IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CARLOS ACOSTA

Plaintiff/Appellee

vs.

JOHN GAFFNEY

Respondent/Appellant

Appeal from the District
Court for New Jersey
C.A. - 76 - 2094

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A. THE FINDING THAT DEPORTATION OF THE INFANT'S PARENTS AMOUNTS TO A DE FACTO DEPORTATION OF THE INFANT IS CORRECT AND CANNOT BE SET ASIDE AS CLEARLY ERRONEOUS.

Judge Stern's decision is simple yet logical. A citizen of the United States cannot be lawfully deported. Lina Acosta, the infant daughter of the alien plaintiffs, is a citizen of the United States. Deporting the plaintiffs is a de facto deportation of Lina.

Judge Stern expressly found that deportation of the parents in this case amounted to a deportation of the child. This finding is binding upon this court unless it is "clearly erroneous," within the meaning of Rule 52 of the Federal Rules of Civil Procedure.

The standard of review used in Grove v. First Nat'l Bank of Herinine, 489 F.2d 512, 515 (3d Cir. 1973) should apply:

> "It is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data." citing Kransnov v. Dinan, 465 F.2d 1298, 1302 (3d Cir. 1972).

There is some authority within this Circuit allowing de novo review in a case where no testimony is taken and the trial court's decision is on the record. Demirjian v. Commissioner, 457 F.2d 1, 4 (3d Cir. 1972); Consolidated Sun Ray, Inc. v. Lea, 401 F.2d 650, 659 n.34 (3d Cir. 1968), cert denied, 393 U.S. 1050 (1969). These decisions are contrary to the clear language of Rule 52 and proper Supreme Court interpretation that the clearly erroneous test

is applicable to "inferences drawn from documents or undisputed facts." United States v. United States Gypsum Co., 333 U.S. 364, 394 (1948). "...(D)espite the confusion in the case law, the correct construction of the rule seems clear. No matter what the nature of the evidence or the basis of the finding, an appellate court may set it aside only when it is convinced that the finding is clearly erroneous..." 9 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE 747 (1971).

The finding that deportation of the infant's parents amounts to a de facto deportation of Lina, a United States citizen, is correct beyond question. There is no doubt that Lina's parents will take her with them to Colombia if they are deported, the alternative of leaving her in a foster home in the United States is not viable. Acosta v. Gaffney, 413 F. Supp. 827, 833 (D. N.J. 1976). There is ample support for the District Court's conclusion that allowing the parent's deportation to take place would result in an unconstitutional deportation of the child.

The argument that any effect upon citizen Lina Acosta is incidental cannot be maintained in light of the trial judge's express findings. Applying these findings, it is clear that the United States is attempting to deport a citizen, something which is patently unconstitutional. Other cases have, indeed, considered constitutional claims on facts similar to those presented here. See, i.e. Gonzalez-Cuevas v. INS, 515 F.2d 1222 (5th Cir. 1975); Cervantes v. INS, 510 F.2d 89 (10th Cir. 1975); Robles v. INS, 485 F.2d 100 (10th Cir. 1973); Aalund v. Marshall, 461 F.2d 710 (5th Cir. 1972). As the District Judge pointed out, 413 F. Supp. 827, 830, none of

these decisions squarely faced the 14th Amendment issue on which he based his holding. Nor was there the express fact-finding in those cases which is present here.

B. BY ATTEMPTING TO DEPORT HER ALIEN PARENTS, THE GOVERNMENT IS INTERFERING WITH LINA ACOSTA'S BASIC CITIZENSHIP RIGHT TO LIVE IN AND BE PROTECTED BY THE UNITED STATES.

No court can uphold the proven interference with citizenship rights which will occur if Lina Acosta's parents are deported. The Supreme Court has spoken in very broad language about the value of U.S. citizenship:

> "...(N)owhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many it is regarded as the highest hope of civilized men." Schneiderman v. United States, 320 U.S. 118, 122 (1943).

The Supreme Court has recognized the importance of citizenship rights by making it very difficult for citizenship to be divested. A naturalized citizen can only be denaturalized upon clear and convincing evidence of fraud in the naturalization. Schneiderman, supra. A native born citizen like Lina Acosta can only lose his/her citizenship by voluntarily relinquishing it. Afroyim v. Rusk, 387 U.S. 253 (1967).

