The Burger Court Opinion Writing Database

Agosto v. INS

436 U.S. 748 (1978)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 6, 1978

Re: 76-1410 - Agosto v. Immigration and Naturalization Service

MEMORANDUM TO THE CONFERENCE

My further review of this case confirms my tentative vote to reverse.

Regards,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 27, 1978

Dear Thurgood:

Re: 76-1410 Agosto v. Immigration and Naturalization Service

I join--just as reluctantly as you have written!

Regards,

WEB

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 7, 1977

RE: No. 76-1410 Agosto v. Immigration & Naturalization Service

Dear Byron:

Please join me in the dissenting opinion you have prepared in the above.

Sincerely,

Mr. Justice White

cc: The Conference

J

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 18, 1978

RE: No. 76-1410 Joseph V. Agosto v. Immigration and Naturalization SErvice

Dear Thurgood:

I agree.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 17, 1978

No. 76-1410 - Agosto v. INS

Dear Thurgood,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 10-6-

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

JOSEPH V. AGOSTO *v.* IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 76-1410. Decided October —, 1977

MR. JUSTICE WHITE, dissenting.

I dissent from the denial of certiorari.

The relevant section of the Immigration and Nationality Act, 8 U. S. C. § 1105a (a)(5) (1970), requires that a petitioner receive a hearing *de novo* in a federal district court whenever he "makes a showing that his claim is not frivolous" and "where a genuine issue of material fact as to the petitioner's nationality is presented." The petitioner here opposed his deportation order on the grounds that he is an American citizen. He introduced the testimony of three witnesses concerning the circumstances of his American birth and early years. The immigration judge disbelieved petitioner's witnesses, and the Board of Immigration Appeals affirmed, although explicitly recognizing that petitioner's witnesses would, if believed, have refuted the documentary evidence introduced against him and that to rule against petitioner required discrediting the oral testimony.

The Court of Appeals sustained this judgment. It thought petitioner's claim not colorable and also cited *Kessler* v. *Strecker*, 307 U. S. 22 (1939), in rejecting the demand for a *de novo* hearing. I cannot believe, however, that a claim supported by three witnesses claiming personal knowledge of petitioner's birthplace directly contrary to the Government's position in this regard, can be considered a "frivolous" claim or one not raising a "genuine issue of material fact" within the meaning of the statute. As I see it Congress intended evidentiary conflicts and credibility issues such as this to be resolved in the District Court. It is also clear enough to me

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 17, 1978

Re: 76-1410 - Agosto v. Immigration and Naturalization Service

Dear Thurgood,

Please join me.

Sincerely yours,

Byron White

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

October 11, 1977

Re: No. 76-1410, Agosto v. Immigration and Naturalization Service

Dear Byron:

Please join me in your dissent.

Sincerely,

T.M.

Mr. Justice White

cc: The Conference

14 APR 1978

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1410

Joseph V. Agosto, Petitioner, *v.* Immigration and Naturalization Service.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April —, 1978]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The question for decision is whether petitioner has made a sufficient showing in support of his claim to United States citizenship to entitle him to a *de novo* judicial determination of that claim under § 106 (a)(5)(B) of the Immigration and Nationality Act, 8 U. S. C. § 1105a (a)(5)(B).

I

In 1967, the Immigration and Naturalization Service began deportation proceedings against petitioner by issuance of a show-cause order charging that he was deportable as an alien who had unlawfully entered the United States. App. 4–6. Petitioner, Joseph Agosto, opposed deportation, claiming that he was born in this country and therefore is a citizen of the United States not subject to deportation. Over the course of several years, a series of hearings were held before an immigration judge,[1] at which the Service presented documentary

[1] After petitioner's first set of hearings, an immigration judge issued a deportation order, App. 18, which petitioner then appealed to the Board of Immigration Appeals. The Board remanded to permit the immigration judge to consider petitioner's claim that he was entitled to relief from deportation pursuant to § 241 (f), 8 U. S. C. § 1251 (f) as the husband of a United States citizen, but did not consider petitioner's other challenges to the finding that he was deportable. App. 19–20. At the hearing on remand,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 11, 1977

Re: No. 76-1410 - Agosto v. INS

Dear Byron:

Please join me in your dissent.

Sincerely,

H.A.B.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 17, 1978

Re: No. 76-1410 - Agosto v. INS

Dear Thurgood:

Please join me.

