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Citizenship - Judicial Review - One Deprived of Citizenship under Immigration and Nationality Act May Seek Injunctive Relief under Administrative Procedure Act and Declaratory Judgment Act

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CASE NOTES

CITIZENSHIP—JUDICIAL REVIEW—ONE DEPRIVED OF CITIZENSHIP UNDER IMMIGRATION AND NATIONALITY ACT MAY SEEK INJUNCTIVE RELIEF UNDER ADMINISTRATIVE PROCEDURE ACT AND DECLARATORY JUDGMENT ACT.

Rusk v. Cort (U.S. 1962).

Appellee, who was born in Massachusetts, after registering for the draft, went to England where he repeatedly ignored several notifications to report for a physical examination. His draft board then ordered him to report for induction, and his failure to do so resulted in an indictment for draft evasion.[1] That same year, 1954, he left England and went to Czechoslovakia. After arriving in the latter country he applied for a United States passport which was denied on the ground that his citizenship was lost under the Immigration and Nationality Act of 1952.[2] The State Department Board of Review affirmed this decision. Cort, the appellee, then instituted this action in a district court seeking declaratory and injunctive relief under both the Administrative Procedure Act and the Declaratory Judgment Act. Section 349(a)(10) of the Immigration Act provides for loss of citizenship, whether the person be a national by birth or by naturalization, when one departs from or remains outside the jurisdiction of the United States in time of war or national emergency for the purpose of avoiding the draft.[3] The appellant, Secretary of State, moved to dismiss on the ground that subsections 360 (b) and (c) of the Immigration Act provide the exclusive remedies under which the agency determination could be made.[4] The above sections concern those who at

1. U.S. District Court for the District of Massachusetts in 1954.
2. 66 Stat. 163, 267-268 (1952), 8 U.S.C. § 1481 (a)(10) (1958).
3. *Ibid.*
4. 66 Stat. 163, 273-274 (1952), 8 U.S.C. § 1503 (b) and (c) (1958):

"(b) If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State who, if he approves the denial, shall state in writing his reasons for his decision. . . . The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States. . . .

"(c) A person who has been issued a certificate of identity under the provisions of subsection (b) and while in the possession thereof, may apply for admission to

one time have been physically present in the United States, but are not now within the country and those whose claim of citizenship has been denied by some agency. The remedy is the filing of an application for a certificate of identity; if that is denied, one may still appeal to the Secretary of State.[5] If it is issued, however, one may apply for admission to the United States, subject to regulations relating to aliens. A determination that he is not entitled to admission is "subject to review in habeas corpus proceedings *and not otherwise.*" (Emphasis added). The Declaratory Judgment Act provides generally for relief in any controversy within a federal court's jurisdiction (except in the case of federal taxes).[6] Sections 10 and 12 of the Administrative Procedure Act also provide generally for judicial review of agency action so long as the statute does not preclude such review and the agency action is by law committed to agency discretion.[7] The district court, relying on these latter acts, held that it had jurisdiction and that section 349 (a) (10) was unconstitutional.[8] The United States Supreme Court partially affirmed the lower court, *holding,* with three justices dissenting, that the district court could entertain this action for declaratory and injunctive relief. The decision was confined to the question of whether the district court had jurisdiction. The constitutionality of the provision and other issues were not considered, but will be reargued in the next term of the Court. *Rusk v. Cort,* 30 U.S.L. Week 4265 (U.S. Apr. 3, 1962).

In speaking for the majority, Mr. Justice Stewart placed great emphasis upon the legislative history of the Immigration and Nationality Act of 1952 to support his interpretation of subsections 360 (a) and (b). The predecessor of section 360 was section 503 of the Nationality Act of 1940,[9] which permitted a declaratory judgment to determine the right to citizen-

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the United States at any port of entry, and shall be subject to all of the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. . . ."

