For Publication

IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

OFFICE OF THE ATTORNEY GENERAL and DIVISION OF IMMIGRATION SERVICES,
Petitioners/Appellees,

v.

ZENAIDA S. ESTEL,
Respondent/Appellant.

Supreme Court Appeal No. 98-028-GA
Superior Court Civil Action No. 98-0797A

OPINION

Cite as: *Office of the Attorney Gen. v. Estel,* 2004 MP 20

Argued and submitted February 20, 2003
Susupe, Saipan, CNMI
Decided September 10, 2004

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BEFORE: MIGUEL S. DEMAPAN, *Chief Justice*; ALEXANDRO C. CASTRO, *Associate Justice*; PEDRO M. ATALIG, *Justice Pro Tem*

CASTRO, Associate Justice:

¶1 Appellant Zenaida S. Estel [hereinafter Estel or Appellant] appeals from the trial court's Order of Deportation entered on September 8, 1998. We find that jurisdiction over deportation proceedings in the trial court was proper, there was no equal protection violation, as controlling immigration is a compelling state interest, and that the Government met its burden of providing clear and convincing evidence that Estel was a deportable alien. We also find that the failure to enforce Estel's transfer employer's repatriation obligation pursuant to the Transfer Order denied her a property interest and violated her due process rights. Therefore, we AFFIRM the Order of Deportation, but require the Department of Labor and Immigration [hereinafter DOLI] to notify resident aliens when repatriation obligations are triggered as a result of a transfer employer's failure to comply with a Transfer Order, and REMAND this case to DOLI for proceedings consistent with this opinion.

I.

¶2 Estel entered the Commonwealth pursuant to a nonresident worker entry permit [hereinafter Entry Permit] on March 22, 1993. The Entry Permit expired on February 24, 1994. On May 30, 1996, after resolving a complaint raised by Estel,[1] DOLI granted Estel a transfer to a new employer. The Transfer Order directed Estel's new employer to file a Nonresident Workers Identification Certificate[2] [hereinafter Labor Permit] with DOLI within 30 days, with failure to file the Labor Permit resulting in the employer's obligation to repatriate Estel to her country of origin, the Philippines. Estel's prospective employer did not file the Labor Permit within 30 days. Estel continued to work in the Commonwealth without a valid entry permit for two years after the expiration of the 30-day period of the Transfer Order.

¶3 The Office of Attorney General and the Division of Immigration Services filed a Petition for an Order to Show Cause seeking Estel's deportation on July 29, 1998. In response, the Superior Court issued an Order to Show Cause on July 29, 1998. A hearing on the Order to Show Cause was held on September 1, 1998 after which the trial court orally ordered Estel's deportation. On September 4, 1998, the trial court heard and denied Appellant's motion to alter or amend judgment and to stay deportation. On September 4, 1998, Estel filed her notice of appeal and sought a stay of deportation from the Superior Court. The Superior Court denied the stay of deportation on September 4, 1998.

II.

¶4 This Court has jurisdiction pursuant to Article IV, Section 3 of the Commonwealth Constitution, 1 CMC § 3102(a) and 3 CMC § 4342.

III.

[1] In 1994, Estel filed a labor complaint against her employer that was not resolved until two years later.

[2] A "nonresident worker's certificate" and a "nonresident worker's entry permit" are now combined into one permit.

¶5 Appellant raises four issues on appeal: first, whether the trial court properly exercised jurisdiction to determine that Estel was a deportable alien; second, whether the deportation of Estel was a violation of her rights under the Due Process clause of Article 1, Section 5 of the CNMI Constitution; third, whether the deportation of Estel was a violation of her rights under the Equal Protection clause of Article 1, Section 6 of the CNMI Constitution; and fourth, whether the CNMI Government established by clear and convincing evidence that Estel was a deportable alien.

