

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ROGER F. ALEXANDER, et al.,

Petitioners

v.

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent

Civil No. 96-147-P-C

GENE CARTER, District Judge

MEMORANDUM OF DECISION AND ORDER

The sole issue before the Court is whether Floyd Alexander legitimated Roger Alexander before Roger attained the age of twenty-one.¹ 8 U.S.C. § 1409(b). In this case, the issue of

¹Roger's statutory claim to United States citizenship is under 8 U.S.C. § 1409(b), which states in pertinent part that

the provisions of section 1401(g) of this title shall apply to a child born out of wedlock on or after January 13, 1941, and before December 24, 1952, as of the date of birth if the paternity of such child is established at any time while such child is under the age of twenty-one years by legitimation.

Section 1401(g) provides that the foreign-born child of parents, one of whom is a United States citizen and one of whom is an alien, is "a citizen . . . at birth" if the United States citizen parent resided in the United States for a statutory period prior to the child's birth. 8 U.S.C. § 1401(g). Accordingly, to show that he was a United States citizen at birth, Roger must prove that (1) Floyd Alexander was his father; (2) Floyd was a United States citizen who satisfied the physical presence requirements of section 1401(g); and (3) Floyd's paternity was established prior to Roger's twenty-first birthday. 8 U.S.C. § 1409(b). The

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whether Roger was properly legitimated is governed by the law of Floyd's residence or domicile -- Maine. 8 U.S.C. § 1101(c)(1) (providing that "a child is legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile"). Under Maine law in 1955, "[i]f the father of a child born out of wedlock adopts him or her into his family or in writing acknowledges before some justice of the peace or notary public that he is the father, such child is . . . the heir and legitimate child of his or her father." 4 Me. Rev. Stat. ch. 170, § 3 (1954), repealed by 1979 Me. Laws ch. 540, § 24-C. This Court has held an evidentiary hearing in order to determine whether Floyd legitimated Roger before Roger's twenty-first birthday.

In October of 1985, Roger filed an administrative N-600 application with the Immigration and Naturalization Service ("INS"), claiming to be a citizen through his father Floyd.² After Roger's N-600 application was denied, David Klickstein executed an affidavit on February 25, 1986, stating that sometime "[a]round 1955, Floyd Lyman Alexander came to see me in my law office in Brunswick, Maine. . . . [Floyd] had some documents with him in which he recognized the paternity, and signed them before

¹(...continued)
first two requirements have been satisfied, and this Court must determine the third. See Alexander v. I.N.S., 74 F.3d 367 (1st Cir. 1996).

²This administrative proceeding is separate and distinct from the deportation proceeding that is the subject of the instant action.

me, and swore that he was the father of Roger Alexander Hobbs, who had been born out of wedlock." Petitioners' Ex. 1B. Subsequently, the Administrative Appeals Unit denied Roger's appeal from the denial of the N-600 application. On December 15, 1986, Klickstein executed another affidavit stating:

Some time during 1955, Floyd came to my legal office for some legal advice. . . . The document contained information about Floyd's relationship with a widow, whose last name I remembered was Hobbs, before he was sent to France in 1944. Contained in the document was a statement that this woman had borne a son after Floyd was sent to the European continent, and that Floyd stated the child was his son. The document named the boy Roger Hobbs. I knew that Floyd was having some financial problems, and I told him that signing the papers might create a responsibility which he would have trouble fulfilling. He told me that he was determined to sign them, and that he intended to go to England to meet his son. He showed me pictures he had of the boy. Floyd signed the papers, and I notarized them. I did not keep copies of the document because I had not drafted them.

Some months after Roger filed the N-600 application, the INS served an order to show cause on Roger, charging that he was deportable under 8 U.S.C. § 1251(a)(2) because he overstayed his nonimmigrant visa. The INS held hearings and the immigration judge entered an order denying Roger's claims, finding him deportable. That order was appealed to the Board of Immigration Appeals. The Board dismissed Roger's appeal, holding that Roger had not met the statutory requirements for derivative citizenship under 8 U.S.C. §§ 1401 and 1409. Roger filed a motion for reconsideration which the Board denied. Roger then filed a

petition for review with the Court of Appeals for the First Circuit; that court granted review transferring the case to this Court for a trial de novo. 8 U.S.C. § 1105a(a)(5).

