# IN THE MATTER OF S.S. “HORNSHELL” ET AL., 1 IN Dec. 470 (BIA 1943)

IN THE MATTER OF THE S.S. “HORNSHELL” ET AL. In FINE Proceedings.

56096/807Board of Immigration Appeals Executive Office for Immigration Review U.S. Department of Justice
Decided by the Board June 18, 1943. Approved by the Attorney General.

Fines — Section 20, Immigration Act of 1924 — Failure to comply with order to detain on board.

1. Executive Order 8429, promulgated pursuant to the Act of May 22, 1918, as amended, is valid.

2. Failure to comply with Executive Order 8429 and General Order C-31 constitutes a valid basis for the issuance of a detention order, and a violation of such order requires the imposition of a fine under section 20 of the Immigration Act of 1924.

3. The difficulty encountered by the responsible parties in detaining alien seamen on board under war conditions is not a defense under section 20 of the Immigration Act of 1924 to a violation of a detaining order.

On motion for reconsideration.

Mr. D.M. Tibbets, of Kirlin, Campbell, Hickox, Keating, an McGrann, New York City, for the respondents.

Mr. Anthony L. Montaquila, Board attorney-examiner.

BEFORE THE BOARD

BEFORE THE BOARD

STATEMENT OF THE CASE: On December 17, 1942, fines totaling $19,000 were imposed against Furness, Withy and Co., agents of the vessels specified above, for failure to detain on board after service of order so to do 19 alien Chinese members of the crews of the various vessels.[1]

Motion for reconsideration of this order has been filed by counsel representing the agents. Mr. Tibbetts, of counsel, has been heard in oral argument in support of the motion.

DISCUSSION: Section 19, Immigration Act of 1924 (8 U.S.C. 166), provides that:

> *No alien seaman excluded from admission into the United States under the immigration laws and employed on board any vessel arriving in the United States from any place outside thereof, shall be permitted to land in the United States,*
>
> *Page 471*
>
> *except temporarily for medical treatment, or pursuant to such regulations as the Attorney General may prescribe for the ultimate departure, removal, or deportation of such alien from the United States.*

Section 20 (a) of the same act (8 U.S.C. 167) so far as pertinent hereto, provides that:

> *The owner, charterer, agent, consignee, or master of any vessel arriving in the United States from any place outside thereof who fails to detain on board any alien seaman employed on such vessel until the immigration and naturalization officer in charge at the port of arrival has inspected such seaman (which inspection in all cases shall include a personal physical examination by the medical examiners), or who fails to detain such seaman on board after such inspection or to deport such seaman if required by such*

*immigration and naturalization officer or the Attorney General to do so, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each alien seaman in respect of whom such failure occurs. * * *.*

The fines in these cases were levied under this section for failure to detain the seamen on board after an order so to do was served on the agents by an officer of the Immigration and Naturalization Service and not for failure to detain on board until inspected. The notices to detain, with one exception, contained the notation "Executive Order 8429," or "General Order C-31," or "General Order C-22," either separately or together.

In the present motion counsel does not reiterate all of the arguments pressed at the time the case was originally considered.[2] He relies mainly upon the following three contentions:

*(1) That Executive Order 8429 is invalid, and, therefore, neither it nor General Order C-22 and C-31 affords a basis for liability under section 20 of the Immigration Act of 1924.*
*(2) That even if Executive Order 8429 is valid, the noncompliance by an alien seaman therewith, or with General Orders C-22 or C-31, which may result in an order to detain a seaman on board the vessel, is not a valid basis for a fine under section 20 of said 1924 act.*



*(3) That even if there be an obligation on the agents for failure to detain seamen on board who have not complied with the Executive order or the general orders in question, fines in these cases should not be assessed because section 20 does not contemplate liability where the duty to detain is*

*rendered impossible of performance.*

We may summarily dispose of the first point urged by counsel, namely, that Executive Order 8429 is invalid. That Executive order[3] was promulgated by the President on June 5, 1940, under the Act of May 22, 1918,[4] as extended by the Act of March 2, 1921.[5] The order requires (with certain exceptions not applicable to the instant cases) a seaman to present an "identifying travel document in the nature of a passport showing his nationality and identity and bearing his fingerprints before he may be granted shore leave for any purpose." We accept without question the validity of this order. Other orders issued under the same authority have been upheld as valid.[6]

The second point merits fuller discussion, but we likewise reject the position counsel urges upon us.

Up until June 5, 1940, the effective date of Executive Order 8429, alien seamen did not require individual documentation. Theretofore, lists visaed by an American consul were all that was necessary. Thus, Executive Order 8429 brought about a wide and radical departure from prior practices by requiring individual documentation as a condition to admission as a seaman under the immigration laws.

