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Immigration Litigation Bulletin

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DEPARTMENT OF HOMELAND SECURITY OPENS FOR BUSINESS — IMMIGRATION FUNCTIONS TO BE TRANSFERRED MARCH 1

The Department of Homeland Security (DHS) officially opened its doors on January 24, 2003, as Governor Tom Ridge was sworn in by the President as its first Secretary, and employees began moving to its headquarter located in a military compound in Washington, D.C.

The new Department, established by the Homeland Security Act of 2002 (HSA), will bring together 190,000 federal employees from 22 existing agencies, including the Immigration and Naturalization Service (INS). Most of the agencies, including the Secret Service, Coast Guard, Customs Service, INS, and Transportation Security Administration, will merge under DHS on March 1, 2003. On that date, the INS will cease to exist and its functions will be transferred from the Department of Justice to DHS.

Most of the INS enforcement functions will be transferred to the Border and Transportation Security Directorate (BTS), while the service functions will be transferred to the Bureau of Citizenship and Immigration Services (BCIS). On January 29, 2003, at a ceremony held at INS headquarters, Asa Hutchinson was sworn in as the first Undersecretary for Border and Transportation Security. He will lead the 100,000-employee Directorate responsible for securing the nation's borders and transportation infrastructure.

> The enforcement functions of the INS will be transferred to the Bureau of Customs and Border Protection and to the Bureau of Immigration and Customs Enforcement.

Under the HSA, INS enforcement functions were planned to be transferred to the Bureau of Border Security under the BTS. However, on January 30, the President submitted to Congress, pursuant to HSA § 1502, a modification to the Department of Homeland Security Reorganization Plan to establish an additional enforcement bureau also under the BTS and to rename them accordingly. Under the new plan, the enforcement functions of the INS will be transferred to the Bureau of Customs and Border Protection and to the Bureau of Immigration and Customs Enforcement. The "service" functions of

(Continued on page 2)

GOVERNMENT FILES CERT PETITION IN CASE INVOLVING A DENIAL OF AN MTR OF AN IN ABSENTIA ORDER

The Solicitor General has filed petition for certiorari suggesting that the Supreme Court summarily reverse the Ninth Circuit's decision in ***Singh v. INS***, 295 F.3d 1037 (9th Cir. 2002) (*pet. cert. filed* Jan. 29, 2003) because it "is manifestly inconsistent with the plain language of the Immigration Act of 1990 and other circuits' application of that Act." The question as presented to the Court is "whether a mistake by an alien regarding the time of his hearing—notwithstanding his receipt of a notice correctly stating the date, time, and place of the hearing—may constitute 'exceptional circumstances' beyond the control of the alien for his failure to appear."

Under the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, an alien who fails to appear for

(Continued on page 6)

SEVENTH ANNUAL IMMIGRATION LITIGATION CONFERENCE TO FOCUS ON SECURITY ISSUES AND REORGANIZATION UNDER THE HOMELAND SECURITY ACT OF 2002

The theme of the Seventh Annual Immigration Litigation Conference, sponsored by the Civil Division's Office of Immigration Litigation, is "Immigration and Homeland Security - Litigation and Reorganization." The Conference will be held on April 21-24, 2003, in St. Louis, Missouri, commencing on the evening of Monday, April 21st with an opening reception. There will be three full days of substantive presentations. Attendees are responsible for their own hotel, travel, and *per diem* costs. Registration and training materials are provided at no cost.

(Continued on page 13)

Highlights Inside

DEPARTMENT OF HOMELAND SECURITY TO ABSORB INS ON MARCH 1, 2003

(Continued from page 1)
the INS as described under HSA § 451 will transfer to the Bureau of Citizenship and Immigration Services.

Bureau of Customs and Border Protection (BCBP)

This new Bureau will bring together approximately 30,000 employees including 17,000 inspectors in the Agricultural Quarantine Inspection program, INS inspection services, Border Patrol, and the Customs Service, including canine enforcement officers. "Instead of four faces at the border, America will have one," said Secretary Ridge in announcing the reorganization plan. "The focus here is to help legitimate foods and people enter our country swiftly, and keep dangerous people and their weapons out," he added.

"Instead of four faces at the border, America will have one."

The BCBP will be headed by the Commissioner of Customs who will report to the Under Secretary for Border and Transportation Security. The current Commissioner of Customs is Robert C. Bonner.

Bureau of Immigration and Customs Enforcement (BICE)

This Bureau will bring together the enforcement and investigation arms of the Customs Service, the investigative and enforcement functions of Immigration and Naturalization Service, and the Federal Protective Services. As Secretary Ridge characterized it while speaking recently in Miami, "this Bureau will enforce the laws once the borders are crossed." "We want to make absolutely certain, to the very best of our ability, that questions of immigration status, customs issues, interdiction laws, and detention concerns receive the full attention of our officers and our criminal investigators," said the Secretary.

The reorganization involves approximately 14,000 employees, including 5,500 criminal investigators, 4,000 employees for immigration and deportation services, and 1,500 Federal Protective Service personnel. They will focus on the mission of enforcing the full range of immigration and customs laws within the interior of the United States in addition to protecting specified federal buildings.

This Bureau will be headed by an Assistant Secretary who will report directly to the Undersecretary for Border and Transportation Security and will advise the Under Secretary on any policy or operation of the Bureau that may affect the Bureau of Citizenship and Immigration Services.

The President intends to nominate Michael J. Garcia, who is currently the Acting Commissioner of the INS, to head this new Bureau. Commissioner Garcia previously served as the Assistant Secretary of Commerce for Export Enforcement. From 1992 until 2001, he served as an Assistant United States Attorney in the Southern District of New York.

Bureau of Citizenship and Immigration Services (BCIS)

The newly created Bureau of Citizenship and Immigration Services will absorb the "service" functions of the INS. The President plans to nominate Eduardo Aguirre to oversee this Bureau. He is currently vice chairman and first vice president of the U.S. Export-Import Bank. He will report to Gordon England, who was confirmed by the Senate on January 30 as the first Deputy Secretary of DHS. Under the Homeland Security Act, the following INS adjudications (including personnel, infrastructure, and funding) are transferred to the BCIS: immigrant visa petitions, naturalization petitions, asylum and refugee applications, applications performed at service centers, and all other adjudications performed by the INS immediately before the date when the functions are transferred to DHS.

Section 451(d) of the HSA establishes the position of Legal Advisor to the Director of BCIS. The legal advisor will be responsible for "providing specialized advice, opinions, determinations, regulations, and any other assistance to the Director of the BCIS," and "representing the BCIS in visa petition appeal proceedings before the Executive Office for Immigration Review."

Section 451(f) of the HSA established the position of Chief of the Office of Citizenship whose role will be to promote instruction and training on citizenship responsibilities for aliens interested in becoming naturalized citizens of the United States.

In addition to the three bureaus, HSA § 475 creates within the Office of Deputy Secretary, a Director of Shared Services who will be responsible for the coordination of resources for the Bureau of Border Security, now split into two bureaus, and the Bureau of Citizenship and Immigration Services, including-- (1) information resources management, including computer databases and information technology; (2) records and file management; and (3) forms management.

