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Immigration--Administrative Finality--Review of Deportation Order Under Administrative Procedure Act (United States ex rel. Trinler v. Carusi, 166 F.2d 457 (3rd Cir. 1947))

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IMMIGRATION—ADMINISTRATIVE FINALITY—REVIEW OF DEPORTATION ORDER UNDER ADMINISTRATIVE PROCEDURE ACT.—The appellant, Trinler, was ordered deported from the United States because he failed to maintain the "treaty merchant" [1] status under which he was admitted. He sought judicial review of his deportation order before he was taken into custody for deportation, claiming this right under the Administrative Procedure Act,[2] in spite of the fact that Section 19 of the Immigration Act of 1917 [3] recites that ". . . the decision of the Attorney General shall be final." *Held,* for the appellant. The Act did enlarge the rights of persons against whom deportation orders have been issued, and they are now entitled to judicial review after issuance of the deportation order. While it may appear that judicial review was precluded under the provisions of Section 19 of the Immigration Act of 1917, in practice such determination was never final because of the availability of habeas corpus. *United States* ex rel. *Trinler v. Carusi,* 166 F. 2d 457 (C. C. A. 3d 1947).

In personal liberty cases habeas corpus was always available as a means of judicial review [4] despite statutory recitals that decisions of the administrative agencies shall be final.[5] In the instant case, however, the petitioner seeks review, not by way of habeas corpus but under the Administrative Procedure Act.[6] The court first applied the doctrine of "administrative finality" to determine whether the petitioner had exhausted all of his administrative remedies, because judicial intervention is denied where the petition is prematurely presented.[7] The Commissioner of Immigration argued that

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[1] 43 STAT. 154 (1924), 8 U. S. C. § 203 (1946). A treaty merchant is one of a class of persons who can enter the United States without regard to the quota assigned their country, but only upon condition that they maintain the exempt status under which they were admitted. When they deviate from and therefore fail to maintain this status they are in the United States illegally and are subject to deportation.

[2] 60 STAT. 243, 5 U. S. C. § 1009 (1946).

[3] 39 STAT. 889 (1917), as amended, 54 STAT. 1238 (1940), 54 STAT. 671 (1940), 8 U. S. C. § 155 (1946).

[4] Ng Fung Ho v. White, 259 U. S. 276, 66 L. ed. 938 (1922).

[5] Judicial constructions have diminished the finality effect of such recitals, requiring more forceful expressions of finality before construing that the intent is to preclude judicial review. Examples are the Economy Act of 1933, 48 STAT. 9 (1933), 38 U. S. C. § 705 (1946); Kirkland v. Atlantic Coast Line R. R., 167 F. 2d 529 (App. D. C. 1948); United States v. Miroch, 88 F. 2d 888 (C. C. A. 6th 1937); Kabadian v. Doak, 65 F. 2d 202 (App. D. C. 1933), *cert. denied,* 290 U. S. 661, 78 L. ed. 572 (1933); *cf.* Reynolds v. United States, 292 U. S. 443, 78 L. ed. 1353 (1934); United States v. Williams, 278 U. S. 255, 73 L. ed. 314 (1929); First Moon v. White Tail, 270 U. S. 243, 70 L. ed. 565 (1926); Auffmordt v. Heddon, 137 U. S. 310, 34 L. ed. 674 (1890) (construing language "final and conclusive" to be final enough).

[6] Hereinafter referred to as the "Act."

[7] Falbo v. United States, 320 U. S. 549, 88 L. ed. 305 (1944); Rochester Telephone Corp. v. United States, 307 U. S. 125, 83 L. ed. 1147 (1939); United States v. Sing Tuck, 194 U. S. 161, 48 L. ed. 917 (1904); United States *ex rel.* Eisler v. District Director, 76 F. Supp. 737 (S. D. N. Y. 1948) (review denied because administrative remedy of bail was not sought).

the administrative processes do not terminate until the petitioner is taken into custody to be placed on a ship for deportation. However, the court held that the taking of a person into custody, and later placing him on a ship for deportation are ministerial acts and are not a part of the administrative process, which came to an end with the issuance of the deportation order.

Previously, habeas corpus was the only form of proceeding which the courts sustained as a method of preventing deportation,[8] and then only where flagrant error appeared.[9] It may appear that such procedure would limit substantially the instances in which a court could intervene. In later decisions,[10] however, the application of this form of proceeding was considerably expanded from the apparently limited orbit suggested by earlier cases.[11] Courts have intervened by way of habeas corpus where (1) the order of deportation was not supported by substantial evidence;[12] (2) the Attorney General was not acting within the scope of his authority;[13] (3) the petitioner was not accorded a fair hearing;[14] (4) the petitioner was in custody under an order of deportation for an unreasonable length of time.[15] Formerly, there was substantial support for the proposition that the writ of habeas corpus was a collateral challenge rather than a direct review of the administrative action.[16] The dissent, in the instant case, urges that habeas corpus is in reality a new suit to enforce a civil right, and not a proceeding in the course of the original action. In repudiation of this argument the majority opinion of the court finds an intent on the part of Congress to enlarge the right to review rather than to limit it. Therefore, where a right of review existed before, it may now be enforced under the Act. Every person adversely affected by the final determination of an administrative agency is now entitled to judicial review.[17] The reviewable acts include those made

