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Deportability of Criminal Aliens Under Domestic Equivalent Statute Existing at "Time of Entry"

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RECENT CASES

Deportability of Criminal Aliens Under Domestic Equivalent Statute Existing at "Time of Entry"

Squires v. Immigration and Naturalization Service
689 F.2d 1276 (6th Cir. 1982)

The Immigration and Naturalization Service (INS) ordered the immediate deportation of Herbert Clyde Squires, a citizen of Canada, because Squires had a previous Canadian conviction for "false pretences."[1] The immigration judge ruled that the offense for which Squires was convicted constituted a "crime involving moral turpitude" within the meaning of 8 U.S.C. § 1182(a)(9),[2] and that Squires was thus an "excludable alien" for purposes of the deportation statute, 8 U.S.C. § 1251(a).[3] Squires appealed to the Board of Immigration Appeals. The Board upheld the immigration judge's findings with respect to deportability, but allowed Squires the privilege of "voluntary departure."[4] Subsequently, Squires appealed to the United States Court of Appeals.[5] The Court of Appeals for the Sixth Circuit, *held*, affirmed: (1) In determining whether Squires's foreign criminal conviction rendered him deportable, the foreign conviction must be analogized to the domestic equivalent offense as it existed at the time of his entry; and (2) Since the domestic equivalent offense was a felony at the time of Squires's entry into the United States, Squires is an excludable alien under 8 U.S.C. § 1182(a)(9), and he is subject to deportation

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1. CAN. CRIM. CODE § 304(1)(a) (current version at CAN. CRIM. CODE § 320(1)(a) (1970)).
2. Immigration and Naturalization Act of 1952, [hereinafter cited as INA], § 212(a)(9), 8 U.S.C. § 1182(a)(9) (1970).
3. INA, § 241(a)(1), 8 U.S.C. § 1251(a) (1970).
4. INA, § 244(e), 8 U.S.C. § 1254(e) (1982) provides that:
   > The Attorney General may, in his discretion, permit any alien under deportation proceedings * * * to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.
5. The court's jurisdiction is based on 8 U.S.C. § 1105(a) (1982).

under 8 U.S.C. § 1251(a)(1). *Squires v. Immigration and Naturalization Service*, 689 F.2d 1276 (6th Cir. 1982).

On or about June 14, 1979, Squires entered the United States as a nonimmigrant visitor for pleasure. On June 30, 1979, INS began deportation proceedings. Squires had been convicted in a Canadian provincial court on August 11, 1970, of the crime of "false pretences."[6] The charges stemmed from Squires passing a bad check in 1969 with knowledge that there were insufficient funds to cover it.

The court of appeals examined the sections of the Immigration and Naturalization Act of 1952 which subjected Squires to deportation.[7] The court recognized the statutory exemption set forth in 8 U.S.C. § 1182(a)(9). Under this section, aliens who have previously been convicted of a "crime involving moral turpitude" are ordinarily deportable, *except* that:

> . . . Any alien who would be excludable because of the conviction of a misdemeanor classifiable as a petty offense under the provisions of section 1(3) of Title 18 [U.S.C.], by reason of the punishment actually imposed, . . . may be granted a visa and admitted to the United States.[8]

The court identified two distinct requirements of this statutory exemption: (1) the crime must be a misdemeanor,[9] and (2) the crime must have been "petty" in terms of the punishment imposed.[10] Since Squires committed a petty offense "by reason of the punishment imposed,"[11] his deportability depended on whether the Canadian crime of "false pretences" was characterized as a felony or a misdemeanor.[12]

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6. Section 304(1)(a) of the Canadian Criminal Code provides in part that:
(1) Everyone commits an offense who (a) by false pretence . . . obtains anything in respect of which the offense of theft may be committed or causes it to be delivered to another person . . . .

7. 689 F.2d at 1278.

8. 8 U.S.C. § 1182(a)(9).

9. 18 U.S.C. § 1(2) (1970) defines a misdemeanor as any offense which is punishable by one year or less in prison.

