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Immigration Litigation Bulletin

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SUPREME COURT TO CONSIDER ISSUE OF CONTINUED DETENTION OF INADMISSIBLE ALIEN IN LIGHT OF ZADVYDAS

The Supreme Court has granted the petition for certiorari filed by an unadmitted criminal alien detained by DHS. ***Benitez v. Wallis***, 337 F.3d 1289 (11th Cir. 2003), *cert. granted,* 2004 WL 67860 (U.S. Jan 16, 2004). The Solicitor General had urged the Court to grant the petition because the issue raised is of "great significance for enforcement of the immigration laws, national security, and public safety."

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The question presented to the Court is whether INA § 241(a)(6) limits the duration of the DHS's detention of a non-admitted alien who has been ordered removed, where there is no significant likelihood of the alien's removal in the foreseeable future. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court held that a resident alien generally may not be detained for more than six months following a final order directing his removal from the United States, if the alien demonstrates that there is not a significant likelihood of removal in the reasonably foreseeable future.

The courts disagree whether the *Zadvydas* six-month rule should be extended to limit the detention of arriving aliens who are stopped at the border and denied admission to the United States, and who cannot be removed to another country. The Third, Fifth, Eighth, and Eleventh Circuits have held that there is no time limit on such detention. *See Sierra v. Romaine*, F.3d (3d Cir. 2003); *Rios v. INS*, 324 F.3d 296 (5th Cir. 2003); *Borrero v. Aljets*, 325 F.3d 1003 (8th Cir. 2003). On the other hand, the Sixth and Ninth Circuits have held that the alien's detention may not generally exceed six months after the final order of removal. *See Rosales-Garcia v. Holland*, 322 F.3d 386 (6th Cir. 2003) *(en banc*), *Martinez-Vasquez v. INS*, 346 F.3d 903 (9th Cir. 2003).

The petitioner in *Benitez,* a citizen of Cuba, sought to enter the United States in 1980 as part of the Mariel boatlift. The INS paroled him into the

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TENTH CIRCUIT FINDS NO CONSTITUTIONAL RIGHT TO NOTICE OF AVAILABILITY OF DISCRETIONARY RELIEF

In ***United States v. Aguirre-Tello***, __ F.3d__, 2004 WL 27737 (10th Cir. January 6, 2004)(*en banc*), a case involving the prosecution of an alien for illegal re-entry, the Tenth Circuit sitting *en banc* held that an alien in deportation proceedings does not have a constitutional right to be informed about the discretionary relief that might be available to him.

Petitioner's prosecution began in February 2001, but the seeds of the dispute date back to August 19, 1994, when he appeared before an immigration judge along with twenty potential deportees. Petitioner had been charged with deportability because in November 1989 he had been convicted in a California state court of attempted murder

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PRESIDENT BUSH PROPOSES A TEMPORARY WORKER PROGRAM AND "FAIR AND SECURE" IMMIGRATION REFORM

On January 7, President Bush announced a proposal to establish a new temporary worker program to match willing foreign workers with willing U.S. employers when no Americans can be found to fill the jobs. This proposal he said, "will make America a more compassionate, and more human and stronger country."

In his White House speech, the President stated that "we should have immigration laws that work and make us proud. Yet today we do not. Instead, we see many employers turning to the illegal labor market. We see millions of hard-working men and women condemned to fear and insecurity in a massive, undocumented economy. Illegal entry across our borders makes more

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Highlights Inside

DETENTION ISSUE HEADS FOR THE SUPREME COURT

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United States, but subsequently revoked the parole after petitioner pled guilty to, *inter alia*, an armed burglary and was sentenced to 20 years' imprisonment. In 1994, an IJ found petitioner excludable and deportable to Cuba in light of his criminal convictions. Petitioner then unsuccessfully filed a habeas challenge to his continued detention.

On appeal petitioner argued that under *Zadvydas* his continued detention was impermissible. The Eleventh Circuit held that inadmissible aliens "have no constitutional rights precluding indefinite detention," and refused to extend the Supreme Court's "narrowing construction" of INA § 241(a)(6). The court explained that the critical distinction *Zadvydas* recognized between resident aliens who have effected an entry, and aliens denied admission on arrival, "has been a hallmark of immigration law for more than a hundred years," and declined to "tamper with the authority of the Executive Branch to control entry into the United States." The court "readily concluded" that, although physically present in the United States for over 20 years, petitioner remained an inadmissible alien, and that his legal status was not altered by either his parole or detention within this country. The court held that petitioner's case was therefore governed by *Shaughnessy v. Mezei*, 345 U.S. 206 (1953), which "remains good law," and does not limit the duration of detention of unadmitted aliens whom the government is unable to remove.

In urging the Court to grant the petition for *certiorari*, the Solicitor General criticized the rulings of the Sixth and Ninth Circuit as opening a "new avenue of unlawful entry," and creating "an obvious gap in border security that could be exploited by hostile governments and organizations that seek to place persons in the United States for their own purposes."

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PRESIDENT PROPOSES IMMIGRATION REFORMS

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difficult the urgent task of securing the homeland. The system is not working."

The President emphasized that immigration reforms should be guided by four principles: First, "America must control its borders." Second, "new immigration laws should serve the economic needs of our country." Third, illegal immigrants should not be given "unfair rewards" in the citizenship process. And fourth, the new laws "should provide incentives for temporary, foreign workers to return permanently to their home countries after their period of work in the United States has expired."

"Illegal entry across our borders makes more difficult the urgent task of securing the homeland. The system is not working."

According to the Fact Sheet issued by the White House, the program would focus on jobs for which there is no available and willing American worker, thus providing a labor supply for American employers. It should do so in a way that is clear, streamlined, and efficient so people can find jobs and employers can find workers in a timely manner.

The program would also grant currently working undocumented aliens a temporary worker status to prevent exploitation. Participants would be issued a temporary worker card that will allow them to travel back and forth between their home and the U.S. without fear of being denied re-entry into America.

The legal status granted by this program would last three years, be renewable, and would have an end. Temporary workers would return to their home countries after their period of work has concluded.

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NOTICE OF DISCRETIONARY RELIEF NOT REQUIRED

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and sentenced to a term of nine years. During the hearing, the IJ realized that petitioner was a resident alien who had been in the U.S. for seven years less one day. This meant that petitioner would have been eligible under the law then in effect for a § 212(c) waiver. The IJ informed petitioner as follows: "Okay. You are not today eligible for a pardon, but you would be tomorrow. Do you want your case postponed to see if you might be granted a pardon and allowed to remain in this country?" Petitioner answered "no." Petitioner was asked again and he expressed his desire to return to Mexico. Accordingly, petitioner was deported. On February 10, 2001, when petitioner was found in New Mexico, he was indicted for illegal reentry. Petitioner challenged the indictment by collaterally attacking on due process grounds the 1994 deportation hearing.