Sincerely,

Harry

Mr. Justice Marshall

cc: The Conference

March 9, 1978

No. 76-1410 Agosto v. Imm. & Nat. Service

Dear Bill:

As I would like to pay my respects to Joseph V. Agosto, alias Vincenzo Dipaola, alias Vincenzo Pianetti, I will undertake a dissent when the Court opinion is circulated.

Astonishingly, you and I seem to be the only Brothers who believe that there is no duty on a court to accept - for any purpose - testimony that is inherently incredible.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 17, 1978

No. 76-1410 Agosto v. Immigration and Naturalization Service

Dear Thurgood:

In due time I plan to circulate a dissent.

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 25 MAY 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1410

Joseph V. Agosto, Petitioner, v. Immigration and Naturalization Service. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May —, 1978]

MR. JUSTICE POWELL, dissenting.

The Court today has construed a statute in a way that rewards falsehood and frustrates justice. The statute is § 106 (a) of the Immigration and Naturalization Act, 8 U. S. C. § 1105a (a), adopted in 1961 as part of a general revision of the statutory provisions governing judicial review of deportation orders. The general revision was designed to prevent repetitious litigation of frivolous claims, and "dilatory tactics" used to forestall deportation, by eliminating in most instances any review by district courts of deportation decisions. *Foti* v. *Immigration & Naturalization Service*, 375 U. S. 217, 224–225 (1963).[1]

Subsection (5) of § 106 (a) provides a narrow exception to the general rule of leaving deportation matters largely to administrative proceedings, subject to review by a Court of Appeals to ensure that the administrative decision is supported by "reasonable, substantial, and probative evidence on the record considered as a whole." 8 U. S. C. § 1105a (a)(4). Section 106 (a)(5), quoted *ante*, at 3 n. 2, requires a Court of Appeals reviewing deportation proceedings to refer

[1] "[B]y eliminating review in the district courts, the bill [was intended to] obviate one of the primary causes of delay in the final determination of all questions which may arise in a deportation proceeding." *Foti* v. *Immigration & Naturalization Service*, 375 U. S., at 225 n. 11 (quoting remarks of Rep. Walter).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 31, 1978

No. 76-1410 Agosto v. INS

Dear Thurgood:

In addition to some minor stylistic changes, I am sending to the printer the following revision of my dissenting opinion in this case, to be substituted for the deleted sentences as indicated on the attached pages 12-13:

> "In effect, the Court applies the summary judgment standard as if the only testimony on the record were that adduced at the third hearing. But if the summary judgment standard is to be applied, it is necessary to view the evidence submitted by petitioner in its totality - as if petitioner, in contesting a summary judgment motion, had submitted three sets of depositions containing precisely the same evidence presented by him at three administrative hearings. A district court then would be confronted with three significantly different stories, each sworn to by petitioner, one belatedly corroborated by his coached kinsmen, and all of them contradicted by authenticated documentary evidence. I doubt that any district court would find petitioner's evidence sufficient, viewed in its totality, to defeat a motion for summary judgment."

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss

cc: The Conference

B

Even if one assumes with the Court that the summary judgment analogy is appropriate, today's decision still is untenable. Under Rule 56 (c) itself, there must be a degree of substantiality to the evidence proffered in opposition to a summary judgment motion if the motion is to be defeated. See *Fireman's Mutual Ins. Co.* v. *Aponaug Mfg. Co.*, 149 F. 2d 359, 362 (CA5 1945); *Whitaker* v. *Coleman*, 115 F. 2d 305, 306 (CA5 1940); 10 Wright & Miller, Federal Practice & Procedure § 2725, at 512 (1973); 6 J. Moore, Federal Practice ¶ 56.15 [4], at 56–521 (1976). See also *Maroon* v. *Immigration & Naturalization Serv.*, 364 F. 2d, at 989. A court never is required to accept evidence that is inherently incredible or "too incredible to be accepted by reasonable minds."[10] 6 J. Moore, *supra*. I believe petitioner's evidence reasonably cannot be viewed in any other light.

