Denver Journal of International Law & Policy

Volume 10
Number 2 *Winter*

Article 13

May 2020

Fedorenko v. United States: The Memories and Emotions of World War II Endure

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Fedorenko v. United States: The Memories and Emotions of World War II Endure

The United States Supreme Court recently confirmed the revocation of a World War II refugee's naturalized citizenship,[1] refusing to apply the *Chaunt v. United States*[2] test of materiality to a misrepresentation found in the refugee's visa application. Significantly, the Court also held that courts do not have broad equitable powers in a denaturalization proceeding when the naturalized citizenship was procured illegally or by willful misrepresentation of material facts. *Fedorenko v. United States* deals specifically with an accused concentration camp guard, but its ramifications are unclear for other persons who were forced to assist in the camps and who entered this country after the war.

Feodor Fedorenko was born in the Ukraine and served in the Russian army until 1941, when he was captured by German troops. The Germans trained him to serve as an armed concentration camp guard and sent him to Treblinka, a notorious extermination camp in Poland.[3] In 1949, he applied for admission to the United States under the Displaced Persons Act (DPA) of 1948,[4] misrepresenting on his visa application his whereabouts during the war years, and failing to note his service as a concentration camp guard. After arriving in the United States in 1949, he led an uneventful and law-abiding life. When Fedorenko applied for naturalization in 1969, he failed again to reveal that he had served as a guard at Treblinka. He was naturalized in 1970.

In 1977, the United States filed a denaturalization action under 8 U.S.C. section 1451(a) against Fedorenko, charging him with willful concealment of his wartime activities both in applying for a DPA visa and in applying for citizenship. The government argued that Fedorenko had procured his naturalization illegally or by willful misrepresentation of material facts under the terms of the denaturalization statute.[5]

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1. Fedorenko v. United States, 101 S. Ct. 737 (1981).
2. Chaunt v. United States, 364 U.S. 350 (1960).
3. Treblinka was literally a death camp:

   > It contained only living facilities for the SS and the persons working there. The thousands who arrived daily on the trains had no need for barracks or mess halls: they would be dead by nightfall. It was operated with barbarous methodology—brutally efficient—and such camps surely fill one of the darkest chapters in the annals of human existence, certainly the darkest in that which we call Western civilization. . . . The death toll? One million victims, according to one witness.

   United States v. Fedorenko, 455 F. Supp. 893, 901 n.12 (S.D. Fla. 1978).
4. Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (1948).
5. 8 U.S.C. § 1451(a) (1952) provides:

   > It shall be the duty of the United States attorneys . . . to institute proceedings . . . for the purpose of revoking and setting aside the order admitting a naturalized citizen to citizenship and cancelling the certificate of naturalization on the gound that such order and certificate of naturalization were ille-

In the midst of a highly emotional trial setting,[6] the district court found that Fedorenko's guard duty was not voluntary[7] and that even though he had made certain misrepresentations, the government had failed, under the *Chaunt* standard, to show by "clear, unequivocal, and convincing' evidence either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship."[8] The court noted the apparent ambiguity in the second of these tests,[9] and interpreted it to require the government to prove that an investigation prompted by a complete and truthful response by Fedorenko *would have* revealed facts justifying denial of citizenship.[10] Since the government had failed to meet this burden, the district court refused to strip Fedorenko of his citizenship.[11]

As an alternative basis for its decision, the district court held that since a denaturalization proceeding is a suit in equity,[12] the court has broad equitable powers to weigh "the rights of the parties in light of all the circumstances in order to arrive at a decision which is just and fair."[13] The court reasoned that since naturalization courts have considered the equities in determining whether citizenship should be granted,[14] similar discretion should also be available in denaturalization proceedings. Since Fedorenko had been a responsible citizen and resident for twenty-nine years and since the record before the court as to his alleged concentration camp activities was inconclusive, the court found that the equities should be weighed in favor of Fedorenko.[15]

The Fifth Circuit Court of Appeals reversed,[16] agreeing with the gov-

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gally procured or were procured by concealment of a material fact or by willful misrepresentation . . . .

