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Immigration--Relief from Deportation--Aliens with Familial Ties and Who Wilfully Evaded Quota Restrictions Are "Otherwise Admissable" at Time of Entry (Immigration & Naturalization Serv. V. Errico, 385 U.S. 214 (1966))

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to defeat the jurisdictional diversity and venue requirements of the federal courts. This problem could be alleviated if Congress would modify these requirements as it has for interpleader [53] and third-party actions,[54] so that joinder of a non-diverse indispensable party would not divest the federal court of jurisdiction. The same would be true of venue. In this way, one of the more serious problems inherent in the indispensable party doctrine would be eliminated and the doctrine made more practical and workable in the federal courts.

Considering the above application of rule 19(b) to the instant case, the end result should not be criticized. However, the broad holding of the Court could militate against a flexible application of rule 19(b), while a discretionary dismissal would have been in accord with the intent of the revisors and applicable case law.

IMMIGRATION — RELIEF FROM DEPORTATION — ALIENS WITH FAMILIAL TIES AND WHO WILFULLY EVADED QUOTA RESTRICTIONS ARE "OTHERWISE ADMISSIBLE" AT TIME OF ENTRY. — Two aliens separately entered the United States by misrepresenting their immigrant quota status; thereafter, each became a parent of an American citizen. The Immigration and Naturalization Service ordered the aliens deported on the ground that they were "excludable at entry" as not having been of the proper status under the quota specified by the immigrant visa. The aliens had contended that they were nevertheless saved from deportation by Section 241(f) of the Immigration and Nationality Act which exempts aliens who enter fraudulently, who have close familial relationships with American citizens, and who were "otherwise admissible" at time of entry. On review of the respective cases, the courts of appeals came to an opposite conclusion. In resolving the conflict, the United States Supreme Court concluded that neither alien was deportable, *holding* that although they had misrepresented their quota status for the purpose of evading the quota restrictions, the aliens were nevertheless "otherwise admissible" at the time of entry. *Immigration & Naturalization Serv. v. Errico,* 385 U.S. 214 (1966).

With the exception of the Alien Act of 1798, which allowed the President to order the deportation of any alien he deemed

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[53] 28 U.S.C. § 1335 (1964).

[54] Williams v. Keyes, 125 F.2d 208 (5th Cir.), *cert. denied,* 316 U.S. 699 (1942).

dangerous to the country,[1] the national immigration policy was mainly one of indifference until the late nineteenth century. At this time, restrictive measures were enacted aimed at remedying particular problems caused by the prior *laissez-faire* immigration policy. First, in order to protect the nation from immigrants who threatened to become public burdens, legislation was passed in 1882 to exclude paupers and criminals.[2] This list of undesirables was later expanded to include idiots, insane persons, and people with loathsome or contagious diseases.[3] Second, to protect the domestic labor force, Congress enacted alien contract labor laws which prohibited the importation of cheap foreign labor.[4] Further safeguards for the American worker were embodied in a law restricting the immigration of Chinese.[5] This act was of additional importance in that, for the first time, exclusion was predicated on nationality. Further restrictions on the immigration of Asians were incorporated in the 1917 act,[6] passed to codify and supplement previous immigration legislation. Despite these qualitative restrictions, massive immigration continued.[7]

The first quota law,[8] enacted in 1921, imposed quantitative restrictions on immigrants of all nationalities.[9] A prospective immigrant had to meet two tests: (1) the qualitative standards of the 1917 act, and (2) the quota requirements of the 1921 act. Significantly, the 1921 act exempted certain "nonquota" immigrants from the numerical limitations. Among these exemptions was a provision for aliens under eighteen years of age whose parents were United States citizens.[10] Furthermore, preference quota status was afforded the wives, parents, brothers, sisters and fiancees of American citizens and aliens in the United States who had applied

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[1] Act of June 25, 1798, ch. 58, § 2, 1 Stat. 571. The law lapsed in 1800 and was not renewed. 2 U.S. CODE CONG. & AD. NEWS 1655-56 (1952).

