

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-91

TITLE IMMIGRATION AND NATURALIZATION SERVICE, Petitioner v.  
PADUNGSRI PHINPATHYA

PLACE Washington, D. C.

DATE October 3, 1983

PAGES 1 thru 41



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WASHINGTON, D.C. 20001

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3 IMMIGRATION AND NATURALIZATION                   :

4     SERVICE,   :

5   Petitioner                         :

6                         v.   :     No. 82-91

7 PADUNGSRI PHINPATHYA   :

8 - - - - -x

9   Washington, D.C.

10   Monday, October 3, 1983

11                   The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 10:03 a.m.

14 APPEARANCES:

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

18 BERT D. GREENBERG, ESQ., Beverly Hills, Cal.; on behalf  
19 of the Respondent.

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1                                    P R O C E E D I N G S

2                    CHIEF JUSTICE BURGER: We will hear first this  
3 morning Immigration and Naturalization Service v.  
4 Padungsri Phinpathya.

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

7                    CRAL ARGUMENT OF ELLIOTT SCHULDER, ESQ.,  
8                    ON BEHALF OF THE PETITIONER

9                    MR. SCHULDER: Mr. Chief Justice, and may it  
10 please the Court:

11                   The question in this case is whether a  
12 deportable alien who first arrived in this country more  
13 than seven years before applying for suspension of  
14 deportation can establish physical presence in the  
15 United States for a continuous period of seven years  
16 when during that seven-year period the alien's illegal  
17 presence in this country was interrupted by a  
18 three-month trip abroad at the conclusion of which the  
19 alien knowingly misrepresented her immigration status to  
20 secure reentry to the United States.

21                   The facts of this case are as follows:  
22 Respondent is a native and citizen of Thailand who first  
23 arrived in the United States in 1969 as a nonimmigrant  
24 student, and she was authorized to remain until July 25,  
25 1971. Her husband arrived in this country in 1968 also



1 as a nonimmigrant student. He was also authorized to  
2 remain until July 1971.

3 Both Respondent and her husband remained  
4 beyond the July 25, 1971 date. The Immigration and  
5 Naturalization Service instituted deportation  
6 proceedings in 1977 charging that Respondent had  
7 overstayed her visa.

8 Respondent conceded deportability but applied  
9 for suspension of deportation under Section 244(a)(1) of  
10 the Immigration and Nationality Act. Section 244(a)(1)  
11 permits the Attorney General or his delegates to suspend  
12 deportation of an alien who shows that he was physically  
13 present in the United States for a continuous period of  
14 seven years immediately preceding the application for  
15 suspension of deportation who also shows that he was a  
16 person of good moral character during that seven-year  
17 period and who also is able to show that he is a person  
18 whose deportation would in the opinion of the Attorney  
19 General result in extreme hardship to the alien or to  
20 certain family members who are U.S. citizens or lawful  
21 resident aliens.

22 In this case Respondent admitted that from  
23 January 1974 until April 18, 1974 she was absent from  
24 the United States when she and her two children took a  
25 trip to Thailand to visit her mother. The Immigration

1 judge concluded that this absence was meaningfully  
2 interruptive of the continuity of Respondent's physical  
3 presence in the United States.

4           The judge applying the factors developed by  
5 this court in Rosenberg v. Fleuti pointed to several  
6 factors, first, the length of the absence which in this  
7 case was three months. The fact that Respondent  
8 obtained travel documents prior to the trip and while  
9 she was abroad tended to demonstrate the deliberateness  
10 with which the trip was undertaken and pointed to the  
11 fact that Respondent had an opportunity to consider the  
12 significance of her trip on her immigration status.

13           Finally, the Immigration judge noted that  
14 Respondent knowingly misrepresented her status as the  
15 spouse of a nonimmigrant student even though her  
16 husband's student visa had expired approximately two and  
17 a half years earlier.

18           QUESTION: Mr. Schulder, did the Service bring  
19 any kind of proceeding against the husband?

20           MR. SCHULDER: Yes, it did.

21           QUESTION: What is the status of that one?

22           MR. SCHULDER: The husband's proceeding -- The  
23 Immigration judge found the husband had met the  
24 requirements of the statute and was eligible, and I  
25 believe the judge found that the husband should be

1 granted relief under the suspension of deportation  
2 statute. The Board of Immigration Appeals reversed that  
3 and the Board in turn was reversed by the Court of  
4 Appeals so the matter was sent back to the Board of  
5 Immigration Appeals for further proceedings.

6 I am not aware whether any further proceedings  
7 have in fact been held with respect to the husband's  
8 case.

9 QUESTION: As far as you know he, too, is  
10 still in this country.

11 MR. SCHULDER: That is correct.

12 QUESTION: Mr. Schulder, as long as you are  
13 interrupted what is the status of any reapplication now  
14 by the Petitioner?

15 MR. SCHULDER: Petitioner reapplied for  
16 suspension of deportation before the Board of  
17 Immigration Appeals while after this Court granted  
18 certiorari she argued that more than seven years had  
19 elapsed since the 1974 trip and claimed that she was  
20 entitled to have her deportation proceedings reopened  
21 for a new application for suspension of deportation.  
22 That application for motion to reopen is still pending  
23 before the Board of Immigration Appeals.

24 QUESTION: It is your position that that does  
25 not make this case moot because of the discretionary

1 nature of that proceeding.

