No. 15719

United States
COURT OF APPEALS
for the Ninth Circuit

WILLIAM P. ROGERS, as Attorney General of the United States of America,

Appellant,

v.

URHO PAAVO PATOKOSKI,

Appellee.

Appeal from the United States District Court for the District of Oregon.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

This case was brought under the provisions of the United States Nationality Act of 1952 for the purpose of securing a judgment declaring appellee a national and citizen of the United States of America.

Appellee's father, Matti Niemela, was a citizen of the United States of America by naturalization in 1894. In either 1896 or 1897, Matti Niemela returned to Finland from the United States, and was married in Finland. Appellee was born in Finland on July 19, 1907, as issue

of such marriage. Appellee's father did not return to the United States, and died in Finland in 1928. Appellee's mother died in Finland in 1945. Appellee lived in Finland from the date of his birth until 1947, when he and his family came to the United States.

Appellee was married in Finland, and three sons, now aged 20, 18 and 15 years, have been born as issue of such marriage.

Although appellee knew that his father was a naturalized citizen of the United States of America, the citizenship of the appellee was not discussed in the family circle and appellee did not know he was a citizen of the United States by birth. Appellee's home in Finland was approximately 500 miles from the nearest United States Consul's office at Helsinki.

Appellee served in the Finnish Army on three occasions: May, 1928, to May, 1929; October, 1939, to July, 1940; and June, 1941, to October, 1944. All of such service was under the conscription law of Finland.

Appellee voted in one election in Finland, in 1946. All persons in Finland who had the privilege were urged to vote at that election to prevent the Communists from gaining control of the Finnish government.

Among appellee's mother's personal effects, after her death, was the naturalization certificate issued to his father. Appellee brought the certificate with him when he came to the United States, and turned it over to the Immigration and Naturalization Service in Portland, Oregon, at a hearing. Some time later he was

informed by the Immigration and Naturalization Service that he had been a citizen of the United States by birth, but had lost his citizenship by taking an oath of allegiance to the Finnish government upon his first entry into the military service of that government. From the time appellee knew he was a citizen of the United States by birth, he has contended he has never lost such citizenship by expatriation.

SUMMARY OF ARGUMENT

I.

The government suggests that appellee's citizenship by birth and up to 1941 is based on a "slender" or "tenuous" claim. However, the government admits that appellee was a citizen up to 1941.

II.

The government contends that appellee lost his citizenship under Sec. 401 (c) of the Nationality Act of 1940 by his service in the Finnish Army from June, 1941, to October, 1944.

Since appellee held dual citizenship, his conscription into the Finnish Army establishes prima facie that his service was involuntary, and the burden of proving voluntary service falls on the government. The government has failed to carry such burden here. Under such circumstances appellee has not expatriated himself. In this kind of case, instituted for the purpose of depriving appellee of the precious right of citizenship previously

conferred, the facts and the law should be construed as far as is reasonably possible in favor of the citizen. See Perkins v. Elg, 307 U.S. 325, 337, 83 L ed 1320, 1327; Schneiderman v. United States, 320 U.S. 118, 122, 87 L ed 1796, 1800; Nishikawa v. Dulles, 356 U.S. 129, 135, 2 L ed 2d 659, 664; Lehman v. Acheson, 206 F. 2d 592; Yoshida v. Dulles, 116 F. Supp. 618; and Okimura v. Acheson, 111 F. Supp. 303.

The majority of the cases support the view that military service for a foreign state under conscription laws under circumstances where protest would be useless is involuntary, and that military service for a foreign state will not result in expatriation unless such service is clearly shown to have been voluntary. See Mandoli v. Acheson, 344 U.S. 133, 97 L ed 146; Acheson v. Maenza, 202 F. 2d 453; Okimura v. Acheson, 111 F. Supp. 303; Terada v. Dulles, 121 F. Supp. 6, Lehman v. Acheson, 206 F. 2d 592; Yoshida v. Dulles, 116 F. Supp. 618; Genshimer v. Dulles, 117 F. Supp. 836; Riccio v. Dulles, 116 F. Supp. 680; and Tomasicchio v. Acheson, 98 F. Supp. 166.

