OPINION AND ORDER

Plaintiff John Lennon has moved for an order enjoining various officials involved in the enforcement and administration of United States immigration laws from further proceedings regarding his deportation.* An appeal from his deportation order of March 23, 1973 is presently pending before the Board of Immigration Appeals (the "Board").

Plaintiff and his wife entered the United States in 1971 with authority to remain until February 29, 1972. On March 1, 1972 they were advised that their authorization had expired and they were expected to leave by March 15. However, on March 6, concluding they had no intention to leave by March 15, the District Director of the Immigration and Naturalization Service ("INS") commenced deportation proceedings against them. This proceeding came on to be heard before Immigration Judge Fieldsteel. At that time, plaintiff and his wife asserted that the deportation proceedings had been discriminatorily commenced because INS had violated its practice by not allowing them "non-priority" status.**

*Those officials are the defendants in the two actions Lennon commenced in October 1973 described infra.

**"Non-priority" refers to a category of cases in which the INS will defer the departure of an alien indefinitely and take no action to disturb his immigration status on the ground that such action "would be unconscionable because of the existence of appealing humanitarian factors."

In this case, the asserted grounds for "non-priority" status were that the wife desired to remain in the United States to endeavor to locate and obtain custody of her child by a former marriage, and plaintiff-husband desired to remain with and assist her.

The Immigration Judge allowed the wife permanent residence,* but plaintiff-husband was ordered deported. The Immigration Judge ruled that his sole function was to determine whether the deportation charge was sustained by sufficient evidence, and finding that plaintiff-husband had been convicted in England upon his plea of possession of "cannibis resin", ruled he was deportable as a matter of law.** The Immigration Judge denied plaintiff's request to terminate the deportation proceedings on the grounds of (1) discriminatory commencement and (2) because of INS' alleged violation of its own practice as regards "non priority" status, stating:

> It is within the District Director's prosecutive discretion whether to institute deportation proceedings against a deportable alien or temporarily to withhold said proceedings. Where such proceedings have begun, it is not in the province

*Pursuant to Section 245 of the Immigration and Nationality Act, 8 U.S.C. Sec. 1255.

**Section 212(a)(23) of the Immigration and Nationality Act, 8 U.S.C. Sec. 1182(a)(23).

> of the Immigration Judge or of the Board on Appeal to review the wisdom of the District Director's action starting the proceedings...

Plaintiff's appeal from the determination of the Immigration Judge to the Board of Immigration Appeals is sub judice.

Thereafter, and in October 1973, plaintiff commenced two actions in this Court. Action #1, under the Freedom of Information Act, 5 U.S.C. Section 552, seeks INS information and records relevant to the maintenance by INS of a "non-priority" category of cases and the standards used in determining its applicability.

Action #2 seeks an order 1) requiring certain government defendants to divulge, pursuant to 18 U.S.C. Sec. 3504, whether or not plaintiff has been the subject of unlawful surveillance and 2) granting a hearing on the question of whether or not the defendants had "prejudged the case against him."

Plaintiff's principal contention is that he is entitled to a stay of all proceedings "until a reasonable time after plaintiff has been furnished with the information and records sought in Action No. 1," on the

ground that while he is not subject to deportation until after a final decision of the Board,* and review by the Court of Appeals,** he will be forced to go to the Court of Appeals on an inadequate and prejudicial record in the event the decision of the Board is against him.***

There seems little question that the District Court has jurisdiction to enjoin agency action for violation of a Freedom of Information Act claim. Renegotiation Board v. Bannercraft Clothing Co., 42 U.S.L.W. 4203 (U.S. Feb. 19, 1974); Sears Roebuck & Co. v. N.L.R.B., 473 F.2d 91 (D.C. Cir. 1973). However, such power is to be exercised only upon a clear showing of irreparable injury. Sears Roebuck, supra, at p. 93 states:

> ...it is only in extraordinary circumstances that a court may, in the sound exercise of discretion, intervene to interrupt agency proceedings to dispose of a single, intermediate or collateral issue. A cogent showing of irreparable harm is an indispensable condition of such intervention.

---

*8C.F.R. Section 3.6(a) (1973).

**8 U.S.C. Section 1105(a)(3).

***Plaintiffs point out that review before the Court of Appeals "shall be determined solely upon the administrative record upon which the deportation order is based. The Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;" 8 U.S.C. Section 1105(a)(4).

On the facts before me, there is no such showing. The plaintiff cannot be deported as a matter of law until a final determination has been made herein by the Court of Appeals, unless that Court so orders. The information and records sought have been held to be irrelevant as a matter of law by the Immigration Judge.* If that ruling is proper, there is no basis for an injunction to permit plaintiff to obtain these records to introduce in that proceeding. If it is improper, either the Board or the Court of Appeals may reverse with appropriate directions to the Immigration Judge to receive and consider such proof.**

*I note that even if the requested information should prove to be relevant in a way overlooked by the parties or the Court, plaintiff is not entirely without remedy. 8 C.F.R. Sec. 3.8 provides a procedure for the reopening of a Board determination upon motion of a party. If the Board should fail to permit plaintiff to reopen and in doing so commits an abuse of discretion, judicial review is available in the Court of Appeals. Schieber v. Immigration and Naturalization Service, 461 F.2d 1078 (2d Cir. 1972). The existence of this procedure further supports my view that the plaintiff will not suffer irreparable injury by the continuation of Board proceedings.

**In the event that the position of the Immigration Judge is held to be incorrect and proceedings to determine the merits of plaintiff's selective prosecution claim proceed without awaiting the release of the information to which plaintiff is entitled in Action #1, I will, at that point, reconsider plaintiff's application for a stay.

Thus plaintiff will have his review and be protected against improper deportation during its course.

The plaintiff alternatively seeks this preliminary injunction pending the outcome of Action #2 on the ground that if the injunction is not granted, he will have no recourse from his asserted "prejudgment" herein and/or the claimed use of tainted evidence against him.

However, plaintiff, in his very limited presentation on this ground, has made no showing that any Immigration official involved in this proceeding has not exercised his independent judgment,* and the Board has yet to rule. Any claim of prejudgment is necessarily premature when an agency's appellate body has yet to act.**

Nor has plaintiff demonstrated a need for a stay of the Immigration proceedings until defendants affirm or deny the use of illegal evidence against plaintiff. Judge Fieldsteel's opinion is based solely

*Exhibit "D" to the complaint in Action #2, while provocative, is not a showing.

