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Immigration Litigation Bulletin

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NINTH CIRCUIT HOLDS THAT UNDER TORTURE CONVENTION GOVERNMENT "ACQUIESCENCE" TO TORTURE REQUIRES ONLY "AWARENESS"

In ***Zheng v. Ashcroft***, __F.3d__, 2003 WL 21397687 (9th Cir. June 18, 2003), the Ninth Circuit held that the BIA's interpretation of the term "acquiescence" to require that government officials "are willingly accepting" of torture to their citizens, misconstrued and ignored the clear intent of Congress. The court found that there was nothing "in the understanding to the Convention approved by the Senate, or the INS's regulations implementing the Convention, to suggest that anything more than awareness is required."

"The correct inquiry as intended by the Senate" is whether an applicant "can show that public officials demonstrate 'willful blindness' to the torture of their citizens by third parties."

The petitioner, a Chinese citizen, claimed that if returned to China he would be killed by the smugglers, also known as snakeheads, who brought him to the United States because he had reported their names to the American government. Petitioner was a material witness in a criminal prosecution of the smugglers. He also believed that the Chinese government would not protect him because public officials are connected to the smugglers. Petitioner testified that as he was boarding the boat out of China, he saw the smugglers give three cartons of cigarettes to the police.

An immigration judge granted petitioner's request for protection under CAT finding a nexus between the Chinese public officials and the smugglers. The BIA reversed that decision relying on *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000) (*en banc*), for the principle that "when the alien alleges a likelihood of torture from non-governmental sources, he or she must demonstrate that government officials 'are willfully accepting of' the non-governmental source's 'torturous activities.'" The BIA found, after assuming that the Chinese government officials knew about the smuggling operations, that petitioner had not shown that government officials would acquiesce in harm that rises to the level of torture.

In reversing the BIA's interpretation of the term "acquiescence," the court looked at the legislative history leading to the Sen-

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SUPREME COURT DENIES CERT IN DETENTION OF INADMISSIBLE ALIEN CASE

On June 23, 2003, the Supreme Court denied the petition for *certiorari* filed by the Solicitor General in ***Rosales-Garcia v. Holland***, 322 F.3d 386 (6th Cir. 2003) (*en banc*), *cert. denied*, 71 U.S.L.W. 3652 (U.S. Jun. 23, 2003). The Solicitor General had asked the Court to consider whether the *Zadvydas* finding of an implied limitation on detention of lawful permanent resident aliens who have been ordered deported, applies to aliens who have been stopped at the border and denied admission to the United States.

In *Rosales-Garcia*, the Sixth Circuit held that the *Zadvydas* six-month rule applies to excludable aliens. Rosales-Garcia, a citizen of Cuba, had been apprehended in 1980 during the

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PETER D. KEISLER SWORN IN AS NEW HEAD OF CIVIL DIVISION

On July 1, 2003, Peter D. Keisler was sworn in as the Civil Division's Assistant Attorney General. Prior to his appointment, he had served as the Principal Deputy Associate Attorney General and Acting Associate Attorney General. Mr. Keisler joined the Department on June 24, 2002.

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Highlights Inside

AQUIESCENCE UNDER TORTURE CONVENTION

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ate's ratification of the Convention, and the enactment of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), which implemented article 3 of the Convention. The court held that the BIA's interpretation of acquiescence "impermissibly narrows Congress' clear intent in implementing relief under the Convention Against Torture." The court noted that the Senate ratified a version of the Convention that "had eliminated an understanding that acquiescence required a public official's *knowledge* and replaced with an understanding that acquiescence required only a public official's *awareness*." The court cited the report of the Senate Committee on Foreign Relations which expressly stated that the purpose of requiring awareness, and not knowledge, "is to make clear that both actual knowledge and 'willful blindness' fall within the definition of the term 'aquiescence.'"

Here, the court found that the BIA, following *Matter of S-V-*, had required the petitioner to prove more than awareness of torture by public officials. The court found this impermissible, noting that it "ignored the Senate's clear intent." "The correct inquiry as intended by the Senate" said the court, is whether an applicant "can show that public officials demonstrate 'willful blindness' to the torture of their citizens by third parties, or as stated by the Fifth Circuit, whether public officials 'would turn a blind eye to torture.'" *See Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 355 (5th Cir. 2002).

Accordingly, the court remanded the case to the BIA with instructions to apply the correct standard of acquiescence to determine if petitioner qualifies for protection under the Convention Against Torture.

By Francesco Isgro, OIL

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CERT DENIED IN DETENTION CASE

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Mariel boatlift, while seeking to entered the United Sates. Like many others, he was paroled into the United States. Subsequently, his parole was revoked because he accumulated several convictions. He was ordered excluded from the United States but the government has been unable to remove him because Cuba has not agreed to accept his return.

