No. 11668

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM A. CARMICHAEL, District Director, Immigration and Naturalization Service, United States Department of Justice, District No. 16,

Appellant,

vs.

WONG CHOON HOI,

Appellee.

BRIEF FOR APPELLEE.

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Statement of the Case.

Appellee filed his petition to become a citizen in the District Court of the United States for the Southern District of California, Central Division, on September 4, 1945. [R. 2-7.] Said petition was filed in the form and manner provided by law [R. 2-8] and attached thereto was the Certificate of Arrival provided by the Commissioner of Immigration and Naturalization stating the date, place and manner of petitioner's arrival in the United States. (54 Stat. 1156; 8 U. S. C. 732.) [R. 9.] The Immigration and Naturalization Service filed with the said court a recommendation that the petition be denied for the reasons: "(1) There was not filed with the peti-

tion a valid certificate showing the date, place and manner of the petitioner's arrival in the United States, and (2) the petitioner has failed to establish continuous legal residence in the United States for the period required by law." [R. 14.] The petition was heard in open court on March 4, 1947, and was granted over the objection as entered. The Judge prepared and filed a written decision in the case. [R. 10-13.] The petitioner subscribed to and took the oath of allegiance to the United States of America. [R. 8.]

Summary of the Facts.

Wong Choon Hoi, appellee herein, a person of Chinese race, was born in China, July 7, 1914. [R. 2.] His father, Wong Yung Sau, was lawfully admitted to the United States for permanent residence in 1922 as a Chinese merchant pursuant to Article II of the Treaty of 1880 between the United States and China. [R. 10.] Appellee was lawfully admitted to the United States, November 24, 1934, as the minor son of a resident Chinese merchant pursuant to Article II of the said same treaty. Both appellee and his father have resided continuously in the United States since the dates of their respective entries. On October 5, 1941, appellee married a born citizen of the United States. He has resided with his wife and family at Los Angeles, California, continuously since his marriage and is engaged in business as a merchant.

Question Raised on Appeal.

There is only one question raised and to be considered on this appeal, namely:

Was the appellee lawfully admitted to the United States for permanent residence on November 24, 1934?

Argument.

Was the appellee lawfully admitted to the United States, November 24, 1934, for permanent residence? The trial court so held and if, on appeal, this question can again be answered in the affirmative the judgment of the lower court must be sustained.

It must first be noted that the appellee is a person of the Chinese race and until the repeal of the so-called Chinese Exclusion Acts on December 17, 1943, was racially ineligible to citizenship in the United States and was even excluded from entering the United States except under provisions of certain treaties existing between the United States and China.

Immigration of Chinese persons to the United States including the appellee herein was controlled by the Treaty of November 17, 1880 (22 Stat. 826), and not by the Immigration Act of June 2, 1924 (8 U. S. C. 224). Article II of the said treaty provides:

> "Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants . . . shall be allowed to go and come of their own free will and accord and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nations."

The Government admits that the father, Wong Yung Sau, was admitted for permanent residence under this provision of the treaty on December 10, 1922, but contends that in some way the Immigration Act of 1924 abrogated the treaty and that the son was admitted under terms of the Act.

We contend that the treaty between the United States and China above referred to, was not modified or abrogated by any of the various acts of Congress, either expressly or by implication, until the Act of December 17, 1943, which repealed the Chinese Exclusion Act and made Chinese of a race eligible for United States citizenship, and that appellee was lawfully admitted to the United States for permanent residence November 24, 1934, under terms of the said treaty of 1880 between the United States and China.