**Given a proper showing, a hearing on prejudgment might be appropriate after the Board's determination. See U.S. v. ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954). To stay the proceedings at this point would be improperly disruptive, even assuming a proper showing had been made.

on the record of Lennon's conviction in England.* Plaintiff has, in any event, specified no evidence admitted in the proceedings which might be inadmissible as the product of an unlawful act and therefore I see no reason to delay further proceedings. Consequently, I decline to grant a preliminary injunction on the alternative grounds urged as to Action #2.

For the foregoing reasons, the plaintiff's motion for a preliminary injunction is denied.

SO ORDERED:

U. S. D. J.

*There can be, and is, no claim that the evidence of the conviction was illegally obtained.

CO 243. 129-A

NEWS DIGEST January 28, 1974

John Lennon, in a last attempt to prevent the U.S. government from deporting him, is appealing to the Queen of England to pardon him. The Ex-Beatle was convicted in London in 1968 of possessing marijuana. Lennon wants very much to become a U.S. citizen, but foreigners with drug convictions are not permitted U.S. citizenship. Lennon would like to fly to London and appeal to Her Majesty in person, but he is afraid that if he once leaves the U.S., he will not be allowed to return. Lennon's non-resident visa expired last February, at which time U.S. immigration authorities sought to deport him, but he hired a battery of lawyers who won him extensions. Beatle John has been an exemplary individual in the U.S., contributing to many causes and working strenuously for the relief of Bangladesh refugees. No doubt he would prove a welcome addition to this country. He is intelligent, talented, and creative, which is more than can be said for some of the bureaucrats who want to deport him. (Parade, WASH. POST 1/27)

INS News Digest

TUESDAY, NOVEMBER 6, 1973 #172

CO 243.129-P

11/6/73

Re: LENNON, John

[redacted]INGTON - Attorney Wildes told the BIA he is suing the government in New York for evidence of government bugging and wiretaps against former Beatle John Lennon and his wife, Yoko Ono, and therefore requesting the BIA to delay its decision on Lennon's deportation order until a U.S. District Court rules on that suit. The order finding Lennon, 32, residing illegally in the U.S. because of a prior conviction for possession of marijuana while living in England was appealed to the BIA. (MIAMI HERALD 11/2) See DIGEST 10/26.

cc: Litg. Unit
cc: CO
cc: CO 243.129-P

cc: CO 893.1 Filing Ltr Material

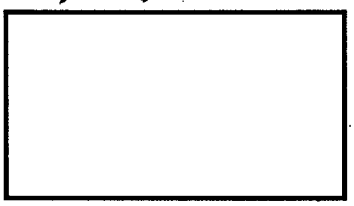
Re: for Lennon & Paul McCartney
Sample reply by Howard Carter

CO 243.129-P

CO 893-C

MAY 24 1973

(b)(6)



I have your recent letter concerning Paul McCartney and John Lennon, former members of "The Beatles".

Many persons have written to this Service concerning their cases. Some of the letters we have received have opposed permitting them to enter or stay in the United States. Some, like your letter, have favored permitting them to come to this country and remain here.

What is involved in both their cases is the fact that they have been convicted of violations of the law relating to marijuana. Under the immigration laws, these convictions make them inadmissible to the United States.

In Mr. Lennon's case, he was given permission to come to this country under a special provision of the law which allows such permission to be given for a temporary visit. After he came to this country, Mr. Lennon indicated a desire to stay here permanently. He was found to be ineligible for that status because of his conviction in London in 1968 for possession of "cannabis resin". Mr. Lennon has filed an appeal to the Board of Immigration Appeals in Washington, D. C. from a decision by this Service requiring him to depart from the United States. The appeal is now pending, and any further action on Mr. Lennon's case will depend upon the decision made by that Board.

Mr. McCartney was convicted on November 14, 1972 of trying to smuggle cannabis into Sweden. Also in March of this year, he pled guilty to growing marijuana on his farm in Scotland and was fined for that violation of law.

cc: CO 243.129-P
cc: CMU

We appreciate the expression of your views with regard to Mr. McCartney and Mr. Lennon. However, unless and until the Congress amends the provision of law which now makes them inadmissible to the United States, it is not possible for this Service to take any other action in their cases.

Sincerely,

James F. Greene

James F. Greene
Associate Commissioner
Operations

CC: A17 597 320 - John Lennon

TC:MJM:pm

INS News Digest

MONDAY - MAY 21, 1973 NO. 80

CO243. 129-P

HOUSTON - Yoko Ono Lennon was awarded permanent custody of her daughter by a Houston court on May 14. The child's whereabouts are unknown. (CHICAGO DAILY NEWS 5/15) See DIGEST 4/3/73.

INS News Digest

MONDAY - MARCH 26, 1973 NO. 46

NEW YORK - John Lennon must leave the U.S. in 60 days but his wife, Yoko Ono, was granted permanent residence and may eventually apply for U.S. citizenship. INS District Director Sol Marks gave the first press conference he has ever held to announce the rulings by Immigration Judge Ira Fieldsteel contained in a 47-page decision. Lennon was denied permanent residence because he was convicted in London in 1968 of possession of cannabis resin, popularly known as hashish. Lennon was given 10 days in which to appeal. If he does appeal, his case will go first to the BIA and then, if necessary, to a U.S. Circuit Court of Appeals. He might thus be able to stay in the U.S. for years as he goes through due process. John and Ono did not attend the press conference held in the MASH room on the 14th floor of the INS building near the southern tip of Manhattan. MASH is the acronym for Multiple Accelerated Summary Hearings -- an INS device for quick processing of aliens who are willing to leave the country, jokingly referred to in the building as Move Aliens Swiftly Home. Lennon was granted permission to leave voluntarily rather than be deported. If he leaves voluntarily at any time in the next 60 days he might be able to return as a visitor on the same kind of a waiver of his narcotics conviction that enabled him to come here in 1971. (WASH. POST 3/24 and others)

CU243.129-P

INS NEWS DIGEST, FRIDAY, JULY 14, 1972

NEW YORK (AP) - A decision in the deportation proceedings against former Beatle John Lennon and his wife, Yoko Ono, may not be reached until September. INS reported yesterday that the government is awaiting a transcript of the May 17 hearing in the case, and SIO Fieldsteel will be away for the month of August. (WASH. POST 7/14)