The district court held, *inter alia*, that petitioner's due process rights had been violated because the IJ had used the word "pardon" instead of the word "waiver" thereby failing to convey the nature of the discretionary relief that would have been available to petitioner on the next day.

The *en banc* Tenth Circuit held that petitioner did not have a constitutional right to be informed of his eligibility for a discretionary relief. Even assuming that there was such a right, the court found that the IJ had adequately informed petitioner of his right to a waiver even though he used the word "pardon." The court further held that, in light of petitioner's criminal history the alien did not show that there was a "reasonable likelihood" that he would have obtained discretionary relief from deportation had the IJ advised him more specifically about its availability.

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Protection of Refugees And The Safe Third Country Concept

Ed. Note: OIL Attorney Anthony Payne recently traveled to Europe as a 2003 American Marshall Memorial Fellow. We asked him to share his views on what he learned about refugee issues.

The international framework for the protection of refugees developed in large part with the 1951 United Nations Convention Relating to the Status of Refugees ("Refugee Convention"). The United Nations Protocol Relating to the Status of Refugees ("Protocol") further extended the principles of the Refugee Convention to persons not originally covered. While many of the member states of the current European Union ("EU") were signatories to the Refugee Convention, many other nations subsequently joined the agreements. Though not a party to the Refugee Convention, the United States acceded to the Protocol in 1968. Because the Protocol is not self-executing, the Refugee Act of 1980 was enacted in order to bring United States immigration law, the Immigration and Nationality Act ("INA"), into line with the overriding goal of the Refugee Convention and the Protocol. *See generally INS v. Stevic*, 467 U.S. 407, 421 (1984). Effectively, the parties to the treaties, including the United States and the EU countries, have committed to a general set of principles for the protection of refugees who arrive at the border of a member state.

In establishing the general framework, the parties of the Refugee Convention and the Protocol recognized that refugee protection required an international approach. In particular, the preamble to the Refugee Convention noted that it was enacted in part because of the following:

> [T]he grant of asylum may place unduly heavy burdens on certain countries, and . . . a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.

The member states formalized the protection of "refugees," defined as those persons unwilling or unable to return to their country of nationality or country of last residence because of a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Article 33 of the Refugee Convention, entitled Prohibition of Expulsion or Return ("refoulement"), provides:

> 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.

Prior to the end of the Cold War, few individuals applied for refugee protection in the countries that now make up the EU.

Consistent with the goal of the Refugee Convention and Protocol and the peculiarities of their respective domestic laws, countries developed individual procedures to provide the protection of asylum or some other form of protection from deportation if an individual establishes that he or she is a refugee. Sections 208(b) and 240 (b)(3) of the INA, respectively, provide for relief and protection for refugees in the United States. Specifically, the INA provides for discretionary relief in the form of asylum and the mandatory protection of withholding of removal, that is, non-refoulment.

For the most part, the Refugee Convention and the Protocol parties initially offered protection to an individual establishing refugee status regardless of whether he or she passed through a "safe" third country prior to reaching their borders. In other words, a refugee was granted protection notwithstanding that he or she traveled through a "safe third country" in which he or she could have requested refuge. Many nations, however, have since reexamined their laws. In particular, starting with Germany, many European countries have now adopted some form of a "safe third country" exception.

Prior to the end of the Cold War, few individuals applied for refugee protection in the countries that now make up the EU. The small number of applicants was due in large part to the few numbers of persons able to depart Soviet-Bloc countries as well as the expense of travel. With the end of the Cold War, however, the difficulty in travel eased and the number of individuals seeking refugee protection dramatically increased within Europe. The increase in the individuals seeking recognition as refugees, however, was not equally distributed throughout Europe. Instead, because of proximity to source countries and the nature of its domestic law, a disproportionate number of applications were filed in Germany.

German law provided that the "politically persecuted enjoyed the right to asylum"; in practice, Germany admitted and allowed all individuals who requested refugee protection to file an application for asylum. Between 1984 and 1993, 62 percent of all applications filed in the EU countries were lodged in Germany. In 1992 alone, 438,191 persons filed applications in Germany, accounting for 78.7 percent of all applications filed in the EU. By 1993, Germany was unable to manage effectively the sheer number of asylum applicants seeking refugee protection.

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Protection of Refugees And The Safe Third Country Concept

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The German government attempted to address the influx of refugees by amending its Basic Law in 1993 to include a "safe third country" concept. Specifically, the law was amended to provide that an individual is ineligible to receive refugee protection if he or she passes through a "safe third country" without applying for refugee status. Germany defined as a "safe third country" those countries that were parties to the Refugee Convention and the European Human Rights Convention; in other words, a "safe third country" was a state where an asylum applicant would have been admitted and could have applied for protection.

The immediate effect of the "safe third country" amendment was mixed. Of the 127,210 persons who sought asylum in Germany in 1994, only 1.5 percent were deemed to be able to be returned to a "safe third country." Nevertheless, the change did have an apparent deterrent effect. The number of asylum applications filed in 1994 was only 40 percent of the 1993 total and 29 percent of the 1992 total.

One acknowledged result of the change in German law was the increase in asylum applications filed in other European countries. For example, in 1993 asylum claims in the Netherlands doubled from 1992, and again increased more than 50 percent in 1994. As a result, the Dutch government followed the German lead and introduced a "safe third country" concept to its asylum law in 1995. Similarly, the EU states have now implemented a number of laws consistent with the "safe third country" policy first adopted by Germany. Initially, the EU Ministers for Immigration adopted a resolution on "host third countries" which essentially provided that if a refugee passed through a third country in which she or he could have received protection, his or her application should not be considered by the EU member.

The "safe third country" rule was formalized by the 1997 Dublin Convention which established rules and procedures for determining one and only one member state that will be responsible for adjudicating each asylum claim in an attempt to remove the risk of "asylum shopping."

European countries have experienced some difficulty with the "safe third country" policy. For example, the "safe third country" rule depends on the willingness of nations to take back asylum seekers. Because international law requires only that a state readmit its own citizens, countries have expressed reservations at the cost of accepting the return of asylum seekers without accompanying financial compensation. In addition, because asylum procedures have yet to be fully harmonized in Europe, the standards for granting refugee protection differ from state to state and there have been instances where an individual has been passed from one country to another without an asylum application being adjudicated.

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In an attempt to address the difficulties, the movement in Europe, at least in the EU, is clearly toward an adoption of a common asylum policy with minimum standards. Furthermore, while Germany's call for burden-sharing based on numbers has been rejected, there has been acknowledgment of the need of EU members to "share responsibility in meeting their international obligations." Regardless of the difficulties, what is clear is that the "safe third country" concept is now ingrained as part of Europe's refugee policy.