As this historic reorganization of federal agencies is officially underway, government attorneys who appear in court on immigration cases will not only be defending the decisions of the Attorney General as made through the Board of Immigration Appeals and Immigration Judges, but also the actions of the Secretary of Homeland Defense as he confronts the challenges of enforcing our immigration laws.

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We Want Asylum Too: Claims to Refugee Protection by Aliens Located in the Commonwealth of the Northern Mariana Islands

In September 1999, two natives of China located on the island of Saipan filed suit against the United States and the Commonwealth of the Northern Mariana Islands ("CNMI"), an unincorporated territory of the United States. One of the plaintiffs was subject to deportation from Saipan because he had overstayed his guest-worker visa. The other was in transit from the United States back to China when he stopped in Saipan and overstayed his visitor visa. Both plaintiffs claimed that if they were deported to China from Saipan they would suffer persecution or torture. To avoid deportation, they wanted to apply for asylum so that they could remain on Saipan or come to the United States. However, asylum is not available to aliens located on Saipan. Saipan is an island within the CNMI. The immigration laws of the United States do not apply in the CNMI, and the CNMI itself does not have a process for aliens to apply for asylum. Nonetheless, plaintiffs argued that the United States' domestic immigration law, international agreements, and general customary international law obligated the United States or the CNMI government to prevent their return from Saipan to their native countries. It was not long before 22 additional plaintiffs joined in their suit. Nearly all of the additional plaintiffs, from China, Sri Lanka, and Bangladesh, had gone to Saipan as guest-workers or on visitor visas as had the lead plaintiffs and made their claims of persecution known after the lawsuit had been initiated.

Over three years later, this case is on its fifth amended complaint and remains pending before the United States Federal District Court for the Northern Mariana Islands. Discovery will soon commence.

Saipan is one of three islands, including Rota and Tinian, that make up the CNMI. It is located in the South Pacific, not far from the island of Guam. The CNMI's relationship with the United States began after World War II when the United Nations established the Trust Territory of the Pacific Islands, which included the CNMI. The United States administered the trusteeship. In 1972, the CNMI broke off from the other Pacific Islands included in the trustee agreement and negotiated separately with the United States, hoping to form a close and permanent political relationship with the United States. The negotiations resulted in the "Covenant," an agreement which defines and governs the political relationship between the United States and the CNMI.

The Covenant provides, among other things, that the immigration and naturalization laws of the United States do not apply to the CNMI, except in limited circumstances providing for the acquisition of U.S. citizenship at birth, the petitioning process for immediate relatives of U.S. citizens, and the loss of U.S. nationality. At the same time, the Immigration and Nationality Act ("INA"), which codifies the United States immigration and naturalization laws, by its own terms applies only to the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands. This means that the asylum and withholding of removal provisions of the INA do not apply to the CNMI. Accordingly, the CNMI controls its own immigration through its domestic law. Although the CNMI allows for the admission of guest-workers and investors, it does not allow for those guest-workers or investors to gain permanent resident status. The CNMI also has not developed a system for allowing persons within its boundaries to apply for asylum or protection from being returned to countries where they fear persecution on account of race, religion, nationality, political opinion, or social group, or where they fear torture. Nevertheless, the Covenant provides that the treaties of the United States shall be the supreme law of the CNMI. Thus, the United States is meeting with representatives of the CNMI government to discuss methods for the CNMI to implement the international obligations of the United States relating to protection from persecution or torture.

Plaintiffs argued that United States domestic immigration law, international agreements, and general customary international law obligated the United States or the CNMI government to prevent their return from Saipan to their native countries.

Claiming a lack of an available forum to apply for asylum, the plaintiffs mentioned above, who are located in the CNMI, filed suit against the United States and the CNMI. They claimed that procedures should be available to allow them to apply for refugee status, asylum, or protection from torture. They base their claims on the INA at sections 207, 208, and 241(b)(3); on international agreements including Article 33 of the 1951 Convention Relating to the Status of Refugees ("1951 Convention"), the 1967 Protocol Relating to the Status of Refugees ("1967 Protocol"), and the 1985 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture"); and on domestic legislation implementing the Convention Against Torture, known as the Foreign Affairs Reform and Restructuring Act of 1998 ("FARR Act").

The United States' position is that the plaintiffs are unable to apply for asylum or protection under the INA while they are located in the CNMI. The INA by its own terms does not apply to aliens located in the CNMI, and the Covenant makes clear that the CNMI controls its own immigration laws. Neither do plaintiffs qualify as refugees located outside of the United States who may obtain admission under section 207 of the INA. Moreover, the international agreements relied upon by

(Continued on page 4)

ASYLUM CLAIMS IN CNMI

(Continued from page 3)

the plaintiffs are not self-executing and do not provide plaintiffs with a right of action. The United States was not a signatory to the 1951 Convention. Thus, the plaintiffs cannot rely on Article 33 of the 1951 Convention directly. Although the United States acceded to the 1967 Protocol which bound parties to comply with the substantive portions of Articles 2 through 34 of the 1951 Convention, the 1967 Protocol is not self-executing and required implementing legislation to make it operative. The implementing legislation was enacted in the 1980 Refugee Act, which amended the INA. The Convention Against Torture is also not self-executing. The FARR Act provided for the Convention's implementation through regulations consistent with the INA. Again, because the INA does not apply to the CNMI, the United States is without legislative authority to provide procedures under either the 1967 Protocol or the Convention Against Torture within the CNMI. Instead, the CNMI is obliged under the Covenant to ensure that at least the minimal international obligations of the United States are met within its borders.

Because the INA does not apply to the CNMI, the United States is without legislative authority to provide procedures under either the 1967 Protocol or the Convention Against Torture within the CNMI.

The CNMI litigation is important to the United States for a number of reasons. First, it would be inappropriate for the court to create a judicial remedy in this case. Treaties without implementing legislation, such as are involved in this case (as far as the CNMI is concerned), do not provide a remedy that is judicially enforceable. As a result, the court is without legal authority to create a remedy in this situation where the INA does not govern. Rather, under such circumstances, it is within the exclusive province of the political branches to implement the international obligations of the United States.

Second, the case implicates the authority of the United States to maintain its borders. The United States does not control the question of which aliens the CNMI allows to enter its islands. As a result, if the court were to order that a process be established whereby the aliens located in the CNMI were allowed to pass through to the mainland United States, the CNMI would gain the authority to determine who may enter the United States. This would cause grave security concerns and have possible implications reaching Guantanamo Bay, Cuba. Conceivably, it might also lead Congress to enact legislation restricting the CNMI's ability to control its own immigration.

Third, the case implicates our interdiction efforts. By Executive Order, the Coast Guard is directed to intercept vessels believed to be illegally transporting passengers and to return the vessel and its passengers when there is reason to believe that an offense is being committed against the U.S. immigration laws, or relevant laws of a foreign country. The Order authorizes the Attorney General to determine in his discretion that a person who is a refugee will not be returned without his consent. Occasionally, the United States is required to take interdicted aliens to places under its sovereignty, but where the INA is inapplicable. If the courts were to find that the INA's inapplicability is of no concern and that aliens have a right to apply for asylum even where the INA does not apply, the U.S. would potentially have to offer much more detailed procedures that are available as a matter of discretion at this point.