[2] Act of Aug. 3, 1882, ch. 376, 22 Stat. 214.

[3] Act of March 3, 1891, ch. 551, § 1, 26 Stat. 1084.

[4] Act of Feb. 26, 1885, ch. 164, 23 Stat. 332, as amended, Act of Feb. 23, 1887, ch. 220, 24 Stat. 414.

[5] Chinese Exclusion Acts, Act of May 6, 1882, ch. 126, 22 Stat. 58. However, this legislation did not prohibit the immigration of professional people or students.

[6] Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 876.

[7] AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES 472 (2d ed. 1961).

[8] Act of May 19, 1921, ch. 8, 42 Stat. 5.

[9] The number of aliens admissible was limited to three per cent of the number of foreign born persons of that particular nationality who were residents here in 1910. Act of May 19, 1921, ch. 8, § 2(a), 42 Stat. 5. The system resulted in the admission of approximately 350,000 immigrants per year, mostly from Northern and Western Europe. 2 U.S. CODE CONG. & AD. NEWS 1667 (1952).

[10] Act of May 19, 1921, ch. 8, § 2(a)(8), 42 Stat. 5.

for citizenship.[11] These preferences and nonquota exemptions were generally followed in the 1924 Immigration Act[12] and the 1952 Immigration and Nationality Act.[13]

A basic objective of immigration law was discernible in these quota laws. The preferences and exemptions indicated a desire to preserve the family and to reunite separated families. This intent was further manifested in the War Brides Act[14] which provided special entry for families of armed service personnel. While such measures evidenced Congress' desire to maintain family unity, this desire did not become apparent in deportation policy until recently. The 1952 Immigration and Nationality Act included a provision for deportation of any alien who had gained entry by misrepresentation or other fraudulent means.[15] Congress recognized the harshness of this deportation section in cases where war refugees[16] misstated their place of birth or personal data because of fear of repatriation to their former homelands.[17] As a consequence, relief from deportation based on such misrepresentations was granted to refugees under Section 7 of the Immigration and Nationality Act on the condition that the misrepresentation was not made for the purpose of evading the quota restrictions or of preventing an investigation.[18] Furthermore, section 7 included a provision which reflected Congress' reluctance to disrupt a family, one of whose members was a citizen or permanent resident. Relief from deportation on the ground of fraud on entry was afforded to an alien who was "the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent resi-

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[11] Act of May 19, 1921, ch. 8, § 2(d), 42 Stat. 6.

[12] Act of May 26, 1924, ch. 190, 43 Stat. 153.

[13] 66 Stat. 175 (1952), as amended, 79 Stat. 911 (1965), 8 U.S.C. §§ 1101-1351 (Supp. I, 1965).

[14] Act of Dec. 28, 1945, ch. 591, 59 Stat. 659.

[15] Section 212(a)(19) provides for *exclusion* at entry of any alien who sought to enter the United States by fraud or wilful misrepresentation of a material fact. 66 Stat. 183 (1952), 8 U.S.C. § 1182(a)(19) (1964). Section 241(a)(1) makes *deportable* any alien who was within any one of the *excludable* classes at time of entry. 66 Stat. 204 (1952), 8 U.S.C. § 1251(a)(1) (1964). See Landon v. Clarke, 239 F.2d 631 (1st Cir. 1956).

[16] These refugees were admitted under the Displaced Persons Act, Act of June 25, 1948, ch. 647, 62 Stat. 1009.

[17] H.R. REP. No. 1365, 82d Cong., 2d Sess. (1952), 2 U.S. CODE CONG. & AD. NEWS 1653, 1704 (1952).

