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Administrative Law--Limitations on Use of Blood Grouping Tests in Immigration Proceedings (United States ex rel. Lee Kum Hoy v. Shaughnessy, 115 F. Supp. 302 (S.D.N.Y. 1953); United States ex rel. Dong Wing Ott v. Shaughnessy, 116 F. Supp. 745 (S.D.N.Y. 1953))

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RECENT DECISIONS

ADMINISTRATIVE LAW—LIMITATIONS ON USE OF BLOOD GROUPING TESTS IN IMMIGRATION PROCEEDINGS.—In two recent cases in the federal district court of New York, petitioners sought admission to the United States on the basis of derivative citizenship, and were given a hearing before the Board of Special Inquiry.[1] The Board, in each instance, denied them admission upon a finding that the petitioners could not be the children of their purported parents, the sole evidence supporting these findings consisting of the interpretation of the results of blood tests. In both cases, the court sustained a writ of habeas corpus unless a rehearing be conducted within twenty days. The court, in *United States* ex rel. *Lee Kum Hoy v. Shaughnessy*,[2] *held* that failure to permit relators to examine the qualifications of those who administered the tests constituted a denial of due process. In *United States* ex rel. *Dong Wing Ott v. Shaughnessy*,[3] the court *held* that a finding based on hearsay evidence alone is invalid when corroborative evidence is "conveniently available."

Since its perfection in 1924,[4] the science of blood grouping has had a turbulent history in the field of law. The introduction of blood grouping results as evidence has been looked upon favorably by the European courts,[5] but has not met with judicial approval in the United States. While some jurisdictions will not compel the parties to submit to such tests,[6] the majority merely refuse to consider the evidentiary facts established by them as conclusive.[7] However, in recent years, several states, recognizing the value of such evidence, have enacted appropriate legislation to facilitate its use.[8]

Prior to the instant proceedings, the federal courts had been called on to consider the use of blood grouping tests in only one in-

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[1] Applicants claimed United States citizenship pursuant to REV. STAT. § 1993 as children of American citizens. See 10 STAT. 604 (1855), as amended, 48 STAT. 797 (1934).

[2] 115 F. Supp. 302 (S.D.N.Y. 1953).

[3] 116 F. Supp. 745 (S.D.N.Y. 1953).

[4] See Flacks, *Evidential Value of Blood Tests to Prove Non-Paternity*, 21 A.B.A.J. 680, 681 (1935).

[5] See Matter of Swahn, 158 Misc. 17, 19, 285 N.Y. Supp. 234, 236 (Surr. Ct. 1936); Flacks, *supra* note 4, at 681.

[6] See, *e.g.*, Commonwealth v. English, 123 Pa. Super. 161, 186 Atl. 298, 301 (1936); Commonwealth v. Krutsick, 151 Pa. Super. 164, 30 A.2d 325, 326 (1943).

[7] See, *e.g.*, Arais v. Kalensikoff, 10 Cal. 2d 428, 74 P.2d 1043 (1937); State *ex rel.* Slovak v. Holod, 63 Ohio App. 16, 24 N.E.2d 962 (1939).

[8] See, *e.g.*, N.Y. CIV. PRAC. ACT § 306-a; N.J. STAT. ANN. tit. 2, §§ 2:99-3, 2:99-4 (Supp. 1951); OHIO REV. CODE ANN. tit. 23, § 2317.47 (Baldwin, 1953); WIS. STAT. §§ 166.105, 325.23 (1951).

stance. In that case, a paternity action, the court ruled that such evidence should be received, and indicated that, under certain circumstances, the results should be conclusive.[9]

I

The *Lee Kum Hoy* case deals with the question as to the constitutional limitations to be placed on the use of the results of such tests in administrative proceedings. The court intimated that it would have been proper for the Immigration Department to have given the results of the blood tests conclusive effect in resolving the question of disputed parentage. The court, however, was not required to pass upon the sufficiency of this evidence as it decided that the relators should have been afforded the opportunity to cross-examine those who administered the tests. In so requiring, the court followed sound legal precedent. In 1949, the Supreme Court of the United States held in *Reilly v. Pinkus* [10] that medical evidence introduced in an administrative hearing must be made subject to cross-examination, and reversed an administrative order based on such evidence where cross-examination was denied. The net result of such cases would seem to be that although legally incompetent evidence may be admitted before an administrative body, the party against whom it is presented must be accorded the right, inherent in our system of jurisprudence, to controvert that evidence by cross-examination. Such a procedure is only in keeping with the "fair hearing" concept governing all administrative proceedings.[11]

II

In the *Dong Wing Ott* case, on the other hand, the relators were afforded the opportunity to cross-examine the physician who generally supervised, but did not himself conduct, the tests. Furthermore, the applicants failed to object to the admission of the blood tests into evidence. Therefore, the problem in this case differs from that of the *Lee Kum Hoy* case in that here the court was concerned with the question of whether the Immigration Department was correct in basing its decisions *exclusively* upon the interpretation of the results of blood tests, such evidence being hearsay. It is well established, both by statute [12] and case law,[13] that administrative tribunals are not

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[9] *See* Beach v. Beach, 114 F.2d 479, 480 (D.C. Cir. 1940).

[10] 338 U.S. 269 (1949).

[11] See Powhatan Mining Co. v. Ickes, 118 F.2d 105 (1941).

