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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 apply 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. ADMINISTRATIVE LAW

ADMINISTRATIVE PROCEDURAL DUE PROCESS SUPPORTED IN MAJOR FOREIGN POLICY DISPUTE—*Dresser Industries, Inc. v. Baldrige*, 549 F. Supp. 108 (D.D.C. 1982).

Plaintiff Dresser Industries, Inc. and its French subsidiary sought to enjoin the United States Commerce Department from imposing sanctions on the French subsidiary for exporting gas pipeline equipment to the Soviet Union in violation of Commerce Department regulations. Plaintiffs' request for a temporary restraining order to prevent the imposition of Commerce Department sanctions revoking the subsidiary's export rights previously had been denied. In response, plaintiffs requested an immediate oral hearing pursuant to 15 C.F.R. § 388.19(b) (1982) seeking an order from the agency to lift the sanctions imposed by the denial order. Because the Hearing Commissioner failed to take immediate action, plaintiffs argued that they had been denied administrative procedural due process and the district court should intervene to stay the sanctions. Although the district court found that all of plaintiffs' administrative remedies had not been exhausted and that plaintiffs made no showing of irreparable harm, it acknowledged that the agency must act expeditiously and issued an order requiring that the agency promptly respond to plaintiffs' motion pending before the Hearing Commissioner. The court denied plaintiffs' motion for extraordinary injunctive relief after considering United States foreign policy prohibiting the export of

gas pipeline equipment to the Soviet Union to protest the imposition of martial law in Poland. *Significance*—This decision establishes that courts will protect and promote a party's procedural rights in the administrative process even though requests for extraordinary judicial relief must be denied because their implementation would compromise United States foreign policy.

II. ALIENS' RIGHTS

PERMANENT RESIDENT ALIEN ATTEMPTING TO RE-ENTER THE UNITED STATES IS ENTITLED TO DUE PROCESS IN AN EXCLUSIONARY HEARING—*Landon v. Plasencia*, 103 S. Ct. 321 (1982).

Respondent, a permanent resident alien, sought habeas corpus relief from an order to exclude and deport her which was issued after an exclusionary hearing by an immigration law judge of the Immigration and Naturalization Service (INS). Respondent was apprehended following a brief visit to Mexico as she attempted to smuggle six nonresident aliens across the United States-Mexican border. The INS charged her with violating section 212(a)(31) of the Immigration and Nationality Act of 1952 (Act), 8 U.S.C. § 1182(a)(31), which provides for the exclusion of any alien seeking admission who "knowingly and for gain" assists any other alien in entering or attempting to enter the United States illegally. Respondent argued to the district court that before she could be barred from the United States, a deportation hearing, not an exclusionary hearing, was required. She asserted that only persons "entering" the United States are subject to exclusionary proceedings and as a permanent resident alien briefly visiting a foreign country she could not "enter" the United States upon her return. She concluded, therefore, the substantively and procedurally favorable deportation hearing was required because it was the only alternative proceeding. The district court vacated the exclusion and deportation order and instructed the INS that it could proceed against the respondent only in a deportation proceeding. The Ninth Circuit Court of Appeals affirmed. The Supreme Court reversed and remanded, holding that the INS had statutory authority to decide questions of entry and exclusion in an exclusionary hearing. The Court reasoned first, that the legislative history and language of the Act indicated a strong congressional intent that questions concerning the admissibility of entering aliens, including permanent resident aliens be determined in an exclusionary hearing and second, that the INS has the authority to deter-

mine if an alien has "entered" the United States as required by the Act. The Court remanded the case so the court of appeals could determine if the exclusionary hearing accorded the respondent the due process required by the interest balancing test articulated in *Matthews v. Eldridge*, 424 U.S. 319 (1976). *Significance*—In this decision the Court extended due process rights to permanent resident aliens in exclusionary hearings and refused to require deportation hearings to exclude permanent resident aliens returning to the United States following brief visits abroad.