Fourth, an examination of the population of the CNMI shows the magnitude of the number of people who ultimately may be affected by this lawsuit. The 2000 Census indicated that the population of the CNMI was approximately 69,000 persons. Approximately 39,000 of the population were aliens, making up a little over 56% percent of the total, with nearly half of those aliens entering the CNMI after 1990. Consequently, as many as 39,000 inhabitants of the CNMI may wish to apply for protection from return to their native countries. If the rate of persons arriving on the CNMI continues as it has been over the past ten years, approximately 19,000 new persons may arrive in the CNMI within the next decade. Depending on the result of this lawsuit, those 19,000 new persons may have an opportunity to apply to the CNMI or even the United States for protection from return to their native countries. The effect on the United States immigration system and the CNMI, with its lagging economy, is potentially quite large.

For these reasons, the United States is working hard to defend its position in this case while at the same time working to find a durable solution for CNMI-located aliens fearing persecution or torture in their native countries.

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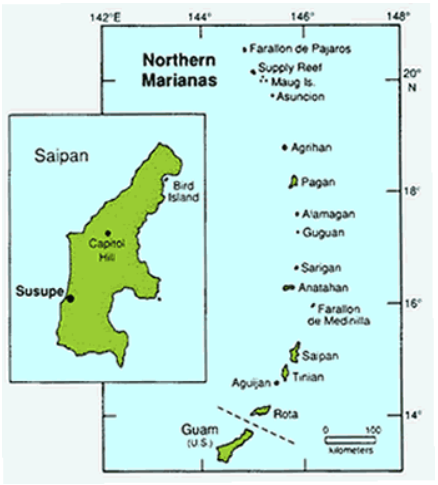
MAP OF THE CNMI



VIEW FROM ABROAD: IRISH SUPREME COURT ISSUES LANDMARK IMMIGRATION DECISION IN CITIZENSHIP CASE

The Supreme Court of Ireland sent shock waves through the legal and immigrant community of the Emerald Island on January 23, 2003, by issuing a landmark immigration decision holding that the Irish government may deport the alien parents of Irish-born citizen children. Although the ruling would seem to be unremarkable under the law of the United States, the Ireland Supreme Court's ruling captured headlines in newspapers all across the Republic of Ireland, and has sparked critical commentary on editorial pages and spirited debates on Irish radio and television. Unlike all other countries in the European Union (but like the United States), Ireland grants citizenship at birth to all persons born within the Republic of Ireland, under both its Constitution and the Irish Citizenship and Nationality Act of 1956. Moreover, until the recent Supreme Court decision, Ireland generally recognized the right of children born in Ireland to the society and protection of their parents within Ireland, even if their parents had no other legal right to remain in the country.

The Irish government argued that removal of the alien parents from Ireland was justified by the "overriding need to preserve respect for and the integrity of the asylum and immigration systems."

The new Supreme Court decision in the consolidated case of *D.L, et al. v. Minister for Justice* and *A.O. and O.J.O. v. Minister for Justice* effectively reversed a 1990 ruling of the Irish Supreme Court in *Fajujonu v. Minister for Justice* [1990] 2 IR 151, which had been interpreted to create a presumption that illegal alien parents of Irish-born citizen children were entitled to remain in Ireland so as not to deprive the children of their fundamental family rights recognized by Article 41 of the Irish Constitution. In the years after the decision in *Fajujonu*, thousand of illegal aliens have been granted permission to remain in Ireland after giving birth to children within the country.

Fajujonu involved a child born in Ireland to a Moroccan mother and Nigerian father. The parents had entered the country illegally in 1981, and gave birth to their daughter in Dublin in 1983. Two more children were born to the couple after deportation proceedings commenced. The government sought to remove the Fajujonus pursuant to the Aliens Act of 1935, and the family moved to quash the deportation order in the Irish courts. The case reached the Supreme Court in 1989, and although the Court generally recognized the power of the government to remove the Fajujonus, the Court also recognized that deportation of the parents would implicate "a constitutional right of great importance which could only be restricted or infringed for very compelling reasons." 2 IR at 162. That right, the Court said, was the "fundamental" right of an Irish-born child, explicitly recognized by Ireland's Constitution, to "the company, care, and parentage of their parents within a family unit." *Id.* According to the Court, the Minister for Justice should reconsider his decision to deport the Fajujonus and could again order deportation "only if, after due and proper consideration, he is satisfied that the interests of the common good and the protection of the State and its society justifies an interference with what is clearly a constitutional right." *Id.* Such a decision, the Court went on, was "a discretion which could only be carried out after and in the light of a full recognition of the fundamental nature of the constitutional rights of the family" and would only be justified by "a grave and substantial reason associated with the common good." *Id.* A concurring Justice added that the Minister for Justice "would have to be satisfied, for stated reasons, that the interests of the common good of the people of Ireland and of the protection of the State and its society are so predominant and so overwhelming in the circumstances of the case, that an action which can have the effect of breaking up this family is not so disproportionate to the aim sought to be achieved as to be unsustainable." *Id.* at 166.

In its latest decision, the Supreme Court revisited the issue presented by *Fajujonu*, and spent considerable time and effort attempting to interpret the meaning of the two separate opinions issued by the Court in that 1990 case. Each of the seven Supreme Court Justices issued written opinions in the *O.L.* and *A.O.* case, five in favor of the government, and two in favor of the applicants. In all, the Court devoted 342 pages of analysis to the case, which involved two sets of non-national parents, a Czech couple with a son born in Ireland in November 2001, and a Nigerian man with a son born in Ireland in October 2001. The government sought deportation in both cases despite the Irish-born children, and the High Court of Ireland ruled in April 2002 that the families were not entitled to remain in Ireland. The government's efforts to obtain deportation orders were based, in part, on the Dublin Convention, to which Ireland is a party. Under the Dublin Convention, applications for asylum are examined by a single member state; in both cases, the parents applied for asylum in Ireland shortly after being denied asylum in the United Kingdom. The government argued that removal of the alien parents from Ireland was justified by the "overriding need to preserve respect for and the integrity of the asylum and immigration systems."

The judgment of the Supreme Court was rendered in a 68-page decision written by Mr. Chief Justice Ronan Keane. The Chief Justice first distinguished the *Fajujonu* case on the basis that the family in that case, which included three Irish-born children, had resided in Ireland for several years prior to the Supreme Court's ruling, while the

(Continued on page 6)

GOVERNMENT FILES PETITION FOR CERTIORARI IN CASE INVOLVING AN IN ABENTIA ORDER OF DEPORTATION

(Continued from page 1)
proceedings to deport him from the United States shall be ordered deported, *in absentia*, if the INS establishes that the alien received notice of the proceedings and is deportable. 8 U.S.C. 1252b (c)(1) (1994). The alien may seek rescission of the *in absentia* order if he files a timely motion to reopen and "demonstrates that the failure to appear was because of exceptional circumstances." 8 U.S.C. 1252b(c)(3)(A) (1994). "Exceptional circumstances" are statutorily defined to be "exceptional circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien." 8 U.S.C. 1252b(f)(2) (1994).

In this case, the alien, a citizen of India, entered the United States illegally in 1990. In 1993, he married a lawful permanent resident, who has since become a United States citizen. The alien was placed into deportation proceedings in 1994. The hearing was continued a number of times to permit the alien to transfer the venue of his case and to obtain an attorney. Following his wife's naturalization, he applied for adjustment of status to lawful permanent resident. That application was scheduled to be considered at a removal hearing at 11:00 a.m., on January 21, 1998. When he failed to appear, he was ordered *in absentia* to be deported. The alien, however, did not promptly notify the immigration judge of the alleged confusion. Instead, nearly two months later, he filed a motion to reopen the deportation proceeding.