III.

The government further contends that since appellee voted in a political election in Finland in 1946, he lost his United States citizenship under Sec. 401 (e) of the Nationality Act of 1940. Courts that have considered this question under like circumstances as existed here have concluded that voting in a political election in a foreign state does not cause loss of United States citizenship for the reason that voting under such circumstances is voting under legal compulsion amounting to

duress. See Tomasicchio v. Acheson, 98 F. Supp. 166; Uyeno v. Acheson, 96 F. Supp. 510; Furuno v. Acheson, 106 F. Supp. 775; Naito v. Acheson, 106 F. Supp. 770; and Okimura v. Acheson, 111 F. Supp. 303. Furthermore, a person holding dual citizenship may have and exercise rights of nationality in two countries and be subject to the responsibilities of both. See Kawakita v. United States, 343 U.S. 717, 96 L ed 1249; Okimura v. Acheson, 111 F. Supp. 303; and Riccio v. Dulles, 116 F. Supp. 680.

IV.

The government also contends that the lack of knowledge on the part of the appellee of his status as a citizen of the United States does not prevent his expatriation as such citizen, if appellee has *voluntarily* committed acts which cause expatriation. The trial court held that since the appellee did not know he was a citizen of the United States at the time he did the things which have been alleged cost him his citizenship, he cannot be held to have given up something he did not know he had. The trial court's reasoning was that "expatriation" and "abandonment" are used interchangeably in the decisions bearing on this issue and that to constitute expatriation or abandonment there must be an "intentional relinquishment of a *known* right."

Appellee in this case did not *voluntarily* perform military service for a foreign state, or *voluntarily* vote in a political election in a foreign state, as has been recognized in many decisions hereinbefore cited, but more than this, he did not *know* he was a citizen of the United States when he performed such military service

and when he voted. In the cases cited by the government the citizen knew he was a citizen when he did the act of expatriation, but pleaded ignorance of the law as to the effect of his act. What the trial court said in effect was: a person cannot give up something he does not know he has—he has to have an opportunity to claim what he has after he learns it is his.

ARGUMENT

I. Appellee Was a United States Citizen by Birth

Since the government admits that appellee was a citizen of the United States by birth and up to his entry into the military service of the Finnish government in 1941, no argument is deemed necessary on this point.

In its argument the government has said that appellee first asserted a right to United States citizenship after deportation proceedings were commenced against him in this country. This supports the contention of the appellee that he did not know he was a citizen of the United States until he had been so advised by the Immigration and Naturalization Service subsequent to a hearing at which he had produced his father's certificate of naturalization, and that since such time (April 20, 1949) he has contended he was a citizen of the United States.

II. Expatriation Did Not Result from Military Service

Whether appellee's military service in the Finnish Army from June, 1941, to October, 1944, was voluntary or not must be determined from all the circumstances

attendant to such service, including the factor of his lack of knowledge that he was a citizen of the United States. The issue of appellee's military service was covered at the trial, both on direct and cross-examination. The trial court made no finding whether such service was voluntary or involuntary, and did not assume that such service was voluntary as appellant argues.

The conscription law of Finland, as in evidence here, was in effect during each of the times that appellee was in military service in Finland. As appears from the exhibit (Ex. 5) the 1950 codification was merely a recodification of the prior existing law, and a prior recodification in 1932 was of the same prior existing law which had been in effect since 1923.

Military service in the Italian, German and Japanese Armies under conscription laws in those foreign states has been ruled as being prima facie involuntary. In Mandoli v. Acheson, supra, the government was forced to abandon its contention that military service by a citizen in the Italian Army in 1931 resulted in expatriation, because the Attorney General of the United States had ruled that such service in the Italian Army, by one similarly situated could only be regarded as having been taken under legal compulsion amounting to duress! The Attorney General said (quoting from Mandoli v. Acheson, supra, page 135), "The choice of taking the oath or violating the law was, for a soldier in the army of Fascist Italy, no choice at all." To the same effect is Genshimer v. Dulles, supra, involving a citizen having dual United States and German citizenship, and

Nishikawa v. Dulles, supra, involving a citizen having dual United States and Japanese citizenship. There are numerous other cases to the same effect involving citizens having dual United States and Japanese citizenship.