5. No remedy is provided if the Secretary affirms the denial.

6. 48 Stat. 955 (1934), 28 U.S.C. § 2201 (1958): "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, *whether or not further relief is or could be sought.* [Emphasis supplied.] Any declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

7. 60 Stat. 237, 243-244 (1946), 5 U.S.C. § 1001 (1958), § 1009: "Except so far as (1) statutes preclude judicial review or (2) agency action is committed to agency discretion—

"(a) Right of Review — Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

§ 1011:

"No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly."

8. Cort v. Herter, 187 F. Supp. 683 (D.D.C. 1961). Consequently the appellee was still a citizen and thus the appellant was enjoined from denying the former a passport on the ground that he was no longer a national.

9. 54 Stat. 1137, 1171-1172 (1940), 8 U.S.C. § 1503 (1958).

ship whether the person was in the United States or abroad. In addition, the Act permitted the claimant to enter the country. Due to this latter provision, certain problems arose; for example, an alien who alleged any right would very often disappear into the general populace.[10] Joint hearings on a proposed bill to remedy the situation were held and the Departments of State and Justice submitted proposals. The former suggested that declaratory relief be given to nonresidents whose original status as a citizen was not in dispute.[11] The latter recommended that such persons should be required to obtain a certificate of identity and come to the country to test their claims in accordance with normal immigration procedures.[12] The Department of Justice's version was passed. The Senate Judiciary Committee, in explaining the purposes of section 360, stated that any person whose claim of citizenship has been denied and who at one time was but is not now within the United States, may be issued a certificate of identity for the purpose of traveling to the United States to apply for admission. "The net effect of this provision is to require that the determination of the nationality of such person shall be made in accordance with normal immigration procedures. These procedures include review by habeas corpus proceedings where the issue of the nationality status of the person can be properly adjudicated."[13] Thus, it would initially appear that section 360 was meant to cover exactly the situation in the present case. Here, the claimant was once within the physical bounds of the United States and is claiming his right as a citizen.

However, as has been pointed out, sections 10 and 12 of the Administrative Procedure Act provide a right of review except where the statute precludes judicial review or expressly supersedes or modifies the Act. Although there appears to be no judicial decision specifically dealing with these sections in relation to section 360 of the Immigration and Nationality Act, the courts' attitude toward the rights of aliens regarding claims of citizenship should be considered. In *Shaughnessy v. Pedreiro,*[14] there was a deportation order against an alien under the Immigration Act of 1952[15] which provided that such orders shall be "final."[16] The United States Supreme Court held that the word "final" did not preclude judicial review for such a restrictive construction would run counter to sections 10 and 12 of the

10. S. Rep. No. 1515, 81st Cong., 2d Sess., p. 777 (1950). Also see, *Joint Hearings Before the Subcommittee of the Committees on the Judiciary on S. 716,* H.R. 2379 & 2816, 82d Cong., 1st Sess., pp. 108-110, 443-445 (1951).

11. *Joint Hearings Before the Subcommittee of the Committees on the Judiciary on S. 716,* H.R. 2379 & 2816, 82d Cong., 1st Sess., p. 710 (1951).

12. *Id.* at 721.

13. S. Rep. No. 1137, 82d Cong., 2d Sess., p. 50 (1952). The Committee also found that section 503 of the Nationality Act of 1940 had been used to gain entry into the United States when no such right existed. S. Rep. No. 1515, 81st Cong., 2d Sess., p. 777 (1950).

14. 349 U.S. 48, 75 S. Ct. 591 (1955).

15. 66 Stat. 163 (1952), 8 U.S.C. § 1101 (1958) *et seq.*

16. *Id.* at § 1252(b)(4). "In any case in which an alien is ordered deported from the United States, . . . the decision of the Attorney General shall be final."

