rather disturbing to realise that in these statutory tribunals which are being set up by Parliament, the officer who performs judicial or semi-judicial duties is capable of being influenced by communications of this kind. No injustice has been done in this case.

The order appealed against is set aside, and I direct that the applicant respondent's name shall be erased from the electoral list. The objector appellant will have his costs both here and below.

Order set aside.