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.

APPELLANT'S REPLY BRIEF.

JAMES M. CARTER,
United States Attorney;

RONALD WALKER,
Assistant United States Attorney,
600 United States Postoffice and
Courthouse Bldg., Los Angeles (12),
Attorneys for Appellant.

BRUCE G. BARBER,
Chief, District Adjudications Division
Immigration and Naturalization Service
on the Brief.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Miscellaneous

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.

APPELLANT'S REPLY BRIEF.

Chinese Merchants Classified as "Non-Immigrants" Under the 1924 Immigration Act.

Appellee's argument is primarily centered on the proposition that it is undisputed that appellee's father was admitted for "lawful permanent residence" under the treaty and that the communicated status of appellee, although his admission occurred after the 1924 Immigration Act, is of equal legal standing. (Br. p. 3.)[1]

---

[1]The abbreviation "Br." when used herein refers to Appellee's Brief.

The authorities do not support this contention. (App. Br. pp. 28, 29, 34, 35, 36, 37.)[2]

It is true that the Supreme Court[3] held that the Chinese wives and minor children of merchants admitted prior to 1924 were "* * * entitled to enter in pursuance of a treaty * * *" and were not excluded by the 1924 Immigration Act for the reason that the immigration status of "merchant" as it existed prior to 1924 was under the Immigration Act of 1924, classifiable as "non-immigrant." This was a clear recognition by the Supreme Court that Chinese merchants admitted prior to the 1924 Immigration Act were regarded as holding an immigration status equivalent to the immigration status of "non-immigrant." The 1924 Immigration Act classified those aliens who were to be admissible for lawful permanent unrestricted residence as "immigrants" and "non-quota immigrants." The Supreme Court held that[4] *"an alien entitled to enter the United States 'solely to carry on trade' under an existing treaty of commerce and navigation is not an immigrant within the meaning of the Act, Section 3 (6), and therefore is not absolutely excluded by Section 13. * * * in a very definite sense they are specified by the act itself as 'non-immigrants.'"* (Emphasis added.)

Appellee erroneously concludes (Br. p. 10) that this Court[5] held that Yung Poy had "* * * legally entered

---

[2]The abbreviation "App. Br." when used herein refers to Appellant's Brief.

[3]*Cheung Sum Shee v. Nagle,* 268 U. S. 336, 45 S. Ct. 539, 69 L. Ed. 985.

[4]*Cheung Sum Shee v. Nagle,* U. S. p. 540.

[5]*Haff v. Yung Poy* (9th Cir.), 68 F. (2d) 203. The maintenance of the status of "merchant" provision of the 1917 Immigration Act, held not applicable to Chinese merchants, *Wong Sun Fay v. U. S.* (9th Cir.), 13 F. (2d) 67, 68.

the United States for permanent residence pursuant to the treaty." The question of whether or not Yung Poy was possessed of an immigration status equivalent to "lawful permanent residence" was not before this Court. This Court found that the status of "merchant" or "son of merchant" had been lost. The Supreme Court decision in the case of *Cheung Sum Shee v. Nagle, supra,* classifying "merchant" as a non-immigrant was cited by this Court. Yung Poy's right of admission was found to stem from that of his father who had entered the United States prior to 1924 and that since there was no provision making it a deportable offense under the prior acts of Congress for failure to maintain the status of merchant, this Court would not require the deportation of Yung Poy by reason of any of the provisions of the 1924 Act.

An alien may be lawfully admitted to the United States and remain here unlawfully.[6] The mere fact that the acts of Congress prior to the 1924 Act did not make it unlawful for a Chinese who had abandoned his mercantile status to remain in this country did not by implication clothe such Chinese with the immigration status of a "lawful permanent resident." Such Chinese was not made deportable under any of the prior laws for failure to maintain his mercantile status. Upon abandonment or loss of mercantile status such a Chinese was not held to acquire any other immigration status. The denial to a right of admission as the wife and minor children of a merchant was sustained by the Supreme Court where the Chinese husband-father after admission as a merchant,

