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Recent Cases

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GREGORY G. COSTAS*

Aerotrade, Inc. v. Republic of Haiti, 376 F.Supp. 1281 (S.D.N.Y. 1974)

The plaintiffs, two Florida corporations, brought an action against the Republic of Haiti to recover $867,000 for goods sold and delivered and for services rendered to the defendant. Other damages included lost profits in connection with the undelivered portions of the contracts set forth in the complaint. Defendant alleged that Haiti is a foreign state and a non-domiciliary of New York. The plaintiffs applied for and were granted an order of attachment against the funds on deposit at the First National City Bank of New York to the credit of *Banque Nationale de la République d'Haiti (Banque)* upon an allegation that *Banque* was wholly owned by, and the alter ego of, the Republic of Haiti (For an action brought against *Banque* based upon the instant transactions see: *Aerotrade, Inc. v. Banque Nationale de la République D'Haiti*, 376 F.Supp. 1286 (S.D.N.Y. May 24, 1974). The funds attached amounted to $867,000.

The defendant moved to dismiss on the grounds that it was entitled to sovereign immunity (Tate Letter, 26 Dept. St. Bull, 1952) because the acts of the Republic upon which the action was founded were those concerning the armed forces (citing *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354 (2d Circ. 1964), cert. denied, 381 U.S. 934 (1965); that the court lacked subject matter jurisdiction under New York State's statute dealing with actions by non-resident corporations (N.Y. Business Corporation Law sec. 1314); and that the court lacked jurisdiction in that the defendant had not been served with process nor had any of its property or assets been attached within the state, based upon a denial that Banque was its alter ego.

Both parties submitted numerous affidavits, documents, and communications relating to the contracts involved. The court found that

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the materials covered by the contracts included armed patrol boats, armed helicopters, machine guns, rifles, anti-aircraft guns and ammunition.

Aerotrade attempted to show that the materials, particularly the helicopters, were used in fashions inconsistent with the functions of the armed forces. The court determined that the use of the aircraft for the aid of disaster victims and the like was not dissimilar to the functions of the armed forces of the United States during peace time. Additional allegations concerning the use of the aircraft were found not to contradict the fact that the contracts upon which the suit was based and the goods sold thereunder, involved equipment for the Haitian armed forces.

The court then stated that should the contracts sued upon and the performances thereunder fall within the categories of either public or political acts as set forth in the *Victory Transport* case, Haiti would be entitled to a grant of immunity. Further, should that fact be established, it would become irrelevant how the equipment was used after delivery because such inquiry would serve as an unwarranted intrusion into the internal affairs of a foreign government (Cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Underhill v. Hernandez*, 168 U.S. 250 (1897).

In conclusion, the court was satisfied that the contracts at issue and the claims sued upon concerned the armed forces of Haiti, and that the plaintiffs failed to raise a material question of fact to defeat the sovereign immunity defense. Accordingly, the complaint was dismissed and the order of attachment was vacated. The court did not address itself to other issues raised by the defendant in view of its finding for the defendant on the first point.

Renchard v Humphreys & Harding, Inc., 381 F.Supp. 382 (D.C.D.C. 1974)

The action arose out of property damage allegedly suffered by the plaintiffs as a result of excavations carried on in close proximity to their property by a contractor (Humphreys & Harding) employed by the Brazilian Embassy. When plaintiffs and defendant could not reach an agreement as to a settlement for repair costs, suit was filed.

Brazil moved to dismiss on the grounds of sovereign immunity. Upon denial of the motion without prejudice, the defendant sought a suggestion of immunity from the State Department and was advised through its ambassador that the case was not one where a suggestion of sovereign immunity should be made.

The defendant's motion to dismiss raised the issue whether the State Department's refusal to suggest immunity was conclusive and whether the court, notwithstanding such refusal, may still grant immunity.

In finding that the State Department's pronouncement was binding, the court made note of the reluctance on the part of the judiciary to controvert a definite determination of the State Department due to the separation of powers doctrine. The court, taking cognizance of the fact that it is the executive's constitutional role to function as the nation's primary organ of foreign policy, stated that it was ill-equipped to determine the propriety of the State Department's recommendation since it was basically a foreign policy decision.

Turning to the court's ability to grant immunity irrespective of the recommendation, it was held that since the refusal to grant immunity was viewed as binding, the purpose behind immunity vanished and the court need not grant it. This holding is based on the fact that the court's recognition of a claim of immunity not sanctioned by the political department of the government could, at best, create a politically embarrassing situation, avoidance of such situations being the primary reason for the invocation of sovereign immunity in the first place.

