No. 490

PUBLIC WELFARE—DEPENDENT CHILDREN—ALIENS—CHILDREN

Held: Section III (e), Part IV, Chapter 82, Session Laws of 1937 (Public Welfare Act), denying assistance to needy dependent children whose parents are aliens unlawfully within the United States, applies only to needy dependent children who themselves are aliens, and does not apply to needy dependent children who are citizens, regardless of their parentage.

Assistance provided by Part IV of Chapter 82, Session Laws of 1937, is for benefit of dependent child alone, and not for benefit of parents.

September 25, 1942.

Mr. J. B. Convery, Administrator
Department of Public Welfare
Helena, Montana

Dear Mr. Convery:

You have requested my interpretation of sub-paragraph (e) of Section III of Part IV of Chapter 82 of the Laws of the Twenty-fifth Legislative Assembly, popularly known as the Public Welfare Act of 1937.

It is my understanding no factual situation has arisen presenting definitely the question of eligibility for aid to a dependent child whose parents are aliens illegally within the United States. However, because the Regional Representative of the Bureau of Public Assistance of the Social Security Board has raised the question of the constitutionality of this particular sub-section, you desire my opinion on that matter.

So far as material, Section III of Part IV of the Welfare Act provides:

> "Assistance shall be granted under this Part to any needy dependent child—as defined in Section 1—who:
>
> "(e) Whose parents are not aliens illegally within the United States."

At the outset, it must be pointed out that sub-section (e) does not specifically differentiate between children who are citizens but of alien parentage and children who themselves are aliens and likewise of alien parentage.

Furthermore, since Section III reads, "Assistance shall be granted under this part to any needy dependent child . . . ," it is obvious the assistance payments are made for and on behalf of the child and not for the benefit of the parents. Therefore, the validity of the restriction contained in sub-section (e) must be tested by its application to the child without reference to the effect, if any, upon the parents.

In the case of a needy dependent child who is a citizen of the United States, but whose parents are aliens, illegally within the country, it is my opinion sub-section (e) might conflict with the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

There has been no decision defining generally the phrase, "privileges or immunities of citizens," as found in the above amendment. However, an appellate court of California, in the case of Sacramento Orphanage and Children's Homes v. Chambers, 144 Pac. 317, construed Section 21 of Article I of the California Constitution, which provides in part as follows:

". . . nor shall any citizen, or class of citizens, be granted privileges or immunities, which, upon the same terms, shall not be granted to all citizens." It was there held that a state statute, providing no child whose parent or parents had not resided in the state for at least three years prior to an application for admission to an orphan's homes publicly supported should be deemed a minor orphan entitled to the benefits of the statute appropriating money for the orphanage, violated the constitutional provision quoted. Although this is not an authoritative interpretation of the Fourteenth Amendment, it would seem that the case is analagous to the question at hand and that the privileges and immunities clause of the Fourteenth Amendment would prohibit a denial of assistance to a citizen child whose parents are aliens and unlawfully within the country, whereas other children who are citizens are entitled to the benefits of our Public Welfare Act.

Moreover, the equal protection of the laws clause of the Fourteenth Amendment would apparently prohibit the state legislature from classifying citizen children, having alien parents unlawfully within the country, separately from other children who are citizens, so as to deny assistance to the former while granting it to the latter. Although classification may be made under the equal protection clause, it is established and such classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. The classification, to be valid, must be founded upon pertinent and real differences, as distinguished from irrelevant ones. Mere difference is not enough. (See Colgate v. Harvey, 296 U. S. 404, 80 L. Ed. 299, and cases therein cited.) This rule has been recognized by the Supreme Court of Montana. (State v. Safeway Stores, 106 Mont. 182, 76 Pac. (2nd) 81.)

It would seem there is no reasonable basis to support a dicriminatory classification of citizen children on the ground their alien parents are unlawfully in the country, as against citizen children whose parents are likewise citizens, in view of the purpose of the Public Welfare Act, which is to relieve distress and privation and provide necessary support and maintenance for persons within the state. The purpose of the Act is not served, but rather restricted, by such a classification.

Turning now to the class of needy children who are themselves aliens and who have alien parents unlawfully within the country, the above constitutional prohibitions are inapplicable. The privileges and immunities clause, by its own language, limits its protection to citizens of the United States, and clearly such children would not come within its operation.

The equal protection of the laws provision would clearly permit a classification of children affected by the Act, based entirely upon their alien status, as distinguished from a classification based upon the status of alien parents of a citizen child.

It has been directly held by the Supreme Court of the United States a classification based upon alienage alone may be justifiable.

(See Ohio ex rel. Clarke v. Dickebach, 274 U. S. 392; 71 L. Ed. 1115; People v. Crane, 239 U. S. 195, 60 L. Ed. 218; Heim v. McCall, 239 U. S. 175, 60 L. Ed. 206; Terrace v. Thompson, 263 U. S. 197, 68 L. Ed. 255; Porterfield v. Webb, 263 U. S. 225, 68 L. Ed. 278.)

The Supreme Court of Montana has on numerous occasions stated a statute will, if possible, be so construed so as to render it valid. (See State ex rel. Floyd v. District Court, 41 Mont. 357, 109 Pac. 438; State ex rel. General Electric Co. v. Alderson, 49 Mont. 29, 140 Pac. 82.) Also, where a statute is capable of two constructions, one of which would render it invalid and the other valid, the construction which will uphold its validity must be adopted. (See Hale v. County Treasurer, 82 Mont. 98, 265 Pac. 6; C. M. & St. P. Ry. Co. v. Board of R. R. Commissioners, 76 Mont. 305, 247 Pac. 162; Mulholland v. Ayers, 109 Mont. 558, 99 Pac. (2nd) 234.)

With these rules in mind, it is my opinion that sub-section (e) of Section III of Part IV of the Public Welfare Act was intended by the legislature to apply only to needy dependent children who are aliens and who have alien parents unlawfully within the United States, but that it should not be construed to apply to needy dependent children who are themselves citizens, regardless of their parentage, for any other interpretation of the statute in question would raise grave doubts as to its constitutionality.

Sincerely yours,

R. V. BOTTOMLY
Attorney General