ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-129

TITLE MICHAEL LANDON, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, Petitioner v. MARIA ANTONIETA PLASENCIA

PLACE Washington, D. C.

DATE October 5, 1982

PAGES 1 thru 48

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BEFORE THE SUPREME COURT OF THE UNITED STATES

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MICHAEL LANDON, DISTRICT DIRECTOR :

OF THE IMMIGRATION AND NATURALIZATION: :

SERVICE, :

Petitioner :

v. : No. 81-129

MARIA ANTONIETA PLASENCIA :

- x

Washington, D.C.

Tuesday, October 5, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 o'clock a.m.

APPEARANCES:

ELLIOTT SCHULDER, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

GARY H. MANULKIN, ESQ., Los Angeles, California; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Landon against Plasencia.

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

ORAL ARGUMENT OF ELLIOTT SCHULDER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SCHULDER: Thank you.

Mr. Chief Justice, and may it please the Court, the question presented in this immigration case is whether a permanent resident alien who is believed by immigration authorities to be excludable from the United States on his return from a trip abroad is entitled to litigate the issues of his entry and excludability in a deportation hearing, as the court of appeals of the Ninth Circuit held in this case, rather than in an exclusion hearing, as Congress mandated in the Immigration and Nationality Act.

Before proceeding to the facts of the case, I would like to put this question into some perspective by briefly reviewing some of the pertinent statutes.

The Immigration Act preserves a long-standing distinction between aliens arriving at the border seeking admission to this country and aliens who are already within the United States. Aliens who are

arriving at the border seeking admission or readmission who are believed not entitled to enter are subject to exclusion proceedings. Aliens who are within the United States who are believed not entitled to remain are subject to deportation proceedings.

The Immigration Act provides various categories of excludable aliens, and also provides procedures governing the exclusion of inadmissible aliens.

Under 8 USC 1225, every alien arriving at a U.S. port of entry and seeking admission or readmission to this country is subject to inspection by an immigration officer. If the alien does not appear beyond a doubt to the immigration officer to be entitled to land, he is detained for an exclusion hearing that is conducted before an immigration judge.

These exclusion procedures apply whenever an alien attempts an entry into the United States. The term "entry" is defined in the Act, 8 USC 1101(a)(13), as any coming of an alien into the United States from a foreign country. However, there is an exception to this broad definition in the case of permanent resident aliens. A return to the United States following an unintentional departure by a lawful permanent resident alien is not regarded as an entry.

In Rosenberg versus Fleuti, this Court held that an innocent, casual, and brief trip abroad is deemed not to have been intended as meaningfully interruptive of an alien's permanent residence. The statute interpreted -- the Court interpreted the statute in this way in order to protect resident aliens from unsuspected risks and unintended consequences of wholly innocent actions.

One of the factors that the Court noted in Fleuti as being crucial in determining the nature of an alien's trip is whether the purpose of the trip was to accomplish an object contrary to the policies reflected in our immigration laws.

The facts of this case show that Respondent, a native and citizen of El Salvador, was admitted to the United States as a permanent resident alien in 1970. On June 29th, 1975, Respondent was returning from a two-day trip to Mexico with her husband when she was arrested at the border for attempting to smuggle six illegal aliens into this country. Respondent was detained for an exclusion hearing to determine whether she was excludable under a provision of the Immigration Act that provides for the exclusion of any alien who knowingly and for gain aids the attempted illegal entry of aliens into this country.

QUESTION: Mr. Schulder, was the husband charged with any offense?

MR. SCHULDER: No, the husband is a United States citizen.

QUESTION: I know that, but was he charged with any offense?

MR. SCHULDER: No, he was not charged with any offense, Your Honor, as far as I am aware. The record doesn't reflect otherwise.

The exclusion hearing was held the following --

QUESTION: Mr. Schulder, is it the government's position that assuming an exclusion proceeding is the proper proceeding, that the alien is entitled to due process at that hearing?

MR. SCHULDER: Absolutely, yes.

QUESTION: And what process is due, do you think?

MR. SCHULDER: Well, as this Court noted in Kwong Hai Chew versus Colding, that a resident alien returning from a trip abroad is entitled to notice of the charges and an opportunity -- and a hearing and an opportunity to respond to those charges.

QUESTION: Do you think some specific period of time has to be given in which to prepare for the

hearing?

MR. SCHULDER: Well, I am not sure that the Constitution mandates a fixed period of time. The period would have to be sufficient for the purposes of preparing adequately to respond to the charges in any given situation.

QUESTION: Mr. Schulder, Kwong Hai Chew just construed a regulation, didn't it? It didn't involve any constitutional holding.

MR. SCHULDER: Well, that's correct. The Court construed --

QUESTION: What about the language in Knauff versus Shaughnessy, that whatever the procedure authorized by Congress is, it is due process so far as an alien denied entry is concerned?

MR. SCHULDER: Well, the Court in Kwong Hai Chew strongly suggested that it would have constitutional problems with the regulation that it construed.

QUESTION: But it certainly didn't hold that.

MR. SCHULDER: It did not go so far as to hold that there was an absolute --

QUESTION: You treat that case as though it was a holding.

QUESTION: Yes.

MR. SCHULDER: Well, the Immigration --

QUESTION: Your practice is now --

MR. SCHULDER: Well, the Immigration Service has accepted that case, and the District of Columbia --

QUESTION: You mean the implications of the case?