[18] The proviso to section 7 required that the refugee "establish to the satisfaction of the Attorney General that the misrepresentation was predicated upon the alien's fear of persecution because of race, religion, or political opinion if repatriated to his former home or residence, and was not committed for the purpose of evading the quota restrictions . . . or an investigation of the alien at the place of his former home. . . ." Act of Sept. 11, 1957, § 7, 71 Stat. 640-41.

dence." [19] Although the prohibition against misrepresentation for the purpose of evading the quota limitations applied only to the refugee, there was an additional requirement, applicable to both the refugee and the alien with family ties, that the alien have been "otherwise admissible at the time of entry." [20] When the relief provision was codified in 1961, the special consideration for the refugee, having served its purpose, was deleted. The preferential treatment of aliens with family ties was continued by Section 241(f) of the Immigration and Nationality Act which provides:

> The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentations, or entry into the United States by fraud or misrepresentation shall not apply to an alien *otherwise admissible at time of entry* who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.[21]

Because the statute provides relief from deportation on the ground of fraud if the alien is "otherwise admissible," it follows that the fraudulent act itself is not determinative. Instead, it must be found that the fact concealed or misrepresented, or any other independent ground, has rendered the alien not "otherwise admissible" at the time of entry.[22]

Despite the apparent significance of the "otherwise admissible" requirement, this term has received little judicial attention. In one case directly construing the phrase, the court of appeals held that the alleged deportee's concealed Communist Party affiliation at the time of entry rendered him not "otherwise admissible." [23] It should be noted that the fact concealed in that case related to a

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[19] Act of Sept. 11, 1957, § 7, 71 Stat. 640-41.

[20] *Ibid.*

[21] 75 Stat. 655 (1961), 8 U.S.C. § 1251(f) (1964). (Emphasis added.)

[22] It must also be noted that although section 241(f), on its face, applies primarily when the government seeks to expel the alien on the ground that he was excludable at entry under section 212(a)(19), *i.e.*, having procured a visa or entry by fraud or misrepresentation, section 241(f) has been ruled to waive deportation based on grounds flowing from such fraud, regardless of the specific section upon which the charges are based. For example, an alien who enters without inspection is deportable under section 241(a)(2), 66 Stat. 204 (1952), 8 U.S.C. § 1251(a)(2) (1964). Nevertheless, it has been ruled that an alien who avoided the inspection by posing as an American was saved from deportation by § 241(f). Matter of K, 9 I. & N. Dec. 585 (1962).

[23] Langhammer v. Hamilton, 295 F.2d 642 (1st Cir. 1961). *But see* Bufalino v. Holland, 277 F.2d 270 (3d Cir.), *cert. denied*, 364 U.S. 863 (1960).

qualitative aspect of the alien's inadmissibility. The problem of inadmissibility because of concealment of a fact affecting the alien's quota status, a *quantitative* ground, has been treated on the administrative level, resulting however in diverse determinations. For example, in *Matter of D'O——*,[24] the alleged deportee was a native of Italy and gained nonquota status by posing as a native of Argentina. The Board of Immigration Appeals held that while section 7, predecessor of section 241(f), excuses the perpetration of fraud, it does not wipe out the existence of all other grounds of inadmissibility which might be present. Thus, the petitioner was not "otherwise admissible" because she did not come within the prescribed quota for Italian nationals. On the other hand, in *Matter of K——*,[25] petitioner, husband of a citizen, had gained preference status and avoided the oversubscribed Rumanian quota by posing as a German. The Board held him not deportable although his misrepresentation may have been made to evade the quota restrictions.[26]

This inconsistency was also apparent in the courts. In *Scott v. Immigration & Naturalization Serv.*,[27] petitioner entered into a sham marriage with an American citizen in Jamaica for the sole purpose of gaining nonquota status. After arriving in the United States, petitioner gave birth to an illegitimate child. Deportation proceedings were brought against Scott as an alien excludable at entry under Section 211(a)(3) of the Immigration and Nationality Act because she was not a nonquota immigrant as specified in her visa.[28] With respect to the applicability of section 241(f),[29] the Court of Appeals for the Second Circuit agreed that she would be saved from deportation regardless of the section used against her if she was "otherwise admissible" at the time of entry.[30] The issue was reduced, then, simply to whether a person who had used

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[24] 8 I. & N. Dec. 215 (1958). This case was decided under the predecessor of section 241(f).

