In the

Supreme Court of the United States

JOSEPH V. AGOSTO,

Petitioner,

v. No. 76-1410

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Washington, D. C.
February 28, 1978

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Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

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Washington, D. C.

Tuesday, February 28, 1978

The above-entitled matter came on for argument at 1:37 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ROBERT S. BIXBY, ESQ., Fallon, Hargreaves, Bixby & McVey, 30 Hotaling Place, San Francisco, California 94111; on behalf of the Petitioner

MARION L. JETTON, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Respondent

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-1410, Agosto v. Immigration and Naturalization Service.

Mr. Bixby, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT S. BIXBY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BIXBY: Mr. Chief Justice, and may it please the Court:

This case is here on certiorari to the United States Court of Appeals for the Ninth Circuit. A divided panel of that court affirmed a final administrative decision of the Board of Immigration Appeals finding that the petitioner in this case is an alien and that he is deportable from the United States.

The petitioner claims to be a citizen of the United States and that he was born here in 1924. When he was two and a half years of age, his mother sent him to Italy to live with her sister and brother-in-law. They later --

QUESTION: These facts are somewhat in dispute, are they not, that you are --

MR. BIXBY: They are in dispute. This is the petitioner's version of the facts, Your Honor.

QUESTION: His versions, is there some variety in his versions of the facts?

MR. BIXBY: There is some inconsistency here in the record, Your Honor, yes, there is. The administrative hearings were held over the course of several years in time and as far as dates are concerned, there are inconsistent dates as to when he claims birth in the United States, and so on.

QUESTION: Are there inconsistencies, as you have called them, in terms of what kind of documents were submitted by the petitioner?

MR. BIXBY: Yes. The only document that was submitted by the petitioner consisted of a birth certificate, Your Honor. This was a birth certificate that showed the petitioner to be born in the year 1921. We take the position, because of evidence that was -- testimony that was later adduced in the administrative hearings, and because of certain developments that the petitioner was not in fact born in the year 1921, that the birth certificate is not a birth certificate that relates to the petitioner's birth, that in fact the petitioner was born in the year 1924.

QUESTION: How did the -- I have some recollection of the Hearing Examiner characterized this document as fraudulent or something of that, in that way, is that correct?

MR. BIXBY: I don't think that is correct, Your Honor. I don't recall --

QUESTION: -- or some such thing?

MR. BIXBY: I don't recall anything in the record as

far as the hearing -- the immigration judge, the hearing officer in the administrative proceeding saying that the document was fraudulent. He did find that the document did not belong to the petitioner, did not reflect the petitioner's birth.

QUESTION: He presented a birth certificate that belonged to somebody else?

MR. BIXBY: Yes.

QUESTION: I suppose that is where the illusion -- the pejorative term came somewhere in the record?

MR. BIXBY: Yes, Your Honor, I believe so. The petitioner contends -- well, the petitioner's evidence attempts to establish that he lived in Italy until the year 1951 and that he then returned to the United States. The sister and brother-in-law of the petitioner's mother affiliated him in Italy. He lived with them until his return here in the year of 1951.

His primary proof in the administrative proceedings as far as birth in the United States is concerned consisted of the testimony of these two people who he lived with and who affiliated him in Italy and the testimony of his half-brother who was born and lives here in the United States.

The government's case rests on documents that were submitted in the administrative proceedings that purport to show that the petitioner was born in Italy in the year 1927.

As far as the testimony of the petitioner's witnesses

was concerned, the Immigration judge that conducted the deportation hearings rejected this testimony as being non-credible. He found that the petitioner was born in Italy and that he was an alien deportable and ordered that he be deported to Italy.

The Board of Immigration Appeals deferred to the Immigration judge on the question of credibility and affirmed his decision. In the board's decision, there is a statement which is a very important statement, I think, and that is that if believed, the petitioner's witnesses, the testimony of petitioner's witnesses clearly refutes the otherwise strong documentary case made by the government as to alienage.

The decision of the Board of Immigration Appeals was taken by petition for review by the Ninth Circuit. In the petition for review, the Ninth Circuit was requested to transfer the proceedings under section 106(a)(5) of the Immigration and Nationality Act to a district court for a hearing de novo on the question of citizenship. The Ninth Circuit declined to do this on the ground that the petitioner had not presented a colorful claim to U.S. citizenship in its administrative proceedings.

Now, the question as presented by this case is a question that has not yet, has never heretofore been considered by this Court, and that is the proper interpretation of section 106(a)(5) of the Immigration and Nationality Act. This is part of a large section, section 106, that was enacted in 1961 that

is a substantial revision of the procedures for obtaining judicial review of a final adminitrative order of deportation.

The key feature of section 106 is to eliminate district courts from the judicial review of deportation orders and to require that an alien go directly into a court of appeals, file a petition for review, and the court of appeals has exclusive jurisdiction to determine the validity of a final order of deportation on the administrative record.

One exception, of course, to that is the section that is involved in this case, and that is 106(a)(5) which provides that where a person has presented a claim for citizenship and that claim is not a frivolous claim, and there is a genuine issue of material fact, the court of appeals must transfer the proceedings to the U.S. District Court for the residence of the petitioner and a trial de novo is had in that District Court to determine the question of citizenship. This exception is necessary because of this Court's decisions going back to Ng Fung Ho v. White, where it was held that any resident of the United States who claims to be a citizen has a constitutional right to a judicial trial on that claim if his evidence presented in the administrative proceedings is sufficient, if believed, to support a finding of citizenship.