While the use of the "safe third country" concept certainly is not as widespread as in Europe, the United States has recently entered into an agreement with Canada founded on the premise that there can appropriately be limits on the ability of an asylum applicant to choose a country of refuge. *Cf.* 8 U.S.C. § 1158(a)(2)(A). In particular, the countries have entered into an agreement that, when implemented, will allocate responsibility between the United States and Canada for processing claims of certain asylum-seekers, namely those that arrive at a port of entry on the land border between the countries. Subject to certain exceptions, asylum seekers will be required to present any asylum claim to the country from which they arrived at the port of entry, rather than the country they are next seeking to enter.

In an attempt to avoid some of the difficulties experienced in Europe, the United States and Canada have agreed that any applicant returned under the agreement will not be removed to a third country without being allowed to file for asylum, unless he or she had already done so. Notwithstanding the agreement with Canada, it remains to be seen whether the "safe third country" concept will garner the same importance in the United States as it has in Europe as a key aspect of the policy toward the protection of refugees.

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Contributions To The ILB Are Welcomed!

EN BANC NINTH CIRCUIT FINDS PETITIONER ELIGIBLE FOR ASYLUM BASED ON "OTHER RESISTANCE" TO CHINESE POPULATION CONTROL POLICIES

In ***Li v. Ashcroft***, __F.3d__, 2004 WL 177858) (9th Cir. January 29, 2004) (Schroeder, Pregerson, Reinhardt, Nelson, Kleinfeld, *Hawkins*, Thomas, Graber, Wardlaw, Paez, Clifton), the *en banc* Ninth Circuit deciding an issue of first impression, reversed the BIA's denial of asylum to a Chinese couple who claimed eligibility under the amended refugee definition extending protection to applicants who resist a coercive population control program. Specifically, the refugee definition includes "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or *for other resistance to a coercive population control program*." INA § 101(a)(2)(B) (emphasis added).

The couple, who met at a McDonald's restaurant, "quickly fell in love" and rumors of their amorous relations began to circulate in their small village. One day, a man from the village confronted the petitioner and told her that she should end her relationship because it was "shameful." Petitioner told him that she did not believe "in the policy," that "this is freedom for being in love, and that, "she would have many babies," with her boyfriend. Two days later two nurses from the "Department of Birth Control" came to her house and forcibly took her for a pregnancy examination at a medical center. The examination lasted for approximately half an hour and her attempts to resist were overcome by brute force. Petitioner was warned that if she were found to be pregnant she would be subject to abortion and her boyfriend would be sterilized. Later that same month, petitioner and her boyfriend sought to obtain a marriage certificate from the Family Planning Department. However, because they did not meet the age requirement, she was nineteen, the boyfriend was twenty-one, their request was denied. Petitioner, nonetheless, decided to marry and planned a ceremony and banquet for October 24, 1998. On October 19, petitioner's boyfriend found out that an arrest order had been issued against him and petitioner. With the help of their parents they left their village in China and eventually took a ship to South Korea. From South Korea, they flew to San Francisco where they presented themselves as United States citizens. After being placed in removal proceedings they applied for asylum. The IJ and subsequently the BIA found that they were not eligible for asylum because they had not demonstrated past persecution or a well-founded fear of future persecution.

A panel of the Ninth Circuit affirmed the BIA's denial of petitioners' asylum, withholding of removal, and CAT claims. 312 F.3d 1094 (9th Cir. 2002). That decision was subsequently vacated, when the Ninth Circuit agreed to rehear the case *en banc*. 335 F.3d 858 (9th Cir. 2003).

"If the Supreme Court speaks, and lower courts do not hear it, does it make law?"

The Ninth Circuit *en banc* held that petitioner Lin's testimony, which the IJ found credible, "compellingly demonstrates that she was persecuted on account of her resistance to a coercive population control program." In particular, the court found that the forced pregnancy examination constituted persecution. "Even by rudimentary medical standards, the examination that followed was crude and aggressive: Li's uterus, vagina, and cervix were probed while she resisted by kicking and screaming in fear," noted the court. "The timing and physical force associated with this examination compel the conclusion that its purpose was intimidation and not legitimate medical practice," concluded the court. Additionally, the court found that the evidence compellingly demonstrated that petitioner Li showed an objective fear of future persecution if she were returned to China.

The court then held that petitioner's past persecution and fear of future persecution was on account of her resistance to a coercive population control program. First, the court found that petitioner possessed a protected characteristic, namely her resistance to coercive population control policies. Second, the court determined that her resistance motivated the government officials to harm her through the forced pregnancy examination, which had occurred just two days after petitioner had defied the village official with her comments about not believing in the policy.

Accordingly, the court determined that petitioner Li was eligible for asylum and suggested that on remand the Attorney General give appropriate consideration to the court's view of "the seriousness of Li's treatment at the hands of Chinese officials." The court further noted that since the withholding issue was not briefed to the *en banc* court it would not decide it at this time Similarly, the court did not address the CAT claims.

In a strong dissent, Judge Kleinfeld disagreed with the majority on two points, by first asking the following question: "If the Supreme Court speaks, and lower courts do not hear it, does it make law?" First, under *INS v. Ventura*, 537 U.S. 12 (2002), Judge Kleinfeld would have remanded the case to permit the BIA to make the initial decision as to whether the persecution was on account of resistance to a coercive population-control program. Second, under *INS v. Elias-Zacarias*, 502 U.S. 478 (1992), he would have deferred to the BIA's reading of the record under the substantial-evidence standard on the question of whether the offensive treatment of petitioner Li amounted to "persecution."

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SIXTH CIRCUIT HOLDS THAT WRIT OF AUDITA QUERELA IS AVAILABLE IN IMMIGRATION PROCEEDINGS AND BLOCKS REMOVAL ORDER

In ***Ejelonu v. INS***, __F.3d__, 2004 WL 34849 (6th Cir. Jan. 8, 2004) (Batchelder, Moore, *Clay*), the Sixth Circuit invoked *sua sponte* the writ of *audita querela* to prohibit the INS from instituting removal proceedings against the petitioner based on conviction records which had been sealed under the Michigan Holmes Youthful Trainee Act.

The petitioner was born in Nigeria on May 24, 1979, and was admitted to the United States at the age of six as a dependent under her parents' student visa. Petitioner's parents were naturalized on September 11, 1996. In October 1996, petitioner's mother filed an Application for Certificate of Citizenship on her behalf and her two younger sisters.

The INS did not schedule an interview until approximately ten months later, on August 18, 1997. By then, petitioner was no longer eligible for citizenship as a child under INA § 322, because she was not under the age of eighteen. The INS denied the application and warned her that it would begin deportation proceedings.

