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SUPREME COURT'S HEIGHTENED STANDARD FOR REVOKING NATURALIZATION SHOULD APPLY TO ALL IMMIGRATION BENEFITS

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Form N-400, Application for Naturalization, asks broadly *"Have you EVER committed a crime or offense for which you have not been arrested?"* One would be hard pressed to find a person who has never committed an offense for which she has not been arrested. Multitudes of New Yorkers must have committed the offense of jay walking with full sight of a police officer who never bothered citing the offender. Another broad question is "*Have you EVER been a member of, involved in, or in any way associated with, any organization, association, fund, foundation, party, club, society, or similar group in the United States or in any other location in the world*?" It would be difficult for an applicant to answer this question accurately or remember every instance of membership in his or her life. For instance, does the applicant need to include membership in a school club in 8th grade? Until recently, an inaccurate but immaterial response to these two questions could have resulted in both criminal liability and revocation of naturalization.

On June 22, 2017, in *Maslenjak v. United States*, the U.S. Supreme Court ruled on the issue of when a lie during the naturalization process may lead to loss of U.S. citizenship under 18 USC 1425(a). Divna Maslenjak, an ethnic Serb, lied during her naturalization process about her husband's service as an officer in the Bosnian Serb Army. When this was discovered, the government charged her with knowingly procuring her naturalization contrary to law because she knowingly made a false statement under oath in a naturalization proceeding. A district court said that to secure a conviction, the government need not prove that her false statements were material to, or influenced, the decision to approve her citizenship application.

The U.S. Court of Appeals for the Sixth Circuit had affirmed the conviction, but the Supreme Court noted that the law demands "a causal or means-end connection between a legal violation and naturalization." The Supreme Court said that to decide whether a defendant acquired citizenship by means of a lie, "a jury must evaluate how knowledge of the real facts would have affected a reasonable government official properly applying naturalization law." The Supreme Court therefore said that the jury instructions in this case were in error, vacated the judgment of the Court of Appeals, and remanded the case for further proceedings.

This ruling is significant. It prohibits a government official from revoking a naturalized American's citizenship based on an insignificant omission or misrepresentation. If the applicant did not indicate that she was a member of her school club to the question on the naturalization application asking about membership in any club at anytime and anywhere in the world, a vindictive prosecutor can no longer use this as a basis to indict her under 18 USC 1425(a), seek a conviction and then revoke her citizenship.

What is even more significant is that the Supreme Court sets a higher standard for demonstrating a connection between the violation and naturalization under 18 USC 1425(a) than the earlier standard of determining materiality under 8 USC 1451(a), the civil revocation statute, and elaborated at length in *Kungys v. United States*. At issue in *Kungys v. United States* was whether the failure to indicate the correct date and place of birth was material to justify the revocation of Kugys's citizenship under the civil provision. Justice Scalia writing for the majority held that the test of whether Kungys' concealments or misrepresentations were material is whether they had a natural tendency to influence the decisions of the former Immigration and Naturalization Service. The formulation in *Kungys v. United States* has been adopted in the State Department's Foreign Affairs Manual to determine whether a visa applicant made a material misrepresentation that would render him or her ineligible for fraud or misrepresentation under INA 212(a)(6)(C)(i):

> The word "tends" as used in "tended to cut off a line of inquiry" means that the misrepresentation must be of such a nature as to be reasonably expected to foreclose certain information from your knowledge. It does not mean that the misrepresentation must have been successful in foreclosing further investigation by you in order to be deemed material; it means only that the misrepresentation must reasonably have had the capacity of

> foreclosing further investigation.

See 9 FAM 40.63 N6.3-1

In *Maslenjak v. United States,* the Supreme Court built on the formulation in *Kungys* to create a heightened standard for the government to prove that a person committed a crime pursuant to 18 U.S.C. 1425(a), which provides: "knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship." Justice Kagan developed the following standard:

> he Government must make a two-part showing to meet its burden. As an initial matter, the Government has to prove that the misrepresented fact was sufficiently relevant to one or another naturalization criterion that it would have prompted reasonable officials, "seeking only evidence concerning citizenship qualifications," to undertake further investigation . If that much is true, the inquiry turns to the prospect that such an investigation would have borne disqualifying fruit.
>
> As to the second link in the casual chain, the Government need not show definitively that its investigation would have unearthed a disqualifying fact (though, of course, it may). Rather, the Government need only establish that the investigation "would predictably have disclosed" some legal disqualification (citation omitted). If that is so, the defendant's misrepresentation contributed to the citizenship award in the way we think §1425(a) requires.