---

[6]*Chung Yim v. U. S.* (8th Cir.), 78 F. (2d) 43, 46.

abandoned his mercantile status and became a laundryman.[7]

It is incontrovertibly established by the foregoing authorities that the immigration status of a Chinese merchant prior to 1924 was limited as to "purpose," and that such merchant never possessed an immigration status of greater legal efficacy than "non-immigrant" as that term is defined in the 1924 Immigration Act. Whether the admission occurred before or after the 1924 Immigration Act, Chinese merchants were not classed as permanent residents, but were admitted as a preferred class for commercial purposes, despite the exclusion of Chinese aliens, "to go and come of their own free will and accord." In the Immigration Act of 1924, Congress deliberately excluded treaty merchants from its designation of "immigrants"—those aliens coming for permanent settlement—and classified them with the "non-immigrants"—whose admission to the United States was limited as to "period of time" or "purpose."

Modification of the Treaty by the Amendment of July 6, 1932 to the Immigration Act of 1924.

Appellee (Br. p. 4) contends that the treaty with China was not modified or abrogated by any of the acts of Congress, either expressly or by implication, until the passage of the Act of December 7, 1943, repealing the Chinese Exclusion Acts. This contention is untenable. The Supreme Court has not had before it for construction the effect on the treaty of the amendment to the Immigration Act of 1924 by the Act of July 6, 1932.[8] Appellee was

---

[7]*Yee Won v. White,* 256 U. S. 399, 41 S. Ct. 504, 65 L. Ed. 1012; App. Br. p. 35, 36.

[8]Act of July 6, 1932 (47 Stat. 607; 8 U. S. C. 203).

admitted to the United States after the effective date of this amendment. (App. Br. p. 18, footnote 25.) The legislators very definitely had in mind the treaty in passing this amendment. To a certain extent, however, it appears that the amendment was for the purpose of codification of existing law as it had been interpreted by the Supreme Court. That design clearly appears stated in the Congressional Committee report on this legislation:[9]

> "The provisions of the section referred to (Sec. 3 (6) of the 1924 Act) have also been interpreted as applicable to the wives and minor children of treaty aliens, in line with the holding of the Supreme Court in Cheung Sum Shee v. Nagle (268 U. S. 336)."

The 1932 amendment made it necessary for a Chinese in order to qualify as a merchant to show that he was engaged in international trade between the United States and the country of which he was a citizen. It further limited admission of the children of a Chinese merchant to the *unmarried children under 21.*[10] Since this amendment in express terms does restrict the treaty, it would appear that the son, whose Chinese merchant father was admitted prior to 1924, was not entitled to admission solely on the basis of the treaty after the amendment supplying the statutory modification to the treaty found lacking under the decision in the case of *Cheung Sum Shee v. Nagle, supra.*

The question of whether a minor child who first applies for admission after the 1932 amendment as the son of a Chinese merchant admitted prior to 1924, would

---

[9]House Rep. 431, 72d Congress, 1st Sess. See also 75th Cong. Rec. 13840.

[10]App. Br. pp. 8, 9, footnotes 7, 8, and p. 18, footnotes 25, 26.

be entitled to admission if his merchant father were not engaged in international trade is not found to have been decided by the courts. The 1932 amendment is found to be construed not to require a merchant who entered prior to the amendment, and who temporarily visited in Canada for a few months, to establish upon his return that he was engaged in international trade.[11] In deciding that the Supreme Court held, in effect, in the *Cheung Sum Shee v. Nagle* decision, *supra,* that the treaty rights of Chinese merchants had not been affected by the Act of 1924, in a later decision the Court stated, "* * * I believe the treaty and the statute were construed together in that case, and that the Supreme Court did not intend to hold that the treaty rights of Chinese merchants had not been in any way affected by the Act of 1924."[12] A regulation of the State Department requiring that a merchant be engaged in international trade was construed as being unauthorized under a similar provision of a treaty with Japan.[13] This regulation, however, was promulgated prior to the 1932 amendment to the Immigration Act of 1924. In a decision involving the provision in the treaty with China relative to teachers, this Court[14] points out that "The Act of 1924, to some extent, circumscribes and limits the rights of students to be admitted, and limits the rights of teachers to professors of colleges * * *," and held that the rights of admission of a Chinese under the status of teacher was controlled and limited by the 1924 Immigration Act, and pointed out that Chinese mer-

---

[11]*Kaname Susuki v. Harris,* 29 F. Supp. 46.