Meanwhile, petitioner graduated with honors from high school and then began college at Wayne State University. While in school petitioner worked at Hudson's department store. On two occasions she accepted from a family that resided in her neighborhood, a credit card number without the credit card. The incidents were captured on security cameras and as a result she was charged with two counts of embezzlement. Petitioner then pled guilty to the charge and was placed on probation under the Michigan Holmes Youthful Trainee Act. The court sealed the record of all proceedings. Subsequently, the judicially-sealed Youthful Trainee record was forwarded to the INS by an unknown person. INS agents then apprehended petitioner at her home and kept her in custody for several weeks. Petitioner was charged with removability as an alien who had been convicted of two crimes involving moral turpitude. The IJ found petitioner removable as charged and the BIA affirmed that decision.

Preliminarily, the Sixth Circuit found "petitioner's lackluster briefing . . . challenging." Nonetheless, the court considered petitioner's pleading as a request to the court to use its equitable powers to halt her deportation. The court then determined that despite the 1946 amendments to the Federal Rules of Civil Procedures, the writ of *audita querela* survives in certain instances. In particular, the court found that the writ may be issued "for equitable reasons regardless of the presence of a legal defect in the original proceedings." The court disagreed with the D.C. Circuit's view that the writ does not provide a purely equitable basis for relief independent of any legal defect in the underlying judgment. *See United States v. Ayala*, 894 F.2d 425 (D.C. Cir. 1990).

> The writ of *audita querela* may be issued "for equitable reasons regardless of the presence of a legal defect in the original proceedings."

The court then found that the equities in petitioner's case "overwhelmingly favor Petitioner - not just to the point where a reasonable person might sympathize with her plight, but to the extent that to deport her under such circumstances would shock the conscience." The court pointed to the fact that but for the INS delay, petitioner would have been a citizen and thus "undeportable."

The court further noted, that several years after petitioner had been denied naturalization, Congress enacted the Child Citizenship Act of 2000 (CCA) to automatically grant citizenship to most foreign-born children of American parents.

The court also noted that the entire removal proceeding "was founded on illegally-obtained evidence . . . Someone broke Michigan law and violated a court order in a disturbingly inexcusable attempt to force petitioner out of the country." The court further noted that petitioner was never advised that accepting Youthful Trainee status would have serious immigration consequences. Finally, the court said that "equity demands a writ of *audita querela* to avoid a punishment grossly disproportionate to the offense."

Accordingly, the court enjoined DHS from using petitioner's Youthful Trainee status as a basis for instituting removal proceedings. In so doing, the court explained that this was an extreme case and that the court had not "created some new easy means to object to deportation."

In a dissenting opinion, Judge Batchelder, while sympathetic to petitioner's plight, criticized the majority decision for sua sponte granting the writ and for intruding upon the power of Congress to administer the immigration laws. In her view, the writ of *audita querela* cannot provide a legal basis for relief in this case because Congress explicitly abolished it in civil proceedings.

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ATTENTION READERS!

If you are interested in writing an article for the Immigration Litigation Newsletter, or if you have any ideas for improving this publication, please contact Francesco Isgro at:

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Summaries Of Recent Federal Court Decisions

ADMINISTRATIVE REMOVAL

■Ninth Circuits Holds That Alien Who Reentered Illegally Is Subject To Administrative Removal

In ***United States v. Hernandez-Vermudez***, __F.3d__, 2004 WL 112631 (9th Cir. January. 26, 2004) (Brunetti, Nelson, *Silverman*), a case involving a prosecution for being unlawfully present in the United States under INA § 276, the Ninth Circuit held that "an illegal alien who enters this country without inspection and commits an aggravated felony is subject to administrative removal." The defendant, a citizen of Mexico, entered the United States illegally in 1985. He was subsequently convicted of two felonies. In March 1999, while defendant was serving a prison sentence, the INS served him with a Notice of Intent to Issue a Final Administrative Order under INA § 238(b). The defendant waived his right to contest the charges of deportability and he was subsequently moved to Mexico. In early 2001, defendant was again found illegally in the United States. The prior order of removal was reinstated and defendant again signed notice indicating that he did not wish to contest the charges.

On May 9, 2002, defendant was again found illegally in the United States. This time, the government issued an indictment, charging the defendant with violating INA § 276(a), (b)(2). A district court dismissed the indictment pursuant to INA § 276(d), finding that the removal statute applied only in the case of an alien who was "admitted" to this country and not to an alien who had entered without inspection. The government appealed.

The Ninth Circuit rejected the district court's "contention that Congress intended to exempt from expedited administrative removal aggravated felons who enter the country by sneaking in." While acknowledging that the removal statute was ambiguous on this issue, the court found that the legislative history was clear: "Congress clearly intended to expedite the removal of criminal aliens who are not lawful permanent residents." The court also deferred to the Attorney General's interpretation of the statute as expressed in 8 C.F.R. § 238.1.

The Ninth Circuit rejected the district court's "contention that Congress intended to exempt from expedited administrative removal aggravated felons who enter the country by sneaking in."

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ASYLUM

■First Circuit Affirms Adverse Credibility Finding Where Evidence Showed Applicant Had Sought Asylum In Germany

In ***Yongo v. Ashcroft,*** __F.3d__, 2004 WL 67337 (1st Cir. January 14, 2004) (*Boudin*, Torruella, Oberdorfer), the First Circuit affirmed the Immigration Judge's adverse credibility finding based on evidence that petitioner had actually been in Germany applying for asylum at the time he claimed in testimony that he was in hiding in the Congo.

The petitioner arrived by air from Europe in January 1997, and sought to enter the United States using a false name and passport. When placed in exclusion proceedings he applied for asylum claiming that in the early 1990s he had been a member of a pro-democracy group opposing the then ruler of Zaire, Mobutu Sese Seko. As a result of his activities he was jailed for ten months and then released. In 1995 he was arrested after joining a political parade and imprisoned. On both occasions he was interrogated and physically abused. He claimed that he escaped prison with the help of his father, left the Congo in mid-November 1996, traveled to Portugal, France, and Germany (for 13 days), and then visited Holland before flying to the United States. He said that this was his first application for asylum and that he had not sought asylum in Germany.

The INS introduced documents indicating that a person with petitioner's name and date of birth had been arrested near Frankfurt in late June 1996 and had applied for asylum. If true, this contradicted petitioner's testimony that in June 1996 he had been in hiding in the Congo. Petitioner flatly denied that he had been near Frankfurt. At a subsequent hearing the INS produced additional German immigration records including a copy of the asylum application filed in Germany, which contained petitioner's photograph and fingerprints. Petitioner's counsel conceded that the photograph and fingerprints belonged to petitioner but denied that petitioner had been in Germany at that time. Rather, petitioner testified that his father had hired some men who took his photograph and fingerprint for the purpose of providing false German documents. However, an INS officer who had served for five years in Frankfurt, testified to the authenticity of the documents, and that German immigration records were extremely accurate. The immigration judge denied asylum on credibility grounds and the BIA affirmed that decision under its streamlined procedures.