A citizen has more rights than an alien in this country. For example, aliens must report their addresses to the attorney general each year,[1] aliens must carry an alien identification card with

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[1] 8 U.S.C. § 1305.

them at all times,[2] aliens generally cannot vote or hold public office.[3] But aliens have been gaining more and more rights. The Supreme Court has ruled that alienage is a suspect class; there must be a compelling reason to justify state discrimination. Graham v. Richardson, 403 U.S. 365 (1971). The Court has struck down blanket state employment prohibitions upon aliens. Sugerman v. Dougall, 413 U.S. 634 (1973) cf. Hampton v. Mow Sun Wong, 426 U.S. ___, 96 S. Ct. 1895 (1976). State prohibitions upon an alien's admittance to the bar are invalid. In re Griffiths, 413 U.S. 717 (1973). State licensing provisions which discriminate against aliens have been ruled unconstitutional. Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

Still, there remains one major difference between the rights of aliens and citizens. Amenability to deportation or exclusion, being ejected from the country, is "the chief distinguishing characteristic of alien status." Gordon & Rosenfield, supra, note 3 at 1-117. One's citizenship rights, then, come down to being allowed to live in the country. Without this, constitutional rights are worthless, as they cannot be enforced outside of the land. This basic value of citizenship has been recognized by the Supreme Court:

> "The calamity in loss of citizenship is not the loss of specific rights, then, but the loss of a community

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[2] 8 U.S.C. § 1304

[3] See, C. Gordon & H. Rosenfield, IMMIGRATION LAW & PROCEDURE § 1.38 (1976)

> willing and able to guarantee any rights whatsoever." (citation ommitted)
> Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160-161 (1962).

In Afroyim, Mr. Justice Black approvingly cited the following statement:

> "To enforce expatriation or exile against a citizen without his consent is not a power anywhere belonging to this Government."
> Afroyim, supra at 264-265.

This is precisely what the government is trying to do here. The Court in Afroyim did not distinguish between direct or indirect means of interference with citizenship rights, it disapproved all. Lina Acosta's citizenship rights are too precious for the government to tamper with.

III. POLICY

Rather than belabor the well-reasoned legal analysis in Judge Stern's opinion, amicus wishes to focus upon the pressing policy factors which underlie this case.

A. HARSHIP TO THE ALIEN PLAINTIFFS

Amicus wishes to emphasize the harsh effects of deportation. An individual is wrenched from his/her home, job and aquaintances and shipped to a foreign land. The Supreme Court has admitted that deportation is a draconian measure, even though it has sorrifully concluded that it is bound by the doctrine of stare decisis to hold that deportation does not amount to cruel and unusual punishment. See Galvan v. Press, 347 U.S. 522, 530-32 (1954).

> "...(D)eportation is a drastic sanction, one which can destroy lives and disrupt families..." Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963)

> "...(D)eportation may, as this Court has said in Ng. Fung Ho v. White, 259 U.S. 276, 284, deprive a man 'of all that makes life worth living;' and, æs it has said in Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 'deportation is a drastic measure and at times the equivalent of banishment or exile.'" Galvan v. Press, 347 U.S. 522, 530 (1954).

The effects of deportation still cause courts considerable difficulty. See, Lieggi v. INS, 389 F. Supp. 12 (N.D. Ill. 1975), rev'd without opinion, 529 F.2d 530 (7th Cir. 1976).

The facts of this case indicate that plaintiff Carlos Acosta supports not only his wife and child, but his citizen niece and nephew, 413 F. Supp. at 830. Furthermore, if he is forced to return to his native Colombia, he may be unable to find work to

support his family. 413 F. Supp. at 329. Important human equities exist in favor of the plaintiffs, two hispanics who visited this country and sought to stay in this nation of immigrants.

B. EFFECT OF THE DECISION

There is a basic dread which underlies the government's approach to this case. Basically, the government is afraid that not deporting alien parents of citizen children will encourage aliens to illegally enter the country and have children. A corollary argument is that allowing illegal entrants to stay is unfair to thousands of aliens abroad awaiting their turn at legal entry. One court phrased it thusly:

> "Petitioners, who allegedly remained in the United States for the occasion of the birth of their citizen children, cannot thus gain favored status over those aliens who comply with the immigration laws of this nation."
> Gonzalez-Cuevas v. INS, 515 F.2d 1222, 1224 (5th Cir. 1975)

The District Judge properly noted that Congress could merely increase quotas or expand the Immigration and Naturalization Service's law enforcement resources. 413 F. Supp. at 833. He also speculated that a constitutional amendment altering the aquisition of citizenship might be desirable. 413 F. Supp at 832.

But there are additional reasons why these oft-expressed government arguments are spurious. Fears that aliens will enter surreptitiously or fraudulently and have children are groundless. It is widely conceded that illegal immigration is encouraged by the economic attraction of this nation. Yet raising children presents very difficult problems, economic and otherwise,

especially to a family of limited means. The decision to have a child is complex, involving many factors. While immigration may be or become a factor, its effect is tenuous when compared with economic, social and cultural considerations.

The empiricle evidence which does exist suggest strongly that aliens do not come here to have children. Prior to January 1, 1977, Western Hemisphere aliens who were the parents of U.S. citizens of any age were exempt from labor certification under §§ 212(a)(14) of the Immigration and Nationality Act and thus at once eligible to enter the United States legally. A backlog which reached 2½ years developed because of the annual 120,000 Western Hemisphere quota, but it was nonetheless true that an alien from the Western Hemisphere who was the parent of a U.S. citizen could enter the United States legally some 2½ years after the birth of his/her child. The passage of P.L. No. 94-571 on October 20, 1976 eliminated this provision effective January 1, 1977, but the evidence is still there. An examination of this evidence reveals that Western Hemisphere aliens did not come into the United States to have children.