[12]*U. S. v. Hughes,* 9 F. Supp. 792, 796.

[13]*Shizuko Kumanomido v. Nagle* (9th Cir.), 40 F. (2d) 42, 46.

[14]*Jeu Jo Wan v. Nagle* (9th Cir.), 9 F. (2d) 309, 310.

chants and their families were not excluded by the 1924 Act because no provision of that Act was in direct conflict with the treaty rights of such classes. This decision takes cognizance of the provisions of Sections 25 and 28(g) of the 1924 Act[15] which reflects a congressional intent to abrogate all laws, conventions and "treaties" relating to immigration, exclusion or expulsion of aliens inconsistent therewith. Article 4 of the treaty with China expressly provides for further legislation to regulate the admission of exempt Chinese and to minimize the opportunities for evasion of the exclusion laws.[16] The 1932 amendment to the 1924 Act does "circumscribe and limit" the treaty in question. This being so, it follows that Section 15 of the 1924 Act[17] and regulations thereunder,[18] requiring the maintenance of exempt status of aliens admitted after 1924 as non-immigrants, would be applicable to appellee even though his merchant father was admitted prior to 1924. The 1932 amendment applies to all nationals of foreign countries entering the United States under similar treaties of commerce and navigation. Any of the treaties containing provisions inconsistent with the 1924 Act and specifically provisions inconsistent with the 1932 amendment relating to merchants were abrogated as contemplated by Sections 25 and 28(g) of the 1924 Act. The decision in *Cheung Sum Shee v. Nagle*[19] decided only the narrow question of whether the omission in Section

---

[15]Secs. 25 and 28(g), Act of 1924 (43 Stat. 166; 8 U. S. C. 223, and 43 Stat. 168-169; 8 U. S. C. 224).

[16]*U. S. ex rel. Lam Shin Hing v. Corsi,* 4 F. Supp. 591, 593.

[17]Section 15, Act of 1924; 8 U. S. C. 215.

[18]App. Br. pp. 10, 11, 12, 21, footnotes 11, 12, 32.

[19]*Cheung Sum Shee v. Nagle,* 268 U. S. 336, 45 S. Ct. 539, 69 L. Ed. 985.

3 (6) to mention the wives and children of merchants and the use of the words "solely to carry on trade" and the language contained in Sections 13(c) and 5 of the 1924 Act showed any "congressional intent absolutely to exclude" the Chinese wives and children of merchants. The Immigration officials refused admission without reference to the provisions of Sections 25 and 28(g) of the 1924 Act,[20] but solely on *"the inhibition * * * found in paragraph (c) of section 13 and that portion of section 5 which reads * * * 'An alien who is not particularly specified in this act as a nonquota immigrant or a nonimmigrant shall not be admitted as a nonquota immigrant or a nonimmigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration."* The decision further recites that the rule in the *Mrs. Gue Lim* case *"* * * was not unknown to Congress when considering the * * *" 1924 Immigration Act.* The express mention of wives and minor children of merchants was not included in the wording of the treaty. The authority for their entry nevertheless existed by implication as stated in the *Mrs. Gue Lim* case. *It was, therefore, unnecessary for Congress by express terms to mention them in the enactment of Section 3 (6) of the 1924 Act providing for the admission of merchants.* "Merchants," their wives and children are then *"In a very definite sense * * * specified by the Act itself as 'nonimmigrants.'"* It was unnecessary for the Court to consider Sections 25 and 28(g) of the 1924 Act, *because it found no intention*

---

[20]Secs. 25 and 28(g), 1924 Act (43 Stat. 166, 168-169; 8 U. S. C. 223, 224). Also see *U. S. v. Hughes*, 9 F. Supp. 792, 796.