The First Circuit held that the German documents had been properly authenticated as established by the testimony of the INS officer that the records were genuine German immigration records. The court further found that even assuming that the arrest record was in part hearsay, " it was hardly so unreliable as to offend due process." The court rejected petitioner's connection that he should have been found credible because he used a narrow lie and false documents to escape persecution. The court found whether petitioner had previously sought asylum

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Summaries Of Recent Federal Court Decisions

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and his narrative that he had been in the Congo in June 1996, were two apparent falsehoods that were "far from merely incidental" to his asylum claim.

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■Ninth Circuit Finds Iranian Petitioners Eligible For Asylum Based On Past Extortion

In ***Jahed v. INS***, __F.3d__, 2004 WL 77890 (9th Cir January 20, 2004) (B. Fletcher, *Trott*; Kozinski, dissenting), the Ninth Circuit reversed the BIA's decision to deny the petitioners' application for asylum and withholding of removal.

The principal petitioner, who applied for asylum together with his wife and two children, testified that he had been the target of persecution by a soldier of the Iranian Revolutionary Guard, known as the "Pastars," and that he fears future persecution because of his involvement with the Mojahedin, a rival political group disfavored by the current government. Petitioner stated that he belonged to this organization from 1981-85. In October 1990, one of the Pastars recognized him and told him that if he didn't pay 200,000 Taomans he would report him to the authorities. Petitioner didn't have the money and immediately fled the country.

The IJ denied the application for asylum concluding that, as to past persecution, petitioner had established only that he had been the victim of an attempted extortion, not political persecution. The IJ noted that petitioner's extended family had remained undisturbed in Iran. As to future persecution, the IJ found that the acts adduced did not independently and objectively support his claim. Petitioner then obtained new counsel who appealed to the BIA and also filed a motion to reopen based on ineffective assistance of counsel. The BIA adopted the IJ's decision, dismissed the appeal, and denied the motion to reopen.

The Ninth Circuit disagreed with the IJ's finding that petitioner had experienced a criminal extortion that was motivated by purely personal and economic interests. The court found that "the undeniable political context of this extortion, which was inextricably coupled with the threat of political exposure to the hostile Iranian government, cannot be ignored or discounted on the ground that the extortionist representative of the government suggested as an alternative that he might pocket the money." The soldier, said the court, may have had more than one motive, but as long as one motive is one of the statutorily enumerated grounds, the requirements have been satisfied. "The soldier may have cocked his own gun, but the bullet in the firing chamber was the government's," said the court. When the evidence presented by the petitioner is viewed in its totality, said the court, it "clearly establishes a causal connection between the persecution, the fear of future persecution, and petitioner's political opinion." Accordingly, the court found that petitioner had shown past persecution and a well-founded fear of persecution on account of his political opinion. "To hold otherwise," said the court, "would be to act as a rubber stamp or a decorative potted plant in disregard of Congress' expectation that we correct the BIA's factual decision where that body has made an egregious mistake."

"Maybe there's something in the water out here, but our court seems bent on denying the BIA the deference a reviewing court owes an administrative agency."

Judge Kozinski, in a dissenting opinion, phrased the question in the case using the immortal words of Humpty Dumpty, "which is to be the master - - that's all." He observed that "when it comes to the granting of asylum, Congress has said the BIA is the master. The statute provides it, the other courts of appeals recognize it and the Supreme Court keeps reminding us of it. But to no avail. Maybe there's something in the water out here, but our court seems bent on denying the BIA the deference a reviewing court owes an administrative agency."

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■Sixth Circuit Affirms Order Denying Asylum To Iranian Who Had Been Imprisoned In Iran For Five Years For Activities In Support Of The Mujahedin-e-Khalq

In ***Daneshvar v. Ashcroft***, __F.3d__, 2004 WL 77696 (6th Cir. January 20, 2004)(*Kennedy*, Aldrich, Gibbons), the Sixth Circuit held that substantial evidence supported the BIA's determination that the petitioner did not have well-founded fear of persecution based on his political opinion.

The petitioner, a citizen of Iran, entered the United States as a visitor on June 17, 1994. When he failed to depart at the expiration of his authorized stay, the INS placed him in deportation proceedings. Petitioner then applied for asylum. He testified that he had served a five-year imprisonment as result of his involvement with the Mujahedin-e-Khalq ("MEK"), a terrorist group currently designated by the Secretary of State as a Foreign Terrorist Organization under INA § 219. Petitioned claimed that he was never a formal member of the MEK and he only distributed flyers in support of a MEK senatorial candidate and sold MEK's newspapers. When petitioner was released from prison, he served in the Iranian military for two years without incident and he was able to obtain some employment. In March 1994, with the assistance of friends, he traveled to Germany and after several months there he obtained a visitors' visa to the United States where his immediate family resides. The IJ denied asylum because petitioner lacked credibility, that even if

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credible, petitioner had not shown fear of future persecution given the changed conditions in Iran, and that, given petitioner's involvement with the MEK, asylum would be denied as a matter of discretion. While the appeal was pending before the BIA, petitioner filed a motion to reopen his case so that he could apply for adjustment of status. The BIA affirmed the IJ's denial of asylum and denied the motion on the basis that petitioner was inadmissible under INA § 212(a)(3)(B)(i)(I) for having engaged in terrorist activity.

In affirming the denial of asylum on the merits, the court did not find it necessary to address the credibility finding. The court found that, notwithstanding the deplorable conditions of human rights in Iran, petitioner had failed to show a well-founded fear of persecution on account of his political opinion. "If we were to accept Petitioner's theory of eligibility for political asylum, we would have to hold that every Iranian citizen has a well-founded fear of persecution solely by virtue of living in Iran," said the court.

However, the court further held that the BIA abused its discretion in denying petitioner's motion to reopen to apply for adjustment of status. The court first found that the BIA erred as a matter of law in its statutory analysis because it failed to consider petitioner's evidence regarding his state of mind when at the age of 16, he "sold newspapers for an organization that advocated an armed revolt against a tyrannical monarch." The BIA should have also considered petitioner's assertions that he was unaware of the MEK's violent activities and that he quit a year after he joined. Accordingly, the court noted that since there was substantial evidence that petitioner is not statutorily ineligible for immigration relief, the burden shifts to the government to show otherwise. Therefore, the court while affirming the denial of asylum, remanded the case to the BIA to reconsider petitioner's motion to reopen.

"If we were to accept Petitioner's theory of eligibility for political asylum, we would have to hold that every Iranian citizen has a well-founded fear of persecution solely by virtue of living in Iran."

Judge Gibbons concurred and dissented. He agreed with the majority affirmance of the asylum denial but he would have found that petitioner is inadmissible for soliciting membership in a terrorist organization.

