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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 recently established legal principles to new and different factual situations. The Cases are grouped in topical categories, and references are given for further research.

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I. IMMIGRATION

NEITHER PRIVATE REFUGEE ASSISTANCE AGENCY NOR ITS MEMBERS HAVE STANDING TO CONTEST U.S. INTERDICTION OF FOREIGN VESSELS ON HIGH SEAS CARRYING UNDOCUMENTED ALIENS. *Haitian Refugee Center v. Gracey*, No. 85-5258, slip op. (D.C. Cir. Jan. 9, 1987).

The Haitian Refugee Center (HRC) and two of its members brought suit to challenge the United States program of interdicting vessels on the high seas that carried undocumented aliens bound for the United States. The President had authorized the program in September 1981 in order to prevent illegal immigration to the United States by sea. Proclamation No. 4865, 46 Fed. Reg. 48107, *reprinted in* 8 U.S.C.A. § 1182 app. at 88 (West Supp. 1986); Exec. Order No. 12,324, 46 Fed. Reg. 48109, *reprinted in* 8 U.S.C.A. § 1182 app. at 88 (West Supp. 1986). For this purpose, the United States and Haiti had entered into a treaty that permitted United States authorities to board Haitian flag vessels outside U.S. territorial waters and make inquiries. If a violation of United States or Haitian law was discovered, the vessel and its passengers were subject to return to Haiti. However, no Haitian migrant who qualified for refugee status was to be returned. Agreement on Interdiction of Illegal Mi-

grants, Sept. 23, 1981, United States-Haiti, T.I.A.S. No. 10241.

In their action for declaratory and injunctive relief, plaintiffs alleged that the interdiction program: (1) violated the rights of the Haitians under the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, and the Immigration and Nationality Act, 8 U.S.C. § 1253(h) (1982); (2) violated the Due Process Clause; (3) failed to satisfy the nonrefoulement obligation established by the United Nations Protocol Relating to the Status of Refugees; and (4) violated the extradition treaty between the United States and Haiti as well as the federal extradition statute. The government defendants moved to dismiss on several grounds, including lack of standing, non-justiciability under the political question doctrine, and failure to state a claim upon which relief could be granted. The U.S. District Court for the District of Columbia held that the plaintiffs had standing, but that they failed to state a claim. It granted defendants' motion to dismiss noting the court's limited scope of review in immigration matters. *Haitian Refugee Center v. Gracey*, 600 F. Supp. 1396 (D.D.C. 1985).

On appeal, the United States Court of Appeals for the District of Columbia affirmed the dismissal on other grounds. Judge Bork, with Judge Buckley concurring, held that (1) all petitioners lacked standing under the Supreme Court's prudential principles, and (2) the individual members lacked article III standing for not alleging a specific substantive injury. In applying recent standing decisions, Judge Bork concluded that HRC alleged sufficient injury for article III standing purposes. However, Judge Buckley's separate concurring opinion expressed a slightly different analysis of the article III standing causation requirement for the HRC. Judge Edwards, concurring in part and dissenting in part, agreed with the dismissal for failure to state a claim upon which relief could be granted, but in his view the majority had adopted an unprecedented test in order to "avoid an obvious showing of standing." *Significance* — This decision offers an exhaustive review and analysis of the Supreme Court's recent standing jurisprudence. The court relies on the doctrine of standing to avoid a decision on the merits which would raise significant separation of powers concerns, particularly in an area of transnational law such as immigration law.

ALIEN MUST SHOW ONLY A SUBJECTIVE WELL-FOUNDED FEAR OF PERSECUTION, NOT AN OBJECTIVE CLEAR PROBABILITY OF PERSECUTION WHEN SEEKING REFUGEE STATUS AND POSSIBLE DISCRETIONARY GRANT OF ASYLUM FROM ATTORNEY GENERAL. *INS v. Cardoza-*

Fonseca, 107 S. Ct. 1207 (1987).

