GHOLAMREZA NARENJI v. CIVILETTI

United States Court of Appeals for the District of Columbia Circuit
January 31, 1980, Filed
No. 79-2460; No. 79-2461

Reporter: 1980 U.S. App. LEXIS 20952

GHOLAMREZA NARENJI, BEHZAD VAHEDI, CYRUS VAHIDNIA v. BENJAMIN CIVILETTI, ATTORNEY GENERAL, ET AL., *Appellants* ; CONFEDERATION OF IRANIAN STUDENTS v. BENJAMIN R. CIVILETTI, *Appellant*

Opinion by: [*1] MacKINNON

Opinion

On Suggestions for Rehearing En Banc

Opinion filed by Circuit Judge MacKINNON setting forth his reasons for voting against rehearing.

Joint statement of Chief Judge WRIGHT and of Circuit Judges ROBINSON, WALD and MIKVA setting forth their reasons for voting to rehear these cases en banc.

Before: WRIGHT, Chief Judge; McGOWAN, TAMM, ROBISNON, MacKINNON, ROBB, WILKEY, WALD, and MIKVA, Circuit Judges

ORDER

The suggestions for rehearing en banc filed by appellees (Narenji, et al., and Confederation of Iranian Students) and the brief in support thereof filed by amicus curiae (Assoc. of Arab American University Graduates) having been transmitted to the full Court and a majority of judges not having voted in favor thereof, it is

ORDERED, by the Court, en banc, that appellees' aforesaid suggestions for rehearing en banc are denied.

Per Curiam.

Opinion of Circuit Judge MacKINNON on Rehearing.

MacKINNON, Circuit Judge: The following individual opinion responds to the petition for rehearing and the amicus brief.

The principal point raised by Appellees' petition for rehearing en banc points out that the court's opinion does not discuss the Supreme Court's [*2] decision in Kent v. Dulles, 357 U.S. 116 (1958) which Appellees' assert is the "leading case" on the issues here involved. In claimed reliance thereon Petitioners contend that the "statute vests no greater discretionary authority in the Attorney General" than the passport statute which was involved in Kent. That argument involves such a gross distortion of the facts and the holding in both Kent and this case, that it should be answered.

Kent arose under the passport statute and involved American citizens who were not in violation of the laws of this country but who were denied passports because they refused to sign noncommunist affidavits. Whereas this case primarily involves non-immigrant aliens who are in violation of our immigration laws. [1] To say that the Constitution and Immigration Laws vest the President and the Attorney General with no greater rights over illegal aliens that they do over law abiding citizens of the United States is a contention that answers itself. The court's opinion did not discuss Kent because Kent on its facts was substantially distinguishable from the facts of this case.

[*3] In this country we have given aliens very substantial rights, and the courts have been zealous in protecting those rights, Hampton v. Mow Sun Wong., 426 U.S. 88 (1976), but, we have never held that aliens who are in this nation in violation of our laws have all the rights of law abiding citizens of the United States. The difference in the legal status of the individual involved in Kent and Narenji with respect to their citizenship and compliance with United States laws, thus places them in different classes and supports a difference in treatment. This difference in status and the effect of that difference on one's rights under the Immigration Laws was pointed to directly by Justice Douglas, in Kent, supra , when he remarked:

"We must remember that we are dealing here with citizens who neither been accused of crimes nor found guilty. [357 U.S. at 129]… The grounds for refusal asserted here do not relate to citizenship or allegiance on the one hand or to criminal or unlawful conduct on the other. [357 U.S. at 128]… If we were dealing with political questions entrusted to the Chief Executive by the Constitution we would have a difference case .

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[1] To the extent that aliens covered bv the Regulations are in compliance with our laws the regulation only has a minimal effect upon them and they are not subject to deportation.

357 U.S.. at 130 (Emphasis [*4] added). The sentence in italics foreshadowed the President's exercise of his power in foreign affairs in the instant crisis.

Moreover, Congress by statute clearly authorized the Attorney General to prescribe regulations with respect to "non-immigrants", such as Appellees, who do not properly maintain their status and are required to depart the United States. Congress in 8 U.S.C. § 1184(a) has provided that:

"admission of… non-immigrant [aliens] shall be for such time and under such conditions as the Attorney General may be regulations prescribe… including such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time, or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under Section 248 , such alien will depart the United States."

