**264 U.S. 32 (1924)**

# MAHLER ET AL.

**v.**

# EBY, INSPECTOR IN CHARGE IMMIGRATION SERVICE, U.S. DEPARTMENT OF LABOR, AT CHICAGO, ILLINOIS.

No. 184.

**Supreme Court of United States.**

Argued January 24, 25, 1924.
Decided February 18, 1924.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

38 *38 *Mr. Walter Nelles,* with whom *Mr. Otto Christensen* was on the brief, for appellants.

*Mr. George Ross Hull,* Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for appellee.

MR. CHIEF JUSTICE TAFT, after stating the case as above, delivered the opinion of the Court.

39 The theory of the draftsman of the petition for the writ and of the assignment of errors was that the same *39 constitutional restrictions apply to an alien deportation act as to a law punishing crime. It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment. *Fong Yue Ting* v. *United States,* 149 U.S. 698, 730; *Bugajewitz* v. *Adams,* 228 U.S. 585, 591. The right to expel aliens is a sovereign power necessary to the safety of the country and only limited by treaty obligations in respect thereto entered into with other governments. *Fong Yue Ting* v. *United States, supra.* The inhibition against the passage of an *ex post facto* law by Congress in § 9 of Article I of the Constitution applies only to criminal laws. *Calder* v. *Bull,* 3 Dall. 386; *Johannessen* v. *United States,* 225 U.S. 227, 242; and not to a deportation act like this, *Bugajewitz* v. *Adams,* 228 U.S. 585, 591. Congress by the Act of 1920 was not increasing the punishment for the crimes of which petitioners had been convicted, by requiring their deportation if found undesirable residents. It was, in the exercise of its unquestioned right, only seeking to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of society. In *Hawker* v. *New York,* 170 U.S. 189, the validity of a law of New York which forbade, on penalty, any one who had been convicted of a felony from practicing medicine, was upheld as a reasonable exercise of the police power and not an increase of the punishment for the felony. The present is even a clearer case than that.

The brief for appellants insists that as the laws under which the appellants were convicted have been repealed, the fact of their conviction can not be made the basis for deportation. It was their past conviction that put them in the class of persons liable to be deported as undesirable citizens. That record for such a purpose was not affected by the repeal of the laws which
40 they had violated and under which they had suffered punishment. The repeal *40 did not take the convicted persons out of the enumerated classes or take from the convictions any probative force rightly belonging to them.

Nor is the act invalid in delegating legislative power to the Secretary of Labor. The sovereign power to expel aliens is political and is vested in the political departments of the Government. Even if the executive may not exercise it without congressional authority, Congress can not exercise it effectively save through the executive. It can not, in the nature of things, designate all the persons to be excluded. It must accomplish its purpose by classification and by conferring power of selection within classes upon an executive agency. *Tiaco* v. *Forbes,* 228 U.S. 549, 557. That is what it has done here. It has established classes of persons who in its judgment constitute an eligible list for deportation, of whom the Secretary is directed to deport those he finds to be undesirable residents of this country. With the background of a declared policy of Congress to exclude aliens classified in great detail by their undesirable qualities in the Immigration Act of 1917, and in previous legislation of a similar character, we think the expression "undesirable residents of the United States" is sufficiently definite to make the delegation quite within the power of Congress. As far back as 1802 the naturalization statute of that year, c. 28, 2 Stat. 153, prescribed that no alien should be naturalized who did not appear to the court to have behaved during his residence in this country "as a man of good moral character, attached to the Constitution of the United States, and well disposed to the good order and happiness of the same." Our history has created a common understanding of the words "undesirable residents" which gives them the quality of a recognized standard.

41 We do not think that the discretion vested in the Secretary under such circumstances is any more vague or *41 uncertain or any less defined than that exercised in deciding whether aliens are likely to become a public charge, a discretion vested in the immigration executives for half a century and never questioned. Act of August 3, 1882, c. 376, 22 Stat. 214, and Act of February 5, 1917, c. 29, 39 Stat. 874. See *Buttfield* v. *Stranahan,* 192 U.S. 470, 496.