NEWS DIGEST

MONDAY - MAY 15, 1972

Co 243.129-P

NEW YORK - Deportation proceedings against John Lennon were recessed in New York yesterday after the former Beatle's lawyer introduced surprise evidence indicating that Lennon's wife, Yoko Ono, has been and may perhaps still be a legal alien resident of the United States. INS District Director Sol Marks said that Mrs. Lennon's residence status would really make no concrete difference in the case anyway. "There's never been much question about her being granted residency. The problem rests with Lennon's drug conviction." Lennon was convicted of possession of a small quantity of hashish (cannabis resin) by a British court in 1968. At the hearing, Dr. Lester Grinspoon, a psychiatrist, Harvard professor and author of "Marijuana Reconsidered," testified that cannabis resin was neither a narcotic nor marijuana. Lennon's lawyer claimed that immigration laws technically bar residency only to those convicted of possessing "narcotic drugs or marijuana."
(WASH. POST 5/13)

A17 597 321 - John Lennon
Yoko Ono

(b)(6)

Yoko ONO (Lennon)

The SAN ANTONIO EXPRESS of 5/12 contains an item relating to a Juan Stie-

THURSDAY, MAY 18, 1972

NEW YORK - The deportation proceedings against John Lennon were recessed for at least two months yesterday with a prediction to a reporter from SIO Ira Fieldsteel that "this thing could drag on for several years." At the close of the hearing yesterday, Fieldsteel granted both parties until July 1 to file briefs. In addition, the American Civil Liberties Union plans to file a brief on behalf of the Lennons. Lennon's attorney said that should Fieldsteel's verdict be negative, he would appeal to the BIA, and later, if necessary, to federal courts for review. (WASH. POST 5/12)

OCB - George Belsw...
2

NEWS DIGEST

FRIDAY, MAY 12, 1972

NEW YORK - John Lennon will likely be ordered deported from the U.S. today when he appears before a special inquiry officer of INS. According to top officials of the Service, the Lennon case is cut and dry. He overstayed his visa, so he will have to leave. Their attorney, Leon Wildes, said "I've never seen a case handled this way before." After discussing the case with Sol Marks, New York director of INS, he said "it was pretty clear to me that the shots were being called in Washington." It seems certain that if, as expected, today's ruling goes against them, they will appeal.
(lengthy article by Stephen Isaacs in Style section of WASH. POST 5/12)

THURSDAY, MAY 11, 1972

An editorial in the WASH. DAILY NEWS of 5/9, captioned "Unhand that Beatle," comments that the INS must have better things to do than spend a lot of time trying to deport John Lennon, the former Beatle, and his wife, Yoko Ono. It goes on to say that the Lennons came on temporary visas last summer to seek custody of Yoko's daughter from a former marriage, but that now they want to stay on, and INS bureaucrats are balking because of Mr. Lennon's 1968 marijuana conviction in England. According to the editorial, there are more than a million illegal immigrants in America, many of them taking jobs away from citizens, committing crimes, or collecting welfare payments, and INS would do better to pursue them instead of Mr. Lennon.

VOL. IV, Number 15, (Issue 93)

Thursday, May 4, 1972

THE ROSSLYN REVIEW

John Lennon and Yoko To Have Press Conference

John Lennon and Yoko Ono will be present at a press conference called by the National Committee for John and Yoko to be held at 10:30 A.M., Friday, May 28, in the ballroom of the National Press Club, 14th and F Sts., N.W., Washington, D.C.

Ken Dewey, Chairman of the National Committee for John and Yoko, and a member of the New York State Commission on Cultural Resources, said today:

"Now and then citizens must remind government that it is obligated to act in the public interest. Our group has formed to make clear to those within the Justice Department's Immigration and Naturalization Service, and within the present administration, that deportation, harrassment, or intimidation of John Lennon and Yoko Ono is not in the public interest. We would like support from all others who agree.

"If as mounting evidence suggests, this couple is having difficulties simply because of their outspoken, sincere, and non-violent opposition to the war in Vietnam and to related issues, then very serious questions about the misuse of governmental power must be raised."

The administration wants Americans to believe that the efforts to deport John Lennon and Yoko Ono are solely based on Lennon's misdemeanor conviction for possession of marijuana in England four years ago. Specific information on the attempts by the administration and a Senate sub-committee on Internal Security to complete to silence them by their summary removal from the U.S. will be made public at the press conference on Friday.

The efforts of the government to make John Lennon and Yoko Ono appear undesirable include attempts to dissuade anti-drug organizations from working with the Lennons in a This despite the influence that John Lennon, the world-famous rock star, and Yoko Ono, the internationally known artist, could exert on the opinions of youth.

A Texas court granted them custody of her eight year old daughter, Kyoko, on the condition that the Lennons bring her up in the United States. The Immigration Service, thus, would be separating parents from child.

The National Committee for John and Yoko represents members of the Ad Hoc Committee for Artistic Freedom, the Justice for John and Yoko Committee, and concerned citizens, who have independently and spontaneously come together for the specific purpose of supporting John Lennon's and Yoko Ono's desire to become permanent residents of the United States, and to defend their constitutionally guaranteed rights of freedom of speech and expression. Distinguished members of the National Committee and concerned citizens will be present along with John and Yoko to answer questions.

Dated 5-4-72

MEMORANDUM OF CALL

TO: Mr. Leary

☑ YOU WERE CALLED BY— ☐ YOU WERE VISITED BY—

OF (Organization) Mr. Cull

☐ PLEASE CALL → PHONE NO. CODE/EXT.

☐ WILL CALL AGAIN ☐ IS WAITING TO SEE YOU

☐ RETURNED YOUR CALL ☐ WISHES AN APPOINTMENT

MESSAGE

Sending something down for you!

[redacted]

RECEIVED BY S. DATE 5/5/72 TIME 2:00

STANDARD FORM 63
REVISED AUGUST 1967
GSA FPMR (41 CFR) 101-11.6

GPO : 1969—048—16—90841-1 332-389 63-108

VOL. IV, Number 15, (Issue 93)

Thursday, May 4, 1972

THE ROSSLYN REVIEW

C.J. E.C.

John Lennon and Yoko To Have Press Conference

John Lennon and Yoko Ono will be present at a press conference called by the National Committee for John and Yoko to be held at 10:30 A.M., Friday, May 26, in the ballroom of the National Press Club, 14th and F Sts., N.W., Washington, D.C.

Ken Dewey, Chairman of the National Committee for John and Yoko, and a member of the New York State Commission on Cultural Resources, said today:

"Now and then citizens must remind government that it is obligated to act in the public interest. Our group has formed to make clear to those within the Justice Department's Immigration and Naturalization Service, and within the present administration, that deportation, harrassment, or intimidation of John Lennon and Yoko Ono is not in the public interest. We would like support from all others who agree.