¶6 Appellant challenges the trial court's exercise of jurisdiction over her deportation hearing and notes that, while a challenge to jurisdiction was not made during proceedings before the trial court, such challenge may be made at any time, including for the first time on appeal. *Kirby v. Quan*, 3 CR 796, 800 (Dist. Ct. 1989). Whether the trial court had jurisdiction to determine the deportability of an alien is a question of law that is reviewed de novo. *Office of Attorney Gen. v. Rivera*, 3 N.M.I. 436, 441 (1993); *Aquino v. Tinian Cockfighting Bd.*, 3 N.M.I. 284, 291-92 (1992). Appellant argues that the trial court may not properly exercise jurisdiction over a worker's deportation proceeding until DOLI revokes that worker's status, after holding an administrative hearing. *Office of the Attorney Gen. v. Jimenez*, 3 CR 827 (Dist. Ct. App. Div. 1989). No such hearing or revocation took place in this case, which, according to Estel, results in the trial court improperly exercising jurisdiction in ordering her deported. To resolve this issue, we review the Commonwealth Code's grant of jurisdiction over deportation proceedings in the trial court.

¶7 Jurisdiction over deportation hearings in the trial court is granted in Commonwealth Code sections 3 CMC § 4341 *et seq*. Deportation proceedings commence in the trial court with the Attorney General's Office filing a Petition to Show Cause. 3 CMC § 4341(a). The record shows that the prosecution filed a Petition to Show Cause in accordance with 3 CMC § 4341(a) on July 29, 1998. E.R. at 2-9. The next step in deportation proceedings is a hearing on the Petition to Show

Cause before the trial court. 3 CMC § 4341(c). Such hearing took place on September 1, 1998. E.R. at 2-9. Section 4341(f) states "[I]f the trial court makes a determination of deportability, an order of deportation shall be entered and the respondent shall forthwith be deported." 1 CMC § 4341(f). Section 4341 *et seq.* of the Commonwealth Code clearly establishes jurisdiction in the trial court to hear and determine deportation proceedings.

¶8 The crux of the prosecution's contention, that Estel's deportation followed the proper procedure outlined by statute, relies on there having been a final determination of Estel's immigration status in the Commonwealth that vests jurisdiction in the trial court pursuant to 3 CMC § 4340(e). Grounds for deportation exist whenever an alien's entry permit has expired, she has failed either to obtain a new entry permit, or there is some other legal reason to allow her to remain.[3] Here, due to the inaction of her transfer employer, Estel's transfer application expired. The effect of that expiration being that she was no longer in compliance with the requirements of her entry permit, making her continued presence and employment in the Commonwealth a violation of the law. Appellant concedes that her status in the Commonwealth was "technically in violation of the CNMI Labor and Immigration Laws for not possessing an entry permit." Appellant's Opening Br. at 9.

¶9 A valid nonresident worker's employment contract may not be terminated until her Labor Permit has been revoked after a hearing and without such a hearing an employment contract may not properly be considered terminated. *Jimenez*, 3 CR at 838. *Jimenez* is distinguishable from the facts of this case because after the expiration of her transfer application, Estel no longer had valid

[3] *See* 3 CMC § 4340(e) (grounds for deportation exist when an "alien has failed to comply with the requirements or condition of his entry"); *Commonwealth Immigration and Naturalization Regulations*, Section 706 (listing the entry permits available in the Commonwealth, most of which have automatic expiration dates); 3 CMC § 4435(b)(6) (providing that a nonresident worker's certificate shall contain an expiration date). *See also* 3 CMC § 4434(g) ("A nonresident worker . . . whose contract of employment has expired . . . shall not be permitted to remain in the Commonwealth.").

legal status or a valid employment contract in the Commonwealth.[4] As such, DOLI was not required to revoke her already invalid status as a prerequisite to deportation, because such action would be unnecessary. It is clear that, by no fault on her part, Estel was in violation of the terms of her entry permit and the trial court's exercise of jurisdiction over her deportation hearing was proper.

IV.