In response to an Immigration and Naturalization Service (INS) deportation proceeding, Luz Marina Cardoza-Fonseca, a Nicaraguan citizen who illegally entered the U.S. in 1979, requested suspension of deportation proceedings under § 243(h) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1253(h) (1982), and eligibility for refugee status and asylum under § 208(a) of the INA, 8 U.S.C. § 1158(a) (1982). She claimed that if returned to her native Nicaragua: (1) it was more likely than not that her life or freedom would be threatened and thus by § 243(h) deportation should be suspended; and (2) she had a well-founded fear of persecution and thus by § 208(a) qualified as a refugee worthy of asylum consideration. She supported both claims with evidence that if returned to Nicaragua she might face a similar treatment as her brother, a political dissident who was imprisoned and tortured by the Sandanistas. The Immigration Judge (IJ) applied the clear probability of persecution standard of § 243(h) to both claims and concluded that the evidence supported neither claim. The Board of Immigration Appeals (BIA) affirmed stating that she had “failed to establish that she would suffer persecution within the meaning of 208(a) or 243(h) of the [INA].” On appeal to the Ninth Circuit, Cardoza-Fonseca argued that both the IJ and the BIA erroneously applied the clear probability standard of § 243(h) to her § 208(a) claim. The Ninth Circuit agreed with Cardoza-Fonseca. 767 F.2d 1448 (9th Cir. 1985).

The Supreme Court granted certiorari and affirmed holding that under § 208(a) of the INA an alien need only show a well-founded fear of persecution upon deportation to qualify as a refugee worthy of asylum consideration. Justice Stevens, writing for the majority, based this distinction on a plain reading of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, which amended the INA, and its legislative history. Section 208(a) gives the Attorney General discretion to grant asylum to an alien who qualifies as a “refugee” which is defined as a person who has at least a “well-founded fear of persecution” if returned to his or her home country. Justice Stevens stated that § 208(a)’s reference to fear “obviously makes the eligibility determination turn to some extent on the subjective mental state of the alien . . . [while the] ‘would be threatened’ language of § 243(h) has no subjective component, but instead required the alien to establish by objective evidence that it is more likely than not that he or she will be subject to persecution upon deportation.” Also, at the time Congress passed the Refugee Act it did not amend the § 243(h) clear probability of persecution standard and did not incorporate the terms refugee or well-founded fear into § 243(h). *Significance* — Because eligibility for asylum now hinges on the more generous subjective,

well-founded fear standard, the Attorney General may evaluate the needs of a broader category of political and religious dissidents and detainees. In addition, U.S. procedures for dealing with refugees now conform with the 1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, which the U.S. has signed.

SEPARATION OF CITIZEN CHILDREN FROM ILLEGAL ALIEN PARENTS SHOULD BE CONSIDERED WHEN DETERMINING EXTREME HARDSHIP IN DEPORTATION PROCEEDINGS—*Cerillo-Perez v. INS*, 55 U.S.L.W. 2457 (9th Cir. 1987).

Petitioners entered the United States from Mexico in 1975 without inspection. Between 1975 and 1982, the petitioners had three children, built up \$22,000 of equity in their home, and established friendships and ties with United States citizens. In 1982, the Immigration and Naturalization Service (INS) issued orders to show cause, alleging that the petitioners were deportable because they had entered the United States without inspection. The petitioners conceded deportability but argued that deportation should be suspended because it would result in extreme hardship to themselves and their children. Both the immigration judge and the Board of Immigration Appeals (BIA) held that, while all other requirements for suspension were satisfied, petitioners did not show extreme hardship. Although the BIA can construe "extreme hardship" narrowly, it must state its reasons and show proper consideration of all factors when denying relief. Courts have held that hardship to spouses, parents, and children should be considered, not simply the hardship to the illegal alien. The petitioners contended that the BIA erred by failing to consider the hardship posed by the separation of parent from child, since the children, as citizens, were free to remain in the United States. The Ninth Circuit agreed. Although the INS argued that a parent would not leave tender aged children alone in another country, the court recognized that there were compelling reasons for the petitioners to do so; namely, the educational advantages of growing up in the United States rather than Mexico, and the fact that the United States is a safe haven from persecution. In addition, the petitioners had strong community ties which would make it possible for them to leave their children in the care of another. While the court conceded that separation is not *per se* hardship, it held that BIA must consider this factor when making deportation decisions. *Significance* — This decision aligned the Ninth Circuit with the Fifth Circuit, *Ramos v. INS*, 695 F.2d 181 (5th Cir. 1983), in holding that the BIA must consider separation of citizen children from illegal alien parents as a possibly crucial factor in determining

extreme hardship which might arise from deportation. Henceforth, the BIA may not assume that school-aged citizen children will automatically accompany their illegal alien parents if deported.