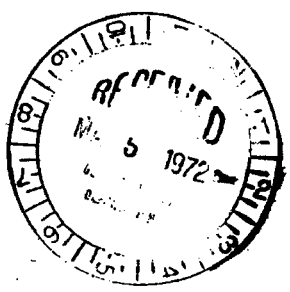
"If as mounting evidence suggests, this couple is having difficulties simply because of their outspoken, sincere, and non-violent opposition to the war in Vietnam and to related issues, then very serious questions about the misuse of governmental power must be raised."

The administration wants Americans to believe that its efforts to deport John Lennon and Yoko Ono are solely based on Lennon's misdemeanor conviction for possession of marijuana in England four years ago. Specific information on the attempts by the administration and a Senate sub-committee on Internal Security to conspire to silence them by their summary removal from the U.S. will be made public at the press conference on Friday.

The efforts of the government to make John Lennon and Yoko Ono appear undesirable include attempts to dissuade anti-drug organizations from working with the Lennons in a This despite the influence that John Lennon, the world-famous rock star, and Yoko Ono, the internationally known artist, could exert on the opinions of youth.

A Texas court granted them custody of her eight year old daughter, Kyoko, on the condition that the Lennons bring her up in the United States. The Immigration Service, thus, would be separating parents from child.

The National Committee for John and Yoko represents members of the Ad Hoc Committee for Artistic Freedom, the Justice for John and Yoko Committee, and concerned citizens, who have independently and spontaneously come together for the specific purpose of supporting John Lennon's and Yoko Ono's desire to become permanent residents of the United States, and to defend their constitutionally guaranteed rights of freedom of speech and expression. Distinguished members of the National Committee and concerned citizens will be present along with John and Yoko to answer questions.



MEMORANDUM RE JOHN LENNON AND YOKO ONO

CO 243.129-1

The following are the particulars with respect to John Lennon and Yoko Ono Lennon in connection with their U.S. immigration problems:

A. JOHN LENNON:

1. Citizen of Great Britain

2. Date of birth - October 9, 1940

3. Passport #1829355, issued by Great Britain

4. Occupation - musician, composer, artist

5. Presently admitted into the U.S. on August 13, 1971 under classification B1/2 under visa #704155 issued by the U.S. Embassy in London, England under the provisions of Section 212 (d) (3) (A) (23) with all matters relating to this entry to be referred to the Immigration and Naturalization Service, Washington, D.C. office under file #17597321

6. Lennon's entry was originally valid until September 24, 1971 but it was extended until November 30, 1971. He was granted a waiver under Section 212 (d) (3) of his inadmissibility under Section 212 (a) (23). Lennon was convicted in 1968 of possession of cannabis, contrary to Regulation 3 Dangerous Drugs (#2) Regulations 1964 and Section 13 of the Dangerous Drugs Act, 1965. The fines and costs amount to £171 (£150 fines and £21 costs).

7. Mr. and Mrs. Lennon have been in the U.S. during the following periods:

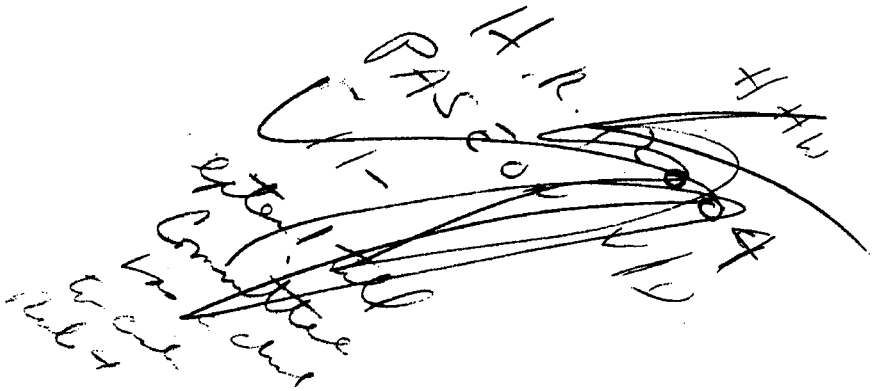
   a. April 24, 1970 through September 15, 1970
   b. The month of December 1970
   c. The last two weeks in July 1971
   d. August 13th through the present

B. YOKO ONO LENNON:

(b)(6)

C. Attached are the following exhibits:

1. Xerox copies of visa and I94 form for John Lennon
2. Xerox copies of visa and I94 form for Yoko Ono Lennon
3. Various papers relating to English drug conviction
4. Affidavit in support of application for extension
5. Various papers in connection with stay of Mr. and Mrs. Lennon in U.S. from April 1970 through mid September 1971



Form G-22
(Rev. 6-15-62) ROUTE SLIP

Date 7-12-74

To Hugh Brien Room

- [ ] Approval
- [ ] Comment
- [ ] Necessary action
- [ ] Per telephone conversation
- [ ] Note & Return
- [ ] Note & File
- [ ] Signature
- [ ] Call me Ext.
- [ ] See me
- [ ] As requested
- [ ] For your information

Remarks

Vern Jervis is conferring with ADD Kiley re publicity which is to be released by the Department.

From WPO Room

IMMIGRATION AND NATURALIZATION SERVICE 934-128

C024 1197-D D

JUL 16 1974

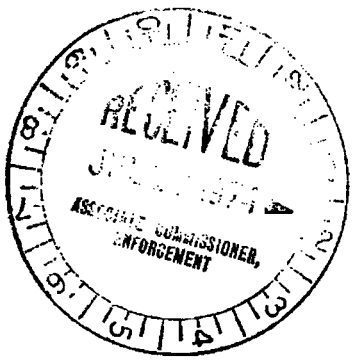
Appellate Trial Attorney

Acting General Counsel

John Winston Ono Lennon, A17 595 321

The Service agrees with the Board's decision and has no objection to its publication as a precedent decision.