On March 5, 2003, a divided *en banc* court again held that the INA does not permit post-order detention of more than six-moths. The court adopted the reasoning of the Ninth Circuit in *Lin Guo Xi v. INS*, 298 F.3d 882 (2002), where that court held that an alien apprehended outside the United States attempting to enter and subsequently ordered removed was entitled to the same presumptive six-month time limitation on post-order detention as *Zadvydas* established for deportable aliens. The court also held, in the alternative, that the indefinite detention of excludable aliens violates the alien's due process rights.

The Court's denial of *certiorari* leaves a conflict among the circuits regarding the applicability of *Zadvydas* to aliens who are apprehended at the border or who are inadmissible and subsequently ordered removed. In *Borrero v. Aljets*, 325 F.3d 1003 (8th Cir. 2003), *pet. for reh'g filed*, No. 02-1506 (May 30, 2003), the Eighth Circuit held that the presumptive six-month limit to post-removal period of detention did not apply to an alien who had not been admitted to the United States. The petitioner in that case was a Cuban alien who had been paroled in the United States in 1980 during the Mariel boatlift, and whose parole had been subsequently been revoked because of his continuing criminal activities. In *Jimenez-Rios v. INS*, 324 F.3d 296 (5th Cir. 2003), the Fifth Circuit reached a similar conclusion, finding that, the petitioner, a Mariel Cuban, could not benefit from *Zadvydas* because the Supreme Court had "distinguished the status of deportable aliens from that of excludable aliens."

In the petition for *certiorari*, the Solicitor General had argued that the extension of the six-month rule – from the context of deportable former permanent resident aliens presented in *Zadvydas* to the context of excludable aliens stopped at the border while attempting to enter illegally – "is incorrect, deepens a circuit split, and has great practical importance."

By Francesco Isgro

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KEISLER TO HEAD CIVIL

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Prior to joining the Department of Justice, Mr. Keisler was a partner in the Washington, D.C. office of Sidley Austin Brown & Wood (formerly Sidley & Austin). He specialized in general and appellate litigation and telecommunications law, and has argued before the U.S. Supreme Court and numerous federal Courts of Appeals.

Mr. Keisler also served as Associate Counsel to the President during the Reagan Administration, and as a law clerk to Justice Anthony M. Kennedy of the U.S. Supreme Court and Judge Robert H. Bork of the U.S. Court of Appeals for the District of Columbia Circuit.

Mr. Keisler graduated magna cum laude from Yale College in 1981, and earned his law degree from the Yale Law School in 1985. He and his wife, Susan, have three children: Sydelle, Alexander, and Philip.

Mr. Keisler replaces Robert D. McCallum, who has been sworn in as the new Associate Attorney General.

HABEAS JURISDICTION OVER REMOVED ALIENS: IS THE ALIEN IN THE CUSTODY OF FEDERAL IMMIGRATION AUTHORITIES?

Now, two years after the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), federal courts are still wrestling with the problem of defining their habeas jurisdiction to review final orders of removal. One question of habeas jurisdiction which is unique to immigration litigation, and has yet to be fully explored, is the extent of such jurisdiction over cases involving removed aliens. On the one hand, there is a growing consensus among the circuits that habeas jurisdiction under 28 U.S.C. § 2241 does not extend to an action filed by a removed alien or, as in the *Samirah* case, an alien denied reentry following a departure from the United States pursuant to a grant of advance parole. *See, e.g., Samirah v. O'Connell*, __ F.3d __, 2003 WL 21507968 (7th Cir. July 2, 2003); *Patel v. U.S. Attorney General*, ___ F.3d ___, 2003 WL 21480378 (11th Cir. June 27, 2003); *Miranda v. Reno*, 238 F.3d 1156 (9th Cir. 2001). These courts have reasoned that an alien outside the United States cannot satisfy the "in custody" requirement for habeas jurisdiction under 28 U.S.C. § 2241. *See Samirah*, __ F.3d __, 2003 WL 21507968 (observing that "Samirah may wander the earth, so long as his wanderings do not lead him to the United States"). However, jurisdiction over a case commenced *before* the alien's removal from the United States presents a closer question.

Several courts, applying the collateral consequences rule of *Spencer v. Kemna*, 523 U.S. 1, 7-8 (1998), have rejected the argument that an immigration habeas case is mooted by the alien's post-filing removal from the United States. *See, e.g., Zegarra-Gomez v. INS*, 314 F.3d 1124 (9th Cir. 2003); *Smith v. Ashcroft*, 295 F.3d 425 (4th Cir. 2002);*Chong v. INS*, 264 F.3d 378, 385 (3d Cir. 2001); *Max-George v. Reno*, 203 F.3d 194 (5th Cir. 2000), *reversed on other grounds*, 533 U.S. 945 (2001). These courts have found that a live controversy continues to exist post-removal, in light of the statutory restrictions on an alien's reentry to the United States after removal. *See* INA § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A).