The immigration judge denied the motion to reopen and the BIA affirmed that decision finding that the "contention that he was not aware of the correct time for the hearing simply does not establish exceptional circumstances for his failure to appear." The Ninth Circuit, finding it an "a highly unusual case" and "exceptional" because, in light of the prospect that he would receive relief, "the alien had no possible reason to try to delay the hearing," reversed the BIA and remanded it for consideration of the merits of the alien's application for relief from deportation.

In the petition for certiorari, the Solicitor General contends that the Ninth Circuit's decision "threatens – contrary to congressional intent – to create new opportunities for delay of removal proceedings and to place substantial new burdens on immigration judges and the BIA." According to EOIR, in FY 2002, immigration judges entered 37,281 in absentia orders nationwide, of which 7,898 were entered in the Ninth Circuit. In more than half of the in absentia orders entered in the Ninth Circuit, the alien had made a claim for relief from deportation, such as an application for asylum and adjustment of status. Therefore, if the Ninth Circuit ruling is not reversed, "appearance at deportation proceedings effectively would become optional rather than mandatory whenever the alien has a facially valid claim of eligibility from removal." "Such a judicially crafted regime would defeat Congress's underlying objective of 'ensuring that aliens properly notified of impending deportation proceedings in fact appear at such proceedings," argues the Solicitor General.

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CITIZENSHIP RULING BY IRISH COURT

(Continued from page 5)
families in the present case had each resided in Ireland for less than two years. The Chief Justice also cited other changed circumstances arising in the years since the *Fajujonu* ruling: intervening legislation setting forth "an elaborate statutory framework" for adjudication of asylum applications; an influx of immigrants to Ireland reflected by an overall increase in the number of asylum applications from 424 in 1995 to 10,924 in 2000; and the Dublin Convention, to which Ireland became a party following enactment of the Irish Refugee Act of 1996. Recognizing the inherent power of the Irish state to expel or deport non-nationals, the Chief Justice rejected the notion that Irish-born children have an absolute constitutional right to the care and company of their parents in Ireland "where the parents have no legal right to reside in the State and can lawfully be expelled from the State." In exercising discretion to order deportation in such circumstances, the Court held, the government is entitled to take into account general policy considerations such as the Dublin Convention and the concern for the integrity of the asylum process. "While the Minister must consider each case involving deportation on its individual merits," the Chief Justice wrote, "he is undoubtedly entitled to take into account the policy considerations which would arise from allowing a particular applicant to remain where that would inevitably lead to similar decisions in other cases, again undermining the orderly administration of the immigration and asylum system." Notably, the Court's judgment cites as persuasive authority three U.S. Court of Appeals decisions addressing similar issues involving the rights of illegal alien parents when children are born in the United States: *Perdido v. INS* (5th Cir. 1969), *Acosta v. Gaffney* (3rd Cir. 1977), and *Schleiffer v. Meyers* (7th Cir. 1981).

The Minister for Justice responded almost immediately to the decision by issuing a statement indicating that the government would not attempt to execute large-scale deportations from Ireland. The overall impact of the decision on Irish immigration law thus will likely take several years to sort out.

By David McConnell
***Ed. Note**: Mr. McConnell, OIL's Deputy Director is currently in Ireland as a Visiting Professor at the University College Cork.*

Summaries Of Recent Federal Court Decisions

ASYLUM

■District Court Grants Permanent Injunction And Certifies A Nationwide Class Enjoining Removal To Somalia

In ***Ali Ali v. Ashcroft***, No. C02-2304 (D. W.D. Wash. January 17, 2003) (Pechman), the district court issued a permanent injunction on behalf of a nationwide class to enjoin removal of all persons in the United States who are believed to be subject to final orders of removal, deportation, or exclusion to Somalia, excluding those with a habeas petition pending, or on appeal, raising the issue of unlawful removal to Somalia under 8 U.S.C. § 1231(b). The court found that Somalia had been without a central government since 1991. The court also found that Section 1231(b) requires that a government of a receiving country accept the removal of an alien, and the Attorney General has no authority to effect removal to a country where there is no government. The court held that the Attorney General and INS Commissioner were proper respondents because this matter was an exceptional case and the detention and removal of Somalis was directed at a high level within the Government. Because removal to Somalia would violate Section 1231(b) and conditions in Somalia would not likely change in the near future, the court directed INS to release three of the named petitioners under *Zadvydas v. Davis*, 533 U.S. 678 (2001).

The district court held that the Attorney General has no authority to effect removal to a country where there is no government.

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Ed. Note: *The decision and a partial transcript of the proceedings are available on the OIL web site.*

■Ninth Circuit Remands Asylum Case Pursuant to Supreme Court's Decision

In ***Ventura v. INS***, __F.3d___, 2003 WL ____, (9th Cir. January 17, 2003) (Schroeder, Lay (8th Cir.), Thompson), the Ninth Circuit remanded the case to the BIA following a remand from the Supreme Court. However, the court ordered the BIA that in the event it reopens the record to consider the changed circumstances, the BIA should permit petitioner to present the new evidence of family persecution which he sought to present in his motion to reopen.

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■Seventh Circuit Holds Immigration Judge Violated Due Process In Asylum Case

In ***Kerciku v. INS***, 314 F.3d 913 (7th Cir. January 3, 2003) (Ripple, Rovner, Wood) (*per curiam*), the Seventh Circuit held that the petitioner and his wife were denied due process when the Immigration Judge excluded much of their proposed testimony.

The petitioner and his wife, both Albanian nationals, sought asylum on the basis of petitioner's pro-democracy political views and activities. At the removal hearing, after questioning the petitioner about documents that he had submitted to corroborate his claim, the Immigration Judge discredited his testimony as being "incredible" and found the documentation "fabricated." The IJ then ended the hearing without allowing any other testimony, and denied their applications for asylum. Petitioner appealed to the BIA arguing that the IJ violated their due process rights. The BIA dismissed the appeal without responding to the due process argument.

The Seventh Circuit distinguished this case from hearings where an active IJ excludes irrelevant testimony and focuses the proceedings, holding that a due process violation arises when the alien is barred from presenting "complete chunks of oral testimony that would support [his] claims." The court remanded for a new hearing and strongly recommended re-assignment to another Immigration Judge.

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CANCELLATION & SUSPENSION

■Ninth Circuit Holds That "Voluntary Departure" Breaks The Continuous Physical Presence Required For Cancellation Of Removal

In ***Vasquez-Lopez v. Ashcroft***, __F.3d__, 2002 WL 103002 (9th Cir. January 13, 2003) (Stapleton, by designation, O'Scannlain, Fernandez) (*per curiam*), the Ninth Circuit affirmed the BIA's denial of cancellation of removal. The petitioner illegally entered the United States in 1988. At some point during the period of 1992 to 1994, he was arrested by the INS, successfully applied for voluntary departure, and was escorted to Mexico by the Border Patrol. Subsequently, he again illegally entered the United States. When placed in removal proceedings, he applied for cancellation of removal under INA § 240A, 8 U.S.C. § 1229b. The BIA eventually held that petitioner was ineligible for cancellation because he could not satisfy the 10-year physical presence statutory requirement. The BIA rejected petitioner's argument that he could establish the required ten years' continuous physical presence by adding together the time before his voluntary departure and the time after his illegal

(Continued on page 8)

Summaries Of Recent Federal Court Decisions

(Continued from page 7)

return. The BIA found the alien's voluntary departure, coerced by the alternative of removal, inconsistent with the ability to continue accruing physical presence.