CC: Associate Commissioner, Enforcement



File

IMMIGRATION & NATURALIZATION SERVICE

CENTRAL OFFICE ROUTING SHEET

DATE: July 11, 1974

Routing Order	OPR Code	DATE IN	DATE OUT	Initial	ADDRESSEES
					COMMISSIONER
					Executive Assistant
3	K				General Counsel
					DEPUTY COMMISSIONER
					Exec. Asst. Deputy Comm.
					ASSOC.DEP.COMM.PLAN.& EVAL.
					Director, Field Inspections
					Director, Internal Investigations
					Director, Intelligence
1	D	7/12	7-12	ABP	ASSOC. COMM. ENFORCEMENT
					Asst. Comm. Border Patrol
					Asst. Comm. Investigations
2	D	7/12/74	7-15	HB.	Asst. Comm. Det. & Deport.
					ASSOC. COMM. EXAMINATIONS
					Asst. Comm. Adjudications
					Asst. Comm. Inspections
					ASSOC. COMM. MANAGEMENT
					Asst. Comm. Naturalization
					Asst. Comm. Administration
					Appellate Trial Attorney
					Other

FROM: Irving A. Appleman

TO: Assoc. Comm'r, Enforcement

SUBJECT: Interim Decision

ROUTING - Use numbers to show order of routing

OPERATION CODE

X - ORIGINATING OFFICE
A - APPROVAL
B - CONCURRENCE
C - COMMENT
D - NECESSARY ACTION
E - NOTE & RETURN
F - NOTE & FILE
G - CALL ME Ext. _____
H - PREPARE REPLY FOR SIGNATURE OF: _____
I - SIGNATURE
J - SEE ME
K - AS REQUESTED
L - FOR YOUR INFO
M - PER TELECON

REMARKS: No objection to publication HB.

No objection to publication ABP

3 Gen. Counsel 7/15

(Continue Comments on Reverse)

FINAL DISPOSITION (Must be completed before return to files)

ACTION COMPLETED BY: ☐ LETTER ☐ MESSAGE ☐ OTHER

NO ACTION REQUIRED ☐

BY:

FORM CO 275 (1-8-74)

1198

CO 649-C

Sam Bernson
Acting General Counsel

July 11, 1974

Irving A. Appleman
Appellate Trial Attorney

JOHN WINSTON ONO LENNON, A17 595 321

Attached is a copy of the Board of Immigration Appeals decision of July 10, 1974, in the subject case. Because of its bulk the record file is being retained in this office, but is readily available and can be forwarded if needed. The decision has been designated for publication.

The decision holds that knowledge of possession was required for a conviction in England under Section 1 of the Dangerous Drugs Act of 1965, for possession of cannabis resin, and hence the respondent is within the proscription of Section 212(a)(23) of the Immigration and Nationality Act and cannot qualify for discretionary relief. No objection is seen to publication.

A prompt response would be appreciated.

Attachment

CC: Associate Commissioner, Enforcement

INT. DEC.

United States Department of Justice

Board of Immigration Appeals

Washington, D.C. 20530

JUL 10 1974

File: A17 595 321 - New York

In re: JOHN WINSTON ONO LENNON

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Leon Wildes, Esq.
515 Madison Avenue
New York, New York 10022

H. Miles Jaffe and
Eve Cary, Esqs.
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011
(Amicus Curiae)

Of counsel:
Burt Neuborne, Esq.
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

ON BEHALF OF I&N SERVICE: Vincent A. Schiano
Trial Attorney

ORAL ARGUMENT: October 31, 1973

CHARGES:

Order: Sec. 241(a)(9), I&N Act (8 U.S.C. 1251 (a)(9)) - Nonimmigrant visitor - failed to comply with conditions of such status

A17 595 321

Sec. 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2)) - Nonimmigrant - remained longer than permitted

APPLICATION: Adjustment of status under section 245 of the Immigration and Nationality Act; motion to defer; voluntary departure; termination of proceedings

The respondent is a male alien who is a native and citizen of the United Kingdom. In 1971 he applied for a nonimmigrant visa and was found by a consular officer to be ineligible for such a visa under section 212(a)(23) of the Immigration and Nationality Act because he had been convicted of possession of marihuana. However, he applied for and received a waiver of inadmissibility under section 212(d)(3)(A) of the Act, which permitted him to be temporarily admitted to the United States as a nonimmigrant.

The respondent entered the United States with his wife, a native and citizen of Japan, on August 13, 1971. They were authorized to remain until February 29, 1972, but they did not depart from the United States by that date. They received a letter from the District Director, dated March 1, 1972, informing them that their authorized stay had expired, that the Service expected them to depart from the United States by March 15, 1972, and that failure to depart would result in the institution of deportation proceedings. On March 3, 1972, the respondents filed petitions for preferred immigration status under section 203(a)(3) of the Act. 1/

In a letter dated March 6, 1972, the District Director informed the respondent and his wife that the privilege of voluntary departure from the United States had

---

1/ These petitions were approved on May 2, 1972.

been revoked pursuant to 8 C.F.R. 242.5(c) because the District Director had learned that they had no intention of departing from the United States by March 15, 1972. Orders to Show Cause were issued on March 6, 1972 charging the respondent and his wife with being deportable under section 241(a)(2) of the Act for having remained in the United States after their authorized stay had expired on February 29, 1972. Superseding Orders to Show Cause were issued the next day repeating the charge of remaining longer than authorized and adding a charge which alleged failure to comply with the conditions of nonimmigrant status under section 241(a)(9). The latter charge was not pursued further by the Service.

A deportation hearing was held. In a decision dated March 23, 1973, the immigration judge found (1) that the respondent and his wife were nonimmigrants who had stayed longer than authorized and were therefore deportable under section 241(a)(2) of the Act; (2) that the respondent's wife was statutorily eligible for adjustment of status under section 245 of the Act, and that this relief should be granted in the exercise of discretion; (3) that the respondent was statutorily ineligible for adjustment of status because he was inadmissible to the United States under section 212(a)(23); and (4) that the respondent was statutorily eligible for the privilege of voluntary departure and that he should be granted this privilege in lieu of deportation. The immigration judge ordered the respondent's wife's status adjusted to that of a permanent resident. He denied the respondent's application for adjustment of status and granted the respondent 60 days in which to depart voluntarily from the United States. An alternate order of deportation to England was entered. 2/ The respondent has appealed from that decision.

2/ The respondent declined to designate a country to which he would prefer to be sent.

A17 595 321

I. MOTION TO DEFER

On appeal, counsel has submitted a motion that we defer the decision in this case pending the outcome of two court actions filed by the respondent in the United States District Court for the Southern District of New York. These suits involve three basic claims by the respondent.

Initially, the respondent is seeking pursuant to 5 U.S.C. 552(a)(3) to compel production by the Service of certain data regarding "nonpriority" cases. 3/ Counsel believes that the records relating to "nonpriority" cases may show that the normal practice of the District Director is not to institute deportation proceedings in circumstances similar to the respondent's, and that therefore the District Director abused his discretion by issuing an Order to Show Cause in the present case.