*International Harvester Co.* v. *Kentucky,* 234 U.S. 216, and *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, are cited on behalf of petitioners. In those cases, statutes were held invalid for vagueness. They were both criminal cases in which the uncertain words of the statute encountered the limitation of the Fifth and Sixth Amendments. They did not inform the accused sufficiently of the nature and cause of the accusation. The rule as to a definite standard of action is not so strict in cases of the delegation of legislative power to executive boards and officers. Cases like the one before us were distinguished from the *Cohen Case* by Chief Justice White in his opinion in that case when he said (p. 92) "the cases relied upon all rested upon the conclusion that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded."

The next objection is that there was no evidence before the immigration inspector and the Secretary upon which a warrant could properly issue. A special objection of this kind is taken in the case of Petro Nigra. It is said that, in the record of the hearing of his case before the inspector, there does not appear any evidence of his conviction under the Espionage and Selective Draft Acts. It is true that the certified copies of the indictment and judgment against all the petitioners do not appear in the hearing of Nigra as shown, but there is a stipulation between the parties in another part of the record herein that such
42 certified copies were used in the hearing of each *42 petitioner. It is clear that the hearing of Nigra was not properly reported and that his case is like the others.

But it is said there was no evidence in the hearings of any of them as to their being undesirable residents of the United States. There were their convictions. Those were enough to justify the Secretary in finding that they were undesirable. The statute does not expressly require additional evidence. If it did, there was here the circumstance that, after the examination of the petitioners had proceeded to a certain point of inquiry, the petitioners under the advice of counsel declined to answers further questions, an attitude from which the Secretary might well infer that what would be revealed by answers would not add to their desirability as residents. Of course the question how much additional evidence should be required must vary with the class which makes its members eligible for deportation. Alien enemies interned during war may be very good people, and their having been interned may have little bearing on their being good material for residents or citizens when peace returns; but the aliens in this case were convicted of crimes under such circumstances that the Secretary without more might find them undesirable as residents.

But the Secretary made no express finding, so far as the warrant for deportation discloses. It is contended that this renders the warrant invalid. It is answered on behalf of the appellee, that, in *habeas corpus* proceedings, the prisoner is not to be discharged for defects in the original arrest or commitment, because the object of the proceeding is not like an action to recover damages for an unlawful arrest or commitment, but is to ascertain whether the prisoner can lawfully be detained in custody, citing *Nishimura Ekiu* v. *United States,* 142 U.S. 651, 662. What that case really decided was that, even if the arrest
43 was unjustified by the warrant or commitment on its face, yet if the evidence on the hearing of the petition for *habeas* *43 *corpus* showed either that facts existed at the time of the arrest or had occurred since, which made the detention legal, the court would not release the prisoner but would do what justice required and would dispose of the prisoner accordingly. *Iasigi* v. *Van De Carr,* 166 U.S. 391; *Stallings* v. *Splain,* 253 U.S. 339, 343; *Bilokumsky* v. *Tod,* 263 U.S. 149, 158; *Mensevich* v. *Tod,* decided this day, *post,* 134.

In the case before us the defect in the warrants of deportation has not been supplied. The defect is jurisdictional. There is no authority given to the Secretary to deport except upon his finding after a hearing that the petitioners were undesirable residents. There is no evidence that he made such a finding except what is found in the warrant of deportation. The warrants recite that upon the evidence the Secretary has become satisfied that the petitioner aliens have been found in the United States in violation of the Act of May 10, 1920, and that they were finally convicted of the offenses named in the act. They could not have been found in the United States in violation of the Act of 1920 until after the Secretary had found that they were undesirable residents. Appellee's argument is that, therefore, this must be taken to mean that he finds them undesirable citizens. But the words "have been found" naturally refer to a time when the warrant of arrest was served on them, and before he had them before him. They exclude a possible meaning that he was then making their stay in the country illegal by implication of a finding that they were undesirable. This conclusion is borne out by the language of the Secretary in the warrant of arrest which before the hearings he issued against the petitioners and in which he directed their arrest on the ground that they had been found in the United States in violation of the Act of May 10, 1920. It would clearly appear from
44 these two documents, which are naturally to be construed *in pari materia,* that the *44 Secretary did not deem his finding that the petitioners were undesirable citizens essential to enable him to deport them. Indeed, he seems to have used forms applicable to aliens of a fixed excluded class to be deported on identification with the class, without any further finding by

him. The natural construction of his language is that he has become satisfied that they are in the country in violation of the act, solely because they have been convicted as stated.