II. PERSONAL JURISDICTION

CALIFORNIA STATE COURT'S EXERCISE OF PERSONAL JURISDICTION OVER JAPANESE MANUFACTURER TO INDEMNIFY TAIWANESE COMPANY IS UNREASONABLE AND UNFAIR IN VIOLATION OF DUE PROCESS. *Asahi Metal Industry Co. v. Superior Court of California*, 107 S. Ct. 1026 (1987).

Gary Zurcher, injured in a motorcycle accident in California, commenced a products liability action against Cheng Shin Rubber Industrial Co. (Cheng Shin), a Taiwanese tire manufacturer, in a California state court alleging it produced faulty tires. In the same action Cheng Shin filed a cross-complaint against Asahi Metal Industry Co. (Asahi) for indemnification alleging that Asahi's defective tire valve assembly caused the accident. Asahi manufactured tire valve assemblies in Japan and sold substantial numbers to Cheng Shin. The motorcyclist's settlement with Cheng Shin led to a dismissal of the original suit, but Cheng Shin's indemnification claim against Asahi remained. Asahi moved to quash summons arguing California's long-arm statute violated the Due Process Clause. The California Supreme Court held the statute did not violate due process and that Asahi was subject to personal jurisdiction in California because it purposefully availed itself of the benefits of California's laws by placing the valve assemblies in the stream of commerce knowing they would end up in California. 39 Cal. 3d 35, 702 P.2d 543 (1985).

The U.S. Supreme Court granted certiorari, reversed and remanded. The Court, except for Justice Scalia, agreed that under the circumstances of this case, California's assertion of personal jurisdiction was unreasonable and unfair. In reaching this decision, the Court considered several factors. First, Asahi would bear a heavy burden in traversing great distances and defending itself in California's foreign legal system. Second, the plaintiff Cheng Shin and the State of California had only a slight interest in resolving the dispute in California, since neither Cheng Shin and Asahi are California corporations. Finally, the procedural and substantive policies of other nations whose interests are affected, i.e. Japan and Korea, as well as the federal interest in its foreign relations policies strongly suggested limiting California's assertion of personal jurisdiction in the international arena.

The Court, however, split 4-4 on whether merely placing a product in the stream of commerce satisfied "minimum contacts" to subject a corpo-

ration in a foreign state to personal jurisdiction. Justice O'Connor (joined by Chief Justice Rehnquist, Justice Powell and Justice Scalia) wrote that to establish necessary minimum contacts, a defendant must purposefully direct its actions toward the forum state; merely placing goods in the stream of commerce, even with an awareness that some of its goods will end up in the foreign state, was not enough in *Asahi's* case. Some additional conduct is necessary. Justice Brennan (joined by Justices White, Marshall, and Blackmun) concluded that *Asahi* had established minimum contacts with the forum state by placing its tire valve assemblies in the stream of commerce. *Asahi* was aware that the product would be marketed in the state and could have reasonably anticipated being hailed into court there. Justice Stevens could have resolved the constitutionality of the stream of commerce theory in this case, but declined to address the issue. *Significance* — The Supreme Court has restricted the reach of state long-arm statutes over foreign defendants based on considerations of fairness and reasonableness without reaching agreement on a minimum contacts standard. The scope of the stream of commerce theory as set-out in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), remains unresolved.

III. TAXATION

NONDISCRIMINATORY AD VALOREM STATE PROPERTY TAX ON IMPORTED GOODS HELD IN CUSTOM-BONDED WAREHOUSES INTENDED FOR DOMESTIC CONSUMPTION IS CONSTITUTIONAL. *R.J. Reynolds Co. v. Durham County, N.C.*, 107 S.Ct. 499 (1986).

R. J. Reynolds Tobacco Company (Reynolds), a New Jersey manufacturer of tobacco products, imported foreign tobacco for blending with domestic tobacco and eventual consumption within the United States. Reynolds stored the imported tobacco for aging in custom-bonded warehouses located in Forsyth and Durham Counties, North Carolina. During the aging period, North Carolina assessed an *ad valorem* property tax on the imported tobacco. Relying on *Xerox Corp. v. County of Harris*, 459 U.S. 145 (1982), Reynolds claimed the imported tobacco was immune from taxation and that the state tax violated the Supremacy Clause, the Import-Export Clause, and the Due Process Clause. The North Carolina tax supervisors and the county and State Board of Equalization and Review denied Reynolds' claim that its imported tobacco was immune from state taxation on constitutional grounds. The North Carolina Court of Appeals and later the North Carolina Supreme Court affirmed the lower rulings.