¶10 Estel's second argument centers on her claim that the Prosecution violated her procedural due process rights under Article 1, Section 5 of the CNMI Constitution when it failed to provide adequate notice of Appellant's employer's failure to comply with the Transfer Order. Constitutional issues are subject to de novo review on appeal. *Riviera*, 3 N.M.I. at 441. In an administrative proceeding where a person's life, liberty, or property is at stake, Article I, Section 5 of the Commonwealth Constitution requires, "at a minimum, that the person be accorded meaningful notice and a meaningful opportunity to a hearing, appropriate to the nature of the case." *Office of the Attorney Gen. v. Deala*, 3 N.M.I. 110, 116 (1992).

¶11 Appellant claims that the CNMI deportation statutes do not clearly delineate what behavior is proscribed, and that she did not know that a third party's failure to act could be grounds for her deportation. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298-99, 33 L. Ed. 2d 222, 227-28 (1972). This argument is unpersuasive because the statute clearly delineates the behavior required for valid status in the Commonwealth. If the meaning of a statute is clear, we will not construe it contrary to its plain meaning. *Limon v. Camacho*, 1996 MP 18 ¶ 40. Our due process analysis does not end there, however, because this Court recognizes Appellant's plight as problematic, and is concerned with the application of the deportation statute to nonresident workers in cases where prospective employers do not fulfill their obligations under Transfer Orders.

[4] Estel did not have legal status in the Commonwealth because her entry permit expired over two years before the deportation proceedings initiated.

¶12 Estel was granted a transfer to a new employer under the Nonresident Workers Act, 3 CMC §§ 4411, *et seq.*, Enforcement Provisions, contained at 3 CMC § 4444(e)(5), which authorizes the Chief of Labor to "[t]ransfer an affected nonresident worker to another employer with the consent of the worker and new employer." Estel's rights under the law pursuant to the current statutory scheme allowed her, as a nonresident worker, a fifteen-day period within which she could contest findings, orders or decisions of the agency, including a Transfer Order. Section 4445 of Title 3 of the Commonwealth Code reads, in pertinent part:

> **Enforcement: Administrative Review**.
>
> (a) Within 15 days of issuance any person or party affected by findings, orders or decisions of the agency made pursuant to 3 CMC § 4444 may appeal to the director by written notice. If no appeal is made to the director within 15 days of issuance of the original findings, orders or decisions shall be unreviewable administratively or judicially.
>
> . . . .
>
> (c) Upon completion of review the director shall confirm or modify the agency findings, order or decision in writing within 10 days. Any modification shall include supplemental findings. The director's decision shall constitute final action for purposes of judicial review.

3 CMC § 4445.[5] Estel's transfer to a new employer was granted by DOLI on May 30, 1996 in response to a complaint filed by Estel in 1994. Pursuant to that Adminstrative Order, Estel's prospective employer had 30 days to file a new Labor Permit for Estel with DOLI, or meet the obligation to provide Estel's repatriation expenses to her country of origin, the Philippines. E.R. at 9. Under the current statutory scheme, Estel's only option to appeal the Transfer Order, which we note was beneficial to her interests, is to raise a challenge by written notice within fifteen days after issuance of the Order. The statutory period for appeal is a non-option because the period within which her prospective employer was to file the new Labor Permit with DOLI had not expired, so she had nothing to challenge beyond the form of the Transfer Order. Essentially, the statute barred

[5] After exhaustion of all administrative remedies, an aggrieved party has fifteen days in which to seek judicial review. 3 CMC § 4446.

Estel from challenging her prospective employer's noncompliance with the Transfer Order fifteen days before noncompliance could even be determined. Estel did all she was required to do to comply with the Transfer Order and continued working under the mistaken belief that she had valid immigration status in the Commonwealth. Under the statutory scheme as applied to a transfer employee, however, she had no redress for the failure of her new employer to comply with the Transfer Order.