Similar claims have been made that a discretionary Service policy, which permits certain deportable aliens who are beneficiaries of approved visa petitions to remain here until a visa becomes available, may confer an enforceable right to remain in the United States. Such claims have been consistently rejected. Vassilios v. INS, 461 F.2d 1193 (10 Cir. 1972); Spata v. INS, 442 F.2d 1013 (2 Cir. 1971), cert. denied, 404 U.S. 857 (1971); Armstrong v. INS, 445 F.2d 1395 (9 Cir. 1971); Bowes v. District Director, 443 F.2d 30 (9 Cir. 1971); Manantan v. INS, 425 F.2d 693 (7 Cir. 1970); Lunarvena v. INS, Civil No. 71-1886 (7 Cir. June 12, 1972); Discaya v. INS, 339 F. Supp. 1034 (N.D. Ill. 1972); Matter of

---

3/ "Nonpriority" cases are those involving deportable aliens where the government, for humanitarian or other reasons, chooses not to proceed with deportation proceedings or not to execute a deportation order.

Merced, Interim Decision 2273 (BIA 1974); Matter of Gallares, Interim Decision 2177 (BIA 1972); Matter of Geronimo, 13 I&N Dec. 680 (BIA 1971); Matter of Li, 13 I&N Dec. 629 (BIA 1970). We have held that the decision to issue an Order to Show Cause is a matter solely within the scope of the District Director's prosecutorial discretion. Matter of Merced, supra; Matter of Geronimo, supra; Matter of Gallares, supra; cf. Matter of Aguva, Interim Decision 2243 (BIA 1973). Our function is not to review the District Director's judgment in instituting deportation proceedings, but to determine whether the deportation charge is sustained by the requisite evidence. Since the information regarding "nonpriority" cases relates to a matter beyond our scope of inquiry, we see no reason to defer our decision pending the outcome of court litigation which could take years, as counsel has admitted.

The respondent is also seeking an order compelling the Attorney General and certain Service officials to perform their statutory duty under 18 U.S.C. 3504 to affirm or deny the occurrence of illegal acts allegedly committed against the respondent, including wiretap and electronic surveillance. In addition, a hearing is requested pursuant to 18 U.S.C. 3504 to determine whether, and to what extent, unlawful acts have influenced the determinations made by the Service in the respondent's case. The respondent's request for an order enjoining deportation proceedings pending the outcome of his court actions was denied by a judge of the United States District Court for the Southern District of New York in a decision dated May 1, 1974.

Counsel claims that a court is the only forum in which evidentiary hearings under 18 U.S.C. 3504 can be conducted. We reject this contention. By its very terms, 18 U.S.C. 3504 is applicable to administrative hearings, and motions to suppress evidence have heretofore been made and adjudicated in deportation proceedings

before immigration judges. See Matter of Au, Yim and Lam, 13 I&N Dec. 294 (BIA 1969), aff'd, Au Yi Lau v. INS, 445 F.2d 217 (D.C. Cir. 1971), cert. denied, 404 U.S. 864 (1971); Matter of Wong, 13 I&N Dec. 820 (BIA 1971); Matter of Perez-Lopez, Interim Decision 2132 (BIA 1972).

Counsel did not present his motion under section 3504 at the hearing before the immigration judge. In an appropriate case, we can remand the proceedings to the immigration judge for a hearing on a motion under section 3504. Before we remand, however, we must be satisfied that a useful purpose would be served by such a remand, and that there was a valid reason why the motion was not presented to the immigration judge at the time of the hearing.

It is unclear exactly how much evidence of surveillance must be presented for a party to show that he or she is "aggrieved" within the meaning of section 3504 (a)(1). Compare In re Evans, 452 F.2d 1239 (D.C. Cir. 1971), cert. denied, 408 U.S. 930 (1972), with United States v. Doe, 460 F.2d 328 (1 Cir. 1972). However, it is not necessary for us to reach that issue.

In the present case, all counsel has presented is a photocopy of an undated memorandum indicating that some unknown party wished the respondent to be placed under surveillance. Counsel has refused to divulge how, when, and from whom that memorandum was obtained (Transcript of oral argument, pp. 25-31). We need more information than has been presented to warrant a remand for further hearing before the immigration judge.

Moreover, the thrust of the material offered seems to be in the direction of showing that someone improperly influenced the District Director to institute deportation proceedings. As we have already stated, this is a matter outside the scope of our jurisdiction. Section 3504 re-

lates to evidence. Counsel has not claimed that any evidence relating to deportability or ineligibility for adjustment of status may have been illegally obtained. In fact, since the evidence in the case consisted solely of the respondent's admitted presence in the United States after February 29, 1972, and the record of his conviction which he readily admitted, we have great difficulty in ascertaining what evidence the respondent may hope to have suppressed.

Finally, the respondent claims that his case has been prejudged by the Service. Counsel has cited Accardi v. Shaughnessy, 347 U.S. 260 (1954), and Bufalino v. Kennedy, 322 F.2d 1016 (D.C. Cir. 1963), as authority for this contention. Both of those cases involved aliens who were concededly deportable and were denied discretionary relief from deportation. Both aliens challenged the denial of discretionary relief on the ground that statements by the Attorney General had prevented the Board (or, in Bufalino, the Service) from making an independent discretionary determination as required by the applicable regulations. On appeal it was held that the district court should have given the aliens an opportunity to prove their allegations of prejudgment.

The present case, however, is distinguishable from Bufalino and Accardi. The respondent was found to be statutorily ineligible for adjustment of status. Since the immigration judge ruled the respondent ineligible as a matter of law, he never had an opportunity to exercise his discretion with regard to the application for adjustment of status. Therefore, he cannot be considered to have prejudged the respondent's application. See Marcello v. Bonds, 349 U.S. 302, 313 (1954). The only discretionary relief for which the respondent was found to be statutorily eligible was voluntary departure, and with respect to this relief the immigration judge exercised his discretion in favor of the respondent.

Counsel has characterized the immigration judge's refusal to terminate proceedings as improvidently begun, and his refusal to issue subpoenas, as instances where applications for "discretionary relief" were prejudged. Counsel's characterization is incorrect. Those requests related to matters outside the scope of the immigration judge's jurisdiction, and therefore his denials were proper as a matter of law.

The power to terminate proceedings as improvidently begun belongs to the District Director, who is an enforcement officer. The District Director declined to move for termination of the present proceedings (Transcript of hearing, p. 1). As a quasi-judicial officer, the immigration judge had no power to grant the relief sought by counsel except upon the motion of the District Director. 8 C.F.R. 242.7; Matter of Wong, 13 I&N Dec. 701, 703 (BIA 1971); cf. Matter of Vizcarra-Delgadillo, 13 I&N Dec. 51 (BIA 1968).