MR. SCHULDER: The implications of the case, and the District of Columbia Circuit's decision in Kwong Hai Chew versus Rogers that an alien, resident alien is entitled to due process --

QUESTION: Do you think the Circuit Court of the District of Columbia can overrule the Knauff case?

MR. SCHULDER: No, Your Honor. What I am saying is that the Immigration Service has essentially acceded to the strong suggestion by this Court in Kwong Hai Chew versus Colding that any procedure involving a returning resident alien that appears to be contrary to due process would be struck down under the due process clause.

QUESTION: Well, of course, naturally, any procedure contrary to the due process would be struck down under the due process clause, but Knauff says whatever procedure Congress provides is due process.

MR. SCHULDER: That's correct. But this Court in Kwong Hai Chew and in the later cases that discuss

Kwong Hai Chew do, I believe, make the point -- Kwong Hai Chew was not a due process case as such, but in Rosenberg versus Fleuti, for example, the Court described Kwong Hai Chew -- the decision in Kwong Hai Chew as having constitutional overtones. I concede that there was no absolute constitutional holding in that case, but for these purposes, in any event, the Immigration Service has accepted the proposition that a returning resident alien is entitled to a hearing and -- notice and a hearing, an opportunity to respond to charges.

QUESTION: But the Service has not, as I understand it, drafted separate regulations to cover the kind of hearing that is required for a returning permanent resident as opposed to a brand new person. I mean, you don't have anything other than deportation regulations and exclusion hearing regulations.

MR. SCHULDER: That's correct.

QUESTION: So that you don't in your actual rules differentiate between the two kinds of cases?

MR. SCHULDER: Well, the regulations themselves do not differentiate, but the Board of Immigration Appeals in its decisions has differentiated between --

QUESTION: Well, can we tell from its

decisions, for example, the answer to Justice O'Connor's question? What kind of advance notice is the returning permanent resident entitled to receive before being put on trial? Ten minutes, or 24 hours, or what?

MR. SCHULDER: Well, the only standard that I am specifically aware of, Your Honor, is the Board of Immigration Appeals has said that an alien may be excluded on the basis of charges that are not necessarily included in the formal written notice of the charges received prior to a hearing. However, the alien is entitled to a reasonable opportunity to respond to those charges.

I am not aware of any specific holding of the Board of Immigration Appeals that --

QUESTION: It sounds like there is no requirement of advanced notice in advance of the hearings, if I understand you correctly. And here, what was the notice? I don't think we can even tell from the record. It may have been ten minutes.

MR. SCHULDER: It is not absolutely clear from the record what the notice was.

QUESTION: Is there any requirement that the person be advised of any right to be represented by counsel?

MR. SCHULDER: Yes, the Immigration Service's

regulations provide that the immigration judge must advise the alien of the right to obtain counsel --

QUESTION: How long in advance of the hearing?

MR. SCHULDER: Well, the --

QUESTION: Right at the outset of the hearing, is what happened here.

MR. SCHULDER: At the outset of the hearing, the alien is so advised, but the notice of charges that is required --

QUESTION: Does that advice include advice as to how to find a lawyer?

MR. SCHULDER: Well, the Service's current regulations provide that the alien is to be informed --

QUESTION: At the time of the hearing here.

MR. SCHULDER: At the time of the hearing here, there was no such provision that the alien be informed of the availability of --

QUESTION: So the hearing as conducted in this case did not comply with the regulations that you now have in effect. Would not have complied had those regulations been in effect.

MR. SCHULDER: That's correct.

At the conclusion of Respondent's exclusion hearing, the immigration judge found that Respondent was

excludable based on clear, convincing, and unequivocal evidence. This is the same standard that applies in deportation hearings. In addition, the judge found that Respondent had made an entry because she engaged in conduct contrary to the immigration laws. Thus, under Fleuti, Respondent's departure was not unintended within the exception to the entry doctrine in the Immigration Act.

After exhausting her administrative appeals, Respondent petitioned for a writ of habeas corpus in the U.S. District Court for the Central District of California. The District Court remanded the case to the Immigration Service with directions to proceed against Respondent, if at all, only in deportation proceedings.

The Court of Appeals for the Ninth Circuit affirmed and held that whenever a resident alien returning from a trip abroad claims that his trip was not meaningfully interruptive of his permanent residence, the issues of entry and excludability must be litigated in deportation and not in exclusion proceedings. Thus, under the Ninth Circuit's holding, every returning resident alien coming back from a trip abroad, no matter the duration or no matter the purpose for which that trip was undertaken, is automatically entitled to return to this country so long as that alien

claims that his departure was not meaningfully interruptive.

There is no basis in law for the Court of Appeals decision. It is clear that the Court of Appeals in this case, by holding that resident aliens are entitled to deportation proceedings, has disregarded the clear distinction that Congress drew in the Immigration Act between exclusion proceedings and deportation proceedings. If there is one thing that is clear in the area of immigration law, it is that Congress has broad authority over immigration matters, including particularly the admission of aliens into this country. The Ninth Circuit's decision in this case has interfered with the Congress's exercise of its authority.

The court purported to base its decision on Kwong Hai Chew versus Colding, and the subsequent decision of the D.C. Circuit in Kwong Hai Chew versus Rogers, which established that the immigration authorities at an exclusion hearing have the burden of proving excludability.

