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Constitutional Law - Deportation - Use of Confidential Information in Denial of Discretionary Relief

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CONSTITUTIONAL LAW—DEPORTATION—USE OF CONFIDENTIAL INFORMATION IN DENIAL OF DISCRETIONARY RELIEF—Plaintiffs, husband and wife, were deportable aliens. At deportation hearings the plaintiffs asked the attorney general to grant discretionary suspension of deportation under section 19 (c) of the Immigration Act of 1917, as amended, which provided in part: "In the case of any alien . . . who is deportable . . . and who has proved good moral character for the preceeding five years, the attorney general may . . . (2) suspend deportation . . . if he finds (a) that such deportation would result in serious economic detriment to a citizen. . . ."[1] Plaintiffs had three children who were all American citizens. The hearing officer denied relief and the Board of Immigration Appeals affirmed, both on the basis of confidential information which was not disclosed to plaintiffs or put on the record. On a proceeding in a federal district court for declaratory judgment and review, *held,* remanded for further hearing. The use of confidential information is contrary to the applicable regulations[2] and is without legislative sanction. Aliens within the country are entitled to a fair hearing in deportation proceedings and a decision based on confidential information is, or may be, arbitrary action by the government. *Maeztu v. Brownell,* (D.C. D.C. 1955) 132 F. Supp. 751.

The power of Congress to exclude or expel aliens is a plenary and fundamental sovereign power, substantially immune from judicial control.[3] Congress may delegate exclusionary powers to the attorney general and his action, however arbitrary, is subject to review only as to the nationality of the person excluded and as to the question of adherence to the procedural standards authorized by Congress.[4] Although the use of confidential information in exclusion hearings has been upheld,[5] an alien once in the United States is entitled to a fair hearing and procedural due process

set standard but sustains the degree of delegation which the Court regards as appropriate in the circumstances. See Jaffe, "An Essay on Delegation of Legislative Power," 47 COL. L. REV. 359 (1947). But the emphasis in recent cases would appear to be not on the propriety of a power delegation, but merely on whether the act was legally effective to transfer the power. Keeping in mind the implications of Prudential Life Ins. v. Benjamin, note 12 supra, it is perhaps not too early to suggest that the Court has abandoned the prohibition against delegation of authority as a constitutional limitation imposed by the judiciary.

1 39 Stat. L. 889 (1917), as amended by 62 Stat. L. 1206 (1948).

2 12 Fed. Reg. 5117 (July 31, 1947), required a discussion of the evidence relating to eligibility for relief and the reasons for the order of the presiding inspector. 15 Fed. Reg. 7638 (Nov. 10, 1950), required a written decision by the hearing officer containing a summary of the evidence. These regulations are superseded by 8 C.F.R. §244.3 (1952). See note 15 infra.

3 The Chinese Exclusion Case (Chaechan Ping v. United States), 130 U.S. 581, 9 S.Ct. 623 (1889); Fong Yew Ting v. United States, 149 U.S. 698, 13 S.Ct. 1016 (1893); Harisiades v. Shaughnessy, 342 U.S. 580, 72 S.Ct. 512 (1952).

4 "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." Knauff v. Shaughnessy, 338 U.S. 537 at 544, 70 S.Ct. 309 (1950).

5 Shaughnessy v. Mezei, 345 U.S. 206, 73 S.Ct. 625 (1953); Knauff v. Shaughnessy, note 4 supra.

before deportation.[6] The use of confidential information as a basis for the denial of discretionary relief in deportation cases has been before the courts often enough to indicate that two general approaches to the problem are used. Many cases have held that a denial of relief based primarily on information outside the record is a denial of due process.[7] The principal case falls within this first group. This approach is probably the better one under the regulations to the 1917 act, because these regulations expressly require a statement of the evidence.[8] Other cases have taken the view that the attorney general may use confidential information as a ground for denying discretionary relief but not in determining the alien's eligibility for relief.[9] This approach is not well developed. It seems to be based on the principle that the courts cannot review the exercise of the attorney general's discretion, but can only interfere where there has been a failure to exercise discretion[10] or an abuse of discretion.[11] Review of the exercise of discretionary power is necessarily limited in scope, but the due process clause of the Fifth Amendment has been construed to mean that an alien must have the opportunity to know and rebut the evidence against him. While the Supreme Court has recognized the plenary power of Congress to deport aliens,[12] and has held that deportation proceedings are not criminal trials so that the alien has no right of confrontation,[13] the Court has also stated that if the statute authorizes any hearing, it must be a fair one.[14] A regulation under the 1952 Immigration and Nationality Act expressly permits the use of confidential information in deportation proceedings.[15] The validity of such a provision presents a new and interesting problem. The earlier cases arising under the 1917 act could have re-

