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Case Digest

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CASE DIGEST

This Case Digest provides brief analyses of cases that represent current aspects of transnational law. The Digest includes cases that establish legal principles and cases that apply established legal principles to new factual situations. These cases are grouped in topical categories and references are given for further research.

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Plaintiffs brought a class action against the Immigration and Naturalization Service (INS) to challenge its policy that required governmental detention of children during the pendency of deportation proceedings. The policy, codified at 8 C.F.R. § 242.24 (1988), required the detention of children suspected of illegal immigration into the United States, unless an adult relative or legal guardian could assume custody until the deportation hearings. The INS did not contend that the release of the detained children would create a threat of harm to the children or to society. The district court held that a blanket detention policy in these circumstances is unlawful. It entered an order that required, when feasible, the release to a responsible party of children who otherwise would have been re-

leased to a parent or guardian. The order further required an administrative hearing for each child to determine whether, and under what conditions, the child should be released. On appeal to the United States Court of Appeals for the Ninth Circuit, a divided panel reversed the district court's holding. Following remand, the active judges voted to rehear the case *en banc. Held: Majority panel decision vacated and the district court's order Affirmed.*

The first issue involved the detention policy itself; whether it affected any constitutionally protected liberty interests of the plaintiffs. The defendants suggested the plaintiffs only had a limited liberty interest because of their status as both aliens and children. The court cited *Mathews v. Diaz*, 426 U.S. 67, 77 (1976), as support for the full application of the due process protections of the Fifth Amendment to aliens, even if illegal in status. Accordingly, any person present in the United States warrants equal justice before the law, including procedural protections in conjunction with any deprivation of liberty and freedom from invidious discrimination. Furthermore, the court, citing *Wong Wing v. United States*, 163 U.S. 228 (1896), reiterated the well-established principle that alienage does not prevent a person from testing the legality of confinement through writ of habeas corpus. The court cited *Carlson v. Landon*, 342 U.S. 524, 538 (1952), for support to allow the application of habeas corpus review to detentions that were administrative, rather than punitive, in nature, much like the present one.

While the court recognized the discretionary nature of INS proceedings and the Attorney General's authority, it also recognized the limit to those discretionary authorities. Therefore, the court held that aliens have a fundamental right to be free from governmental detention unless a determination occurs that detention furthers a significant governmental interest. Moreover, the court recognized that detention could be justified only by clear and convincing evidence that the arrestee presented an identified and articulated threat to an individual or the community. The Constitution secures the right to freedom and liberty in its enumerated guarantee of habeas corpus through judicial scrutiny of the basis for governmental confinement.

The second issue was the juvenile status of the plaintiffs and its affect on their liberties and the protections allotted to those liberties. The court recognized that while a child accused of an offense may be subject to pretrial detention based on a determination that release is not safe for the child, such a determination has been held to meet the mandates of due process only when made by a neutral and detached official, with the justifications for detention clearly stated. The court concluded that minority status of plaintiffs cannot materially alter the nature of rights to

which they are entitled.

The court finally turned to the issue concerning the governmental purpose for the blanket policy of detaining alien children pending deportation preceding. INS presented two reasons for the blanket detention of those children. First, it suggested that the children's interest would be better served by detention than by release to a responsible adult, whose living environment the INS does not have the means to investigate. Second, it asserted that the policy is necessary to protect the agency from potential liability in the event some harm should befall the children upon their release to unrelated adults. The court rejected both arguments as insufficient to support the infringement of liberties on a wide-scale basis.

