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Aliens - Parole

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RECENT DECISIONS

ALIENS—Parole—Automatic revocation of approval of alien's nonquota visa petition pursuant to statute authorizing Attorney General to revoke same for "good and sufficient cause" and subsequent revocation of alien's parole without a hearing does not violate fifth amendment due process.

United States ex rel. Stellas v. Esperdy, 366 F.2d 266 (2d Cir. 1966).

Relator, an alien seaman, entered the United States on June 23, 1961 as a medical parolee.[1] At the expiration of his parole Stellas absconded and remained at large until July 11, 1963, when he was found by the Immigration and Naturalization Service. When it was learned that he had married an American citizen, who was expecting a second child, the INS reparoled him so that he could be with her until thirty days after the termination of her pregnancy. At this point Mrs. Stellas filed a petition to have relator accorded nonquota immigrant status.[2] The petition was approved by the District Director and forwarded to the American Consulate in Caracas, Venezuela, where Stellas was to perfect his nonquota status by obtaining a visa.[3] The visa was never obtained and Stellas never achieved full nonquota status, although parole was periodically extended to permit him to do so. On November 10, 1965, Mrs. Stellas

1. 8 U.S.C. § 1182(d)(5) provides:

> The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purpose of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

Pursuant to this section the Attorney General has issued 8 C.F.R. § 253.1(d):

> An alien crewman . . . may be paroled into the United States . . . at the expense of the transportation line for medical treatment or observation.

2. 8 U.S.C. 1155(b) [This section has been reenacted as 8 U.S.C. § 1154(a) (Supp. I 1965), but is hereinafter referred to as 8 U.S.C. 1155 as cited by the court.] provided:

> Any citizen of the United States claiming that any immigrant is his spouse . . . and that such immigrant is entitled to a nonquota immigrant status under section 1101(a)(27)(A) of this title . . . may file a petition with the Attorney General.

3. 8 U.S.C. § 1181(a) (Supp. I 1965) provides: ". . . no immigrant shall be admitted into the United States unless at the time of application for admission he (1) has a valid unexpired immigrant visa . . . ."

Upon filing of the petition by the citizen spouse, the alien, if he is within the United States may a) leave the United States and appear before a United States Consul to get a visa—8 U.S.C. § 1204; or b) apply to the Attorney General for adjustment of his status—8 U.S.C. § 1255. However, if the alien entered the United States as a crewman on a vessel the second alternative is not available—8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(a); therefore, Stellas would have to leave the United States to get his visa.

withdrew her petition, filed another on December 6, 1965, and withdrew this one nine days later. Consequently the approval of the District Director of relator's visa petition was *automatically revoked* pursuant to 8 C.F.R. § 206.1(b)(1).[4] Stellas was then notified that his parole was revoked[5] and he was to be summarily deported, *i.e.*, without a hearing or showing of cause beyond revocation of his wife's petition. This petition for habeas corpus was then filed wherein relator claimed that he had a right to a hearing before his parole could be revoked.[6]

The court characterizes relator as a mere parolee permitted to remain within the United States in order to perfect his status.[7] Since the purpose of his parole no longer exists the parole can be revoked without any violation of due process. The law employs a fiction in the case of a parolee, treating him as if he were "stopped at the limit of our jurisdiction . . . ."[8] Therefore, denial of permission to a parolee to remain in the United States is exclusion of an alien and not expulsion of an alien once admitted into the country, the latter being entitled to a hearing before deportation.[9] The state of the law today is that whatever Congress prescribes as the procedure for the exclusion of aliens is due process.[10]

The legal issue at this point is whether the Attorney General and the INS have followed the procedure set by Congress. The applicable statute empowers the Attorney General to revoke approval of nonquota visa petitions "at anytime, for what he deems to be *good and sufficient cause*."[11] (Emphasis added.) The Attorney General has implemented this statute

4. The regulation provided:

> The approval of a petition made under [8 U.S.C. §§ 1154, 1155, or 1183(c)] and in accordance with Parts 204, 205, or 214 of this chapter is revoked as of the date of approval in any of the following circumstances:
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> . . . .
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> (b) [8 U.S.C. § 1155]. As to a petition approved under section 205 of the Act [8 U.S.C. § 1155]:
>
> (1) Upon formal notice of withdrawal filed by the petitioner with the officer who approved the petition.

This regulation has been recodified as of January 1, 1966 as 8 C.F.R. § 205.1(a)(1), but is hereinafter cited as § 201.1(b)(1) as cited by the court.

The regulation is an implementation of the statutory authorization of 8 U.S.C. § 1156 [This section has been reenacted as 8 U.S.C. 1155 (Supp. I 1965) but is hereinafter cited as 8 U.S.C. 1156 as cited by the court.]:

> The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under sections 1154, 1155, or 1184(c) . . . .

5. 8 U.S.C. § 1182(d)(5).

6. United States *ex rel.* Stellas v. Esperdy, 366 F.2d 266, 267-8 (2d Cir. 1966).

7. 366 F.2d at 270.

8. United States v. Ju Toy, 198 U.S. 253, 263 (1905).

9. 8 U.S.C. § 1252(b).

10. 366 F.2d at 271.

11. 8 U.S.C. § 1156.

in part by a regulation which provides for automatic revocation upon the withdrawal of the citizen spouse's application.[12] The court finds that this regulation is authorized by the statute. Via the administrative discretion which the statute gives him the Attorney General has set up a reasonable class of cases wherein such petitions are automatically revoked, *i.e.*, where a citizen spouse withdraws the petition for nonquota status.[13] Therefore, Stellas no longer has any power or right to proceed with his attempt to gain full nonquota status.

The theory of parole is based upon the "accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."[14] When an alien seeking admission is paroled into the country he is not *legally* within the United States; rather, parole simply allows physical entry to avoid inconvenience.[15] Therefore, the parolee is subject to the will of Congress alone.

