Business Immigration, Workforce and Compliance Law

Benjamin N. Cardozo School of Law

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Supplemental Materials

Class #12

527 F.2d 187
United States Court of Appeals,
Second Circuit.

John Winston Ono **LENNON**, Petitioner,
v.
IMMIGRATION AND NATURALIZATION SERVICE, Respondents.

No. 18, Docket 74-2189. | Argued Sept. 4, 1975. | Decided Oct. 7, 1975.

Alien petitioned to review an order of the Board of Immigration Appeals directing his deportation and denying his application for adjustment of status. The Court of Appeals, Irving R. Kaufman, Chief Judge, held that alien's conviction of possession of cannabis resin in violation of British law under which guilty knowledge was irrelevant could not furnish grounds for excluding alien under statute making excludable any alien convicted of violation of any law or regulation relating to the illicit possession of marijuana.

Denial of alien's application for adjustment of status and order of deportation vacated, and case remanded for reconsideration.

Mulligan, Circuit Judge, filed a dissenting opinion.

West Headnotes (8)

[1] **Aliens, Immigration, and Citizenship**
Constitutional and Statutory Provisions

Deportation statutes must be construed in favor of the alien. Immigration and Nationality Act, § 212(a)(23), 8 U.S.C.A. § 1182(a)(23).

8 Cases that cite this headnote

[2] **Statutes**
Executive Construction

Court must accord some deference to an administrative agency's interpretation of its governing statutes.

[3] **Aliens, Immigration, and Citizenship**
Controlled Substances Offenses

Court must decide proper construction of statute making excludable any alien who has been convicted of a violation of any law or regulation relating to illicit possession of marijuana in light of the deep-rooted requirement of knowledge and intent in our legal system. Immigration and Nationality Act, § 212(a), (a)(23), 8 U.S.C.A. § 1182(a), (a)(23).

2 Cases that cite this headnote

[4] **Sentencing and Punishment**
Factors Related to Offender

There is an unbroken tradition of criminal law that harsh sanctions should not be imposed where moral culpability is lacking.

3 Cases that cite this headnote

[5] **Aliens, Immigration, and Citizenship**
Grounds for Denial of Admission or Exclusion

General purpose of statute enumerating excludable aliens is to bar undesirable aliens from our shores. Immigration and Nationality Act, § 212, 8 U.S.C.A. § 1182.

[6] **Aliens, Immigration, and Citizenship**
Controlled Substances Offenses

Congress in making excludable an alien convicted of violation of any law or regulation relating to the illicit possession of marijuana did not tend to impose excludable alien classification on person convicted under foreign law that makes guilty knowledge irrelevant. Immigration and Nationality Act, § 212(a)(23), 8 U.S.C.A. § 1182(a)(23).

8 Cases that cite this headnote

[7] **Aliens, Immigration, and Citizenship**

Next:

Lennon v. Immigration and Naturalization Service, 527 F.2d 187 (1975)
32 A.L.R. Fed. 521

Controlled Substances Offenses

Alien was not excludable under statute rendering excludable a person who has been convicted of violation of law or regulation relating to illicit possession of or traffic in narcotic drugs or marijuana where alien's conviction for possession of cannabis resin was under British law which, in effect, made guilty knowledge irrelevant. Immigration and Nationality Act, § 212(a)(23), 8 U.S.C.A. § 1182(a)(23).

1 Cases that cite this headnote

[8] **Aliens, Immigration, and Citizenship**

Judicial Review or Intervention

Courts will not condone selective deportation based upon secret political grounds. Immigration and Nationality Act, § 212, 8 U.S.C.A. § 182.

4 Cases that cite this headnote

Attorneys and Law Firms

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Mary P. Maguire, Sp. Asst. U.S. Atty. (Paul J. Curran, U.S. Atty., S.D.N.Y., and Mel P. Barkan and Naomi Rice Buchwald, Asst. U.S. Attys., of counsel), for respondent.

Jack Wasserman, Esther M. Kaufman, Washington, D.C., Donald L. Unger, San Francisco, Cal., and Mark A. Mancini, Washington, D.C., filed a brief for the Association of Immigration and Nationality Lawyers as amicus curiae urging reversal.

Before KAUFMAN, Chief Judge, and MULLIGAN and GURFEIN, Circuit Judges.

Opinion

IRVING R. KAUFMAN, Chief Judge:

We have come a long way from the days when fear and prejudice toward alien races were the guiding forces behind our immigration laws. The Chinese exclusion acts of the 1880's and the 'barred zone' created by the 1917 Immigration Act have, thankfully, been removed from the statute books and relegated to the historical treatises. Nevertheless, the power of Congress to exclude or deport natives of other countries remains virtually unfettered. In the vast majority of deportation cases, the fate of the alien must therefore hinge upon narrow issues of statutory construction. To this rule, the appeal of John **Lennon**, an internationally known 'rock' musician, presents no exception. We are, in this case, called upon to decide whether **Lennon's** 1968 British conviction for possession of cannabis resin renders him, as the Board of Immigration Appeals believed, an excludable alien under s 212(a)(23) of the Immigration and Nationality Act (INA), 8 U.S.C. s 1182(a)(23), which applies to those convicted of illicit possession of marijuana. We hold that **Lennon's** conviction does not fall within the ambit of this section.

I.

To provide the necessary context for decision in this case, an overview of the factual background is appropriate.

On October 18, 1968, detectives from the Scotland Yard drug squad conducted a warrantless search of **Lennon's** apartment at 34 Montague Square, London. There, the officers found one-half ounce of hashish inside a binocular case and thereupon placed **Lennon** under arrest. **Lennon** pleaded guilty to possession of cannabis resin in Marylebone Magistrate's Court on November 28, 1968; he was fined S 150. [1]

*189 On August 13, 1971, **Lennon** and his wife Yoko Ono arrived in New York. They had come to this country to seek custody of Mrs. **Lennon's** daughter by a former marriage to an American citizen.

It was at this point that the **Lennons** first met with the labyrinthine provisions of the Immigration and Nationality Act which were to result in the deportation proceedings which we review. Accordingly, a brief description of the relevant portions of that Act is here in order.

INA s 212(a), 8 U.S.C. s 1182(a), lists thirty-one classes of 'excludable aliens' who are ineligible for permanent residence, and, indeed, are (with the exception provided by s 212(d)(3)(A)), unable to enter this country at all. This portion

of the Act is like a magic mirror, reflecting the fears and concerns of past Congresses. Among those excludable is

> any alien who has been convicted of a violation of . . . any law or regulation relating to the illicit possession of . . . marihuana (s 212(a)(23))

Section 212(d)(3)(A) permits the **INS**, in its discretion, temporarily to waive excludability

Since **Lennon's** conviction appeared to render him excludable, the **INS** specifically waived excludability under s 212(d)(3)(A). The **Lennons** were then given temporary visas valid until September

The day after **Lennon's** visa expired, March 1, Sol Marks, the New York District Director of the **INS**, notified the **Lennons** by letter that, if they did not leave the country by March 15, deportation proceedings would be instituted. On March 3, **Lennon** and his wife filed third preference petitions.[2] In response to these applications, the **INS** instituted deportation proceedings three days later. The **INS**, for reasons best known to them, did not act on the applications, and the **Lennons** were therefore unable to apply for permanent residence. After waiting two months, the **Lennons** filed suit in the Southern District for an injunction compelling the **INS** to rule on their petitions. **Lennon** v. Marks, 72 Civ. 1784.[3] At oral argument in that case, Marks advised the judge that the **INS** *190 would consider the applications; they were approved within the hour.