The Ninth Circuit in this case assumed that the Immigration Service has ignored the burden of proof requirement of the D.C. Circuit in Kwong Hai Chew versus Rogers, but in fact, as we show in our brief, the Immigration Service has accorded returning resident

aliens a hearing at which the government bears the burden of proving excludability, so that the court's decision is based on a totally erroneous impression of the type of procedures that are available at an exclusion hearing to a resident alien.

Respondent has tried to defend the holding below by raising some additional arguments. Respondent first argues that the procedures available to permanent resident aliens in exclusion proceedings do not satisfy due process standards. We disagree with Respondent's framing of the issue here. The government, as I mentioned in response to Justice O'Connor's question, fully agrees that resident aliens should receive procedures that meet due process standards, but that does not mean that resident aliens are entitled to a deportation hearing rather than to the exclusion hearing that Congress provided for in the Act.

If the procedures at exclusion hearings need to be strengthened to meet due process standards, the remedy is to provide proper safeguards in exclusion hearings, not to provide aliens with a right to deportation hearings, which is simply contrary to Congress's decision in establishing exclusion hearings in the Immigration Act.

Respondent also argues --

QUESTION: May I interrupt once more? Is it the government's position that at this particular hearing, this person did receive due process?

MR. SCHULDER: Yes, we believe that Respondent did receive due process, but we like to point out that Respondent did not really raise the due process issues that she is now raising here in the courts below. For example, the claim about inadequate notice was never raised either in the district court or in the court of appeals.

QUESTION: The due process point.

MR. SCHULDER: That is clearly an argument, yes.

QUESTION: What you really mean is, they got due process on this type of a hearing, but it wouldn't be due process on a deportation hearing. Are you arguing that there are different degrees of due process?

MR. SCHULDER: Well, the deportation --

QUESTION: Is that your position?

MR. SCHULDER: I'm not --

QUESTION: You have different types of due process?

MR. SCHULDER: There are different types of due process, depending on the --

QUESTION: Some are a whole lot, and some are a little?

MR. SCHULDER: Well, our position is that it is not absolutely necessary that the precise procedures that happen to be available in deportation hearings have to be provided in exclusion hearings. There are different levels. That is true.

QUESTION: But as I understand you, you do concede that the process required in the exclusion of a permanent resident alien may be greater than the process required for an alien who is not a permanent alien.

MR. SCHULDER: That's correct.

QUESTION: But you also say that the process given here satisfies your concept of that intermediate level of process that the Constitution requires.

MR. SCHULDER: That's correct, but the point, the major point that we make here is that even if there was a problem here in terms of the process that was provided, the Ninth Circuit's remedy was totally wrong.

QUESTION: What would the proper -- you say the remedy isn't to require a deportation hearing.

MR. SCHULDER: That's correct.

QUESTION: The remedy is to require sort of an intermediate hearing.

MR. SCHULDER: That's correct.

QUESTION: Now, how should that be done, assuming that we thought you were wrong on the adequacy of the process in this case? How should the rules for such a hearing be formulated? You are saying, well, they don't have deportation, and if you conceded that the exclusion rules were not adequate in this intermediate category, what is to be done in the government's view?

MR. SCHULDER: Well, if the Immigration Service is informed of the deficiencies in any of its procedures in exclusion hearings, it should be -- it would provide for regulations, I would think.

QUESTION: I thought you said that they should improve the exclusionary hearing.

MR. SCHULDER: That's correct, but I'm saying that the Service most likely would provide specifically for regulations that would deal with permanent resident aliens in an exclusion setting.

QUESTION: Well, could we tell them what to do? Could we tell them what type of rules to set out?

MR. SCHULDER: Well, the Court conceivably could say that the particular procedures --

QUESTION: Conceivably, or could?

MR. SCHULDER: The Court could certainly say that the procedures that were made available here were

not adequate, but the point that I was trying to make earlier is that the issue really is not properly presented here, because it hadn't been presented either in the district court or the court of appeals, and that because of the peculiar posture of the case, there is really no basis for relying on this as an alternative ground for affirmance, since the proper remedy if due process was not provided would not be to send the case back for a deportation hearing, but instead to send the case back for an exclusion hearing.

QUESTION: The case has sort of a peculiar procedural history, because the alien was successful in persuading, I guess, both the magistrate and the district court and the court of appeals that she was entitled to a deportation hearing.

MR. SCHULDER: That's correct.

QUESTION: So there really wasn't an occasion for her to say, well, in the alternative, if I don't get that, I should at least get something more than I received in this particular case.

MR. SCHULDER: Well, she certainly had the opportunity to raise that claim in the district court.

QUESTION: Did she raise it?

MR. SCHULDER: Well, she did argue that she was entitled to the procedural safeguards of the

deportation hearing, but what the record actually shows is that she was arguing for an entitlement to entry into the country and being placed in deportation proceedings rather than to the same types of safeguards that happen to be available in the deportation context.

QUESTION: Well, Mr. Schulder, just to clarify it, as far as the government is concerned, this Court could be asked to simply determine whether she was entitled to a deportation proceeding or an exclusion proceeding, and if it were determined that she were entitled to an exclusion proceeding, just remand it for that without attempting to spell out all of the requirements for that proceeding. Is that your position?