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[8] Kabadian v. Doak, 65 F. 2d 202 (App. D. C. 1933), *cert. denied,* 290 U. S. 661, 78 L. ed. 572 (1933); *cf.* Poliszek v. Doak, 57 F. 2d 430 (App. D. C. 1932) (denying writ of prohibition); Fafalios v. Doak, 50 F. 2d 640 (App. D. C. 1931), *cert. denied,* 284 U. S. 651, 76 L. ed. 552 (1931) (denying equitable relief to cancel deportation); Rash v. Zurbrick, 6 F. Supp. 390 (E. D. Mich. 1934) (denying equitable relief to enjoin deportation).

[9] Vajtauer v. Commissioner, 273 U. S. 103, 71 L. ed. 560 (1927).

[10] Bridges v. Wixon, 326 U. S. 135, 89 L. ed. 2103 (1945); Ng Fung Ho v. White, 259 U. S. 276, 66 L. ed. 938 (1922).

[11] Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905 (1893); Nishimura Ekiu v. United States, 142 U. S. 651, 35 L. ed. 1147 (1892).

[12] Bridges v. Wixon, *supra* note 10.

[13] Mahler v. Eby, 264 U. S. 32, 68 L. ed. 549 (1924); Gegiow v. Uhl, 239 U. S. 3, 60 L. ed. 114 (1915).

[14] Kwock Jan Fat v. White, 253 U. S. 454, 64 L. ed. 1010 (1920).

[15] Ross v. Wallis, 279 Fed. 401 (C. C. A. 2d 1922); Lisafield v. Smith, 2 F. 2d 90 (W. D. N. Y. 1924).

[16] Vajtauer v. Commissioner, *supra* note 9.

[17] 60 STAT. 243, 5 U. S. C. § 1009 (1946). This section permits judicial review of agency action to any person adversely affected except "so far as (1) statutes preclude judicial review, or (2) agency action is by law committed to agency discretion."

final by statute and those final agency actions for which no other adequate remedy exists.[18] While application of the Act does not substantially enlarge the petitioner's remedy, it may make it more effective in that it is available sooner.

Although this decision has already been followed,[19] there is considerable opposition to it outside of the courts;[20] nor is there any assurance that the Supreme Court will follow it in view of their most recent pronouncements of policy.[21]

B. F. N.

INSURANCE—LIFE INSURANCE—ACCIDENTAL DEATH BENEFITS —MILITARY SERVICE EXEMPTION CLAUSE.—The court was called upon to construe the meaning of a clause exempting the insurance company from paying double indemnity while the insured is in military service. The defendant insurance company had issued on August 3, 1936, two policies of life insurance, each for $500, on William Jorgenson. The plaintiff, his wife, was named beneficiary. Each policy contained a provision to the effect that if the insured died as a result of an accident, double indemnity would be paid. Each policy also contained the provision, "No Accidental Death Benefit will be paid if the death of the Insured is the result of self-destruction . . . or while the Insured is in military or naval service in time of war." On October 18, 1944, the insured, a member of the U. S. Army, was on duty at Bangolore, India. While on town patrol the motorcycle on which he was riding became involved in an accident, and the insured suffered a fractured skull from which he later died. The beneficiary submitted proof-of-death and a claim for $1,000 under each policy. The company paid $500 on each policy, refusing to pay the additional $500 for accidental death on the ground that the insured

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[18] 60 STAT. 243, 5 U. S. C. § 1009c (1946), provides: "Acts reviewable. Every agency action made final by statute and every final agency action for which there is no other adequate remedy in any court, shall be subject to judicial review. . . ."

[19] United States *ex rel.* Cammarata v. Miller, 79 F. Supp. 643 (S. D. N. Y. 1948).

[20] The Commissioner of Immigration and Naturalization has steadfastly insisted that the Act does not apply to his agency, 8 I. & N. S. Monthly Review 105 (1947); and a bill was submitted to the 80th Congress to make the Act inapplicable to the Immigration and Naturalization Service. H. R. 6333 (Hobbs 1948).

[21] Chicago & Southern Air Lines v. Waterman Steamship Corp., — U. S. —, 92 L. ed. 367, 369 (1948). "This court has long held that statutes which employ broad terms to confer power of judicial review are not always to be read literally. Where Congress has authorized review of 'any order' or used other equally inclusive terms, courts have declined the opportunity to magnify their jurisdiction, by self-denying constructions which do not subject to judicial control orders which, from their nature, from the context of the Act, or from the relation of judicial power to the subject-matter, are inappropriate for review."