2 MR. SCHUIDER: That is correct, Your Honor.

3 The Board of Immigration Appeals affirmed the  
4 Immigration judge's decision. In addition to the  
5 factors mentioned by the Immigration judge the Board  
6 pointed out that Respondent had overstayed her visa  
7 before her trip to Thailand and she reentered this  
8 country by misrepresenting her status.

9 According to the Board, the trip, therefore,  
10 substantially increased the likelihood that Respondent's  
11 illegal status would be discovered and that Respondent  
12 would be deported. The Court of Appeals for the Ninth  
13 Circuit reversed.

14 The Court concluded that the factors  
15 enumerated in Fleuti were merely evidentiary with  
16 respect to the significance of an alien's absence and  
17 that even if an absence increases the risk of an alien's  
18 deportation it cannot be meaningfully interruptive if  
19 the hardships associated with that deportation would be  
20 equally severe if the absence had not occurred.

21 For the purposes of this case we accept the  
22 application of the test announced in Fleuti in the  
23 different context of suspension of deportation. Since  
24 the Ninth Circuit's decision in Wadman v. INS in 1964,  
25 both the courts and the Board of Immigration Appeals



1 have applied the Fleuti standards in determining whether  
2 an absence by an alien was meaningfully interruptive of  
3 the continuity of the alien's physical presence.

4 In other words, we believe --

5 QUESTION: You said you accept the Fleuti  
6 standards for the purposes of this case. What does that  
7 mean? You have reservations whether you will continue  
8 to --

9 MR. SCHULDER: No, Your Honor, but just in the  
10 -- I am arguing this case in the context of the Court's  
11 decision and the issues that are --

12 QUESTION: But you are not suggesting that the  
13 Agency no longer wants to follow the Fleuti standard?

14 MR. SCHULDER: Oh, no. No, Your Honor. In  
15 fact, the Agency believes that there is room for  
16 flexibility in applying the statute.

17 The problem here, however, is that the test  
18 created by the Court of Appeals far exceeds any  
19 flexibility that was permitted by this Court in Fleuti.  
20 In fact, it wrenches the Fleuti test out of the context  
21 in which that test was created, and it produces wholly  
22 irrational results in our view.

23 Fleuti, in fact, created a very narrow rule to  
24 deal with an exceptional situation where the literal  
25 construction of the statute would subject the alien to

1 the sport of chance and meaningless and irrational  
2 hazards that were noted in the Court's opinion in  
3 Fleuti. The Court relied largely on the analysis of  
4 Judge Hand in his decision in DiPasquale v. Karnuth and  
5 on this Court's earlier decision on Delgadillo v.  
6 Carmichael.

7 QUESTION: Mr. Schulder, is it not also true  
8 that the Court relied on the comparison of the test of  
9 residence where there could be more substantial  
10 interruptions under the residence standard in the Fleuti  
11 opinion? Did not the Court also find support in the  
12 notion that residents may be interrupted for a different  
13 purpose?

14 MR. SCHULDER: You are saying the Court of  
15 Appeals in this case?

16 QUESTION: No, no. I am talking about the  
17 Supreme Court in the Fleuti opinion itself because that  
18 did not confine its reasoning to the examples you give.  
19 It also drew support from the fact that in measuring  
20 residence Congress has allowed substantial interruptions  
21 not to interrupt residence.

22 MR. SCHULDER: That is true. The Court's  
23 opinion did point to that provision of the Immigration  
24 Act.

25 QUESTION: Right.

1           MR. SCHULDER: Of course, this case involves a  
2 separate statute which does not refer to residence but  
3 which refers to physical presence.

4           QUESTION: Right.

5           MR. SCHULDER: In fact, the statute had been  
6 amended to exclude residence and to insert physical  
7 presence into the statute.

8           QUESTION: Did Fleuti involve the same  
9 statute?

10          MR. SCHULDER: No, Fleuti involved a different  
11 provision of the Immigration Act.

12          QUESTION: In your opinion that makes no  
13 difference?

14          MR. SCHULDER: Well, as I said before since  
15 1964 when the Ninth Circuit applied the same test that  
16 had been developed by this Court in Fleuti for the  
17 separate statutory context of the suspension of  
18 deportation statute both the courts and the Board of  
19 Immigration Appeals have applied the Fleuti standards.  
20 As the Court had said in Wadman the Court believed that  
21 the word "continuous" in this statute should no more be  
22 read rigidly as the word "intent" or not intended in the  
23 entry provision of the statute that was at issue in  
24 Fleuti.

25          We agree that a certain amount of flexibility

1 is proper under the statute. The flexible construction  
2 of the entry provision in Fleuti as the Court pointed  
3 out in that case protects a resident alien from the  
4 unsuspected risks and unintended consequences of wholly  
5 innocent action.

6 QUESTION: Under the plain language of the  
7 statute where do you find the flexibility?

8 MR. SCHULDER: The plain language of the  
9 statute I would --

10 QUESTION: Is not flexible is it?

11 MR. SCHULDER: -- certainly would not tend to  
12 support a flexible reading.

13 QUESTION: Is there anything in the  
14 legislative history that suggests flexibility?

15 MR. SCHULDER: The only thing in the  
16 legislative history that might suggest flexibility is  
17 the history of the suspension of deportation statute  
18 before the insertion of the particular language at issue  
19 here. In other words, the whole notion of suspending  
20 deportation was one that was developed by Congress in  
21 order to give the Attorney General some discretion to  
22 grant relief in cases which previously had only been  
23 covered by private bills submitted to Congress.

