Michigan Law Review

Volume 51 | Issue 8

1953

CONSTITUTIONAL LAW-ALIENS-POWER TO EXCLUDE AND DENY HEARING

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RECENT DECISIONS

CONSTITUTIONAL LAW—ALIENS—POWER TO EXCLUDE AND DENY HEARING—In two similar cases, petitioners sought a writ of habeas corpus from federal district courts in order to obtain release from federal immigration authorities. Both were aliens who had been lawful permanent residents at the time they left the country. Mezei had allegedly gone abroad to visit his dying mother, and his return to the United States had been delayed by difficulty in securing an exit permit. Kwong Hai Chew had left the country to sail aboard a vessel of American registry, prior to which he had been screened by the United States Coast Guard. He had also served in the United States Merchant Marine with credit during World War II. On return to the United States, both petitioners were denied entry without a hearing, "on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest." This action was taken pursuant to federal regulations duly prescribed.[1] In the *Kwong* case, the district court denied the writ on the ground that, since every entry by an alien is to be deemed a new entry, the petitioner became subject to the exclusion provisions of the immigration laws.[2] In the *Mezei* case, the district court granted the petition and authorized temporary admission after refusal of the federal authorities to disclose *in camera* any proof of the petitioner's danger to the public safety, since the petitioner had already been held for 21 months and the government conceded that, despite every effort on both its part and on that of the petitioner, his entry into another country could not be secured.[3] The decisions of the district courts were affirmed by the respective courts of appeals.[4] On

[1] 8 C.F.R., §175.53 and §175.57 (1949). The regulations are based on 40 Stat. L. 559 (1918), as amended by 55 Stat. L. 252 (1941), 22 U.S.C. (1946) §223. The Immigration and Nationality Act of 1952 continues the provision. 66 Stat. L. 190 (1952), 8 U.S.C.A. (1953 Supp.) §1185. It also expressly provides that the attorney general may deny a hearing if he is satisfied that the alien is excludable on certain grounds, on the basis of information of a confidential nature, the disclosure of which the attorney general, in the exercise of his discretion and after consultation with the appropriate security agencies, concludes would be prejudicial to the public interest. 66 Stat. L. 199 (1952), 8 U.S.C.A. (1953 Supp.) §1225(c). The exclusion of the petitioners did not come under the new act because of the saving clause in §405(a). See 66 Stat. L. 280 (1952).

[2] United States ex rel. Kwong Hai Chew v. Colding, (D.C. N.Y. 1951) 97 F. Supp. 592.

[3] United States ex rel. Mezei v. Shaughnessy, (D.C. N.Y. 1951) 101 F. Supp. 66. The district court held that the due process clause of the Fifth Amendment applies even to aliens on Ellis Island, and that, in the absence of facts showing that the detention was reasonable, it must be considered unreasonable. The immigration authorities refused to show facts which would prove the detention reasonable.

[4] United States ex rel. Kwong Hai Chew v. Colding, (2d Cir. 1951) 192 F. (2d) 1009. United States ex rel. Mezei v. Shaughnessy, (2d Cir. 1952) 195 F. (2d) 964. The majority of the court of appeals in the Mezei case affirmed the admission but directed reconsideration of the terms of the parole, since they deemed the terms imposed by the district court as creating too much hardship. Judge Learned Hand dissented in the Mezei case on the ground that no constitutional question was involved, since an alien could not force the United States to admit him even qualifiedly.

certiorari to the United States Supreme Court,[5] *held,* both decisions reversed. Since he had been on a vessel of American registry, Kwong Hai Chew had not lost his status as a lawful permanent resident. The regulations under which he had been denied entry without a hearing were construed not to apply to lawful permanent residents, both on constitutional grounds and on the ground of statutory intent. Mezei, on the other hand, could no longer be considered as a lawful permanent resident, and since he thus became an alien seeking entry, he had no right to a hearing on the question of his exclusion, even though he was undeportable; he could be detained indefinitely if his removal could not be effected. *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206, 73 S.Ct. 625 (1953); *Kwong Hai Chew v. Colding,* 344 U.S. 590, 73 S.Ct. 472 (1953).