¶13 The Government argues that because Estel's transfer status had automatically expired thirty days after it was issued, no additional hearing was required prior to referring her matter to Immigration for deportation because there was "nothing to revoke, nothing to determine, and nothing to address in a hearing." Br. at 7. This argument fails, as the Transfer Order also required the prospective employer to repatriate Estel to the Philippines if a new Labor Permit was not filed with DOLI within thirty days. E.R. at 9. Estel's right to repatriation expenses pursuant to the Transfer Order remained an issue to be addressed, determined, and enforced by DOLI. "Hence it is a mistake to think, that the Supreme or *Legislative Power* of any Commonwealth, can do what it will, and dispose of the Estates of the Subject *arbitrarily*, or take any part of them at pleasure." JOHN LOCKE, TWO TREATISES OF GOVERNMENT (II.138) (Peter Laslett ed. 1988) at pp. 360-61.

¶14 The Commonwealth Code requires that DOLI provide notice of noncompliance with a Transfer Order, but only to a prospective employer and not the transferred nonresident worker, who is arguably more affected by failure to comply with the Transfer Order. 3 CMC § 4447(c). Section 4447(c) reads, in pertinent part:

> (c) If any person fails to comply with any provision of this chapter, or any rule, regulation, or order issued under this chapter, or any nonresident worker employment agreement, after notice of such failure and expiration of any reasonable period allowed by the chief for corrective action, the person shall be liable for a civil penalty of not more than $500 for each day of the continuance of such failure.

3 CMC § 4447(c). Estel's prospective employer failed to comply with the Transfer Order, and under Section 4447(c), should have received notice from DOLI and reasonable time to take corrective action. *Id*. After notice and reasonable time for corrective action has passed, DOLI is authorized to impose a civil penalty of not more than $500 for each day that noncompliance continues. *Id*. Of course, no penalty shall be assessed until the person charged with a violation receives a hearing pursuant to 3 CMC § 4444. *Id*. The record before us does not show whether DOLI accorded such notice to Estel's prospective employer, but it is clear that Estel received neither notice nor opportunity to confirm her valid status in the Commonwealth.

¶15 In her Reply Brief, however, Estel concedes, "the transfer order informed her that if her new employer failed to submit certain documentation within 30 days, then the transfer employer had the obligation to repatriate her." Appellant's Reply Br. at 1. Estel's knowledge that her employer had 30 days in which to file a Labor Permit and that failure to file such permit triggered a duty to repatriate her is not the same as knowing whether a transfer employer indeed complied with the Transfer Order. Appellant is a housekeeper with a seventh grade education who acted in good faith by relying on her prospective employer to comply with the Transfer Order by either filing a new Labor Permit, or repatriating her to the Philippines. Her new employer did neither and as a direct result Estel lost her ability to live and work in the Commonwealth as a nonresident worker, was deported, and had to pay her own repatriation expenses. E.R. at 12.

¶16 This Court's sympathies to Appellant's unfair and unconstitutional plight compel us to expand the holding of *Deala*,[6] to apply to DOLI in cases where a prospective employer does not comply with a Transfer Order by filing a Labor Permit within the given time period, and fails to

[6] In *Office of the Attorney Gen. v. Deala*, this Court held that a party did not abandon his claim simply because he did not diligently pursue it. 3 N.M.I. 110, 118-19 (1992). We also required Labor to issue a written determination of Deala's status, as required by statute, and held that a nonresident worker is not required to check with DOLI periodically on the status of his or her claim. *Id*. Further we held that Deala had a property interest in unpaid wages. *Id*.

fulfill the obligation to repatriate the transfer employee. *See Office of the Attorney Gen. v. Deala*, 3 N.M.I. 110, 118-19 (1992). In *Deala* we found a protected property interest in unpaid wages and today we find a protected property interest in unpaid repatriation expenses, in the limited case where a transfer employer fails to comply with a Transfer Order that requires payment of a transfer employee's repatriation expenses. Therefore, we affirm[7] Appellant's deportation order and find that DOLI was required to notify Estel of her prospective employer's non-compliance with the Transfer Order in order to enforce the repatriation term of that Order, and that DOLI remains responsible for enforcing Appellant's prospective employer's obligation to provide repatriation expenses to the Philippines. [8]