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■Seventh Circuit Finds "Pattern Of Serious Misapplications" By The BIA And The Immigration Judges In Asylum Cases

In ***Niam v. Ashcroft,*** __F.3d__, 2004 WL 32920 (7th Cir. January 7, 2004) (*Posner*, Ripple, Williams), the Seventh Circuit consolidated two asylum cases and reversed the decisions below. The court explained that although the petitions raised different issues, they were "related in suggesting, together with other recent cases in this and other circuits . . . a pattern of serious misapplications by the [B]oard and the immigration judges of elementary principles of adjudication."

Petitioner Niam claimed that he was an official of the government of Sudan when it was controlled by the Umma Party. However, he entered the United States on a student visa using a Chadian passport. Petitioner never attended school. When the INS placed him in proceedings he applied for asylum and withholding. The application for asylum was denied because it had not been filed within a year of arriving in the United States. The IJ then denied on the merits petitioner's application withholding of removal. The BIA affirmed that decision after noting that the IJ had incorrectly identified the regime in power in Sudan during petitioners 1990 arrest.

The court found that, although the BIA had corrected one error, it had not noticed that the remainder of the IJ's decision was "riven with errors." In particular, the court noted that the IJ's analysis "was so inadequate as to raise questions of adjudicative competence."

The other petitioner, a Bulgarian citizen, had entered the United States in 1993 also as a student. His wife and stepdaughter were admitted as visitors. Petitioner did not attend school and the three of them overstayed their visas. When placed in removal proceedings, petitioner applied for asylum and withholding. He contended that he came from a prominent anticommunist family and that when the communist regime collapsed in 1989, he publicly advocated the restoration of the monarchy. As a result of his stand, petitioner and his family received death threats. When an attempt was made to abduct his stepdaughter, petitioner left his country. The IJ, relying on the Department of State Profile, found that in light of the political changes in Bulgaria, petitioner's fear was no longer well-founded. In addition, he determined that petitioner and his family had not suffered past persecution, only "harassment."

The court found that the IJ had not mentioned in his decision some of the evidence of past persecution that petitioner had presented. The court also found that the IJ had arbitrarily excluded an affidavit of an expert witness while relying heavily on the Department of State country report. Petitioner's expert witness would have testified about present conditions in Bulgaria and how the security service in that country is run by the same people who ran it under the communist regime. However, the expert witness was in Prague at the time of the hearing, and

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the IJ did not permit her to testify by telephone. The IJ also granted the INS attorney's motion to exclude the affidavit because the witness could not be *voir dire* as to her qualifications. The court found that the exclusion of this affidavit "was devastating in its consequences, and a denial of the [petitioner's] minimum procedural rights."

Accordingly, the court remanded both cases for further proceedings, urging that the cases be assigned to different immigration judges.

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■Seventh Circuit Overturns Denial Of Asylum Application Filed By Claimed Jehovah's Witness

In ***Muhur v. Ashcroft***, __F.3d__, 2004 WL 77913 (7th Cir. January 20, 2004) (Flaum, *Posner*, Williams), the Seventh Circuit vacated the Immigration Judge's decision denying asylum to an Ethiopian citizen of Eritrean origin, who claimed to fear persecution on account of her religion.

According to her testimony, petitioner was born to Christian family in Eritrea in 1974. When she was 17 her family moved to Addis Ababa. In 1992 she became a Jehovah's Witness. In 1997 petitioner married a Muslim Ethiopian, who converted to the Jeohovah's Witness faith to marry her to the displeasure of his family. Shortly thereafter petitioner's husband moved to Saudi Arabia where he resumed Islam "and browbeat his wife to abandon her faith and behave like a Muslim wife." Petitioner instead, entered the United States as a visitor and applied for asylum.

The Asylum Officer who interviewed the petitioner did not find her story credible and referred her for a hearing before an IJ. The IJ rejected petitioner's claim noting the credibility finding by the Asylum Officer. However, the IJ, although skeptical of petitioner's story, did not make an explicit credibility finding. Instead the IJ determined that petitioner was not an "active, visible" adherent to the Jehovah's Witness faith. The IJ further found that Ethiopia does not persecute Jehovah's Witnesses, and that if the Ethiopian government were to deport her to Eritrea, she would not be subject to persecution there, and she would not attract "undue notoriety" because she was not a "religious zealot." Accordingly, the IJ ordered petitioner removed to Ethiopia, with an alternate removal order to Eritrea. On appeal, the BIA affirmed without opinion.

The "fatal flaw" in the IJ's decision was "the assumption -- a clear error of law -- that one is not entitled to claim asylum on the basis of religious persecution if (a big if, by the way) one can escape the notice of the persecutor's by concealing one's religion."

The court held that the "fatal flaw" in the IJ's decision was "the assumption -- a clear error of law -- that one is not entitled to claim asylum on the basis of religious persecution if (a big if, by the way) one can escape the notice of the persecutor's by concealing one's religion." The court pointed out that under the Roman Empire before Constantine, Christians who practiced their religion in secret, faced little risk of being thrown to the lions, but this didn't follow that Rome didn't persecute Christians. Thus, the court found that if petitioner is a Jehovah's Witness, she is entitled to asylum if the denial of asylum would mean her return to Eritrea.

Accordingly, the court remanded the case for further proceedings on whether the petitioner is a Jehovah's Witness and whether she would be permitted to remain in Ethiopia if she were returned to that country. The court also urged that the case be reassigned, given the IJ's "mishandling" of petitioner's asylum claim.

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■Seventh Circuit Affirms Denial Of Asylum To Applicant From Montenegro

In ***Capric v. Ashcroft,*** __F.3d__, 2004 WL 103314 (Cudahy, Ripple, *Kanne*) (7th Cir. January 23, 2004), the Seventh Circuit affirmed the BIA's decision denying the petitioner's application for asylum and withholding of removal. The court rejected petitioner's claim that he was prejudiced by the lack of an interpreter at his first hearing before the Immigration Judge. On the merits of his asylum claim, the court found substantial evidence supporting the Immigration Judge's adverse credibility finding, and his alternate finding that the alien's testimony, even if true, was insufficient to sustain his burden of proof.

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■Seventh Circuit Finds Fraudulent Birth Certificate Insufficient Basis For Adverse Credibility Finding

In ***Kourski v. Ashcroft***, __F.3d__, 2004 WL 99025 (7th Cir. January 22, 2004)(Bauer, *Posner*, Evans), the Seventh Circuit rejected the Immigration Judge's adverse credibility determination and remanded proceedings to the BIA. The court found that there was no evidence that the alien knew or suspected that the birth certificate he submitted in support of his asylum claim was a forgery. Thus, the court concluded that proof that the document was forged was not evidence that the alien was lying.