Since the decision in Perkins v. Elg, supra, as affirmed in Nishikawa v. Dulles, supra, it has been the law that no conduct of the citizen results in expatriation unless the conduct is indulged in voluntarily. Military service for a foreign state by a citizen holding dual citizenship in the United States and such foreign state is prima facie involuntary, and it becomes the burden of the government to prove by clear, convincing and unequivocal evidence that the military service was voluntary. Here, all of the evidence is to the contrary. Appellee was first called to serve before he became of age, and again during the Finnish-Russian Winter War, and lastly during the 2nd World War. All of such service was under the conscription law. Every able-bodied man in Finland had to serve. If a man didn't serve, he would be put in prison (Ex. 5; R. 57, 90). Appellee sought no advancement in the military service—whatever advancement he received was due to his education, his experience in construction work, and length of service. Although Finland was not a totalitarian state, its manpower was small, and severe penalties accompanied refusal to serve. Underlying all these facets of the situation, appellee was a citizen holding dual citizenship, without knowledge that he was a citizen of the United States, and without any way to get out of Finland after 1939, when the 2nd World War really began, and

because of his dual citizenship, owing a duty to Finland to serve in its military service, if called upon.

Obviously, the government has failed to sustain the burden of proof.

III. Expatriation Did Not Result from Voting

Voting by dual citizens, under similar circumstances as here, has been held to be voting under duress—not necessarily duress resulting from physical force or threats, but, as said in Uyeno v. Acheson, supra, at page 517, "there may be a type of public coercion which renders an act involuntary, *although it does not stem from the use of force.*" (Emphasis by the court). The same case, at page 519, draws a distinction between persons given a deliberate choice between acts which express allegiance to the United States or allegiance to a foreign state, who makes a free choice, *with full knowledge* (emphasis ours), and who should, under the circumstances be held to its consequences, and persons without any knowledge of the ways, laws, customs or privileges of the United States—who are citizens of the United States by birth, but have never lived there—who, under public pressure, are urged to vote, and because of such circumstances cannot be said to have acted voluntarily.

Appellee testified (R. 57) that in order to prevent the Finnish Communists and Russian Communists from taking over the Finnish government right after the close of the 2nd World War, everyone who had the privilege was asked to vote, and election propaganda required it, and that was the reason he voted. It must be

remembered that at this time he did not yet know he was a United States citizen, and had no knowledge of his rights as such.

The government at one time acquiesced in the view that appellee's voting in Finland would not have affected his United States citizenship, as expatriation under Sec. 401 (e) of the Nationality Act of 1940 cannot be brought about unless the voting was voluntary and free from legal compulsion or duress. (Ex. 6, Order of Immigration and Naturalization Service dated April 20, 1949, page 3). The testimony of the appellee at the hearing which preceded such order convinced the Immigration and Naturalization Service that appellee voted under legal compulsion.

In Kawakita v. United States, supra, where the citizen was being tried on a charge of treason with his life at stake, and where he was urging that he had renounced his United States citizenship in favor of Japanese citizenship, the Supreme Court of the United States acknowledged the doctrine of dual nationality, and held that the accused had not expatriated himself by various acts, including actual renunciation of United States citizenship, which were voluntary.

In Riccio v. Dulles, supra, the citizen (who held dual citizenship in the United States and Italian government) was conscripted into the Italian Army while a minor, was required to take an oath of office, was called again into military service in 1939, and voted in Italian elections in 1949. He made no formal protest to military service or the oath of allegiance. The court

said (at page 682): "There cannot be expatriation because of the confirmation of these acts (military service, taking oath of allegiance and voting) unless the intention to relinquish citizenship was clear. 'Expatriation is the voluntary renunciation or abandonment of nationality and allegiance' (citing Perkins v. Elg, supra), and 'proof to bring about a loss of citizenship must be clear and unequivocal.' Common knowledge of conditions prevailing in Italy at the times in question lends credence to plaintiff's testimony that he acted as a result of duress."

Appellee submits that upon application of the test of voluntariness, it is apparent his voting took place under circumstances amounting to compulsion and legal duress.