The initial question in this case I think is whether Congress intended to change the evidentiary standard when it enacted section 106(a)(5). The case law prior to 1961 had been

that a substantial -- the test for obtaining judicial determination of citizenship was the substantial evidence test. Now, there is no legislative history one way or the other on the subject of whether Congress intended to make any change in the burden of proof, but the fact that the Congress did employ summary judgment language in 105(a)(5) strongly suggests I think that they did intend to relax the burden of proof, that something less than substantial evidence was intended to be required to obtain judicial determination of nationality.

QUESTION: Mr. Bixby, you think that the word "frivolous" is an additional qualification to a genuine issue of material fact?

MR. BIXBY: I am not sure that it is. I think that if there is a genuine issue of material fact, it is quite hard to perceive of any situation where there would be a frivolous claim and also a genuine -- I mean, if it is a genuine issue of material fact, to me it can't be a frivolous claim. I think it is really redundant and I don't think --

QUESTION: By contrast, if it is frivolous, there is no genuine issue of material fact, is that true?

MR. BIXBY: I think that would hold true, Your Honor.

QUESTION: What relief are you asking for here, simply that this be heard by the district court?

MR. BIXBY: Yes, Your Honor, that is all.

QUESTION: Nothing else?

MR. BIXBY: Nothing else, Your Honor. No. In the administrative proceedings, there were various forms of discretionary relief from deportation that were applied for in the alternative without, of course, waiving our claim to citizenship, and these forms of relief were not granted but I don't believe they are at issue here because we did not argue in our briefs before the Ninth Circuit, we didn't make these points in the briefs and we solely confined the briefs to the transfer issue.

QUESTION: The Court of Appeals for the Ninth Circuit found that there was no colorable claim to citizenship. Do you view that as the equivalent of holding that the claim was frivolous?

MR. BIXBY: I think the Court of Appeals for the Ninth Circuit, and especially -- well, I say that for several reasons -- the court cited a case that was decided prior to 1961, a case that dealt with -- actually it was a case that only contained dictum --

QUESTION: Kessler v. --

MR. BIXBY: -- Kessler v. Strecker, Your Honor, correct, and that was a case that did in dictum mention the substantial evidence rule. And I think the Court of Appeals, the majority of the Court of Appeals found that the petitioner had not satisfied the substantial evidence rule.

QUESTION: It didn't quite say that, though, did it?

MR. BIXBY: Well, I don't think it quite said that. I think the dissent points out aside from that -- well, the dissent points out that the correct function of the Court of Appeals is not to determine credibility, not to act as a fact-finder, and I think that is what the majority of the Court of Appeals did in this case.

QUESTION: Well, supposing that there were a birth certificate showing that the person claiming to be a national was in fact born in a town in Italy and the claimant did not contest the birth certificate nor offer any explanation as to why it was not a perfectly valid document, I take it your client here does make some contest to that. But supposing that he didn't, and it was simply a question of this document versus the claimant's sworn statement that he was born in the United States, now would that be a non-frivolous claim?

MR. BIXBY: No, I think that would be a frivolous claim because I think the case that you put is really a bare assertion of citizenship without any evidentiary support at all.

QUESTION: In other words, just a statement, even though made just from knowledge --

MR. BIXBY: Under oath.

QUESTION: -- will not overcome an unchallenged document?

MR. BIXBY: That's correct. I don't think a person that merely asserts citizenship and has no evidence to support

it is entitled to a transfer of proceedings under this statute, Your Honor.

QUESTION: How do you suppose the Court of Appeals came to think that the decisive question here was whether or not there was a colorable claim to United States nationality? The majority found there wasn't and the dissenting judge thought that there was a colorable claim, and that phrase is nowhere to be found in the statute, is it?

MR. BIXBY: No, it isn't, Your Honor.

QUESTION: Do you suppose that they thought the issue was whether or not it was frivolous or whether or not there was a genuine issue of material fact, because those are the two statutory tests?

MR. BIXBY: That's correct. I think again, and it is impossible to say for certain because it is a very brief decision --

QUESTION: But each of them acts as -- both the court and the dissent speak as though the issue were whether or not there was a colorable claim and that particular test is nowhere in the statute, is it?

MR. BIXBY: That's true.

QUESTION: The only two statutory tests is whether or not it is frivolous and whether or not there is a genuine issue of material fact. To which issue do you suppose the Court of Appeals was directing its attention, or to both?

MR. BIXBY: Well, again, I am not certain that these are two separate requirements. I think that really there is a redundancy here, that frivolous and genuine issue of material fact, if it is a non-frivolous claim, I think that there is a genuine issue of material fact, and vice versa.

QUESTION: And so you think colorable claim is a suitable synonym for both of the statutory phrases?

MR. BIXBY: Probably it wouldn't have been the phrase that I would have used, but I think that the majority -- well, the majority and the dissent, as you point out, both use that phrase and I think they must have thought that it was --

QUESTION: But the majority cited the Kessler case, which used the --

MR. BIXBY: Substantial evidence.

QUESTION: -- substantial evidence under the old statute.

MR. BIXBY: And it did say it also, the short majority opinion went on in the last sentence saying that it also did not, the evidence does not meet the standard set forth in Kessler v. Strecker.

QUESTION: As though it were an additional --

MR. BIXBY: As though it were an additional requirement of the statute, right.

I believe that the case -- well, to begin with, I should say, as the Court realizes I am sure, there are merely a

handful of decisions from the Court of Appeals, reported decisions that have construed section 106(a)(5), and in looking at these decisions I think that the case of Pignatello v. Attorney General is the only decision that really deals in any depth with the statute. Now, in that case, the Court viewed the statute as being essentially a summary judgment statute and it did state that as far as the standard that must be satisfied, that the statute only requires a modicum of substantiality to the claim of citizenship, and that the claim not be a frivolous one.

