Recent Cases

ALIENS—REFUGEES—RESETTLEMENT IN THIRD COUNTRY NOT RELEVANT TO DETERMINATION OF ELIGIBILITY FOR REFUGEE STATUS. *Chien Woo v. Rosenberg* (9th Cir. 1969).

In 1953 Yee Chien Woo fled to Hong Kong from Communist China. He established himself in business there, married and had one son. In 1960 he entered the United States as a temporary business visitor, and he has never departed. His family joined him in 1965 after being admitted to the United States as temporary visitors. In 1966, after expiration of his permitted stay, Woo failed to depart, and the Immigration and Naturalization Service commenced deportation proceedings. On March 8, 1966 Woo applied for classification as a refugee under the Immigration and Nationality Act.[1] The application was denied by the District Director,

1. 8 U.S.C. § 1101 *et seq.* (Supp. V, 1970). 8 U.S.C. § 1153(a)(7) (Supp. V, 1970) provides as follows:

> Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 1151(a)(ii) of this title, to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who

and the Regional Commissioner affirmed on the ground that Woo's resettlement in Hong Kong made him ineligible for refugee status. The federal district court reversed that decision holding, on the facts, that Woo had not become firmly resettled.[2] The Court of Appeals for the Ninth Circuit affirmed the result but held that the matter of resettlement was irrelevant to the determination of eligibility for refugee status. *Chien Woo v. Rosenberg*, 419 F.2d 252 (9th Cir. 1969).[3]

The *Woo* decision was the first pronouncement on the matter of resettlement by a federal court of appeals. The court disregarded all precedent in administrative and district court proceedings and, in effect, made new law. Such a step was probably not necessary in the situation which confronted the court in *Woo*.[4]

Prior to *Woo*, the Immigration and Naturalization Service had long considered the resettlement factor to be a key item in the determination of refugee status.[5] A district court agreed in the case of *Min Chin Wu v. Fullilove*.[6] The court said that a refugee must not have been resettled, must not be a national of the country in which he applies for conditional entry and must be a refugee from a Communist or Communist-dominated country at the time

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are unable to return to their usual place of abode. For the purpose of the foregoing the term "general area of the Middle East" means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: *Provided*, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status.

2. Chien Woo v. Rosenberg, 295 F. Supp. 1370 at 1372 (S.D. Cal. 1968).

3. *Cert. granted*, 39 U.S.L.W. 3167 (U.S. Oct. 20, 1970) (No. 156).

4. Apparently, the court could have simply affirmed the district court's findings without reaching the resettlement issue as such. However, the lower court's seeming rejection of the facts found at the administrative hearing may have posed some difficulties in this regard. Judicial review is normally confined to the administrative record, and the facts established at the administrative level are usually conclusive. 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE, §§ 8.9Ah, 8.11b, 8.12c (1969).

5. Matter of Sun, 12 I. & N. Dec. 36 (1966); Matter of Rodriguez, 11 I. & N. Dec. 901 (1966); Matter of Moy, 12 I. & N. Dec. 117 (1967); Matter of Moy, 12 I. & N. Dec. 121 (1967); Matter of Ng, 12 I. & N. Dec. 411 (1967); Matter of Chai, 12 I. & N. Dec. 81 (1967); Matter of Hung, 12 I. & N. Dec. 178 (1967).

6. 282 F. Supp. 63 (N.D. Cal. 1968).

of application for entry.[7] This reasoning was approved by another district court in *Alidede v. Hurney*.[8] The district court in Woo's case discussed resettlement but found on the facts that Woo had not been firmly resettled.[9]

In reaching its conclusion on resettlement, the Ninth Circuit examined the intent of Congress. The court noted that refugee acts passed in 1948 and 1953 expressly excluded persons who had been resettled from the benefits of refugee status.[10] However, the court found that such a provision was omitted from four similar statutes passed in later years[11] and the phrase "not nationals" (of the intermediate country in which the applications are made) put in its place.[12] Thus, the matter of Woo's resettlement in Hong Kong was not relevant. What was relevant, said the court, was that he was not a national of Hong Kong or the United Kingdom but, in fact, was a national of Communist China and as a refugee from that country remained stateless.[13]

The government argued that Congress did not intend that a person could remain a refugee in spite of resettlement in a third country and that to so hold would make thousands of former refugees, who are now firmly resettled, eligible to apply for conditional entry under the present statute. The court concluded:

> But Congress appears to have met this possibility by specifically limiting the number of those who can claim conditional entry under the "Seventh Preference." In any event we cannot disregard the clear manifestation of congressional intent shown by the substitution, in 1957, of the status "not a national" for that of "not firmly resettled" as formerly specified in the 1953 Act. Nothing in the legislative history advanced by appellant persuades us that

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7. *Id.* at 65. The court said:
> Once an individual has stopped fleeing and is safely resettled, regardless of the country which he may choose, he is outside of the scope of Congressional concern as evidenced by [the present] statute.