[25] 8 I. & N. Dec. 310 (1959). This case was decided under the predecessor of section 241(f).

[26] *Ibid.*

[27] 350 F.2d 279 (2d Cir. 1965).

[28] 66 Stat. 181 (1952), 8 U.S.C. § 1181(a)(3) (1964). Section 241(a)(1) makes deportable any alien who was excludable at time of entry. 66 Stat. 204 (1952), 8 U.S.C. § 1251(a)(1) (1964).

[29] Before discussing the meaning of "otherwise admissible," the court rejected petitioner's contention that she was not excludable at time of entry because her marriage to an American citizen was valid under Jamaican law. The court concluded that "a marriage contracted solely to circumvent the immigration laws, with no intention that the parties will ever live together, does not suffice to make the alien the 'spouse' of a United States citizen" for immigration purposes. Scott v. Immigration & Naturalization Serv., 350 F.2d 279, 281-82 (2d Cir. 1965).

[30] *Id.* at 282. See *supra* note 22.

fraudulent means to evade the quota restrictions was "otherwise admissible." The court stated that although the phrase was subject to differing interpretations, it encompassed "all grounds of inadmissibility . . . including quantitative standards. Any other interpretation is likely to invite frustration and wholesale evasion of the quota system. . . ." [31] The court refuted the argument that its interpretation rendered the phrase "otherwise admissible" meaningless, concluding that section 241(f) saved the alien from deportation for the fraud itself but not for an underlying offense.[32]

In *Errico v. Immigration & Naturalization Serv.*,[33] petitioner had misrepresented himself as a skilled mechanic in order to gain first preference immigration status as a person "needed urgently in the United States because of . . . technical training." [34] After admission into the United States, Errico and his wife had a son. Deportation proceedings were brought against Errico as an alien excludable at time of entry under section 211(a)(4) because he was not of the quota specified in his immigrant visa.[35] Errico's claim for relief under section 241(f) was granted, the court stating that the dispensation was not reserved only to those aliens charged with fraud.[36] In determining whether the petitioner was "otherwise admissible," the court reasoned that if an alien did not qualify because of a quantitative ground, the phrase would be stripped "of all substantial meaning and purpose." [37] The court rejected the idea that the possible encouragement of fraudulent entries was a sufficient ground to deny the relief afforded by the "most reasonable construction" of the statute.[38]

The United States Supreme Court granted certiorari [39] in the instant case in order to resolve the conflict between the courts of appeals. The Government agreed at the outset that section 241(f) could not be applied literally, so as to be limited to afford relief only when deportation is predicated on the general fraud section.[40]

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[31] Scott v. Immigration & Naturalization Serv., 350 F.2d 279, 283 (2d Cir. 1965).

[32] *Id.* at 284.

[33] 349 F.2d 541 (9th Cir. 1965).

[34] Immigration and Nationality Act § 203(a)(1)(A), 66 Stat. 178 (1952), 8 U.S.C. § 1153(a)(1)(A) (1964).

[35] Immigration and Nationality Act § 211(a)(4), 66 Stat. 181 (1952), 8 U.S.C. § 1181(a)(4) (1964). Section 241(a)(1) makes deportable any alien who was excludable at the time of entry. 66 Stat. 204 (1952), 8 U.S.C. § 1251(a)(1) (1964).

[36] Errico v. Immigration & Naturalization Serv., 349 F.2d 541, 544 (9th Cir. 1965). See *supra* note 22.

[37] *Id.* at 546.

[38] *Id.* at 546-47.

[39] Immigration & Naturalization Serv. v. Errico, 383 U.S. 941 (1966).

[40] Immigration & Naturalization Serv. v. Errico, 385 U.S. 214, 217 (1966).