8 U.S.C. § 1184(a) (Emphasis added). The regulation here in question is so clearly authorized by this statute, and the other statutes referred to in the majority opinion, that petitioners do not present any substantial question by its argument in this case.

Petitioners real objection is to the manner in which the Attorney General [*5] through the Regulation has chosen to determine whether those in petitioners' class have maintained their status. The Regulation requires petitioners and others similarly situated to report and only those in violation of law are subject to being sent home. There is nothing novel or illegal about requiring aliens to report. That is the usual requirement which is applied to aliens of all classes. 8 U.S.C. § 1305. The major difference here is one in slightly accelerated timing which is necessitated by the urgency of the present emergency involving Iran. Such regulation is well within the prosecutorial discretion vested in the Attorney General under his duty to enforce the Immigration Laws. Those statutes charge, "The Attorney General with the administration and enforcement of this [Immigration and Nationality] Act… He shall establish such regulations; prescribe such… reports ;… and perform such other acts as he deems necessary for carrying out his authority under the provisions of this Act ." 8 U.S.C. § 1103(a). (Emphasis added)

Additional authority, previously referred to, for the Regulation promulgated by the Attorney General stems from 8 U.S.C. § 1303 which provides:

[*6] "(a) … the Attorney General is authorized to prescribe special regulations and forms for registration and fingerprinting of … (5) aliens of any… class not lawfully admitted to the United States for permanent residence ." (Emphasis added).

Petitioners here are not admitted for permanent residence and have definitely been made a special "class" separate from non-immigrants of other nations by virtue of the violent and lawless acts which their Government has allowed to be committed against the United States and its envoys duly accredited to Iran. These facts clearly bring the Attorney General's Regulation within the statutory power vested in him by the statutes cited above.

Petitioners also assert that the court's opinion "nowhere indicates how the national identity of non-immigrant students is 'reasonably related' to the obligation of the Attorney General to assure that non-immigrant students are maintaining the lawfulness of their status in the Unitedc States and will depart this country when required. (Page 4). This statement, which professes to state the issue here, chooses to ignore the principal fact in the problem, i.e., that the Regulation is confined to Iranian [*7] students whose government in violation of all international law, 1 Oppenheim, International Law , § 386, p. 789, has violently infringed in Iran upon the inviolability of over 50 of our diplomatic envoys in that country by countenancing their arrest by so-called "students" and imprisonment as hostages to demands that are beyond the constitutional power of this nation to fulfill. If under such strained circumstances between Iran and the United States, the reasonable relationship of the regulation to the departure of illegal non-immigrant aliens who owe their allegiance to Iran, and to the determination of the location of other non-immigrant Iranian nationals, is not self evident, petitioners are being opaque. The international crisis and confrontation in Iran is of such severity that those who are illegally in this country create a clear and present danger because of their allegiance and illegal status. Under the circumstances it is reasonable even as to those aliens who are legally here but profess their allegiance to Iran, that they should be located in case the international crisis worsens, so that the Government may immediately take proper security measures to protect against [*8] the dangers which all aliens of such a foreign national potentially create under such circumstances.

Petitioners aso contend that the Regulation amounts to a "discriminatory classification" of those in their class. The basis for the separate classification and its reasonableness is set forth in the concurring opinion and petitioners have not even attempted to attack or answer that explanation. To repeat, the classification of non-immigrants from Iran, and particularly those who are here illegally, is valid and reasonable because they owe allegiance to Iran and Iran at the present time is the only nation that has with force and violence transgressed upon American property and imprisoned our diplomatic envoys as hostages in violation of our treaty and international law. I will not further point out the status of such acts under international law except to

state that they justify more extreme action then is called for by the Regulation.

Petitioners argue, in effect, that non-immigrant Iranians must be treated the same as all other non-immigrants in the United States. The argument is absurd. In view of the acts of the Iranian Government against the United States and our accredited [*9] diplomats, non-immigrant Iranians in the United States at this time, and particularly those who are here illegally, are no more entitled to be treated the same as other non-immigrants than non-immigrants of any other nation would be entitled after their country has committed hostile acts against the United States.

