Golden Gate University Law Review

Volume 22
Issue 1 *Ninth Circuit Survey*

Article 16

January 1992

Immigration Law - Price v. INS: Requiring Resident Alien Seeking Citizenship to List All Memberships and Affiliations Does Not Violate First Amendment

Stuyvesant Wainwright IV

IMMIGRATION LAW

SUMMARY

PRICE v. INS: REQUIRING RESIDENT ALIEN SEEKING CITIZENSHIP TO LIST ALL MEMBERSHIPS AND AFFILIATIONS DOES NOT VIOLATE FIRST AMENDMENT

I. INTRODUCTION

In *Price v. United States Immigration and Naturalization Service*,[1] the Ninth Circuit held that the United States Attorney General did not exceed his statutory authority by requiring a resident alien petitioning for naturalization to state past and present memberships in any and all organizations.[2] The court concluded that the exercise of this authority did not violate petitioner's First Amendment right of association because a resident alien's constitutional protection may be limited[3] and invoke only narrow judicial review.[4]

II. FACTS

John Eric Price is a resident alien who petitioned for naturalization in 1984.[5] Question 18 on the application to petition

1. 941 F.2d 878 (9th Cir. 1991) (per Beezer, J.; the other panel members were Singleton, J., United States District Judge for the District of Alaska sitting by designation, and Noonan, J., dissenting).
2. *Id.* at 882.
3. *Id.*
4. *Id.* at 884.
5. Price v. United States Immigration and Naturalization Serv., 941 F.2d 878, 879 (9th Cir. 1991). Appellant John Eric Price is a United Kingdom national who has lived and worked in this country since he was granted lawful resident alien status in 1960. *Price* at 879.

asked Mr. Price to list his memberships in any and all organizations.[6] Mr. Price completed the entire application with the exception of Question 18, which he responded to with a legal brief contending that the question violated his First Amendment right to freedom of association.[7]

When read the text of Question 18 at the Further Preliminary Hearing, Price told the examiner that he had no foreign military experience, that he had been a member of an organization, and that he refused to answer further questions regarding his association with any group on the grounds that the questions were both "overbroad" and violative of his First Amendment rights.[8] At this hearing and at an earlier hearing, as well as on the application to petition for naturalization, Price swore under oath that he had never been a communist, nor had he ever in any manner advocated, taught, or supported communism.[9] Price also swore that he had never been a member or affiliate of any organization in which membership or participation would automatically preclude an alien from naturalization.[10]

---

6. Question 18 reads: "List your present and past memberships in or affiliation with every organization, association, fund, foundation, party, club, society or similar group in the United States or in any other country or place, and your foreign military service. (If none, write 'None.')." *Price* at 879.

7. *Id.*

8. *Id.* Price refused to answer the following questions: "Are you now or have you ever been a member, or are you now affiliated, or have your ever been affiliated with any organization, association, fund, foundation, party, club, society or similar group in the United States or in any other country or place?"; "Are you now, or have you ever been, in the United States, a member of any organization in the United States?"; "Have you been a member of any organizations outside the United States?"; "Have you ever been a member of a political organization in the United States?"; "Were you ever a member, outside of the United States, of any organization that ... is or was political?; Are you now or have you ever been a member of any association, fund, foundation, party, club, society or any similar groups?"; and "Have you ever been affiliated with any organization, political or nonpolitical, in the United States?". *Id.* at 879, n.1.

9. *Price* at 879. On the application to petition Price denied ever being a member of the Communist Party, or endorsing the interests of communism. *Id.* During a preliminary examination before an immigration officer Price avowed that he had never been a member of any organization proscribed by the Immigration and Nationality Act, nor had he engaged in any acts therein prohibited. *Id.* At a Further Preliminary Examination, Price again swore under oath that he had never been a member of the Communist Party or an advocate or supporter of its aims and goals. *Id.* at 879-80.