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

Respondent attempts to justify the court of appeals decision by arguing that somehow it is unfair for a resident alien to be -- to have both the issues of entry and excludability turn on a single immigration offense. In other words, in this case, Respondent was found to have attempted to smuggle illegal aliens into the country, and that finding established both that she was excludable and also that she had made a meaningful interruption of her permanent residence, and thus had been attempting an entry.

But we have responded to this argument in our reply brief at Pages 6 through 8, and I would essentially like to rely on that, but I would also like to point out that Respondent's argument essentially is that the Immigration Act requires the Immigration Service to admit a resident alien into the country because of an alleged immigration violation.

In other words, if the entry and excludability issues both turn on an immigration offense rather than on two other factors, technical violations, then the Immigration Service must allow the alien to enter. We don't think that Congress conceivably intended this result when it established separate proceedings for exclusion and deportation of aliens.

Finally, I must emphasize that there is no danger of a resident alien being excluded if he has not made an entry. If the evidence in an exclusion hearing shows that the trip was in fact innocent, casual, and brief, the exclusion hearing must be terminated, and the alien must be allowed into the United States. So that there is no danger here that an alien will be found excludable where in fact the evidence shows that the resident alien, at least under the terms of the immigration statute, was not in fact making an entry.

I would like to reserve the remainder of my

time.

QUESTION: May I ask one other question on the meaningful departure exception to the general rule? What point in time is relevant for determining the alien's intent when a criminal activity is disclosed as we assume was true here? Is it important whether the intent to engage in criminal activity was held at the time of departure, or is it sufficient if it is at the time of return?

MR. SCHULDER: We submit that it is sufficient at the time of returning to the country. In fact, the Ninth Circuit held to that effect in the Palatian case.

QUESTION: And you would satisfy that clearly here even if -- assuming your proof is correct.

MR. SCHULDER: Absolutely. In fact, Respondent's testimony acknowledged -- she herself acknowledged that she did intend to bring these aliens in illegally. The only issue at the hearing was one of whether she had done it for gain or not. That went to the excludability question, not to the entry question.

QUESTION: On that point, on the gain, the trial examiner, the judge, whatever he was called, on Page 33 of the abstract asked one of the witnesses if it was the witness's understanding that he was going to pay the alien an amount of $200 after he arrived in Los

Angeles, and he said yes, he had that understanding, although he didn't indicate whether it was based on conversation with the alien.

One thing puzzled me in reading this. I wonder where the trial judge got the basis for that question. Does the trial judge look at affidavits during the hearing that are not made a part of the record?

MR. SCHULDER: I'm not exactly aware, but I believe there was a statement -- I believe there were statements from the alien witnesses that were admitted.

QUESTION: And would they be things that the trial examiner would look at in an ex parte fashion during a hearing of this kind?

MR. SCHULDER: Well, these were statements that were, I believe, admitted into evidence. They are part of the administrative record.

QUESTION: I see. Thank you.

QUESTION: Mr. Schulder, where is the Respondent now? Is she in this country?

MR. SCHULDER: Well, she was paroled into this country by the district director. As far as we know, she is living in this country. That's correct.

CHIEF JUSTICE BURGER: Mr. Manulkin.

ORAL ARGUMENT OF GARY H. MANULKIN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. MANULKIN: Mr. Chief Justice, and may it please the Court, I would like to begin argument with a little discussion of the manner of the framing of the issues by the court below, by the Petitioner, and by the Respondent, because I think that will tend to simplify, at least for my purposes, further argument, the reasoning behind our argument or behind our briefs, and behind the decision and the rationale of the court below.

The court below stated the issue as whether Plasencia was entitled to have her violation of the immigration laws and the purpose of her trip determined in deportation rather than exclusion proceedings. Now, neither the Petitioner nor the Respondent --

QUESTION: What by the way of notice, for example, would be greater in the deportation proceeding than in the exclusion?

MR. MANULKIN: In the -- I am sorry. Are you asking whether the notice is different in the two, deportation and exclusion?

QUESTION: Yes. Wouldn't she have had more notice in order to meet the problem she was facing?

MR. MANULKIN: Yes. In a deportation proceeding, the Title 8 of the Code of Federal Regulations, Section 242, does require seven days'

notice be given to a deportee.

QUESTION: I am not talking about the number of days. The content of the notice.

MR. MANULKIN: Well, the content is different --

QUESTION: So that she would know what it was she was being charged with.

MR. MANULKIN: From the record -- I was not present at the time of the hearing, but from the record, I can only determine that the notice was written to her a few minutes before the judge proceeded, the immigration judge in this case proceeded with the presentation of the case and allowed the trial attorney to go forward, and from the record again, I only discern that the judge read that you are being charged with aiding and abetting the entry of aliens into the United States for gain, the illegal entry of those aliens, although I will say that the notice itself was a little difficult to read, and I noticed that someone in fact had to make some marks over it to be read.

Now, in a deportation proceeding, the notice is somewhat different. There is an order to show cause that is issued on the Respondent that has a number of factual allegations, such as in her case it would have said, you are a native and citizen of El Salvador, you

entered the United States as a permanent resident on whatever date it was in 1970, March, 1970, and you left the United States and departed from the United States on such and so date, and you were charged with, and found with aliens in your automobile, upon your re-entry to the United States on such and so date.