In March, April, and May, 1972, deportation hearings were held before Immigration Judge Fieldsteel. On May 12, 1972, ten days after the **INS** finally approved their petition for third preference status, the **Lennons** applied to the Immigration Judge for permanent residence.[4] During the hearing, letters from many eminent writers, artists, and entertainers, as wel as from John Lindsay, at that time the Mayor of New York, were submitted to show that, were the applications approved, the **Lennons** would make a unique and valuable contribution to this country's cultural heritage. The Government did not challenge **Lennon's** artistic standing, but instead contended that his 1968 guilty plea made him an excludable alien, thus mandating the denial of his application. **Lennon** countered by arguing that he was not excludable under s 212(a)(23) since he had not been convicted of violating a law forbidding illicit possession. Under British law, **Lennon** urged, guilty knowledge was not an element of the offense. **Lennon** further argued that, by commencing deportation proceedings while he was seeking custody of his wife's child,[5] the agency had violated its hitherto invariable practice and therefore had abused its discretion.[6]

The Immigration Judge filed his decision on March 23, 1973. Since Yoko Ono had obtained permanent resident status in 1964, he granted her application. But, because he believed that **Lennon** was an excludable alien, the Immigration Judge denied his application and ordered him deported. The Immigration Judge also held that it was not within his province to review the Director's decision to begin deportation proceedings.

Lennon sought review of the Immigration Judge's decision before the Board of Immigration Appeals. He also began a collateral action in the Southern District in which he sought to enjoin his deportation. He was deserving of this relief, he contended, since the District Director and the Immigration Judge had prejudged his case. The **INS** had, he said, instituted deportation proceedings because they feared he might participate in demonstrations that would be highly embarrassing to the then-existing administration. In January, 1975, Judge Owen denied a government motion for summary judgment. **Lennon** v. United States, D.C., 387 F.Supp. 561 (1975).

Meanwhile, on July 10, 1974, the Board filed its decision. The Board conceded that s 212(a)(23) does not exclude aliens convicted of possession under laws which made knowledge immaterial to the offense. However, the Board concluded that

> a person who was entirely unaware that he possessed any illicit substance would not have been convicted under *191 the (British) Dangerous Drugs Act of 1965. (p. 25)

The Board also held that it was without jurisdiction to consider **Lennon's** claim that he was improperly denied nonpriority status. Accordingly, the Board concluded that **Lennon** was ineligible for permanent residence and affirmed the Immigration Judge's deportation order.[7]

II.

It is within the context of these issues that we must decide the merits of this appeal. INA s 212(a), 8 U.S.C. s 1182(a), provides:

> (T)he following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States . . .. (23) Any alien who has been convicted of a violation of, or conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana . . ..

The Immigration Judge and the Board of Immigration Appeals believed that **Lennon's** 1968 conviction made him excludable under this section. We are of the view that it did not. We base this result upon our conclusion that (A) **Lennon** was convicted under a law which in effect makes guilty knowledge irrelevant and that (B) a foreign conviction for possession of marijuana under such a law does not render the convicted alien excludable.

A. Lack of Knowledge Requirement under British Law in 1968

The language of the British statute under which **Lennon** was convicted is deceptively simple: 'A person shall not be in possession of a drug unless . . . authorized . . .'[8] But around this concise provision, judicial interpretation has created a scholastic maze as complex and baffling as the labyrinth at Knossos in ancient Crete.

The most authoritative judicial pronouncement on the knowledge requirements of the British act is Warner v. Metropolitan Police Commissioner, (1969) 2 A.C. 256, (1968) 2 All E.R. 356. The facts in that case were relatively simple. The luckless Warner was stopped by police while he was driving his van. Inside a box in the back of the vehicle, police found twenty thousand amphetamine tablets. Warner claimed ignorance; he had, he said, been given the parcel by a friend who had told him that it contained perfume, which Warner sold as a sideline. The House of Lords was called upon to decide whether Warner would be guilty of amphetamine possession even if he did indeed believe that his package held perfume.

Each of the five Law Lords delivered a separate opinion. All save Lord Reid agreed that, once possession was proven, liability was absolute and mental state irrelevant. They felt that, to require the prosecution to prove full mens rea would, in Lord Guest's words, create a 'drug peddlar's charter in which a successful prosecution will be well-nigh impossible.' (1969) 2 A.C. at 301, (1968) 2 All E.R. at 384. The Lords recognized, however, that it was unfair for a person to be held criminally liable if it appeared that the drugs had, for example, been 'planted' by an enemy. The Lords sought a halfway house between equity and efficiency that would permit many if not most blameless defendants to go free without allowing the guilty to escape in sheep's clothing. To do this, they resurrected a hoary line of cases which had held, in the context of larceny statutes, that some knowledge must be proved to establish possession.

*192 The peers' progress up to this point was relatively straightforward. But the question of how much knowledge should be required for possession precipitated a verbal Donnybrook Fair. From the ensuing tangle of rhetoric, two conclusions emerged. First, four of the Lords adopted the conclusion of the Queen's Bench Division in an earlier case, Lockyer v. Gibb, (1967) 2 Q.B. 243, (1966) 2 All E.R. 653, that a person who is aware that he has a substance possesses it even if he is mistaken as to its qualities. (1969) 2 A.C. at 290, (1968) 2 All E.R. at 375-76 (Morris); A.C. at 299-300, All E.R. at 383-84 (Guest); A.C. at 305, 307, All E.R. at 388, 390 (Pearce); A.C. at 311, All E.R. at 393 (Wilberforce). See A. L. Goodhart, Possession of Drugs and Absolute Liability, 84 L.Q.Rev. 382, 389 (1968), Comment, Possession of Drugs-The Mental Element, 26 Camb.L.J. 179, 181 (1968), Comment, Possession and Absolute Liability, 32 Mod.L.Rev. 202, 204-05 (1969). The grave import of this holding is made clear by the striking example used by Lord Pearce:

> Though I reasonably believe the tablets which I possess to be aspirin, yet if they turn out to be heroin I am in possession of heroin tablets. This would be so I think even if I believed them to be sweets.

(1969) 2 A.C. at 305, (1968) 2 All E.R. at 388.

The second holding which may be gleaned from Warner deals with the so-called 'package cases'. In these cases, the

defendant possesses a box or container but is either mistaken as to its contents or thinks it empty; the package in fact contains drugs. Three of the Lords held that such a person would be guilty if he had a chance to open the parcel, the right to do so, and (perhaps) some indication that the package was not empty; that he never availed himself of the opportunity to open the container would be of no importance. (1969) 2 A.C. at 296, (1968) 2 All E.R. at 381 (Morris); A.C. at 301-02, All E.R. at 385 (Guest); A.C. at 306, 307-08, All E.R. at 389, 390 (Pearce). See Comment, supra, 26 Camb.L.J. at 180-81, Comment, supra, 32 Mod.L.Rev. at 205-06. Under British law, as Lord Pearce stated,

> a man takes over a package or suitcase at risk as to its contents being unlawful if he does not immediately examine it (if he is entitled to do so).

A.C. at 306, All E.R. at 389. [9]

We conclude from this analysis of British law as it existed in 1968 that **Lennon** was convicted under a statute which made guilty knowledge irrelevant. A person found with tablets which he reasonably believed were aspirin would, under the Warner holding, be convicted if the tablets proved to contain heroin. And a man given a sealed package filled with heroin would, if he had had any opportunity to open the parcel, suffer the same fate-even if he firmly believed the package contained perfume. [10]

***193 B. Knowledge Requirement of INA s 212(a)(23)**

Any analysis of s 212(a)(23) must find its starting point in the statute's plain language. That language provides compelling evidence of a knowledge requirement, for it renders excludable 'any alien who has been convicted of a violation of . . . any law or regulation relating to the illicit possession of . . . marihuana.' (Emphasis ours) [11]

[1] This unambiguous wording is bolstered by several well-established principles of statutory construction which we must apply here. It is settled doctrine that deportation statutes must be construed in favor of the alien.

> (S)ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 68 S.Ct. 374, 376, 92 L.Ed. 433 (1948). See e.g. Costello v. **INS**, 376 U.S. 120, 128, 84 S.Ct. 580, 11 L.Ed.2d 559 (1964), Bonetti v. Rogers, 356 U.S. 691, 699, 78 S.Ct. 976, 2 L.Ed.2d 1087 (1958).