The basic question has been settled by the Courts in a series of cases which we now discuss:

In *U. S. v. Mrs. Gue Lim* (176 U. S. 459) it was contended by the Government that the Congressional Act of 1884, relating to the necessity of Chinese persons obtaining certain certificates of identity, abrogated the terms of the Treaty of 1880 with reference to Chinese merchants, in that the certificate required by the terms of the Act could not be obtained by the wife and minor children of the merchant and consequently they could not enter the United States. The Court in considering the question quoted with approval the words of Mr. Justice Harlan delievered in *Chew Heong v. U. S.,* 112 U. S. 536, as follows:

> "The Court should be slow to assume that Congress intended to violate the stipulation of a treaty so recently made with a government of another country. * * * Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the Court cannot be unmindful of the fact that the honor of the Government and the people of the United States is involved in every inquiry whether rights secured

by such stipulations shall be recognized and protected. And, it would be wanting in proper respect for the intelligence and patriotism of a coordinate department of the Government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted."

At page 465, the opinion goes on to say:

"We ought, therefore, to so consider the Act, if it can reasonably be done, as to further the execution and not to violate the provisions of the Treaty."

The Court held that the Act of Congress did not abrogate the treaty but must be interpreted as carrying the terms of the treaty into effect.

The question as to the status of Chinese merchants, their wives and minor children who are admitted to the United States under terms of the Treaty of 1880 and the effect of the Immigration Act of 1924 was considered by the Supreme Court of the United States in *Cheung Sum Shee v. Nagle,* 268 U. S. 336, wherein the Act of 1924 was construed so as to preserve the treaty rights of 1880.

In this case the question was whether or not the wife and minor children of a resident Chinese merchant were still admissible to the United States under the terms of the Treaty of 1880 or whether these rights had been lost with the passage of the Immigration Act of 1924. In other words, did the Immigration Act of 1924 abrogate the Treaty of 1880? The Court held that it did not. At page 345 the opinion states:

"The wives and minor children of resident Chinese merchants were guaranteed the right of entry by the Treaty of 1880 and certainly possessed it prior to July 1, 1924, when the present Immigration Act

became effective. (U. S. v. Mrs. Gue Lim, 176 U. S. 459.) That Act must be construed with the view to preserve Treaty rights unless clearly annulled, and we cannot conclude that, considering its history, the general terms therein disclose a congressional intent absolutely to exclude the petitioner from entry.

"In a certain sense it is true that petitioners did not come 'solely to carry on trade.' But Mrs. Gue Lim did not come as a 'merchant.' She was nevertheless allowed to enter, upon the theory that a treaty provision admitting merchants by necessary implication extended to their wives and minor children. The rule was not unknown to Congress when considering the Act now before us, nor do we think the language of Sec. 5 is sufficient to defeat the rights which petitioner has under the treaty. In a very definite sense, they are specified by the Act itself as 'non-immigrant.' They are aliens entitled to enter in pursuance of a treaty as interpreted and applied by the Court 25 years ago."

The foregoing decision is applied to consideration of Sec. 5 of the Immigration Act of 1924. The Government in the instant case contends that appellee was admitted under Sec. 3 of the same Act. It must be noted that Sec. 13(c) of the same Act specifically prohibits the admission of appellee as an "alien ineligible to citizenship" and the only law available to him at the time of his entry was the Treaty of 1880. The reasoning advanced by the Supreme Court in *Cheung Sum Shee v. Nagle* (268 U. S. 336), applies equally to Sec. 3 of the Immigration Act of 1924. The Act did not modify or abrogate the treaty in any respect and the appellee was lawfully admitted under the terms of said treaty for permanent residence in the United States.

The Admission of the Minor Child of a Resident Chinese Merchant Under Terms of the Treaty of 1880 Is an Admission for Permanent Residence.

This question is well reasoned and decided in *Haff v. Yung Poy,* 68 F. (2d) 203. (C. C. A., 9th Cir., 1933.) In that case the appellee was a native born Chinese boy legally admitted to the United States as the minor son of a resident Chinese merchant on June 2, 1926, at the age of nine (9). His father was, at the time of admission, lawfully domiciled in the United States and engaged as a merchant at San Jose, California. In 1927 the father ceased to be a merchant and obtained employment as a janitor, and the mercantile institution with which the father had been associated went out of business. Deportation proceedings were instituted against the minor son contending, (1) that the appellee's rights to remain permanently in the United States were measured by the Immigration Act of 1924 and not by the Treaty of November 17, 1880, and, (2) that one admitted to the United States under the Immigration Act of 1924 as the minor son of a trader became subject to deportation if the father ceased to carry on trade.