At the hearing, Roger Alexander offered the two affidavits of David Klickstein, now deceased, a Maine attorney and notary public. According to the affidavits, in 1955 Floyd Alexander signed a document acknowledging that Roger was his son.³ Klickstein notarized the document but did not keep a copy, nor was one offered at the hearing. Although the affidavit is hearsay, Petitioner contends the general exception to the hearsay rule supports admissibility of Klickstein's affidavit. Admission under Rule 804(b)(5) requires that the following be shown: (1) the statement must have circumstantial guarantees of trustworthiness equivalent to the first four exceptions in Rule 804(b); (2) the statement must be offered as evidence of a material fact; (3) the statement must be more probative on the point for which it is offered than any other evidence that the proponent reasonably can procure; and (4) introduction of the statement must serve the interests of justice and the purposes of the Federal Rules.⁴

³Given that Roger was born on February 13, 1945, the acknowledgment of paternity was required to be executed on or before February 13, 1966.

⁴Rule 804(b)(5) also conditions admission upon the declarant being "unavailable" and the proponent giving advance notice to the adverse party of his intention to offer the statement. In this case, Klickstein is clearly unavailable and the Petitioner gave timely notice of his intention to move for admission of the
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In this case there is no question but that the declaration is material: it is essential to Petitioner's theory of the case. The statement is also more probative on the point for which it is offered than any other evidence which the Petitioner can procure through reasonably available evidence. Since Klickstein and Floyd Alexander died prior to the hearing, there is no one now living who is able to attest to the fact that Floyd Alexander signed an acknowledgment of paternity under oath prior to Roger's twenty-first birthday. The affidavit is critical to the Petitioner's case and cannot be adequately duplicated through any other evidence. Finally, the general purposes of the Rules of Evidence and interests of justice must be best served by admission of the evidence. In this case, that interest is served if the evidence is trustworthy. This then brings the Court to the primary conflict which relates to whether there are circumstantial guarantees of trustworthiness equivalent to the other exceptions to the hearsay rule.

The INS emphasizes the lack of trustworthiness of the affidavits. Specifically, the INS questions the reliability of the Klickstein affidavits because they were not the first written document Klickstein made on this subject. The INS contends that although there may not be "enough evidence to conclusively prove that Klickstein committed a fraud, there are enough questions

⁴(...continued)
affidavit.

raised by the Klickstein letter and affidavits themselves to show that the December 15, 1986, affidavit does not have the requisite trustworthiness to be admitted into evidence" without the declarant being cross-examined.⁵ Memorandum in Support of Motion in Limine (Docket No. 8) at 9.

The INS's concerns surrounding the preparation of the affidavits are unsubstantiated. From the testimony at the hearing, the Court concludes that Klickstein was the Alexander family lawyer. Petitioner's Ex. 1A; Tr. 37-38. The Court notes that the substance of both affidavits is essentially the same although the later-dated affidavit includes more detail regarding the circumstances and events which surrounded Floyd's creation of the document acknowledging Roger as his son. The Court, however, does not find anything unusual about executing a second affidavit with more specific details of the events surrounding Floyd's acknowledgment. At the time the affidavits were made, Klickstein was a member in good standing of the bar in Maine. As an attorney, Klickstein "could not have failed to appreciate the significance of the oath he took in executing the affidavit."

⁵The Court understands the INS to be relying on a document - namely, a letter dated October 5, 1985 -- which although it was included in the administrative record submitted to the Court of Appeals for the First Circuit prior to the issuance of its order directing this Court to conduct an evidentiary hearing, it was not admitted during the course of this Court's evidentiary hearing. Under 8 U.S.C. § 1105a(a)(5), this Court is required to conduct a hearing de novo on Roger's claim for citizenship. The INS failed to mark and move for the admission of the exhibits it relies upon in post-trial briefing. Because this document was not introduced in evidence, the Court cannot consider it on the issue of trustworthiness of the affidavits.