While the court recognized the deference that governmental agencies warrant in making determinations that relate to an area of their special expertise, the court refused to recognize this deference in the present case because the justifications asserted in this case dealt with the welfare of children, an area in which INS, by its own admission, has no expertise. With regard to the second justification—that release to unrelated adults could subject INS to liability in the event harm befell the child—the court could find little support for this potential liability. According to the court, governmental agencies would face far greater exposure to liability by maintaining a special custodial relationship than by releasing children to reasonable adults and away from the constraints of governmental custody. Accordingly, the court affirmed the district court's order requiring the INS to hold a hearing to make the necessary determinations. The determination at the hearing must include an inquiry into whether any nonrelative who offers to take custody represents a danger to the child's well being. The hearing is a reasonable procedure to protect the children and provide the appropriate procedural safeguards for the deprivation at issue. *Significance*—The Court of Appeals for the Ninth Circuit held a blanket policy of detaining alien children who have no adult relative or legal guardian to take their custody pending deportation proceedings to be a violation of the fundamental right to challenge the deprivation of liberty protected by the Constitution.

QUESTIONS REGARDING ORGANIZATIONS WITH WHICH APPLICANTS FOR NATURALIZATION HAVE BEEN AFFILIATED, TO ASCERTAIN ANY RELATIONSHIP WITH COMMUNIST-FRONT ORGANIZATIONS, IS CONSISTENT WITH BOTH THE IMMIGRATION AND NATURALIZATION SERVICE'S AUTHORITY UNDER IMMIGRATION AND NATURALIZATION ACT AND THE FIRST AMENDMENT RIGHT TO FREEDOM OF ASSOCIATION. *Price v. Immigration and Naturalization Service*, 941 F.2d 878

(9th Cir. 1991).

The petitioner, John E. Price, is a citizen of the United Kingdom who had resided in the United States under lawful resident alien status since 1960. On April 21, 1984, Price applied to petition for naturalization. Price answered all questions on the application except Question 18, which asked for a list of all present and past memberships in, or affiliations with, organizations and associations in the United States or abroad. In an attached statement, he presented a legal brief contending that Question 18 violated his First Amendment right of association. With regard to any past association with the Communist Party, the Communist cause, or any organization or activity described in section 313 of the Immigration and Naturalization Act (INA), 8 U.S.C. § 1424(a), Price responded negatively in all counts both in writing and during the preliminary examination. While Price later swore that he was not consciously thinking of any organization, the knowledge of which he intended to keep from the Immigration and Naturalization Service (INS), he also refused to respond orally to Question 18, beyond the fact that he did participate in an organization. Price grounded his refusal upon the allegedly overbroad language of the question, which he contended violated his First Amendment rights. Once his petition was denied, Price brought suit in the United States District Court for the Northern District of California. On the basis of his refusal to answer Question 18, the district court denied Price's petition for naturalization on the INS's recommendation. On appeal, Price argued that Question 18 exceeded the statutory authority granted the Attorney General by Congress and that the question violated his First Amendment right to freedom of association. The United States Court of Appeals for the Ninth Circuit *Held: Affirmed.* The INS policy to ask applicants for naturalization to list their association with all organizations, to ascertain potential relationship with any Communist-front organizations, is consistent with both the agency's authority under the INA and the First Amendment right to freedom of association.

To be able to deny any association with organizations that advocate opposition to organized government or the overthrow of the United States government, the naturalization process requires applicants to answer questions regarding their past affiliation with various groups. The INA grants the Attorney General the authority to "prescribe the scope and nature of the examination of petitioners for naturalization as to their admissibility to citizenship." Within the limitations proscribed, the Attorney General has the authority to require applicants to aver to "all facts which in the opinion of the Attorney General may be material to the applicant's naturalization."

Price argued that by listing in section 1424(a) certain types of organizations whose alien members or affiliates cannot be naturalized, Congress implicitly prohibited the Attorney General from denying naturalization on the basis of association with any other organization. Therefore, he argued, the broad authority granted the Attorney General to inquire into any matter "touching or in any way affecting" admissibility does not include inquiry into any other types of organizations. The court, however, could find no support for the assumption that Congress intended the list in section 1424(a) to be exclusive.