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■Tenth Circuit Affirms Streamlined Asylum Denial

In ***Batalova v. Ashcroft***, __F.3d__, 2004 WL 103555 (10th Cir. January 23., 2004) (Henry, Holloway, *Anderson)*, the Tenth Circuit affirmed the BIA's streamlined denial of petitioner's application for asylum and withholding of removal. The court ruled that, absent any indication to the contrary, the court would assume that a single BIA member properly reviewed the administrative record prior to summarily affirming the Immigration Judge's decision, and that the BIA's decision in conjunction with that of the Immigration Judge provided a sufficient basis for meaningful judicial review.

Absent any indication to the contrary, the court would assume that a single BIA member properly reviewed the administrative record prior to summarily affirming the Immigration Judge's decision.

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CANCELLATION

■Eighth Circuit Holds That Voluntary Departure Under Threat Of Deportation Interrupted Petitioner's Continuous Physical Presence

In ***Palomino v. Ashcroft,*** __F.3d__, 2004 WL 63404 (8th Cir. January 15, 2004) (*Murphy*, Lay, Bright), the Eighth Circuit affirmed the Immigration Judge's determination that Petitioner was not eligible for cancellation of removal because he lacked the requisite continuous physical presence. The petitioner, a citizen of Mexico, entered the United States without inspection in 1987. In April 1997, petitioner was apprehended while attempting to renter the United States near San Ysidro. The INS granted him voluntary departure and petitioner left the United States in April 1997. However, a few weeks later petitioner again reentered illegally. Petitioner was placed in removal proceeding on September 2, 1998, and subsequently charged with having been convicted of a crime involving moral turpitude, namely an enhanced gross misdemeanor for DWI. Petitioner then applied for cancellation of removal but the IJ determined that petitioner's continuous physical presence terminated when he voluntarily departed from the United States. The BIA summarily affirmed that decision.

The Eighth Circuit held that the IJ reasonably concluded that petitioner's period of physical presence ended when he voluntarily departed the United States under threat of deportation. The court noted that the BIA in *Matter of Roman-Alcaide*, 23 I&N Dec. 423 (BIA 2002), held that under IIRIRA the continuous physical presence comes to a end when an alien voluntarily departs under threat of deportation. The court found the BIA's interpretation "reasonable and consistent" with the cancellation statute. The court also noted that the Fifth Circuit and the Ninth Circuit had reached a similar conclusion. *See Mireles-Valdez v. Ashcroft*, 349 F.3d 213 (5th Cir. 2003); *Vasquez-Lopez v. Ashcroft*, 343 F.3d 969 (9th Cir. 2003).

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CRIMES

■Ninth Circuit Finds That State Drug Offense Is Aggravated Felony Only If Punishable As Federal Felony

In ***Cazarez-Gutierrez v. Ashcroft,*** __F.3d__, 2004 WL 112635 (9th Cir. January 26, 2004) (Hug, *B. Fletcher*, Tashima), the Ninth Circuit joined the Second and Third Circuits in holding that a state drug offense is not an aggravated felony for immigration purposes unless it is punishable as a felony under the federal narcotics laws or is a crime involving a trafficking element. Under this framework, the court held that the alien's conviction for possession of methamphetamine was not an aggravated felony, and remanded to the BIA for further consideration of his eligibility for cancellation of removal.

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■Fifth Circuit Finds that Conviction Of Intoxication Assault Is Not A Crime Of Violence

In ***United States v. Vargas-Duran***, __F.3d__, 2004 WL 40558 (5th Cir. Jan. 8, 2004)(*en banc*), a case involving the application of a sentence enhancement to a defendant's sentence for being unlawfully present in the United States, the Fifth Circuit held that a Texas conviction for intoxication assault was not a "crime of violence." The defendant, a citizen of Mexico, was convicted in 1996 of intoxication assault in Texas. Following his sentence defendant was deported to Mexico. On June 24, 2001, the defendant was again found in Texas and was prosecuted for being unlawfully present in the United States in violation of INA § 276(a) and (b)(2). The Pre-Sentencing Report (PSR) recommended a sixteen-level enhancement of defendant's sentence on the basis that the conviction for intoxication assault was a crime of violence. The district court agreed with the PSR. On appeal, defendant relied on *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001) (holding that the sentence of a defendant with a prior conviction for driving while intoxicated could not be enhanced as a crime of violence). However, the panel found, *inter alia*, that a conviction for intoxication assault required the use of force, and as such, met the definition of a crime of violence.

The Fifth Circuit *en banc*, held that the "use of force" under the Sentencing Guidelines requires the intentional use of force, which the court fur-

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ther found is not an element of the crime of Texas intoxication assault. The court adopted the plain meaning of the word "use," finding that it requires intent. The court found that its interpretation was supported by its prior ruling in *Chapa-Garza*. The court also found that no *mens rea* need be established for the prosecution of the crime of intoxication assault. Therefore, contrary to the panel's finding, the intentional use of force is not an element of the crime of intoxication assault. Consequently, defendant's sentence was improperly enhanced.

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DETENTION

■Seventh Circuit Upholds Immigration Detention Pending A Final Order Of Removal Under INA § 236(c)

In ***Gonzalez v. O'Connell***, __F.3d__, 2004 WL 94060 (Bauer, *Ripple*, Williams) (7th Cir. January 21, 2004), the Seventh Circuit reversed the district court's grant of a habeas petition for an alien who challenged his detention pending a final order of removal. Initially, the court held that a habeas petitioner with a statutory argument that has a reasonable prospect of success may not avoid the exhaustion requirement simply by recasting his statutory claim as a constitutional claim. As to petitioner's challenge to the constitutionality of his detention, the court noted that the Supreme Court's decision in *DeMore v. Kim*, 538 U.S. 510 (2003), controlled the appeal and held that raising a "facially meritless" challenge to removability does not suffice to take an alien's case out of the ambit of *Kim*.

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"A habeas petitioner with a statutory argument that has a reasonable prospect of success may not avoid the exhaustion requirement simply by recasting his statutory claim as a constitutional claim."

JURISDICTION

■Second Circuit Rules That Exhaustion Requirement Applies To Habeas Petitions

In ***Theodoropoulos v. INS,*** __F.3d__, 2004 WL 49118(2d Cir. January 12, 2004) (*Walker*, Winter, Parker), the Second Circuit, in a decision *superseding* 313 F.3d 732 (2d Cir. 2002), ruled that the INA's exhaustion requirement applies to petitions for habeas relief. Despite initially stating in immigration court that he accepted the IJ's decision as final, the petitioner later filed a successful habeas petition in district court. The Second Circuit reversed, finding that the petitioner's statements to the IJ amounted to a clear waiver of appeal to the BIA and that his subsequent attempt to file a notice of appeal was without effect. The court then held that the reference to "review" in the INA plainly encompassed habeas proceedings as well as petitions for review in circuit courts.