It was pointed out that under such a restricted interpretation, an alien who had entered by fraud would be deportable, without recourse, on a charge based on a defective visa or other documentary irregularity. As a consequence, section 241(f) was deemed to waive "any deportation charge that results directly from the misrepresentation regardless of the section under which the charge was brought, provided that the alien was 'otherwise admissible at the time of entry.' "[41]

The real issue, then, was the meaning of the phrase "otherwise admissible." The Government argued that to be deemed "otherwise admissible," the alien must prove that if he had not lied he would have been admitted.[42] Since both aliens would have been excluded because of their true quota status, such an interpretation would have denied them relief. The aliens contended, on the other hand, that the Government version of this term would negate congressional intent to grant relief for fraud since it is precisely their quota status that aliens would misrepresent.

The majority relied heavily on the legislative history of section 241(f) in their construction of "otherwise admissible." The Court stated that the predecessor of section 241(f), section 7, provided relief to both refugees and to aliens with the necessary family relationships, but expressly withdrew relief if the fraud was used to evade the quota laws or to frustrate investigation only in the case of the refugees. From this difference in treatment, it was inferred that such quota evasion and avoidance of investigation did not disqualify the alien with a family from being "otherwise admissible." The Court concluded that "Congress meant to specify two specific types of fraud that would leave an alien [with a family] 'otherwise admissible' " but that would disqualify the refugee. The fact that section 7 may have been primarily intended for the benefit of Mexicans, who were not subject to quotas, did not imply that aliens from countries that do have a quota must be within that quota to be "otherwise admissible." Although section 241(f) deleted all provisions for refugees, the Court was certain that no substantive change was intended with respect to aliens with family ties.

Assuming that there was a doubt as to the language of section 241(f), the Court stated that, in view of the drastic nature of deportation which is analogous to a criminal punishment, all doubt should be resolved in favor of the alien. This is especially proper in view of Congress' frequently manifested intent to maintain the unity of a family, one of whose members is a citizen or permanent resident. Legislative history indicated that "Congress felt that, in

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[41] *Ibid.*
[42] *Ibid.*

many circumstances, it was more important to unite families and preserve family ties than it was to enforce strictly the quota limitations. . . ." [43]

The dissent objected to the Court's holding on two grounds. The first objection related to the extensive applicability of section 241(f). Since deportation was not predicated on the fraud section, section 241(f) should not have been invoked at all. The dissent felt that the majority's position was "tantamount to holding that [section 241(f)] . . . is applicable to bar deportation based on any ground so long as the alien lied about that ground. . . ." [44] This point was dramatized by posing a hypothetical wherein a Communist who had lied about his party membership could invoke section 241(f) and escape deportation, but a Communist who admitted to his affiliation and was admitted by administrative mistake would be deported.[45]

Even assuming the pervasive applicability of section 241(f), the dissent excepted on the second ground that the aliens were not "otherwise admissible" because they were outside their respective quota limitations at time of entry. It was insisted that "otherwise admissible" was a technical term including quota admissibility. The dissent reasoned that "to except quota requirements of admissibility from the statutory qualification of 'otherwise admissible' would undercut the elaborate quota system which was for years at the heart of the immigration laws." [46]

The language of the dissent with respect to the general applicability of section 241(f) conjures up the specter of granting all undesirables immunity from deportation "on any ground at all so long as the alien lied about that ground at the time of his unlawful entry." [47] Assuming *arguendo* that there is some basis for that fear, the dissent's alternative interpretation would emasculate section 241(f). Such a limited application invites the use of procedural niceties by the Immigration and Naturalization Service in order to avoid the availability of relief. By grounding the deportation charges on the documentary irregularity sections,[48] instead of on the general fraud section,[49] relief would be precluded.[50]

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[43] *Id.* at 220.
[44] *Id.* at 227-28.
[45] *Id.* at 228 n.3.
[46] *Id.* at 228.
[47] *Id.* at 227-28.
[48] Immigration and Nationality Act § 211(a)(1)-(4), 66 Stat. 181 (1952), 8 U.S.C. § 1181(a)(1)-(4) (1964).
[49] Immigration and Nationality Act § 212(a)(19), 66 Stat. 183 (1952), 8 U.S.C. § 1182(a)(19) (1964).
[50] The Board of Immigration Appeals agrees that the specific section on which the charges are based is immaterial. *Supra* note 22.