The Court obviously, although it didn't expressly state this, it obviously felt that there was some change in the evidentiary standard from substantial evidence over to a modicum of substantiality, and I would suppose that the fact that the statute employs the summary judgment language as the basis for the Second Circuit's conclusion that only a modicum of substantiality is required.

The case of Pitnatello also points out that the function of the Court of Appeals is not to determine credibility of evidence, and it is not to sift and to weigh the evidence, that that is the function of the District Court. If the proceedings are transferred to the District Court, the District Court acting as the tier of fact --

QUESTION: In the first instance, it is the function of the hearing examiner, is it not?

MR. BIXBY: If there is -- well, in the first instance, you are correct, Your Honor, administratively it is the hearing examiner who makes this decision initially and then the Board of Immigration Appeals, the final administrative authority on this --

QUESTION: And what you say is the hearing examiner concluded about the --

MR. BIXBY: He decided, Your Honor, that the testimony of the petitioner's witnesses in this case was not credible. He did not accept their testimony as being truthful and therefore he rejected the testimony --

QUESTION: This is why you wanted a de novo hearing?

MR. BIXBY: This is exactly it. We feel that we are entitled to a judicial determination and we feel that this case turned on the issue of credibility. And where that is the case, the --

QUESTION: Must the District Court try every such case of deportation ultimately if credibility is an issue?

MR. BIXBY: Not at all, Your Honor. It is limited to only this case. Not only does the Constitution require in a case where a person claims citizenship that the District Court where there is, as we say, a modicum of substantiality, as the Court in Pignatello says, a modicum of substantiality of the claim, it is for the District Court to judicially determine that claim. But in no other case involving deportation, Your

Honor, would the District Court be involved at all. Section 106 makes it very clear that courts of appeals determine the validity of final orders of deportation on the administrative record in all cases except for cases where there is a claim to citizenship.

QUESTION: But you would say, I take it, that administrative resolutions of credibility in cases like this, where there is a claim of citizenship, if you believe the person, if you believe the fellow is a citizen, and if you disbelieve him, he isn't -- you take it that those situations would always have to go to the District Court?

MR. BIXBY: Always, Your Honor, I think so because there is a credibility issue and that was what this section was designed to -- well, it was designed to codify actually the constitutional right, the Fifth Amendment due process right.

QUESTION: And you confine that to cases where the issue is citizenship or non-citizenship?

MR. BIXBY: Exactly correct, Your Honor, yes.

QUESTION: May I give you an example of the point that Mr. Justice White just put to you? Let's assume in this case that you had documentary records such as those that were presented that showed on their face that the plaintiff was born in Italy, was married in Italy, assume further there were no other documentary records of any kind and the only other evidence was the plaintiff took the stand and said those documents

are false. Well, I will add one other set of facts to it. You had an individual who had a long criminal record, as this individual had. Does all one have to do is to stand up and swear that he is an American citizen without presenting any supporting evidence of any kind except his own statement?

MR. BIXBY: Well, I think you have to present more than your own statement. I believe that there would have to be more evidence than that certainly.

QUESTION: Well, what if he not only made the bald assertion which you before said wasn't enough, what if he said I was born on such and such a date in Detroit, Michigan, and my parents were so and so, and he attempted to support his claim to citizenship by some facts? If he called somebody else, like he did here, and they said, yes, we have known this man all our life and he was born in Detroit, Michigan, we knew him as a child and he was here, you would say at least in that latter case it would require a retrial in the District Court?

MR. BIXBY: Well, I think in the latter case you would have --

QUESTION: Well, what about the former where he just himself attempts to support his claim with his own assertions?

MR. BIXBY: I don't think there would be a modicum of substantiality to the claim in the former case.

QUESTION: Yet under the summary judgment rule, the interested party himself by denying or asserting can survive a

motion for summary judgment, so if you concede that you admit that this isn't the same as a summary judgment rule?

MR. BIXBY: I think this is essentially a summary judgment statute, and I think the Courts of Appeals that have dealt with this statute treated it as such.

QUESTION: But then your answer to Justice White's question should be that it only should take the statement of your client under oath that "I am a citizen of the United States, born in Detroit," without any supporting witness at all, because that is the uniformly applied summary judgment test, as I understand it.

MR. BIXBY: Well, all I can say on that, certainly if that is the test, if it truly were a summary judgment statute, then perhaps that is so.

QUESTION: Well, I am questioning you, you know, I am not purporting to give an answer.

MR. BIXBY: I think that the cases that have been decided by the Courts of Appeals have not viewed the statute as strictly summary judgment, that is they have required that there be something more than a sworn statement by the petitioner to the effect that "I am a U.S. citizen."

QUESTION: So you think that there can be an administrative determination of the alien or the supposed alien's own credibility, but there can't be administrative rejection of the credibility of any witnesses he calls, if he would win, if their

testimony was believed?

MR. BIXBY: Well, I think that there has -- again, I suppose I am coming back to this modicum of substantiality. I think there has to be something more than --

QUESTION: I guess you say at least if he calls some other witnesses and they present some testimony, you are entitled to a trial in the District Court?

MR. BIXBY: Well, I think it would probably be -- you would have to look at the testimony of the witnesses that he called as to what they would testify to. Their testimony might be worthless or it might --

QUESTION: At least that isn't your case?

MR. BIXBY: That isn't my case. I think the closest case to that is the Rassano case, which is cited in the brief.

QUESTION: Mr. Bixby, what do you do with these three alleged convictions?

MR. BIXBY: I don't think they have any bearing on whether the man is a citizen of the United States or not.