Instead, INS argued that limiting examination to asking petitioner whether they are members of organizations of the type described in section 1424(a) would require the INS to rely on petitioners' own determinations whether particular organizations are of the prohibited type. The court accepted this argument. The petitioner making those determinations, INS argued, could wrongfully believe that an organization with which he had been affiliated does not fall within section 1424(a). Therefore, INS concluded that only by examining all organizations with which the petitioner is affiliated can the Attorney General determine whether the petitioner has been affiliated with one of the type listed in section 1424(a).

While the court did recognize that resident aliens enjoy the protections of the First Amendment, it also recognized that the cases establishing constitutional protection for aliens within the territory of the United States have accorded those aliens different protections than to citizens of the United States. Furthermore, the court recognized the historical deference Congress has enjoyed in the area of immigration and naturalization.

The INS relied on *Kleindienst v. Mandel*, 408 U.S. 753 (1972), for the proposition that petitioner's First Amendment rights receive limited judicial review at most. Price argued that because *Kleindienst* involved exclusion rather than naturalization, its proposition could not control here. The court, however, found the determination of who will become a citizen of the United States at least as "peculiarly concerned with the political conduct of government" as the decision of who will be allowed to enter the United States. Therefore, naturalization decisions deserve at least as much judicial deference as decisions about initial admission.

Price then argued that while he did not challenge the political decision underlying the determination of the substantive requirements for naturalization, he did challenge the method of inquiry, which, in the case of Question 18, limited his right to free association. The court, however, used similar arguments raised by the Supreme Court in *Kleindienst* to reject the application of a greater judicial scrutiny. Accordingly, the application of the limited standard of review to the Attorney General's de-

cision to ask Question 18 was appropriate because aliens have no right to naturalization unless they comply with all the statutory requirements. The court distinguished *Girouard v. United States*, 328 U.S. 61 (1946), from the present case because in *Girouard* the requirement involved commitments that would last beyond naturalization, which natural-born citizens could avoid based on their First Amendment rights. *Significance*—Because a petitioner might be mistaken about whether an organization is of the type prohibited by section 1424(a) and because the information required could reasonably reveal information relevant to other requirements of naturalization, the question raised by the Attorney General does not violate the First Amendment to the Constitution or the spirit of the act granting the Attorney General this authority.

II. Taxation and Foreign Commerce

THE APPLICATION OF CALIFORNIA'S UNITARY TAX METHOD OF WORLDWIDE COMBINED REPORTING TO DOMESTIC PARENT UNITARY GROUPS DOES NOT VIOLATE THE FOREIGN COMMERCE CLAUSE IN THE UNITED STATES CONSTITUTION. *Colgate-Palmolive Co. v. Franchise Tax Board*, 284 Cal. Rptr. 3d 780 (1991).

California directed Colgate-Palmolive Company, Inc. (Colgate), a domestic-parent unitary group with approximately seventy-five foreign subsidiaries operating in about fifty-four foreign states, to pay additional taxes for the years 1970 through 1973 after California applied the worldwide unitary tax method to the group. Under protest, Colgate paid the additional taxes, and this action ensued. At trial, Colgate challenged the federal constitutionality of the additional taxes on foreign commerce clause grounds. The trial court agreed with Colgate's proposition that the federal executive branch had acted decisively after *Container Corp. v. Franchise Tax Board*, 436 U.S. 159 (1983), to communicate its long-standing position that California's worldwide unitary tax method impermissibly interfered with United States foreign policy. The Franchise Tax Board (Board) appealed the trial court's decision to the California Court of Appeals. *Held: Reversed.* The application of California's worldwide unitary tax method to domestic parent unitary groups does not violate the foreign commerce clause of the United States Constitution.

