NOTES AND COMMENTS

ADMINISTRATIVE LAW

DEPORTATION — JUDICIAL REVIEW OF ACTION OF IMMIGRATION OFFICIALS — APPLICABILITY OF EIGHTH AMENDMENT

Weinberg, a Jew born in that part of Austria-Hungary which until recently was Czechoslovakia, first entered the United States illegally without inspection in August, 1927, landing as a member of a ship's crew. Remaining in the United States until October, 1931, he then made a temporary visit to Poland upon a passport issued to him in the name of Fliegelman, which he obtained by using the original copy of Fliegelman's naturalization certificate. Upon his return to the United States in May, 1932, Weinberg was permitted to re-enter without an unexpired consular immigration visa under a claim of citizenship based upon the above mentioned passport. In June, 1938, Weinberg was arrested upon a telegraphic warrant charging him with entering in violation of section 213 of title 8 of the United States Code[1] in that at the time of his entry he did not have possession of an unexpired immigration visa. Proceedings under section 214 of the same title[2] resulted in an order that Weinberg be deported. Weinberg then filed in the Federal District Court a petition for a writ of *habeas corpus*. The court granted the relief prayed for and ordered that relator be discharged from custody. *U. S. ex rel. Weinberg* v. *Schlotfeldt*, 26 Fed. Supp. 283 (1938).

Since the warrant for Weinberg's arrest charged him only with entering the United States without an immigration visa in violation of section 213, the sole issue is whether the deportation order issued under section 214 can be set aside by the district court. It is impossible to determine in what way the court reached its decision; the opinion makes no direct reference to any case or to any statutory or constitutional provision. However, it is submitted that the court has taken a very broad view of

[1] "No immigrant shall be admitted to the United States unless he has an unexpired immigration visa. . . . " 8 U.S.C.A. 213(a).

[2] "Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this subchapter to enter the United States, or to have remained therein for a longer time than permitted under this subchapter or regulations made thereunder, shall be taken into custody and deported in the same manner as provided in sections 155 and 156 of this title." 8 U.S.C.A. 214.

its function and power in *habeas corpus* proceedings and has significantly extended judicial review of the action of immigration officials.

Although it is expressly provided by statute that the decision of the Secretary of Labor shall be final in deportation proceedings under sections 155 and 156,[3] which govern the proceedings under section 214,[4] courts have exercised judicial review in both exclusion and expulsion cases on a theory of interference with the alien's person.[5] The scope of that review, however, is more limited than in the case of the decision of other administrative agencies, especially where alienage is admitted. Proceedings on a petition for a writ of *habeas corpus* do not constitute a trial *de novo* either on the record or with the introduction of new evidence,[6] and courts have interfered only where there has been either (1) a denial of a fair hearing,[7] (2) a finding not supported by evidence,[8] (3) an application of an erroneous rule of law,[9] (4) a claim of citizenship made in expulsion proceedings,[10] or (5) detention for deportation for a reason not within the immigration statutes.[11]

Weinberg's admitted alienage and the clear predication of the order of deportation upon section 213 rendered the last two of these grounds inapplicable in the present case. The same is true of the first two. Requirements of a fair hearing in deportation proceedings are less, and less evidence is required to support the administrative findings, than in other types of proceedings. Thus a denial of fair hearing is not established by proof that the decision of the Secretary of Labor is wrong[12] or against the weight of the testimony.[13] In the principal case the findings were clearly supported by the evidence and the issue of a fair hearing was not raised.

Nor does it appear that the officials erred in applying the law. Weinberg was not exempt from the requirements of section 213. A nonquota immigrant may re-enter the United States after a temporary absence without a visa.[14] But an alien landing as a sailor and remaining in the United States is not, upon his return from a temporary visit abroad, a nonquota immigrant within the meaning of subdivision (b)

[3] 8 U.S.C.A. 155, 156.
[4] See note 2, *supra*.
[5] Van Vleck, THE ADMINISTRATIVE CONTROL OF ALIENS, (1932) 149.
[6] *Ibid.* at 152.
[7] *Exedahtelos* v. *Fluckey*, 54 Fed. (2d) 858 (1931).
[8] *Ibid.*
[9] *Ibid.*
[10] *Ng Fong Ho* v. *White*, 259 U.S. 276, 42 S.Ct. 492 (1921).
[11] *Gegiow* v. *Uhl*, 239 U.S. 3, 36 S.Ct. 2 (1915).
[12] *U. S. ex rel. Tisi* v. *Tod*, 264 U.S. 131, 44 S.Ct. 260 (1923).
[13] *Ex parte Lee Soo*, 291 Fed. 271 (1923).
[14] *Johnson* v. *Keating ex rel. Taratino*, 17 Fed. (2d) 50 (1926).