General Order C-31 was promulgated by this Department, in part, as an aid to the proper execution of Executive Order 8429. That order (amending sec. 120.21, title 8, C.F.R.) provides, pertinent hereto, that:

*A bona fide alien seaman wishing to go ashore in the United States pursuant to the provision of section 3 (5) of the Immigration Act of 1924 may be granted shore leave for the period of time the vessel on which he arrives remains in the United States if he establishes to the satisfaction of the immigration officer at the port of arrival (a) that he is a bona-fide seaman as defined in section 120.2 (rule 7, subd.*

*A., par. 2 of the aforesaid immigration rules and regulations), (b) that his name appears on the duly visaed crew list of the vessel on which he arrives, (c) that he is in possession of an identifying travel document in the nature of a passport showing his nationality and identity and bearing his fingerprints, and (d) that he has been registered as an alien and presents receipt on Form AR-103 issued within a year or is registered as an alien at time of inspection * * *.*



General Order C-22, second supplement, is concerned with the registry and fingerprinting of alien seamen. As it read at the time of the arrival of the aliens in relation to whom these fines have been assessed, it did not in terms direct the detention on board of alien seamen until fingerprinted and registered, although by necessary implications, this was required. As amended on May 20, 1942, no doubt is left on this point.[7] In no case was the order based solely on General Order C-22. Hence, whether this regulation prior to its amendment on May 20, 1942, justified the issuance of an order to detain on board need not be considered at this time.

Sections 19 and 20 of the Immigration Act of 1924 set up the procedure for examining alien seamen and preventing the landing of those found inadmissible. This procedure is summary and was so intended to the end that the even flow of commerce would not be unduly hampered through involved procedures to determine[8]
whether seamen may go ashore for the limited time allowed by the regulations.

Section 19 of the Immigration Act of 1924 in its terms is broad. It provides, with certain exceptions immaterial to the case under consideration, that no alien seaman excluded from admission to the United States under immigration laws shall be

permitted to land. It is quite clear that the Passport Act of May 22, 1918, as extended by the Act of March 2, 1921, and Executive orders issued thereunder, including Executive Order 8429, are a part of the immigration laws. They deal with the admissibility of aliens to the United States. The regulations (General Order C-31) interpret the passport requirements as a part of the immigration laws. It seems clear, therefore, that it is not only permissible but mandatory for an officer of the Immigration and Naturalization Service to deny shore leave to any alien seaman who does not have the identifying travel document



required by Executive Order 8429. The validity of an order to detain on board, based on failure to comply with the Executive order or failure to be fingerprinted within a year, unquestionably is valid. The fact that the detention orders issued on either of these grounds are often lifted and shore leave granted the seaman because of the subsequent obtaining of identifying travel document is a matter of no importance in reference to our present consideration.[9]

We think it also a fallacious contention that Congress intended the penal provisions of section 20 to apply only where a detention order was based on a ground of inadmissibility existing at the time the Immigration Act of 1924 became law. When there is power under section 19 to order the detention of a seaman on board for noncompliance with an Executive order promulgated after the 1924 act became law, or in connection with the enforcement of the Alien Registration Act of 1940, we think it only logical that the means of making effective such an order are also applicable. The effectiveness in administering the seaman program depends in a large measure on the effectiveness of the execution of detention orders by ship owners and their agents. If there be no penalty on a ship owner or his agents for failure to comply with detention orders, it is apparent that the effective execution of such

orders will be materially weakened.

We, therefore, hold that a failure to comply with Executive Order 8429 and General Order C-31 constitutes a valid basis for the issuance of a detention order and a violation of such orders requires the imposition of the penalties prescribed in section 20 of the act of 1924.

Had the order to detain given no reason for its issuance it would be valid. In fact, a written order is not essential. All that is required is a finding by an immigration officer that an alien seaman is not entitled to shore leave and notice of such finding served on those persons responsible for detaining the seaman under the statute.[10]

Lastly, counsel argues that under present war conditions, orders to detain on board are impossible of enforcement. He claims that seamen arriving from hazardous foreign voyages, sometimes of long duration, are so eager to obtain shore leave that it becomes impossible to detain them on board ship. He cites precedents holding that impossibility of abiding by regulations relieves of a penalty otherwise



incurred. In the cases before us the facts do not establish that there was an impossibility of performance. At most, it has been shown that in some cases difficulty was experienced in attempting to comply with the orders to detain on board. That in most instances orders to detain on board are obeyed demonstrates that in the average case compliance is not impossible. We are without authority to relieve the respondents of fines which counsel contends are oppressive. The remedy lies with Congress.

After very careful consideration of the record and all of the arguments advanced by counsel,[11] we find no basis for granting the present motion for reconsideration and remission of the fines.

Counsel informs us that proceedings involving similar situations on identical points of law amounting to over a hundred thousand dollars will be coming before us for decision. He is desirous that these cases be adjudicated so that they may be considered a precedent for future action. We believe that the matter is of sufficient importance to certify to the Attorney General for review of our decision.