24 QUESTION: Is there anything in the  
25 legislative history that suggests an absence of



1 congressional intent to provide flexibility?

2 MR. SCHULDER: Yes, there are indications in  
3 the legislative history that indicate that Congress  
4 meant the statute to be construed quite strictly if not  
5 literally.

6 QUESTION: If so, why does the Solicitor  
7 General take the position you have stated here?

8 MR. SCHULDER: The reason for our position  
9 essentially is that the Board of Immigration Appeals  
10 which is the delegate of the Attorney General and has  
11 been administering this statute has in a sense  
12 acquiesced in the application of the Fleuti standards to  
13 this particular statute.

14 As we pointed out in our reply brief we  
15 certainly think that there ought to be room in the  
16 statute to cover certain kinds of situations, for  
17 example, the situation that was involved in the  
18 DiPasquale v. Karnuth situation where an alien took an  
19 overnight train from Buffalo to Detroit.

20 There was nothing in the record that  
21 established that he knew that the train was going to go  
22 through Canada during the night. Certainly there must  
23 be, we think, some room in the statute for flexible  
24 application, and we think that both the courts and the  
25 Board of Immigration Appeals and the Immigration judges

1 have been applying the Fleuti standards here.

2           They know the contours of the test, and they  
3 have been applying it without any major problems until  
4 the Ninth Circuit in this case in its earlier opinion in  
5 Kamheangratiyooth totally obliterated the --

6           QUESTION: Did the government seek certiorari  
7 in the Wadman case?

8           MR. SCHULDER: No, I do not believe so.

9           Under the Fleuti test the question essentially  
10 is whether it is reasonable to conclude that the alien  
11 should have considered the adverse immigration  
12 consequences of a trip abroad. Applying the Fleuti  
13 factors to this test we submit that Respondent clearly  
14 should have considered the adverse implications of her  
15 trip.

16           For one thing, the trip itself was quite  
17 lengthy. It was three months in duration, a substantial  
18 period of time especially when compared to the two-hour  
19 trip across the border involved in Fleuti.

20           Second, Respondent obtained travel documents  
21 prior to the trip evidencing the fact that she had an  
22 opportunity to consider the consequences of the trip.  
23 Third, Respondent had been here illegally for two and a  
24 half years when she left for Thailand.

25           During the trip she knowingly misrepresented

1 her immigration status to obtain a reentry visa and  
2 thereby increased the risk that her illegal status would  
3 be discovered.

4 QUESTION: Mr. Schulder, could I ask one  
5 question? These factors I think unquestionably could be  
6 relied on by the Attorney General as a matter of  
7 discretion to deny suspension even if you should lose  
8 here.

9 Is it your position on the eligibility for  
10 consideration as a discretionary matter that every three  
11 months interruption would be sufficient to defeat the  
12 continuous presence requirement?

13 MR. SCHULDER: I think it would be the  
14 government's position that three months is simply too  
15 substantial a period of time.

16 QUESTION: How about one month?

17 MR. SCHULDER: Excuse me?

18 QUESTION: How about one month?

19 MR. SCHULDER: Well, as we say in our brief we  
20 do not think that the Fleuti test establishes bright  
21 lines as to what the quantum is of --

22 QUESTION: What is the standard of judicial  
23 review?

24 MR. SCHULDER: The standard of judicial --

25 QUESTION: You are asking us to say this is

1 unreasonable?

2 MR. SCHULDER: Well, we are asking the Court  
3 to apply the test that was established in Fleuti and to  
4 conclude that the test that was created by the Court of  
5 Appeals in this case is totally inconsistent with  
6 Fleuti.

7 QUESTION: Totally inconsistent.

8 MR. SCHULDER: That is correct.

9 QUESTION: Because of all of the factors or  
10 just the three months?

11 MR. SCHULDER: No, because what the Court of  
12 Appeals did here was essentially ignored all of the  
13 factors that were enumerated in Fleuti and said that  
14 even though there was an absence of three months, even  
15 though there were travel documents obtained, even though  
16 there was a misrepresentation about status in order to  
17 reenter so long as the alien can show that there are  
18 hardships associated with deportation then the alien has  
19 established continuous physical presence for a  
20 seven-year period even though she was gone for three  
21 months. We think that that simply turns Fleuti on its  
22 head.

23 QUESTION: What would you say about a  
24 three-month absence which was explained by the  
25 individual showing that he became ill on arriving in



1 Thailand and was not permitted by the doctors to leave  
2 until he had fully recovered three months later? Would  
3 that explanation satisfy the government's standard?

4 MR. SCHULDER: It would seem to me that that  
5 certainly would satisfy the standards of the Immigration  
6 Service because in that situation the alien simply would  
7 have no choice in the matter.

8 QUESTION: Was there any explanation offered  
9 here?

10 MR. SCHULDER: No, there was not. In  
11 Respondent's Court of Appeals brief her attorney claimed  
12 that the trip was to visit her sick mother, but there is  
13 nothing in the record of the administrative proceedings  
14 in this case that shows that Respondent's mother was ill  
15 or that the illness if there was any necessitated or  
16 occasioned the trip.

