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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 29

ARGYLE R. MACKEY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION,
and WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES,

APPELLANTS,

v.

FRANCISCO MENDOZA-MARTINEZ,

APPELLEE.

On appeal from the United States District Court for
the Southern District of California, Northern Division

JOHN W. WILLIS
1735 De Sales St., N. W.
Washington, D. C.

VINCENT P. DI GIORGIO
THOMAS R. DAVIS
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Bakersfield, California

Counsel for Appellee

MEMORANDUM FOR THE APPELLEE

We respectfully submit answers to the questions posed to us by the Court in the Clerk's letter of March 1, 1960, in the order in which they were set out in his letter.

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To determine whether appellee's criminal conviction was premised in any manner upon his citizenship status, it is necessary that the indictment and the judgment of conviction be before the Court. We therefore attach hereto certified copies of both documents as Exhibits A and B.

We answer the first question in the affirmative: The judgment of conviction was premised on a determination that appellee was, on June 23, 1947, a citizen of the United States.

According to the indictment and the judgment, appellee departed the United States and went to Mexico for the purpose of draft evasion on or about November 15, 1942, and remained there until on or about November 1, 1946.

The classes of persons liable for military duty under Selective Service were defined in 50 U.S.C.A. 303(a), which read in part as follows:

"Except as otherwise in this act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of eighteen and forty-five at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States."

(Italics ours)

It is to be seen that duty was imposed on citizens and resident aliens but not on non-resident aliens.

Section 401-j of the Nationality Act was enacted on September 27, 1944, about half-way through the period of draft evasion with which appellee was charged. According to 401-j, appellee became a non-resident alien as of that date.

But we have just seen that such non-resident aliens were not liable for military service. Therefore when the government charged appellee with draft evasion between September 27, 1944 and November, 1946, and when the trial court subsequently found him guilty of evasion during the same period, it followed inexorably that appellee was thereby adjudged to be still a citizen of the United States. The judgment of conviction presupposed that appellee had not been denationalized under 401-j.

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We urge that litigation of appellee's citizenship in the present case is foreclosed in the sense that the government is estopped now to deny that he is a citizen of the United States or that he is entitled to the declaratory relief that he seeks.

Where a fact or a determination is necessarily comprehended in a judgment, even though the judgment does not explicitly contain it, the judgment is a bar under the doctrine of res judicata or collateral estoppel. (Washington A. and G. Stean Packet Co. v. Sickles, 5 Wall 580, 18 L Ed 550.) In the present case the trial court in the criminal proceeding could not have found appellee guilty of draft evasion between September 27, 1944, and November 1, 1946, without concluding that he was still a citizen of the United States.

Collateral estoppel may arise from a criminal proceeding to estop a party in a subsequent civil action. (Emich Motors Corp. v. General Motors Corp., 340 U. S. 558, 95 L Ed. 534.) The estoppel may arise no less against the United States, in its capacity as plaintiff. (50 Corpus Juris Secundum 370).

And the estoppel is equally a bar to the government if the law in the first action was erroneously applied to the facts, as long as there was determination of a "fact, question or right": United States v. Moser, 266 U. S. 236, 69 L Ed 262. The Court in Moser concluded: "A determination in respect to the status of an individual, upon which his right to recover depends, is as conclusive as a decision upon any other matter."

It is no answer to say that appellee's offense from 1942 to the enactment of 401-j in 1944 would alone have supported the penalty imposed on him. (Thus presumably invoking the rule in Roviaro v. U. S., 353 U. S. 53, 1 L Ed 2nd 639.) It is not the imposition of the penalty we are concerned with here; it is the legal impact of a substantive finding as to appellee's citizenship status which is implicit in the judgment of conviction

The foregoing point, however, draws attention to an aspect of the collateral estoppel now invoked which lends additional force to it. Appellee invokes no mere technical defense. He relies on a determination by the original trial judge on the basis of which he actually suffered punishment. If the trial court had found that the extent of his offense was from 1942 to 1944, instead 1942 to 1946, it seems an inevitable inference that the penalty imposed would have been mitigated accordingly. Having been punished as a citizen, he deserves to be treated as no less now that he has paid the penalty.

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We believe the foregoing questions are appropriate for the Court's consideration. We asserted generally that 401-j is unconstitutional "as applied to plaintiff" (Transcript Pg. 4). Moreover, the Court properly knows of the prior criminal proceedings. It is a part of the stipulated facts (Transcript Pg. 3) in the present appeal, and it was a part of the first record on certiorari.

Perhaps more importantly, we believe the Court may legitimately consider that it now has before it a grave constitutional question of the kind that it has bound itself to avoid ^{if} a decision can be made on any other ground. This is a consideration which overrides the ordinary assertion of waiver. This Court has recognized that the paramount character of some questions justifies their consideration regardless of the record below. (Terminiello v. Chicago, 337, U. S. 1, 93 L Ed 1131) The Court should not now consider the point to aid appellee but to honor the restraint it has imposed upon itself respecting constitutional questions.

CONCLUSION

Nothing in what we have said implies in any way any relaxation of our basic contention concerning the unconstitutionality of 401-j on its face. Especially do we feel that we have brought here considerations of procedural due process of law which could appeal to members of the Court who have hitherto expressed the utmost reluctance to overturn enactments of Congress. Yet we recognize and respect the historic restraint respecting constitutional issues just referred to, and if this should cause the Court to consider the present questions, we contend that a limited judgment of affirmance should result.

Respectfully submitted,

Thomas R. Davis