The real issue involved and avoided by the court is whether the rule that whatever Congress prescribes as due process for exclusion of aliens is valid when applied to parolees. Hart and Wechsler have commented that such an application of the rule is "patently preposterous,"[16] that whenever a party brings a petition in habeas corpus the United States Constitution always applies and the court must test the applicable law against the fundamental law of due process.[17] They contend that it is not sufficient to state that what has been authorized by Congress has been followed. Under this theory the court in the instant case should have examined the statute against the requirements of due process.

Such an inquiry would disclose a violation of due process. It has been noted that one reason for the hearing requirement in deportation cases, as opposed to "exclusion" cases involving parolees, is to insure that administrative officials act in accord with the law. This safeguard is logically necessary in exclusion as well as deportation cases; both involve action by administrative officials in removing an alien from the country.[18]

It is further stated that the distinction between a resident alien and a

12. 8 C.F.R. § 206.1(b)(1).

13. 366 F.2d at 269 and 270.

14. Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1891).

15. Leng May Ma v. Barber, 357 U.S. 185, 190 (1957).

16. H. M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 332 (1953).

17. *Id.* at 333-4.

18. Note, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 YALE L.J. 760, 786 (1962).

non resident alien, *i.e.*, a parolee, "represents a meaningless triumph of form over substance."[19] Only the former is entitled to a hearing before deportation while both are often in the same circumstances in actuality, *i.e.*, both may be physically present within the United States for long periods and have strong ties here. However, through the legal fiction of parole, the non resident is not considered to have *entered* the United States and is, therefore, not entitled to the rights of a resident alien. Indeed, the irony of the matter is shown when it is noted that a person "illegally entering" the United States, *i.e.*, one who successfully sneaks across the border, is considered to have made a "legal entry" for purposes of status classification and is entitled to consideration as a resident alien while one "legally entering," *i.e.*, one being brought in by the INS as a parolee, is not considered to have made a "legal entry" for classification purposes and may be deported without a hearing.[20] To have granted such a hearing would have required the court to ignore existing precedent; however, decisional law, regardless of how deeply entrenched, is always subject to the appeal to principle.[21]

The Second Circuit Court of Appeals decided not to undertake an investigation of the "no hearing for parolees" rule under fifth amendment due process; rather, it followed the decisions in this area.

However, the court could have reached the opposite result, *i.e.*, granted Stellas a hearing on the sufficiency of the grounds for his deportation, and not have ignored existing precedent. This could have been done in either of two ways suggested by the dissent. The dissenting judge states that the automatic revocation upon withdrawal by the citizen spouse is not authorized by the statute. Approval of the nonquota immigrant petition is granted only after a full investigation of the facts in each case. The revocation provision is a corollary to nonquota petition proceedings and calls for "good and sufficient cause" to revoke approval. It would seem that a "good and sufficient cause" determination would also require a full investigation of the facts. Withdrawal of the petition by a spouse is not good and sufficient cause since there are other considerations to be investigated, such as the reason for the withdrawal and the family status of the alien spouse in reference to children involved.[22] To allow further investigation of these factors would require a full hearing on the merits.

Alternatively the dissent indicates that, even if the automatic revocation is authorized by the statute, Stellas is entitled to a hearing on the constitutionality of the law itself since he is not a mere parolee. In the case of *United States ex rel. Zacharias v. Shaughnessy*[23] it was held that

19. *Id.* at 787.
20. *Id.* at 787-8.
21. H. M. HART & H. WECHSLER, *op. cit. supra* note 16, at 335.
22. 366 F.2d at 271 and 273.
23. 221 F.2d 578 (2d Cir. 1955).

the filing of a preliminary petition by a citizen spouse to gain nonquota status for her alien husband gave the alien a "status, condition, right in process of acquisition, act, thing, or matter then done or existing . . ." to which the repealed law—under which relator's spouse filed—was continued in force by the savings clause in the new Act. Zacharias was to be deported for lack of good moral character and under the new law, adultery, which was admitted, was conclusive of the charge against him whereas it was not under the old law; relator was thus saved by the change in his status brought about by the filing of the petition alone. By analogy, the filing of the petition by Mrs. Stellas gave relator in the instant case a similar "right in process of acquisition" and this changed his status from a mere parolee to something greater. Therefore, Stellas is no longer subject to treatment as a parolee, *i.e.*, his petition for habeas corpus cannot be dismissed by the mere statement that what Congress has authorized has been done. Rather, the sufficiency of the grounds for his deportation should be tested against the fundamental law of due process.[24]

The majority rejected both approaches. While the court states that relator's case "evokes sympathy"[25] it did not choose to enforce its feelings with logic. The Second Circuit Court of Appeals remains tied to the form of a procedure which "tells a story reminiscent of the 'due process' of the Middle Ages, the Star Chamber—even of the shanghaiing of seamen."[26]

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ANTITRUST—Money and Finance—Bank Merger Act of 1966—Clayton Act—The Supreme Court has ruled that the Justice Department is not required to base its complaint in bank merger suits on the Bank Merger Act of 1966 and that the burden is on the merging banks to show that the Act's standards clearly outweigh the merger's anticompetitive effects.

United States v. First City Natl. Bank of Houston, 87 Sup. Ct. 1088 (1967).

The First City National Bank of Houston and the Southern National Bank of Houston applied to the Comptroller of the Currency for approval of their proposed merger. The Provident National Bank of Philadelphia and the Central-Penn National Bank made a similar request. In accordance with the Bank Merger Act of 1960,[1] as amended by the

24. 366 F.2d at 271-3.
25. *Id.* at 272.
26. *Id.* at 271.

1. 74 STAT. 129 (1960).