No. 11,860

IN THE

United States Court of Appeals

For the Ninth Circuit

LEE FONG FOOK,

Appellant,

vs.

I. F. WIXON, District Director, Immigration and Naturalization Service, Port of San Francisco,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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To the Honorable William Denman, Chief Judge, and to the Honorable Circuit Judges of the United States Court of Appeals for the Ninth Circuit:

Lee Fong Fook, appellant, demands a rehearing of his cause on appeal upon the following grounds and for the following reasons:

SOLE QUESTION INVOLVED IS PURE QUESTION OF LAW.

No contention has been made by the appellee that the certified copy of the judgment of the California Superior Court establishing the fact of appellant's birth is a forgery or that the identity of the appellant is not that of the person named in that judgment.

to control the movements of a citizen or to regulate his departure and return to our shores. Nowhere by statute has Congress sought to restrict the departure and return of citizens to our shores. Passports are issued to them simply as a means of identification for use abroad. The Immigration Service usurps legislative authority in restraining a citizen from re-entry to this country upon returning from abroad. See *U. S. v. Wong Kim Ark,* 169 U.S. 649. Even Congress is prohibited from enacting such restrictive legislation for the 9th and 10th Amendments reserve this power to the People or to the respective States. Legislative power over immigrants is lodged in Congress by Art. I, Sec. 9. It is only through the medium of acts of Congress that an executive agency may regulate the entry of foreigners. In consequence, the only authority over a citizen returning from abroad that the Immigration Service may exercise is limited to inspection and temporary detention to ascertain that he is not an immigrant. See *U.S. v. Sing Tuck,* 194 U.S. 161, 168. Unfortunately, the Immigration Service pleads necessity compels it to detain claimants to citizenship for an unreasonable period of time while it endeavors to ascertain whether the person seeking entry is an excludable foreign immigrant. Whatever excuse it may urge for detaining those who are unable to identify themselves no such excuse is acceptable where the claimant presents a certified copy of an admittedly authentic judgment of a State Court of competent jurisdiction proving his native birth and, *ipso facto,* his national citizenship.

The judicial trial to which a claimant to citizenship seeking entry to our shores is entitled and to which this Court's opinion refers, nowhere is provided by Congress. It is a creature of the judiciary and the product of usurped legislative power. The Declaratory Judgment Statute, 28 USCA, Sec. 400, and the Suit to Determine Nationality, 8 USCA, Sec. 903, seem not to be the remedy for the reasons pointed out in our supplemental brief. (The new Declaratory Relief statute, 18 USCA, Sec. 2201, effective Sept. 22, 1948, may yet be interpreted to cover new cases.) The Suit to Determine Nationality may be invoked only when a right of citizenship has been denied. If that remedy applies to citizens at our door and is not restricted to them while abroad, it means simply that the appellant here, when denied entry, could file such a suit. The question, however, is how. The Immigration Service hold incommunicado those seeking admission for weeks and even months while it conducts investigations and its administrative reviews are pending. Nothing in that statute authorizes the applicant to post bond with that Service or to be enlarged on bail by the Court. The Service makes it a practice to deny release on bond to persons it deems excludable.

PURSUIT AND EXHAUSTION OF ADMINISTRATIVE REMEDIES UNNECESSARY WHERE QUESTION OF LAW ONLY IS INVOLVED.

The exhaustion of administrative remedies may be made a condition precedent to the right to maintain

a suit at law or a bill in equity but it is not a condition precedent to the right to apply for a writ of habeas corpus where the issue involved is purely a question of law. See *Gonzales v. William,* 192 U.S. 1, so deciding; *U.S. v. Sing Tuck,* 194 U.S. 161, 169, distinguishing cases involving factual issues from those presenting only issues of law; see also, *U.S. v. Wong Kim Ark,* 169 U.S. 649; *U.S. ex rel. Bradley v. Watkins* (CCA-2), 163 Fed. (2d) 328, 330-1; and also *Whitfield v. Hanges* (CCA-8), 222 Fed. 745, 747, pointing out that the denial of a fair and impartial hearing by an executive agency also presents a question of law which gives rise to relief in habeas corpus.

OPINION ERRS IN LEGISLATING RULE OF EVIDENCE INTO ESSE AND AUTHORIZING DELEGATION OF JUDICIAL FUNCTION TO EXECUTIVE AGENCY.