10. *Price* at 880. Mr. Price was given 8 U.S.C. § 1424(a) (1988) which explains that no person shall be naturalized who is a member of, or is in some way affiliated with, any organization which advocates or publishes material advocating anarchism, communism, totalitarianism, or the violent overthrow of the United States government.

Based on Price's refusal to answer Question 18, the district court denied the petition for naturalization on the recommendation of the Immigration and Naturalization Service (INS).[11] Price appealed on the grounds that the Attorney General does not have the statutory authority to ask Question 18, and that Question 18 violates the petitioner's First Amendment right to freedom of association.[12]

III. COURT'S ANALYSIS

A. MAJORITY

The Ninth Circuit first considered whether Question 18 exceeded the authority granted to the Attorney General by Congress to implement the naturalization statutes.[13] The court then considered whether exercise of that authority unconstitutionally violated petitioner's right to freedom of association.[14]

1. *Statutory authority to demand membership list*

The court found that Congress authorized the Attorney General to establish the breadth and depth of the examination into a petitioner's eligibility for citizenship.[15] The scope and intensity of the investigation, however, must be limited to the applicant's "residence, physical presence in the United States, good moral character ... and other qualifications to become a naturalized citizen as required by law."[16] Within these set limits, the court determined that the Attorney General is granted broad power to make inquiries provided the inquiries are relevant to the naturalization requirements established by Congress.[17]

Having established that the Attorney General has broad statutory authority to make inquiries of prospective citizens,

11. *Price* at 880.

12. *Id.*

13. Price v. United States Immigration and Naturalization Serv., 941 F.2d 878, 881 (9th Cir. 1991).

14. *Id.* at 882-85.

15. *Id.* at 881. The court cited 8 U.S.C. § 1443(a), which both grants this authority and establishes its limits.

16. *Price*, 941 F.2d at 881.

17. *Price*, 941 F.2d at 881. The court cites 8 U.S.C. § 1445(a) which grants the Attorney General authority to require a naturalization applicant to attest to "all facts which in the opinion of the Attorney General may be material to the applicant's naturalization." *Price*, 941 F.2d at 881.

the Ninth Circuit gave three reasons why the Attorney General did not exceed this broad authority when demanding a list of organizations of which Price was a member or affiliate.[18]

First, although Price contended that the § 1424(a) list given to him at the Further Preliminary Hearing was intended to be an exhaustive list of the proscribed organizations,[19] the court found no legislative history to support petitioner's position.[20] The court agreed with the INS that only by examining all organizations in which a petitioner was ever a member could the Attorney General determine whether a petitioner had been a member of a proscribed organization.[21]

Second, the court stated that the INS is entitled to know of any facts bearing on the petitioner's eligibility for citizenship.[22] The court considered it "completely reasonable to assume knowing the organizations with which a petitioner is associated will be relevant to one or more of the requirements of citizenship."[23]

Third, the court noted that INS decisions frequently implicate questions of foreign relations.[24] Therefore, the judicial deference to agency decisions in administrative contexts applies with particular force to the INS.[25]

---

18. *Price*, 941 F.2d at 881-82.

19. *Id.* at 881. *See supra* note 10. The list includes organizations such as the Communist Party of the United States and the Communist Political Association. *Id.* at 880.

20. *Price*, 941 F.2d at 881.

21. *Id.* at 881. The INS' position was that if a petitioner was unaware that an organization was a communist front, or wrongly believed that an organization was not the type prohibited under § 1424(a), petitioner would not list that organization in response to an eligibility inquiry. *Id.* This, in turn, would leave the INS dependent on a petitioner's own determinations whether an organization was of the prohibited type. *Id.*

22. *Id.* at 882. *See also* Berenyi v. District Director, INS, 385 U.S. 630 (1967). The petitioner in this case was denied naturalization on the grounds that he was not a person of "good moral character" because he testified falsely in the preliminary naturalization proceedings when questioned regarding membership in the Hungarian Communist Party. *Id.* at 637. Further, "the Government is entitled to know of any facts that may bear on an applicant's statutory eligibility for citizenship." *Id.* at 638.

23. *Price*, 941 F.2d at 882.

