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Aliens--Deportation Proceedings--Right of Review

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NOTES

ALIENS. DEPORTATION PROCEEDINGS—RIGHT OF REVIEW—In a recent case[1] the federal court held in substance that the determination of the Attorney General that an alien would not be subject to physical persecution upon being returned to his country of origin was not reviewable.

In *United States* ex rel. *Dolenz* v *Shaughnessy*,[2] a Yugoslavian seaman who had deserted his ship after being admitted to this country for shore leave was arrested a year after his desertion on an immigration warrant charging unlawful entry. His deportation was ordered, it being directed that he be returned to Yugoslavia. The alien claimed that he would be subjected to persecution and perhaps death if returned to Yugoslavia, and that such deportation was contrary to the provision of the Immigration and Nationality Act of 1952.[3] This Act provides that:

> "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

The Attorney General offered no evidence to show that he had made a finding that the alien would not be persecuted if sent back to Yugoslavia. The hearing officer recommended deportation to Yugoslavia and the Commissioner of Immigration and Naturalization affirmed the order, finding merely that:

> "After a review of the facts in this case, I do not find that if this alien is deported to Yugoslavia he would be subject to physical persecution."[4]

The relator brought habeas corpus proceedings on the ground that he had been denied procedural due process because the hearing officer was not an impartial trier of facts and the determination of the Commissioner was arbitrary and capricious. The writ was dismissed by the federal district court,[5] this dismissal being affirmed by the Court of Appeal for the Second Circuit.[6]

One week later the appellant moved for a rehearing on newly discovered evidence, or in the alternative, that a new writ of habeas corpus be issued. The motion alleged several reasons, the most important being that the commissioner's order that the alien would not be subjected to physical persecution was based on material outside of the record of the hearing. The motion was denied, the Court of Appeals for the Second Circuit affirming this denial.[7]

In writing the opinion of this case Judge Swan said.

> "That section modified the language of the former statute in a manner which shows clearly, we think, that the withholding of deportation in cases where the alien fears persecution rests wholly in the administrative judgment and 'opinion' of the Attorney General or his delegate. The courts may not substitute their judgment for his. Doubtless a court might intervene to stay deportation, if the Attorney General or his delegate should deny the alien an opportunity to present evidence on the subject of persecution or should refuse to consider the evidence presented by the alien. But we see nothing in the statute to suggest that the courts may insist that the Attorney General's opinion be based solely on evidence which is disclosed to the alien. In his official capacity the Attorney General has access to

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[1]United States *ex rel.* Dolenz v. Shaughnessy, 200 F.2d 288 (2d Cir. 1952), *cert. denied*, 345 U.S. 928 (1953)
[2]*Ibid.*
[3]66 STAT. 214 (1952), 8 U.S.C. § 1253(h) (Supp. 1953).
[4]United States *ex rel.* Dolenz v. Shaughnessy, *supra* note 1 at 290.
[5]107 F.Supp. 611 (S.D.N.Y. 1952)
[6]See note 1 *supra.*
[7]206 F.2d 392 (2d Cir. 1953)

> confidential information. . . . We believe Congress intended the Attorney General to use whatever information he has. To preclude his use of confidential information unless he is willing to disclose it to the alien would defeat this purpose."[8]

In cases decided prior to this one quite different results were found. It is well settled that aliens, even those not eligible for citizenship, are entitled to the protection of the due process clause of the Fifth Amendment of the Constitution.[9] In *United States* ex rel. *Chen Ping Zee* v. *Shaughnessy*,[10] the court held that where aliens relied on the Internal Security Act providing that no alien would be deported to any country in which the Attorney General should find that the alien would be subject to physical persecution, aliens were entitled to procedural due process which includes the right to a hearing and a reasoned rather than an arbitrary ruling.

Again, in the case of *Wong Yang Sung* v. *McGrath*,[11] Justice Jackson said:

> "We would hardly attribute to Congress a purpose to be less scrupulous about the fairness of a hearing necessitated by the Constitution than one granted by it as a matter of expediency.
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> "Indeed, to so construe the Immigration Act might again bring it into constitutional jeopardy. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself."

It has also been held that deportation without a fair trial, or on charges not supported by any evidence constituted denial of due process which may be prevented by habeas corpus.[12] In *Alexiou* v. *McGrath*,[13] the court held that the refusal of the Attorney General to show "secret evidence" to the alien was a denial of due process, and in such a case the alien would be entitled to have the case remanded for a decision on the evidence alone.

In another case[14] the court held that courts may not substitute their judgment for that of the Attorney General, but if the alien alleges that he has been deprived of due process the courts will review the Attorney General's use of discretion.