Wherein is this Court authorized to declare that the trial Court should hold the habeas corpus proceeding in abeyance while it awaits the final decision of the Commissioner and has the benefits of his views on the question of the appellant's claim of citizenship? The significance of this Court's decision is that the trial Court, sitting in habeas corpus, necessarily must attach weight and probably controlling weight to the decision of the Commissioner on this important judicial issue. This is nothing but a method of making a judicial determination dependent upon a spurious manufactured mass of evidence consisting of vague hearsay, opinions and conclusions by a strange pro-

cess of judicial osmosis. It elevates the opinions and conclusions of an executive agency to the dignity of credible evidence to which the judicial tribunal may attach even controlling weight. In effect, this Court's opinion, by usurping legislative power, decides that the judicial function of passing on evidence may be relegated or delegated to the executive agency. This is a method of obviating congressionally created rules of evidence and of substituting whim and caprice as the test of a citizen's right to enter his own country. Thus, administrative agents of the nation, arrogating unto themselves a power not lodged in them, through the instrumentality of the Courts and with the consent of the Courts, are enabled to deprive a citizen of his birthright.

OPINION ERRONEOUS FOR IMPAIRING WRIT OF HABEAS CORPUS.

No right exists in this Court or in the district Court or any other court whatever to emasculate the great writ of habeas corpus. Courts, by judicial interpretation, may expand the rights of an applicant for that writ but no power whatever is lodged in them to lop off any of its incidents. That writ forever (or rather what is termed, forever), is safeguarded by Art. I, Sec. 9, Cl. 2 of the Constitution from interference with its operation by any of the divisions of Government because any interference with its full and complete operation would amount to an impairment or a suspension of the writ. The opinion of this Court com-

manding the Court below to hold the habeas corpus proceeding in abeyance pending its receipt of information on the Commissioner's views on the citizenship of the appellant and his eligibility to admission to the United States does nothing but impair and suspend the writ of habeas corpus and is void for said reasons.

Habeas corpus proceedings need not wait for the Commissioner's views. Title 28 USCA, Sec. 455, now 2243, requires the Court or judge to whom an application for a writ of habeas corpus is pending "forthwith" to award the writ when it states grounds for relief. Sec. 458, now 2243, requires the detainer to bring the body of the restrained person to Court. Sec. 459, now 2243, requires the Court to set a day for the hearing thereon within five (5) days. Sec. 461, now 2243, requires that the Court must proceed summarily to determine the case and dispose of the matter as law and justice require. The opinion of this Court, however, dispenses with the requirements of these sections by commanding the Court below to delay that proceeding, that is to say, to take no judicial action thereon but to hold the proceeding in abeyance until such time as the Immigration Service stops worrying the problem and decides to admit the applicant to this country or informs the Court that it believes the petitioner is an excludable alien or nonresident. This is, therefore, either a command to the Court below to refuse to exercise its statutory duty to hear the cause summarily or a command that its judicial functions, impliedly delegated to the Commissioner, are to be

exercised by the Commissioner. Judicial functions, however, cannot be delegated to executive or legislative bodies or to juries. Compare *U.S. v. L. Cohen Grocery Co.,* 255 U.S. 81; *Field v. Clark,* 143 U.S. 649; *Schechter Poultry Corp. v. U. S.,* 295 U.S. 495.

Although the word "forthright" in Sec. 455 does not signify "instanter" it would be a distortion of its definition and interpretation to say it authorizes the wholly unnecessary delay this Court's opinion would occasion by ordering the proceeding below to be held in abeyance while the Immigration Service determines what decision it is to make. What the Supreme Court said of a similar delay on hearing on a writ in *Holiday v. Johnston,* 312 U.S. 342, 350, is an appropriate answer, viz., "It is said that the procedure tends to expedite the disposition of habeas corpus cases. The record in this case would seem to contradict the argument."

Habeas corpus proceedings and decisions thereon need not wait on the pleasure of administrative agencies or the Courts. There are no conditions precedent to the right to apply for the writ and to a special and summary hearing thereon in habeas corpus proceedings where illegal detention is alleged. See Mr. Justice Holmes' formulation of the rule, long accepted by the Supreme Court, in his opinion in *Frank v. Mangum,* 237 U.S. 309 at 346, 59 L. Ed. 969 at 988, in the following language:

> "But habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the

> proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell."