Administrative Procedure Act. "There is no language that expressly supersedes or modifies the expanded right of review granted by § 10. . . ."[17] A deportation order in *McGrath v. Kristensen*[18] brought under the Immigration Act of 1917,[19] which also provided that the administrative decision shall be final, was held reviewable by the terms of the Declaratory Judgment Act.[20] The opinion did not discuss the applicability of the Administrative Procedure Act. "When an official's authority to act depends upon the status of the person affected, in this case eligibility for citizenship, that status, when in dispute, may be determined by a declaratory judgment proceeding after the exhausting of administrative remedies."[21] The respondent sought judicial review in *Brownell v. We Shung*[22] of an agency's adverse determination barring her admission to this country under the War Brides Act.[23] Notwithstanding the provision stating that when an alien is excluded from admission, the decision shall be final unless reversed on appeal to the Attorney General, the Court held that any preclusion of judicial review would run counter to sections 10 and 12. "Exemptions from the . . . Act are not likely to be presumed."[24] In the present case, the United States Supreme Court found that the intent of Congress in enacting the Immigration and Nationality Act was not to cut off injunctive relief, especially when viewed in context with the prior cases interpreting the Act and the consequent effect upon the Administrative Procedure Act if a different interpretation were adopted.

It would seem that the basic issue is whether subsections 360 (b) and (c) were intended to include a person who was, prior to any agency determination, a citizen of the United States. The majority states, ". . . the question in this case is whether despite the liberal provisions of the Administrative Procedure Act, Congress intended that a native of this country living abroad must travel thousands of miles, be arrested, and go to jail in order to attack an administrative finding that he is not a citizen of the United States."[25] Such phrasing clouds the real issue.[26] In order to reach its decision, the Court takes a journey through unusual grammatical constructions of both the statute, in relation to the alleged intent, and the Judiciary Committee's description of the purposes of the statute. It concludes that since the word *may* is used throughout the subsections, the remedy of habeas corpus is not an exclusive one and thus

17. 349 U.S. at 51, 75 S. Ct. at 594 (1955). See also Brzovich v. Holten, 222 F.2d 840 (7th Cir. 1955); Rubinstein v. Brownell, 206 F.2d 449 (D.C. Cir. 1953), *aff'd*, 346 U.S. 929, 74 S. Ct. 319 (1954). For a contrary analysis see Batista v. Nicolls, 213 F.2d 20 (1st Cir. 1954).
18. 340 U.S. 162, 71 S. Ct. 224 (1950).
19. 39 Stat. 889 (1917), 8 U.S.C. § 155(a) (1958).
20. *Supra* note 6.
21. 340 U.S. at 169, 71 S. Ct. at 229 (1950).
22. 352 U.S. 180, 77 S. Ct. 252 (1956).
23. 59 Stat. 659, (Omitted from U.S.C. as expired three years after Dec. 28, 1945.)
24. 352 U.S. at 185, 77 S. Ct. at 255-256 (1956). See also Marcello v. Bonds, 349 U.S. 302, 75 S. Ct. 757 (1955).
25. Rusk v. Cort, 30 U.S.L. Week at 4267 (U.S. Apr. 3, 1962).
26. Compare the dissenting opinion at 4674-75.

a person outside the country should not be denied "existing remedies."[27] It would appear equally plausible that Congress had intended that once there was such a determination, the decision would be final and if one wished to attack it, he *might* apply for a certificate and be confined to the remedy of habeas corpus. This latter construction is strengthened by the fact that section 360 (a), which concerns a person within the United States who has been denied such rights, specifically permits an action under the provisions of the Declaratory Judgment Act. It is significant that there are no such provisions in (b) and (c) of that section. Furthermore, these latter subsections state that they are only applicable to persons who have been physically present at some time in the United States, making no distinction as to whether the person had previously been a citizen. Be that as it may the Court then wanders into the legislative history of the Act. The purpose of the statute as described by the Senate Judiciary Committee is cited[28] as authority for the conclusion that the appellee was not intended to be within the statute: ". . . it seems obvious that the 'such person' referred to in the Committee Report is a person who has chosen to obtain a certificate . . . and seek admission to the United States in order to prosecute his claim. The appellee in the present case is, of course, not such a person."[29] However, the preceding paragraph of the Committee's description begins with what appears to be a rather succinct statement of its intent:

> The bill modifies § 503 of the Nationality Act of 1940 by limiting the court action exclusively to persons who are within the United States . . . .[30]

Thus the obvious would not seem to be so obvious. The cases cited by the majority are easily distinguishable. In both *Shaughnessy* and *McGrath,* the Court dealt with an alien in connection with a deportation order; in *We Shung,* there was no question of citizenship. However, it would appear that since the right of review was given, surely in a case where citizenship is the crucial issue, this same right should not be denied even if the only reason be policy. It is also quite clear that Cort is not an example of the abuses that Congress sought to correct, for he is not seeking admission to the country. Thus it seems that the opinion can find refuge in three factors: (a) the policy of the immigration and alien cases appear to support the decision; (b) the holding does not frustrate the original purpose of the act; and (c) the act does not state that it expressly supersedes or modifies the right of review. The latter factor, however, followed to its conclusion, would demand that future legislation concerning agency action must specifically state that the Administrative Procedure Act does not apply. It is indeed questionable

27. *Supra* note 25. See also the district court's analysis, 187 F. Supp at 685.
28. *Supra* note 13.
29. Rusk v. Cort, *supra* note 25, at 4268.
30. *Supra* note 13.

whether such a result would manifest the true intent of Congress. Therefore, the Court, even though it delves into such unusual constructions and relies on distinguishable cases, has protected an important right; namely, the right to be heard in a court on the paramount question of citizenship.

There are two other major considerations which may underlie the opinion. If the district court did not have jurisdiction, the appellee would have been deprived of his citizenship without having gained access to a court except through habeas corpus. Thus, the problem of a denial of procedural due process would arise. If we conclude that due process has been complied with, it would seem that the assumptions must be made that both the constitutionality of the entire statute could be challenged in habeas corpus and that the evidence could at least be reviewed. In fact, the Judiciary Committee thought that the "status of the person can be properly adjudicated"[31] in such a proceeding. In a habeas corpus proceeding in the federal courts, the constitutionality can be challenged under a theory that an act which is unconstitutional is no law at all and thus a person cannot be detained.[32] However, such a proceeding does not usually take evidence and probably will not even review the merits, but will just determine whether the petitioner was afforded a fair hearing.[33] Therefore, there is deprivation without a judicial determination. Even if both assumptions are correct, the due process question will come into play if the application for the certificate is denied. The statute only gives an appeal to the Secretary of State. Thus, if the latter sustains such a denial, the person loses his citizenship without having had access to any court for there is not even a provision for a habeas corpus hearing. The second consideration is the determination of the constitutionality of the entire section in that it deprives one of his citizenship merely because he evaded the draft. Perhaps the only reason that the Court finds jurisdiction in this case is to clear away the other above issues that could easily cloud this one. A question of this magnitude should be decided by the Supreme Court and not be avoided.[34]

The last difficulty one may encounter in the instant decision is found in these words of the Court: ". . . we hold that a person outside the country who has been denied a right of citizenship is not confined to the procedures prescribed by § 360 (b) and (c), and that the remedy pursued in the present case was an appropriate one."[35] Assuming that a person has a constitutional right to be present in a proceeding of a federal court in which he was a party, it would follow that once the action is filed, the petitioner would then be allowed to come into this country and the problem of disappearance into the general populace would be with us again. How-

31. See *concurring* opinion, 30 U.S.L. Week at 4269.
32. Ex parte Siebold, 100 U.S. 371 (1880). See also 25 AM. JUR. *Habeas Corpus* § 29 (1940).
33. See generally, 25 AM. JUR. *Habeas Corpus* (1940).
34. See Trop v. Dulles, 356 U.S. 86, 78 S. Ct. 590 (1958) where the rationale of cruel and unusual punishment declared another part of the statute unconstitutional.
35. Rusk v. Cort, *supra* note 25, at 4268.