17 QUESTION: Mr. Schulder, my first hypothetical  
18 is if somebody goes to Thailand because her mother is  
19 ill and it develops that her mother has appendicitis  
20 which is over in a week, that would be okay I would  
21 assume.

22 MR. SCHULDER: I would assume so, Your Honor.

23 QUESTION: Suppose it develops it was cancer  
24 and it took three months. Would that make any  
25 difference?

1           MR. SCHULDER: I think it would make a  
2 difference. The alien has to consider -- The point of  
3 this whole test is whether the alien should have  
4 considered that there would be adverse consequences.  
5 This was an alien who had illegally overstayed her visa  
6 in this country.

7           She certainly should be charged with knowing  
8 that a trip abroad certainly a lengthy trip abroad --

9           QUESTION: Would that apply to the one-week  
10 trip to Thailand?

11          MR. SCHULDER: In the case of an alien who had  
12 been here illegally I would say --

13          QUESTION: I did not get through with that. I  
14 am going to give you one day.

15          MR. SCHULDER: In the case of an alien who has  
16 been here illegally and leaves while the alien is here  
17 illegally I would submit that that alien might very well  
18 be found not to have --

19          QUESTION: Go to Thailand at all --

20          MR. SCHULDER: I think the alien would not be  
21 able to meet the Fleuti test absolutely because any  
22 alien who is here illegally --

23          QUESTION: You just destroyed the statute.

24          MR. SCHULDER: That is not true. There are --

25          QUESTION: You say there is no way.

1           MR. SCHULDER: No, well Wadman itself involved  
2 an alien who had been here lawfully prior to the trip,  
3 and the factors --

4           QUESTION: But you say the statute does not  
5 apply if the alien is here having overstayed his time.  
6 You are not saying that are you?

7           MR. SCHULDER: No, I am not saying that. The  
8 question is whether an absence is meaningfully  
9 interruptive of the continuity of the alien's physical  
10 presence in the country. That is --

11          QUESTION: You say three months it is. Some  
12 people take a vacation for three months.

13          MR. SCHULDER: That is correct.

14          QUESTION: You would not consider that an  
15 interruption would you?

16          MR. SCHULDER: I would consider that a  
17 disruption in the context of this particular statute.  
18 The question here is whether the Court should stretch  
19 the meaning of the statute to benefit an alien in  
20 Respondent's position.

21          QUESTION: Mr. Schulder, is it not true that  
22 unlike the situation that arose in Fleuti where the  
23 question is whether an entry was made which could  
24 involve a permanent resident who is lawfully here, is it  
25 not true that by hypothesis under this statute where the

1 consideration whether to suspend deportation that there  
2 is an illegal presence in every case?

3 MR. SCHULDER: There is not necessarily an  
4 illegal presence before the trip. In Wadman there was  
5 not.

6 QUESTION: But at least it is illegal as of  
7 the time of application to suspend deportation.

8 MR. SCHULDER: That is correct. In  
9 Kamheangpatiyooth again there was no illegal presence at  
10 the time of the trip.

11 QUESTION: Mr. Schulder --

12 QUESTION: Do all of these hypotheticals that  
13 keep pushing you in one direction and then in another  
14 suggest that government would be better off adhering to  
15 the strict language of the statute and the legislative  
16 history? You would still exercise discretion in the  
17 case where the train crossed the Canadian border?

18 I am talking now about what judges should do.  
19 What standard is there once you leave the statute and  
20 the legislative history?

21 QUESTION: As soon as you leave the statute  
22 you lose the fellow that goes on the train overnight.

23 MR. SCHULDER: That may well be true if you  
24 apply the statute literally.

25 QUESTION: Perhaps in a court but --



1 MR. SCHULDER: The point is though that the  
2 Immigration authorities have been applying this test  
3 with some success over the years for almost 20 years.

4 QUESTION: And here we are.

5 MR. SCHULDER: Here we are, but the reason we  
6 are here is that the Ninth Circuit totally jettisoned  
7 that test. What --

8 QUESTION: Mr. Schulder, it is very difficult,  
9 though, to understand why you should apply Fleuti to a  
10 different statute and to an alien who is illegally here,  
11 not someone who has permanent resident status. It is  
12 just hard to understand your position at all on this  
13 thing.

14 QUESTION: I agree.

15 QUESTION: Why did the government not seek  
16 certiorari in Wadman?

17 MR. SCHULDER: I have no idea.

18 QUESTION: I know you were not there and  
19 probably were not even born then.

20 (Laughter)

21 MR. SCHULDER: I am not that young, Your  
22 Honor.

23 (Laughter)

24 MR. SCHULDER: If this Court exercising its  
25 responsibility to construe the statute determines that

1 in fact the statute should be applied literally we will  
2 certainly be bound by that interpretation.

3 QUESTION: Mr. Schulder, is it not true that  
4 in last analysis the question is whether these decisions  
5 shall be made by Congress, by private bills or by the  
6 Attorney General? In other words, if you prevail they  
7 still have the remedy they used to have before the  
8 statute was enacted.

9 MR. SCHULDER: That is correct.

10 As I was pointing out to the Court, the  
11 problem of the test that the Court of Appeals adopted  
12 here is that even where the Immigration authorities show  
13 that the alien has taken a substantial trip abroad, has  
14 falsified information in order to return, has obtained  
15 travel documents, all these factors are totally ignored  
16 so long as the alien can establish that there was no  
17 diminution of hardship.