See also, *Price v. Johnston* (1948), 92 L. Ed. 993 at 996, declaring that the writ of habeas corpus should not "lose its effectiveness in a procedural morass" and at page 1002 where it is stated that the purpose of the writ is "to afford a swift and imperative remedy in all cases of alleged restraint upon personal liberty". Except for the innate goodness of the judge in the Court below in releasing him on bail the appellant still would be deteriorating in detention in the immigration jail. Had he not been able to raise cash bail or to purchase a surety bond he still would be lodged there. Ordering the Court below to suspend hearing and action on the writ cannot be said to afford a swift or imperative remedy for the restraint of liberty continues, even though the petitioner is enlarged on bond or bail, until a discharge is granted.

The Supreme Court, in its necessary capacity as a super-legislative body, does such things by resting its decisions on the law of necessity (as done in its opinion in *Price v. Johnston,* but circuit and district Courts may not invade the legislative field into which the Supreme Court itself trespasses only with the greatest caution.

We do not believe that a citizen must wait for an administrative body to create evidence, consisting of its views, opinions and conclusions, and then transmit it to a judicial tribunal, sitting in habeas corpus,

where it is given evidentiary weight. In that manner the conclusion of an executive agency is substituted for judicial determination of an issue which is purely judicial. The Courts are not empowered to delegate judicial functions to executive agencies.

IMPORTANCE OF DECISION ON MERITS OF ISSUE.

Probably between 100,000 and 300,000 like judgments of the Superior Court of California establishing the fact of birth have been rendered since the statute has been in force and effect. The majority of these seem to have been rendered since 1941. Those judgments have been necessary to enable men and women to have determined the dates and facts of their births to enable them to gain employment, to fix their retirement ages and to prove their eligibility to receive pensions, social security and other benefits for which they labor. A number of our Superior Court judges have obtained like judgments for such purposes and it is likely that a number of our federal judges have done likewise.

It would be strange were this Court to adopt the whimsical view that the Superior Court judges did not know what they were doing when they rendered those judgments and that they did not have jurisdiction to decide the issue involved therein and that those judgments are worthless. If this Court were to deny the binding effect of the appellant's judgment establishing his birth and *ipso facto* his national citizenship its decision, in effect, is tantamount to a nullifi-

cation of the California statute and to a cancellation of all those judgments and is a denial of their efficacy. We do not believe any such power is lodged in our federal Courts.

Of course a citizen is entitled to a judicial hearing on his claim to citizenship when it is disputed by the Immigration Service. He is entitled to apply for a writ of habeas corpus. In such a proceeding the issue is the legality of the detention and, as an incident to that issue, proof of citizenship or of residence is involved. Habeas corpus waits upon no agency. A citizen need not wait upon an executive agency which, after all, is his servant and not his lord. When the servant is presented with a certified copy of an authentic judgment establishing the fact of birth and recognizes and admits its authenticity the authority for temporary detention lodged in the servant disappears. Detention from that moment forth is unlawful.

CONCLUSION.

Although the great liberty writ cuts across all forms of legal red tape this Court, by its opinion and decision herein, retards its speedy relief and, in effect, deprives it of efficacy. This Court has exceeded its power. It omitted passing on the serious issues involved. It is highly unsatisfactory from the viewpoint of the appellant and also from that of the appellee for the question whether the California judgment is final and conclusive is a like issue in many cases pending before the Immigration Service and in many more

cases to arise. It decides nothing and offers no solution to the pressing problem confronting appellant, the Immigration Service and many thousands of citizens who have procured like judgments. Why should a citizen await the whim of an executive agency. Citizens still have some rights left. We do not intend to lay these few preciously won rights upon the sacrificial altar of executive caprice. Magna Carta and the Bill of Rights still are sacred to citizens regardless what administrative agents may think of them. We are not willing to yield any of them even to judicial caprice. We are not willing to surrender them to any entity, governmental or private.

We trouble you, therefore, to set aside your order remanding the cause with the instructions therein contained and urge that appellant be granted a rehearing on the serious issues framed in the pleadings, involved in the appeal and stressed herein and in the briefs of both sides.

Dated, San Francisco, California,
November 22, 1948.

Respectfully submitted,
GUS C. RINGOLE,
Attorney for Appellant
and Petitioner.

WAYNE M. COLLINS,
Counsel for Amicus Curiae.

Certificate of Counsel

The within petition for a rehearing is well founded in point of law and fact and is not interposed for delay.

Gus C. Ringole,
Attorney for Appellant and Petitioner.

Wayne M. Collins,
Counsel for Amicus Curiae.