10. 18 U.S.C. § 1(3) (1970) defines a petty offense as any misdemeanor, "the penalty of which does not exceed imprisonment for a period of six months or a fine of not more than $500."

11. Squires was sentenced in Canada to only six months in prison, and all six months were suspended. Therefore, his crime is clearly a "petty offense" within the definition of 18 U.S.C. § 1(3). 689 F.2d at 1278.

12. *Id.* Because the statute under which Squires was convicted, section 304(1)(a) of the Canadian Criminal Code, carries with it a maximum punishment of ten years imprisonment

In making this determination, it is a well-established principle that the maximum penalty available under a foreign criminal code is not necessarily dispositive of the crime's characterization for purposes of United States immigration laws.[13] To avoid the inconsistencies which would arise by virtue of varying penalties for similar crimes in different nations, the courts look not to the maximum penalty prescribed by foreign law, but rather to the maximum penalty for an analogous statutory offense under the laws of the United States.[14] If an equivalent crime cannot be found in title 18 of the United States Code, the reviewing authority must turn to the provisions of title 22 of the District of Columbia Code.[15]

The sixth circuit made an initial inquiry to determine the appropriate statutory analog for the Canadian "false pretences" statute. Two possible D.C. Code statutes were considered because no federal offense corresponded directly to Squires's crime. Section 1301 of the D.C. Code[16] describes the crime of "false pretenses" as a felony. Using this statute as a domestic equivalent would result in Squires's deportation.[17] The D.C. Code also contains a "bad check" statute.[18] At the time of Squires's conviction in Canada, this statute characterized a "bad check" offense as a misdemeanor. Two months after Squires's conviction, the "bad check" offense was reclassified as a felony.[19] Thus, if the "bad check" statute in its original form was chosen as the domestic equivalent of Squires's offense, he would have qualified for the § 1182(a)(9) exemption and be non-excludable.[20]

The court looked beyond the facial similarities between the Canadian "false pretences" statute and the D.C. Code "false pretenses" statute because of the "extreme importance of the interest

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where the amount involved exceeds fifty dollars, the crime appears to be a felony under the statutory definition set forth in 18 U.S.C. § 1(1). Section 1(1) defines a felony as "any offense punishable by death or imprisonment for a term exceeding one year . . . ."

13. *See* Patel v. INS, 542 F.2d 796 (9th Cir. 1976); Soetarto v. INS, 516 F.2d 778 (7th Cir. 1975); Giammario v. Hurney, 311 F.2d 285 (3d Cir. 1962).

14. 689 F.2d at 1278-79 (citing Patel v. INS, 542 F.2d 796 (9th Cir. 1976); Soetarto v. INS, 516 F.2d 778 (7th Cir. 1975); Giammario v. Hurney, 311 F.2d 285 (3d Cir. 1962)).

15. 689 F.2d at 1279 (citing *Soetarto*, 516 F.2d at 780-81; *Giammario*, 311 F.2d at 287).

16. 22 D.C. CODE ANN. § 1301 (1981).

17. Both the immigration judge and the Board of Immigration Appeals chose section 1301 as the proper equivalent offense. Their reasons for doing so were not set forth, but it appears that they relied simply upon the nominal likeness between section 1301 and the provision under which Squires was actually convicted. 689 F.2d at 1280.

18. 22 D.C. CODE ANN. § 1410 (1981).

19. Title 22, section 1410 was amended on October 22, 1970.

20. 689 F.2d at 1279-80.

at stake."[21] After assessing the harsh consequences of deportation, the court set forth a "fairness" test for determining whether a foreign crime constitutes a misdemeanor for purposes of § 1182(a)(9). The test provides that "a domestic criminal statute is suitable as an equivalent offense under § 1182(a)(9) only if, under all the circumstances, both factual and legislative, it would be fair to hold the alien accountable for a violation thereunder."[22] Using this enunciated test, the court found that it would be unfair to view Squires's offense under the D.C. Code "false pretenses" statute.[23] The court concluded that § 1410, the "bad check" statute, is more "closely tailored to the particulars" of the crime committed.[24]

After determining the appropriate analog, the court had to ascertain which version of the "bad check" statute to apply. If the original classification of § 1410 applied, Squires would qualify for the § 1182(a)(9) exemption. If, on the other hand, the present version of § 1410 was utilized, Squires would be precluded from the statutory exemption.