The Ninth Circuit held that the BIA's interpretation of the voluntary departure statute was reasonable and therefore entitled to deference under *Chevron* and *Aguirre-Aguirre*. The court rejected petitioner's contention that IIRIRA's amendments now provide for a bright-line rule that all absences are to be ignored if they last less than 90 days and do not exceed 180 days in the aggregate. The court deferred to the BIA's interpretation that the "'continuous physical presence' requirement continues to mean the same thing in the context of voluntary departure that it meant before the 1996 amendments."

The "'continuous physical presence' requirement continues to mean the same thing in the context of voluntary departure that it meant before the 1996 amendments."

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■Eighth Circuit Finds Jurisdiction To Review The BIA's Good Moral Character Determination For Purpose Of Suspension Of Deportation

In ***Ikenokwalu-White v. INS***, __F.3d__, 2003 WL 138874 (8th Cir. Jan. 21, 2003) (McMillian, *Melloy*, and Frank (District Judge)), the Eighth Circuit held that the BIA's determination that petitioner did not establish good moral character for purpose of suspension of deportation was a nondiscretionary, reviewable determination under IIRIRA's transitional rule.

The petitioner, a citizen of Nigeria, entered the United States on August 21, 1977, and as phrased by the court, "has a long history with the INS including two rescissions of permanent resident status." The instant proceedings commenced in 1995 when petitioner was placed in deportation proceedings on the basis of overstaying her student visa. During the hearing petitioner applied for suspension of deportation. An IJ determined that she was ineligible for that relief because she lacked good moral character and could not show extreme hardship. The BIA affirmed the IJ's order finding that petitioner lacked good moral character. The BIA found it unnecessary to address the extreme hardship requirement. The BIA also denied voluntary departure based on the same evidence supporting the finding of lack of good moral character.

Before the Eighth Circuit, petitioner argued that the IJ and BIA impermissibly relied on expunged convictions and conduct which occurred outside the three-year period for which good moral character was required. Preliminarily, the court rejected the government's contention that under IIRIRA's transitional rules, the court lacked jurisdiction to review the good moral character determination because it was based under the catch-all provision under INA § 101(f), 8 U.S.C. § 1101(f). The court reached this conclusion in light of the statutory language, the purpose underlying the statute, and the treatment of the issue by courts prior to IIRIRA. On the merits of the appeal, however, the court found that the BIA properly considered expunged convictions in making a moral character determination in conjunction with an application for suspension of deportation. "A contrary holding would lead to anomalous results whereby an alien's treatment for immigration purposes would depend upon the vagaries of state law and geographical happenstance." The court also found it permissible for the BIA to consider past, pre-statutory period, conduct in determining present moral character, "but that such conduct cannot be used as the sole basis for an adverse finding of that element."

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CONVENTION AGAINST TORTURE

■District Court Holds That Removal Of Alien Who Cooperated In Federal Drug Prosecution Resulting In Threats To His Life Would Violate Due Process Under State-Created Danger Exception

In ***Builes v. Nye***, __F. Supp. 2d__, 2003 WL 132540 (M.D. Pa. January 2, 2003) (Caldwell), the district court granted the habeas petition of a Colombian citizen who had cooperated in a federal drug prosecution as part of a plea agreement. The petitioner was placed in removal proceedings after he had been convicted for conspiracy to distribute cocaine. At the hearing petitioner testified that he and his family had been threatened if he cooperated with the prosecutors. The evidence indicated that at petitioner's sentencing hearing, the prosecutor had stated that petitioner had cooperated fully with the investigation of two major drug dealers. Petitioner sought withholding of removal under INA § 241(b)(3), 8 U.S.C. §1231(b)(3), and under the Convention Against Torture (CAT). The IJ rejected the CAT claim but granted withholding of removal. The BIA affirmed the CAT denial but reversed the grant of withholding finding that distribution of large quantities of a dangerous drug precluded the granting of withholding under INA 241(b)(3)(B)(ii).

In his habeas petition, petitioner challenged the CAT denial and contended that his removal to Colombia would violate his right to substantive due process because he would be killed by drug traffickers upon his return as a result of his cooperation with American prosecutors.

Preliminarily, the district court rejected the government's argument that it lacked jurisdiction to consider the CAT claim. It reasoned that under 28 U.S.C. § 2241 the court had jurisdiction to hear

(Continued on page 9)

Summaries Of Recent Federal Court Decisions

(Continued from page 8)

claims that the INS had misrepresented a statute or a regulation. However, on the merits it agreed with the BIA's finding that the petitioner had not met his burden of showing acquiescence by the Colombian government in torture, and thus affirmed the denial of withholding under CAT.

The district court then applied the state-created danger exception to find a violation of substantive due process. Specifically, it found that if petitioner is returned to Colombia, his murder would be a foreseeable and fairly direct result of INS' action to remove him. It found that the INS' attempts to remove petitioner showed a deliberate indifference to an excessive risk to his safety and thus shocks the conscience. It also found that there was a relationship between the INS and petitioner, because the INS was detaining petitioner in furtherance of its efforts to remove him. Finally, it found that removing petitioner to Colombia would create an opportunity for drug traffickers there to kill him, which otherwise would not have existed. The district court ordered petitioner's immediate release from custody and permanently enjoined the government from removing him to any country.

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DETENTION

■Fifth Circuit Holds That Filing Of INS Detainer Does Not Place Alien Serving Prison Sentence In INS Custody

In ***Zolicoffer v. USDOJ***, __F.3d__, 2003 WL 15899 (5th Cir. January 7, 2003) (Davis, Wiener, Garza)(*per curiam*), the court held that petitioner, who was still serving his criminal sentence when the INS lodged a detainer against him, was not in INS "custody" for habeas purposes. The court followed the majority of the circuit courts that have considered the issue. *See e.g. Campos v. INS*, 62 F.3d 311 (9th Cir. 1995); *Galaviz-Medina v. Wooten*, 27 F.3d 487 (10th Cir. 1994); *Orozco v. INS*, 911 F.2d 539 (11th Cir. 1990); *Mohammed v. Sullivan*, 866 F.2d 258 (8th Cir. 1989).

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FUGITIVE DISENTITLEMENT

■Ninth Circuit Applies Doctrine of Fugitive Disentitlement To Alien With Pending Petition For Review

In ***Antonio-Martinez v. INS***, __F.3d__, 2003 WL 194410 (9th Cir. Jan. 30, 2003) (*Kozinski,* Kleinfeld, George (D. Nev.)), the Ninth Circuit held that the doctrine of fugitive disentitlement applies to an alien who has a pending petition for review. The petitioner, an asylum applicant from Guatemala, was placed in proceedings in 1985, and filed a petition for review in 1990, when the BIA denied his application for asylum. The petition was subsequently dismissed without prejudice, but the mandate was withheld to permit petitioner to exercise his rights under the agreement set forth in *American Baptist Church (ABC) v. Thornburgh*, 70 F. Supp. 796 (N.D. Cal. 1991) (providing *inter alia* for a *de novo* asylum review for qualified class members). In October 2000, petitioner's counsel informed the court that he had lost contact with his client. The INS, too, was unable to locate the petitioner. The court then *sua sponte* reinstated the petition for review and directed the parties to brief the issue.