6. As one example of the emotional intensity surrounding the trial, the district court observed that the Jewish Defense League ran advertisements in newspapers offering chartered buses from Miami Beach to Fort Lauderdale on opening day. A demonstration outside the courtroom echoed with a chant: "Who do we want? Fedorenko. How do we want him? Dead." 455 F. Supp. at 899. This emotional intensity also seems to have influenced the government's presentation of their case. The government requested daily copy of the reporter's transcript and had four lawyers at its counsel table. In addition, the government hired two Russian translators for Fedorenko's testimony. *Id.* at n.8. Futhermore, Attorney General Civiletti personally argued the government's case before the Supreme Court.

7. *Id.* at 913.

8. 364 U.S. at 355.

9. The court of appeals and the Supreme Court also noted the ambiguity. 597 F.2d at 951; 101 S. Ct. at 759 (White, J., dissenting).

10. 455 F. Supp. at 916.

11. *Id.* at 921.

12. Knauer v. United States, 328 U.S. 654, 671 (1946).

13. 455 F. Supp. at 918.

14. *In re* Iwanenko's Petition, 145 F. Supp. 838 (N.D. Ill. 1958); *In re* Baspatow, 100 F. Supp. 44 (W.D. Pa. 1951); Petition of R., 56 F. Supp. 969 (D. Mass. 1944).

15. 455 F. Supp. at 920-21.

16. 597 F.2d at 954.

ernment that the proper interpretation of the second *Chaunt* test was that the government only had to prove by clear and convincing evidence that disclosure of the true facts would have led the government to make an inquiry that *might* have uncovered other facts warranting denial of citizenship.[17] In addition, the circuit court held that the lower court did not have broad equitable powers under the denaturalization statute to excuse a "fraudulent procurement of citizenship."[18]

In affirming the revocation of Fedorenko's citizenship, the Supreme Court agreed that the "right to acquire American citizenship is a precious one, and that once it has been acquired, its loss can have severe and unsettling consequences."[19] However, the Court noted an important line of cases[20] holding that a certificate of citizenship may be cancelled unless there has been strict compliance with the conditions imposed by Congress prerequisite to the acquisition of citizenship: "Failure to comply with any of these conditions renders the certificate of citizenship 'illegally procured,' and naturalization that is unlawfully procured can be set aside."[21] Rather than being irreconcilable, these two lines of cases were used to illustrate the importance to the Court of the issues at stake for both the citizen and the government in a denaturalization proceeding.[22]

In the seven-to-two *Fedorenko* decision written by Justice Marshall, the Court refused to accept the Fifth Circuit's analysis of the *Chaunt* test for two reasons: first, the materiality standard announced in *Chaunt* was as applied to false statements in applications for citizenship rather than a visa; second, the arrests that Chaunt failed to disclose all took place after he entered the United States.[23] Fedorenko, on the other hand, had made

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17. *Id.* at 951. This is also the interpretation offered by the dissenters in *Chaunt*, 364 U.S. at 357 (Clark, Whittaker, Stewart, JJ., dissenting). The circuits have split on the interpretation of *Chaunt*. The district court's interpretation is in accord with the Third and Ninth Circuits. United States v. Riela, 337 F.2d 986 (3rd Cir. 1964); United States v. Rossi, 299 F.2d 650 (9th Cir. 1962); La Madrid-Peraza v. I.N.S., 492 F.2d 1297 (9th Cir. 1974). But the First, Second, and Sixth Circuits support the Fifth Circuit's interpretation. Langhammer v. Hamilton, 295 F.2d 642 (1st Cir. 1961); United States v. Oddo, 314 F.2d 115 (2d Cir. 1963), *cert. denied*, 375 U.S. 833 (1964); Kassab v. I.N.S., 364 F.2d 806 (6th Cir. 1966).

18. 597 F.2d at 954.

19. 101 S. Ct. at 747. Justice Black wrote that "[n]ot only is United States citizenship a 'high privilege,' it is a priceless treasure." Johnson v. Eisentrager, 339 U.S. 763, 791 (1950) (Black, J., dissenting). *See also* Costello v. United States, 365 U.S. 265, 269 (1961); Baumgartner v. United States, 322 U.S. 665, 675, 676 (1944); Schneiderman v. United States, 320 U.S. 118, 122 (1943).

20. *See* Maney v. United States, 278 U.S. 17 (1928); United States v. Ness, 245 U.S. 319 (1917); United States v. Ginberg, 243 U.S. 472 (1917).

21. 101 S. Ct. at 747.

22. *Id.* at 748.