[2] It is equally well settled that we must accord some deference to an administrative agency's interpretation of its governing statute. Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965). We therefore find it relevant that the Board held that 'Congress did not intend to exclude persons who were entirely unaware that a prohibited substance was in their possession.' (p. 14)

[3] Finally, we must decide the proper construction of s 212(a)(23) in the light of the deeply rooted requirement of knowledge and intent in our legal system. [12] See Morrisette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952). Although some minor inroads on this principle have been made by the so-called 'regulatory' crime statutes, such laws have, in the main, either imposed petty penalties, see Tenement House Dept. v. McDevitt, 215 N.Y. 160, 168, 109 N.E. 88 (1915, Cardozo, J.), or have reached only those who, by virtue of their position or past acts, have been in effect put on notice that a high standard of care is required of them, see United States v. Freed, 401 U.S. 601, 609, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971), United States v. Balint, 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604 (1922). Neither category applies here.

[4] Deportation is not, of course, a penal sanction. But in severity it surpasses all but the most Draconian criminal penalties. We therefore cannot deem wholly irrelevant the long unbroken tradition of the criminal law that harsh sanctions should not be imposed where moral culpability is lacking.

We are now called upon to decide whether the exclusion of convictions for possession obtained under laws imposing ***194** absolute liability would significantly impede the enforcement or undermine the purpose of the Immigration and Nationality Act. If we find that it does not, then we cannot, in the light of these firmly established precepts of statutory construction, conclude that Congress intended to include such convictions within the ambit of s 2 2(a)(23). [3]

[5] The general purpose of s 212 is, of course, to bar undesirable aliens from our shores. See 1952 U.S.Code Cong. and Adm.News, pp. 1653, 1698. There is also, we note, some indication that Congress, in enacting s 212(a)(23), was far more concerned with the trafficker of drugs than with the possessor. See 1956 U.S.Code Cong. and Adm.News, at pp. 3280-81, cf. Varga v. Rosenberg, 237 F.Supp. 282 (S.D.Cal.1964).

We do not believe that our holding will subvert these Congressional ends.[14] Virtually every undesirable alien covered by the drug conviction provision would also be barred by other sections of the statute. Thus, the statute makes excludable.

any alien who the consular officer or immigration officers know or have reason to believe is or has been an illicit trafficker in . . . drugs. s 212(a)(23)

Moreover, addicts are barred by s 212(a)(5). Finally, our holding will not, of course, give any comfort to those convicted in the United States of drug violations.[15]

[6] [7] Given, in sum, the minimal gain in effective enforcement, we cannot imagine that Congress would impose the harsh consequences of an excludable alien classification upon a person convicted under a foreign law that made guilty knowledge irrelevant.[16] We hold that it did not.[17]

*195 We base our decision in this appeal solely upon our interpretation of s 212(a) (23) of the Immigration and Nationality Act. We deem it appropriate, however, to add a brief word on **Lennon's** contention that he was singled out for deportation because of his political activities and beliefs.

[8] Although the Board rejected **Lennon's** selective enforcement defense as beyond their jurisdiction, we do not take his claim lightly. This issue, however, is not presented to us for determination. At oral argument, **Lennon's** counsel agreed not to press this point unless we found **Lennon** to be excludable under s 212(a)(23). We note, nonetheless, that if **Lennon's** application for permanent residence should be denied for discretionary reasons after our mandate is received, Judge Owen will proceed expeditiously to hear **Lennon's** claim and accord him the relief to which he may be entitled. The courts will not condone selective deportation based upon secret political grounds. It would be premature for us to be more specific, since the facts underlying **Lennon's** claim of selective prosecution have not been developed sufficiently for appellate review.

Before closing with the traditional words of disposition, we feel it appropriate to express our faith that the result we have reached in this case not only is consistent with the language and purpose of the narrow statutory provision we construe, but also furthers the intent of the immigration laws in a far broader sense. The excludable aliens statute is but an exception, albeit necessary, to the traditional tolerance of a nation founded and built by immigrants. If, in our two hundred years of independence, we have in some measure realized our ideals, it is in large part because we have always found a place for those committed to the spirit of liberty and willing to help implement it. **Lennon's** four-year battle to remain in our country is testimony to his faith in this American dream.

Accordingly, the denial of **Lennon's** application for adjustment of status and the order of deportation are vacated and the case remanded for reconsideration in accordance with the views expressed in this opinion.

MULLIGAN, Circuit Judge (dissenting):

As the majority opinion observes, **Lennon's** claim that he is the victim of selective prosecution is an issue not before this court but rather is sub judice in the Southern District, and therefore we cannot appropriately discuss its merits. The sole issue before us is whether **Lennon** is an excludable alien under INA s 212(a)(23).

That statute would exclude any alien who has been convicted of a violation of any law or regulation relating to the illicit possession of narcotic drugs or marihuana. Since the statute applies to any alien it makes no difference whether he be John **Lennon**, John Doe or Johann Sebastian Bach. Great Britain has made the possession of cannabis resin (marihuana) without authorization illicit (s 3, Dangerous Drugs (No. 2) Regulations, under the Dangerous Drugs Act 1965). It is further conceded that **Lennon** pleaded guilty to the possession of that drug on November 28, 1968 and was fined S 150. From these premises one would logically conclude that **Lennon** should be excluded from the United States.

*196 The majority argues however that s 212(a)(23) should not be interpreted to exclude from this country those who are innocently in possession of an illicit drug. I agree but

I cannot agree that **Lennon** was convicted under a statute which imposes 'absolute liability' and makes the knowledge of the defendant 'irrelevant.' The five opinions in Warner v. Metropolitan Police Commissioner, (1969) 2 A.C. 256, (1968) 2 All E.R. 356, which interpret the British statute, are hardly as clear as a mountain lake in springtime but there is a consensus on basic principles.

Lennon claims here that the drugs were concealed in a binocular case in a closet of his apartment and that he had absolutely no idea of their presence. There is the further suggestion that they may have been 'planted' by the arresting constable who it is alleged was at the very least overzealous in prosecuting rock musicians. Assuming that **Lennon's** version of the facts is accurate, it is my view that he could not have been properly convicted in Great Britain of the offense charged. [1]

In Warner Lord Pearce clearly held the view that the Parliament did not intend to impose absolute liability in the Drugs Act of 1965. 'It is conceded by the Crown that these words (have in possession) do not include goods slipped into a man's pocket without his knowledge' ((1968) 2 All E.R. at 386). He also quoted with approval the dictum of Lord Parker in Lockyer v. Gibb (1967), 2 Q.B., 243, 248 (1966), 2 All E.R. 653, 655:

> In my judgment, it is quite clear that a person cannot be said to be in possession of some article which he or she does not realize is, or may be, in her handbag, in her room, or in some other place over which she has control. That I should have thought is elementary; if something were slipped into one's basket and one had not the vaguest notion it was there at all, one could not possibly be said to be in possession of it.

(Emphasis added).

The very same paragraph of Lord Parker's opinion in Lockyer v. Gibb was cited with approval by all of the other law Lords who sat in Warner (Lords Guest ((1968) 2 All E.R. at 383), Morris (id. at 372-73), Wilberforce (id. at 393), and Reid (id. at 387)).

That this position of Lord Parker in Lockyer v. Gibb represented the view of all five Lords who wrote in Warner is fortified by the comments of A. L. Goodhart, Editor of the Law Quarterly Review in his article 'Possession of Drugs and Absolute Liability,' 84 L.Q.Rev. 382, 391-92 (1968). After citing the Parker dictum in Lockyer to which we have referred, he noted:

> This statement is of outstanding importance because it was accepted as a self-evident statement of the law by all the judges, both in the Court of Appeal and in the House of Lords, in the present case (Warner). It was the foundation-stone on which their judgments were based.

