MATTER OF M——

In DEPORTATION Proceedings

A-10464027

Decided by Board November 12, 1957

Deportability—Section 241 (c), Immigration and Nationality Act—Failure to fulfill marital agreement.

(1) Deportability under clause (2) of section 241 (c) of the 1952 act is not established where the evidence shows that the respondent was not at fault for the failure to fulfill the marital agreement.

(2) Under clause (2) of section 241 (c) the Government has the burden of establishing that its case rests on reasonable, substantial, and probative evidence (Cf. *Matter of V——*, A-10316169, Int. Dec. No. 859).

CHARGE:

Order To Show Cause: Act of 1952—Section 241 (c) (8 U. S. C. 1251 (c))—Failed to fulfill marital agreement made to procure entry as immigrant.

BEFORE THE BOARD

Discussion: This case is before us on appeal from a decision of a special inquiry officer granting voluntary departure and directing that the respondent be deported if he fails to depart voluntarily.

The respondent is a 24-year-old divorced male, native and citizen of Japan, whose only entry into the United States occurred on September 6, 1955, at which time he was admitted for permanent residence. He secured nonquota status on the basis of his marriage to a United States citizen on July 6, 1954. His wife obtained a divorce on April 11, 1956. The special inquiry officer found that the respondent failed to fulfill his marital agreement. The sole issue to be determined is whether the respondent is deportable on the charge stated above.

The circumstances surrounding the respondent's marriage and subsequent events are as follows. T—— I——, who apparently is a native of Japan, returned there for a visit and met the respondent through a relative. The respondent asked him how he could come to the United States, and I—— suggested that he would send his

daughter to Japan and if they liked each other they could get married which would enable the respondent to enter this country.

T—— I——'s daughter, V——, arrived in Japan on May 21, 1954, and she and the respondent were married at the American consulate on July 6, 1954. On the same day she executed a visa petition on behalf of the respondent which was filed with the Service on March 4, 1955. The respondent's wife returned to the United States in July 1955 but he could not accompany her as he was still awaiting documents. He entered the United States on September 6, 1955.

The respondent had lived with his mother prior to the marriage and he continued to live there until he departed for the United States. When V—— I—— arrived in Japan during May 1954 she went to the home of her older sister and remained there until her return to the United States in July 1955. These two homes were about 8 to 10 miles apart. At the time the respondent arrived in the United States, his wife was living at her father's home and the respondent remained there 2 days after which he went to live at his brother's home.

The respondent never had sexual intercourse with his former wife. In his statement of September 25, 1956, he stated that he never tried to have intercourse with her as he was afraid that she might have a baby and he would not be able to support it. At the hearing the respondent stated that he actually sought to have sexual intercourse with his wife but that she refused, and that he had made the previous contrary statement because he found it embarrassing to admit that she had refused to have sexual intercourse with him. He also stated that he would have liked to have had children. His former wife testified that the respondent did seek to have sexual intercourse with her while in Japan and after his arrival in the United States but that she refused because she had become interested in a man named H——.

The respondent testified that his primary purpose in marrying V—— I—— was so that they might live together and establish a home for themselves, and that he was still in love with her. He and his former wife testified that no money was paid as a consideration for her marriage to him. The respondent stated that T—— I—— paid all the expenses of his daughter's divorce; that he (the respondent) was to reimburse I——; that he had paid I—— $150 and still owed him a balance of $120.

After the respondent's wife obtained the divorce from him, she returned to Japan and married H—— in August 1956. Thereafter she filed a visa petition on his behalf. On the day on which she appeared as a witness for the respondent (March 29, 1957) she notified the Service that she desired to withdraw the visa petition on behalf of H—— and she stated at the hearing that she intended to terminate

that marriage and that she would not mind starting all over again with the respondent. She stated in an affidavit dated February 4, 1957, that the sole blame for failure to consummate the marriage should be placed upon her.

If we find the respondent is deportable under 8 U. S. C. 1251 (c), the specific provisions of that section will render him permanently inadmissible to the United States in accordance with 8 U. S. C. 1182 (a) (19). From a review of the record, it is apparent that the respondent desired to come to the United States; that he was aware that he could accomplish this by marrying a United States citizen; and that arrangements were made for a native-born girl to go to Japan to marry him. These are factors which must be weighed against the respondent's testimony that he married his wife for the purpose of living together and establishing a home.