6 Kwock Jan Fat v. White, 253 U.S. 454, 40 S.Ct. 566 (1920); The Japanese Immigrant Case, 189 U.S. 86, 23 S.Ct. 611 (1903); Bridges v. Wixon, 326 U.S. 135, 65 S.Ct. 1443 (1945).

7 Orahovats v. Brownell, (D.C. D.C. 1955) 134 F. Supp. 84; Alexiou v. McGrath, (D.C. D.C. 1951) 101 F. Supp. 421; United States ex rel. Weddeke v. Watkins, (2d Cir. 1948) 166 F. (2d) 369, cert. den. 333 U.S. 876, 68 S.Ct. 904 (1948). See also Kwong Hai Chew v. Colding, 344 U.S. 590, 73 S.Ct. 472 (1953).

8 Note 2 supra.

9 United States ex rel. Matranga v. Mackey, (2d Cir. 1954) 210 F. (2d) 160, cert. den. 347 U.S. 967, 74 S.Ct. 778 (1954); United States ex rel. Von Kleczkowski v. Watkins, (D.C. N.Y. 1947) 71 F. Supp. 429. But see United States ex rel. Giacalone v. Miller, (D.C. N.Y. 1949) 86 F. Supp. 655 at 657, where the judge who wrote the opinion in the Von Kleczkowski case took the view of the cases cited in note 7 supra.

10 Mahler v. Eby, 264 U.S. 32, 44 S.Ct. 283 (1924); Tod v. Waldman, 266 U.S. 113, 45 S.Ct. 85 (1924); United States ex rel. Mazur v. Commissioner, (2d Cir. 1939) 101 F. (2d) 707; United States ex rel. Di Paola v. Reimer, (2d Cir. 1939) 102 F. (2d) 40.

11 United States ex rel. Kaloudis v. Shaughnessy, (2d Cir. 1950) 180 F. (2d) 489, and cases cited therein.

12 Harisiades v. Shaughnessy, note 3 supra.

13 Johannessen v. United States, 225 U.S. 227, 32 S.Ct. 613 (1912).

14 Klapprott v. United States, 335 U.S. 601, 69 S.Ct. 384 (1949); Kwock Jan Fat v. White, note 6 supra.

15 8 C.F.R. §244.3 (1952), which provides: "In the case of an alien qualified for voluntary departure or suspension of deportation under section 242 or 244 of the Immigration and Nationality Act the determination as to whether the application . . . shall be granted or denied . . . may be predicated upon confidential information . . . if in the opinion of the officer or the Board . . . the disclosure of such information would be prejudicial to the public interest, safety, or security."

lied on the regulations requiring statements of the evidence. However, those earlier cases chose to stress the question of the fundamental fairness of the hearing and indicated that the use of secret information may be a denial of due process whether or not the regulations permit its use.[16] The Court of Appeals for the Ninth Circuit recently affirmed a case in which the new regulation was held to permit a ruling based on secret information[17] although little consideration was given to the constitutionality of the provision.[18] As more deportation cases are decided under the 1952 act, there must be a resolution of the issue of whether due process permits expulsion of an alien on the basis of secret information, or whether there must be a review of the strength of the secret information on which the exercise of discretion is based.

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[16] See the concurring opinion of Justice Murphy in Bridges v. Wixon, note 6 supra.

[17] Jay v. Boyd, (9th Cir. 1955) 222 F. (2d) 820.

[18] The contention that use of confidential information was a denial of due process was rejected with a reference to Matranga v. Mackey, note 9 supra, indicating that the court is of the opinion that confidential information may be used in the formulation of the discretionary decision under the old regulations. There was apparently no direct attack on the validity of 8 C.F.R. §244.3 (1952) as a denial of due process.