It must be further observed that this was the interpretation given to Warner in later English opinions. [2] This unanimous *197 position in Warner is emphasized here because **Lennon's** case precisely fits the example posed by Lord Parker in Lockyer and unanimously approved in Warner. **Lennon's** position has been either that the cannabis resin was planted by the police or that in any event he was totally ignorant of its presence in the binocular case. His counsel must also have so read Warner since as the opinion below reveals his solicitors told him after his arrest that he stood a good chance of acquittal at trial.

In light of this discussion I cannot accept the majority view that **Lennon** was convicted under a law which imposed absolute liability and eliminated mens rea. If ignorant of the drug's presence he would not have had possession under English law and could not have been properly convicted.

The undisputed fact however is that **Lennon** did plead guilty to the possession of cannabis resin, and while this may have been convenient or expedient because of his wife's pregnancy and his disinclination to have her testify in court, it is elementary that we cannot go behind the plea. Rassano v. **INS**, 377 **F.2d** 971, 974 (7th Cir. 1967); Giammario v. Hurney, 311 **F.2d** 285, 287 (3d Cir. 1962); Pino v. Nicolls, 215 **F.2d** 237, 245 (1st Cir. 1954), rev'd on other grounds sub nom. Pino v. Landon, 349 U.S. 901, 75 S.Ct. 576, 99 L.Ed. 1239 (1955). Since **Lennon** was convicted under a statute which did not impose liability absolutely but required knowledge on the part of the defendant where the contraband is secreted in a container, I cannot concur in the result reached by the majority.

The majority here further concludes that a foreign conviction for the possession of marijuana under the British statute or any similar foreign law does not render the convicted alien excludable. They argue that the Congress was more concerned with trafficking in drugs than in possession and their opinion does not cover the trafficker who obviously is fully aware of the nature of the business he is pursuing. The statute (INA s 212(a)(23)) however bars the possessor as well as the trafficker. If there were no users there would be no trafficking.

Great Britain bars the unauthorized possession not only of cannabis resin but raw opium, coca leaves (from which cocaine is extracted) and other substances as well. Congress has also barred from this country those aliens who have been convicted of the possession not only of marihuana but other illicit drugs. Although the majority limits its holding to a marihuana conviction under the British statute or any foreign counterpart, its reasoning would compel the same result if the drug at issue were heroin or cocaine. It must also be emphasized that the vast majority of those who are arrested ***198** with illicit drugs in their homes or on their persons are users who are fully aware of their presence and their properties. It is the unusual case where contraband such as this is surreptitiously planted in one's reticule or blue jeans pocket. Yet by disregarding convictions under the British statute or any other foreign counterpart, the majority would admit to the United States those who knowingly possessed any illicit drugs. This holding seems to me to conflict with INA s 212(a)(23) which plainly bars those who have been convicted of a violation of 'any law or regulation relating to the illicit possession of . . . narcotic drugs or marihuana'. **Lennon's** guilty plea here puts him within the statute.

The holding here will undoubtedly and unfortunately result in the abandonment of **Lennon's** claim of selective prosecution now pending in the Southern District Court. If others found guilty of the same crime have been permitted entry and **Lennon** has been barred because he is John **Lennon**, the jongleur, and not John Doe, then that contention should be litigated not only in the interests of **Lennon** and **INS** but the public as well.

Parallel Citations

32 A.L.R. Fed. 521

Footnotes

1 It is unnecessary to discuss the facts underlying **Lennon's** conviction in greater detail since they are not relevant to our decision. See note 17, infra.

1 1. **Lennon** v. Marks, supra, instituted in a temporary non-immigrant visa. When this visa expires, the alien must leave or face deportation. INA s 241(a)(2), 8 U.S.C. s 1251(a)(2). At any time after admission, however, the alien may petition
2. **Lennon** v. Richardson, 73 Civ. 4476, instituted s 245(a), 8 U.S.C. s 1255(a). This application can be, in effect, a challenge to his classification as an excludable alien.

3 3. **Lennon** v. United States, 73 Civ. 4543, the expiration date to February 29, 1972.

2 A third preference petition is a preliminary application under INA s 245, 8 U.S.C. s 1255, for permanent residence. An alien admitted under a temporary visa must qualify for immigrant visa before applying for permanent residence. s 245. Visas are allocated on a quota system which gives preference to several groups, one of which, the 'third preference', is given to 'qualified immigrants who . . . because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States.' INA s 203(a)(3), 8 U.S.C. s 1153(a)(3). In order to receive this preference, the alien must file a petition with the **INS**. 8 C.F.R. s 204.1(c). He cannot apply for permanent residence until this petition has been approved. 8 C.F.R. s 245.2(2).

3 This case was one of three actions instituted by **Lennon** in the Southern District during the course of these prolonged proceedings. For the purpose of clarity we list these actions at this point, although we discuss them in greater detail below:
1. **Lennon** v. Marks, supra, instituted in May 1972, was a suit for an injunction compelling the **INS** to act on **Lennon's** third preference petition, which the **INS** had pigeonholed. The suit became moot when the **INS** granted the petition.
2. **Lennon** v. Richardson, 73 Civ. 4476, instituted in October 1973, was an action brought under the Administrative Procedure Act, 5 U.S.C. s 552, to obtain **INS** records detailing the **INS** procedure of granting of 'nonpriority status' to otherwise deportable aliens. The **INS** mooted this action by providing copies of 1,863 case files of aliens accorded nonpriority status.

3. **Lennon** v. United States, 73 Civ. 4543, instituted in October 1973, was a suit to enjoin **Lennon's** deportation on the grounds that he had been singled out for deportation because of his political beliefs. This action is still pending.

4 Since deportation proceedings had been commenced, **Lennon** was required to make the application directly to the Immigration Judge. 8 C.F.R. s 242.17(a), s 245.2(a)(1).

5 The custody fight was-and is-unresolved. The District Court of the Virgin Islands awarded custody of Mrs. **Lennon's** daughter by her prior marriage to the **Lennons** in September 1971, Cox v. Cox, Civ. 20-1969, aff'd 457 **F.2d** 1190, 3 Cir., (1972), but Mrs. **Lennon's** former husband fled to Texas with the child. A Texas court gave the **Lennons** custody, but limited its exercise to the territorial limits of the United States. Cox v. **Lennon**, Court of Domestic Relations, Harris County, Texas, No. 876,663 (1973). Mr. Cox, however, once again promptly absconded with the child.

6 In response to **Lennon's** action in the Southern District, **Lennon** v. Richardson, supra, the **INS** produced records of 1,863 deportable aliens against whom deportation proceedings had not been instituted. Of these, more than 150 involved narcotics convictions. Many aliens granted such status had criminal records far more serious than **Lennon's**. Some were convicted of murder or rape, and one was described in his file as 'an admitted heroin addict' who was reputedly one of the 'largest suppliers of marijuana and narcotics in the area.' This unsavory alien was not deported because his wife and child were United States citizens. **Lennon's** child was, of course, an American citizen and, during the hearing, it was discovered that **Lennon's** wife had obtained permanent residence status in 1964, while married to her first husband.

7 After oral argument was heard on this appeal, the **INS** on September 23, 1975, accorded **Lennon** 'nonpriority status', which is, in effect, an informal administrative stay of deportation. The deportation order, however, remains in effect suspended, and may be executed at any time. The grant of nonpriority status, moreover, does not affect the Board's holding that **Lennon** is ineligible for permanent residence.

8 Section 3, Dangerous Drugs (No. 2) Regulations. Anyone who violates these regulations is made guilty of a criminal offense by s 13 of the Dangerous Drugs Act 1965.

9 Although our dissenting brother Mulligan deems the Warner opinions 'hardly as clear as a mountain lake in springtime,' the English courts have found Warner sufficiently pellucid. Indeed, in one of the cases upon which our brother relies, the unanimous court recognized Warner to have held that

If a man is in possession of a box and he knows there are articles of some sort inside it and it turns out that the contents comprise, for example, cannabis resin, it does not lie in his mouth to say: 'I did not know the contents included resin.'

Regina v. Marriott, 55 Cr.App.R. 82 (1971) 1 All E.R. 595.