And then, after those allegations of fact are being charged, then it will say the legal ground for charge of deportability. In this case, it would have said that therefore, you are excludable from the United States under Section 212(a)(31) of the Immigration and Nationality Act. Now, that is the way a deportation notice would in fact be presented to her seven days before the hearing was to commence, and then, of course, at that hearing it is simply an arraignment type of a hearing, where she is just asked to plead, do you admit the facts and admit deportability or deny them?

If in fact she has counsel present, counsel in almost all instances will ask for some additional time in which to review the evidence against her.

Now, in an exclusion proceeding such as this at the border, it is extremely difficult, most obviously, for any alien who does not speak our language and is -- in this case, Mrs. Plasencia, of course, was at San Isidro, 100 miles from her home in Los Angeles,

and it was extremely difficult for her at that remote location to obtain counsel with approximately maybe 12 hours' notice. It is hard to tell from the record. It looks as though she was arrested the evening before, and the hearing concluded at 11:00 a.m. the next morning, so she probably had around 12 hours to obtain counsel. They were not wealthy people, and so they may very well have had to have contacted one of the organizations in Los Angeles that were able to do pro bono or other kinds of free representation.

QUESTION: Mr. Manulkin, getting back to what the government said, suppose the rule is changed which says simply that at an explusion hearing you have the exact same as the deportation hearing. Would you be here?

MR. MANULKIN: Well, the difficulty that we feel there is with that type of a route would be the preclusion of all of those sections of the Immigration Act that are not regulation but statutory sections, such as a stay of deportation in Section 243(h), which she would very possibly --

QUESTION: You just want to rewrite the statute.

MR. MANULKIN: Well, we certainly don't -- yes, we certainly don't want to cause a multiplicity of

litigation.

QUESTION: Or rather, you want us to rewrite the statute.

MR. MANULKIN: What we are asking the Court to --

QUESTION: You don't really want us to do that, do you?

MR. MANULKIN: No. We do not, Justice. What we basically wish for this Court to do is to recognize the Respondent in the position of --

QUESTION: What more can we do than say that they must give due process?

MR. MANULKIN: I think Chew v. Colding is our answer. I think the Chew v. Colding decision in 1953 is the answer. If you assimilate Mrs. Plasencia to the status of a continuing permanent resident who continues to reside in the United States even after and even during a brief visit outside the United States, then she must be given deportation proceedings, if she has in fact assimilated to that status.

QUESTION: Chew had simply taken passage on an American ship, hadn't he? He hadn't deliberately left the country the way your client had.

MR. MANULKIN: In fact, I believe he was an American merchant seaman, that's correct, yes, and he

had --

QUESTION: Yes, on an American ship.

MR. MANULKIN: On a ship, and for four months he had been gone from the United States, and he was without any visible family, or there were no particular hardships in terms of his home. His home was the ship. And also, he was also charged with a violation of the policies of the immigration laws in that his presence in the United States the Attorney General felt would be opposed to the national interest, and in that regard he was excludable, and of course in our case it is similar.

QUESTION: But he didn't deliberately leave for foreign soil, the way your client did.

QUESTION: And he didn't bring back illegal aliens, either, did he?

MR. MANULKIN: No. No, he did not bring back illegal aliens. We would argue that the evidence is not completely clear in this case whether Mrs. Plasencia, if in fact there had been a charge of smuggling aliens, would have been convicted of a charge of aiding and abetting illegal entry, and that her husband in fact was driving the car.

QUESTION: Mr. Manulkin, if we could go back to the Chew case for a minute --

MR. MANULKIN: Yes.

QUESTION: -- would you agree that the Chew decision does not give returning resident aliens a right to treatment that is identical to that of a continuously present resident?

MR. MANULKIN: No. No, I would not agree with that.

QUESTION: You don't agree.

MR. MANULKIN: And the reason I don't agree with that is because of the language in the Chew v. Colding, that specific language that says, "to protect a status described in those cases as assimilated to that of an alien continuously residing and physically present in the United States," that Chew was to be considered in that light, and then, of course, the Chew v. Rogers decision, which was five years later, in 1958. The D.C. Circuit, upon remand from this Court, made the determination that we will -- the Court will remand for deportation proceedings Mr. Chew, and I think that is a correction that we have to make of the government's brief. If you read the last sentence, in fact, of the Chew v. Rogers decision, it specifically says we are remanding for deportation proceedings.

QUESTION: Well, all that shows is that the District of Columbia Circuit agrees with the Ninth Circuit.

MR. MANULKIN: Yes, that is true, and agrees, they felt, agreed with the Supreme Court of the United States.

QUESTION: Well, Chew was actually decided prior to the Immigration Act of 1952, when the Congress codified all of these immigration policies. The concept of entry before 1952 was purely a judicial one. It was codified in 1952.

MR. MANULKIN: I believe, Your Honor, that the case was in fact -- you are right -- begun before 1952, but in actuality this Court's decision was rendered in 1953, after the 1952 Immigration Act.

QUESTION: Yes, but it didn't purport to construe the 1952 Act.

MR. MANULKIN: Well, no, it did in one sense. Section 101.813 of the Immigration and Nationality Act, which defined entry, they did in the footnotes describe some of the Congressional intent as to the reasoning behind this change that was upcoming in the '52 Act in that statute, which dealt with the harshness of the strict entry rule, and it dealt very carefully with the 64 years, as it stated in the footnotes, of cases that had come before, that had tried to accept to that strict harshness.