18 In our view this compresses two separate  
19 elements of the statute, the extreme hardship element  
20 that the Court dealt with in the Wang case and the  
21 continuous physical presence element that is involved  
22 here, into one element. In fact, in Respondent's brief  
23 at pages 19 and 23 Respondent's counsel admits that he  
24 cannot come up with any example of a situation where an  
25 alien could show extreme hardship but not continuous

1 physical presence under the statute.

2           The upshot of the Court of Appeals' approach  
3 here is that it essentially converts the continuous  
4 physical presence language of the statute into a  
5 continuous residence requirement. In our view the test  
6 of the Court of Appeals would not be any different or  
7 lead to any different results if the statute simply said  
8 residence instead of physical presence.

9           But as I said earlier in response to Justice  
10 Stevens' question Congress inserted the words  
11 "physically present" in the statute in 1952 in place of  
12 residence in order to discontinue the lax practices and  
13 to discourage abuses that had arisen under the residence  
14 standard. In order to give meaning to Congress' action  
15 here we submit that the judgment of the Court of Appeals  
16 should be reversed.

17           I would like to reserve the remainder of my  
18 time.

19           CHIEF JUSTICE BURGER: Very well.

20           Mr. Greenberg.

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1 ORAL ARGUMENT OF BERT D. GREENBERG, ESQ.,

2 ON BEHALF OF RESPONDENT

3 MR. GREENBERG: Mr. Chief Justice, and may it  
4 please the Court:

5 Respondent's position, one position in this  
6 matter is that the action at bar is actually moot. The  
7 Respondent has accumulated seven years' continuous  
8 physical presence in the United States since her return  
9 from Thailand in April 1974.

10 Since the filing of this case, therefore, and  
11 the Respondent's independent qualification on the sole  
12 question presented to this Court, namely, did she have  
13 the seven years' continuous presence, we believe that  
14 this Court should abate proceedings and wait for a  
15 decision from the Board of Immigration Appeals on the  
16 pending motion which has been on file since February of  
17 this year.

18 The Board --

19 QUESTION: Mr. Greenberg, if the statute  
20 simply allows discretion in the Attorney General  
21 assuming someone has been continuously present here for  
22 that interval of time to grant relief or not, how can  
23 you argue that it is moot? Your argument is really that  
24 we should defer to the administrative proceedings and  
25 let them decide it because it might become moot, but it



1 certainly is not moot today is it?

2 MR. GREENBERG: Well, I believe it can be,  
3 Your Honor. The Immigration judge in the hearing found  
4 Respondent eligible for two of the three statutory  
5 requirements of Section 244.

6 The Respondent was found eligible as having  
7 good moral character and as demonstrating extreme  
8 hardship albeit through her daughter's illness. The  
9 hardship was imputed to her through her daughter's  
10 illness, and the only issue that the Immigration judge  
11 did not find for her on and did find for the husband on  
12 all three issues was did she have a continuous  
13 seven-year presence.

14 Petitioner's argument is without that she  
15 cannot have any eligibility for 244 relief. We simply  
16 say she --

17 QUESTION: Well, even if she met all the  
18 qualifications, is there not a residuum of discretion in  
19 the Attorney General whether to apply it or not?

20 MR. GREENBERG: Yes, Your Honor. It would  
21 just seem peculiar to me that if she were found eligible  
22 at the time of the Immigration hearing as to moral  
23 character and extreme hardship and for the fact that she  
24 did not have the seven years then but she has it now, I  
25 would think it appropriate for the Board to first make a

1 ruling on that rather than --

2 QUESTION: But you are arguing for a  
3 deferral. It is not technically moot today is it?

4 MR. GREENBERG: I am not sure I understand the  
5 technical mootness doctrine, Your Honor. I believe that  
6 the matter could be moot.

7 QUESTION: Let's just say it is not moot today  
8 is it?

9 MR. GREENBERG: Okay, Your Honor.

10 QUESTION: But your position would simply  
11 allow an alien who can postpone the inevitable for a  
12 while to come in at the end by virtue of seven years'  
13 residence even though three or four years might have  
14 been simply pursuant to fighting something that the  
15 alien ultimately loses.

16 MR. GREENBERG: Well, it is our position that  
17 the Respondent was eligible then at the time of the  
18 hearing, but since there was an adverse decision on that  
19 one issue and since seven years has passed we did not  
20 see why the Respondent should get a hearing on that  
21 matter prior to coming to this tribunal.

22 QUESTION: Mr. Greenberg, we have been testing  
23 hypotheticals from three months down. You obviously  
24 think three months is not a serious interruption.

25 What about four, five, six or seven months? I

1 will put the questions all in one. You tell me where  
2 the cutoff is.

3 MR. GREENBERG: Listening to that, Mr. Chief  
4 Justice, it really goes to the heart of my argument. We  
5 do not believe that there can be a purely mechanical  
6 test as to one day out of the country or three weeks out  
7 of the country because we are dealing with human beings  
8 and everybody --

9 QUESTION: Here we are dealing with three  
10 months so let's start there.

11 MR. GREENBERG: All right. Depending upon the  
12 totality of circumstances in this case the Immigration  
13 judge firstly has to make a decision whether based on  
14 the precedent decisions that are used here, the Fleuti,  
15 the Wadman doctrine, the Kamheangpatiycoth standard  
16 enounced by the Circuit Court of Appeals in the Ninth  
17 Circuit, making it an individual determination on the  
18 totality of circumstances surrounding each of the three  
19 elements of Section 244, being the trier of fact does he  
20 feel, does the Immigration judge feel that that person's  
21 entry constituted a break in a seven-year period.