In any event, the fear of pervasive immunity is, in fact, ill-founded. Although section 241(f) is generally applicable, it does not follow that immunity will necessarily be granted. The dissent suggests that a Communist who is admitted by error will be deported, while one who lies about his affiliation will not.[51] It appears that the dissent misinterprets the effect of the majority opinion. The Court does not hold that a *qualitative* ground will also be included under the "otherwise admissible" criterion. The opinion is addressed only to the issue of whether a *quantitative* ground is included. It is submitted that the earlier court of appeals' holdings, *i.e.,* concealed Communist Party membership, a qualitative ground, renders an alien not "otherwise admissible," [52] remains unaffected by this decision.

Mr. Justice Stewart's dissenting opinion recognizes that the decision goes to the "heart of the immigration laws." A basic principle of our immigration policy since 1921 has been numerical limitation based on national origin. As the present case illustrates, these harsh restrictions could motivate fraudulent entries. The restrictions were relaxed to some extent in 1965.[53] The aggregate number of immigrants from non-Western Hemisphere countries totals 170,000,[54] with the number of immigrants from any particular country not to exceed 20,000.[55] This is a significant departure from the "national origins" system whereby each particular nation had a smaller specific allotment,[56] with no provision for the use of another nation's unfilled quota. It is likely that these new provisions will reduce the waiting list of applicants, diminishing to a certain degree the compulsion for fraudulent entry. However, the new amendment does not obviate the motivation for fraud because there still exists a numerical limitation. And as before, preferences, including those for spouses of citizens [57] and for skilled workers,[58] provide a convenient means for fraudulently obtaining priority treatment. Thus the instant case will still be of considerable importance in the future since situations similar to those in *Scott* and *Errico* are likely to recur.

Although the holding of the majority with respect to Scott might be seen as encouraging wholesale evasion of the quota laws by the bearing of illegitimate children, this interpretation is un-

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[51] Immigration & Naturalization Serv. v. Errico, 385 U.S. 214, 228 n.3 (1966).

[52] *Supra* note 23.

[53] 79 Stat. 911 (1965), 8 U.S.C. §§ 1101-1351 (Supp. I, 1965).

[54] 79 Stat. 911 (1965), 8 U.S.C. § 1151 (Supp. I, 1965).

[55] 79 Stat. 912 (1965), 8 U.S.C. § 1152 (Supp. I, 1965).

[56] Immigration and Nationality Act, Act of June 27, 1952, ch. 477, § 201, 66 Stat. 175.

[57] 79 Stat. 911 (1965), 8 U.S.C. § 1151 (Supp. I, 1965).

[58] 79 Stat. 912 (1965), 8 U.S.C. § 1153 (Supp. I, 1965).

warranted. While Scott was saved from deportation because of her illegitimate child, it is difficult to envision widespread promiscuity aimed at avoiding expulsion. A counterbalance to the possible encouragement of the evasion of the quota laws is a more thorough screening at the time of entry. It is recognized that detection of a fraudulent marriage is difficult at the time of entry. Nevertheless, the imposition of a more severe penalty on the American citizen who has participated in the fraudulent marriage would discourage such sham relationships at the outset.

The effect of the present cases presents no real danger to any vital national interests if the decision is read with the limitation that it applies only to quantitative grounds for deportation. Although the majority does not distinguish qualitative and quantitative grounds, it is submitted that the distinction is a valid one. A criminal or pauper may become a public burden. A Communist or other subversive is a threat to national security. An alien here in violation of the quota laws, on the other hand, affects no national interest other than enforcement of the quotas themselves. Congress itself has placed the preservation of the family above the blind imposition of numerical limitations. The instant case reflects such a balancing of strict compliance with quotas against the disruption of a family, a member of which is a citizen or permanent resident. The balance struck by the Court, consistent with Congress' humanitarian policy, avoids the hardship that would befall not only the alien but also the innocent parties who would be left behind.