Sale v. Haitian Centers Council

SUPREME COURT OF THE UNITED STATES

509 U.S. 155 (1993)

Associate Justice Blackmun, dissenting.

Author's Note: The trial court decided against the Haitians, confirming the legality of President Clinton's directive requiring returns to Haiti without having an "Article 33 Refugee Convention" hearing.

The Court of Appeals disagreed. Its judges did not accept the US government's argument that the treaty did not bar returns made prior to the refugee's arrival in the US or its territorial waters. The 1980 amendment to the national immigration laws was apparently intended to conform US immigration law to the provisions of the Refugee Convention. This intermediate court's panel of judges read the Article 33.1 "return" provision as "plainly" covering all refugees, regardless of their location, and where they were found and immediately turned back by the US Coast Guard. The US was thus characterized as engaging in the act of "returning" these refugees on the high seas. This, said the intermediate court, thereby triggering the Article 33.1 requirement to require a determination of whether these "returns" would subject the Haitians to death or other heinous mistreatment on the basis of their political beliefs.

The US Supreme Court majority decided, however, that in spite of the moral weight of this argument, Article 33 was not intended to have such an extraterritorial effect. The treaty could not apply to a return ("refouler") occurring outside of US territorial waters, on the high seas between Haiti and the US. In the final paragraph, the majority of the Supreme Court's justices presented their final argument by quoting from the opinion of a lower court case with similar facts: "This case presents a painfully common situation in which desperate people, convinced that they can no longer remain in their homeland, take desperate measures to escape. Although the human crisis is compelling, there is no solution to be found in a judicial remedy" (implying the need for a diplomatic remedy or a treaty modification).

What follows is the dissent to the majority opinion. Justice Blackmun agreed with the intermediate appellate court which would have required a hearing before the Haitian refugees could be turned back by the US Coast Guard. According to Justice Blackmun, the lower court's judges correctly interpreted the "refouler" (return) provision of the Refugee Convention as prohibiting President Clinton's Executive Order to the Coast Guard in violation of the treaty.

Justice Blackmun, dissenting:

When, in 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, it pledged not to "return (refouler) a refugee in any manner whatsoever" to a place where he would face political persecution. In 1980, Congress amended our immigration law to reflect the Protocol's directives. Today's majority nevertheless decides that the forced repatriation of the Haitian refugees is perfectly legal, because the word "return" does not mean return, because the opposite of

"within the United States" is not outside the United States, and because the official charged with controlling immigration has no role in enforcing an order to control immigration. . . .

Article 33.1 of the Convention states categorically and without geographical limitation: "No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

The terms are unambiguous. Vulnerable refugees shall not be returned. The language is clear, and the command is straightforward; that should be the end of the inquiry. Indeed, until litigation ensued, the Government consistently acknowledged that the Convention applied on the high seas.

The majority, however, has difficulty with the Treaty's use of the term "return ('refouler')." "Return," it claims, does not mean return, but instead has a distinctive legal meaning. For this proposition the Court relies almost entirely on the fact that American law makes a general distinction between deportation and exclusion. Without explanation, the majority asserts that in light of this distinction the word "return" as used in the Treaty somehow must refer only to "the exclusion of aliens who are . . . 'on the threshold of initial entry'" [citation omitted].

. . . The text of the Convention does not ban the "exclusion" of aliens who have reached some indeterminate "threshold"; it bans their "return." It is well settled that a treaty must first be construed according to its "ordinary meaning." Article 31.1 of the Vienna Convention on the Law of Treaties. The ordinary meaning of "return" is "to bring, send, or put (a person or thing) back to or in a former position." Webster's Third New International Dictionary 1941 (1986). That describes precisely what petitioners [US government agencies] are doing to the Haitians. By dispensing with ordinary meaning at the outset, and by taking instead as its starting point the assumption that "return," as used in the Treaty, "has a legal meaning narrower than its common meaning," the majority leads itself astray.

The straightforward interpretation of the duty of nonreturn is strongly reinforced by the Convention's use of the French term refouler. The ordinary meaning of "refouler," as the majority concedes, is "[t]o repulse . . . ; to drive back, to repel." *Dictionnaire Larousse* 631 (1981). Thus construed, Article 33.1 of the Convention reads: "No contracting state shall expel or [repulse, drive back, or repel] a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened. . . ." That, of course, is exactly what the Government is doing. It is no surprise that when the French press has described the very policy challenged here, the term it has used is *refouler*. See, e.g., Le bourbier haitien, *Le Monde*, May 31–June 1, 1992 ("[L]es Etats-Unis ont decide de refouler directement les refugies recueillis par la garde cotiere." (The United States has decided [de refouler] directly the refugees picked up by the Coast Guard). . . .

Article 33.1 is clear not only in what it says, but also in what it does not say: it does not include any geographical limitation. It limits only where a refugee may be sent "to," not where he may be sent from. This is not surprising, given that the aim of the provision is to protect refugees against persecution. . . .

The Convention that the [US] Refugee Act embodies was enacted largely in

response to the experience of Jewish refugees in Europe during the period of World War II. The tragic consequences of the world's indifference at that time are well known. The resulting ban on refoulement, as broad as the humanitarian purpose that inspired it, is easily applicable here, the Court's protestations of impotence and regret notwithstanding.

The refugees attempting to escape from Haiti do not claim a right of admission to this country. They do not even argue that the Government has no right to intercept their boats. They demand only that the United States, land of refugees and guardian of freedom, cease forcibly driving them back to detention, abuse, and death. That is a modest plea, vindicated by the Treaty and the statute. We should not close our ears to it.

I dissent [from the majority's holding affirming President Clinton's Executive Order which authorizes returns to Haiti, without the required determination of refugee status under the Refugee Convention].