We can assume that Parliament does not waste its time with the enactment of superfluous statutes, nor does it conserve its time by unnecessarily tinkering with statutes interpreted to its satisfaction by the Courts. We note, therefore, that Parliament repealed the Dangerous Drugs Act and passed the Misuse of Drugs Act in 1971, believing it necessary to provide explicitly that a defendant should be acquitted 'if he proves that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug.' s 28(3)(b).

10 Our reading of Warner differs from the interpretation of that authority by our brother. Our view that the British statute lacked a requirement of guilty knowledge is not negated by any of the cases cited in the dissent. Every case cited by Judge Mulligan stands for the principle that the defendant must merely have known that he possessed an object, that is, he was required to know that 'something' was in his possession, e.g., a 'package,' tablets of any kind or description, etc. There was no requirement, however, that he know the contents of the package or the characteristics of the tablets. For example, it was not a defense that the charged party was ignorant of the fact that the 'tablets' contained heroin or any other drug. It is interesting that no case cited by our dissenting brother takes issue with this interpretation. Our dissenting brother seems to have overlooked the distinction between the two different types of knowledge which the British cases so clearly recognized. It was probably because this distinction was not perceived that our brother failed to include the two crucial sentences which immediately follow the passages quoted in his dissent from A. L. Goodhart's analysis of Lockyer:

Strange to say, however, it was only a dictum in the Lockyer case (that a woman could not be in possession of something which had been slipped into her basket without her knowledge) because the defendant knew that the bottle of tablets was in her carry-all, and she also knew that it contained tablets. All that she claimed not to know was that the tablets contained drugs.

(Emphasis added.) Mrs. Lockyer's ignorance of the tablets' contents was insufficient to warrant reversal of her conviction.

11 We note that if 'illicit' merely meant 'unlawful', it would be redundant.

12 It is also relevant that the Federal drug possession statute specifically requires mens rea. 21 U.S.C. s 844(a).

13 It is also relevant to our task of statutory construction that the Supreme Court has held in other contexts that

The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960). See Aptheker v. Secretary of State, 378 U.S. 500, 512-14, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964), and Elfbrandt v. Russell, 384 U.S. 11, 18, 86 S.Ct. 1238, 16 L.Ed.2d 321 (1966).

14 Nor is it irrelevant that, in 1974, Parliament enacted the Rehabilitation of Offenders Act, an expunction statute which wiped out convictions for minor offenses, including **Lennon's** provided the convicted person had kept his record free of serious offenses for five years. It is reasonable that weight should be given to a legislative determination by the country which imposed the conviction that it is not evidence of bad character.

15 The dissenting opinion revives the not unfamiliar 'House of Horrors' argument suggesting that our interpretation of s 212(a)(23) will permit hordes of undesirables to descend upon the United States. There is no merit to this scare argument and it was not ignored in the consideration of this case by the majority. We have already disposed of this contention. (See text). We note, in addition, that the Attorney General has ample powers to deal with knowing narcotics law violations. Section 212(a)(27), 8 U.S.C. s 1182(a)(27) renders excludable:

Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States.

16 Whether **Lennon** himself lacked guilty knowledge is immaterial. It is 'elementary'-as our dissenting brother concedes-that in a deportation proceeding we cannot go behind a guilty plea to try the case anew. To make the facts of each individual case determinative would require the Board or the reviewing court to, in effect, retry the case on which the conviction was based. This, of course, would pose insurmountable obstacles. Witnesses would be scarce or impossible to find and the deportation proceedings would be interminably delayed. In addition, the events may well have occurred in foreign lands and in the dim past. All we can consider is whether the statute permits the conviction of an individual who would be quite innocent under our system of criminal justice. We thus are baffled by our brother's insistence on examining the facts underlying **Lennon's** conviction. If Judge Mulligan is asserting that no one without mens rea could be convicted under the British statute, nothing is added by discussing **Lennon's** individual case and ignoring the Warner aspirin-heroin example. Perhaps our colleague is tacitly conceding that some defendants who lack certain varieties of mens rea could be found guilty under English law. If so, it is inconsistent to look behind **Lennon's** conviction for facts revealing that **Lennon** was not such a defendant, while refusing to hold that the same facts-which, if true, establish, as Judge Mulligan stated, that **Lennon** 'could not have properly been convicted'-render him nonexcludable. (We note that **Lennon** was excluded solely because of his British conviction.) In any event, there was no trial or hearing preceding **Lennon's** guilty plea and conviction, and Judge Mulligan's factual discussion thus relies upon unsupported statements contained in briefs.

17 We therefore find it unnecessary to rule upon **Lennon's** contentions that the British expunction statute had wiped out his conviction for purposes of s 212(a)(23), and that his hashish conviction is not a conviction of possession of 'marihuana' for purposes of that section.

1 With respect to the arrest, we have no record before us except the memorandum of the conviction which reveals only the conviction and makes no reference to the amount of cannabis resin discovered or the exact place where it was found. The brief submitted by the American Civil Liberties Union on **Lennon's** behalf before the Bureau of Immigration Appeals states that the drug was found in three different containers in a closet in **Lennon's** apartment. Although the majority chides me for discussing the facts, I am accepting them as urged in **Lennon's** brief before this court. There is no admission by **Lennon** and no contention by the Government that **Lennon** knew that the illicit drug was physically present in the closet but that he had no idea that it was cannabis resin. Hence Lord Pearce's aspirin-heroin example relied upon by the majority is not relevant. Moreover, it must be understood in the context of his further comment: 'On the other hand, I do not think that Parliament intended to make a man guilty of possessing something when he did not know that he had the thing at all.' (1968) 2 All E.R. at 388.

2 In Sweet v. Parsley, (1969) 1 All E.R. 347 (H.L.) four of the five lords who had earlier written in Warner (all but Lord Guest) were asked to construe another provision, of the 1965 Dangerous Drugs Act, which made it an offense for an occupier or manager of premises to permit them to be used for the smoking of cannabis or for dealing in the drug. In construing that provision the lords discussed again their opinion in Warner. Three expressed the view that the possession dealt with in Warner meant knowing possession (Pearce, id. at 358; Wilberforce, id. at 360; and Diplock, id. at 361). Lord Morris, as he did in Warner, again cited Brend v. Wood, (1946) 175 L.T. 306, 307: '(A) court should always bear in mind that, unless a statute, either clearly or by necessary implication rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.' ((1969) 1 All E.R. at 353). See also Lord Reid, id. at 350, 351.

In Regina v. Marriott, (1971) 1 All E.R. 595 (C.A.), the defendant's house was raided by the police who found a penknife with traces of cannabis resin adhering to a broken blade. His conviction was quashed on appeal. In construing Warner the court noted. '(i)t does not seem to us to be the law that proof of the mere possession of the penknife, without more, was enough.' Id. at 597.

Lennon v. Immigration and Naturalization Service, 527 F.2d 187 (1975)

32 A.L.R. Fed. 521

In Regina v. Fernandez, (1970) Crim.L.Rev. 277, the Court of Appeal observed: 'The majority jority view Warner was that one could not safely regard the offence as absolute: some mental element, or subjective test, might have to be applied.' Id. at 278. Finally, we note that in the Parliamentary debates over the revision of the Misuse of Drugs Act in 1971, although a Member of Parliament indicated that he believed that Warner created absolute liability, regardless of mens rea, the Solicitor-General's response indicated that the revision was a codification of Warner rather than a rejection of it. 808 Parl.Deb., H.C. (5th ser.) 621 (1970).

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378 F.Supp. 39
United States District Court, S.D. New York.

John Winston Ono **LENNON**, Plaintiff,
v.
Elliot **RICHARDSON**, Attorney General of the United States, et al., Defendants.
John Winston Ono **LENNON**, Plaintiff,
v.
The UNITED STATES of America et al., Defendants.

Nos. 73 Civ. 4476, 73 Civ. 4543. | May 1, 1974.