[12] The Administrative Procedure Act provides that "[a]ny oral or documentary evidence may be received. . . ." The only qualification is that ". . . every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence . . . ." 60 STAT. 241, 5 U.S.C. § 1006(c) (1946).

[13] *See* ICC v. Baird, 194 U.S. 25, 44 (1904).

bound by the strict judicial rules regarding the admissibility of evidence. Not so well settled, however, are the questions: How much weight is to be accorded to this evidence and, further, may a decision be based exclusively on it? Congress, in enacting the Administrative Procedure Act,[14] left these questions unanswered when they provided that the findings must be ". . . supported by and in accordance with the reliable, probative, and substantial evidence." A study of case law on the question leads only to uncertainty and confusion. Some states [15] follow New York's viewpoint and have adopted the "residuum rule." [16] Under this rule, there must be *some* legal evidence to support that which is incompetent. On the other hand, Judge Learned Hand, of the federal court of appeals, has formulated another test which permits an administrative agency to base its decision exclusively on hearsay. However, this evidence must be of the type upon which "responsible persons are accustomed to rely in serious affairs," and is sufficient only if other evidence is not "conveniently available." [17]

The court, wisely adopting Judge Hand's rule, stated that while a treatise concerning the interpretation of blood tests may properly be considered as "the kind of evidence upon which responsible persons are accustomed to rely in serious affairs," it fails to meet the "conveniently available" safeguard. Here again, the court infers that it would have been proper for the Immigration Department to have given the results of the blood tests conclusive effect had there been some other legally competent corroborative evidence.

The court in the *Dong Wing Ott* case, with respect to Chinese applicants, revealed startling statistics clearly indicating the prevalence of fraud.[18] Since many of the fraudulent applicants are well rehearsed, and since the Immigration Department's information regarding China is meager, it is difficult to detect such deceit. The use of blood tests, however, has proven so invaluable in combating this fraud that it should not be unduly restricted by the courts. The approval of such evidence by the courts in the above-mentioned cases, and in several

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[14] See note 12 *supra*.

[15] See, *e.g.*, Lloyd-McAlpine Logging Co. v. Whitefish, 188 Wis. 642, 206 N.W. 914 (1926).

[16] *See* Matter of Carroll v. Knickerbocker Ice Co., 218 N.Y. 435, 440, 113 N.E. 507, 509 (1916). *But cf.* Altschuller v. Bressler, 289 N.Y. 463, 46 N.E.2d 886 (1943).

[17] *See* NLRB v. Remington Rand, Inc., 94 F.2d 862, 873 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938).

[18] The court recited the results of a survey showing that the ratio of male to female applicants was 9 to 1. Another survey revealed that 95% of the applicants allegedly came from a remote part of China for which the Immigration Department has no maps. Many allege to have been born on the same day of the same month, *e.g.*, 2d day of the 2d month, 4th day of the 4th month, etc. For an interesting discussion concerning such Chinese applicants, see Mar Gong v. McGranery, 109 F. Supp. 821 (S.D. Cal. 1952).

others recently decided,[19] is a distinct advance in the development of the law.

The Immigration Department, as a governmental agency, has a dual purpose. It must correctly decide the case as between the litigants, and further, its determination must subserve the public interest, which it is charged with protecting.[20] It is for the latter reason that such administrative agencies have not been held bound by the strict rules of evidence.[21] Since it is their duty to investigate, they should be free to receive both judicially competent and incompetent evidence. Nevertheless, in receiving hearsay evidence in the nature of blood test results, the relators are entitled to due process. It would therefore appear that the limitations imposed by the *Lee Kum Hoy* and *Dong Wing Ott* cases are justifiable and necessary implementations of the "fair play" concept of the due process clause.

ANTI-TRUST—CONSCIOUS PARALLELISM—INSUFFICIENT BASIS FOR DIRECTED VERDICT.—Plaintiff, a motion picture exhibitor in suburban Baltimore, brought an action against defendants, moving picture producers and distributors, for violation of the anti-trust laws.[1] In moving for a directed verdict, plaintiff contended that defendants uniformly refused plaintiff the privilege of showing "first-run" pictures, and restricted such exhibits to downtown Baltimore theatres. No direct evidence of an illegal agreement was shown. The same defendants had previously been adjudicated guilty of conspiracy under the anti-trust laws.[2] The Supreme Court, in affirming a denial of the motion, *held* that consciously parallel business behavior, even taken in conjunction with the prior adverse decrees, is not conclusive proof of a conspiracy in violation of the anti-trust laws. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 74 Sup. Ct. 257 (1954).

Conspiracy, at common law, has generally been defined as an agreement by two or more persons to do an unlawful act, or to do a lawful act by unlawful means.[3] In anti-trust litigation, however, the

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[19] See Wong Yoke Sing v. Dulles, 116 F. Supp. 9 (E.D.N.Y. 1953); Chin Kwong Hing v. Dulles, Civil No. 14,980—HW, S.D. Cal., Oct. 5, 1953.

[20] See DAVIS, ADMINISTRATIVE LAW 453 (1951).

[21] *Ibid.*

[1] 26 STAT. 209, 210 (1890), 15 U.S.C. §§ 1, 15 (1946) (Sherman Act: made criminal any conspiracy in restraint of interstate commerce and allowed treble damages to parties injured thereby); 38 STAT. 737 (1914), 15 U.S.C. § 26 (1946) (Clayton Act: granted injunctive relief to interested parties).

[2] See United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

[3] *See* Pettibone v. United States, 148 U.S. 197, 203 (1893); Common-