8. 301 F. Supp. 1031, 1032 (N.D. Ill. 1969). Here a Yugoslav refugee became naturalized in Turkey and later came to the United States as a visitor. The court denied his application for refugee status because of his resettlement, his Turkish nationality and because he left Turkey to visit relatives and did not flee because of persecution or fear of persecution on account of race, religion or political opinion.

9. 295 F. Supp. at 1372.

10. 419 F.2d at 254. The statutes referred to are the Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009 and the Refugee Relief Act of 1953, ch. 336, 67 Stat. 400.

11. Refugee Act of 1957, Pub. L. No. 85-316, 71 Stat. 639; Fair Share Refugee Act of 1960, Pub. L. No. 86-648, 74 Stat. 504; Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121; 8 U.S.C. § 1153(a) (7) (Supp. V, 1970).

12. 419 F.2d at 254. The phrase "not nationals" appears only in the Fair Share Refugee Act of 1960, Pub. L. No. 86-648, § 1, 74 Stat. 504 and in the present statute at 8 U.S.C. § 1153(a) (7) (A) (iii) (Supp. V, 1970).

13. 419 F.2d at 254.

> Congress intended this substituted language to mean anything but what it clearly says.[14]

The Court of Appeals for the Second Circuit recently handed down a decision which rejected the Ninth Circuit's holding as to the resettlement factor.[15] The court considered that the Ninth Circuit broadened the statute to mean "not a national of the intermediate host country . . . ."[16] The Second Circuit, however, felt that the statutory language meant only that a person may not be a national of one of the seven countries in which applications for conditional entry may be made as specified by the Attorney General.[17] The court found that this more limited interpretation was supported by a reading of the 1960 act[18] under which applications for parole into the United States—the procedure used to admit refugees until the present statute became effective—could only be made before immigration officers in those same countries which the Attorney General has designated under the present law.[19] Thus, the Second Circuit was not persuaded that the substitution of the present language for the "resettled" language of earlier acts represented any congressional intent to alter the previous law. The court also noted that the Immigration and Naturalization Service had used the "firmly resettled" factor for several years as grounds for denying conditional entry applications and that this fact had been reported to Congress with no indication of disapproval from that body.[20]

It is not at all clear that congressional intent changed with respect to resettlement after 1957. While the statutory language did omit any reference to resettlement, this fact by itself is not persuasive when compared with the tremendous effect of such a change on the refugee immigrant category. By extending the benefits of refugee status to those with established permanent

14. *Id.* (citations omitted). The limitation on the number of those who can claim conditional entry or adjustment of status as refugees is 10,200 per year.
15. Shen v. Esperdy, 428 F.2d 293 (2d Cir. 1970).
16. 428 F.2d at 298 n.9, *citing* 419 F.2d at 254.
17. 428 F.2d at 298. Present regulations require applicants for conditional entry as refugees to be physically present and make their applications in one of seven countries in Europe and the Middle East. 8 C.F.R. § 235.9a (1970). Aliens with two years presence in the United States may apply for adjustment of status under 8 C.F.R. § 245.4 (1970).
18. 74 Stat. 504.
19. 428 F.2d at 299.
20. *Id.* at 301, 302.

homes in third countries, the law would put homeless refugees at such a serious disadvantage that it is inconceivable the Congress could have intended this result without clear language to that effect. For example, a person who fled one of the Baltic states in 1940 and settled in a third country without ever becoming naturalized there would, 30 years later, be as eligible as recent refugees for one of the 10,200 quota numbers available each year. The addition of resettled persons to the refugee category could easily cause the quota to be oversubscribed.[21] It would then be necessary to maintain quota waiting lists with the result that refugees might encounter delays of several years before they could be processed for entry into the United States. The government would not be able to respond quickly to natural or political upheavals, and, of course, the refugees produced by these events would be forced to settle elsewhere until their turn had been reached on the waiting list. This result is incredible in view of the fact that one of the purposes of the present law is to permit the government to act quickly in the face of such upheavals.[22] Nothing in the legislative history of the present or previous laws suggests that the Congress intended such a development.[23]

Other disadvantages of the *Woo* holding for homeless refugees are highlighted by a look at the nonimmigrant aspect of the immigrant law. In order for Woo to enter the United States as a temporary business visitor in 1960, he had to convince an American consular officer in his visa application and an immigration officer at the time of entry that he had a permanent residence outside of the United States which he had no intention of abandoning and to which he intended to return at the end of his temporary stay.[24] When his wife applied for the temporary visitor's visa and entry into the United States—after apparently being separated from her husband for five years—she also had to establish the same facts.[25] The Woos could establish their visitor status in large part because of their permanent residence in Hong Kong. Non-settled refugees cannot normally establish eligibility for visitor status due to their lack of such a residence. Under *Woo*, they would have to compete

21. The State Department Visa Office reports that refugees used the full quota allotment in fiscal year 1969. U.S. Dep't of State, 1969 Report of the Visa Office at 6 (1970).