Squires urged the court to adopt the "time of conviction"[25] rule which would allow him to qualify for the petty offense exception and thus avoid deportation. INS, however, advocated a "time of entry" rule which would require the prior conviction to be analogized to a domestic equivalent offense as it existed at the time of entry into the United States. Neither of these proposed rules is specifically mandated by statute, regulation or case law. Therefore, in order to resolve the issue, the court resorted to general principles of statutory construction, as well as to the underlying policies reflected by the language, structure, and legislative history of the statutes involved.[26]

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21. *Id.* at 1280. The court found support in a principle enumerated in several Supreme Court decisions which require courts to interpret all aspects of the immigration laws, including the § 1182(a)(9) proviso, liberally in favor of the alien. *See* Woodly v. INS, 385 U.S. 276 (1966); INS v. Errico, 385 U.S. 214 (1966); Costello v. INS, 376 U.S. 120 (1964); Barber v. Gonzales, 347 U.S. 637 (1954).

22. 689 F.2d at 1280.

23. 22 D.C. CODE ANN. § 1301.

24. From the facts adduced at the deportation hearing, it appears that Squires's crime was little more than a routine bad check violation. Squires was charged with the Canadian crime of "false pretences" because there was no statutory alternative. Had Squires committed his crime in the District of Columbia, it is likely that he would have been prosecuted under section 1410. 689 F.2d at 1280-81.

25. This rule would require the foreign conviction to be classified as a misdemeanor so long as its domestic equivalent was so classified at the time of conviction.

26. 689 F.2d at 1282.

The court focused on the language of the deportation statute, ". . . the law existing at the time of . . . entry."[27] Based upon the court's review of the legislative history surrounding § 1251, the court found that Congress intended the "time of entry" language of § 1251 to apply to changes in criminal statutes as well as amendments in immigration laws.[28] In adopting the "time of entry" rule, the court was mindful of the harsh effect such a ruling has on aliens like Squires who are prejudiced by the amendment of a domestic criminal statute.[29]

The court concluded that Squires's offense must be analogized to a violation of the District of Columbia bad check statute, § 1410, as amended in 1970. Since violation of this statute was a felony at the time of Squires's entry into the United States, he is an excludable alien and subject to deportation.[30]

This case is significant because it resolves two very important issues regarding the deportation of aliens previously convicted of foreign crimes. The opinion sets forth a test to be applied in determining the appropriate statutory analog for foreign offenses. A domestic criminal statute is a suitable equivalent only if, under all the circumstances, both factual and legislative, it would be fair to hold the alien accountable for violation of the domestic offense. This fairness test is a departure from the traditional cursory view utilized by the courts in choosing an equivalent domestic offense. This test will result in a more thorough examination of the legislative intent of our criminal statutes and the factual circumstances under which aliens are convicted of foreign offenses. Additionally, the courts adoption of the "time of entry" rule resolves the difficult and unsettled classification problem caused by changes in our criminal statutes.

This ruling, however, will be of little beneficial value to the alien because it will give retrospective applicability to upgraded domestic criminal statute. The "time of entry" rule will arbitrarily determine whether an alien will be excludable based on the precise

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27. By referring to "the law existing at the time of . . . entry," Congress clearly intended deportability to turn on contemporary federal statutes governing excludable classes, including section 1182(a)(9). An alien who enters the country subsequent to an amendment in section 1182(a) or any other excludability provision is thus viewed in light of the new amendment, even though the act or omission which gives rise to excludability occurred well before the change in the law. *Id.*

28. *Id.*

29. *Id.* at 1285.

30. *Id.*

moment of time in which he enters the country. The critical impact of this ruling is that an alien will not be able to anticipate the effect his foreign conviction will have on his admission to the United States.

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