¶17 This Court previously held "[a] transfer is, in short, a discretionary remedy" but once that remedy is issued at the discretion of the Division of Labor, then the terms granted in the transfer order are enforceable. *Office of the Attorney Gen. v. Paran*, 4 N.M.I. 191,194 (1994). Estel's property interest is not in the discretionary Transfer Order itself, but in the unpaid repatriation expenses that became her property right on the expiration of the Transfer Order. To hold otherwise would diminish DOLI's discretionary power to issue and enforce Administrative Orders pursuant to the Nonresident Workers Act, and confuse parties both bound and benefitted by those Orders.

V.

¶18 Estel's third argument on appeal is that the trial court's order of deportation violated her equal protection rights under Article 1, Section 6 of the Commonwealth Constitution because it was based on inaction of a third party and does not further the Government's interest in enforcing the

[7] The Court notes that the word "affirm" is a correction from the original editing error that provided "vacate," as noted in *Office of the Attorney Gen. v. Estel*, 2004 MP 24 ¶ 2.

[8] DOLI may compel payment of Appellant's repatriation expenses from Appellant's transfer employer under 3 CMC § 4447(b), as well as seek civil penalties per 3 CMC § 4447(c).

deportation statute. Constitutional issues are subject to de novo review. *Rivera*, 3 N.M.I. at 441. Estel argues that classifying her as a deportable alien when she did not intentionally violate the CNMI Labor and Immigration law but was technically in violation of her entry permit as a result of her transfer employer's inaction is a violation of the Equal Protection clause of the Commonwealth Constitution. Estel attempts to define the suspect classification that violates equal protection as the arbitrary inclusion of those who intend to circumvent immigration law with those who do not, and asks this Court to apply intermediate scrutiny. *See Sirilan v. Castro*, 1 CR 1082, 1112-31 (Dist. Ct. App. Div. 1984). We quickly note that under equal protection analysis, "suspect classes are groupings based on factors such as race or national origin" and demand strict scrutiny. *In re Blankenship*, 3 N.M.I. 209, 219 (1992); *see also Charfauros v. Bd. of Elections*, 1998 MP 16. Such suspect classification, argues Estel, may be convenient in terms of enforcement of immigration law in the Commonwealth, but also may lead to discriminatory classifications that violate the Commonwealth Constitution.

¶19 The Equal Protection clause protects those similarly situated who are treated differently. *Vacco v. Quill*, 521 U.S. 793, 799, 117 S. Ct. 2293, 2297, 138 L. Ed. 2d 834, 841 (1997) (*citing Plyer v. Doe*, 457 U.S. 202, 216, 102 S. Ct. 2382, 2394, 72 L. Ed. 2d 786, 798 (1982)). To make a valid equal protection challenge, "there must be a showing that the statute . . . results in members of a certain group being treated differently from other person based on membership in that group." *Commonwealth v. Francisco*, Crim. No. 99-0055 (N.M.I. Super. Ct. Dec. 14, 1999) (Order Granting Plaintiff's Motion to Amend the Information and Denying Defendant's Motion to Dismiss Counts II and III of the Information at 9) (*citing United States v. Lopez-Flores*, 63 F.3d 1468, 1472 (9th Cir. 1995)). Here, Estel has no viable equal protection argument because she was treated the same as others in her position, namely visitors to the CNMI without valid immigration status.

¶20 Controlling immigration is an important government interest over which the "Commonwealth Legislature exercises plenary power . . . pursuant to section 503 of the Covenant." *Office of the Attorney Gen. v. Sagun*, 1999 MP 19 ¶ 8. The Legislature's decision to require that aliens maintain valid immigration status, regardless of the alien's good intentions, is directly and substantially related to compelling state interests. *See id*. If this Court were to recognize actions by a third party as a valid defense to deportation, then the deportation laws would be eviscerated and difficult, if not impossible, to enforce.