It should also be recognized that prior to the issuance of the Regulation in question the President by Executive Order 12170 of November 14, 1979 did "declare a national emergency to deal with… the situation in Iran [which] constitutes an unusual and extraordinary threat to the national security , foreign policy and economy of the United States." Authority: International Emergency Economics Powers Act, *50 U.S.C.A. Sec. 1701 et seq.*, the National Emergencies Act, *50 U.S.C. Sec. 1601 et seq.*, and 3 U.S.C. Sec. 301. 44 Fed. Reg. No. 222 Thursday, November 15, 1979. (Deft's. Ex. 4). (Emphasis added)

The argument is advanced that the regulation deals improperly with Iranian students . The sympathy implicit in that characterization is misplaced. Those who are primarily affected and might be subject to deportation (unless they asked for asylum, delay for valid reasons, [*10] or raised compassionate considerations) would be sent home precisely because they are not students. As with the so-called students in Iran, that are blamed for all the mob action that the Government of Iran does not oppose, these students appear to be of the non-studying kind. How they continue to be students eludes me. A student by definition is one who is enrolled and attends educational classes. Those who are the object of this regulation, were admitted for that purpose, but they have not maintained their status as students . Hence, having ceased to be valid students, if they ever acquired that status, the basis upon which they were allowed to enter this country has ceased to exist and they are required to return home. This is not punishment, but merely carrying out the understanding to which they agreed when they were allowed to enter the United States. If the illegal Iranian non-immigrants who are the principal focus of this Regulation are still referred to as students , even though they do not attend classes, then the term student is being misused. [2]

[*11] In closing I wish to state that because of the authorities I have set forth previously, I disagree with the dissent which suggests that the President's action should be subjected to further "close scrutiny". In the circumstances this is tantamount to seriously questioning the President's action. It should be pointed out, however, that the question has already received full consideration and more than sufficient time has passed to give the questions full consideration. It is also incorrect to say "that the President has taken this action without express authorization of Congress." (Dissent, n. 4). In the situation with which we are here dealing, the President's power is at its zenith -- right up to the brink of war and he does act pursuant to the "express authorization" of Congress. The relevant statute provides that whenever "any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government… if [their] release is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may thing necessary and proper to obtain or effectuate the release…". This expressly covers the [*12] holding of United States citizens as hostages.

The foregoing Presidential authority has been in existence since the Act of July 27, 1868, R.S. 2001, 15 Stat. 224 which presently appears at Title 22, U.S.C. § 1732. In its entirety it provides:

Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as

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[2] In reply to the amicus brief it should merely be added that it places too much reliance on dissenting opinions. It also incorrectly assumes that non-immigrant aliens who are illegally in the country have some right to remain here without being subject to due process deportation hearing, which is all the subject regulation requires them to face.

The assertion that the presence of subject illegal aliens does not "in some way [constitute] a clear and present danger to the welfare of the United States or its citizens" is controverted by the ruling of this court in November 19, 1979, in No. 79-2359, Jack alone v. Andrus , "that a demonstration at Lafayette Park has an unacceptable potential for danger to the hostages now being held in the American Embassy in Tehran." Their allegiance to their mother country implicitly creates such hazard. Notice can also be taken of other instances elsewhere in the country where aliens with such allegiance have resorted to mob action in support of the policies being presently carried on in their mother country. Federal Rules of Evidence, Rule 201(b).

practicable be communicated by the President to Congress.

This direction to the President by Congress is unequivocal. It completely supports every act and order that he has taken to free the United States hostages. No further scrutiny [*13] of his acts is required or necessary.

I therefore vote to deny rehearing.

Joint statement of Chief Judge WRIGHT and of Circuit Judges ROBINSON, WALD and MIKVA setting forth their reasons for voting to rehear these cases en banc .

Under challenge in these cases is an executive decision to enforce an immigration statute selectively against a group of aliens because of the conduct of their parent country, thus affecting them solely on the basis of their nationality. [1] Such selective law enforcement poses a novel and serious question implicating an equal protection component of *fifth amendment* due process.[2] Because we believe the question is of exceptional importance, [3] we have voted in favor of en banc reconsideration.

