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Recent Cases

RECENT CASES

SUCCESSION TO PROPERTY FROZEN UNDER CUBAN ASSETS CONTROL REGULATIONS

Richardson v. Simon, 560 F.2d 500 (2d Cir. 1977)

Appellants, executors of an estate of a former Cuban citizen appealed from a decision of the U.S. District Court for the Eastern District of New York dismissing their complaint. Appellants contended that (1) promulgation of the Cuban Assets Control Regulations (hereinafter, the Regulations), 31 C.F.R. § 515 (1976), was not authorized by the Trading with the Enemy Act of 1917 (hereinafter, the Act), 50 App. U.S.C. § 1, *et seq.*, and (2) that the respondent, Secretary of the Treasury (hereinafter, the Secretary), unconstitutionally deprived appellants of property in violation of the U.S. Const. amend. V by his continued application of the Act and the Regulations appurtenant thereto.

Prior to the effective date of the Regulations, a husband and wife, residents and citizens of Cuba, owned a joint account in a New York bank. Pursuant to § 515.201 of the Regulations, the Secretary froze the assets in the account. Subsequently, the husband died intestate in Cuba and his wife, his sole heir according to Cuban law, immigrated to the United States and established permanent residency. Pursuant to § 515.525(a)(1) of the Regulations, the Secretary granted her a license to one-half of the frozen assets. Upon her death, her estate devised by will to her niece, a U.S. citizen. Following the Secretary's refusal to release the remaining portion of the frozen assets, the appellants, executors of the estate — all citizens of the United States — sought an order directing the Secretary to release that portion of the assets which had remained frozen. The appellants appealed from the district court's dismissal of their cause.

The case presented issues of legislative and constitutional interpretation remarkably similar to those raised in *Real v. Simon,* 510 F.2d 557 (5th Cir. 1975). There the court held that since Congress did not intend § 5(b)(1)(B) of the Act, which delegated to the Executive the power to regulate those transactions involving property in which a *foreign* national had an interest, to be used to freeze assets beneficially claimed by U.S. citizens, § 515.525(b) of the Regulations, which retained the decedent's interest in property transferred by intestate succession if the decedent was a foreign national, was without logic and not supported by the Act.

In dispensing with appellants' initial claim that § 515.525(b) was not authorized by the Act, the Second Circuit disregarded the *Real* decision. The court stated that the issue was one requiring executive or legislative expertise. This declaration of judicial deference did not, however, preclude the court from dismissing the Legislature's expression that assets wholly or substantially owned by citizens and residents of the United States should not remain frozen, S. Rep. No. 701, 89th Cong., 1st Sess., *reprinted in* [1965]

U.S. Code Cong. & Ad. News 3581, 3585, nor from ignoring the Executive's statement that even former Cuban nationals residing in the United States should be regarded as unblocked nationals, 49 Dep't State Bull., 160 (1963).

This apparent system of selectively excluding legislative and executive declarations enabled the court to discount appellants' initial argument that since U.S. citizens, and not foreign nationals, were those seeking beneficial interest in the frozen bank accounts, § 515.525(b) was inconsistent with § 5(b) of the Act.

As to appellants' second argument that even if the Regulations were supported by the Act, the appellants were deprived of property without due process, the court conceded that the Secretary's actions were difficult to explain in terms of promoting the purposes of the Act as identified in *Sardino v. Federal Reserve Bank of New York,* 361 F.2d 106 (2d Cir. 1966), *cert. denied,* 385 U.S. 898 (1966) and in *Real.*

Such an admission, however, did not dissuade the court from suggesting possible rational bases from which the court could pronounce satisfaction of the constitutional requirement. Though the court was correct in asserting that it was not confined when searching for a rational basis to those purposes the Congress enunciated when it passed the Trading with the Enemy Act, it is curious that the "basis" the court settled on was one which, if accurate, would have imposed only an indirect sanction upon economic intercourse with the "enemy." The court speculated that *if* the basis for maintaining frozen assets was to prevent U.S. citizens from expressing support for Cuba's policies as a *quid pro quo* for the receipt of assets from their Cuban relatives, then the Act, and the Secretary's actions, were supported by a rational basis. This possible basis for Congressional passage of the Act provided the justification for the court's rejection of appellants' argument that they were deprived of property without due process.

The court's reasons for affirming the district court's dismissal of appellants' request that the Secretary be ordered to release the remaining frozen assets were not convincing. In fact, the court itself attested to the questionable nature of its decision. While the court concluded its opinion by alluding to the persuasive human effects of the *Real* decision, the Second Circuit (sitting *en banc*), could not bring itself to the conclusion reached by the Fifth Circuit in *Real.* Instead, the court once again deferred to the expertise of the legislative and executive branches. As the dissent pointed out, by failing to align itself with the *Real* decision, the court allowed the Secretary to perpetuate the fiction that a decedent foreign national, "though in his grave, hovers as a Cuban national spirit over the vaults of the Bank of Nova Scotia." *Richardson,* 560 F.2d at 507 (Moore, J., dissenting).