The Court held that the Act of 1924 did not abrogate the Treaty of 1880, for the reason that "no provision of the Act is in direct conflict with the treaty rights of such merchants."

After reviewing the decisions, including the ones herein above discussed (*Cheung Sum Shee v. Nagle,* 268 U. S. 336, 45 S. Ct. 539, and *U. S. v. Mrs. Gue Lim,* 176 U. S. 459, 20 S. Ct. 415), the Court states (page 204):

> "In view of these decisions, we are of the opinion that appellee's right to remain in the United States

is measured by the Treaty and not by the Immigration Act of 1924, even though he came here after the passage of that Act."

The Court then passed to the question: "Did the change in the father's status require that the son be deported?" If the son was subject to the Act of 1924 and admitted thereunder on a temporary or terminable basis, he must now be deported. If admitted pursuant to the Treaty of 1880 the admission was for permannt residence and the boy was not deportable. The real question then for consideration must be worded thus: "Was the entry of the minor son, as the son of a Chinese merchant, on June 2, 1926, after the effective date of the Immigration Act of 1924, a lawful entry for permanent residence?" The Court held that the minor son's right to remain in the United States was governed by the Treaty of 1880 and not by the Act of 1924 and that no limitation or restriction upon the alien's stay in the United States is contained in the Treaty. At pages 204-205 the Court says:

> "In support of its claimed right to deport appellee because he has lost his communicated status as the son of a merchant, the Government relies upon Section 15 of the Act of 1924 (8 U. S. C. A. 215) and the departmental rules promulgated thereon. Said Section 15 provides, in part, that, upon failure to maintain the status under which admitted, the alien will depart. But, as we have seen, appellee's right to remain in the United States is governed by the treaty and not by the act, and no limitation or restriction upon the alien's stay in the United States is contained in the treaty. On the contrary, it is well settled that a Chinese merchant, lawfully admitted prior to the Act of 1924, may remain here after he has lost his

status as a merchant (See Lo Hop v. U. S. (C .C. A. 6), 257 F. 489, and Wong Sun Fay v. U. S. (C. C. A. 9), 13 F. (2d) 67); and the government therefore concedes that appellee's father is not now deportable. The right of such a merchant's wife or minor child to remain here after loss of his or her communicated status, by reason of the merchant's changed occupation, is, of course, another question; but that such an alien's right is co-extensive with the right of the husband, or father, seems a just and reasonable answer, for the absurdities and hardships of a contrary rule of law are apparent. Thus, if a merchant, because of illness, mishap, economic condition, or other misfortune, were required to change his status as a merchant and secure other employment, should his hapless—and perhaps helpless—family be deported and he allowed to remain, or perforce required to remain because of long absence from his native country and environment? Likewise must the family of such a merchant be deported because, upon the death of the merchant, the communicated status of the wife and children has been lost?

With these harsh consequences in mind, and in view of the well-settled rule of law 'that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.' (Lau Ow Bew v. U. S., 144 U. S. 47, 59, 12 S. Ct. 517, 520, 36 L. Ed. 340), we cannot conclude that the rights of such aliens to remain here should be construed so narrowly as the government contends, or that it was the intention of Congress in enacting the Immigration Act of 1924 that aliens admitted to the United States by virtue of the 'merchant status' of their prior domiciled father or husband, as the

case might be, should be deported because the merchant, although not subject to deportation, has lost his status as a merchant."