QUESTION: But they might have a bearing on his credibility though, because all the convictions were for fraud or something that --

QUESTION: Two of them were in Italy and one was in Alaska.

MR. BIXBY: That's correct.

QUESTION: So he is quite a traveler.

MR. BIXBY: Yes, Your Honor.

QUESTION: But you don't feel any obligation to explain at all?

MR. BIXBY: I don't feel any obligation to explain them. I am not --

QUESTION: Maybe that explains why the court did not accept the --

MR. BIXBY: Well, I am relying more on the testimony of the witnesses called by the petitioner than I am on the petitioner's testimony, for that matter. The witnesses were --

QUESTION: The examiner said he did not believe, that they were not credible?

MR. BIXBY: That's correct, Your Honor. They were in a position, though, the Pianettis, who were the couple in Italy that were affiliated with the petitioner, where he lived, they were in the best position to know the facts as far as his birth, of course. He was only two and a half years of age when he was sent to Italy. He wouldn't know these things, but they would and they were in the best position to know and so I am relying more on their testimony than I would upon the petitioner's testimony.

QUESTION: And you think you are entitled to have a district judge, nothing less than a district judge make the evaluation of the credibility of the witnesses --

MR. BIXBY: I think we are entitled to a trial de novo

and --

QUESTION: By a district judge?

MR. BIXBY: -- by a district judge who would observe the demeanor of the witnesses and who would determine the credibility.

QUESTION: That doesn't give much utility to the function of the hearing examiner, does it?

MR. BIXBY: In a particular case where U.S. citizenship is involved, Your Honor, it doesn't leave the hearing officer as the final authority.

QUESTION: But can you imagine any case where the claim of citizenship could not be made?

MR. BIXBY: I think it must be very rarely made, Your Honor, considering the fact that there is only a handful of cases since 1961 that have been decided.

QUESTION: My question was can you imagine a case where it could not be made?

MR. BIXBY: Oh, I suppose it could be made in any case that came before the Immigration authorities, Your Honor.

QUESTION: Up to now it has been apparently thought that the determination of the hearing examiner was sufficient.

MR. BIXBY: Not at all, Your Honor, not by the Courts of Appeals.

QUESTION: No.

MR. BIXBY: The Courts of Appeals have --

QUESTION: I am talking about the administrative, the reviewing Immigration -- what do you call that, the Board of --

MR. BIXBY: The Board of Immigration Appeals.

QUESTION: -- the Board of Immigration Appeals.

MR. BIXBY: Yes, Your Honor. It hasn't -- I am not quite certain I understand your question. If I understand it properly --

QUESTION: Within the administrative framework, it has been -- credence has been given to the credibility findings of the hearing examiner.

MR. BIXBY: That's correct, within the administrative framework, yes.

QUESTION: When was section 106(a)(5) enacted?

MR. BIXBY: 1961, Your Honor.

QUESTION: '61?

MR. BIXBY: Yes, sir.

QUESTION: Mr. Bixby, just so I have it clearly in mind, the evidence consistent with your client's present version of events is that of the witnesses, the two Pianettis, his adoptive parents --

MR. BIXBY: Yes.

QUESTION: -- and his half-brother, Carmen Ripolino.

MR. BIXBY: That's correct, Your Honor.

QUESTION: And then his own testimony. Now, is there any documentary testimony whatsoever that corroborate any portion

of their testimony?

MR. BIXBY: In the administrative record, there is no document to corroborate this testimony, that's correct.

QUESTION: Your claim, as I understand it, is that if we were to believe the testimony -- I mean if the trier of fact were to believe the testimony of those three persons, they would establish citizenship?

MR. BIXBY: Yes, that was the conclusion, Your Honor, of the Board of Immigration Appeals.

QUESTION: They said the same thing?

MR. BIXBY: Yes.

QUESTION: May I ask you a question about congressional intent. I realize, of course, you are relying on the words of the statute, but here we have a case in which the Immigration judge found -- and I am reading from the record -- that the claim to citizenship here has been knowingly false from its inception, knowingly false all the way down the road. He has had two or three hearings before an Immigration judge and a couple before the board. The board affirms that conclusion of totally false testimony all the way. The Court of Appeals reviewed it and concluded that there was no colorable claim to citizenship, and now you are asking us to start all over again at the level of the District Court and then come back up to the Court of Appeals presumably. Do you think Congress could have intended a regime of litigation of that character?

MR. BIXBY: I think the Congress intended the words of 106(a)(5) -- they make it quite clear that Congress intended that when a case, when it is citizenship, U.S. citizenship that is involved, and the administrative findings, findings by the hearing officer and Board of Immigration Appeals turn on the issue of credibility, that certainly that man is entitled to --

QUESTION: It didn't use the word "credibility." It spoke of a frivolous claim.

MR. BIXBY: Well, I think it is quite clear that the Board of Immigration Appeals felt that the determination on the issue of citizenship was one that turned on the issue of credibility. They defer to the Immigration judge as the tier of fact as far as the issue of credibility is concerned. So I think that the statute was certainly designed to give the individual who claims to be a citizen and who has presented a modicum anyway of substantiality to his claim, to give him that right to have a judicial determination made. That, of course, has been decided by this Court, that that is a constitutional right, but that is going back to Ng Fung Ho v. White.

QUESTION: Just offhand I can't recall any other system of review in the federal system quite comparable to the position you are taking. I recognize that you have a statute with special language, and I would make that argument that you argue. I am just wondering whether Congress conceivably could

have had any such intention.

MR. BIXBY: I think they had to have an intention, Your Honor, because the man has a constitutional right and they had to make an exception in this section, section 106, and give him that constitutional right of a judicial trial of the issue of citizenship if he presented the -- if he does present in his administrative hearing evidence that at least had a modicum of substantiality.