Two basic methods of income allocation exist for corporations that conduct business across state or national boundaries: the arm's length or separate accounting method, and the formulary apportionment or unitary business method. Under the arm's length method, the state treats the related corporations of a multijurisdictional enterprise as distinct entities with separate taxable incomes. The state corrects improper shifting

of value between the related corporations by requiring arm's length pricing in related corporate transactions. In other words, the related corporations must act as if they were unrelated entities dealing at arm's length in the marketplace. The unitary business or formulary apportionment method, on the other hand, treats the related corporations of a multijurisdictional enterprise as units of a single business, in other words, a unitary group. Based on tax policies of the jurisdiction implementing the unitary business method, a proportion of the income associated with the unitary group is then taxed in the given jurisdiction.

While the federal government has been devoted consistently to the arm's length method, states like California have opted for the formulary apportionment approach. Accordingly, if a corporation doing business in California is deemed to be part of a unitary group, the group's total worldwide income is apportioned to California by a three-factor formula. Under the formula, the Board arithmetically compares the property, payroll, and sales figures for the group in California to the property, payroll, and sales figures for the group worldwide. The comparison will produce an apportioned amount applied to the group's income to derive the income taxable by California.

The court first reviewed the applicability of *Wardair Canada v. Florida Dept. of Revenue*, 471 U.S. 1 (1986), as proposed by the Board in support of precluding a dormant foreign commerce clause analysis. The Board presented five matters under which an affirmative federal policy presumably existed. The court, however, could discern no such affirmative action in any of the five proposed matters. Therefore, the court concluded that *Wardair* did not apply, buttressed by the fact that the *Container* court had all of the significant factors upon which the Board relied in the present case before it and nevertheless engaged in a dormant foreign commerce clause analysis. Accordingly, the court proceeded with a foreign dormant commerce clause analysis and the application of the corresponding test created in *Japan Line Ltd. v. Los Angeles County*, 441 U.S. 434 (1979), and refined in *Container*.

Under the dormant foreign commerce clause test created in *Japan Line*, a state taxation method is unconstitutional if it either creates a "substantial risk of international multiple taxation" or "impair[s] federal uniformity in an area where federal uniformity is essential" and prevents "the federal government from 'speaking with one voice when regulating commercial relations with foreign governments.'" The court cited *Container*, which involved the precise issue presented in the present case: the constitutionality under the foreign commerce clause of the California worldwide unitary tax method as applied to a domestic parent unitary group with foreign subsidiaries. Based on the analysis presented

in *Japan Line*, the Court in *Container* held the tax method constitutional. According to the Court in *Container*, California's worldwide unitary tax method as applied to the domestic parent groups did not create an "automatic 'asymmetry' " in international taxation, disadvantaging a foreign entity. Furthermore, the Board applied the tax method to a domestic, rather than a foreign, corporation. And lastly, even if foreign nations have a legitimate interest in reducing the tax burden of domestic corporations, that burden results more from tax rate than allocation method.

Colgate asserted that after *Container* the federal executive branch acted to communicate clearly its longstanding policy that states are not to apply the world wide unitary method to any multinational corporation because this application interferes with the federal government's conduct of foreign policy and foreign affairs. To strengthen its proposition, Colgate introduced a number of statements and letters by numerous government officials as evidence of a government position opposed to the unitary tax method. While the court refused to discount the evidence presented, it was not persuaded by its weight. One of the factors that was most influential in the court's decision was the lack of an amicus brief by the executive branch to indicate its position in the present case. The Department of Justice response to Colgate's counsel was that it adheres to the position it took in *Barklays Bank International Ltd. v. Franchise Tax Board,* 59 L.W. 2384 (Calif. Ct. App. 3d Dist. 1990).

While in *Barklays*, the Department of Justice adhered to the arm's length method as essential to avoiding adverse consequences for the foreign relations of the United States, the court in the present case distinguished *Barklays* based on the type of unitary group in question. While in the present case the corporation subject to unitary taxation is a United States parent corporation, in *Barklays* the corporation subject to the same taxation was a foreign parent corporation with subsidiaries in the United States. According to this court, while it is conceivable that a unitary taxation applied to a foreign parent corporation may conflict with the foreign commerce clause, the application of the same to a United States parent corporation cannot. *Significance*—Based on the intentional or unintentional failure by the executive branch of the federal government to make its position on the matter clear through an amicus brief, the court has pursued a limited interpretation of the foreign commerce clause to uphold the California worldwide unitary method, at least as applied to domestic parent corporations.