Does this omission invalidate the warrant? The finding is made a condition precedent to deportation by the statute. It is essential that, where an executive is exercising delegated legislative power, he should substantially comply with all the statutory requirements in its exercise and that, if his making a finding is a condition precedent to this act, the fulfillment of that condition should appear in the record of the act. In *Wichita R.R. & Light Co.* v. *Public Utilities Commission*, 260 U.S. 48, a statute of a State required that a public utility commission should find existing rates to be unreasonable before reducing them, but there was no specific requirement that the order should contain the finding. We held that the order in that case made after a hearing and ordering a reduction was void for lack of the express finding in the order. We put this conclusion not only on the language of the statute but also on general principles of constitutional government. After pointing out the necessity for such delegation of certain legislative power to executive agencies we said (p. 59):

"In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial
45 compliance therewith to *45 give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.

"It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We can not agree to this."

If the principle thus stated is to be consistently adhered to, it is difficult in any view to give validity to the warrants of deportation before us.

It is said that no exception was taken to the warrant on this account until the filing of the brief of counsel in this Court. There was an averment that the warrant was void without definite reasons in the petition of *habeas corpus.* There was nothing of the kind in the assignment of error. But we may under our rules notice a plain and serious error though unassigned. Rules 21, § 4, and 35, § 1, 222 U.S., Appendix, pp. 27, 37; *Wiborg* v. *United States*, 163 U.S. 632, 658; *Clyatt* v. *United States*, 197 U.S. 207, 221-222; *Crawford* v. *United States*, 212 U.S. 183, 194; *Weems* v. *United States*, 217 U.S. 349, 362. The character of the defect is such that we can not relieve ourselves from its consideration. The warrant lacks the finding required by the statute and such a fundamental defect we should notice. It goes to the existence of the power on which the proceeding rests. It is suggested that if the objection had been made earlier it might have been quickly remedied. There was no chance for objection afforded the petitioners until, after the warrant issued, in the petition for *habeas corpus.* The defect may still be remedied on the objection made in this Court.

We need not discharge the petitioners at once because of the defective warrant. By § 761 of the Revised Statutes, the duty of the court or judge in *habeas corpus* proceedings is prescribed as follows:

46 *46 "The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

Under this section, this Court has often delayed the discharge of the petitioner for such reasonable time as may be necessary to have him taken before the court where the judgment was rendered, that defects which render discharge necessary may be corrected. *In re Bonner*, 151 U.S. 242, 261; *Medley, Petitioner,* 134 U.S. 160, 174; *Coleman* v. *Tennessee*, 97 U.S. 509; *United States* v. *McBratney*, 104 U.S. 621, 624; *Bryant* v. *United States*, 214 Fed. 51, 53. The same rule should be applied in *habeas corpus* proceedings to test the legality of confinement under the decision of an administrative tribunal like the Secretary of Labor in deportation cases. No time limitation is imposed upon proceedings under the Act of May 10, 1920. If upon the evidence the Secretary finds that these petitioners are undesirable residents and issues warrants of deportation reciting that finding with the other jurisdictional facts, there will then be no reason, so far as this record discloses, why they should not be deported.

Accordingly, the judgment of the District Court is reversed with directions not to discharge the petitioners until the Secretary of Labor shall have reasonable time in which to correct and perfect his finding on the evidence produced at the original hearing, if he finds it adequate, or to initiate another proceeding against them.

*Reversed.*