The statutory provision under which the respondent is charged with deportability (clause (2) of 8 U. S. C. 1251 (c)) is very similar to its legislative predecessor, that is, the second paragraph of section 3 of the Act of May 14, 1937 (8 U. S. C. 213 (a)), except that the 1937 act used the phrase "to fulfill his promises for a marital agreement," whereas clause (2) of the present provision employs "to fulfill his or her marital agreement" thus omitting the word "promises." An opinion of the Solicitor of Labor dated May 22, 1940 (55804/996), which is quoted in part in *Matter of L—— T—— H——*, A-6714677, 3, I. & N. Dec. 73 (1947), and *Matter of B——*, A-3170648, 3, I. & N. Dec. 102 (1947), is to the effect that the alien's failure to maintain the marital status must be traceable back to fraud in the inception of the marriage and that the purpose for which the fraud was perpetrated must have been "solely to fraudulently expedite admission to the United States." Hence, if the parties in the instant case intended a bona fide marriage, the fact that as a consequence of the marriage the respondent received an advantage under the immigration laws would not in itself authorize deportation.

In connection with the respondent's admission that he and his former wife never had sexual intercourse, the special inquiry officer in his decision of November 20, 1956, stated that in the United States a marriage does not exist until its consummation through cohabitation. That statement was not repeated in the decision under appeal but there was quoted a paragraph appearing in 55 C. J. S. Marriage, § 22 (a), concerning consummation, cohabitation and coition. Although this paragraph shows that in some States cohabitation and coition are not essential to the validity of a marriage which has been duly solemnized, we assume that the special inquiry officer was impressed with the statement, "It has been laid down broadly that a marriage must be consummated, * * *." Ordinarily, consummation of a marriage is understood to mean sexual intercourse of the parties following the

marriage ceremony. However, we believe that in the statement we have quoted, consummation was being used merely in the sense of completion as distinguished from the more specific term "coition." This is illustrated by footnote 95 of the paragraph quoted from C. J. S. which shows that, even where a statutory provision required consummation to constitute a valid marriage, consummation was effected by obtaining a license to marry and performance of a ceremony by a person authorized to join persons in matrimony. The black-letter summary at the beginning of § 22 (a) further demonstrates this. It is as follows:

> Cohabitation of two persons who are generally reputed to be husband and wife or holding out as husband and wife does not in itself constitute a marriage. While the necessity of consummation has been recognized, it has been held or recognized that cohabitation or coition is not an essential element of a marriage which has duly been solemnized.

While 55 C. J. S. Marriage, § 22 (b) (2), indicates that there is a conflict of authority as to whether cohabitation is essential to the validity of a *common-law marriage*, we are satisfied that where a marriage has been duly solemnized in accordance with the laws of the place where it is performed, the marriage comes into existence at that moment regardless of whether it is followed by sexual intercourse. In *Lutwak* v. *United States*, 344 U. S. 604 (1953), and *United States* v. *Rubenstein*, 151 F. (2d) 915 (C. C. A. 2, 1945), in which the aliens went through marriages for the purpose of obtaining entry to the United States, there was no sexual intercourse following the marriages. That factor did not cause the courts to hold the marriages invalid but rather the fact that there was no intention of entering into a bona fide marriage. In the *Rubenstein* case at page 919, the court said, "It is quite true that a marriage without subsequent consummation will be valid; * * *." In the *Lutwak* case, it was contended by the petitioners that the fact that the marriage ceremonies were performed was sufficient to establish the validity of the marriages. The court did not hold that the marriages were invalid because they were not followed by sexual intercourse and, in fact, stated that the validity of the marriages was not material (p. 611). However, the court held that they were sham marriages because they were entered into for the fraudulent purpose of circumventing the immigration laws.

The fact that coition did not occur following a marriage ceremony does not mean that the marriage itself is incomplete. Of course, it is a factor to be considered in determining the bona fides of the marriage. We have held aliens deportable under 8 U. S. C. 1251 (c) even though their marriages were followed by coition. On the other hand, it does not necessarily follow that a conclusion must be reached that a marriage was not bona fide merely because the parties did not thereafter have sexual intercourse.

The special inquiry officer relied on certain language in *Giannoulias* v. *Landon*, 226 F. (2d) 356 (C. A. 9, 1955), which will be discussed later, and made the following statement as to his reasoning that the respondent was deportable:

> Here, the respondent failed to keep the marital status intact. He asserts that he did not refuse to fulfill his marital agreement and that the failure was not his but that of his wife to keep the marriage alive. Whether through his fault or not, the fact remains that he has failed to fulfill his marital agreement. The act renders deportable one who *either* fails *or* refuses to fulfill the said marital agreement.