The *Haff v. Yung Poy* (*supra*) case is exactly in point with the case here under consideration. The father in each case was admitted as a treaty trade merchant prior to the Immigration Act of 1924 and the minor son in each case was admitted as the minor son of the respective merchant after the effective date of the Act of 1924. The Court held that *Yung Poy* legally entered the United States for permanent residence pursuant to the Treaty of 1880 and was not subject to deportation. By the same reasoning Wong Choon Hoi, appellee herein, legally entered the United States for permanent residence pursuant to the Treaty of 1880 and is eligible to naturalization on such record.

The Cases Cited by Appellant Are Not in Point.

Appellant argues the effect of a qualified admission to the United States under provisions of the Act of July 1, 1924, and we have no quarrel with the conclusions reached and the cases cited. He does, however, entirely disregard the fact that the appellee herein was admitted pursuant to the Treaty of 1880, and that his admission carried "no restrictions as to occupation, profession or limitation of time" [R. 21].

The cases cited by appellant wherein the question of entry into the United States is discussed are not in point. Not a single one of these cases involves an admission pursuant to the Treaty of 1880 and consequently are not helpful in considering the instant question.

In *Kaplan v. Tod* (267 U. S. 226, 45 S. Ct. 257, 69 L. Ed. 585), the subject was of feeble mind and was detained at Ellis Island when she applied for admission. She was later paroled to an institution and, by the institution, permitted to reside in the City of New York with her father. The Court held the subject had never legally entered the United States for residence even though for some period of time she had been physically in the United States.

In *Zartavian v. Billings,* 204 U. S. 170, 27 S. Ct. 182, 51 L. Ed. 428, the minor daughter of a naturalized citizen was denied admittance to the United States. She claimed to be a citizen of the United States through the naturalization of her father and the further fact that she was actually in the United States as a minor. The Court held that having been debarred from entry she was never lawfully in the United States.

In *U. S. v. Parisi,* 24 Fed. Supp. 414, the subject entered as a stowaway and attempted to use such entry as a basis for legal residence in the United States. The Court rightly held that he had no basis for legal residence.

In *In re Weig,* 30 F. (2d) 418, the subject entered as a visitor on a six month permit. The Court held this not to be a lawful entry for permanent residence.

In *U. S. v. Beda,* 118 F. (2d) 458, the subject obtained his naturalization, alleging five years' continuance residence in the United States immediately preceding the filing of his petition. In a cancellation action the Court found that he had actually been away from the United States more than two years out of the five and had returned to the United States as a non-immigrant on a temporary visit.

In *U. S. v. Kreticos,* 40 F. (2d) 1020, the subject arrived as a deserting seaman and manifestly was not admitted for permanent residence.

In *Fanfariotis v. U. S.,* 63 F. (2d) 352, the subject entered as a seaman and the Court rightly held that he was not admitted for permanent residence.

In *In re Jensen,* 11 F. (2d) 414, the subject also entered as a deserting seaman and of course was not lawfully admitted for permanent residence.

In *In re Olsen,* 18 F. (2d) 425, the subject obtained a declaration of intention while on a trip to the United States and then entered and paid head tax at a later date. The Court held the declaration to be invalid since it was obtained before he had any status as a resident in the United States.

In *Sadi v. U. S.,* 48 F. (2d) 1040, the subject entered as a student for a period of two years. Of course, he was not admitted for permanent residence.

In *Stapf v. Corsi,* 287 U. S. 129, 53 S. Ct. 40, 77 L. Ed. 215, the subject entered as a deserting seaman in 1923 and was thereafter permitted to return to the United States after a visit abroad upon his representation that he was a previously lawfully admitted immigrant. The Court rightly held that he had not been lawfully admitted for permanent residence in 1923.

It will be noted that all of the cited cases simply hold that an alien must be admitted for permanent residence as a condition precedent to applying for naturalization. We thoroughly agree with that statement of the law and we submit that the appellee herein was lawfully admitted for permanent residence on November 24, 1934.

The Appellant Takes an Inconsistent View.