of section 204[15] because his continued stay was illegal.[16] Nor did Weinberg's marriage to an American citizen confer upon him any right to remain.[17] Moreover, neither the time limitation specified in section 155 nor any other applies to deportation under section 214 for unlawfully entering without an immigration visa.[18] Not only was Weinberg not exempt from the provisions of section 213, but also he had clearly violated those provisions. It has been expressly held that an alien entering under a passport fraudulently obtained by pretending to be a different person entered in violation of section 213 and was subject to deportation under section 214, even though in possession of an unexpired visa issued in that other name.[19] And in proceedings arising under section 155 deportation has been held proper in the case of an alien entering under the unexpired passport of another[20] or entering or re-entering by means of false representation as to American citizenship.[21] That the court itself regarded Weinberg as clearly deportable within the provisions of the immigration statutes is indicated by its expression of disbelief "that the immigration laws contemplate any such strict compliance with the letter thereof, as would compel the court to return a Jew to a country where his property would be confiscated, where his life might be in jeopardy. . . ."[22]

Other bases on which the court may have intended to rest the decision are the Eighth Amendment, and arbitrary refusal on the part of immigration officials to exercise discretion or to consider the merits of Weinberg's situation. Though the latter basis is recognized,[23] judicial intervention having occurred in cases involving the exclusion of minors coming to relatives in the United States who were able and willing to support them,[24] its applicability to Weinberg meets a two-fold obstacle. The existence of any administrative discretion in the present circumstances is somewhat difficult to find. The language of section 214 would appear to be mandatory,[25] and the discretion conferred by subdivision (d) of section 213[26] applies to admission, not to expulsion. Moreover, Wein-

[15] "An immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad." 8 U.S.C.A. 204(b).

[16] *Ex parte Domenici*, 8 Fed. (2d) 366 (1925).

[17] *U. S. ex rel. Dombrowski* v. *Karnuth*, 19 Fed. Supp. 222 (1937).

[18] *U. S.* v. *Vanbiervliet*, 284 U.S. 590, 52 S.Ct. 132 (1931).

[19] *U. S. ex rel. Fink* v. *Reimer*, 96 Fed. (2d) 217 (1938).

[20] *U. S. ex rel. Fanoco* v. *Corsi*, 57 Fed. (2d) 868 (1932).

[21] *U. S. ex rel. Volpe* v. *Smith*, 62 Fed. (2d) 808 (1933); *Ex parte Saadi*, 26 Fed. (2d) 458 (1928). *Contra* as to entry, *U. S. ex rel. Iorio* v. *Day*, 34 Fed. (2d) 920 (1929).

[22] *U. S. ex rel. Weinberg* v. *Schlotfeldt*, 26 Fed. Supp. 283, 284 (1938).

[23] See Van Vleck, p. 187.

[24] See *De Sousa* v. *Day*, 22 Fed. (2d) 472 (1927).

[25] See note 2, *supra*.

[26] "The Secretary of Labor may admit to the United States any otherwise admissible immigrant not admissible under clause (2) or (3) of subdivision (a) of this section, if satisfied that such inadmissibility was not known to, and could not have been ascertained by

berg violated clause (1) of subdivision (a) of section 213 and the discretion conferred by subdivision (d) does not extend to inadmissibility under clause (1). And Weinberg must be deemed to have known of his inadmissibility from his subterfuge in obtaining his passport. But even if there was discretion in the Secretary of Labor to allow Weinberg to remain, it is doubtful if the refusal to exercise it was such as would justify interference by a court. In *U. S. ex rel. Azizian* v. *Curran*,[27] it was held that an Armenian was not so much a victim of religious persecution as would authorize admission notwithstanding illiteracy. There the denial of entry to an Armenian mother and her daughter was held not such an abuse of, or refusal to exercise, the discretion conferred by subdivision (o) of section 136[28] as would justify interference by the courts. While the *Azizian* case is distinguishable from the principal case in several particulars,[29] the conflicting inferences to be drawn from these differences, together with the existence of a counterbalancing factor,[30] support a conclusion that the two decisions are inconsistent in attitude and in their view of the function of the courts in *habeas corpus* proceedings. The instant court appears to lose sight of the fact that on the merits the decision as to whether an alien should be deported is for the Secretary of Labor, not the court, to determine.[31]

While the opinion in the principal case does not refer expressly to the Eighth Amendment, the court possibly had it in mind[32] when it

the exercise of reasonable diligence by, such immigrant prior to the departure of the vessel from the last port outside the United States and outside foreign contiguous territory, prior to the application of the immigrant for admission." 8 U.S.C.A. 213(d).