Actions by alien, while appeal from deportation order was pending before the Board of Immigration Appeals, seeking information and records of the Immigration and Naturalization Service and seeking a hearing on question of whether or not defendants had prejudged case against lien. On motion by alien for order enjoining various officials from further proceedings regarding deportation, the District Court, Owen, J., held that agency action would not be enjoined due to alleged violation of Freedom of Information Act where information and records sought had been held to be irrelevant as matter of law by immigration judge, and where, if that ruling was proper, no basis existed for an injunction to permit alien to obtain such records, while if it was improper either the Board of Immigration Appeals or the Court of Appeals could reverse with appropriate direction.

Motion denied.

West Headnotes (3)

[1] **Injunction**
Injunctions to enforce laws and regulations in general

District court has jurisdiction to enjoin agency action for violation of Freedom of Information Act claim, but such power should be exercised only upon a clear showing of irreparable injury. 5 U.S.C.A. § 552.

1 Cases that cite this headnote

[2] **Injunction**
Aliens, immigration, and citizenship

Alien was not entitled to injunction against further agency action for violation of Freedom of Information Act where information and records sought were held to be irrelevant as a matter of law by immigration judge, and where if that ruling was proper, there was no basis for an injunction to permit alien to obtain such records to introduce at deportation proceeding, while, if it was improper, either the Board of Immigration Appeals or the Court of Appeals could reverse with appropriate directions to the immigration judge to receive and consider such proof. 5 U.S.C.A. § 552; Immigration and Nationality Act, § 106(3), 8 U.S.C.A. § 1105a(a)(3).

1 Cases that cite this headnote

[3] **Injunction**
Aliens, immigration, and citizenship

Alien was not entitled to preliminary injunction preventing further proceedings regarding his deportation, pending outcome of alien's action seeking order requiring certain government defendants to divulge whether or not alien had been subject to unlawful surveillance, and seeking a hearing on question of whether or not defendants had prejudged case against alien, where claim of prejudgment was premature, since the Board of Immigration Appeals had not yet acted on appeal by alien from deportation order. 18 U.S.C.A. § 3504.

3 Cases that cite this headnote

Attorneys and Law Firms

***40** Leon Wildes, New York City, for plaintiff.

Paul J. Curran, U.S. Atty., for the S.D. of N.Y., Joseph Marro, Asst. U.S. Atty., of counsel, for the United States.

Lennon v. Richardson, 378 F.Supp. 39 (1974)

Opinion

OPINION AND ORDER

OWEN, District Judge.

Plaintiff John **Lennon** has moved for an order enjoining various officials involved in the enforcement and administration of United States immigration laws from further proceedings regarding his deportation.[1] An appeal from his deportation order of March 23, 1973 is presently pending before the Board of Immigration Appeals (the 'Board').

Plaintiff and his wife entered the United States in 1971 with authority to remain until February 29, 1972. On March 1, 1972 they were advised that their authorization had expired and they were expected to leave by March 15. However, on March 6, concluding they had no intention to leave by March 15, the District Director of the Immigration and Naturalization Service ('INS') commenced deportation proceedings against them. This proceeding came on to be heard before Immigration Judge Fieldsteel. At that time, plaintiff and his wife asserted that the deportation proceedings had been discriminatorily commenced because INS had violated its practice by not allowing them 'non-priority' ***41** status.[2] In this case, the asserted grounds for 'non-priority' status were that the wife desired to remain in the United States to endeavor to locate and obtain custody of her child by a former marriage, and plaintiff-husband desired to remain with and assist her.

The Immigration Judge allowed the wife permanent residence,[3] but plaintiff-husband was ordered deported. The Immigration Judge ruled that his sole function was to determine whether the deportation charge was sustained by sufficient evidence, and finding that plaintiff-husband had been convicted in England upon his plea of possession of 'cannibis resin', ruled he was deportable as a matter of law.[4] The Immigration Judge denied plaintiff's request to terminate the deportation proceedings on the grounds of (1) discriminatory commencement and (2) because of INS' alleged violation of its own practice as regards 'non priority' status, stating:

It is within the District Director's prosecutive discretion whether to institute deportation proceedings against a deportable alien or temporarily to withhold said proceedings. Where such proceedings have begun, it is not in the province of the Immigration Judge or of the Board on Appeal to review the wisdom of the District Director's action starting the proceedings . . .

Plaintiff's appeal from the determination of the Immigration Judge to the Board of Immigration Appeals is subjudice. judice.

Thereafter, and in October 1973, plaintiff commenced two actions in this Court. Action #1, under the Freedom of Information Act, 5 U.S.C. Section 552, seeks INS information and records relevant to the maintenance by INS of a 'non-priority' category of cases and the standards used in determining its applicability.

Action #2 seeks an order 1) requiring certain government defendants to divulge, pursuant to 18 U.S.C. Sec. 3504, whether or not plaintiff has been the subject of unlawful surveillance and 2) granting a hearing on the question of whether or not the defendants had 'prejudged the case against him.'

Plaintiff's principal contention is that he is entitled to a stay of all proceedings 'until a reasonable time after plaintiff has been furnished with the information and records sought in Action No. 1,' on the ground that while he is not subject to deportation until after a final decision of the Board,[5] and review by the Court of Appeals,[6] he will be forced to go to the Court of Appeals on an inadequate and prejudicial record in the event the decision of the Board is against him.[7]

[1] **[2]** There seems little question that the District Court has jurisdiction to enjoin agency action for violation of a Freedom of Information Act claim. Renegotiation Board v. Bannercraft Clothing Co., 1 U.S. 415,94 S.Ct. 1028, **39** L.Ed.2d 123 (1974); Sears Roebuck & Co. v. N.L.R.B., 153 U.S.App.D.C. 380, 473 F.2d 91 (1973). However, such power is to be exercised only upon a clear showing of irreparable injury. Sears Roebuck, supra, at p. 93 states:

. . . it is only in extraordinary circumstances that a court may, in the sound exercise of discretion, intervene ***42** to interrupt agency proceedings to dispose of a single, intermediate or collateral issue. A cogent showing of irreparable harm is an indispensable condition of such intervention.

On the facts before me, there is no such showing. The plaintiff cannot be deported as a matter of law until a final determination has been made herein by the Court of Appeals, unless that Court so orders. The information and records sought have been held to be irrelevant as a matter of law by the Immigration Judge. [8] If that ruling is proper, there is no basis for an injunction to permit plaintiff to obtain these records to introduce in that proceeding. If it is improper, either the Board or the Court of Appeals may reverse with appropriate directions to the Immigration Judge to receive and consider such proof. [9] Thus plaintiff will have his review and be protected against improper deportation during its course.

The plaintiff alternatively seeks this preliminary injunction pending the outcome of Action #2 on the ground that if the injunction is not granted, he will have no recourse from his asserted 'prejudgment' herein and/or the claimed use of tainted evidence against him.

[3] However, plaintiff, in his very limited presentation on this grounds, has made no showing that any Immigration official involved in this proceeding has not exercised his independent judgment, [10] and the Board has yet to rule. Any claim of prejudgment is necessarily premature when an agency's appellate body has yet to act. [11]

Nor has plaintiff demonstrated a need for a stay of the Immigration proceedings until defendants affirm or deny the use of illegal evidence against plaintiff. Judge Fieldsteel's opinion is based solely on the record of **Lennon's** conviction in England. [12] Plaintiff has, in any event, specified no evidence admitted in the proceedings which might be inadmissible as the product of an unlawful act and therefore I see no reason to delay further proceedings. Consequently, I decline to grant a preliminary injunction on the alternative grounds urged as to Action #2.

For the foregoing reasons, the plaintiff's motion for a preliminary injunction is denied.

So ordered.

Footnotes

1 Those officials are the defendants in the two actions **Lennon** commenced in October 1973 described infra.

2 'Non-priority' refers to a category of cases in which the INS will defer the departure of an alien indefinitely and take no action to disturb his immigration status on the ground that such action 'would be unconscionable because of the existence of appealing humanitarian factors.'