It is clear from the foregoing that the special inquiry officer was of the opinion that the respondent was deportable in the event that he failed to fulfill his marital agreement even if he was not at fault for such failure. While we have indicated above that a ceremonial marriage does not depend for its validity upon subsequent coition, this is not contrary to the court's statement in *Giannoulias* v. *Landon*, *supra*, that the term "marital agreement" as used in the 1937 act "plainly means more than the mere indulgement in the marriage ceremony" and that it "means that the contracting parties at least begin in good faith to live together as husband and wife." In other words, even if there is a valid marriage for certain purposes, it does not follow that the "marital agreement," as the term is used in the immigration law, has been fulfilled.

In the *Giannoulias* case, the court had under consideration the second paragraph of section 3 of the Act of May 14, 1937, which we have indicated above was similar to the provision under which the respondent is charged with deportability. There the court said:

> In the instant case, the immigration authorities have held with finality and upon substantial evidence, that appellant alien entered into a fraudulent marriage for the purpose of entering into the United States without waiting for a legal entry under her quota number. And, even if the appellant actually entered into the marital agreement in good faith and actually went through the marriage ceremony in good faith but refused to consummate the marriage, she is subject to deportation. Thus, fraud is not a necessary element in the instant case.

There are two respects in which the respondent's case differs from that of *Giannoulias*. It is evident from the above quotation that the court there sustained deportability on two hypotheses—either that the marriage was fraudulent or that the alien *refused* to consummate the marriage. In either event, the alien would have been to blame. The court did not suggest that she would have been deportable if she had *failed* to fulfill the marital agreement but had not been at fault for such failure.

A second distinction between the cases is that the court stated that it was not necessary to establish fraud to support deportation under that provision of the 1937 act. In that respect, the court's interpreta-

tion disagrees with the opinion of the Solicitor of Labor on May 22, 1940, previously mentioned. Assuming that fraud was not a requirement under the second paragraph of section 3 of the 1937 act, the specific language in 8 U. S. C. 1251 (c) shows that every deportation under that subsection is predicated on the assumption that the alien procured his visa by fraud, and this is true whether the deportation is under clause (1) or under clause (2) relating to failure to fulfill his or her marital agreement. In making this statement, we do not wish to imply that the Government must establish fraud and the language of the section indicates no such requirement. However, deportations under this subsection are actually based on the fact that the alien procured his visa by fraud and, if the evidence shows that he did not procure his visa by fraud, we do not believe deportation can be ordered based on the alien's failure to fulfill his marital agreement where such failure was through no fault of his own.

One additional matter must be borne in mind. In considering clause (1) of 8 U. S. C. 1251 (c), we held that the Government must prove alienage and that there exists the contemplated relation, in point of time, concerning marriage, entry and annulment, and that thereafter the burden is on the alien to establish that the marriage was not contracted for the purpose of evading any provisions of the immigration laws (*Matter of V——*, A–10316169, Int. Dec. No. 859 (Apr. 5, 1957)). This conclusion was reached because clause (1) provides for deportation when the events occur within the prescribed period unless the alien shows he comes within the exemption. Clause (2) requires that it must appear to the satisfaction of the Attorney General (or his delegated officers) that the alien failed or refused to fulfill his marital agreement. Hence, where the charge is based on clause (2), the case is subject to the provisions of 8 U. S. C. 1252 (b) (4) that no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The respondent and his former wife testified that he sought to have sexual intercourse with her; that she refused; that he desired a permanent union; and that she was at fault for the failure to fulfill the marital agreement. The special inquiry officer's seventh finding of fact shows only that the respondent "failed to fulfill his marital agreement" but not that he refused to do so. The quotation above from the special inquiry officer's decision indicates that he reached no conclusion as to whether the respondent was at fault for the failure to fulfill the marital agreement or whether his wife was at fault. In effect, the special inquiry officer held that the respondent was deportable regardless of whether he was or was not at fault. In other words, even if the respondent did not, in fact, procure his visa by fraud, he is to be deported on that ground, nevertheless. With this, we cannot agree and since we believe that the evidence establishes

that the respondent was not at fault for the failure to fulfill the marital agreement, we conclude that a decision of deportability in this case would not be based upon reasonable, substantial, and probative evidence. Hence, we hold that the charge in the order to show cause is not sustained. The dates of marriage, entry, and divorce are within the period stated in the first clause of 8 U. S. C. 1251 (c) but no charge was lodged under that statutory provision. However, we believe that respondent has satisfactorily established that he is within the exemption stated in clause (1). Accordingly, the proceedings will be terminated.

Order: It is ordered that the appeal be sustained and that the proceedings be terminated.