QUESTION: And if this is a unique procedure, it is because of deportation as a unique process, i.e., is a monstrously unconstitutional thing to forcibly deport a citizen to some foreign land.

MR. BIXBY: I think that is correct, Your Honor.

Thank you.

MR. CHIEF JUSTICE BURGER: Mrs. Jetton.

ORAL ARGUMENT OF MARION L. JETTON, ESQ.,

ON BEHALF OF THE RESPONDENT

MRS. JETTON: Mr. Chief Justice, and may it please the Court:

The petitioner is seeking a hearing de novo in the United States District Court of his claim that he is a United States citizen by virtue of his birth in the United States. We contend that petitioner's claim of citizenship is frivolous and that he has not raised a genuine issue of material fact concerning his claim of U.S. citizenship, therefore the Court

of Appeals properly held petitioner deportable on the basis of the administrative record before it, without referring the proceedings to the District Court for a hearing.

Section 106(a)(5) of the Immigration and Nationality Act, which petitioner asserts requires de novo trial in his case, is part of a general revision of provisions for judicial review of deportation orders. This revision which was enacted in 1961 was, as petitioner's counsel has noted, intended to prevent repetitious litigation of deportation order cases.

QUESTION: Mrs. Jetton, it would help me if you went a little -- if you raised your voice a little bit and went a little slower.

MRS. JETTON: The revision prevented this repetitious litigation by eliminating District Court review in most cases. Indeed, the Court of Appeals generally review deportation order cases on the administrative record.

Section 106(a)(5) is a narrow exception to this scheme. It provides a de novo hearing in the District Court when a person subject to final deportation order makes a substantial claim of citizenship. But in keeping with the general purposes of section 106(a)(5), not every claim of United States citizenship need be referred to the District Court for trial. Instead, the section requires the person requesting transfer to make a showing that his claim is not frivolous and to show that there is a genuine issue of material fact as to that person's

nationality.

Only if these two showings are made must the Court of Appeals transfer the case to the District Court.

QUESTION: I was just going to ask if you would state your view as to what the difference is between frivolous and the existence or absence of a material issue of fact.

MRS. JETTON: The statute isn't entirely clear as to whether those are two different standards. In part, they use the term genuine issue of material fact to distinguish those non-frivolous cases where there is an issue of fact from those non-frivolous cases where there is an issue of law. Those cases where there is an issue of law that is non-frivolous can be determined by the Court of Appeals under the statute, and non-frivolous cases where there is an issue of fact, a genuine issue of material fact, are intended to be referred to the District Court. The frivolous claim can be disposed of by the Court of Appeals under the language of the statute merely by the holding that the claim is frivolous.

QUESTION: Like they did here?

MRS. JETTON: They appear to have done here, yes.

QUESTION: But they can do that on a factual issue as well as an issue of law?

MRS. JETTON: Yes, the way the statute is written a frivolous claim issue of law can be disposed of under the frivolous standard as well.

QUESTION: Another puzzling aspect of this statute to me -- and perhaps you can answer it -- it refers to the pleadings and affidavits filed by the parties, are we limited to those in reviewing the record in this case?

MRS. JETTON: In this case, the pleadings incorporated the entire administrative record.

QUESTION: Including all of the testimony of witnesses?

MRS. JETTON: Yes, that was all before the Court of Appeals and was referred to in the pleadings. Presumably that was intended to be picked up by the term "pleadings." Again, as you note, the statute isn't entirely clear, but that had to be, I would assume was the intention of the Congress.

QUESTION: And there is no issue in the case on that point?

MRS. JETTON: No -- excuse me, Your Honor, there is an issue in the case as to what record, what part of the record the Court of Appeals was permitted to look to in passing on whether there was a genuine issue of material fact. Petitioner contends that the Court of Appeals was not permitted to go beyond reading the opinion of the Board of Immigration Examiners, and we contend that the plain language of the statute permits the Court of Appeals to look at the pleadings including the administrative record incorporated in the pleadings as well as any affidavits that are provided to the Court of Appeals.

QUESTION: And we are to read it all without any help

from the Court of Appeals? Is there any way we can do it without reading all of it?

MRS. JETTON: There are fairly good summaries in the various opinions of the Immigration judge.

QUESTION: Well, would we be doing our job if we did?

MRS. JETTON: Those are merely a starting point, Your Honor.

QUESTION: And we would have to read the whole thing because Congress meant to dump it all here? Do you think Congress meant that?

MRS. JETTON: I believe that Congress intended that these cases which are factual cases would normally end up here, yes.

QUESTION: What evidence did the government put in other than -- what?

MRS. JETTON: The service presented a comprehensive documentary case in the administrative hearings. These began with records of birth of petitioner, three separate independently created recorded records showing his birth in Italy in 1927, as a foundling he was recorded under the name Vincenzo Di Paola.

QUESTION: Your live testimony was --

MRS. JETTON: The government did not present any live testimony, to my recollection.

QUESTION: Well, the defendant did?

MRS. JETTON: Yes, the defendant did.

QUESTION: And the Court of Appeals just brushed that aside, the sworn testimony?

MRS. JETTON: The Court of Appeals had the entire record before it and --

QUESTION: Well, the Court of Appeals failed to mention anything about it?

MRS. JETTON: That's correct, Your Honor, the Court of Appeals merely stated in conclusory terms that there had been no --

QUESTION: So the Court of Appeals had the choice of sending this to be decided on its facts to the District Court or to us, so they sent it to us? [Laughter] I understand now.