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■D.C. District Court Finds That It Lacks Jurisdiction To Review Attorney General's Denial Of National Interest Waiver

In ***Zhu v. INS***, __F. Supp.2d__, 2004 WL 161325 (D.D.C. Jan. 28, 2004) (*Collye*r, District J.), the district court held that the denial of a "national interest" waiver, which waives the labor certification requirement for an employment based immigrant visa, is not subject to judicial review under INA § 242. The statute provides in pertinent part that the Attorney General "may, when the Attorney General deems to be in the national interest, waive the requirements" of a labor certification. The court concluded that the word "may" connotes discretion, and that together with the use of the word "deem," the statutory provision "fairly exudes deference."

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MOTION TO REOPEN

■Seventh Circuit Reverses Denial Of Petitioner's Motion To Reopen Based On Changed Conditions In Ethiopia

In ***Mengistu v. Ashcroft***, __F.3d__, 2004 WL 99027 (7th Cir. January 22, 2004) (Flaum, *Posner*, Easterbrook), the Seventh Circuit found that the BIA improperly denied petitioner's motion to reopen based on changed country conditions at the start of the civil war between Ethiopia and Eritrea. The court noted that the "Board's long delay in deciding [petitioner's] appeal was ironically, the springboard for his motion to reopen." Petitioner had filed his appeal in 1993, and the BIA decided the case in 2000. Petitioner's motion to reopen was filed a month later.

The court held that evidence was insufficient to demonstrate that conditions in Ethiopia, specifically regarding the persecution of ethnic Eritreans, had sufficiently changed from what they were during the civil war to warrant denial of the motion to reopen.

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STREAMLINING

■Tenth Circuit Upholds BIA's Streamlining Regulation

In ***Yuk v. Ashcroft***, __ F.3d__, 2004 WL 79095 (10th Cir. January 20, 2004) (Henry, Holloway, *Anderson*), the Tenth Circuit joined the First, Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits, to hold that the BIA's streamlining procedures do not violate an alien's right to due process. The court then found that substantial evidence supported the conclusion that the alien failed

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to establish past persecution or a well-founded fear of future persecution in Cambodia.

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VISAS

■Third Circuit Finds No Authority To Issue Diversity Visa After End Of Fiscal Year

In ***Coraggioso v. Ashcroft***, __F.3d__, 2004 WL 103410 (Scirica, Nygaard, *Ambro*) (3d Cir. January 23, 2004), the Third Circuit rejected petitioner's claim that his removal proceedings should have been terminated due to the INS's failure to timely adjudicate his parents' application under the 1998 Diversity Visa program.

Petitioner entered the United States with his parents in 1984 at the age of six. In 1988, his parents were selected to participate in the 1998 DV program. Petitioner's parents submitted the required fees and documentation. Petitioner, who was then under 21, was included in the application. However, in January 1999, petitioner's parents received a letter indicating that the INS had denied their applications because they had not finished processing their application before the end of the fiscal year. The court noted that "sadly, only 51,565 of the 55,000 diversity visas were actually issued in FY 1988."

The court concluded "with regret," that the language Congress used to create the Diversity Visa program prevents the INS from issuing a visa pursuant to that program upon the expiration of the relevant fiscal year. The court noted that petitioner "is more truly an American than an Italian," and in the absence of a private bill to direct the INS to grant a visa number, he "will be forced to leave behind his family, friends and the only life he can remember."

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OIL HONORS MARIAN J. BRYANT, SUPERVISORY PARALEGAL SPECIALIST

The Office of Immigration Litigation recently honored Supervisory Paralegal Specialist, **Marian Luise Julius Bryant**, at a luncheon held at the Hotel Washington, in Washington, D.C.

Ms. Bryant, who retired after 37 years of government service, began working for the government in September 1967 when she was hired as a GS-2 Clerk/Typist at the General Accounting Office. She transferred to the Department of Justice, Land and Natural Resources Division in May 1970, and was promoted to Supervisory Legal Clerk in 1973.

In October 1975, Ms. Bryant transferred to the U.S. Attorney's Office for the Southern District of New York where she was promoted to Legal Technician. In June 1979, she was reassigned to the INS and detailed to the SAUSA Unit in the S.D. N.Y. In 1982 she was promoted to Paralegal Specialist.

Ms. Bryant returned to Washington in July 1983 to join the newly established Office of Immigration Litigation. In 1989, she was selected as OIL's Supervisory Paralegal Specialist.

During her government career, Ms. Bryant was bestowed numerous awards, including the Excellence in Paralegal Support Award. Marian has been recognized by the Civil Division as an outstanding example of upward mobility.

The attorneys and support staff at OIL will miss Marian and wish her the very best.

Marian Bryant being presented with the Department of Justice Seal by OIL's Director, Thomas Hussey at a reception in the Office of Immigration Litigation.

David McConnell, Deputy Director of Operations, Marian J. Bryant, and Karen Y. Drummond, at the Hotel Washington.

CASES SUMMARIZED IN THIS ISSUE

MARK YOUR CALENDAR

The Eighth Annual Immigration Litigation Conference has been tentatively scheduled for May 4-6, 2004, in Washington, D.C. Additional information, including lodging arrangements, will appear in the February issue of this newsletter.

INSIDE OIL

Congratulations to Deputy Assistant Attorney General **Laura L. Flippin**, who has accepted a position with the White House's Homeland Security Council. Ms. Flippin joined the Department of Justice after serving in the Office of Counsel to the President at the White House. A graduate of William and Mary and the University of Virginia School of Law, Ms. Flippin was in private practice at the Washington D.C. office of White & Case. As a DAAG, Ms. Flippin was responsible for overseeing the Office of Immigration Litigation among other matters.

Congratulations to **M. Jocelyn Lopez Wright** who has been selected as Assistant Director. Congratulations to **Barry Pettinato**, **James Hunolt**, and **Alison Igoe**, who have been promoted to Senior Litigation Counsel.

Pictured from L to R, Thomas W. Hussey, Laura L. Flippin, and David J. Kline

The goal of this monthly publication is to keep litigating attorneys within the Departments of Justice and Homeland Security informed about immigration litigation matters and to increase the sharing of information between the field offices and Main Justice. This publication is also available online at https://oil.aspensys.com. If you have any suggestions, or would like to submit a short article, please contact Francesco Isgro at 202-616-4877 or at francesco.isgro@usdoj.gov. Please note that the views expressed in this publication do not necessarily represent the views of this Office or those of the United States Department of Justice.

Office of Immigration Litigation

"To defend and preserve the Executive's authority to administer the Immigration and Nationality laws of the United States"

If you are not on our mailing list or for a change of address please contact francesco.isgro@usdoj.gov

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