On appeal, the U.S. Supreme Court held the state tax constitutional

because (1) the tax does not act as an "Impost or Duty" by interfering with the federal government's regulation of commercial relations with foreign governments, by depriving the federal government of revenues, or by disturbing the harmony among the States through unequal State taxation at the seaboard and thus does not violate the Import-Export Clause; (2) the tax bears a fiscal relation to state protection, opportunities and benefits, i.e. police and fire protection, and thus does not violate the Due Process Clause; and (3) the tax does not interfere with federal custom duty regulations and thus is not preempted. The Court narrowed the *Xerox* holding to exempting from state tax only those imported goods stored in a U.S. customs-bonded warehouse destined for *foreign* markets, not the U.S. domestic market. *Significance* — This decision distinguishes imported goods held in customs-bonded warehouses intended for domestic manufacturers and consumption from those held for reexport in the stream of foreign commerce. States may assess property taxes on imported goods intended for domestic sale which allows equal treatment of both imported and domestic goods sold in the U.S. without affecting those goods traveling in the stream of foreign commerce.

PANAMA CANAL TREATY EXEMPTS U.S. CITIZENS EMPLOYED BY THE PANAMA CANAL COMMISSION FROM PANAMANIAN TAXATION BUT NOT U.S. TAXATION. *O'Connor v. U.S.*, 107 S. Ct. 347 (1986).

Petitioners, Panama Canal Commission employees, sought refunds of U.S. taxes paid on salaries paid by the Commission between 1979 and 1981. They contended that a provision of the Panama Canal Treaty, Panama Canal Treaty: Implementation of Articles III, Sept. 7, 1977, U.S.-Panama, § 2, T.I.A.S. No. 1031, exempts Commission salaries for U.S. citizens from both U.S. and Panamanian taxation. The Claims Court agreed, 6 Cl. Ct. 115 (1984); however, the Court of Appeals for the Federal Circuit reversed and held that the treaty exempts U.S. citizens working for the Commission from paying Panamanian taxes only. 761 F.2d 688 (Fed. Cir. 1985).

On grant of certiorari, a unanimous Supreme Court affirmed the court of appeal's reading of the treaty. Writing for the Court, Justice Scalia stated art. XV, section 2, which exempts the Commission "from payment in the Republic of Panama of all taxes," when read in context with the entire article must be consistent with section 1, which is limited to Panamanian taxes. If the article operated as the petitioners claimed, then Commission employees would be exempt from all U.S. taxation on any income including gifts, inheritances, and investments within the United States. Justice Scalia found this was an implausible result contrary to the executive branch's historical application of the treaty. *Significance* —

The Supreme Court resolved conflicting interpretations of the treaty which had arisen in the lower courts. The Court did so without relying on the Tax Reform Act of 1986, Pub. L. 99-514, which directs that the treaty not be construed to exempt any U.S. citizens from U.S. taxation. Thus, the Court avoided confronting the constitutionality of a retroactive income tax.

IV. FOREIGN SOVEREIGN IMMUNITIES ACT

FOREIGN SOVEREIGN IMMUNITIES ACT DOES NOT OPERATE RETROACTIVELY TO CONFER SUBJECT MATTER JURISDICTION OVER PEOPLE'S REPUBLIC OF CHINA DEFAULT ON GOVERNMENT BONDS ISSUED IN 1911. *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986).

United States citizens who purchased bearer bonds issued by the Imperial Government of China in 1911, filed a class action in U.S. district court demanding payment from the present government — the People's Republic of China (PRC). The PRC failed to respond, and the district court entered a default judgment in excess of 41 million dollars. 550 F. Supp. 869 (N.D. Ala. 1982). Following high level diplomatic negotiations, the PRC entered the suit seeking dismissal based on absolute sovereign immunity. The district court set aside the default judgment and dismissed holding that the FSIA did not apply retroactively to confer jurisdiction over the 1911 sale of bearer bonds and the subsequent payment default in 1951. 596 F. Supp. 386 (N.D. Ala. 1984).