Lastly, the court rejected the defendant's contention that the Tate letter should be construed by the court as a basis for granting immunity contrary to the State Department's suggestion, stating that the court would look to the Tate letter only when the State Department chose to remain silent with respect to a particular case.

Lan-Chile Airlines, Inc. v. Rodriguez, 296 So.2d 498 Fla. 3d. Dist. 1974)

The appellees (plaintiffs below) were victims of a beating which occurred in the appellant's (defendant below) VIP room at Miami International Airport. By evidence elicited at trial, it was shown that the assailants were hired by agents of Lan-Chile Airlines, Inc. to commit an assault and battery upon the appellees in order to discourage their activities on behalf of a labor union. The appellees brought suit and the jury returned a verdict in their favor, resulting in awards of $2,500 compensatory damages and $110,000 punitive damages to each of them. The defendant appealed.

Lan-Chile's first point on appeal presented the question as to whether or not the doctrine of sovereign immunity was a bar to recovery. Additional points on appeal were directed to the admissibility of certain statements and the excessiveness of the awards.

With respect to the sovereign immunity question, it had been shown at trial that Lan-Chile Airlines was owned by the Chilean State, but run as an independent business in the U.S. In light of this fact, the court held that the doctrine of sovereign immunity did not operate as a bar to a cause of action arising out of a purely commercial operation by a foreign government in the U.S. (citing *Harris and Company Advertising, Inc. v. Republic of Cuba,* 127 So.2d 687 (Fla.2d Dist. 1961), where it was held that where the defendant government was engaged in commercial activity and was not performing a governmental function, it could not invoke the doctrine of sovereign immunity in an assumpsit action brought against it.)

As to the other issues, the court found that the statements were admissible and that the awards of punitive damages were excessive.

Castro-Guerrero v. Immigration and Naturalization Service, 503 F.2d 964 (5th Cir. 1974).

The sole issue raised on this appeal was whether the appellant, Castro-Guerrero, was entitled to the automatic relief from deportation granted by 8 U.S.C. Sec. 1251(f), 241(f) (1970), to the spouse, parent, or child of a U.S. citizen.

Castro-Guerrero was admitted to the U.S. as a lawful permanent alien in 1956. He married another resident alien and they had children born in the U.S. in 1962 and 1970. In March 1971, appellant was returning from a trip to Mexico and procured entry into the U.S. with an invalid Alien Registration Receipt Card. He was ordered to show cause why he shouldn't be deported for not having possession of a valid entry document. He was subsequently deported in April 1973.

The appellant sought relief under Sec. 241(f) of the Immigration and Nationality Act, which excepts from deportation aliens who entered by fraud or misrepresentation, but were "otherwise admissible at the time of entry" and now are the spouse, parent, or child of a U.S. citizen. The court rejected the contention of the INS that Castro-Guerrero was not "otherwise admissible" because he circumvented the visa issuance and inspection process through his illegal entry, and remanded the case for a hearing before the Board of Immigration Appeals to determine whether at the time of his entry, the appellant met the physical, mental, and moral standards for admission as set out in 8 U.S.C.A. Sec. 1182.

Trujillo-Hernández v. Farrell, 503 F.2d 954 (5th. Cir. 1974).

This was a consolidated appeal in which appellant. Trujillo-Hernández, acting in the capacity of both an affected individual and as a class representative brought action in the court below. The appellant challenged the English language requirement of the naturalization statute, 8 U.S.C. Sec. 1423(1), along with its associated regulations. At trial below his petition for naturalization was denied and the class action was dismissed.

The court viewed the case as turning on either of two points: (1) the right-privilege distinction as it concerns naturalization, and (2) the nonjusticiability of a direct attack on the congressional exercise of the naturalization power.

With respect to the first issue, the court held that although aliens are entitled to due process protection, Congress has broad authority in setting requirements for naturalization. Further, Congress may grant or withhold the privilege of naturalization upon any grounds or without any reason, as it sees fit. The court citing numerous cases, pointed out that the opportunity to become a citizen of the U.S. is a privilege and not a right—the Constitution does not confer upon aliens the right to naturalization.