III. Air Carrier Liability—Warsaw Convention

Employed Mechanics Who Travel Aboard Planes and Maintain Them in Places Where the Carrier Does Not Have Regular Maintenance, Crew Is Not a "Passenger" Within the Meaning of Article 17 of Warsaw Convention. *Sulewski v. Federal Express Corp.*, 933 F.2d 180 (2nd Cir. 1991).

Leonard Sulewski, employed as an aircraft mechanic by the cargo carrier, Flying Tiger Line, Inc. (FTL), performed maintenance and repairs on FTL airplanes. Contrary to its normal policy, FTL did not assign Sulewski to any specific airport. FTL assigned him as a member of the "Magnificent Seven" to specific flights that landed at airports where FTL did not employ aircraft mechanics. Under the employment agreement, Sulewski was responsible for performing various duties associated with certain flights prior to departure and upon landing at the flight's destination. To perform these duties, Sulewski had to travel with the plane to which he was assigned. Sulewski died in a crash in Kuala Lumpur, while aboard his assigned plane. Sulewski's wife, Dolores, brought an action against Federal Express Corporation, the successor-in-interest to FTL. Relying on the liability provisions of the Warsaw Convention (the Convention) and on common law negligence, she sought compensatory damages for her husband's wrongful death. The court had to determine whether an aircraft mechanic assigned to specific flights of a cargo carrier to perform maintenance on the plane while it was at airports at which the company had not maintained regular crews is a "passenger" within the meaning of article 17 of the Warsaw Convention. The district court decided that he was not a "passenger" within the meaning of the Convention, and hence, granted Federal Express' motion for summary judgment and dismissed the complaint. Upon appeal, the United States Court of Appeals for the Second Circuit, *Held: Affirmed.*

The material factual dispute in this case turned on the meaning of the term "passenger" in the Convention. The text of the Convention eliminates several potential tests for determining the meaning of that term. For instance, passenger status does not hinge on whether the person was a fare-paying traveler. While article 1(1) states that the Convention shall apply "to all international transportation of persons," both article 1(2) and article 17 have limited the scope of the language surrounding passenger status. Given those limitations, the court concluded that the Convention does not cover the transportation of all persons, but only those who board the plane pursuant to a contract of carriage. Furthermore, article 17 requires the contract to have been made between the carrier and a "passenger" for the Convention to apply.

The court applied different techniques to determine the scope and nature of the term "passenger" as used in the Convention. Based on the interpretations applied, the court concluded that as a matter of law Sulewski was not a passenger aboard the flight in question. Because of the nature of his services, Sulewski was also not a member of the flying or operational crew. Because FTL assigned him to the flight and that company policy, absent permission, prohibited mechanics like Sulewski to fly on flights other than those assigned, the court's conclusion was strengthened. While the court recognized that Sulewski performed the bulk of responsibilities before and after the flight, the court refused to apply a test that would hinge on this factor. An employee, such as Sulewski, may be aboard a flight primarily to perform employment duties, even if those duties are limited necessarily to times immediately after the plane lands and before it takes off. Moreover, the court found it sufficient that the employee was on call to perform employment services, even if no such services occurred on the specific flight in question. Because Sulewski's primary purpose for being on the flight in question was to facilitate the departure and arrival of the flight, in accordance with his unique employment responsibilities, the court found sufficiently compelling evidence to rule as a matter of law that the mechanic was not a "passenger" within the meaning of the Convention. *Significance*—The recent interpretations of the Warsaw Convention suggest a continued trend towards the placement of further limitations on air carrier liabilities at the expense of the injured parties.