22 If you do not have some type of standard like  
23 that what you will have in every Immigration court  
24 around the United States is second-guessing by  
25 Immigration judges because nobody has a standard to

1 propound.

2           QUESTION: You say second-guessing by the  
3 Immigration judges. Who do you think the Immigration  
4 judges are second-guessing?

5           MR. GREENBERG: Each other in effect, Your  
6 Honor, because one judge in one Immigration courtroom in  
7 one state may feel that a trip involving any travel  
8 documents out of the United States constitutes a break  
9 and another Immigration judge may not depending upon the  
10 purpose of that trip and the brevity of that trip.

11           QUESTION: Is that not a very good reason for  
12 going back to the statutory language which we are  
13 dealing with of physically present in the United States  
14 for a continuous period of not less than seven years?

15           MR. GREENBERG: It would solve the problem. I  
16 agree with Your Honor on that, but I do not think it is  
17 the way the government itself as represented by  
18 Petitioner wants the problem solved.

19           QUESTION: Well, the question is not how the  
20 government "wants the problem solved." The question is  
21 what Congress intended by that statute is it not?

22           MR. GREENBERG: Well, Respondent here believes  
23 that this remedy --

24           QUESTION: You cannot answer my last question  
25 whether it does not depend on the intent of Congress?



1           MR. GREENBERG: Yes, it does, Your Honor. It  
2 depends on the intent of Congress.

3           But the intent of Congress as we read the  
4 intent in this particular legislation, Section 244, and  
5 despite the revisions that have gone on over the years  
6 is that this is a statute in the nature of an equitable  
7 remedy. Historically equitable remedies are interpreted  
8 more liberally. Otherwise --

9           QUESTION: What authority do you have for the  
10 proposition that this is in the nature of an equitable  
11 remedy as you put it?

12          MR. GREENBERG: Discussions in the  
13 administrative reports and the legislative reports about  
14 when the bill was drafted and redrafted, Your Honor.

15          QUESTION: I thought that the legislative  
16 history indicated the desire for a fairly literal  
17 interpretation. You do not agree with that?

18          MR. GREENBERG: No, I do agree with you, Your  
19 Honor. I believe a fairly literal reading of the  
20 statute is fine, but I think the nature of the remedy  
21 itself more or less tends to be equitable rather than  
22 strictly law related.

23          QUESTION: Why do you think that?

24          MR. GREENBERG: Because it allows for a person  
25 who has no other eligibility for permanent residence to

1 show that by thier ties to the United States, by their  
2 devotion to this couuntry, by their commitments to this  
3 country that they can have the normal laws suspended on  
4 their behalf.

5 QUESTION: That is an argument that one might  
6 well make to Congress, but where do you find that  
7 Congres has accepted that argument?

8 MR. GREENBERG: I cannot speak to that, Your  
9 Honor.

10 QUESTION: I am not sure you responded to my  
11 question. What about six mnths if the interruption had  
12 been six months and unexplained?

13 MR. GREENBERG: Depending upon other factors  
14 in the case, Mr. Chief Justice, if other family members  
15 were here, if there were a reason for going abroad, if  
16 there were certain ties to the United States --

17 QUESTION: Whose burden is it to show and  
18 explain those things?

19 MR. GREENBERG: The alien's, Your Honor.

20 QUESTION: Did he show that he had an illness  
21 while he was abroad, for example, as one reasonable  
22 explanation for prolonging the absence?

23 MR. GREENBERG: No, Your Honor.

24 QUESTION: Where do we draw this line?

25 MR. GREENBERG: Where would the line be drawn?

1 QUESTION: Yes. Six months? Twelve months?

2 MR. GREENBERG: Our basic approach, Your  
3 Honor, is that we cannot draw the line that a test on  
4 this particular issue has to be a test of totality of  
5 circumstances and that there is no better way to draw  
6 the line than to say to the Immigration judge and to the  
7 Board of Immigration Appeals you must look at the  
8 factors in each case and make an independent decision  
9 but look at each factor of the statute independently.

10 We are not --

11 QUESTION: The government has conceded if I  
12 understood the Solicitor General's Office correctly that  
13 if an explanation could be made that the man was ill and  
14 could not return that would be satisfactory. What  
15 explanation was offered here?

16 MR. GREENBERG: In our case, Your Honor,  
17 none. In fact, there is an error which the counsel has  
18 alluded to.

19 There was an error in the transcript -- not an  
20 error in the transcript. There was an error done in our  
21 brief indicating that the trip abroad was to visit her  
22 sick mother. There was no evidence at the hearing that  
23 she was a sick mother. That was picked up and picked up  
24 and was never corrected. We apologize to the Court for  
25 that.

1           The female Respondent merely stated that she  
2 was going to Thailand to visit her mother. What our  
3 basic argument is is that --

4           QUESTION: Do I understand that if the absence  
5 were two years you would not be here?

6           MR. GREENBERG: Once again, if we apply this  
7 type of test, a totality of circumstance test, which we  
8 feel is applied in other areas of law which is a logical  
9 extension of the Fleuti-Wadman doctrine that the  
10 Immigration judge can look at the factors involved and  
11 make a decision whether the absence was interruptive of  
12 the seven-year period. But to hang it on a merely  
13 mechanical 3 days or 30 days does not seem appropriate.