23. In *Chaunt*, the government sought to denaturalize the defendant because he had procured his citizenship by concealment and misrepresentation of his arrest record. He had stated on a form connected with his naturalization that he had never been arrested. In fact, he had been arrested three times: once for distributing handbills in violation of an ordinance, once for making a speech in violation of park regulations, and once for general breach of peace. All of these arrests occurred at least ten years prior to the defendant's naturaliza-

false statements in his application for a visa, and the alleged misconduct occurred prior to his arrival in the United States. Announcing a new standard for materiality of false statements in visa applications, the Court stated that "at the very least, a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa."[24]

The Court then turned its attention to the DPA to see if Fedorenko had indeed been ineligible for a visa. Under the DPA, the definition of "displaced persons" eligible for immigration into this country specifically excluded individuals who had "assisted the enemy in persecuting civil[ians]" or had "voluntarily assisted the forces . . . in their operations."[25] Even though the district court had found that Fedorenko served involuntarily as a guard at Treblinka,[26] the Supreme Court was unable to find any basis for an "involuntary assistance" exception in the language of the DPA: "The plain language of the Act mandates precisely the literal interpretation that the District Court rejected: an individual's service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for a visa."[27]

The laws under which Fedorenko was admitted to citizenship require an applicant to have been admitted lawfully into the United States for permanent residence.[28] Lawful admission for permanent residence, in turn, requires that the individual hold a valid unexpired immigrant visa.[29] Since the DPA provided that "all immigration laws . . . shall be applica-

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tion. Although the record in the case was not clear, it appeared that he was convicted of only one charge, that involving the park regulation. 364 U.S. at 351, 352.

24. 101 S. Ct. at 748.

25. The Displaced Persons Act, 62 Stat. 1009, at § 2, incorporated the definition of "refugees or displaced persons" contained in Annex I to the Constitution of the International Refugee Organization of the United Nations (IRO). The IRO Constitution, 62 Stat. 3037-55 (1946), was ratified by the United States on December 16, 1945 (T.I.A.S. No. 1846) and became effective on August 20, 1948. 62 Stat. 3037. The IRO Constitution provided that the following persons would not be eligible for refugee or displaced person status:

> 1. War criminals, quislings and traitors.
>
> 2. Any other person who can be shown:
>
> (a) to have assisted the enemy in persecuting civil populations of countries, Member of the United Nations; or
>
> (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.

Annex I, Part II, 62 Stat. 3051-52.

26. 455 F. Supp. at 913.

27. 101 S. Ct. at 750.

28. Sections 316(a) and 319(a) of the Immigration and Nationality Act of 1952; 8 U.S.C. §§ 1427(a), 1429.

29. At the time of Fedorenko's initial entry into the United States, § 13(a) of the Immigration and Nationality Act of 1924, ch. 190, 43 Stat. 153, 161 (repealed in 1952), provided that "[n]o immigrant shall be admitted to the United States unless he has an unexpired immigration visa." The courts at that time consistently held that § 13(a) required a valid visa and that a visa obtained through a material misrepresentation was not valid. *See* United States *ex rel.* Jankowski v. Shaughnessy, 186 F.2d 580, 582 (2d Cir. 1951).

ble to . . . eligible persons who apply to be or who are admitted into the United States pursuant to this Act,"[30] Fedorenko was not admissible into the United States under the terms of the DPA. The Court concluded that his citizenship must be revoked.[31]

Justice Blackmun concurred with the majority's result,[32] noting their reluctance to adopt the *Chaunt* test and expressing his own preference for doing so. Justice White, on the other hand, dissented[33] on the narrow ground that while the court of appeals had correctly interpreted *Chaunt*, it had incorrectly focused its attention solely on whether Fedorenko had willfully concealed material facts when he applied for a visa. Since the Fifth Circuit had failed to review the district court's application of *Chaunt* to Fedorenko's concealment of material facts at the time he applied for citizenship, Justice White would have remanded the case for the court of appeals to make this review. Finally, Justice Stevens, in an emotional dissent,[34] pointed out numerous problems with the case which the majority, in his opinion, had failed to resolve. He seemed even more troubled, however, with the underlying premise of the majority that Fedorenko's or any citizen's involuntary conduct could provide the basis for stripping him of his United States citizenship.