QUESTION: Well, are you suggesting that Chew

when the 1952 Act wasn't before the Court, attempted to cast doubt on the 1952 Act?

MR. MANULKIN: No. It basically was talking about what the definition of entry was to be in the 1952 Act, and by the time the Court's decision in fact was published, the '52 Act was history. It had in fact been promulgated, and passed by Congress.

I think I would like at this point to again restate the issue difference in terms of the emphasis by the government and the Respondent. The government states the charge of excludability itself, just the charge calls for a conclusion of meaningful departure, and therefore calls for a conclusion of exclusion rather than deportation, not the proof of the charge, the making of the charge by the Immigration Service.

The Respondent emphasizes that the person is a returning permanent resident who has lived in the United States, has a home in the United States, had been admitted to the United States as a permanent resident at one time, had gone through all of the inspection process, had been given a permanent resident card, and then made a brief visit, a two-day visit to Tiajuana, and was returning from that two-day visit.

Now, the question is not whether the charge of smuggling aliens or aiding and abetting illegal entry is

true or false at that point, until there has been a hearing to make that determination. In this case, the fact that the District Director of Immigration handed this piece of paper, which was the exclusion notice, to Mrs. Plasencia, the mere handing, that act of handing that to her, made her excludable instead of deportable.

That is what we have a great deal of difficulty in understanding, that approach, and we feel that is exactly what happened in Rosenberg versus Fleuti, which is what we would like to see happen in this case, which is that a deportation proceeding should have been initiated under Section 241(a)(1) of the Immigration and Nationality Act, which states that a person is now deportable if they were at the time of any entry excludable.

Now, of course, the 32 grounds of excludability are encompassed within Section 241(a)(1), so the government certainly would have not been prejudiced by the bringing of that deportation charge, and through Section 212(a)(31), could have then been adjudicated in a deportation setting, and it is possible that the conclusion of that case would have been that she was found excludable because she had -- deportable because she had been excludable at the time of entry.

QUESTION: You say it is possible?

MR. MANULKIN: The evidence is very difficult from the 20-some pages of transcript to determine, I feel. I feel it is very conflicting as to whether or not it is possible that she was the smuggler, whether that was in fact a matter of gain on her part when $25 was paid to her husband for gas. I think it is a very difficult proof by the government, and in fact I might even suggest that there might have been some reason for the government not going forward on a criminal charge. The question was asked earlier in that regard.

QUESTION: Mr. Manulkin, if the alien had been out of the country for five years under your theory, would that alien be entitled on coming back in to say, it isn't true, I contest this, and therefore be entitled to a deportation hearing.

MR. MANULKIN: You mean, if she had remained in Mexico for five years?

QUESTION: Sure.

MR. MANULKIN: No, no.

QUESTION: Comes back in and says, no, no, that is not true, I want a deportation hearing.

MR. MANULKIN: No.

QUESTION: What is the difference?

MR. MANULKIN: Well, because we feel that -- we agree with the Shaughnessy versus Mezei decision of

this Court when it stated that Mr. Mezei, having left the United States for 19 months to go to Hungary without the permission of this --

QUESTION: But under your theory, those facts should be determined at a deportation hearing. What is the difference?

MR. MANULKIN: No, no, because in that particular case, there is not a brief visit outside the United States, in either Shaughnessy versus Mezei or the factual situation that you just presented. We are not arguing with the fact that the Immigration Service has the right to control its borders as to persons who are not residing therein.

QUESTION: Why shouldn't the government be entitled to proceed at an exclusion proceeding, as the statute might well indicate, and simply afford the alien whatever process is due?

MR. MANULKIN: Well, I think one of the most difficult problems with a person put into that situation would be the sections dealing with the amelioration of the hardships attendant to being deported from the United States, such as, I mentioned earlier Section 243(h) of the Immigration and Nationality Act, which states that a person can apply for a stay of deportation if there is a well-founded fear of the likelihood of

persecution on the basis of race, religion, or political opinion.

Now, this particular individual, for example, Mrs. Plasencia, has a U.S. citizen husband, four permanent resident children who were coming of military age, who were getting older. Taking this family back to El Salvador might have given her, and a showing to the Court and proof to the Court that she has a fear of likelihood of returning to El Salvador with this family, might well have occasioned the immigration judge to grant a stay of deportation, but as the cases, and this Court is one of the decision-makers on that issue, that 243(h) does not apply to a person who is a respondent in exclusion proceedings. So she would be precluded from making that application for, in the vernacular, asylum or refugee status.

Also, another preclusion would be Section 244(a)(1) and 244(d) of the Immigration and Nationality Act in that she could not apply for a suspension of deportation in an exclusion proceeding. Again, the courts, this Court and other courts have found that that application could not be made in an exclusion proceeding by an excludee only by someone who is in deportation proceedings, and of course she could maybe very easily show that it would be extreme and unusual hardship to

herself and her family to in fact return to El Salvador, a country in the middle of a civil war and great strife, and where maybe U.S. citizen men are not to be invited to remain, and permanent resident children are not going to be treated in a hospitable fashion, especially --

QUESTION: How long since she undertook to the United States?

MR. MANULKIN: I am sorry?

QUESTION: How many years have passed since this episode occurred?

MR. MANULKIN: Well, she has been living in the United States.