14           QUESTION: Or two years.

15           MR. GREENBERG: Or two years. That is  
16 correct.

17           QUESTION: What do you get for the  
18 unexplained? I could consider a one-month unexplained  
19 absence from the country being bad and a two-year  
20 explained absence not being bad, could you not?

21           MR. GREENBERG: Yes, Your Honor.

22           QUESTION: We do not have that in this case  
23 because there was no explanation.

24           MR. GREENBERG: That is correct.

25           QUESTION: What do you do with that?



1           MR. GREENBERG: You go back to the actual  
2 trial judge who was the trier of fact on the spot and  
3 look at what he decided as to the cause of sufficiency  
4 of the absence.

5           QUESTION: You mean he "explained"?

6           MR. GREENBERG: No, there was no explanation  
7 on the record.

8           QUESTION: Did he go outside the record in his  
9 explanation?

10          MR. GREENBERG: No, Your Honor.

11          QUESTION: I have problems on the  
12 nonexplanation and you have not helped me yet. Can you  
13 give me some help?

14          MR. GREENBERG: I have not helped you, no,  
15 Your Honor.

16          QUESTION: It was of record that she went to  
17 visit her mother?

18          MR. GREENBERG: That is correct. That is  
19 correct, Your Honor, but there was no language in the  
20 transcript about visiting a sick mother.

21          QUESTION: I understand, but nevertheless the  
22 explanation was she went to visit her mother.

23          MR. GREENBERG: That is correct.

24          QUESTION: Well, I know it is outside the  
25 record but why did you not say that?

1                   MR. GREENBERG: I hoped it was the truth, Your  
2 Honcr.

3                   The Petitioner herein has cited and has stated  
4 for the Court in their brief that other Circuit courts  
5 around the United States have felt compelled not to  
6 follow the Ninth Circuit's reasoning in the  
7 Kamheangratiyooth test and in fact have criticized that  
8 test as being too broad and destroying any standard that  
9 we have. We disagree on that.

10                  We believe that other cases from other  
11 Circuits are basically using the same test of a totality  
12 of circumstances but are just saying it in different  
13 ways or just interpreting it in different ways. For  
14 example, the recent Eleventh Circuit case in 1983,  
15 Fedalgo Valez v. The Immigration Service, it was held in  
16 that case that a one-day trip to Canada where the alien  
17 proceeded to obtain an immigrant visa knowing that her  
18 husband had died -- That was the eligibility for  
19 getting the immigrant visa through her citizen husband  
20 -- broke the seven year period for residence.

21                  That is a one-day trip abroad. We have no  
22 problem with that. An alien who leaves the United  
23 States on the compulsion, and one of the cases that we  
24 have indicates leaving the United States under  
25 compulsion one-day abroad breaks the seven-year period.

1 This type of case we believe the Ninth Circuit could  
2 make a finding that there is a break in the seven-year  
3 residence here.

4           Petitioner argues basically for a strict  
5 interpretation of Section 244, but concedes that the  
6 Fleuti-Wadman doctrine applies. There was no appeal  
7 filed on Kamheangpatiyooth so we really have an  
8 inconsistent position that we are faced with constantly  
9 as members of the Immigration Bar in trying to decide is  
10 it a strict standard or it is a liberal standard.

11           We believe the remedy to that is to allow the  
12 Immigration judges wide latitude in making their  
13 decisions. If the Immigration does that and the Board  
14 of Immigration Appeals if there is an appeal filed by  
15 either side makes an independent determination I do not  
16 believe we will be in a situation where we have been  
17 criticized for trying to go around the Wang decision  
18 decided by this Court.

19           QUESTION: How do you square the Court of  
20 Appeals test in this case with the Fleuti factors?

21           MR. GREENBERG: Fleuti mentioned several  
22 factors involved in an entry statute. Fleuti did not  
23 say these are the only factors involved.

24           Fleuti said that there may be by judicial  
25 inference or other factors may be read into it that can

1 be used in determining whether entry was made, and they  
2 said --

3 QUESTION: What would you say if the factors  
4 mentioned in Fleuti were exclusive? What if those were  
5 the only factors. Would the Ninth Circuit's test not be  
6 inconsistent with that?

7 They seem to feel compelled to say that the  
8 Fleuti factors were only some evidence and you could  
9 look at other evidence. What if you were confined to  
10 the Fleuti factors here?

11 MR. GREENBERG: With Fleuti alone without  
12 Wadman?

13 QUESTION: Yes.

14 MR. GREENBERG: I think that you --

15 QUESTION: No, not with -- Wadman just applied  
16 the Fleuti factors in this context.

17 MR. GREENBERG: Yes, Your Honor.

18 QUESTION: But the Ninth Circuit said the  
19 Fleuti factors and the Wadman factors were just  
20 evidentiary.

21 MR. GREENBERG: Yes.

22 QUESTION: And came up with this test.

23 MR. GREENBERG: Yes.

24 QUESTION: What if the Fleuti factors were the  
25 only factors you should look at?



1 shall decide questions like this. You do still have a  
2 remedy by way of private bill in Congress do you not?