on the part of Congress to exclude from the use of the term "merchant" in Section 3 (6) of the 1924 Act, the "implicative" rights to admission of the wives and children that had existed in the use of that term for "25 years." This construction harmonizes the 1924 Act with the treaty. Otherwise, the Court would have been compelled to have given some expression to reasons why the provisions of Sections 25 and 28(g) of the 1924 Act did not in clear and unmistakable language make excludable any alien although admissible under any "treaties" "* * * if he is excluded by any provisions of * * *" the 1924 Immigration Act. This is the rationale of the decision in the *Cheung Sum Shee v. Nagle* case.

Appellee contends that the right of wives and minor children to join after 1924 a merchant admitted prior to the effective date of the 1924 Act, is determinable solely on the laws that existed at the time of the merchant's admission. The 1924 Act provided an alien, in addition to being admissible under any "treaties," must also comply with all of the requirements for admission under the Act itself. The contention of appellee, if sustained, would result in the setting up of a class of aliens who after 1924 could enter and re-enter without regard to the express provisions of the 1924 Act.

The character of the Immigration status of "merchant" in relation to naturalization is significantly shown in the decision of a court[21] in denying naturalization to a native born citizen of the United States upon her return to this Country under the status of wife of an Italian treaty

---

[21] *In re Pezzi*, 29 F. (2d) 999, 1002.

merchant following loss of her citizenship by marriage in 1920:

> "Has the petitioner here met the requirements of the law? I think not. The petitioner has no status in the United States, other than being the wife of her husband. Her husband's status is defined by the provisions of section 3, of the Quota Act of 1924 and the treaty of commerce and navigation between the United States and Italy of 1871 (17 Stat. 845). This treaty defines the status of 'Italian citizens in the United States and citizens of the United States in Italy.' Article 1. It clearly contemplates the temporary stay of the merchants of one country in the territory of the other. It accentuates the fact that the citizen of one counrty is entitled to certain rights and privileges in the other country, including the privilege of being accompanied by wife, minor children, servants, etc., solely and wholly because such citizen of one country is in the other country temporarily and for no other purpose than to carry on trade. There is not the slightest thought involved in the language of the treaty that the citizen of one country, residing in the other country as a treaty merchant, is laying the foundation for becoming a citizen of the other. Everything in the treaty negatives that thought."

Judicial expression again classes merchants with those aliens whose sojourn in this country is of a temporary character:[22]

> "* * * aliens who seek admission to the United States are divided into three classes: nonimmigrants, nonquota immigrants and quota immigrants, 8 U. S. C. A. Secs. 203, 204, 205. Nonimmigrants are al-

---

[22] *U. S. v. Carusi,* 72 F. Supp. 195.

lowed admission under a policy of promoting good relations among the peoples of the world; *e.g.*, the two most numerous groups in this class are alien seamen, members of a crew, and alien visitors, on business or pleasure. Petitioner, a treaty merchant, falls into this class, and was entitled to enter the United States solely to carry on trade authorized by the provisions of a treaty of commerce and navigation with the country of which he was a national."

Certain Actions of the Immigration and Naturalization Service Not of Binding Effect on This Court.

Appellee contends that the Government holds "an inconsistent view" (Br. p. 13) because of certain actions of the Immigration and Naturalization Service with respect to applications of Chinese merchants for citizenship where admission occurred prior to July 1, 1924.

Chinese admitted as merchants prior to the effective date of the basic naturalization act of June 29, 1906, like other aliens, are not required to file with their applications for naturalization, certificates showing lawful admission for permanent residence. It is only necessary that such aliens establish that the residence acquired prior to 1906 has not been abandoned. Since Chinese became racially eligible for naturalization on December 17, 1943, it is true that in a very limited number of cases no opposition has been made to the naturalization of Chinese admitted as "merchants" subsequent to 1906 and prior to July 1, 1924. Such action over a brief period of time in a limited number of cases cannot have any binding effect in the instant determination. It only emphasizes the need for judicial clarification for the guidance of the Immigration and Naturalization Service as that problem may be relevant to the present issue.