ORDER: The motion for a reconsideration of the order imposing fines totaling $19,000 is denied.

[1] The vessels all arrived at the port of New York between June and November of 1941. Notices to detain on board and deport the 19 members of the various crews whose names are specified in the notices of liability for fine were served upon the agents. Thereafter the seamen involved effected their escape and were not aboard when the vessels departed.
[2] It had been argued that (a) the notices to detain did not conform to the rule requiring that the name of each seaman be set forth therein and (b) they were not issued in accordance with sec. 20. We held that since the agents knew whom they were required to detain, the specification of names was, therefore, immaterial; and pointed out that sec. 20 does not specify the manner or form of notice. Likewise, we determined that service of the notices by an immigrant inspector, “By direction of the Immigration Officer in Charge” were functions properly delegated and in accord with well-established principles of law (British Empire Steam Navigation Co., Ltd. v. Elting, 74 F. 2d 204 Compagnie Generale Transatlantique v. Elting, 298 U.S. 217 United States ex rel. Petach v. Phelps, 40 F. 2d 500; Leu Shee v. Nagle, 22 F.2d 107; Lloyd Royal Belge Societe Anonyme v. Elting, 61 F.2d 745).
[3] Full text on page 367, decision of December 17, 1942.
[4] Full text on page 367, decision of December 17, 1942.
[5] Full text on page 367, decision of December 17, 1942.
[6] 32 Op. Atty. Gen. 493; 39 Op. Atty. Gen. 516; Johnson v Keating ex rel. Tarantino, 17 F. 2d 50; United States v. One Airplane, 23 F. 2d 500; Flora v. Rustad, 8 F. 2d 335 United States on Petition of Albro ex rel. Graber v. Karnuth, 30 F. 2d 242; United States ex rel. Komlos v. Trudell, 35 F. 2d 281.
[7] As amended, the general order contained the following

provision (now sec. 170.8, title 8, C.F.R.):
"SEC. 170.8. Registration and fingerprinting of alien seamen. — (a) No alien seaman, as defined in section 120.1 of this chapter, shall be admitted to the United States (including Alaska, Hawaii, Puerto Rico, and the Virgin Islands of the United States) after May 31, 1942, under the provisions of sec. 3 (5) of the Immigration Act of 1924, except after compliance with all applicable laws and regulations, including the provisions of this section, and unless:

"(1) He presents a receipt of registration on Seaman Form AR-103-S; or

"(2) He presents an unexpired receipt of seamen's registration on Form AR-103 issued prior to June 1, 1942, and which when issued was made valid for 1 year; or

"(3) He is registered and fingerprinted by a registration officer in accordance with subsection (c) of this section and is issued a receipt of registration on Seaman Form AR-103-S at the time he is admitted to the United States."

[8] In United States ex rel. D'Istria v. Day, 20 F. 2d 303, the court held that, inter alia, sec. 20 does not afford an appeal from an order of detention.
[9] During the present abnormal times through uncontrollable circumstances seamen arrive without the identifying travel documents required by Executive order and regulation. The practice of the Immigration and Naturalization Service is to aid such seamen to meet those requirements. Despite this assistance some seamen must be detained on board the entire time their vessel is in port because of inability to obtain identifying travel documents. Likewise, seamen are registered under the Alien Registration Act as soon after arrival as available personnel and facilities permit.
[10] British Empire Steam Navigation Co. v. Elting, 74 F. 2d 204.
[11] It is stated that in some of the cases documents were obtained, and, therefore, there was no basis for continuing the detention orders, despite the fact that the seamen had

absconded before the documents had been obtained. The fact remains that the duty to detain had not ceased, and, moreover, the seamen had deserted prior thereto and were not on board when the vessel upon which they arrived sailed foreign. The argument is without merit. In three other cases it is alleged that since there was no way in which the seamen could have escaped, they must have jumped overboard and in all probability were drowned. This allegation is based on pure conjecture. If the allegation were established as a fact, liability would not have been incurred. In another case it is urged that since the seamen could have been reshipped foreign on another vessel, remission of fine could be justified on the basis of the ruling in a case involving the S.S. Aeas (56068/170). In that case it was held that where a seaman, following escape from the vessel, was later apprehended through the efforts of the responsible persons, and departed with the same vessel upon which he arrived, the requirement of the law had been substantially fulfilled, and, therefore, there was no liability. In the instant case, the facts are not comparable. The seaman was not apprehended until sometime after the vessel upon which he arrived sailed foreign. To extend the ruling in the Aeas case, irrespective of the time or manner of departure or reshipment, would not be within the contemplation of the statute.
BEFORE THE ATTORNEY GENERAL

The foregoing decision and order of the Board were certified to and approved by the Attorney General.