In concluding that there is a "genuine issue of material fact" presented on this record, under the standard applicable to a summary judgment motion, the Court relies primarily on the testimony of petitioner's adoptive parents and supposed half-brother, presented for the first time at petitioner's *third* hearing before the immigration judge. The judge found the testimony of these witnesses no more credible or substantial than that of petitioner.[11] The half-brother knew only

[10] And while the facts must be viewed in the light most favorable to the party opposing summary judgment, this means no more than that "the party opposing summary judgment motion is to be given the benefit of all *reasonable* doubts and inferences in determining whether a genuine issue exists that justifies proceeding to trial." 10 Wright & Miller, *supra*, at 510 (emphasis supplied).

[11] The Board of Immigration Appeals did say: "It is not beyond the realm of possibility that [petitioner's] claim to United States citizenship is legitimate." But the rest of the Board's statements place this one in perspective. Immediately following its acknowledgement that petitioner's claim was not demonstrably impossible, the Board observed that it would have to accept a number of illogical and unrealistic propositions.

3-5, 7, 13

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: 1 JUN 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1410

Joseph V. Agosto, Petitioner, *v.* Immigration and Naturalization Service. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May —, 1978]

MR. JUSTICE POWELL, dissenting.

The Court today has construed a statute in a way that rewards falsehood and frustrates justice. The statute is § 106 (a) of the Immigration and Naturalization Act, 8 U. S. C. § 1105a (a), adopted in 1961 as part of a general revision of the statutory provisions governing judicial review of deportation orders. The general revision was designed to prevent repetitious litigation of frivolous claims, and "dilatory tactics" used to forestall deportation, by eliminating in most instances any review by district courts of deportation decisions. *Foti* v. *Immigration & Naturalization Service*, 375 U. S. 217, 224–225 (1963).[1]

The general rule under § 106 (a) leaves deportation matters largely to administrative proceedings, subject to review by a court of appeals to ensure that the administrative decision is supported by "reasonable, substantial, and probative evidence on the record considered as a whole." 8 U. S. C. § 1105a (a)(4). Section 106 (a)(5), quoted *ante*, at 3 n. 2, provides a narrow exception to the general rule when the deportation proceeding involves a person claiming to be a national of the

[1] "[B]y eliminating review in the district courts, the bill [was intended to] obviate one of the primary causes of delay in the final determination of all questions which may arise in a deportation proceeding." *Foti* v. *Immigration & Naturalization Service*, 375 U. S., at 225 n. 11 (quoting 104 Cong. Rec. 17173 (remarks of Rep. Walter)).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 10, 1978

Re: No. 76-1410 - Agosto v. Immigration & Naturalization Service

Dear Lewis:

Needless to say, I shall await your dissent in this case. I think I expressed my view at Conference that while there were some good "lawyer's arguments" in favor of petitioner, the legislative history coupled with the inclusion of the language "frivolous" in the statute itself did not require us to buy them.

Sincerely,

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 19, 1978

Re: No. 76-1410 - Agosto v. INS

Dear Thurgood:

I shall await Lewis' dissent in this case.

Sincerely,

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 26, 1978

Re: No.76-1410 - Agosto v. Immigration and Naturalization Service

Dear Lewis:

I am entirely in accord with all of your dissent in this case except the second and third paragraphs of Part IIIB which appear at the bottom of page 12 and the top of page 13. I think most courts have interpreted the summary judgment rule to prohibit a judge from assessing credibility of witnesses or affiants in the normal motion for summary judgment. I have no objection to the first paragraph of this part, at the top of page 12, which speaks generally in terms of "inherently incredible" evidence. But when you get right down to it and say that in a procedure governed by summary judgment rules, which you assume arguendo are applicable in this part, a judge may disregard conflicting testimony such as that of the Pianettis simply because he thought it was false, I have substantial doubt.

If you feel strongly that you want to leave those two paragraphs in, I may well end up joining you in full anyway, but I think the dissent would be stronger if they were out. At any rate, I will join everything but Part IIIB of the opinion even if you decide to leave it as it now stands.

Sincerely,

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 30, 1978

Re: No. 76-1410 - Agosto v. INS

Dear Lewis:

"Rider A" to your original dissent in this case suits me fine. I enclose a join letter.

Sincerely,

WHR

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 30, 1978

Re: No. 76-1410 - Agosto v. INS

Dear Lewis:

Please join me in your dissent.

Sincerely,

WHR

Mr. Justice Powell

Copies to the Conference

/

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 17, 1978

Re: 76-1410 - Agosto v. INS

Dear Thurgood:

Please join me.

Respectfully,

Mr. Justice Marshall

Copies to the Conference