3 MR. GREENBERG: Well, the private bill remedy,  
4 Your Honor, is practically an academic issue today  
5 because Rule 6 in the House and very few private bills  
6 are -- The old benefit of the private bill where they  
7 would be introduced and they would sit during two  
8 sessions of Congress does not happen realistically any  
9 more.

10 When they are introduced they get voted on  
11 quite quickly. The private bill is really not a  
12 solution here.

13 QUESTION: This is the same statute that was  
14 involved in the Chadha case is it not?

15 MR. GREENBERG: That is correct, Your Honor.

16 QUESTION: That case does not really shed any  
17 light on our problem does it?

18 MR. GREENBERG: There is one analogous issue  
19 in that case. In 1980 Chadha became married to a U.S.  
20 citizen and had alternate relief, 245 relief, for  
21 adjustment of status.

22 What we are saying here is our Respondent has  
23 the same relief, no difference, no other eligibility, no  
24 245 relief -- 244 relief, that she had it and that the  
25 Petitioner said she did not have it then because she did

1 not have her seven years, but she has got it now.

2           So whether you look at the first view or the  
3 second view of it she has eligibility now.

4           QUESTION: Let me go back. You say that the  
5 congressional remedy is no longer available. How long  
6 has it been true that there really is no congressional  
7 remedy because as I understand the background of this  
8 statute its purpose was to turn over a group of  
9 decisions to the Attorney General that Congress had  
10 previously been making.

11           Did they immediately change their rules so  
12 that there no longer was a remedy as you say there is  
13 not now?

14           MR. GREENBERG: No, Your Honor. With respect  
15 to private bills if memory serves it was some time in  
16 the late 1970's that Rule 6 was introduced in the House  
17 requiring members of the Judiciary Committee and the  
18 Immigration Subcommittee to decide whether or not  
19 private bills should be allowed to be introduced on the  
20 floor.

21           As a result of that, very few private bills  
22 ever get through the House. In the Senate there is no  
23 limitation on introducing private bills; however, the  
24 few that I have seen in the Senate have been called up  
25 and voted on very quickly. One was within 90 days of

1 introduction whereas prior to that prior to the  
2 Immigration Service's complaints about private bills was  
3 they would sit for two sessions of Congress as more or  
4 less a courtesy to the Congressman or Senator that  
5 introduced it. But that is not the case any more.

6 QUESTION: I see.

7 MR. GREENBERG: I do not think many practicing  
8 immigration lawyers rely on private bills to assist them  
9 with their clients.

10 QUESTION: The thought that was running  
11 through my mind is that maybe a strict construction  
12 would be very appropriate if there is a congressional  
13 remedy as there had been in the past. If there is no  
14 longer a congressional remedy available perhaps the  
15 statute should be construed a little differently.

16 That is the problem I am wrestling with.

17 MR. GREENBERG: I understand.

18 QUESTION: May I ask whether there was a quota  
19 on immigration from Thailand at the time of the case?

20 MR. GREENBERG: Yes, there was, Your Honor.

21 QUESTION: Where there Thai citizens awaiting  
22 their turn to come into the United States under that  
23 quota?

24 MR. GREENBERG: With these particular people,  
25 the Respondent here, no.

1 QUESTION: From Thailand, not these people.

2 MR. GREENBERG: Yes, Your Honor.

3 QUESTION: But there were Thai people awaiting  
4 their turn to come into the United States lawfully.

5 MR. GREENBERG: That is correct, Your Honor.

6 QUESTION: Was it not the intention of  
7 Congress to protect the interest of people who were  
8 operating in accordance with the laws of the United  
9 States primarily rather than people who were deportable  
10 who had disobeyed our laws?

11 MR. GREENBERG: I believe so, Your Honor.

12 My last point is simply that the Petitioner  
13 herein in their brief and in their argument is seeking  
14 to do basically what they are accusing Respondent of of  
15 collapsing two of the three elements of Section 244 into  
16 each other in effect saying that if the Immigration  
17 judge finds hardship do not worry so much about seven  
18 years and do not worry so much about good moral  
19 character.

20 Respondent's position is that is not the  
21 situation at all that the Respondent believes that each  
22 factor of Section 244 shall be independently determined  
23 by the Immigration judge. In fact, in this case the  
24 Immigration judge first made a finding on hardship  
25 before he even looked at the issue of seven years'



1 residence or good moral character.

2           In summation, we believe that the standards  
3 set forth by the Court of Appeals in the Ninth Circuit  
4 describing a totality of circumstances test for  
5 adjudicating Section 244 is fair, and we do believe that  
6 the case is moot at this point and there is a proper  
7 relief before the Board of Immigration Appeals with the  
8 pending motion.

9           Thank you.

10           CHIEF JUSTICE BURGER: Very well, Mr.  
11 Greenberg.

12           Do you have anything further, Mr. Schulder?

13           MR. SCHULDER: No, Your Honor.

14           CHIEF JUSTICE BURGER: Thank you, gentlemen.

15           The case is submitted.

16           (Whereupon, at 10:48 a.m., the case in the  
17 above-entitled matter was submitted.)

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# CERTIFICATION

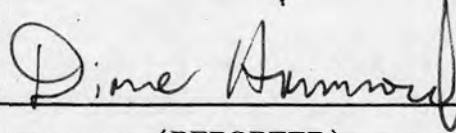
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IMMIGRATION AND NATURALIZATION SERVICE, Petitioner v. PADUNGSRI  
PHINPATHYA # 82-91

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