From these cases, decided prior to the new act, it is apparent that an alien is entitled to due process in a deportation hearing, and that this requires: a hearing before an impartial tribunal, a reasoned rather than an arbitrary opinion, a fair trial, including charges supported by evidence, an opportunity to see the evidence being used against him, and a judicial review of the Attorney General's use of discretion if the alien alleges that he has been denied due process.

In the principal case the alien claimed that he had been denied due process of law because of the Attorney General's arbitrary action in failing to make diplomatic inquiry as to persecution of the alien if deported. The court said that it had been categorically denied that this was the general practice of the Government and that in a single instance a subordinate official had made such inquiry without authority to do so. So saying, the court declined to discuss this matter.

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[8] *Id.* at 394-395. When the court speaks of "the former statute" they are referring to section 20 Immigration Act as amended in 1950, 8 U.S.C.A. 156, which provides: "No alien shall be deported under any provision of this chapter to any country in which the Attorney General shall find that such alien would be subject to physical persecution."

[9] United States v. Pink, 315 U.S. 203 (1942); *Ex Parte* Bunji Une, 41 F.2d 239 (S.D.Cal. 1930).

[10] 107 F.Supp. 607 (S.D.N.Y. 1952).

[11] 339 U.S. 33 (1950).

[12] Bufalino v. Irvine, 103 F.2d 830 (10th Cir. 1939); Castro-Louzan v. Zimmerman, 94 F.Supp. 22 (E.D. Pa. 1950).

[13] 101 F.Supp. 421 (D.D.C. 1951).

[14] Chavez v. McGrannery, 108 F.Supp. 255 (S.D. Cal. 1952).

Yet in *Chen Ping Zee* v. *Shaughnessy*,[15] decided under the prior act, the court said that the immigration service read the section of the Internal Security Act too literally where, instead of making findings that aliens would not be persecuted, the immigration service merely stated that it did not find the aliens would be subjected to physical presecution if deported. (The exact situation here.) The court further said that if the alien claimed he would be subjected to physical persecution within the meaning of the act, then a finding that there would be no persecution would be a condition to deportation. This requires a finding of fact based upon investigation. It is certainly not inconceivable that this investigation to be thorough and fair would require a diplomatic inquiry to another country. The opinion of the principal case interpreting the new act removes this as a requirement of the deportation hearing. Now the Attorney General need only find "in his opinion" that the alien will not be subject to persecution. This requirement has thus become a matter of the Attorney General's discretion.

The court also expressly refused to review the Attorney General's exercise of discretion by saying that the very nature of the decision he must make concerning what the foreign country might do is a political question into which the courts should not intrude. Yet it is well established that if the decision of an administrative official is arbitrary and capricious it is an abuse of discretion and is subject to judicial review.[15]

In the principal case the court said that in making this decision the Attorney General could consider confidential evidence which the alien is not allowed to see. Since this decision of the Attorney General was made at the time of the only hearing granted to this alien, the implication is that confidential or "secret evidence" may be used in a deportation hearing. If this is true it is a statement that nullifies most of the requisites necessary to constitute due process in a deportation proceeding as established by the prior decisions.

Prior to the principal case the alien was entitled to a reasoned rather than an arbitrary opinion. What is to prevent an arbitrary opinion now? If the Attorney General had decided to deport a certain alien, he need only grant a "hearing" to the alien and then render his pre-determined decision based on "secret evidence." The alien will not be heard to complain. He has had a "hearing," and since secret evidence was used no court will determine whether the opinion was reasoned or not, as the courts will not review the decision.

Consider the requirements that the alien be granted a fair trial including charges supported by evidence and that he have an opportunity to examine the evidence being used against him. These requirements meet the same fate as the previous requirements. If the Attorney General is allowed to use "secret evidence," of course the alien is not allowed to see it nor is he allowed an opportunity to meet it. Again the alien could not complain of a denial of due process, as no court would review the decision of the Attorney General if "secret evidence" was used.

The requirement that the alien be afforded a judicial review of the Attorney General's use of discretion was expressly denied in the principal case. Thus the only element of due process assured the alien is that he be granted a "hearing." This will certainly be an empty and meaningless gesture if all the other elements necessary to constitute due process are not to be afforded him in a deportation proceeding.

The interpretation of this statute is, of course, a question of congressional intent. It does not seem likely that Congress intended this act to deprive an alien of the elements of due process as established in earlier cases. If the Attorney General is allowed to use "secret evidence" in these proceedings, it is placing in his hands the power to

[15]Dismuke v. United States, 297 U.S. 167 (1936)