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*Casenotes***FEDERAL PROCEDURE—INDISPENSABILITY OF SUPERIOR OFFICERS IN REVIEW OF DEPORTATION ORDER**

Plaintiff deportee brought an action against the District Director of Immigration and Naturalization seeking a declaration that a deportation order issued against him by the Commissioner of Immigration and Naturalization was invalid, alleging a lack of due process in the hearing and asking injunctive relief against the enforcement of the order. The defendant district director moved to dismiss the action for lack of an indispensable party. *Held*: the commissioner is not an indispensable party to an action to review an order of deportation.¹

The term "indispensable party" is used in the federal courts to describe a party without whom the court cannot proceed.² The first case involving the question of indispensability of superior governmental officers in an action against a subordinate was *Warner Valley Stock Co. v. Smith*.³ That case held the superior officer indispensable on the ground that the purpose of the suit was to control his action. Subsequent to this decision many cases were decided without raising the question.⁴ Twenty-seven years later the United States Supreme Court reiterated the doctrine

¹ *Pedriero v. Shaughnessy*, 213 F.2d 768 (2d Cir. 1954), cert. granted sub nom. *Shaughnessy v. Pedriero*, 99 L. Ed. 77 (1954). This note does not discuss the other question raised in the case, i.e., the propriety of a declaratory judgment action to review the validity of a deportation order.

² *Minnesota v. Northern Securities Co.*, 184 U.S. 199 (1902). Under Fed. R. Civ. P. 19(b), failure to join an indispensable party requires dismissal of the action. *United States v. Washington Institute of Technology*, 138 F.2d 25 (3d Cir. 1943).

³ 165 U.S. 28 (1897) (action to require the Secretary of Interior to issue a land patent and to enjoin his subordinate from taking possession of the land).

⁴ *Leach v. Carlile*, 258 U.S. 138 (1922) (action to enjoin a local postmaster from enforcing a fraud order issued by the Postmaster General); *Missouri v. Holland*, 252 U.S. 416 (1920) (action to enjoin United States Game Warden from enforcing the Migratory Bird Treaty Act and regulations issued in pursuance thereof by the Secretary of Agriculture); *Swigart v. Baker*, 229 U.S. 187 (1913) (action to enjoin reclamation officers from cutting off irrigation water supply); *Public Clearing House v. Coyne*, 194 U.S. 497 (1904) (action to enjoin local postmaster from enforcing fraud order issued by the Postmaster General); *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902) (action to enjoin local postmaster from enforcing fraud order issued by Postmaster General); *Magruder v. Belle Fourche Valley Water Users' Ass'n*, 219 Fed. 72 (8th Cir. 1914) (action to enjoin manager and project engineer of irrigation project from collecting allegedly illegal charges). In none of these cases was the question of indispensability of the superior officer raised.

in *Gnerich v. Rutter*,⁵ followed shortly by *Webster v. Fall*.⁶ These three cases were ignored in *Colorado v. Toll*⁷ which allowed the action to proceed without the superior officer, holding that he was not indispensable. Irreconcilable conflict followed, with courts following both lines of authority.⁸ *Williams v. Fanning*⁹ unsuccessfully attempted to settle the controversy by ruling that the superior is not indispensable

...if the decree granted will effectively grant the relief desired by expending itself on the subordinate official who is before the court.¹⁰

Efforts to apply this rule have resulted in a conflict in deportation order cases.¹¹

The principal argument advanced in favor of requiring the presence of the superior in actions to review deportation orders is that if the district director alone is made a party to the action, neither the commissioner nor directors in other districts will be bound by a decree in favor of the deportee. Should the deportee leave the district in which he brought the action, he could still be deported by the district director of another district under the

⁵ 265 U.S. 388 (1924) (action for injunction against a local prohibition officer to restrain him from enforcing a regulation issued by the Commissioner of Internal Revenue restricting the issuance of liquor manufacturing permits was dismissed on the ground that the subordinate acted only under the direction of the commissioner who was therefore an indispensable party).

⁶ 266 U.S. 507 (1925) (action against local Indian agent to require payment of funds was dismissed on the ground that the power and responsibility for making the payment was lodged with the Secretary of the Interior).

⁷ 268 U.S. 228 (1925) (action to enjoin a national park superintendent from carrying out regulations issued by the Secretary of the Interior).

⁸ See cases collected in 3 Moore, Federal Practice § 19.16, n. 8 (2d ed. 1948).