PAUL E. LINET

JUDICIAL REVIEW OF IMMIGRATION DECISIONS

United States v. McAninch, 435 F. Supp. 240 (E.D.N.Y. 1977)

Plaintiffs brought suit against the Consul General of the United States at Santo Domingo, an employee of the Embassy in Santo Domingo, and a "John Doe," for damages arising under 22 U.S.C. § 1199. Plaintiffs, A. Garcia, a citizen and resident of the United States, and J. Ortiz, a permanent resident of the United States, alleged that the defendants acted unlawfully and arbitrarily in denying visas to Garcia's fiance and Ortiz's spouse.

At issue was whether the plaintiffs were entitled to sue for damages under the statute because judicial review of immigration decisions is prohibited, since the decisions are within the province of the executive and legislative branches of government. The defendants moved to dismiss the action on the grounds that: (1) The court lacked jurisdiction over the subject matter; (2) the plaintiffs lacked standing to sue; (3) the court lacked jurisdiction over the defendants; (4) the plaintiffs failed to join an indispensable party; (5) the actions were barred by the doctrine of sovereign immunity; and (6) venue was improper under 28 U.S.C. § 1391(e).

In May of 1976, A. Garcia filed a petition for a non-immigrant visa for her fiance, E. Hernandez, a citizen and resident of the Dominican Republic, so that the two could be married and live in the United States. When Hernandez applied at the U.S. Embassy in Santo Domingo for the visa, the officials questioned his intention to marry, and withheld the visa petition.

In July of 1975, L. Ortiz applied at the U.S. Embassy in Santo Domingo for an immigrant visa to join her husband, J. Ortiz, whom she married in 1973. The Embassy denied the visa to Mrs. Ortiz claiming that the marriage was one of convenience for immigration purposes.

The plaintiffs alleged that the officials' conduct had been willfully malfeasant or an abuse of power and that the defendants acted unlawfully and arbitrarily in denying the visas. As a result of the defendant's actions, plaintiffs alleged that they suffered emotional harm, anxiety, loss of consortium, loss of economic benefits of a martial relationship, loss of ability to plan for the future, inordinate delays in obtaining tax benefits, unforeseen travel, and other expenses.

The Court held that the plaintiffs were entitled to bring an action for damages against the Consul General under 22 U.S.C. § 1199. The court, however, held that J. Heredia, an investigator employed by the Embassy, could not be held liable under the statute since he was not a consular officer.

In asserting that the court lacked jurisdiction over the subject matter, defendants claimed that the plaintiffs' suit was an attempt to circumvent the rule that the courts cannot review decisions made by immigration officials. The court noted that the plaintiffs were not challenging the denial of the visas, but rather were suing under 22 U.S.C. § 1199, which expressly allows suits for damages. Citing the decisions in *American Surety Co. v. Sullivan*, 7 F.2d 605 (2d Cir. 1925) and *Pena v. Kissinger*, 409 F. Supp. 1182 (S.D.N.Y.

1976), the court concluded that plaintiffs could bring a suit for damages under section 1199 which would not constitute review of the decision by the immigration officials.

The defendants' argument that the plaintiffs lacked standing to sue was quickly dismissed by the court. Defendants argued that only the persons actually denied the visas, and not their spouses or fiances, could sue under section 1199. The court, however, relied on *Pena* which held that a wife could sue for damages for the denial of a visa to her husband.

The defendants challenged the court's jurisdiction over the persons of the defendants, whether they were sued as individuals or in their official capacity. Plaintiffs cited 28 U.S.C. § 1391 (e) in alleging jurisdiction. Citing *Driver v. Helms*, 74 F.R.D. 382 (D.C.R.I. 1977) the court construed section 1391(e) as extending jurisdiction to district courts if the parties have minimum contacts with the United States. Since the defendants were employed by the United States, the court held that there were sufficient contacts to bring them within the jurisdiction of the court.

The eleventh amendment prohibits actions for damages against defendants in their official government capacity. The court, however, noted that defendants could be sued as individuals under the ruling of *Ex Parte Young*, 209 U.S. 123 (1908). The Court determined that it had jurisdiction over the consular officials since they were both being sued in their individual capacities.

Since section 1199 pertains only to consular officials and not to all employees of the Embassy, the court dismissed the actions against defendant Heredia, the investigator employed by the Embassy, for a lack of subject matter jurisdiction.

Plaintiffs brought the suit "in the name of the United States for the use of the person injured (Garcia and Ortiz)" as required by section 1199. Defendants contended that the failure to join the United States as an indispensible party (defendant) warranted dismissal. The court determined that the plaintiffs had compiled with the requirements of section 1199, and interpreted the statute as not requiring the United States to be joined as a defendant.

The doctrine of sovereign immunity was not a bar to the action as suggested by the defendants. The court stated that section 1199 was a waiver of the doctrine since it allowed suits to be brought against consular officers.

Finally, defendants attempted to have the court dismiss the action by alleging that venue was improper under 28 U.S.C. § 1391 (e) since the defendants were either retired or no longer in service in the Dominican Republic. In an action for damages, the fact that defendants have had a change in employment status is irrelevant. Following the decision in *Driver*, the Court held that venue was proper against a retired official or one who has changed his post.

The major significance of this case is that consular officers will be reluctant to deny visas without a legitimate factual basis to uphold their decisions. Immigration decisions are still immune from judicial review and courts will not circumvent this rule, although they will show suits for damages to be brought against consular officers.

JAMES ROBERTSON

Editor's Note: The statute under discussion, 22 U.S.C. §1199, has been repealed.