24. *Id.*

25. *Id. See also* INS v. Abudu, 485 U.S. 94 (1988). The Supreme Court affirmed the Board of Immigration Appeal's denial of a motion to reopen deportation hearings, partially on grounds of deference to INS officials' sensitive political functions. *Abudu* at 110.

2. *Resident alien's constitutional right of association*

The court began its analysis by noting that aliens seeking admission to the United States for the first time have no constitutional rights.[26] The court then observed that once an alien enters the country and develops ties and connections, his constitutional protections change.[27] However, the court went on to state that the constitutional protection afforded resident aliens may be limited.[28] The court finished its initial observations by declaring that "the Court has historically afforded Congress great deference in the area of immigration and naturalization."[29]

The Ninth Circuit refused to apply strict scrutiny to the Attorney General's exercise of his authority to require petitioner to list all memberships.[30] Although the petitioner's right of freedom of association was implicated, this did not demand extension of the court's scrutiny.[31] Applying the *Kleindienst v. Mandel*[32] standard, the court decided limited judicial scrutiny

26. *Price*, 941 F.2d at 882. The court relied on Landon v. Plasencia, 459 U.S. 21 (1982) wherein the Supreme Court held that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Landon* at 32.

27. *Price*, 941 F.2d at 882. *See also* Bridges v. Wixon, 326 U.S. 135 (1945) (resident aliens have First Amendment rights).

28. *Price*, 941 F.2d at 882. The Ninth Circuit relied on the Supreme Court decision in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), which held that constitutional protections are not available for a nonresident alien. The Court stated that previous decisions granting constitutional rights and privileges to resident aliens were "constitutional decisions of this Court expressly according differing protection to aliens than to citizens, based on our conclusion that the particular provisions in question were not intended to extend to aliens in the same degree as to citizens." *Id.* at 273.

29. *Price*, 941 F.2d at 882. *See also* Fiallo v. Bell, 430 U.S. 787 (1977) (not for court to test legislative decision in special preference immigration statute). *See also* Mathews v. Diaz, 426 U.S. 67 (1976). "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Mathews* at 79-80.

30. *Price*, 941 F.2d at 883.

31. *Id.* The court relied on Kleindienst v. Mandel, 408 U.S. 753 (1972) for the appropriate standard of review in cases involving immigration and First Amendment matters. In *Kleindienst*, Ernest Mandel, a radical Marxist scholar, was denied a temporary visit visa to the United States. *Id.* at 759. Several United States citizens brought suit claiming Dr. Mandel's exclusion violated their First Amendment right to freedom to receive information and ideas. *Id.* at 759-60. The Supreme Court reasoned that since immigration is a Congressional policy-making area and its execution is an executive function, the court is granted only narrow judicial review. *Id.* at 769-70. The Court established a standard that forbids the court to look behind the exercise of an executive's decision on a facially legitimate and bona fide reason to exclude an individual from entering the country, nor test the decision by balancing its justification against First Amendment interests. *Id.*

32. *Kleindienst*, 408 U.S. at 770. *See supra* note 31 and accompanying text.

was appropriate and declined to balance the justification of the executive's power against the petitioner's First Amendment right because the power was exercised for a facially legitimate and bona fide reason.[33]

The Ninth Circuit stated that this limited standard of review was also appropriate because no alien has any right to naturalization unless all statutory requirements are met.[34] Furthermore, the burden of proving compliance with all statutory requirements for naturalization rests with the resident alien seeking citizenship.[35]

The Attorney General's decision that knowing the political associations of a resident alien seeking citizenship is relevant to eligibility is facially legitimate and bona fide.[36] Therefore, under limited judicial scrutiny, the question requiring a resident alien to list his memberships does not violate the First Amendment.[37] Failure to respond, however, is sufficient grounds for denying the petition for naturalization.[38]

B. DISSENT

In his dissent, Judge Noonan claimed that the Attorney General's exercise of the power to require an answer to Question 18 was unconstitutional because it chilled Price's right to freedom of association.[39] The dissent felt that resident aliens receive full constitutional protection once they

33. *Price*, 941 F.2d at 885. The court disagreed with Price's contention that *Kleindienst* did not apply because his case involved naturalization, rather than immigration. *Id.* at 883. The court stated that "naturalization decisions ... deserve at least as much judicial deference as do decisions about initial admission." *Id.* The court went on to say that although Price was entitled to expect the greatest degree of constitutional protection that could be afforded to him, as a non-citizen that protection certainly could not be considered greater than that afforded to the plaintiff/appellees in *Kleindienst*. *Id.* at 883-84.