QUESTION: The episode, coming across the border with aliens.

MR. MANULKIN: How long had she been living in the United States?

QUESTION: No, how many years ago did this occur?

MR. MANULKIN: This occurred in 1975, Your Honor.

QUESTION: So now it is seven years.

MR. MANULKIN: Yes, it is, Your Honor.

QUESTION: Now, if you prevailed here, could any criminal charges be brought against her?

MR. MANULKIN: Under the possible statute of

limitations, I believe not.

QUESTION: The statute of limitations has run.

MR. MANULKIN: That's right. Yes.

QUESTION: What about a deportation proceeding, the full-scale proceeding that you would like?

MR. MANULKIN: Yes. Yes, I believe that could be brought.

QUESTION: That could be brought?

MR. MANULKIN: Yes, I believe so.

QUESTION: The evidence is seven years old now, isn't it?

MR. MANULKIN: Well, the government did have written statements from all of the witnesses, as we understand it, and written statements are admissible in deportation proceedings when there is unavailability of the individuals to testify, so I believe the government would be very little prejudiced by holding a deportation hearing today.

As a matter of fact, in this particular case, I might call your attention to the fact that the written statements that were presented as evidence in court were never read to Mrs. Plasencia, but yet she was being asked to cross examine the maker of those statements.

She was not -- She was, if you will look at the transcript of the record, she was handed the statement in English, saying, do you object to the admission of this statement, but there is no indication that it was -- she doesn't read English -- that it was ever translated to her.

QUESTION: How long had she lived in the United States before?

MR. MANULKIN: She had -- It is not in the record, Your Honor.

QUESTION: Well, she's got three children that are getting ready to go in the Army.

MR. MANULKIN: Well, as a matter of fact, I believe only one of those was a son, but she had come to the United States in probably the late sixties, about 1968, and then immigrated in 1970.

QUESTION: Did she bring those children with her?

MR. MANULKIN: Yes, she did.

QUESTION: I thought you said they were American citizens.

MR. MANULKIN: No, the children never became American citizens.

QUESTION: Oh, I guess I misunderstood you.

MR. MANULKIN: They are still permanent

residents. I am sorry I didn't make that clear. Her husband is a U.S. citizen, and in fact he immigrated her to the United States in 1970 while remaining here, which was through an adjustment of status type of approach, which precludes her from having to go back to San Salvador to obtain her permanent residence.

I really believe that the government is asking this Court to overrule Chew v. Colding. Looking at the case, looking at this case, the facts of the two cases, I cannot see any substantive differences. It has been mentioned that Mr. Chew did not leave for a foreign country, yet the ship did, of course, stop in foreign ports.

QUESTION: Well, why couldn't I -- I could personally distinguish on the fact that he wasn't importing illegal aliens?

MR. MANULKIN: Because he was a danger to national security, as I would --

QUESTION: Well, that is a distinguishing proposition, isn't it?

MR. MANULKIN: It would be a matter, I suppose, of weighing which is more in violation of immigration policy, to aid and abet illegal entry or to become a danger to national security. I am not maybe --

QUESTION: Well, Chew also simply construed a

regulation. It didn't make any holding on any constitutional issue. When did it construe the 1952 statute?

MR. MANULKIN: It only -- like I said, Your Honor, in the footnotes, discussed 1018.13, which --

QUESTION: The footnote discusses it in two sentences.

MR. MANULKIN: Yes, it does. You are right.

QUESTION: Not in the long discourse which you are suggesting.

MR. MANULKIN: No, you are right, it does not go into a long discussion of the 1952 Act, but I believe I would differ in that it did in fact construe the situation of a continuing permanent resident as to the amount of procedural protections and due process that that individual is entitled to, whatever the statute is, whether it was a pre-'52 statute or a post-'52.

QUESTION: Doesn't Chew contain the statement that all we are doing is construing this regulation and saying it wasn't authorized by statute?

MR. MANULKIN: It did attempt to limit --

QUESTION: I thought it quite successfully limited it. I don't think Justice Bergman was incapable of limiting an opinion like that.

MR. MANULKIN: Well, I believe, Your Honor,

that you are right, that it did construe a regulation, and I believe that it did attempt to narrow at the very latter part of the case, after it had already said these words in different contexts three or four times, "assimilated to the status of a continuing permanent resident." It said that four times through the case, and it is very difficult unless you read Chew having been outside the United States for four months, our client having been outside the United States for two days, both challenging immigration policies --

QUESTION: But here, the statute clearly authorizes what was done, and in Chew they simply held the statute didn't authorize what was done.

MR. MANULKIN: That is basically true. That is basically true, Your Honor. You were dealing, again, like you said, with a regulation, not a statute. Here we do have a statute. The statute, of course, does include an element of gain, and I think it is important also for this Court to become aware of the fact that this is different for criminal proceedings than it is for civil proceedings.

Section 1324, Title 8 of the United States Code talks about smuggling of aliens as being a crime, but it does not bother to mention the word "gain." Gain is not an element in the criminal context. It is only

in the immigration context. And because of that, it is really a more difficult prove up, I would guess, for the government in a criminal context, and again I draw your attention to the fact that the government did not proceed against either Mr. or Mrs. Plasencia in a criminal proceeding, bringing a criminal charge, and in fact if they had, we might not be here today, because we would then have had procedural protections in that criminal context. We would have had right to counsel, and notice, and Fifth Amendment self-incrimination rights, as you --

QUESTION: How would that help her on her exclusion?