Justice Kagan's opinion went on to state that "ven when the Government can make its two-part showing, however, the defendant may be able to overcome it. §1425(a) is not a tool for denaturalizing people who, the available evidence indicates, were actually qualified for the citizenship they obtained."

Justice Gorsuch with whom Justice Thomas joined, issued a concurring opinion stating that there was no need for the Supreme Court to create a new formulation, and that the Court of Appeals could do just that. "This Court often speaks most wisely when it speaks last, " according to Justice Gorsuch. In a separate concurring opinion, Justice Alito suggested that the formulation in *Kungys v. United States* should apply equally to §1425(a). According to Justice Alito, "§1425(a) does not require proof that a false statement actually had some effect on the naturalization decision." But this is pivotal to Justice Kagan's new

formulation. The illegal act must have somehow contributed to obtaining citizenship. Take Justice Kagan's example of John obtaining a painting illegally. This would connote that John stole the painting from the museum or impersonated the true buyer when the auction house delivered it. But if John did something illegal on his way to buy the painting legally, such as excessively violating the speed limit or purchasing an illegal weapon, those acts did not contribute to obtaining the painting illegally. Justice Alito would see it differently. A runner who holds the world record wants to ensure that she gets the gold medal at the Olympics, and takes a performance enhancing drug. She wins the race and is disqualified. The second-place time is slow and sportswriters speculate that she would have come first anyway even without taking the drug. According to Justice Alito, she cannot argue that her illegal act of taking drugs did not make a difference and was not material to her performance in the race.

Justice Kagan's logic should have more force over Justice Alito's. A naturalization applicant who stole bread when he was desperately hungry, but was never arrested and does not answer "Yes" to the question of whether he had ever committed a crime for which he was never arrested, should not have his citizenship revoked. First, determining whether a criminal defendant has committed a crime is based on the applicable law where the alleged conduct occurred and whether a prosecutor was able to prove beyond reasonable doubt that the defendant met all the elements of the offense. If the applicable law provides defenses, such as the doctrine of necessity, then no crime would have occurred. This defense too - that the defendant stole bread to avoid death through starvation - also has to be established within the penal system. It would not be appropriate for an applicant to judge himself guilty on an immigration form – or for his immigration lawyer to condemn him for theft. Even with respect to making an admission, the Board of Immigration Appeals ("BIA") has established stringent requirements for a validly obtained admission: (1) the admitted conduct must constitute the essential elements of a crime in the jurisdiction in which it occurred; (2) the applicant must have been provided with the definition and essential elements of the crime in understandable terms prior to making the admission; and (3) the admission must have been made voluntarily. *See Matter of K-*, 7 I&N Dec. 594 (BIA 1957). It would be very difficult for an applicant to satisfy the requirements of an admission while completing the form. Justice Kagan's heightened standard to demonstrate

materiality should not just apply to 18 USC §1425(a), but ought to also apply to 8 USC §1451(a) cases as well as cases involving willful misrepresentation under INA §212(a)(6)(C)(i). The following words of Justice Kagan's in *Maslenjak v. United States* are prescient:

> Under the Government's view, a prosecutor could scour her paperwork and bring a §1425(a) charge on that meager basis, even many years after she became a citizen. That would give prosecutors nearly limitless leverage - and afford newly naturalized American precious little security.

The need for a uniform heightened standard becomes even more urgent in light of questions in immigration forms becoming increasingly broad and ambiguous. For example, the latest Form I-485 asks whether an applicant intends to "engage in any activity that would endanger the welfare, safety or security of the United States." The next question in Form I-485 asks whether the applicant intends to "engage in any other unlawful activity?" If the applicant answered "No" to the latter question and was later found to have engaged in an unlawful activity that would have no bearing on either the procurement of the green card or on the naturalization, such as participating in a peaceful protest that resulted in an unlawful road blockage, a vindictive prosecutor could still potentially use this to revoke either permanent residence or citizenship. This would not be a just outcome. A lie told out of embarrassment, fear, a desire for privacy or lack of comprehension of the question asked - which is not relevant to naturalization, the green card or a visa - should never result in revocation.