"Those who invoke our appellate jurisdiction must take the bitter with the sweet: They cannot ask to overturn adverse judgments while insulating themselves from the consequences of an unfavorable result."

The court held that it would be appropriate to apply the doctrine of fugitive disentitlement to an alien who has a petition for review pending where he cannot be contacted by his counsel and the INS. "Applying the fugitive disentitlement doctrine here furthers its punitive and deterrent purposes," said the court. "The prospect of disentitlement provides a strong incentive to maintain contact with the INS and counsel, rather than taking one's continued presence in the country for granted." Applying the doctrine also responds appropriately to the consequences of petitioner's absence. The court explained that "those who invoke our appellate jurisdiction must take the bitter with the sweet: They cannot ask to overturn adverse judgments while insulating themselves from the consequences of an unfavorable result."

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JURISDICTION

■Tenth Circuit Finds That The Timely Filing Of A Petition For Review Is Jurisdictional And Not Subject To Equitable Tolling

In ***Nahatchevska v. Ashcroft***, __F.3d__, 2003 WL 191550 (10th Cir. Jan. 29, 2003) (Bronrby, Lucero) (*per curiam*), the Tenth Circuit held that the timely filing of a petition for review is mandatory and jurisdictional and not subject to equitable tolling. The petitioner had been ordered removed on November 15, 2002. Under INA § 242 (b)(1) she had thirty days, or until December 16, 2002, to file her petition for review. However, she filed her petition on December 18, 2002. When petitioner moved the court for a stay of removal, the government objected and argued for dismissal in light of the untimely filing. Relying on *Stone v. INS*, 514 U.S. 386 (1995), the court held that it lacked jurisdiction to consider an untimely filed petition for review.

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(Continued on page 10)

Summaries Of Recent Federal Court Decisions

(Continued from page 9)

■Ninth Circuit Finds That It Lacks ■ Jurisdiction Over Untimely Filed PFR

In ***Ram Singh v. INS,*** __F.3d__, 2003 WL 77031 (9th Cir. January 10, 2003) (*Stapleton*, O'Scannlain, Fernandez), the Ninth Circuit found that it lacked jurisdiction over a petition for review untimely filed by nine months. The petitioner claimed that his appeal was untimely because the BIA did not mail its decision to his attorney, but instead mailed it to petitioner's address of record, from which he had since moved. Petitioner conceded that he had failed to notify the BIA of his current address, and that his attorney never filed a notice of appearance with the BIA. However, he argued that the BIA should have gleaned from his attorney's brief that he was represented and mailed the decision to his attorney.

The court held that the BIA was entitled to rely on the regulation requiring counsel to file a notice of appearance, and in the absence of such a notice, to treat petitioner as *pro se.* Thus, the BIA complied with the applicable regulations and the court found that it lacked jurisdiction over the appeal.

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■Ninth Circuit Finds Habeas Petition Not Mooted By Alien's Removal

In ***Zegarra-Gomez v. INS***, 314 F.3d 1124 (9th Cir. 2003) (Schroeder, Fletcher, *Weiner* (District Judge E.D. Pa.)), the Ninth Circuit held that the removal of an alien who had a pending petition for habeas, did not render the proceedings moot where the removal results in "actual" and "concrete legal disadvantages." The petitioner, a native of Peru, entered the United States in 1984. In 1995, the INS instituted deportation proceedings against the petitioner on the basis that he had been convicted of an aggravated felony. During the proceedings, he applied for relief under INA § 212(h), but expressly waived relief under INA § 212(c). The IJ denied § 212(h) relief and the BIA affirmed that decision. The INS issued a warrant of removal on July 28, 1999.

Petitioner then filed his habeas petition on July 19, 2000. While the petition was pending, the INS filed a Notice of Intent to remove him. Petitioner then filed a motion for a stay of deportation which was denied by the district court. The INS removed the petitioner on April 24, 2001, and the district court eventually dismissed the petition as moot.

The Ninth Circuit held that the habeas petition was not moot because petitioner was in custody when he filed his habeas petition "and continues to suffer actual collateral consequences of his removal." Accordingly, it remanded the petition to the district court to consider the merits of petitioner's claims.

The Ninth Circuit held that the habeas petition was not moot because petitioner was in custody when he filed his habeas petition "and continues to suffer actual collateral consequences of his removal."

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■Eighth Circuit Affirms BIA Where Alien's Arguments Are Waived, Unsupported, And Not Exhausted.

In ***Halabi v. Ashcroft***, __F.3d__, 2003 WL 138875 (8th Cir. January 21, 2003)(McMillian, Melloy, Frank (by designation)) the Eighth Circuit held that it would not hear petitioner's arguments concerning the merits of his pending motion to reopen before the BIA because he not exhausted those arguments.

The petitioner, a citizen of Israel, had been ordered removed as a nonimmigrant who remained in the United States longer than authorized. The BIA also found that petitioner was ineligible for cancellation of removal, because he could not demonstrate the ten years of continuous physical presence and the required hardship. Petitioner timely appealed that decision but also filed a motion to reopen with the BIA alleging, *inter alia*, a recent marriage.

Before the Eighth Circuit, petitioner did not challenge the merits of the BIA's order, but only the merits of his motion to reopen pending before the BIA. Preliminarily, the court noted that it had not yet decided whether the exhaustion requirements under INA § 242, 8 U.S.C. § 1252, were jurisdictional in nature. Nonetheless, assuming jurisdiction, the court held that it would not "address petitioner's unexhausted arguments regarding his recent marriage." The court also questioned whether it had jurisdiction to consider the denial of cancellation of removal. However, it did not decide that question because "petitioner waived any substantive objections to that ruling by failing to raise them in his appeal brief."

Finally, the court held that the alien offered no evidentiary support for his claim that his right to due process would be violated if he were removed during the pendency of his motion to reopen, and so declined to address the issue.

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MARRIAGE FRAUD

■Eighth Circuit Holds BIA Must Accept Immigration Judge's Credibility Findings, And Sua Sponte Orders BIA To Grant Alien Citizenship

In ***Mayo v. Ashcroft***, __F.3d__, 2003 WL 168254) (8th Cir. January 27, 2003) (Wollman, Lay, Heaney) the Eighth Circuit reversed the BIA's adverse credibility finding, and directed the BIA to grant the petitioner a waiver of inadmissibility, and *sua sponte* also directed the BIA to grant him citizen-

(Continued on page 11)

Summaries Of Recent Federal Court Decisions

(Continued from page 10)
ship.