QUESTION: Mrs. Jetton, before you get back into your argument, if we disregard the petitioner's own testimony entirely, because he was impeached repeatedly, and if we merely assume for purposes of decision that it is at least theoretically possible that the trier of fact might believe the Pianettis who, as I understand it, were the couple that adopted him or affiliated him, according to his version, and the testimony of his brother-in-law. Would you agree that if that testimony were believed, that he made a non-frivolous claim of citizenship?

MRS. JETTON: Our contention is that the Pianettis' testimony and that of his brother-in-law cannot be read in isolation, that when their testimony is read against the rest

of the record, including petitioner's own testimony on a variety of occasions, that the result is that the Pianettis have not --

QUESTION: Have not told the truth? And my question is if we assume that the tier of fact thought they told the truth, and you accepted that for the purposes of my question, would you then agree that he has made a non-frivolous claim of citizenship?

MRS. JETTON: Assuming that what the Pianettis had said was true, which is that the documents which the service has provided in the record --

QUESTION: Were prepared by his grandfather in order to hide the fact that he was illegitimate --

MRS. JETTON: -- were entirely falsified

QUESTION: -- and so forth.

MRS. JETTON: If that is the case, then -- and if none of the previous testimony that was in the record was disregarded, then petitioner probably, that would have been the absolute minimum showing to get to the District Court. However, the --

QUESTION: That is not quite my question. My question -- and I will try to state it very simply -- is if one were to believe the Pianettis and Carmen Ripolino, that everything they said was true, would their testimony make out a non-frivolous claim of citizenship on behalf of the petitioner?

MRS. JETTON: I think that is the case. If --

QUESTION: So in order to find his claim frivolous, we must disbelieve these three witnesses?

MRS. JETTON: That is our contention, or disbelieve the Pianettis --

QUESTION: As a matter of law, they all three -- it can be demonstrated as a matter of law that all three of them fabricated their testimony?

MRS. JETTON: Yes. Our contention is that at least the Pianettis' testimony was fabricated and the purported half-brother's testimony was not, did not prove that the petitioner was a citizen.

QUESTION: It is also your position that that is properly determined by the administrative agency and by the Court of Appeals?

MRS. JETTON: Yes, our position is that on this record --

QUESTION: That determination doesn't have to be made in the District Court?

MRS. JETTON: Yes, on this record, that the Court of Appeals could properly dispose of the case.

As petitioner agrees, the showing --

QUESTION: Can you tell me what kind of record that would not be so in the face of the statute?

MRS. JETTON: I'm sorry?

QUESTION: You say on this record the Court of Appeals

could properly dispose of the case. Can you illustrate for me the kind of record where that would not be so, where the opposite would be true?

MRS. JETTON: Probably if the only evidence in this case was on one side the Immigration Service's documentary record and on the other side was the Pianettis' testimony. If the Pianettis had testified in 1967, at the beginning of the trial and had said that those documents are falsified, we know from family history that these documents were falsified, if that was the only evidence in the case, that would be an absolute minimal showing that would permit transfer to the District Court. Our contention is that the Pianettis' testimony came only after four years of hearings, and the content of the testimony provided by petitioner in those four years of hearings cast such doubt on the credibility of the Pianettis that one can only conclude that the Pianettis' testimony was not -- either they didn't know the story or they were not telling the truth.

QUESTION: Isn't that the theory you argue to the District Court?

MRS. JETTON: Our contention is that following the summary judgment standard, that there are some cases that it is not -- that where a claim has been made that is so incredible that it cannot be accepted by reasonable minds, and that there is no need to transfer that type of case to the District Court

for the District Court to merely enter summary judgment.

QUESTION: Well, you had a split opinion below, so there was some reasonable -- there was one reasonable mind that thought otherwise.

MRS. JETTON: The question --

QUESTION: Why isn't the government's position just plain and simple --maybe it is, but you haven't said so yet -- that the administrative agency is entitled to make credibility determinations, and if affirmed by the Court of Appeals, that is the end of it?

MRS. JETTON: The cases on summary judgment indicate that a genuine issue of credibility is properly not dealt with by summary judgment, so our contention is necessarily that in this case the Pianettis --

QUESTION: There is just no genuine issue of credibility?

MRS. JETTON: There is no issue of credibility and I will --

QUESTION: Their credibility may be determined in this case anyway, although you admit that if you believed everything they said, there would be a genuine issue of fact?

MRS. JETTON: And if there had been no previous testimony to cast doubt on their story.

QUESTION: Well, again, if you just believe everything that they said --

MRS. JETTON: Yes, you would have to disregard the previous testimony is our position in order to believe everything they said.

QUESTION: During the first four years he was litigating this, what was the theory of his case for non-deportation?

MRS. JETTON: He initially claimed that he was Joseph Agosto, born in Cleveland in 1921, and the sole basis for this belief was a birth certificate which he subsequently admits belonged to an entirely different person and was not his own.

QUESTION: So he presented someone else's birth certificate to prove his American citizenship during the first four years of his --

MRS. JETTON: He presented -- and in addition he presented that certificate to get into the United States and to get a United States passport.

I would like to go over to some extent the reasons that we don't think the Pianettis' testimony can be viewed in isolation, as petitioner would have you do, and why when taken together with the rest of the record we believe that it is clear that their testimony was a fabrication, just as all of petitioner's earlier versions of which --

QUESTION: Mrs. Jetton, you don't say at just any time the administrative agency may make final determinations of credibility, don't need to go to the District Court, it is just

that if it is really incredible?

MRS. JETTON: Yes. Our contention is, among others, that the administrative agency, if you read the entire opinion, did not say that this case was turning on an issue of the demeanor of the Pianettis. The administrative agency had a number of other reasons for determining that the story was a fabrication. It relied in part on the number of times the Agosto story had changed, it relied on the past documentary record that --

QUESTION: So the agency may determine that the witness is lying in certain circumstances? When it is clear enough that he is lying, they can say he is lying, and refuse to credit his testimony?