On June 27, 1972, after the hearing had been completed, counsel moved that the immigration judge issue subpoenas pursuant to 8 C.F.R. 287.4(a)(2). The subpoenas were sought in order to obtain evidence in support of the respondent's motion to terminate the proceedings as improvidently begun. Since the subpoenas related to a motion that the immigration judge had no power to consider, his refusal to issue the subpoenas was proper. See Kahook v. Johnson, 273 F.2d 413 (5 Cir. 1960); Matter of Anttalainen, 13 I&N Dec. 349 (BIA 1969).

If the respondent had made a sufficient showing that illegal acts took place which might have tainted evidence used at the hearing, or if he had established a prima facie case of prejudgment, we would not have to defer to a court, but rather could remand the proceedings to an immigration judge for further hearing. In essence, however, the issues in both of the respondent's court actions relate to his attempt to challenge the

District Director's decision to issue an Order to Show Cause. Determinations relating to the District Director's decision to institute deportation proceedings are not germane to our function.

We are not required to delay deportation proceedings to allow the respondent to pursue collateral remedies in the courts. Matter of Agarwal, 13 I&N Dec. 171 (BIA 1969). The ends of justice are best served by insisting upon a speedy resolution of the administrative deportation proceedings. Should the collateral challenge remain undecided upon the conclusion of the deportation proceedings, the alien could then apply to the District Director for a stay of deportation pending the outcome of his other litigation, and he could seek review of a denial of such a stay in the federal courts. This approach should afford an opportunity for any respondent with a meritorious claim to preserve his rights, while not providing an extra measure of delay for those who in reality seek nothing more. We must therefore deny the respondent's motion that we defer our decision.

In a letter to the Chairman of the Board of Immigration Appeals dated November 16, 1973, counsel expressed his understanding that we had agreed to inform him of our decision on his motion to defer prior to rendering a decision on the merits. Counsel was informed by a letter dated November 20, 1973 that such an understanding was incorrect.

Counsel had more than seven months in which to prepare for oral argument on the merits of the case. He was informed in advance of oral argument by telephone and letter, and again at oral argument, that we believed he had sufficient time to prepare and that we expected argument on the merits. It was made clear to counsel at oral argument that by not arguing on the merits he was taking the risk, if the decision on his motion was adverse, that he would not have a further

opportunity to argue. Counsel indicated that he fully understood our position (Transcript of oral argument, p. 13). He declined argument on the merits and stated that he would rely instead on his extensive brief (Transcript of oral argument, p. 47).

II. DEPORTABILITY

The respondent is charged under section 241(a)(2) with having remained in the United States after the expiration of his authorized stay as a nonimmigrant. The respondent's authorization to remain in the United States ended on February 29, 1972, but the District Director, in the exercise of discretion pursuant to 8 C.F.R. 242.5, granted the respondent the privilege of departing voluntarily on or before March 15, 1972. The District Director's discretionary action did not extend the period of the respondent's authorized stay, nor did it restore him to a lawful nonimmigrant status; the respondent remained here merely at the sufferance of the District Director. Matter of Merced, Interim Decision 2273 (BIA 1974); Matter of Gallares, Interim Decision 2177 (BIA 1972). 4/

On March 6, 1972, the District Director revoked the respondent's privilege of voluntary departure pursuant to 8 C.F.R. 242.5(c). This regulation allows a District

---

4/ The discretionary grant of voluntary departure under 8 C.F.R. 242.5(b) should not be confused with action that a District Director may take under 8 C.F.R. 214.1(a) to extend the period of a nonimmigrant's authorized stay pursuant to an application made by a nonimmigrant whose authorized stay has not yet expired. We cannot agree with language on page 3 of the immigration judge's opinion which indicates that the granting of the privilege of voluntary departure by the District Director extended the period of the respondent's authorized stay.

Director to revoke voluntary departure granted under 8 C.F.R. 242.5 without notice if he ascertains that the application for voluntary departure should not have been granted. The regulations vest no authority in the Board to review such a revocation. See 8 C.F.R. 242.5 (c); 8 C.F.R. 3.1(b). The decision to revoke a grant of voluntary departure and institute deportation proceedings is a matter of prosecutorial discretion which is outside the Board's jurisdiction. Matter of Merced, supra; see Matter of Geronimo, 13 I&N Dec. 680 (BIA 1971); Matter of Gallegos, supra. The respondent cannot claim that he was induced to remain past February 29, 1972 by the grant of voluntary departure, since at the time the District Director granted that privilege, on March 1, 1972, the respondent had already remained longer of his own volition.

The present case can be distinguished from Matter of Siffre, Interim Decision 2230 (BIA 1973). That case dealt with an alien who had been admitted as a nonimmigrant student for a fixed period of time. Before the authorized stay had expired, the District Director attempted to "revoke" the alien's nonimmigrant student status and to charge him under section 241(a)(2) as a nonimmigrant who remained longer than permitted. We held that the District Director had no authority to "revoke" a nonimmigrant status. If the District Director believed that the alien was violating the conditions of nonimmigrant status, he should have instituted deportation proceedings under section 241(a)(9) for failure to maintain nonimmigrant status. The District Director's other option was to wait until the alien's authorized stay had expired and then, if the alien failed to depart, to institute deportation proceedings under section 241 (a)(2) based upon the alien's having remained longer than permitted.

The respondent's situation, however, is quite different. His authorized stay expired on February 29, 1972. At that point he lost his lawful nonimmigrant

status. He remained in the United States merely as a deportable alien who had been granted the discretionary privilege of departing voluntarily pursuant to 8 C.F.R. 242.5. The decision whether or not to grant voluntary departure under 8 C.F.R. 242.5, or to revoke such privilege once granted, is a matter within the sole discretion of the District Director. We conclude that deportability under section 241(a)(2) of the Act has been established by evidence that is clear, convincing and unequivocal.

III. ELIGIBILITY FOR ADJUSTMENT OF STATUS

The respondent applied for adjustment of status under section 245 of the Act. In order to show eligibility for adjustment of status, an alien must establish that he was inspected and admitted or paroled into the United States, that he is eligible to receive an immigrant visa, that he is admissible to the United States for permanent residence, and that an immigrant visa is immediately available. Since adjustment of status is a privilege, the alien has the burden of establishing his eligibility. 8 C.F.R. 242.17(d); Montemurro v. INS, 409 F.2d 832 (9 Cir. 1969); Cabrera v. INS, 415 F.2d 1096 (9 Cir. 1969).