Several aspects of *Fedorenko v. United States* deserve note. First, the *Fedorenko* majority was overly concerned with avoiding the *Chaunt* test of materiality. Admittedly, *Chaunt* is factually distinguishable since it involved a citizenship application which contained false statements concerning events which had occurred after Chaunt's arrival in the United States.[35] Yet even these differences fail to explain the Court's reluctance to apply *Chaunt*, given the similarities and close relationship between a visa and citizenship.[36] While differences do exist between the two, the differences do not seem so great as to warrant application of one test of materiality to misstatements in citizenship applications and another to those in visa applications.

As another basis for its refusal to apply *Chaunt*, the Court distinguished Fedorenko's alleged misconduct itself as having occurred prior to his arrival.[37] Again the difference does not support two separate tests. A person with a history of misconduct prior to his arrival would appear just as unacceptable for United States residency or citizenship as a person whose arrival preceded his misconduct. The use of two different tests

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30. Displaced Persons Act, § 10.

31. 101 S. Ct. at 753.

32. *Id.* at 753-58 (Blackmun, J., concurring).

33. *Id.*, at 758-59 (White, J., dissenting).

34. *Id.* at 759-63 (Stevens, J., dissenting).

35. 364 U.S. at 351, 352.

36. A visa is an initial step in the process which eventually may lead to citizenship. Also, a visa may be just as difficult to obtain as citizenship in light of the numerical limits imposed on total lawful admittances. 8 U.S.C. § 1151 (1952). Furthermore, a visa, like citizenship, can be revoked. 8 U.S.C. § 1201(i) (1952).

37. 364 U.S. at 351, 352.

based on the date of a visa or citizenship applicant's misconduct, without elaboration, is not the ideal way for the Court to draw its analysis.[38]

Another interesting aspect of the Court's decision was its refusal to accept the circuit court's interpretation of the second part of the *Chaunt* test—"that the Government need only prove that disclosure of the true facts *might* have led to other facts which would have warranted denial of citizenship."[39] Yet although the Court refused to accept this interpretation, it declined expressly to reject the Fifth Circuit's interpretation in favor of the district court's, that the Government must prove that a truthful response by Fedorenko *would have* led to other facts which would have justified denial of citizenship.[40]

Under the district court's interpretation of *Chaunt*, the Government would bear a heavy burden (often impossible, according to Justice White[41]) of proving facts that existed many years before the person applied for citizenship or visa. However Justice White's conclusion that the district court's definition of materiality would greatly improve the odds of successful concealment and encourage applicants to withhold information is one-sided.[42] As a practical matter, the chances for abuse would be just as great under the court of appeals' interpretation, since its application suggests that a deliberately made false answer to any question the government might ask in a visa or citizenship application may be material. Conceivably, a person's naturalization could be revoked years after it is conferred, on the mere suspicion that certain undisclosed facts might have warranted exclusion from the country. It should be noted, however, that "by concluding that the government has demonstrated the actual existence of disqualifying facts—facts that themselves would have warranted denial of [Fedorenko's] citizenship—the Court adheres to a more rigorous standard of proof."[43] This standard of proof is closer in line with the district court's interpretation than with the court of appeals' and suggests that, although Fedorenko lost his citizenship, future cases where the Court chooses to apply *Chaunt* may be resolved under the higher standard of proof espoused by the district court.

The Court's rejection of the "involuntary assistance" exception in the language of the DPA[44] is another interesting aspect of this case. The difficulty with this position and the Court's literal construction of the Act is that such an interpretation might bar many Jewish prisoners who sur-

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38. The difficulty encountered by the Court in trying to avoid the *Chaunt* test is apparent in the similarity between its new definition of materiality for the visa application—"if the disclosure of the true facts would have made the applicant ineligible for a visa," 101 S. Ct. at 748—and the first part of the *Chaunt* test, which deems material those facts "which, if known, would have warranted denial of citizenship." *See* text accompanying note 8 *supra*.

39. *See* text accompanying note 17 *supra*.

40. *See* text accompanying note 10 *supra*.

41. 101 S. Ct. at 759 (White, J., dissenting).

42. *Id.*

43. *Id.* at 756 (Blackmun, J., dissenting).