MR. MANULKIN: Well, it wouldn't, as a matter of fact, help her if she were found guilty, Your Honor. It would in fact cause an easier situation for the immigration judge to present the conviction as evidence of excludability, and then we might have a little different -- more difficulty with the government in arguing against them.

QUESTION: The government might at that time have decided to prosecute him and not her, if she was excludable and excluded.

MR. MANULKIN: They did not though, Your Honor. They did not. They didn't proceed against

either one. The evidence was very contradictory, and they might have read the evidence, and they might have seen that this one witness, the number one witness in the case, in fact made contradictory statements the night before under oath in both cases. She even misstated her name. She misstated how much money supposedly was to be promised, $300 the night before, $250 the next morning. She misstated the fact that it was the wife of her uncle that she was traveling with. In fact, during the hearing she says, I have no family.

So if you look at the contradictions of her evidence, I think the United States Attorney's office just decided that this would be a very difficult case to prosecute.

I think I would like to draw finally the attention to the differences in exclusion and deportation proceedings and the particular prejudices to Mrs. Plasencia in this cse. We have already talked about the stay of deportation, the notice of charges. The continuances that are granted regularly in deportation proceedings, I think, are crucial. An immigration attorney must in fact prepare seven, ten, twelve, fifteen weeks, sometimes, for a case such as this, to be ready to argue it, and I would like to ask this Court to find that Mrs. Plasencia will be held in

deportation proceedings, and that it will be the obligation of the government to prove her deportability, and I would ask this Court to not overturn Chew v. Colding.

QUESTION: Wait a minute. Let me understand you correctly. She is now free. You want us to order her arrested?

MR. MANULKIN: Well, Your Honor, we are arguing --

QUESTION: You said you want her held for deportation. You want us to say that she should be held for deportation?

MR. MANULKIN: I feel -- that is my position, if we are asking for an affirmance of the Ninth Circuit.

QUESTION: Well, does your client agree with you?

MR. MANULKIN: Well, certainly not. Certainly not. I would agree with you that she does not want to be held in deportation proceedings, but we are asking for an affirmance of the lower court's determination. We feel that is our obligation. Thank you. Unless there are any other questions.

QUESTION: No.

MR. MANULKIN: Thank you.

CHIEF JUSTICE BURGER: Do you have anything

further, Mr. Schulder?

ORAL ARGUMENT OF ELLIOTT SCHULDER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SCHULDER: Yes, Your Honor.

Respondent has conceded here that greater procedural protections could be provided for resident aliens in exclusion proceedings. I think it is quite apparent from Mr. Manulkin's argument that what Respondent relly wants here is the opportunity to be eligible for a whole variety of discretionary forms of relief that are available to aliens only in a deportation context, and not in an exclusion context, but due process does not entitle an alien to these substantive forms of relief. It is Congress and the statute that provides which aliens in which types of proceedings are entitled to certain substantive remedies.

I think it is simply a distortion of the whole statutory scheme to allow resident aliens like Respondent to be placed in deportation proceedings where they will be given all kinds of substantive remedies that Congress specifically declined to give to these people when it separated exclusion proceedings from deportation proceedings in the statute.

I would also like to point out that

Respondent's claims of inadequate notice and the other procedural deficiencies that she alleges are a red herring here. She could have raised these claims before the Board of Immigration Appeals, and in fact she was represented by counsel in a motion to reopen before the Board of Immigration Appeals, and if her claims had been rejected, she could have appealed to the Ninth Circuit and then to this Court raising the due process claims.

The fact of the matter is that she did not raise any of these claims either before the BIA or in the District Court or Court of Appeals.

Finally, I think Justice O'Conner hit the nail on the head when she asked my adversary whether he conceded that where an alien has taken a trip of five years or of extended duration, whether he would still be arguing that there was an entitlement to a deportation proceeding. Counsel conceded in response to that that there would not be such entitlement, but the whole point of this case is where and in what forum is the determination made as to whether the trip was brief or not.

In fact, the Ninth Circuit in a number of cases has held that fairly extensive trips abroad do not amount to extensive enough visits to interrupt permanent residence.

And I would like to make one final point in response to Respondent's argument relying on Kwong Hai Chew versus Colding, the language that a resident alien is to be assimilated to an alien continuously residing and physically present. At Page 596 of Volume 344 of U.S.

At Page 596 of Volume 344 of U.S. Reports, it is true that the Court said for purposes of his constitutional right to due process we assimilate petitioner's status to that of an alien continuously residing and physically present in the United States.

But several pages later, on page 601, the Court says, it may well be that an alien's ultimate right to remain in the United States is subject to alteration by statute or authorized regulation because of a voyage undertaken by him to foreign ports.

The point of our submission here is that the determination whether an alien is entitled to reenter the United States after a trip abroad is to be made in an exclusion setting, as Congress provided in the immigration statute. The Ninth Circuit, and Respondent here, have provided absolutely no justification in law for departing from the statutory scheme. Thank yo

CHIEF JUSTICE BURGER: Thank you, gentlemen.

(Whereupon, at 10:56 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:
MICHAEL LANDON, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE v. MARIA ANTONIETA PLASENCIA No. 81-129

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY _____
(REPORTER)