Furtado v. Bishop, 604 F.2d 80, 89-91 (1st Cir. 1979).

The Court also finds "circumstantial guarantees of [the affidavits'] trustworthiness" in the testimony presented at the hearing. Abundant evidence presented at the hearing satisfies the Court that Floyd and his parents acknowledged, from the time Roger was a small child, that Roger was the son of Floyd. In 1944, Allegra Alexander, Floyd's mother, first became aware of the romance between Sally Hobbs and her son Floyd through correspondence from Sally and Floyd. Tr. 17-18. Allegra corresponded with Sally and, prior to Roger's birth, learned that Sally was pregnant by Floyd. Tr. 17-18. Following Roger's birth, Sally wrote to Allegra to tell her about Roger, and Allegra sent items for Roger to Sally. Tr. 17-18, 23, 24. After he returned from the service at the end of World War II, Floyd often spoke of Roger and acknowledged his paternity. Tr. 20, 71. Floyd often indicated that some day he would bring Roger to the United States. Tr. 20-22; Petitioner's Ex. 21,⁶ at 13-16. Floyd also mentioned Sally, Roger's mother, and there was a picture of Sally hanging in the living room of the Alexander home. Tr. 22, 28.

The testimony regarding Floyd Alexander and his family's acceptance of Roger as Floyd's son serves two purposes. First, it corroborates the assertion in Klickstein's affidavits that both Floyd and his parents mentioned a son, named Roger Hobbs,

⁶Having admitted this exhibit de bene at the hearing, the Court admits it at this time without reservation.

which Floyd had sired in England. Petitioners' Exs. 1A and 1B. Second, it is general evidence of Floyd's state of mind regarding his son. The Court finds it is reasonable to infer from this evidence that Floyd would attempt to legally legitimate Roger.

In addition, the testimony of Carroll O. Darling also supports the trustworthiness of the affidavit. Darling testified that he drove Floyd to Klickstein's office in Brunswick, Maine. Petitioners' Ex. 21, at 16. Floyd went into Klickstein's office while Darling waited in his truck. Petitioners' Ex. 21, at 16-17. When Floyd returned to the truck, he had papers in his hand. Petitioners' Ex. 21, at 17. Darling noticed that the papers had a notary seal on them. Petitioners' Ex. 21, at 17-19. Darling understood that the papers concerned Floyd's son, Roger, and included Floyd's signature. Petitioners' Ex. 21 at 17-19; Tr. at 51. Although Darling did not know the exact content of the papers, the Court finds this testimony supports the reliability of the Klickstein affidavits.

Finding the affidavits to possess the circumstantial guarantees of trustworthiness equivalent to the other exceptions to Rule 804, the Court will admit them in evidence.⁷ Petitioners' Exs. 1A and 1B. Based on the affidavits of Klickstein as well as the testimony presented at the hearing, the Court finds that Roger Alexander was legitimated, in accordance with Maine law, by Floyd Alexander in 1955. The Court,

⁷At the evidentiary hearing, the Court admitted de bene the Klickstein affidavits.

therefore, concludes that Roger Alexander has satisfied all of the requirements to be a citizen of the United States⁸ and that he is entitled to be made a citizen of the United States by the appropriate processes.

It is hereby ORDERED that counsel confer and file within ten days of the date of docketing of this Order a proposed order to implement the Court's decision. It is further ORDERED that the Immigration and Naturalization Service VACATE any outstanding deportation order.

GENE CARTER
District Judge

Dated at Portland, Maine this 27th day of February, 1997.

⁸The Court admitted a document indicating that Roger executed the oath prescribed by 8 U.S.C. § 1448. Petitioners' Ex. 24.