⁹ 332 U.S. 490 (1947) (action to enjoin a local postmaster from enforcing a fraud order issued against the plaintiff by the Postmaster General).

¹⁰ *Id.* at 494.

¹¹ The superior officer was held indispensable in the following cases. *Rodriguez v. Landon*, 212 F.2d 508 (9th Cir. 1954); *Belizaro v. Zimmerman*, 200 F.2d 282 (3d Cir. 1952); *Paolo v. Garfinkel*, 200 F.2d 280 (3d Cir. 1952); *Slavik v. Miller*, 89 F. Supp. 575 (W.D. Pa. 1950), *aff'd*, 184 F.2d 575 (3d Cir. 1950); *Podovinnikoff v. Miller*, 179 F.2d 937 (3d Cir. 1950); *Corona v. Landon*, 111 F. Supp. 191 (S.D. Calif. 1953); *Birns v. Commissioner*, 103 F. Supp. 180 (N.D. Ohio 1952); *Medalha v. Shaughnessy*, 102 F. Supp. 980 (S.D.N.Y. 1951). *Contra: Navarro v. Landon*, 106 F. Supp. 73 (S.D. Calif. 1952). See *Ragni v. Butterfield*, 115 F. Supp. 953, 955 (E.D. Mich. 1953); *Torres v. McGranery*, 111 F. Supp. 241 (S.D. Calif. 1953).

same deportation order.¹² Therefore, effective and adequate relief can be granted only if the commissioner is made a party to the action.¹³

In the instant case it is pointed out that only the district director is authorized to issue the warrant of deportation necessary to remove the alien from this country.¹⁴ Therefore, a decree in favor of the deportee against the director alone will grant all the relief desired if the deportee is willing to stay within the district in which he brought the action. If the commissioner is to be made a party to the action, it must be brought in Washington, D.C., the place of his official and actual residence.¹⁵ Since many of the aliens bringing such actions are persons of limited means, the travel expense incident to bringing suit in Washington, D.C. would, in many cases, be virtually "a denial of the right to bring suit."¹⁶ It has been suggested that the government is needlessly concerned over the efficacy of the plaintiff's remedy. He may be perfectly content to remain in the district in which he brought suit.¹⁷

Some courts which have held the commissioner or the attorney general indispensable in an action to review a deportation order recognize the hardship of the holding upon indigent aliens, but suggest that the proper remedy for such defects in the administration of justice lies with Congress, rather than with the courts.¹⁸ It would seem that since this hardship would have a

¹² In *National Conference on Legalizing Lotteries v. Goldman*, 85 F.2d 66, 67 (1936), Judge L. Hand suggests that if it is held that the superior is not indispensable in an action to enjoin the carrying out of his orders by a subordinate, the subordinate might be left in a cross-fire. He admits, however, that this is "...the only reason we have been able to conjure up." This "cross-fire" argument was deemed immaterial in *Williams v. Fanning*, 332 U.S. 490, 494 (1947).

¹³ *Paolo v. Garfinkel*, 200 F.2d 280, 281 (3d Cir. 1952); *Corona v. Landon*, 111 F. Supp. 191, 196 (S.D. Calif. 1953); *Birns v. Commissioner*, 103 F. Supp. 180, 182 (N.D. Ohio 1952).

¹⁴ 8 Code Fed. Regs. § 243.1 (1952); *Pedriero v. Shaughnessy*, 213 F.2d 768, 769, 770 (2d Cir. 1954).

¹⁵ Except in cases of diversity of citizenship, the plaintiff must sue in the district in which all the defendants reside, 62 Stat. 935 (1948), 28 U.S.C. § 1391(b) (1952).

¹⁶ *Ragni v. Butterfield*, 115 F. Supp. 953, 955 (E.D. Mich. 1953).

¹⁷ At any rate, the superior officer could intervene under Fed. R. Civ. P. 24. This would also serve to protect any interest that the superior might have in the action.

¹⁸ *Vaz v. Shaughnessy*, 112 F. Supp. 778, 782 (S.D.N.Y. 1953), aff'd. 208 F.2d 70 (2d Cir. 1953); *Paolo v. Garfinkel*, 200 F.2d 280, 282 (3d Cir. 1952).

direct and immediate effect upon the availability to many aliens of the processes of justice, while the danger of being deported from another district depends upon their own act in leaving the district in which they brought suit, the decision in the instant case should be upheld. Where, under the rule of the *Williams* case, the relief *desired* can be granted, the availability to aliens of the courts should not be made to wait upon the uncertainty of congressional action.

Clark Nichols, Jr., '56