On appeal, the Eleventh Circuit affirmed and generally agreed with the district court's interpretation of the FSIA, its legislative history, and the effect of antecedent rights of China to absolute immunity. In addition, the court of appeals stated this decision was consistent with the leading case, *Corporacion Venezolana de Fomento v. Vintero Sales*, 629 F.2d 786 (2d Cir. 1980), on FSIA retroactivity. In dicta, the court of appeals suggested that jurisdiction might have existed if plaintiffs had contended that the renegotiation of the bonds in 1937 caused the subsequent default to occur in 1976. This could be possible because of the FSIA's retroactive effect back to 1952 when the U.S. adopted restrictive immunity through the Tate Letter. *Significance* — This decision holds that the FSIA does not confer retroactive subject matter jurisdiction to the claims and facts of this case. But, because at least six other cases are pending in federal courts which assert liability for acts of foreign sovereigns committed before 1952, FSIA retroactivity remains an open question ripe for Supreme Court review.

V. ACT OF STATE

ACT OF STATE DOCTRINE DOES NOT BAR TEXAS DEPOSITOR'S ALLEGATION THAT MEXICAN BANK AND ITS AGENTS NEGLIGENTLY MISREPRESENTED THE SECURITY OF MEXICAN INVESTMENTS. *Grass v. Credito Mexicano, S.A.*, 797 F.2d 220 (5th Cir. 1986).

Adrian Grass, who had deposited U.S. dollars over a six year period in Credito Mexicano, S.A., a bank in Mexico, filed suit after the bank paid back the principal and interest in pesos at the official exchange rate, rather than in U.S. dollars as the parties had earlier agreed. The district court dismissed all claims holding that the act of state doctrine barred consideration by a U.S. court.

On appeal, the Fifth Circuit Court of Appeals agreed that the act of state doctrine barred six of Grass's seven claims; however, the negligent misrepresentation claim survived this stage of the litigation. Based on the pleadings, the alleged misrepresentations involved commercial activity of Credito Mexicano's agent within the U.S. without directly implicating an act of state — a subsequent Mexican currency control regulation which requires payment of deposits in pesos at the official rate. Relying on *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985), the court warned that if further adjudication involved reviewing the validity of the exchange control regulations, the act of state doctrine would bar this claim as well. *Significance* — The 5th Circuit applied the act of state doctrine analysis developed in *Callejo v. Bancomer* to the claim of negligent misrepresentation and held that this complaint on its face *does not* directly implicate the validity of the Mexican currency control regulations and thus the act of state doctrine does not apply.

VI. EXTRADITION

NARROW SCOPE OF HABEAS CORPUS REVIEW OF A MAGISTRATE'S EXTRADITION ORDER APPLIES TO REVIEW OF PRE-EXTRADITION PROVISIONAL DETENTION HEARING. *In the Matter of the Extradition of Russell*, 805 F.2d 1215 (5th Cir. 1986).

A United States citizen was confined after a probable cause hearing before a federal magistrate concerning an arrest warrant sought by a U.S. Attorney on behalf of the government of Colombia. The underlying charges arose out of a transaction in which 13 million dollars was transferred out of a Columbian government account at the Chase Manhattan Bank in London which allegedly violated the Columbia Penal Code. The U.S. citizen was confined pursuant to the provisional arrest clause in article 11 of the Extradition Treaty between the U.S. and the Republic

of Colombia; however, a formal extradition hearing had not yet been held.

On review, the district court adopted the narrow standard used to review extraditability issues and found that a reasonable basis existed for the magistrate's probable cause determination. 647 F. Supp. 1044. The court reviewed only (1) whether the magistrate had jurisdiction, (2) whether the offense charged was within the treaty; and (3) whether there were reasonable grounds for the magistrate's findings ordering no bail and ordering provisional detention under article 11 of the treaty. On appeal, the 5th Circuit affirmed the district court and without discussion approved the district court's adoption of the narrow standard of review for the provisional detention hearing. *Significance* — This decision adopted the traditional limited scope of habeas review used to review the formal extradition hearing to a preliminary provisional detention hearing. *See also* Comment, *Scope of Review in Extradition Proceedings: The Government Cannot Appeal the Denial of Extradition Request Based on the Declaratory Judgment Act — U.S. v. Doherty*, 19 VAND. J. TRANSNAT'L L. 893 (1987).