MRS. JETTON: Yes. Our contention is that the Court of Appeals has to look at the whole matter itself. They can't just take the statement by the Immigration Board, and in this case the Court of Appeals could, setting aside the discussion about the demeanor of the Pianettis, on a number of other grounds conclude that the Pianettis' statements were fabrications.

The conflicts between the Pianettis' testimony and petitioner's earlier testimony are not reconcilable, and yet there is no explanation in the record for why petitioner's earlier statements were incorrect. On a number of the subjects, they were topics that had to be within petitioner's own

recollection. For example, the year he started school, as a child of six or seven, he does not claim that he couldn't count back from the year he graduated from school to find out when he started.

QUESTION: Incidentally, on that point, Mrs. Jetton, that was over in Italy, wasn't it?

MRS. JETTON: Yes.

QUESTION: Does the government disagree with the fact that he was raised by the Pianettis?

MRS. JETTON: No, we quite agree. In fact, the government's case shows that he was taken from a foundling home at the age of a month by Mrs. Pianetti. There is a question of who he lived with as a boy. He testified to one thing, that at the age of 9, up to the age of 9 he lived with his grandfather and then went to live with the Pianettis. The Pianettis took the stand and testified that he went to live with them immediately. Now, a nine-year-old boy would know who he had lived with.

There is a considerable discrepancy as to the year that he was told that he was illegitimate. One version was that he was 17; another is that he wasn't told until 1948 or '49, four or five years later. Surely, an event of such moment as the time you are told that you are illegitimate and were born in the United States and not in Italy as you previously thought, would be indelibly marked on someone's mind.

QUESTION: Well, Mrs. Jetton, supposing that you had an ordinary civil case where the statute of limitations was critical and the question was the date on which the accident happened and the plaintiff in that position testified that it happened on August 11th, August 12th, August 13th, he contradicted himself three times. With one of those dates as correct, he is within the statute of limitations, if the other two are correct, he is without it. Now, can he survive a summary judgment motion on that kind of a deposition?

MRS. JETTON: I believe there are cases saying that you can't create your own conflict. I mean, you cannot create an issue of credibility by coming up with three separate versions yourself and then claiming that you should be allowed a trial to decide which of your versions is correct.

QUESTION: So you say then that-- I was under the impression that he could survive a summary judgment motion on that kind of testimony. You say I am wrong and that he could not.

MRS. JETTON: Assuming that there was evidence to the contrary --

QUESTION: No, I am assuming that all the court has before it is his testimony as to when the accident happened and the defendant moves for summary judgment saying that it is barred by the statute of limitations. And two of his versions would bar him and the third one would not, and they are all

inconsistent with one another.

MRS. JETTON: I think that under the summary judgment standard he could be precluded from proceeding further, and summary judgment could be entered on the theory that his claim was incredible because it was impossible to determine what it was. I mean, courts are not expected to --

QUESTION: What if his last claim was the date that would save his case?

MRS. JETTON: And he repudiated the earlier ones?

QUESTION: He just says that when he is cross-examined that he made a mistake, the real date is "X."

MRS. JETTON: Probably in a pure case like that, where there was some explanation of the mistake, he could survive --

QUESTION: There wasn't any, he just says I remember better now.

MRS. JETTON: Even so, he might be able to survive summary judgment. I don't believe that that is our case, because --

QUESTION: You think the government is entitled to a more lenient standard than a summary judgment standard under this statute?

MRS. JETTON: Well, under this -- the language of the statute is very similar to the summary judgment.

QUESTION: Unless the word "frivolous" modifies the genuine and material.

MRS. JETTON: Yes. The summary judgment provisions probably should -- the summary judgment standards certainly are helpful in this case. But you are hypothesizing where somebody says "I made a mistake, the accident happened on a certain day." Agosto has not claimed to make that kind of mistake but just a familure of memory. His testimony was that in 1921, he worked for many years on a 1921 birth certificate, which he claimed was his. I mean this was not just a failure of memory.

QUESTION: Mrs. Jetton, supposing that you certainly persuaded me that he lied deliberately and frequently and repeatedly and he is totally incredible as a witness, but what is there that makes it equally clear that the Pianettis lied?

MRS. JETTON: Several things. One -- which I have gone over very briefly -- that the Pianettis' testimony conflicts with him on subjects which --

QUESTION: Conflicting with him, but that doesn't mean anything because he is totally incredible and he should have known. We discount his testimony a hundred percent. Apart from his testimony, what is it that makes the Pianettis' testimony absolutely clearly false?

MRS. JETTON: In addition to -- there is no testimony that the Pianettis said this fellow iw an incurable liar. I mean, he --

QUESTION: But you convinced us of that and we take that as given, he is a liar. So you have got to bring something

other than conflicts with his testimony in order to discredit the credibility of the Pianettis. That is all I am suggesting.

MRS. JETTON: Okay. I think another significant ingredient is the absence of documentary evidence to support his case where there should be documentary evidence. He was asked --

QUESTION: Didn't they give an explanation for that?

MRS. JETTON: No, it was not explained.

QUESTION: Wasn't their explanation that they wanted to conceal his illegitimate birth?

MRS. JETTON: One of the documents that should very early on in ths proceedings -- he was asked fairly early on whether there were any landing documents, State Department documents, manifests, this sort of material, that would show that he came to the United States. He said he hadn't looked. And although there was ample time after that to prepare that kind of evidence, it was never presented. He was asked whether he had ever looked for a 1924 birth certificate --

QUESTION: These are documents that would have existed some fifty years ago?