As of early 1976, there were 50,000 Mexicans on the 2½ year Western Hemisphere "waiting list" who were the parents of minor U.S. citizen children--an average of 20,000 per year.[4] This figure is indeed tiny when one considers that hundreds of thousands

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[4]This figure comes from an analysis prepared by the Department of State located in Hearings before the Subcommittee on Immigration, Citizenship and International Law of the Committee on the Judiciary of the House of Representatives, 94th Cong. 2d Sess. Ser. No. 34 at p. 372 (1976).

of Mexicans are annually expelled from the United States--709,959 in 1974 and 680,392 in 1975. See 1975 INS Annual Report at 13.

The most recent study done for the Department of Labor on illegal aliens found that only 12.7% of the Western Hemisphere aliens had U.S. born children.[5] This data affirmatively indicates that undocumented aliens do not come here to have children, even when they can gain immigration benefit by doing so. Rather, like most people, they make decisions about child-rearing independant of collateral immigration consequences.

A good example of this is presented by the facts of this case. Plaintiff/Appellee Carlos Acosta did not father a child immediately after coming to the United States, his daughter was born some three years after he entered. His daughter's birth came about independant of any immigration consequences.

The government argument that letting the Acostas stay is not fair to legal immigrants awaiting entry is similarly spurious. The government, on a daily basis, admits or allows to remain many aliens independant of the quota system. Often the government decision is purely political and exercised in cases of aliens with far less equity in their favor than the Acostas in this case. Various examples will illustrate this:

Section 212(d)(5) of the Immigration and Nationality Act gives the attorney general through his agents in the Immigration and Naturalization Service the authority to allow any alien to enter for any reason deemed in the public interest. It is this

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[5] D. North & M. Houston, The Characteristics and Role of Illegal Aliens in the U.S. Labor Market: An Exploratory Study, (Linton & Co., March 1976) at 83.

parole authority which has been used to admit thousands of refugees, including 30,000 Hungarians, 230,000 Cubans and over 130,000 Vietnamese.[6] In the case of the Cubans and the Vietnamese, the parole authority has been used broadly, permitting the entry of persons from a variety of economic and social backgrounds.

A second example is the INS's "non-priority" cases. These are cases of aliens who, although deportable, are permitted to remain in the country for humanitarian reasons. This program came to light as the result of litigation in the Southern District of New York, Lennon v. Richardson, 73 Civ. 4476. Data which came to light as the result of that litigation revealed that a total of 1,843 aliens had been granted non-priority status, nearly 1/3 because of effects on their family in the United States. An analysis of this program, containing the above-cited statistics is contained in a two-part article by the attorney who handled that case. See, Wildes, The Non-Priority Program of the INS...A Measure of the Attorney General's Concern for Aliens, 53 Interpreter Releases 25-32 (January 26, 30, 1976).[7]

A final, though extraordinary example is private legistlation through Congress. In the 91st through 94th Congresses, approximately 250 aliens secured relief out of 10,000 bills submitted. This

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[6]See 1975 INS Annual Report at 41; Hearings before the Subcomm. on Immigration, Citizenship & Int'l Law of the House Comm. on the Judiciary, 94th Cong. 2d Sess. Ser. No. 43 at 509 (1976).

[7]This analysis appears in slightly altered form in Wildes, The Non-priority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act, 14 SAN DIEGO L. REV. 42 (1977).

is not a significant number, but it is of some note when one considers that the vast majority of aliens are unable to go this route because their Senator or Congressman is unwilling to assist them. And, as one can see from the statistics, having a bill submitted on one's behalf is no guarantee of receiving relief. Yet a number of people do this every year, a matter of being in the right place with the right Congressman.

Any government description of unfairness to aliens awaiting entry abroad must take into account the government's own discretionary determinations which let many aliens enter or stay in the United States. And unlike the case at bar, where there has been an express finding by a District Court that no deportation should take place, aliens who are allowed to enter or remain under the various programs listed do so as a matter of unreviewable discretion.

IV. CONCLUSION

Amicus' employees are daily faced with the problem of trying to explain to members of the Hispanic community why, under U.S. law, alien parents can be deported if they have a child who is a U.S. citizen. The child's citizenship is meaningless if the parents are forced to leave the country, necessarily taking their baby with them. This argument, so obvious to laypersons, should be embraced by the courts. The government must not be allowed to interfere with citizenship rights.

In sum, there are compelling grounds for permitting Carlos Acosta and his wife to remain in this nation and give their U.S. citizen child the kind of home and upbringing she needs.