22. 2 U.S. CODE CONG. & AD. NEWS (1965) at 3334.

23. A good summary of the legislative history of the refugee question is found in Shen, *supra*, and cases cited therein.

24. A temporary visitor is an alien ". . . having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure." 8 U.S.C. § 1101(a)(15)(B) (1964).

25. Certain facts established in the district court raise some provocative, if unanswered, questions along this line. Admittedly, the facts in the

for quota numbers with settled refugees, many of whom would be able to enjoy the benefits of a stay in the United States while applying for adjustment of status.

The reasons why Congress has not included the resettlement factor in the present law are not apparent. It is possible, of course, that a change in procedures was intended. However, it does not seem logical that the Congress would profess to give the government more flexibility in dealing with refugees while establishing a

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opinion do not constitute the complete record upon which the opinion was based, and the questions are discussed here for their general applicability to similar cases.

The district court found that Woo never intended to reside permanently in Hong Kong. It distinguished three cases cited by the government because ". . . here plaintiff never intended to remain in Hong Kong permanently." 295 F. Supp. at 1372. It said that the record revealed that Woo considered Hong Kong a temporary refuge and that he remained there only because he was forced to by economic and other circumstances. *Id.* A person is ineligible for a visa and is excludable from the United States if he ". . . has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by wilfully misrepresenting a material fact." 8 U.S.C. § 1182(a)(19) (1964). An alien in the United States is deportable if he fell within an excludable class at the time of entry. 8 U.S.C. § 1251(a)(1) (1964). An alien who is inadmissible to the United States will not be granted adjustment of status to that of an alien lawfully admitted for permanent residence. 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE, 7.7b at 7-61 (1969).

If an alien's *intent* not to reside permanently in his foreign domicile is the basis for finding that he was never "firmly resettled" in an intermediate country, would not that same intent, if undisclosed to the consular and immigration officers in temporary visitor applications, render him excludable from the United States and ineligible for adjustment of status regardless of his classification as a refugee? It would seem that the finding of refugee status on the basis of *intent* not to take up permanent residence in the intermediate country immediately raises a presumption of ineligibility where the alien is in the United States in a temporary status.

A temporary visitor for business may not engage in purely local employment or labor for hire; the term "business" indicates only legitimate activities of a commercial or professional character. 22 C.F.R. § 41.25(b) (1970). The business visitor must still exhibit a clear intent to retain his foreign residence and domicile; the principal place of business and the place where the profit accrues must remain in the foreign country, and while the business activity need not be temporary, the various entries into the United States must individually and separately be of a plainly temporary character. 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE, § 2.8b at 2-45, 2-46.

The district court found that Woo's business and financial holdings were confiscated by the Chinese Communist government in 1952 but that he was unable to earn and save enough money in Hong Kong for several trips to the United States. In fact, said the court in 1968, "He is now in a

system which in practice makes that flexibility a sham. It is also difficult to understand how the Immigration and Naturalization Service could be permitted to apply the resettlement factor without any sign of legislative disapproval if Congress had intended the contrary. Finally, it is reasonable to assume that a system which contains serious disadvantages for the homeless refugee would only be adopted with a clear expression of congressional intent as to the desired result. Otherwise, the result is absurd.

The statute, as written, may permit settled persons to qualify for refugee status. On balance, however, it is highly questionable whether Congress contemplated such a result.

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CIVIL RIGHTS—STATE ACTION—CUSTOMS HAVING THE FORCE OF LAW BY VIRTUE OF PERSISTENT PRACTICES OF STATE OFFICIALS CONSTITUTE STATE ACTION. *Adickes v. S.H. Kress and Company* (U.S. 1970).

Plaintiff-petitioner, Sandra Adickes, a white volunteer summer Freedom School teacher and full time teacher in the New York City School System, brought an action against S.H. Kress and Company in the United States District Court for the Southern District of New York[1] to recover damages under 42 U.S.C. § 1983[2] for an alleged violation of her civil rights. Miss Adickes and six Negro students attempted to use the Hattiesburg, Mississippi library facilities[3] and then, while under police surveillance, proceeded to the local Kress store to eat lunch. The Kress waitress, under orders from the store manager, took the orders of the Negro students, but refused to serve petitioner. The waitress stated: "We have to

position to provide for himself and his family in this country. Indeed, he has been doing so for the *past eight years.*" 295 F. Supp. at 1372 (emphasis added). The implication is that he had been gainfully employed since his entry into the United States. A temporary visitor who fails to maintain his status is deportable. 8 U.S.C. § 1251(a)(9) (1964).

1. Adickes v. S.H. Kress & Co., 252 F. Supp. 140 (S.D.N.Y. 1966).
2. 42 U.S.C. § 1983 (1964), states:
   Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
3. 252 F. Supp. at 142. Petitioner and her Negro students were denied use of the public library, at which time it was closed by the police.