3 Pursuant to Section 245 of the Immigration and Nationality Act, 8 U.S.C. Sec. 1255.

4 Section 212(a)(23) of the Immigration and Nationality Act, 8 U.S.C. Sec. 1182(a)(23).

5 8 C.F.R. Section 3.6(a) (1973).

6 8 U.S.C. Section 1105a(a)(3).

7 Plaintiff points out that review before the Court of Appeals 'shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;' 8 U.S.C. Section 1105a(a)(4).

8 I note that even if the requested information should prove to be relevant in a way overlooked by the parties or the Court, plaintiff is not entirely without remedy. 8 C.F.R. Sec. 3.8 provides a procedure for the reopening of a Board determination upon motion of a party. If the Board should fail to permit plaintiff to reopen and in doing so commits an abuse of discretion, judicial review is available in the Court of Appeals. Schieber v. Immigration and Naturalization Service, 461 F.2d 1078 (2d Cir. 1972). The existence of this procedure further supports my view that the plaintiff will not suffer irreparable injury by the continuation of Board proceedings.

9 In the event that the position of the Immigration Judge is held to be incorrect and proceedings to determine the merits of plaintiff's selective prosecution claim proceed without awaiting the release of the information to which plaintiff is entitled in Action #1, I w at that point, reconsider plaintiff's application for a stay.

10 Exhibit 'D' to the complaint in Action #2, while provocative, is not a showing.
Given a proper showing, a hearing on prejudgment might be appropriate after the Board's determination. See U.S. ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954). To stay the proceedings at this point would be properly disruptive, even assuming a proper showing had been made.

12 There can be, and is, no claim that the evidence of the conviction was obtained.

'cannabis resin' in Great Britain which made him excludable from the **United** States under § 212(a)(23) of the Act, 8 U.S.C. § 1182(a)(23).

Plaintiff has appealed the Board's decision to the Court of Appeals, which has yet to hear argument. [2]

The application to dismiss the first cause of action is granted. That cause of action, pursuant to 18 U.S.C. § 3504 [3] demands that the government affirm or deny the occurrence of certain unlawful acts as specified in the statute including alleged illegal electronic and mechanical surveillance on plaintiff. In response to plaintiff's demands the Department of Justice has stated in letter form that it has no information indicating that any conversations of plaintiff were overheard or that any premises known to have been owned or leased by plaintiff were covered by electronic surveillance. The letter also denied that **Lennon** was subjected to electronic surveillance by six other governmental agencies specified in the letter.

[1] **[2]** Passing the issue of whether this unsworn letter form denial is sufficient to moot plaintiff's claim under 18 U.S.C. § 3504, I find that other reasons compel dismissal of this cause of action. The terms of § 3504 make clear that it only comes into play upon a claim that certain evidence is inadmissible in a proceeding because it is the primary product of an unlawful act or is obtained by the exploitation of such an act. I agree with the Board's conclusion that:

Counsel has not claimed that any evidence relating to deportability or ineligibility for adjustment of status may have been illegally obtained. In fact, since the evidence in the case consisted solely of the respondent's admitted presence in the **United** States after February 29, 1972, and the record of his conviction which he readily admitted, we have great difficulty in ascertaining what evidence the respondent may hope to have suppressed.

In re **Lennon**, A 17 595 321 (BIA, July 10, 1974) at p. 7. In any event, and more fundamentally, plaintiff's claim has already been presented both to the Immigration Judge and the Board which have the power and means to fully protect plaintiff's rights under 18 U.S.C. § 3504. In re **Lennon**, supra, at 5-6 and cases cited therein. Any error in the Board's ruling as to this contention is reviewable in the Court of Appeals and not in collateral proceedings in the District Court. § 106(a) of the Immigration and Nationality Act, 8 U.S.C. § 1105a(a). The first cause of action is therefore dismissed.

The second cause of action alleges, in essence, that the District Director, other officials of the INS and the Immigration Judge 'prejudged' all of plaintiff's applications for discretionary relief by routinely denying or not acting upon any such requests, rather than by exercising such discretionary power as is vested in them according to their own understanding and conscience. Principal among the several alleged failures to exercise independent judgment was the institution by the District Director of deportation proceedings against **Lennon** ***564** despite the fact that, absent prejudgment, **Lennon** would allegedly not have been prosecuted because he would ordinarily have been accorded 'non-priority' status. [4] While plaintiff does not so denominate it, this is essentially an allegation of 'selective prosecution' to get the plaintiff out of the country, the reason for which, plaintiff claims, was to penalize him for his association with individuals judged to be highly political and unfavorable to the then-existing daministration, as well as to prevent his participation in demonstrations possibly embarrassing to that administration.

The third cause of action alleges that the conduct alleged in the second cause of action occurred at the behest of high government officials, and was the result of and part of a conspiracy by various government officials to violate plaintiff's rights guaranteed by the First, Fourth, Fifth and Ninth Amendments to the Constitution. Part of the conduct of the alleged conspiracy was to unlawfully wiretap the phones of plaintiff and his attorney and interfere with plaintiff's mail.

[3] **[4]** The above allegations clearly state valid causes of action. U.S. ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954); Bufalino v. Kennedy, 116 U.S.App.D.C. 266, 322 F.2d 1016 (1969). [5] Defendants argue that the decision to institute immigration proceedings on the basis of a non-priority classification or for any other reason is a matter that rests entirely in the discretion of the District Director and is unreviewable in any Court or administrative proceeding, citing Spata v. Immigration and Naturalization Service, 442 F.2d 1013 (2d Cir.), cert. denied, 404 U.S. 857, 92 S.Ct. 107, 30 L.Ed.2d 99 (1971); and Riva v. Immigration and Naturalization Service, Civil No. 74-1601 (D.N.J. October 20, 1974). As I view it, these cases hold no more than that the District Court lacks jurisdiction to review the judgment of the District Director in a bona fide exercise of his discretion in deciding to institute a deportation proceeding

even if he acted arbitrarily, capriciously or irrationally in so doing. These cases do not, and, in may view, could not hold that a government official can with impunity, immune from judicial review, institute a deportation proceeding solely as a penalty for the lawful exercise of constitutional rights. As stated by the Court of Appeals for the Second Circuit in U.S. v. Berrios, 501 F.2d 1207, at 1209 (1974):

Nothing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations, such as race, religion, or control over the defendant's exercise of his constitutional rights, as the basis for determining its applicability. See Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962). Selective prosecution then can become a weapon used to discipline political foe and the dissident, see, e.g., **United** States v. Falk, 479 F.2d 616 (7th Cir. 1973); **United** States v. Steele, 461 F.2d 1148 (9th Cir. 1972). The prosecutor's objective is then diverted from the public interest to the punishment of those harboring beliefs with which the administration in power may disagree.

[5] I note that plaintiff's claim is normally asserted as a defense in the prosecution alleged to have been selectively instituted.[6] However, it is the Board's holding in this very case that it and the Immigration Judge have no jurisdiction to consider claims of prejudgment ***565** or selective prosecution by the District Director or INS.

Thus, while reaching the conclusion that plaintiff may assert a selective prosecution defense to a deportation proceeding in a complaint in a collateral civil action in the District Court, I question plaintiff's right to have uncontrolled access to the full panoply of discovery normally available pursuant to the Federal Rules of Civil Procedure. I deem it inappropriate for a potential deportee, by the mere assertion of such a claim, to subject the government to a highly disruptive burden of justification in each such case. Counsel for **Lennon** did not contend otherwise on the argument hereof, and conceded that there must be an adequate preliminary factual showing of possible selective prosecution to justify the commencement of discovery. And for similar reasons, even assuming a factual showing justifying some inquiry has been made, the potential deportee is still not entitled in my opinion to a wholly unfettered discovery. I therefore conclude that in this situation the Court is under a duty to retain control over the discovery process to ensure that there is no unjustified and improper intrustion into the prosecutorial decision-making process. See **United** States v. Berrios, supra, **United** States v. Berrigan, supra.