The petitioner is a Filipino woman who obtained a immigrant visa as the unmarried daughter of a lawful permanent resident. In her visa application she also stated that she had no children. When she sought to enter the United States in 1987, an INS agent found pictures suggesting that she was married and had a child. Petitioner was paroled and at her request her case was transferred to Minnesota while the INS conducted an investigation in the Philippines. Subsequently, the INS found evidence, including a marriage license, that petitioner had been married at the time she obtained her immigrant visa. In light of the evidence, petitioner was placed in exclusion proceedings on the basis that she had obtained a visa by material misrepresentations. In response to the evidence, petitioner testified that she thought that she had only signed a proposal of marriage that was never certified. She admitted that she had a son. The Immigration Judge found her not credible and ordered her excluded. Petitioner appealed to the BIA. While her case was pending, she remained in INS custody.

On appeal to the BIA, petitioner argued that her marriage was void under Filipino law because her marriage ceremony had occurred before issuance of her marriage license. She proffered marriage documents which appeared to support her argument. The BIA affirmed the IJ's decision without considering the new evidence. Petitioner then challenged her exclusion order in the district court as she was required to do so by former INA § 106(b). The district court affirmed the exclusion order solely on the ground that petitioner had materially misrepresented that she had no children. The court did not determine the validity of the marriage.

On August 28, 1990, petitioner appealed to the Eighth Circuit and requested a stay of exclusion. The Eight Circuit granted the stay and ordered petitioner released to the custody of a relative. By this time petitioner had been in INS custody for 22 months. Subsequently, the Eighth Circuit reversed the district court finding that it had erred when it affirmed the exclusion order on a totally new ground. *Mayo v. Schiltgen*, 921 F.2d 177 (8th Cir. 1990). The Eighth Circuit determined that the BIA had relied on the misrepresentation of petitioner's marriage and not on her misrepresentation that she had no children. The court also determined that petitioner appeared pro se at her initial exclusion hearing and that she had a "marginal command of the English language." The court also noted that the investigative report prepared by the INS had not been served upon petitioner until her final hearing before the IJ, and consequently "did not have a fair opportunity to rebut" it. The court also questioned why the BIA had not remanded the case to permit the consideration of the new argument that the marriage was void. The court also expressed its concerns that an the exclusion order would be an harsh penalty because it would permanently bar petitioner from the United States. Accordingly, the court did not remand the case to the district court, but rather sent it back to the immigration judge for an evidentiary hearing.

Subsequently, between 1991-92, another Immigration Judge heard petitioner's case. On May 13, 1993, the IJ issued a decision finding that petitioner had not willfully misrepresented her marriage because she "honestly believed that she was not married." The IJ also found that even if the marriage ceremony took place, the ceremony was void because it was performed before the issuance of a marriage license. The IJ rejected the testimony of the Mayor in the Philippines who had performed the marriage ceremony, noting that he had given inconsistent statements. Apparently, the Mayor had also testified telephonically. Nonetheless, the IJ found that petitioner's testimony was "straightforward and credible." The INS appealed that decision on May 29, 1993. On April 29, 2002, nine years later, the BIA reversed the IJ's decision finding that petitioner had continually and materially misrepresented her marital status to authorities. The BIA also found that the Mayor from the Philippines had provided credible testimony about the validity of the marriage.

The Eighth Circuit again reversed the BIA. The court held that the BIA had misread its prior opinion, erred in relying on evidence from the first defective hearing, and failed to give "proper deference" to the second IJ's credibility findings. The court found that the BIA had failed to give proper deference to the IJ's credibility findings. It also found that the BIA erred for relying on the prior IJ's opinion to dispute petitioners credibility. The court further found that petitioner's marriage was void because it was performed prior to the time that a valid marriage license was signed by the Filipino Mayor. The court also found that the IJ had properly exercised his discretion in granting the 212(k) waiver and that the BIA had not addressed that issue. Finally, the court rejected the government's contention that under *Ventura*, the case should be remanded to the BIA. It said the circumstances in this case compelled the court to remand the case to the BIA with direction to carry out the IJ's order, to grant citizenship to the petitioner, and to grant the 212(k) waiver.

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SPECIAL REGISTRATION

■District Court Grants Temporary Stay Of Removal To An Alien Who Appeared For Registration Pursuant To The INS' Entry-Exit System

In ***Shahjanian v. Ashcroft,*** No. CV 03-00362 (C.D. Cal. January 23, 2003) (Murrow), the district court stayed the removal of an alien who violated the terms of the Visa Waiver Pilot Program and was taken into custody when he appeared for registration as

(Continued on page 12)

Summaries Of Recent Federal Court Decisions

(Continued from page 11)

required under the "National Security Entry – Exit Registration System." Preliminarily, the court rejected the government's contention that under INA § 217 (b)(2), 8 U.S.C. § 1187(b)(2), it lacked jurisdiction to review petitioner's claim because he had waived his right to contest removal under the VWPP. The court found that it had the jurisdiction to hear habeas petitions such as the one brought by the petitioner. The court also rejected the argument that it lacked jurisdiction under INA § 242(g), 8 U.S.C. §1252(g), finding that that provision does not bar habeas corpus jurisdiction under 28 U.S.C. § 2241.

On the merits, the district court found that the petitioner raised serious questions concerning whether his pending application for adjustment of status entitled him to a stay of removal, noting that the Ninth Circuit had held that an alien may not be deported while a properly filed application for adjustment of status is pending. The court also found that petitioner demonstrated that he would suffer irreparable harm if removed from the United States, even though the government contended that the harm was speculative because petitioner's application for adjustment would not be adjudicated until 2010 or 2011.

Accordingly, the court entered a temporary stay of the order of removal and directed the INS not to remove the petitioner until the court had had an opportunity to hear the merits of his petition. However, the court denied petitioner's application for an order directing his release from detention, finding no showing of irreparable harm if he remained in custody pending further proceedings in his case.

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Ed. Note: *The unpublished decision is available on the OIL web site.*

■Plaintiffs Voluntarily Dismiss Complaint Challenging INS's Detention Of Aliens Who Register Pursuant To The INS' Entry-Exit System.

After the district court denied plaintiffs' application for a temporary restraining order in ***Momtazian. v. Ashcroft***, No. CV 02-1140 (C.D. Cal. December 23, 2002) (order denying TRO) (Stotler), on December 27, 2002, plaintiffs voluntarily dismissed their complaint. Plaintiffs, a group of eleven aliens who claim to be citizens of Iran, and who were required to register with the INS by December 16, as part of the "National Security Entry – Exit Registration System," argued that INS was improperly detaining aliens who appeared for registration. Only the lead plaintiff had registered and he was taken into custody after the INS discovered that he had overstayed his visa. The district court held that the injury to the lead plaintiff, namely his arrest and detention, "related to the status of his visas and the status of any pending adjustment of status," application. Those issues could be litigated in the pending removal hearing.

"Under IIRIRA, removal now occurs after the BIA level of appellate review, and the alien continues his second level of appeal from abroad."

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STAY OF REMOVAL

■Eleventh Circuit En Banc Clarifies Stay Standard And Denies Haitian Persecutor's Stay Request

In ***Dorelien v. Ashcroft***, __F.3d__, 2003 WL 103276 (11th Cir. January 13, 2003) (Edmondson, Tjoflat, Anderson, Birch, Dubina, Black, Carnes, Barkett, Hull, Marcus and Wilson), the Eleventh Circuit denied a petition to rehear *en banc*, a denial of a stay of removal sought by a Haitian national who sought protection under the Convention Against Torture.