These two cases draw a distinction between an alien seeking to enter who is still to be deemed a lawful permanent resident and one who, though formerly a lawful permanent resident, has lost that status by reason of his remaining abroad for a certain length of time. The category into which the alien falls is determined by reference to naturalization law, which defines the circumstances under which continuity of residence is broken. An alien who is no longer in the category of a lawful permanent resident is not entitled to the constitutional protection of the due process clause. This holding is based upon the power of Congress to provide that once an alien has departed and remained abroad for a certain length of time, his re-entry is to be determined as if he were an alien entering for the first time. He is then subject to the existing requirements for entry.[6] In the case of the alien who is not a lawful permanent resident, the action of the executive department is final and not subject to judicial review when Congress has not provided for it, since exclusion of aliens is an inherent executive function in the conduct of foreign affairs. The rule of *Knauff v. Shaughnessy,*[7] in which the Supreme Court upheld the exclusion without hearing of an alien who had never been a lawful permanent resident, has thus been extended to cover an alien whom Congress has impliedly declared is no longer a lawful permanent resident; but the alien whom Congress has impliedly declared to be still a lawful permanent resident is entitled to the protection of the due process clause and therefore to a hearing. Justice Clark's opinion for the majority in the *Mezei* case does not explain why a hearing should be denied when the exercise of the power to exclude necessarily results in indefinite detention

[5] United States ex rel. Mezei v. Shaughnessy, cert. granted 344 U.S. 809, 73 S.Ct. 25 (1952); United States ex rel. Kwong Hai Chew v. Colding, cert. granted 343 U.S. 933, 72 S.Ct. 769 (1952).

[6] United States ex rel. Polymeris v. Trudell, 284 U.S. 279, 52 S.Ct. 143 (1932); United States ex rel. Stapf v. Corsi, 287 U.S. 129, 53 S.Ct. 40 (1932); The Chinese Exclusion Case, Chae Chan Ping v. United States, 130 U.S. 581, 9 S.Ct. 623 (1889).

[7] 338 U.S. 537, 70 S.Ct. 309 (1950). The Supreme Court sustained the same regulations involved in the principal case against the contentions that it violated due process of law, constituted an unreasonable delegation of power by Congress to the President, and that it was inapplicable to persons entering under the War Brides Act. Justices Frankfurter, Jackson, and Black dissented as to the holding that the procedure was applicable to persons entering under the War Brides Act.

especially when the loss of status by the alien was involuntary.[8] The dissenters in the *Mezei* case recognize the right of an alien to a hearing when his removal cannot be effected, but they do not recognize the constitutional limitation implicit in the *Kwong* case on the power of Congress to change the status of the lawful permanent resident into that of an alien entering for the first time. Justice Black's dissent, in which Justice Douglas concurred, was based on the belief that the petitioner had a constitutional right to a hearing in open court, and that there was substantial danger to our democratic society when one man held an unchecked power over the liberty of another. Justice Jackson's dissent, in which Justice Frankfurter joined, stated that although detention of an alien might be consistent with due process of law, nevertheless, failure to grant the alien a hearing when his removal could not be effected was not. Justice Minton dissented from the decision in the *Kwong* case without opinion.

The implication of the *Kwong* case is that Congress may not arbitrarily convert a lawful permanent resident into an entering alien, and thereby take away constitutional rights. But Congress is not acting arbitrarily in providing for a change of status after an alien had been abroad for 19 months, thereby placing him in a category in which he is denied constitutional rights.[9] However, the limitation on Congress which the *Kwong* case imports portends a holding that section 235(c) of the Immigration and Nationality Act of 1952[10] is unconstitutional. That section incorporated the regulation which was involved in both the principal cases, declaring that the attorney general may exclude an entering alien without a hearing "on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest." Since section 101(13) expressly defines entry to include lawful permanent residents,[11] it would seem that section 235(c) is unconstitutional at least in part. The limitation on Congress is not yet defined, but it would, it seems, prevent arbitrary change of classification which will deny a hearing to a person whom the Court believes should still be considered a lawful permanent resident. It is submitted that there are two weaknesses in the decisions in the principal cases. In the first place, the reasoning of neither gives Congress any explanation of the limitations on its action; in the second place, if there is a fundamental policy with respect to giving one alien who leaves this country a hearing on his exclusion, then there is the same fundamental policy with respect to giving another alien who has left this country a hearing on his exclusion. Aliens who are permitted by the government to go abroad temporarily should at least have the security of knowing that on their return, if they are excluded, they will know why and have a chance to challenge the exclusion.

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[8] Congress recognized the problem of the undeportable alien in considering changes in the immigration laws, but it felt that it would be dangerous to permit their parole. See S. Rep. No. 1515, 81st Cong., 2d sess., 637-639, 643-644 (1950).

[9] In the Mezei case, the petitioner had been abroad for 19 months.

[10] 66 Stat. L. 198 (1952), 8 U.S.C.A. (1953 Supp.) §1225.

[11] 66 Stat. L. 166 (1952) 8 U.S.C.A. (1953 Supp.) §1101.