Since on the present state of the record there are adumbrated sufficient facts to justify at least a limited inquiry, the parties shall appear before me on Januray 9, 1975 at 4:30 p.m. to establish the extent of discovery to be initially allowed. Unitl that time the pending stay of discovery is continued.

On the basis of the foregoing, defendants' motion to dismiss for failure to state a claim is granted as to the first cause of action, and is denied as to the second and third causes of action.

Defendants' motion for summary judgment is denied without prejudice, plaintiff having engaged in little discovery as yet.

So ordered.

Footnotes

1 With the consent of both parties this motion has been treated as one for summary judgment nder Fed.R.Civ.P., Rule 56, as matters outside the pleadings have been submitted for my consideration.

2 It appears that a ruling on the appeal is more than six months away.

3 18 U.S.C. § 3504 provides:

(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the **United** States -

(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act; . . .

4 The term 'Non-Priority' refers to a category of cases in which the INS will defer the departure of an alien indefinitely and take no action to disturb his immigration status on the ground that such action 'would be unconscionable because of the existence of appealing humanitarian factors.'

387 F.Supp. 561
United States District Court, S.D. New York.

John Winston Ono **LENNON**, Plaintiff,
v.
The **UNITED** STATES of America, et al., Defendants.

No. 73 Civ. 4543. | Jan. 2, 1975.

An alien against whom an order of deportation had been rendered filed a complaint alleging in effect that immigration officials had resorted to 'selective prosecution' to get the plaintiff out of the country to penalize him for his association with individuals judged to be highly political and unfavorable to the administration, and to prevent his participation in demonstrations possibly embarrassing to the administration. The complaint alleged also that such acts were part of a conspiracy by government officials to violate constitutional rights and that part of the conduct of the alleged conspiracy was an unlawful wiretap and interference with the alien's mail. On the Government's motion to dismiss or for judgment on the pleadings, treated as motion for summary judgment, the District Court, Owen, J., held that the complaint stated valid causes of action, and that government officials cannot, with impunity, immune from judicial review, institute a deportation proceeding solely as a penalty for lawful exercise of constitutional rights.

Government's motion granted as to first cause of action and denied as to second and third; Government's motion for summary judgment denied without prejudice.

West Headnotes (6)

[1] **Criminal Law**
Response or Answer to Motion

Statute providing that, when party aggrieved claims evidence is inadmissible because it is primary product of unlawful act or was obtained by exploitation of unlawful act, opponent of claim shall affirm or deny occurrence of alleged unlawful act comes into play only upon claim that evidence is inadmissible. 8 U.S.C.A. § 3504.

2 Cases that cite this headnote

[2] **Aliens, Immigration, and Citizenship**
Jurisdiction and venue

Where evidence in deportation case consisted solely of alien's admitted presence in **United** States at specified date and record of his conviction which he readily admitted, and where alien's claim under disclosure statute had been presented both to immigration judge and board which had power and means to fully protect alien's rights under such statute, any error in board's ruling as to alien's claim under such statute was reviewable in Court of Appeals and not in collateral proceedings in district court. 18 U.S.C.A. § 3504; Immigration and Nationality Act, § 106(a), 8 U.S.C.A. § 1105a(a).

1 Cases that cite this headnote

[3] **Aliens, Immigration, and Citizenship**
Judicial Review or Intervention

Alien's complaint that, in effect, immigration officials resorted to "selective prosecution" to get alien out of the country to penalize him for his association with individuals thought to be highly political and unfavorable to administration as well as to prevent participation in demonstrations possibly embarrassing to administration and that such selective prosecution was result of and part of conspiracy to violate alien's constitutional rights by, inter alia, unlawful wiretap stated valid causes of action. U.S.C.A.Const. Amends. 1, 4, 5, 9.

[4] **Aliens, Immigration, and Citizenship**
Judicial Review or Intervention

Government official cannot, with impunity, immune from judicial review, institute deportation proceeding solely as penalty for lawful exercise of constitutional rights.

1 Cases that cite this headnote

Next

[5] **Federal Civil Procedure**

Government records, papers and property

Privileged Communications and Confidentiality

Investigatory or law enforcement records

In view of Immigration and Naturalization Board's disclaimer of jurisdiction, alien could assert selective prosecution defense to deportation proceeding in complaint in collateral civil action in district court, but did not have right to uncontrolled access to full panoply of discovery normally available pursuant to federal rules of civil procedure, and adequate preliminary factual showing of possible selective prosecution would be required to justify commencement of discovery; court would retain control over discovery process to prevent unjustified and improper intrusion into prosecutorial decision-making process. 18 U.S.C.A. § 3504; Immigration and Nationality Act, § 106(a), 8 U.S.C.A. § 1105(a); U.S.C.A.Const. Amends. 1, 4, 5, 9.

6 **Aliens, Immigration, and Citizenship**

Judicial Review or Intervention

In view of Immigration and Naturalization Board's disclaimer of jurisdiction, alien could immune from judicial review, institute deportation proceeding in complaint in collateral civil action in district court, but did not have right to uncontrolled access to full panoply of discovery normally available pursuant to federal rules of civil procedure, and adequate preliminary factual showing of possible selective prosecution would be required to justify commencement of discovery; court would retain control over discovery process to prevent unjustified and improper intrusion into prosecutorial decision-making process. 18 U.S.C.A. § 3504; Immigration and Nationality Act, § 106(a), 8 U.S.C.A. § 1105a(a); U.S.C.A.Const. Amends. 1, 4, 5, 9.

Cases that cite this headnote

Attorneys and Law Firms

*562 Leon Wildes, New York City, for plaintiff.

Paul J. Curran, U.S. Atty., So. District of New York, Joseph Marro, Asst. U.S. Atty., of counsel, for defendants.

Opinion

OPINION AND ORDER

OWEN, District Judge.

Defendants in this action move for an order dismissing the complaint of plaintiff John **Lennon** for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P., Rule 12(b)(6) or alternatively for an order granting them judgment on the pleadings pursuant to Fed.R.Civ.P., Rule 12(c). [1] The facts pertaining to this action are contained in my earlier opinion, **Lennon** v. Richardson, 378 **F.Supp**. 39 (S.D.N.Y.1974) and need not be repeated here. Since that decision was rendered, the Board of Immigration Appeals ('the Board') dismissed plaintiff's appeal from the order of deportation of Immigration Judge Fieldsteel. In doing so, the Board held (1) that plaintiff was not entitled to a stay of immigration proceedings pending the outcome of the action before me, (2) that the decision to issue an order to show cause in an immigration proceeding is solely within the Immigration and Naturalization Service ('INS') District Director's prosecutorial discretion and as such was unreviewable by it, (3) that the Immigration Judge has the power to enforce the provisions of 18 U.S.C. § 3504 in proceedings before him but plaintiff was not entitled to any of the relief he sought thereunder, (4) that no prejudgment claim existed as to the actions of the Immigration Judge since the only denial by the Judge related to statutory ineligibility and other matters of law and not to any discretionary matter, (5) that the Immigration Judge was without jurisdiction to investigate any alleged prejudgment by the District Director or *563 other INS officials or to terminate deportation proceedings as improvidently begun and (6) that plaintiff was shown deportable by clear, convincing and unequivocal evidence under § 241(a)(2) of the Immigration & Nationality Act, 8 U.S.C. § 1251(a)(2) and was statutorily ineligible for adjustment to permanent resident status under § 245 of the Act, 8 U.S.C. § 1255 because of a conviction for possession of

Lennon v. Richardson, 378 F.Supp. 39 (1974)

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5 Defendants attempted distinction of these cases is unpersuasive. Even assuming, as the Board has held, that the Immigration Judge never denied any discretionary applications, the same cannot be said as to the actions of the District Director and the INS.

6 See, e.g., U.S. v. Berrios, supra; U.S. v. Berrigan, 482 F.2d 171 (3rd Cir. 1973).

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