IV. Appellee's Actions Without Knowledge of His Rights Did Not Result in Expatriation

The government argues that since appellee knew that his father was a citizen of the United States that appellee must have known he had some derivative rights and should be charged with knowledge of such rights. It must be borne in mind, however, that we are dealing with a man who had never been in the United States, who had no knowledge of our customs, laws or mores, who had never been taught to stand up for his own rights, and who had never known, until the Immigration and Naturalization Service in the United States, in 1949, told him so, that he was a United States citizen. Appellee grew up in the country which had conscription long before the United States had it; he was taught to

serve and endure in silent compliance with the laws and requirements of superiors. He lived a long distance from the nearest American Consul. When at long last, after the 2nd World War, he had an opportunity to come to the United States as an immigrant, which he could have done by waiting six more months, he learned that he was on a list of alleged war criminals wanted by the Russian government (R. 55, 56) and he therefore decided to leave Finland as quickly as possible and obtained a student visa. He brought with him a document which he thought might be important—his father's certificate of naturalization. He applied for an extension of his visa, and after a long period of time, this was denied. A deportation hearing was then held, and at this hearing the certificate was handed to the Immigration and Naturalization Service hearing officer. Later, appellee was told he had been a citizen but had lost his citizenship by taking an oath of allegiance to the Finnish government. This the government now concedes was erroneous, as appellee was a minor when he took such oath. Private bills were introduced in Congress for the relief of appellee and his family. One of the bills was passed by the Senate but died in the sub-committee of the Judiciary Committee of the House. Appeals under all applicable provisions of the law to the Immigration and Naturalization Service resulted in denials of relief. This case under the Nationality Act was instituted as a last measure. After a hearing on the merits, the trial court found that there was no intentional abandonment of United States citizenship by appellee by any of the alleged acts of expatriation committed by appellee be-

cause he didn't know he was a United States citizen and therefore couldn't have intended to lose something he didn't know he had. Analogous situations, so well established that no citations are deemed necessary, are: Limitations of actions based on fraud will not run until the fraud is discovered; persons under an incapacity or disability will not be held to strict performance as to time, until the incapacity or disability is removed; buyers are usually afforded an opportunity to inspect before they are bound to buy; marriages may be annulled where one party doesn't know that the other was unable to contract marriage, even though the marriage has been consummated and the incapacity isn't discovered until later.

The government contends that a citizen can lose his citizenship even though he does not intend to do so and cites four cases in support of such contention. A close examination of such cases, however, reveals that in each of the cases the citizen committed a *voluntary* act of expatriation, and that in each instance the citizen *knew* that he was a citizen of the United States. In this case, appellee did not know he was a citizen of the United States when he committed the acts which the government claims resulted in his expatriation as a United States citizen, and furthermore neither his military service nor the one act of voting were voluntary, but were committed under legal compulsion. This is not a situation where appellee was ignorant of the law —it is a situation where he did not know he had a birthright. Surely the law protects the innocent.

CONCLUSION

The mere fact that appellee was born in Finland, rather than the United States, does not make his claim to United States citizenship tenuous, or slender, as asserted by the government, nor does it make his citizenship any less dear to him than if he were a native-born citizen. The government has admitted that appellee was a citizen of the United States by birth. Before appellee knew of this citizenship, through no voluntary act on his part, and solely through happenings that could occur to anyone similarly situated, two things occurred which the government says cost him his citizenship. There is no claim that appellee or his family are not worthy of citizenship, or that they have committed acts which obviously would make them unworthy of citizenship. As a person holding dual citizenship (although he did not know of one) appellee's military service and voting were prima facie involuntary, and the government has failed to prove by a preponderance of clear, convincing and unequivocal evidence that he has expatriated himself. In addition, appellee could not give up something he did no know he had, until he was possessed of such knowledge, and after he learned he was a citizen of the United States he has always claimed such citizenship and has done nothing which would forfeit it. A person who has had to fight for his citizenship as strongly as the appellee, and who obviously deserves it as much as he does, should not be denied such citizenship on a basis as thin as that of the government's in this case.

It is respectfully submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

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