[*14] There can be no doubt but that Congress, has broad authority, [4] which it may vest in the Executive, to limit immigration on a variety of bases, including nationality. [5] But once an alien has taken up residence in the United States, even temporarily, he or she derives substantial protection from the Constitution and laws of this land. [6] It may be that the President, in these troubled days, has the power to decide that our deep aversion to selective law enforcement against a group solely on the basis of their country of origin must give way to some other imperative. [7] The Supreme Court has certainly suggested that

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[1] Narenji v. Civiletti, No. 79-2460, slip op. at 2-3 (D.C. Cir. Dec. 27, 1979).

[2] See Bolling v. Sharpe, 347 U.S. 497 (1954).

[3] Rehearing en banc "is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." *Fed. R. App. P. 35(a)*. There is no serious claim of decisional conflict within the circuit.

[4] The fact that the President has taken this action without express authorization from Congress is a significant factor in the constitutional balance. Even the cases upholding the right of the Executive, acting pursuant to congressional authorization, to exercise virtually unfettered discretion in expelling "undesirable" aliens from the United States have approved expulsion only upon a specific claim that the alien has acted in a manner contrary to the interests of the United States. See, e.g., Shaughnessy v. Mezei, 345 U.S. 206 (1953). By way of contrast, in Kent v. Dulles, 357 U.S. 116 (1958), the Court refused to sanction the withholding of a passport -- a power usually deemed discretionary -- absent a state of war or a showing that the individual denied the passport was actually engaged in illegal conduct.

[5] As the Court stated in Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 97 (1903):

The Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions, conditions and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court.

[6] Thus, the Court has said that immigration statutes may have "the effect of precluding judicial intervention in deportation cases except insofar as… required by the Constitution . Heikkila v. Barber, 345 U.S. 229, 234-235 (1953) (emphasis added). The Court recently observed that the cases "generally reflect a close scrutiny of restraints imposed by States on aliens," and that although "we have never suggested that such legislation is inherently invalid.… the Court has treated certain restrictions on aliens with 'heightened solicitude.'… a treatment deemed necessary since aliens… have no direct voice in the political process." Foley v. Connelie, 435 U.S. 291, 294 (1978). The Court has reminded us that in the immigration field, as elsewhere, "[it] is clear, of course, that no Act of Congress can authorize a violation of the Constitution." Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973).

[7] In Hirabayashi v. United States, 320 U.S. 81 (1943), the Court upheld a curfew for citizens of Japanese descent but cautioned:

Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.… We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas .

Id. at 100 (emphasis added). In Korematsu v. United States, 323 U.S. 214 (1944), the Court emphasized that "[nothing] short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify" such restrictions. Id . at 218 (emphasis added). And see Ex parte Endo, 323 U.S. 283 (1944).

Congress has that power. [8] Nevertheless, the question requires close scrutiny, and our answer must reflect careful consideration of "fine, and often difficult, questions of values." [9]

[*15] We presently have no settled opinion on the propriety of the action attacked here. These cases do, however, raise a grave constitutional issue. When the rule of law is being compromised by expediency in many places in the world, it is crucial for our courts to make certain that the United States does not retaliate in kind. We think rehearing by the full court is appropriate and necessary.

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[8] In Harisiades v. Shaughnessy, 342 U.S. 580 (1952) the Supreme Court discussed the ambiguity of the position of aliens, pointing out that the alien brings with him

a foreign call on his loyalties which international law not only permits our government to recognize but commands it to respect…. Though the resident alien may be personally loyal to the United States, if his nation becomes our enemy his allegiance prevails over his personal preference and makes him also our enemy, liable to expulsion or internment, and his property becomes subject to seizure and perhaps confiscation. But it does not require war to bring the power of deportation into existence or to authorize its exercise. Congressional apprehension of foreign or internal dangers short of war may lead to its use. So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure.

Id . at 585-87 (footnotes omitted).

[9] Foley v. Connelie, 435 U.S. 291, 294 (1978) (upholding New York State's exclusion of aliens from the police force).