Relevancy of Immigration Status as a Basis for Naturalization.

Appellee raises the further contention that none of the cases relied on by the Government as listed in his brief (Br. pp. 10, 11, 12) are in point, because none of the cases relate to an admission pursuant to the treaty with China.

Appellee's qualifications for naturalization founded on the immigration status of "son of a merchant" must be measured in the terms of the nationality Act in deciding whether he has been "lawfully admitted for permanent residence" as that phrase is used and construed under the naturalization laws. Residence which may be deemed lawful for immigration purposes may not meet the rigid tests for naturalization.[23]

---

[23]*In re Sinmiolkjier,* 71 F. Supp. 553; App. Br. p. 23. See also 8 C. F. R. 110.38, which provides:

> "Citizens of Canada or Newfoundland who entered the United States across the Canadian border prior to October 1, 1906, and citizens of Mexico who entered across the Mexican border prior to July 1, 1908, shall, for re-entry purposes, be presumed to have been lawfully admitted even though no record of their original entry can be found. [Sentence amended: effective October 17, 1945; published 10 F. R. 12956, October 18, 1945.] Aliens who entered the Virgin Islands of the United States prior to July 1, 1938, shall, for purposes of re-entry at any port of entry, be presumed to have been lawfully admitted for permanent residence even though no record of their original entry can be found or even though a record of their admission as nonimmigrants is found. Any alien within the terms of this section shall upon application for readmission to the United States be inspected and be subject to the requirements of the immigration laws and regulations the same as if the original presumed lawful entry was by recorded admission for permanent residence; and if no record exists of a re-entry since such presumed lawful entry, the alien shall be regularly manifested for the purpose of recording the application for re-admission. Nothing in this section shall be deemed to preclude

The rule of construction in naturalization matters is succinctly stated by Mr. Justice McReynolds as follows:[24]

> "An alien who seeks political rights as a member of this nation can rightfuly obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare."

Chinese as well as other aliens whose residence in this country began prior to the effective date of the Immigration Act of 1924, upon regularizing their entries through registry proceedings,[25] may then meet the requirements for naturalization without departing and re-entering the United States. The naturalization laws specifically provide that a registry of entry when so created is sufficient.[26] The appellee cannot avail himself of this privilege since his admission occurred subsequent to July 1, 1924. He

---

an alien qualified to do so from applying for registry under section 328(b) of the Act of October 14, 1940 (54 Stat. 1152; 8 U. S. C. 728b)."

It is further provided in 8 C. F. R. 363.7 that:

> "No certificate of arrival shall be issued in behalf of an alien on the basis of an original entry which under the provisions of Sec. 110.38 of this chapter is presumed for re-entry purposes to have been a lawful admission for permanent residence. A certificate of arrival will be issued on the basis of the re-entry of such an alien where there is a manifest record showing that the entry was by lawful admission for permanent residence. [Section added: effective January 9, 1945; 10 F. R. 447, January 11, 1945.]"

[24]*U. S. v. Ginsberg,* 243 U. S. 472, 37 S. Ct. 422, 61 L. Ed. 853.

[25]Sec. 328(b), Nationality Act of 1940 (54 Stat. 1152; 8 U. S. C. 728).

[26]Sec. 328(c), Nationality Act of 1940 (54 Stat. 1152; 8 U. S. C. 728). See also App. Br. p. 37.

may, however, have created a registry of entry for naturalization purposes by departing from the United States and re-entering under the status of a preference quota immigrant by reason of his marriage to an American citizen subsequent to July 1, 1932.[27]

Respectfully submitted,

JAMES M. CARTER,
United States Attorney;

RONALD WALKER,
Assistant United States Attorney,
Attorneys for Appellant.

BRUCE G. BARBER,
Chief, District Adjudications Division
Immigration and Naturalization Service
on the Brief.

---

[27]Sec. 6, 1924 Immigration Act (43 Stat. 155-156; 47 Stat. 656; 45 Stat. 1009; 8 U. S. C. 206).