MRS. JETTON: Yes --

QUESTION: The non-existence of fifty-year old documents conclusively demonstrates that this story is false?

MRS. JETTON: A 1924 birth certificate in Cleveland, Ohio, he was asked whether he had made an effort to find it --

no, and there was no further explanation as to why he had not looked or --

QUESTION: Who is "he," Mr. Pianetti?

MRS. JETTON: The petitioner, excuse me.

QUESTION: I say, he is a total liar. I try to put his testimony to one side. And then what is it that makes the Pianettis' testimony totally incredible other than the absence of fifty-year-old documents?

MRS. JETTON: We can deal with the absence of the fifty-year-old documents. It is significant. The testimony of -- the Pianttis themselves testified that there was a baptismal certificate for the petitioner, that he was baptised, and the petitioner had ample funds to send an investigator to Italy to find documents, and yet there was no effort to find --

QUESTION: You are still in the category of fifty-year old documents. That is enough under the statute to say their story is totally incredible? That is the government's position, I guess?

MRS. JETTON: The --

QUESTION: Mrs. Jetton, if this case had been tried in the District Court, with this testimony, would you have gotten a summary judgment?

MRS. JETTON: We contend that if this case were sent to the District Court, that the District Court should enter summary judgment.

QUESTION: I didn't say "should." I said "would."

MRS. JETTON: Would.

QUESTION: If you think there is a direct dispute in testimony, a direct dispute, open dispute?

MRS. JETTON: There is a dispute as to whether the Pianettis are credible or not. If somebody came in and said I am a United States citizen and the government's documents shows that he was not an American citizen --

QUESTION: If the Pianettis were credible witnesses, would he win?

MRS. JETTON: If these were --

QUESTION: Don't answer that too fast because if you do you may throw out your summary judgement argument completely.

QUESTION: Mrs. Jetton, let me put it another way. Why is the government so afraid of going into the District Court in this case?

MRS. JETTON: We are --

QUESTION: Are you afraid that you will get a great avalanche of cases or something?

MRS. JETTON: There is a concern. This case has gone on for ten years now. There has been a determination that the petitioner is deportable. He does not challenge that he is deportable if he is an alien. If the case goes to the District Court, it will then go to trial in the District Court and will doubtless go to an appeal to the Court of Appeals, and

it is our contention that the Court of Appeals have properly disposed of it at this juncture.

In addition, if this variety of claim is held by this Court to warrant a District Court hearing, with the beneficial effects of delay for the deportees --

QUESTION: Of course, if we hadn't opposed it going to the District Court, it would be all over with by this time, wouldn't it?

MRS. JETTON: Probably not the appeal to the Ninth Circuit.

QUESTION: It would now be on appeal to the Ninth Circuit, wouldn't it?

MRS. JETTON: If this case is found to be referrable to the Ninth Circuit, there will probably be more claims of this substantiality.

QUESTION: If he lost in the District Court, what conceivably would be the basis for an appeal?

MRS. JETTON: Credibility of the witnesses.

QUESTION: Judges of the Court of Appeals think there is no case which is not appealable. They are all appealable.

QUESTION: I haven't seen any of it. I haven't seen any of these witnesses, and can we pass on their credibility? You told me that we had to read the whole record and now I have got to pass on the credibility, too?

MRS. JETTON: We contend that you do not have to

decide whether or not to do anything about the demeanor of the Pianettis, that the record as it stands is deficient to conclude that their story was a fabrication.

QUESTION: His story, his own testimony which he contradicted on a number of occasions in presenting a false certificate, you say, warrants disbelieving anything he will ever say?

QUESTION: I am not talking about him, I am talking about the people, the Pianetti people.

MRS. JETTON: We are obviously not asking you to pass on the demeanor evidence of the Pianettis.

QUESTION: Well, how am I going to know from their testimony?

MRS. JETTON: We contend that the record itself is such that it contains its own death wounds in the language that this Court has used in Pittsburgh Steamship.

QUESTION: This involves somebody's citizenship which -- I don't know about you, but that is very important to me.

MRS. JETTON: This Court has said in Ng Fung Ho that it is an important right, but even in that case this Court said that a substantial claim of citizenship had to be made before trial de novo was required.

I would like to just briefly address the petitioner's claim that there is a conflict between the Pignatello case, and that is a Second Circuit case. A reading of Pignatello,

initially there is a discussion of a modicum of evidence which appears to be a reference to the frivolous standard in the statute, but then that court goes on to very clearly state that in order to get a de novo hearing in the District Court, that the issue is whether a genuine issue of fact has been presented. That case does not contain any other standard. It does not contain a frivolous standard for getting to the District Court.

QUESTION: They did write an opinion in that?

MRS. JETTON: Yes, the Second Circuit did.

QUESTION: Judge Marshall.

MRS. JETTON: I believe. In addition, the facts of the Pignatello case are substantially different from this. I believe Mr. Justice Marshall characterized the claim in that as coherent and credible. There was an affidavit provided by the company commander of the person who was being deported stating that he was a citizen. The official government records stated that he was a citizen, his discharge papers, as a mater of fact. He claimed to have been naturalized during the war. So there is no indication that the Second Circuit would have decided this case any differently.

In sum, the petitioner's claims have been rejected by three tribunals and it is unlikely that a fourth would reach a different conclusion. The purpose of rule 106(a)(5) does not extend to providing trial de novo for petitioner's fanciful

claims. We therefore submit that the judgment of the Court of Appeals should be affirmed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

[Whereupon, at 2:38 o'clock p.m., the case in the above-entitled matter was submitted.]

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