¶21 Estel argues that she is classified as a deportable alien even though she did not intend to violate the deportation statute and was in violation only due to the failure of her prospective employer to comply with a Transfer Order. Estel also argues that the deportation of a person, who has performed all that was required of her pursuant to a Transfer Order, does not further the legitimate goals of the deportation statute and is a violation of the equal protection clause. This argument fails strict equal protection scrutiny centered on suspect classifications because controlling immigration and labor is a compelling state interest that transcends good faith compliance with a statute. *See id*.

¶22 Review of the Commonwealth's statutory scheme controlling deportation reveals no mention of intent as a requirement for a violation. See 3 CMC §§ 4340, *et. seq*. This Court will not read such a requirement into the statute. The immigration status of aliens in the Commonwealth is impacted by countless outside influences. Distinguishing the cause of a violation, be it intentional, a result of carelessness, mistake, or many other influences not contemplated by the immigration statutes, does not mitigate the violator's invalid status. Were this Court to recognize a complete defense to deportation based on intent, or the acts of third parties, or other influences, it would invite challenges to every deportation order based on a litany of foreseen and unforeseeable causes, thereby rendering

enforcement of the deportation statute altogether impossible.

VI.

¶23 Appellant's fourth and final issue on appeal is that the Government failed to establish the facts alleged as grounds for deportation by clear and convincing evidence as required by statute. 3 CMC § 4341(e). Factual findings constitute a question of law when the burden of proof is clear and convincing evidence and the assigned error is that the evidence does not support the trial court's findings. *In re Discipline of Lizama*, 2 N.M.I. 360, 377 (1991). The standard of review is whether as a matter of law, the findings are supported by competent and substantial evidence. *Id*. Clear and convincing evidence is required to "protect[] society from the consequences of grave decisions too lightly reached." *Eastwood v. Nat'l Enquirer, Inc.*, 123 F3d 1249, 1252 n.5 (9th Cir. 1997). The clear and convincing standard requires more evidence than a preponderance, and less than beyond a reasonable doubt. *Pate v. Columbia Mach., Inc.*, 930 F. Supp. 451, 468 (D. Idaho 1996).

¶24 Evidence in the record includes testimony of Major John Taitano, the Immigration Investigator on Appellant's case, noting that Appellant's work permit expired on February 24, 1994 and was not renewed. He also categorized Estel's status in the Commonwealth after that date as being an "overstay." Supplemental Excerpts of Record [hereinafter S.E.R.] at 6-8. Most damaging to Appellant's case is her own testimony that she did not have a valid work permit at any point after May 30, 1996. S.E.R. at 12. The fact that Appellant did not know her status until receiving the Order to Show Cause does not alter her illegal status in the Commonwealth. *Id*. The record clearly shows that when Estel's prospective employer failed to comply with the Transfer Order by not filing a Labor Permit within thirty days, she was in violation of the Commonwealth's immigration law and subject to deportation proceedings.

VII.

¶25 The trial court properly exercised jurisdiction in finding Appellant to be a deportable alien in violation of Commonwealth law. Further, there was no equal protection violation because the Commonwealth's control of immigration is a compelling state interest and Estel was treated similarly to other nonresident workers who are in violation of Commonwealth law. Finally, the Government met its burden of providing clear and convincing evidence that Estel did not have valid status in the Commonwealth. We also find, however, that DOLI's failure to enforce Estel's prospective employer's repatriation obligation pursuant to the terms of the Transfer Order, denied her a protected property interest and violated her due process rights. For the foregoing reasons, we AFFIRM the deportation order, but we REMAND this case to the Department of Labor and Immigration for enforcement of the Transfer Order by determining the proper amount of repatriation expenses owed to Estel by her transfer employer and delivering those expenses to her through her attorney of record.

SO ORDERED THIS 10TH DAY OF SEPTEMBER 2004.

/s/_____
MIGUEL S. DEMPAN, CHIEF JUSTICE

/s/_____ /s/_____
ALEXANDRO C. CASTRO, ASSOCIATE JUSTICE PEDRO M. ATALIG, JUSTICE *PRO TEMPORE*