The immigration judge found that the respondent was not admissible to the United States for permanent residence because he was excludable under section 212(a)(23) of the Act as one who had been convicted of violating a law relating to the illicit possession of marihuana. Section 212(a)(23) provides for the exclusion of:

> Any alien who has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana . . . .

A certified copy of a record of conviction was placed in evidence, showing that on November 28, 1968, the respondent pleaded guilty in the Marylebone Magistrates'

Court (England) to a charge of having a dangerous drug, cannabis resin, in his possession without being duly authorized (Ex. 10). The British statute which he violated was Regulation 3, Dangerous Drugs (No. 2) Regulations, Dangerous Drugs Act of 1965. Copies of the British statute and regulations were introduced as Exhibit 11. The pertinent statutory provisions are:

Dangerous Drugs Act 1965, Section 1:

> The drugs to which this Part of this Act applies are raw opium, coca leaves, poppy-straw, cannabis, cannabis resin and all preparations of which cannabis resin forms the base.

Regulation 3, Dangerous Drugs (No. 2) Regulations 1964:

> A person shall not be in possession of a drug unless he is generally so authorised or, under this Regulation, so licensed or authorised as a member of a group, nor otherwise than in accordance with the provisions of these Regulations and, in the case of a person licensed or authorised as a member of a group, with the terms and conditions of his licence or group authority.

The respondent has admitted that the record of conviction relates to him (Transcript of hearing, p. 30). Nevertheless, the respondent contends that his conviction does not place him within the exclusion provision of section 212(a)(23) because (1) the British statute under which he was convicted did not require mens rea, and (2) cannabis resin is not "marihuana" within the meaning of section 212(a)(23).

As to the contention regarding mens rea, it is maintained by counsel in his brief that a binoculars case containing cannabis resin was found in the respondent's

house, but that the respondent had no knowledge of the presence of the drug (Respondent's brief on appeal, p. 54; Transcript of hearing, p. 81). He pleaded guilty, counsel alleges, because lack of knowledge was not a defense to a prosecution under the Dangerous Drugs Act of 1965 (Transcript of oral argument, p. 46). Therefore, counsel claims, the respondent's plea of guilty was an admission only of physical control of a binoculars case which proved to contain a dangerous drug (Respondent's brief on appeal, p. 62). Counsel argues that the respondent did not admit any knowledge of the drug's presence, and that he therefore would not come within the class of persons whom Congress wished to exclude under section 212(a)(23).

The provisions of section 212(a)(23) were intended to deal with foreign as well as domestic convictions. See Matter of Gardos, 10 I&N Dec. 261 (BIA 1963), aff'd, Gardos v. INS, 324 F.2d 179 (2 Cir. 1963); cf. S. Rep. No. 1515, 81st Cong., 2d Sess. 410 (1950). However, under federal law, in order to be convicted of the crime of possession of marihuana one must have knowledge or intent to possess. 21 U.S.C. 844. The same is true under the law of the District of Columbia, United States v. Weaver, 458 F.2d 825 (D.C. Cir. 1972), as well as the law of the vast majority of states. See Annot., 91 A.L.R. 2d 810, 821 et seq. (1963) and supplements. Therefore, it is fair to state that in enacting section 212(a)(23), Congress did not intend to exclude persons who were entirely unaware that a prohibited substance was in their possession. Cf. Varga v. Rosenberg, 237 F. Supp. 282 (S.D. Cal. 1964); Matter of Sun, 13 I&N Dec. 569 (BIA 1970). Since the respondent has raised a significant question regarding the knowledge requirement of the British statute, we believe that an in-depth discussion of the British law is warranted.

A. Knowledge Requirement of British Statute.

The history of the British laws relating to illegal possession of drugs is quite involved. 5/ The earliest reported decision relating to possession of drugs is R. v. Carpenter, [1960] Crim. L. Rev. 633. In that case, drugs were found in the trunk of a car parked outside a house in which the defendant was arrested. The defense was that he had borrowed the car from a friend some 24 hours earlier and was unaware of the presence of the drugs. The trial court convicted the defendant, but the Court of Criminal Appeal reversed, holding that there was not sufficient evidence of conscious possession of the drug to go to the jury. Since it was conceded by the prosecution at trial that knowledge was a necessary element of the crime, this case does not help greatly in clarifying the legal definition of possession. However, one commentator has noted that "as the law tends to work rather by description than by definition the case is important as an illustration of a fact-situation where a person was held not to be in possession." A. Owen, Dangerous Drugs--Possession, The New Law Journal, September 28, 1972, at 844.

In Lockyer v. Gibb, [1966] 2 All E.R. 653 (Q.B.), the first fully reported case, a bottle containing tablets was discovered in the hold-all which the defendant was carrying. The tablets were found to be a prohibited drug. The defendant admittedly was aware that she was in possession of the bottle and that the bottle contained tablets; however, she claimed that a friend had given the bottle to her to look after and that she did not know what the tablets were. The trial

---

5/ There were several predecessors to the Dangerous Drugs Act of 1965. However, since the provisions relating to possession are nearly identical, no distinction between them will be made in the following discussion.

court concluded that she was in unauthorized possession of a prohibited drug, notwithstanding the fact that she might not have known that the tablets she had were such a prohibited drug. The defendant was given leave to appeal her conviction.

On appeal, the Queen's Bench Division sustained the conviction, holding that while it was necessary for the prosecution to show that the defendant knew that she had the articles which turned out to be a drug, it was not necessary that she should know in fact that the articles were a drug and a drug of a particular character. In the course of his opinion, Lord Parker rendered the following notable dictum:

> In my judgment, before one comes to a consideration of a necessity for mens rea or, as it is sometimes said, a consideration of whether the regulation imposed an absolute liability, it is of course necessary to consider possession itself. In my judgment, it is quite clear that a person cannot be said to be in possession of some article which he or she does not realise is, or may be, in her handbag, in her room, or in some other place over which she has control. That, I should have thought, is elementary; if something were tipped into one's basket and one had not the vaguest notion it was there at all, one could not possibly be said to be in possession of it. 6/

Lord Parker also referred to the Canadian case of Beaver v. R., [1957] S.C.R. 531, in which the majority of the Supreme Court of Canada concluded under a similar statute that one who has physical possession of a package which he believes to contain a harmless substance,

---

6/ [1966] 2 All E.R. at 655.