[27] 12 Fed. (2d) 502 (1926).

[28] " . . . The following classes of persons shall be exempt from the operation of the illiteracy test, to wit: All aliens who shall prove to the satisfaction of the proper immigration officer or to the Secretary of Labor that they are seeking admission to the United Sates to avoid religious persecution in the country of their last permanent residence. . . " 8 U.S.C.A. 136(o).

[29] The *Azizian* case involved exclusion whereas the principal case involves expulsion, and there is some indication that the courts have greater power to review expulsion proceedings than exclusion proceedings. Compare *U. S.* v. *Ju Toy*, 198 U.S. 253, 25 S.Ct. 644 (1904), with *Ng Fong Ho* v. *White*, 259 U.S. 276, 42 S.Ct. 492 (1921). Also, the Armenian in the *Azizian* case had spent the three years preceding her application for admission to the United States in France where there was no persecution, whereas Weinberg would be sent to Czechoslovakia in the midst of persecution.

[30] Offsetting the factors indicated in note 29, *supra*, is the fact that there was an express statutory grant of discretion in the *Azizian* case (see note 28, *supra*), but none in the principal case.

[31] *Ex parte Garcia*, 2 Fed. Supp. 966 (1933).

[32] The court recites and emphasizes facts that show that Weinberg had never been on relief, had always supported himself, had never been arrested except for a traffic violation, and had never been guilty of a crime involving moral turpitude. These facts would be relevant in proceedings under section 155 but the only relevancy to Weinberg's deportation under section 214 would appear to be in connection with the Eighth Amendment. The court could not have in mind the prohibition of that amendment in the *absolute* sense, but may have treated the deportation as "cruel and unusual punishment" in the *relative* sense, that is, unduly severe considering Weinberg's actions and record while within the United States.

emphasized that "it would be cruel and inhuman punishment to deport this petitioner to Czechoslovakia, belonging as he does to the race which is thus being persecuted and exiled, especially when the charge against him is that at the time of his entry he was not in possession of an unexpired immigration visa."[33] If this language looks to the Eighth Amendment, it is clear that the instant court has departed from the prior decisions and has extended the scope of this constitutional provision. It has been held that the punishment imposed for a violation of a statute, which is within the punishment provided for by the statute, cannot be regarded as excessive, cruel, or unusual,[34] though there is *dicta* indicating that courts might interfere with the Congressional function of fixing penalties and punishments where such are clearly and manifestly cruel and unusual.[35] Conclusive, however, is the fact that deportation proceedings are of a civil nature, to which constitutional rights of the type guaranteed by the Eighth Amendment are inapplicable;[36] indeed, there is an express holding, where the alien pleaded the Eighth Amendment, that the deportation of an alien is not punishment within the meaning of that amendment.[37] MYRON D. OLIVER

APPELLATE PROCEDURE

APPELLATE PROCEDURE — FINAL ORDER, ORDER GRANTING NEW TRIAL NOT.

"In the opinion of the court, the courts of this state have gone the limit in construing court orders as 'final' . . . and the attempt to make the setting aside of a verdict and the granting of a new trial a final order . . . violates the Constitution. . . . " Thus wrote Judge Hart in his opinion in the recent Ohio case of *Hoffman* v. *Knollman*[1] which reaffirmed the concept of finality as the touchstone of Ohio appellate practice and set forth the rule that the principle could not be disturbed by legislative definition.

The case involved an action to contest a will, wherein the jury had returned a verdict for the plaintiff and the defendant had filed a motion for a new trial which was sustained. The plaintiff then appealed to the Court of Appeals assigning as error that the motion should have been

[33] *U. S. ex rel. Weinberg* v. *Schlotfeldt*, 26 Fed. Supp. 283, 284 (1938).
[34] *Hernandez* v. *U. S.*, 15 Fed. (2d) 190 (1926).
[35] *Bailey* v. *U. S.*, 74 Fed. (2d) 451 (1934).
[36] *Ah Lin* v. *U. S.*, 20 Fed. (2d) 107 (1927).
[37] *Costanzo* v. *Tillinghast*, 56 Fed. (2d) 566 (1932), affirmed without reference to this point in 287 U.S. 341, 53 S.Ct. 152 (1932).
[1] 135 Ohio St. 170, 186, 20 N.E. (2d) 221 (1939).