As to the second point, the court in light of the foreign relations responsibilities of the Congress set out in Art. 1, Section 8 of the Constitution, held that the question for decision was nonjusticiable on the basis that there were no judicially manageable standards for reviewing the foreign relations functions carried on by the other branches of the government. The court noted, however, that the holding of nonjusticiability applied only to the power of congress to establish conditions precedent for naturalization.

The decision of the trial court was affirmed.

Saxbe v. Bustos, 95 S.Ct. 272 (1974).

The respondents, a group of farm workers and a collective bargaining agent for farm workers, brought suit in the U.S. District Court for the District of Columbia for declaratory and injunctive relief with respect to the practice of the Immigration and Naturalization Service (INS) granting special treatment to those aliens who commute to work in the U.S. from Mexico and Canada, on a daily or seasonal basis. The court granted the petitioner's (defendant below) motion for summary judgment and the respondents (plaintiffs below) appealed. The case was remanded by the U.S. Court of Appeals for the District of Columbia Circuit (156

U.S. App. D.C. 304, 481 F.2d 479) and the U.S. Supreme Court granted certiorari in light of the conflict between the decision of the D.C. Circuit Court of Appeals in the case below and the Ninth Circuit in *Gooch v. Clark*, 433 F.2d 74 (1970).

The practice complained against is that whereby the INS classifies the daily and seasonal commuters as immigrants "lawfully admitted for permanent residence" who are "returning from a temporary visit abroad." This is one category of "special immigrant" as defined by the Immigration and Nationality Act, 8 U.S.C. sec. 1101(a)(27)(B). By procuring such a classification, an immigrant who is otherwise admissible may be readmitted to the U.S. by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit or other documentation. Additionally, this class of immigrant is also excluded from the labor certification requirements in 8 U.S.C. sec. 1182(a)(14) which provides in part:

> "Aliens seeking to enter the U.S., for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the U.S. who are able, willing, qualified, and available at the time of the application for a visa and admission to the U.S. and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the U.S. similarly employed."

Mr. Justice Douglas, in delivering the opinion of the court, defined the salient issue as whether the practice, on the facts of the case, conformed with the Immigration and Nationality Act. The court viewed the resolution of the issue as turning upon the meaning of 8 U.S.C. sec. 1101(a)(27)(B), in the light of the legislative history and administrative construction of the statute.

The respondents relied heavily upon 8 U.S.C. sec. 1101(a)(15)(H) which provides that one category of alien non-immigrant is "an alien having a residence in a foreign country which he has no intention of abandoning . . . (ii) who is coming temporarily to the U.S. to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country." They contended that the commuters maintained a residence in a foreign country which they had no intention of abandoning.

In response, the court pointed out that while this position was correct in relation to residence, the commuters only partially met the statutory requirements in that they did not show that unemployed people capable of performing the labor or services could not be found in this country. As a result, the presumption in the Act that an alien is an immigrant until or unless he proves he is a nonimmigrant, was not overcome.

Turning to the meaning to be given to 8 U.S.C. sec. 1101(a)(27)(B), the court noted that sec. 1101(a)(20) defined "lawfully admitted for permanent residence" as "the *status* of having been lawfully accorded the *privilege* of residing permanently in the U.S. as an immigrant in accordance with the immigration laws, such *status* not having changed" (emphasis added by the court). The court held that this *status* or *privilege* did not have to be reduced to permanent residence so long as the individual's status had not changed. It was indicated that there was nothing in the Act to declare or suggest that such status would be denied if he did not intend to permanently reside here.

Secondly, the court agreed with the finding in the *Gooch* case that the commuters could be viewed as "returning from a temporary visit abroad" (433 F.2d, at 79-81, 82 n.1). In support of this finding the court stated that such a position was reflective of administrative practices dating back at least to 1927, and that such long standing administrative construction was entitled to great weight, particularly when Congress had revisited the Act and had left the practice untouched.

Lastly, the court found no difference in the treatment of daily commuters and seasonal commuters because identical statutory language covered each status.

The court concluded that alien commuters were immigrants, that they were lawfully admitted for permanent residence, that they were "returning from a temporary visit abroad" when they entered the U.S., and that the above classification was applicable to both daily and seasonal commuters.

Mr. Justice White joined by Justices Brennan, Marshall, and Blackman dissented, stating that administrative construction over a long period of time is available for judicial interpretation only when statutory terms are doubtful or ambiguous. Therefore, the court's interpretation of the statute contravened the principle of statutory construction which does not permit administrative practice to overcome a statute so plain in its commands as to leave nothing for construction.