The question of the status of Chinese persons admitted to the United States as minor sons of merchants prior to July 1, 1924, has been considered by the government in many cases, where, since the repeal of the Chinese Exclusion Act, these persons have applied for admission to citizenship with a Certificate of Arrival based upon said entry. In these cases the Immigration and Naturalization Service has ruled that where the subject arrived prior to July 1, 1924, the entry is for lawful, permanent residence and is sufficient in law for naturalization purposes.

Where is the authority in law to take a different view concerning an identical entry after July 1, 1924, and before December 17, 1943? All such Chinese persons have been admitted under authority of the same law; the Treaty of 1880, and all are lawfully admitted for permanent residence.

Admission of the Minor Son of a Chinese Merchant After July 1, 1924 Is on Exactly the Same Basis as a Similar Admission Prior to That Date.

We have heretofore pointed out that there is no difference in law as to the resident status of the minor son of a Chinese merchant admitted at any time prior to December 17, 1943. We have also shown that the Immigration and Naturalization Service admits that the said sons admitted prior to July 1, 1924, are lawfully in the United States for permanent residence and eligible to be naturalized upon the basis of such entry record.

In an attempt to distinguish the case of *Cheung Sum Shee v. Nagle* (*supra*) and *Haff v. Yung Poy* (*supra*), Appellant fails to recognize that at the time said cases

were considered and, in fact, until December 17, 1943, persons of the Chinese race were not eligible to be naturalized. Naturally neither case touches upon the subject of residence for naturalization purposes. The *Shee* case is authority for the proposition that the Immigration Act of 1924 did not modify, abrogate, or in any respect affect the Treaty of 1880. The *Haff v. Yung Poy* case is authority for the proposition that the admission of a Chinese to the United States as the minor son of a resident Chinese merchant is an admission pursuant to the Treaty of 1880, and although admitted after July 1, 1924, the admission is for permanent residence.

Congress Granted the Privilege of Naturalization to All Chinese Aliens Lawfully Admitted to the United States for Permanent Residence.

Appellant argues that Congress in repealing the Chinese Exclusion Act and making persons of Chinese race eligible to naturalization did not contemplate that those admitted as the sons of merchants prior to December 17, 1943, would become citizens. The Senate Committee reports are cited as evidence wherein it is stated that a large number of the then 37,242 alien Chinese in continental United States have never been admitted for lawful permanent residence, and therefore many of this number would not be eligible for naturalization. Undoubtedly the statement and the conclusion are both true, and while we find no statistics showing the exact number of persons in the 37,242 who were admitted as sons of merchants, acquaintance with any group of resident Chinese indicates that the percentage is relatively small. Furthermore, the Hon. Edward J. Shaughnessy, in his article published in the U. S. Department of Justice, Immigration and Naturalization Service, Monthly Review, Vol. I, No. 7, April

1944, gives the real reason for the small number of alien Chinese in the group who would seek naturalization, when at page 6, he states:

> "The Chinese is an old population group; the median age for non-citizen Chinese males is 50.29—in 1940 the median age for the male population of the United States as a whole was 29.1. Undoubtedly, many of the older Chinese will not be able to satisfy the naturalization courts' so-called 'educational requirements' and will, because of their age, never be able to."

The entire alien Chinese population, as shown above, amounted to less than 1% of our total alien population at that time, and to a relatively smaller percentage when compared with our 130 odd millions. It is readily understood that the Senate Committee, knowing the small number of Chinese in the United States and the median age and customs pertaining to the group would state: "The number of Chinese who will actually be made eligible for naturaliaztion under this Section is negligible."

The Congress certainly intended to open the privilege of naturalization to all those who could meet the requirements of the law, which appellee herein has fully done.

Conclusion.

The trial court properly found that appellee had been lawfully admitted to the United States for permanent residence, and was therefore eligible to naturalization. The judgment and the order of the Court admitting him to citizenship should be sustained.

Respectfully submitted,

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Attorney for Appellee.