The petitioner was a military leader in Haiti from 1991 until 1994 under the Cedras military regime. Due to his involvement in a massacre during that regime he was convicted of mass murder, albeit in absentia. Petitioner's wife and child continued to reside unharmed in Haiti after the return of the Aristide government. In 1997 petitioner won the Florida Lottery, receiving 3.1 million to be paid in 20 annual installments of $159,000.

In a specially concurring opinion, Judge Hull explained why the new "clear and convincing evidence" standard for injunctive relief under INA § 242(f)(2), 8 U.S.C. § 1252(f)(2) applied to a motion to stay removal. He noted that "IIRIRA embodies a paradigm shift in how aliens, like [petitioner] are removed." "Under IIRIRA, removal now occurs after the BIA level of appellate review, and the alien continues his second level of appeal from abroad," assuming they can get judicial review at all. Thus, in light of these changes, when an alien asks a court to stop removal, "that alien necessarily is seeking injunctive relief from a court." The concurrence disagreed with the Ninth Circuit's view in *Andreiu v. Ashcroft*, 253 F.3d 477 (9th Cir. 2001), where that court stated that imposing a "clear and convincing evidence" standard would have an "absurd" result, effectively requiring the removal of large number of aliens with meritorious arguments. The problem with those arguments, wrote Judge Hul, is that they "ignore Congress's policy choice to eliminate delays . . . While the dissent and the Ninth Circuit take umbrage with policy choices enacted by Congress, unless such Congressional action runs afoul of the Con-

(Continued on page 13)

Summaries Court Decisions

(Continued from page 12)

stitution, courts cannot, and must not, engage in strained interpretations of statutes to circumvent a Congressional choice with which they disagree."

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SUMMARY DISMISSAL

■Fifth Circuit Affirms Summary Dismissal Finding It Within BIA's Statutory Authority

In ***Rioja v. Ashcroft***, __F.3d__, 2003 WL 57037 (5th Cir. Jan. 22, 2003) (Barksdale, DeMoss, Benavides) (*per curiam*), the Fifth Circuit held that the BIA was within "its statutorily designated discretion to summarily dismiss" petitioner's appeal after he indicated on the notice of appeal that a separate brief or statement would be filed and then failed to submit it before the filing deadline. *See* 8 C.F.R. § 3.1(d)(2)(i)(D).

The petitioner, a native of Bolivia, was admitted as a non-immigrant in June 1990, but never departed when his authorized stay expired. When placed in proceedings he sought asylum, withholding, and voluntary departure. An IJ denied all of petitioner's requests for relief. Petitioner appealed to the BIA but never filed a brief after indicating that he would so. He contended that his failure to do so should have been excused due to the withdrawal of his counsels and his insufficient command of English. The court reviewed petitioner's appeal under an abuse of discretion standard. The court noted that petitioner's counsel had withdrawn at his request, and that he had sufficient time to appraise the BIA of his failure to file the brief.

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SEVENTH ANNUAL IMMIGRATION LITIGATION CONFERENCE

(Continued from page 1)

The agenda for the Conference will reflect the significant restructuring of immigration responsibilities and the role of immigration in homeland security issues. In addition to topics relating to the defense of the new Department of Homeland Security, the Conference will present various panels to address a number of topics of current interest, including the detention and removal of criminal aliens, asylum and withholding of removal, and relief under the Convention Against Torture.

Speakers will include: Robert McCallum, Jr., Assistant Attorney General for the Civil Division, Peter D. Keisler, Acting Associate Attorney General, Kevin Rooney , Director of the Executive Office for Immigration Review, Honorable Richard C. Tallman, United States Circuit Judge United States Court of Appeals for the Ninth Circuit, and Raymond W. Gruender, III United States Attorney. We also expect a number of officials from the Department of Homeland Security and the Department of Health and Human Services to make presentations. The preliminary agenda with the list of speakers will be available on the OIL web site and will be updated regularly.

Registration is a two-step process. First, government attorneys who wish to attend should register for the Conference by calling Francesco Isgro at 202-616-4877, before March 21, 2003. Second, attendees must make their own hotel reservations before March 21, 2003, by calling the Ritz-Carlton St. Louis at 314-863-6300. The hotel, which was selected through competitive bidding, will be available at the government's per diem rate only until March 21, 2003. Please request the group rate for DOJ/Immigration Litigation.

Questions regarding hotel accommodations and requests for any special need should be directed to Julia Doig, at 202-616-4893.

INSIDE OIL

In January, OIL welcomed eight new lawyers. Mr. **Larry P. Cote**, is a graduate of Union College in Schenectady, New York and of the Albany Law School of Union University. Prior to joining OIL, he was an Associate General Counsel at EOIR. He also serves in the Army Reserves.

Ms. **Efthimia S. Pilitsis** is a graduate of the University of Michigan and of the Catholic University's Columbus School of Law. She joined the Department under the Honor's Program and served as a Judicial Law Clerk at EOIR prior to joining OIL.

Mr. **Hillel Smith** graduated from Belmont University in Nashville and obtained his J.D. from Mississippi College School of Law. He joined the Department of Justice through the Honors Program and prior to joining OIL served as an Assistant District Counsel with the INS in Miami.

Ms. **Leslie M. McKay** is a graduate of Linfield College in Oregon, and the American University, Washington College of Law. She joined the Department through the Honors Program in 1999, and served as an Attorney Advisor to the BIA before joining OIL.

Ms. **Jacqueline R. Dryden** received both her BA and Juris Doctor from the University of Florida. She joined the Department through the Honors Program and worked as a Law Clerk for the Miami Immigration Court. Prior to joining OIL, she was and Attorney Advisor for the Office of the Chief Immigration Judge.

Ms. **Terri Leon-Benner** is a graduate of the University of Massachusetts and Boston University School of Law. Prior to joining OIL, she served as an Attorney Advisor in the Office of Chief Counsel for the Drug Enforcement Administration.

Ms. **Stacy S. Paddack** graduated from the University of Texas and

CASES SUMMARIZED IN THIS ISSUE

NOTED

Indiana Rep. **John Hostettler** has been selected as chairman of the Subcommittee on Immigration, Border Security and Claims.

On February 5, 2003, the International Court of Justice in The Hague, ordered the United States to stay the execution of three Mexican nationals who claimed a breach of the 1963 Vienna Convention on Consular Relations.

INSIDE OIL

Pictured above are OIL's new lawyers. Back: Larry Cote, Efthimia Pilitsis, Hillel Smith, Leslie McKay, Jackie Dryden. Pictured in the front: Terri Leon-Brenner Stacey Paddack. Not pictured, Virginia Lum.

(Continued from page 13)

American University where she obtained an MA in International Affairs. She earned her J.D. at the American University Washington College of Law. Ms. Paddack joined the Department through the Honors Program and served as an Attorney Advisor at EOIR prior to joining OIL.

Ms. **Virginia M. Lum** is a graduate of the Julliard School where she also received an MA, and from the Georgetown University Law Center. Before joining OIL, she was a Trial Attorney in the Civil Division's Commercial Litigation Branch.

The goal of this monthly publication is to keep litigating attorneys within the Department of Justice 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. The deadline for submission of materials is the 20th of each month. 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 Attorney General's authority to administer the Immigration and Nationality laws of the United States"

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