44. *See* text accompanying notes 26-27 *supra*.

vived the concentration camps from asserting that they had lawfully entered this country after the war. For example, working prisoners who led arriving prisoners to the gas chambers to be executed or wore armbands as part of the ruse at the gas chambers or cut the hair of the females to be executed would have technically assisted the enemy, albeit involuntarily and under the utmost duress, and would not have been eligible for entry into the United States under the DPA. It is absurd to call their conduct "assistance" inasmuch as it was involuntary, even though the word "voluntarily" was omitted from the definition of an eligible person in the DPA.[45]

The Court handled this dilemma in a footnote[46] by concluding that prisoners who did no more than lead new arrivals to the gas chambers or cut the hair of women prisoners could not be considered to be assisting the enemy in *persecuting* civilians. However, as Justice Stevens argued, "the Court would give the word 'persecution' some not yet defined specially limited reading. In my opinion, the term 'persecution' clearly applies to such conduct; indeed, it probably encompasses almost every aspect of life or death in a concentration camp."[47] The Supreme Court also attempted to distinguish the Jewish workers and the Ukrainian guards on such factors as the issuance of uniforms and weapons, the receipt of a stipend, and the privilege of being allowed to leave the camp and visit the nearby town.[48] These distinguishing factors, though, seem to bear no relation to the persecution of the Jews in the concentration camps.

The last noteworthy aspect of this case is the Court's facile approval of the court of appeals' holding that district courts lack equitable discretion to enter or refrain from entering a judgment of denaturalization against a naturalized citizen whose citizenship was procured illegally or by willful misrepresentation of material facts.[49] The Court, in effect, refused to look beyond the fact that Fedorenko made misstatements on his visa and citizenship applications. That Fedorenko may have feared for his life while he served at Treblinka or thought that repatriation to the Soviet Union would follow if he told the truth on his DPA application are possibilities[50] the Court chose to ignore. This rigid stance is disturbing because if United States citizenship is a "priceless treasure,"[51] then great care should be exercised when it is granted *or* revoked. The Court's un-

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45. The word "assistance" connotes voluntary assistance: "The act or action of assisting; aid, help. . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 67 (1971).

46. 101 S. Ct. at 750 n.34.

47. *Id.* at 762 (Stevens, J., dissenting).

48. *Id.* at 750 n.34.

49. *Id.* at 752-53.

50. The district court accepted Fedorenko's testimony that although Russian guards did enjoy some privileges such as being able to walk down the road outside the camp, if a guard did not return, he would be captured and executed. 455 F. Supp. at 901. The district court also accepted one witness' testimony that thousands committed suicide rather than be repatriated to the Soviet Union. *Id.* at 911.

51. Johnson v. Eisentrager, 339 U.S. at 791.

willingness to take even a brief look at the reasons behind Fedorenko's misstatements seems unjustified.

Perhaps at the bottom of the Court's difficulties with this case were the emotions and memories that remain of World War II concentration camps. In his dissent, Justice Stevens recognized this force—"a sort of 'hydraulic pressure' that tends to distort our judgment."[52]

He concluded:

> Perhaps my refusal to acquiesce in the conclusion reached by my highly respected colleagues is attributable in part to an overreaction to that pressure. Even after recognizing and discounting that factor, however, I remain firmly convinced that the Court has committed the profoundest sort of error by venturing into the unknown to find a basis for affirming the judgment of the court of appeals. That human suffering will be a consequence of today's venture is certainly predictable; that any suffering will be allayed or avoided is at best doubtful.[53]

Bernie M. Tuggle

The Impact of Title VII Protection on FCN Treaties: Conflict and Interpretation

Avigliano v. Sumitomo Shoji America, Inc.,[1] a recent Second Circuit case, brings into focus a direct conflict between United States domestic law and the provisions of a 1953 commercial treaty between the United States and Japan.[2] A group of female secretarial employees of Sumitomo Shoji America, Inc. (Sumitomo), a New York-incorporated, wholly-owned subsidiary of a Japanese commercial firm, brought a class action alleging that the corporation's practice of hiring only male Japanese nationals for management-level positions violated Title VII of the Civil Rights Act of 1964,[3] section 1981 of the Civil Rights Act of 1866,[4] and the Thirteenth Amendment.[5]

Sumitomo sought dismissal on the ground that the Japanese Treaty of Friendship, Commerce and Navigation (FCN) exempted Japanese trading companies and their wholly owned subsidiaries in the United

52. 101 S. Ct. at 763 (Stevens, J., dissenting).
53. *Id.*

1. 638 F.2d 552 (2d Cir. 1981).
2. Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 [hereinafter cited as Japanese Treaty or Treaty].
3. 42 U.S.C. §§ 2000e *et seq.* (1976).
4. 42 U.S.C. § 1981 (1976).
5. U.S. CONST. amend. XIII.