ALIEN DOES NOT HAVE A FOURTEENTH AMENDMENT INTEREST IN A PROCEDURE TO STAY DEPORTATION WHERE THE INS ESTABLISHED THE PROCEDURE FOR ADMINISTRATIVE CONVENIENCE—*Wong Chung Wen v. Ferro*, 543 F. Supp. 1016 (W.D.N.Y. 1982).

An alien under warrant of deportation sought a writ of habeas corpus to challenge the Immigration and Naturalization Service's (INS) unexplained denial of "deferred action status," which is available according to the INS Operating Instruction (OI) 103.1(a)(1)(ii). The OI provides that "[t]he district director, may, in his discretion, recommend consideration of deferred action, an act of administrative choice to give some cases lower priority, and in no way an entitlement, in appropriate cases." The district court affirmed that an illegal alien is entitled to the protection of the fourteenth amendment, but held that OI 103.1(a)(1)(ii), which implements an informal administrative procedure for convenience of the INS, confers no substantive benefit. The court specifically rejected *Nicholas v. INS*, 590 F.2d 802 (9th Cir. 1979), in which the Ninth Circuit Court of Appeals held that OI 103.1(a)(1)(ii) was based on humanitarian considerations and thus conferred a substantive interest entitled to due process and equal protection. Under *Nicholas* the INS had to justify its refusal to confer deferred action status when an alien had established prima facie compliance with the OI's guidelines. The court rejected *Nicholas* for two reasons. First, the INS amended IO 103.1(a)(1)(ii) to clarify the agency's original intention to utilize the OI solely for the administrative convenience of the Service. The OI originally required that the district director recommend deferred action if the deportation of an alien "would be unconscionable because of . . . appealing humanitarian factors . . ." The amended OI now provides that the director "may, in his discretion, recommend consideration of deferred action" and expressly denies that deferred action is an entitlement. Second, the court relied on the

reasoning in *Zacharakis v. Howerton*, 517 F. Supp. 1026 (S.D. Fla. 1981), and held that judicial recognition of substantive benefits in intra-agency administrative guidelines would create rights that Congress did not intend to confer. *Significance*—This decision clearly establishes that the amended OI 103.1(a)(1)(ii) is a purely discretionary proceeding of the INS and that it confers upon aliens no substantive right to deferred action status.

III. JURISDICTION AND PROCEDURE

A PLAINTIFF SUING A FOREIGN SOVEREIGN'S INSURER IS NOT ENTITLED TO A TRIAL BY JURY—*Goar v. Compania Peruana de Vapores*, 688 F.2d 417 (5th Cir. 1982).

Plaintiff sued a government-owned Peruvian corporation and its insurer claiming damages for injuries sustained when a negligently operated vessel, wholly owned by the Peruvian government, struck a dock. Plaintiff argued that the grant of diversity jurisdiction in 28 U.S.C. § 1332(a)(2) entitled him to bring his claim before a jury. The district court, however, held that 28 U.S.C. § 1330, which establishes jurisdiction only for nonjury civil actions against foreign states, governs all cases in which foreign states, including agencies and instrumentalities of foreign states, are defendants. The court also held that pursuant to 28 U.S.C. § 1330(a) the plaintiff's direct action against the Peruvian corporation's insurer was an action against the sovereign. The court reasoned that permitting diversity jurisdiction and a jury trial would contravene the legislature's intent in the Foreign Sovereign Immunities Act to promote uniformity of treatment. The court then considered whether the seventh amendment right to a jury trial "in suits at common law" applied to guarantee a jury trial in this case. Unable to find any historical precedent supporting jury trials in cases involving a foreign sovereign as defendant, the court concluded that the plaintiff had no constitutional right to a jury trial. *Significance*—This decision establishes that 28 U.S.C. § 1330(a), which precludes jury trials, applies not only to suits against foreign sovereigns, but also to direct actions against insurers of foreign sovereigns.