34. *Id.* at 884. *See* Fedorenko v. United States, 449 U.S. 490 (1981) (held an alien who lied to procure admission and citizenship could be deported).

35. *Price*, 941 F.2d at 884. *See also Berenyi*, 385 U.S. 630, 637 (1967). The Supreme Court held that the burden of proof is on the applicant for naturalization "to show his eligibility for citizenship in every respect." *Id.* at 637. *See also supra* note 22.

36. *Price*, 941 F.2d at 885.

37. *Id.* at 884.

38. *Id.* at 885.

39. Price v. United States Immigration and Naturalization Serv., 941 F.2d 878, 885-886 (9th Cir. 1991). Judge Noonan likened the Immigration Service's treatment of resident aliens to pre-Abolition slaves in that resident aliens are "subject to treatment as second class people in the United States." *Id.* at 885.

lawfully enter and reside in the United States.[40] The dissent concluded that because resident aliens are granted constitutional protections, the Immigration Service can only exercise its broad statutory authority within its circumscribed constitutional limits.[41] The dissent felt that the majority construed this authority in such a way that it is unconstitutional.[42] Permitting the use of this authority to formulate questions intended to gauge something as immeasurable as a petitioner's character is impossible. The dissent felt the statute was unconstitutional because it both lacks rational purpose and infringes on the right of free association.[43]

IV. CONCLUSION

The Ninth Circuit concluded that the First Amendment rights of resident aliens petitioning for naturalization will not be balanced against the actions of an Attorney General exercising congressionally-granted statutory authority for what the court considers a facially valid and bona fide reason.[44] The Ninth Circuit stated that if the Supreme Court would not balance the First Amendment interests of United States citizens against an executive decision made with a facially legitimate and bona fide reason, the Ninth Circuit certainly cannot be expected to implement greater judicial scrutiny when an executive decision is made in regards to a resident alien.[45]

This holding establishes that the First Amendment rights of resident aliens petitioning for naturalization invoke only narrow judicial review. The practical effect of this ruling is that the

40. *Id.* The dissent quotes with approval Justice Murphy's concurrence in Bridges v. Wixon, 326 U.S. 135 (1946) that "once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders." Id. at 161. Justice Murphy's view was later adopted by the Supreme Court in Kwong Hai Chu v. Colding, 344 U.S. 590 (1953) (held that resident aliens enjoy constitutional protections).

41. *Price*, 941 F.2d at 886. The dissent suggests a more tailored question, directed at petitioner's involvement in any organization dedicated to the overthrow of the government or membership in any foreign military or intelligence service would serve the intended purpose. *Id.* Use of this question would inform the naturalization examiner of relevant information without being overly broad and inquiring into associations with no relation to governmental concerns. *Id.*

42. *Price* at 886.

43. *Id.*

44. Price v. United States Immigration and Naturalization Serv., 941 F.2d 878 (9th Cir. 1991).

45. *Id.* at 884.

Attorney General will be permitted to ask, and an applicant required to answer, any question which the Attorney General considers material to an applicant's eligibility for citizenship, provided the court can find a facially legitimate and bona fide reason for the question. Given the court's deference to Congress in the area of immigration and naturalization, the Attorney General could now conceivably ask almost any question of an applicant, under the guise of determining an applicant's "good moral character," without running afoul of the applicant's constitutional protections.

*Stuyvesant Wainwright IV**

* Golden Gate University School of Law, Class of 1993.