Such decisions do not preclude the government from seeking dismissal for mootness in cases where the alien is subject to a permanent reentry bar for reasons unrelated to the charge at issue in the habeas proceeding. For example, if the government has reason to believe that the alien has engaged in terrorist activity, or has committed a criminal offense not charged in the Notice to Appear, it should consider moving to dismiss the habeas petition on mootness grounds, because the alien may be permanently barred from reentering the United States regardless of the results of the habeas petition. *Cf. Perez v. Greiner*, 296 F.3d 123 (2d Cir. 2002) (in criminal habeas case brought under 28 U.S.C. § 2254, holding that petitioner's challenge to his robbery conviction was mooted by his deportation from the United States, where petitioner had a prior drug trafficking conviction which rendered him permanently inadmissible to the United States). However, absent an independent ground of inadmissibility, the government is likely to have difficulty convincing courts that the petition is moot because no collateral consequences flow from the alien's executed removal order.

> Several courts have rejected the argument that an immigration habeas case is mooted by the alien's post-filing removal from the United States.

The "in custody" requirement of 28 U.S.C. § 2241 presents an alternative and, arguably, a stronger basis than mootness for dismissal of habeas petitions involving removed aliens. To date, several courts have assumed, without analysis, that the "in custody" requirement is satisfied as long as the alien was in the United States when he filed the petition. *See Leitao v. Reno*, 311 F.3d 453, 455 (1st Cir. 2002); *Smith v. Ashcroft*, 295 F.3d at 428; *Chong v. District Director*, 264 F.3d at 382. In light of the collateral consequences rule, the Article III requirement of a live case or controversy may well be satisfied in these cases. With respect to the "in custody" requirement, however, the alien's new "at large" status outside the United States' territorial boundaries is a fundamental change in circumstances, which should operate to deprive the district court of habeas jurisdiction.

While the Supreme Court has held in the context of criminal cases that habeas jurisdiction is not defeated by a prisoner's release from custody, after filing his habeas petition, *see Carafas v. LaVallee*, 391 U.S. 234, 238-39 (1968); *Spencer v. Kemna*, 523 U.S. at 7, it has never held that a habeas petitioner's "in custody" status, once established, may never be lost as a result of an event occurring during the pendency of the habeas litigation.

It is difficult to imagine an event which could more completely remove a habeas petitioner from "in custody" status than his departure from the United States. Not one Supreme Court case directly addressing continued "in custody" status, after a habeas petitioner's release from the immediate physical custody of his jailers, has dealt with the issue of "release" of a petitioner outside the territorial boundaries of the United States. On the other hand, the Supreme Court consistently has applied a "presumption that Acts of Congress do not ordinarily apply outside our borders." *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 174 (1993).

This presumption against extraterritoriality may be overcome by an "affirmative intention of the Congress clearly expressed" that the statute should apply outside the United States.

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IS THERE HABEAS JURISDICTION OVER REMOVED ALIENS?

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EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (quotation omitted). Section 2241 of Title 28 is silent on the issue of whether it confers jurisdiction to prosecute a habeas action from abroad. Such silence does not constitute the clear expression of legislative intent needed to overcome the presumption against extraterritoriality.

Moreover, though it has not addressed the precise situation here, the Supreme Court has emphatically rejected the notion that aliens abroad may seek to vindicate alleged violations of their presumed "rights" under the Constitution, laws or treaties of the United States, by bringing habeas actions in our domestic courts. Thus, in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court held that German nationals confined by the United States Army in Germany, had no right to test the legality of their detention through habeas petitions. In so ruling, the Court observed that "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." *Id.* at 771. Relying largely on this settled premise, the Court flatly rejected the proposition that the Constitution ever was meant to confer rights on aliens outside the United States' borders. Id. at 784-85. *Accord, Odah v. United States*, 321 F.3d 1134, 1140-42 (D.C. Cir. 2003) (following *Eisentrager*, holding that federal habeas jurisdiction does not extend to petitions filed by aliens in military custody at Guantanamo Bay, Cuba).

In *Eisentrager* and *Odah*, the aliens were within the physical custody of United States officials, yet were precluded from availing themselves of habeas remedies within the United States. If anything, a removed alien presents a stronger case for dismissal for failure to satisfy the "in custody" requirement, because he is an alien "at large" in the world outside our borders and, except in rare cases, our immigration authorities will have lost contact with him. To extend habeas jurisdiction to such a situation, where the petitioner is under no "official restraint," "would read the 'in custody' requirement out of the statute." *Maleng v. Cook*, 490 U.S. 488, 492 (1989).

The removed alien's "at large" status outside the United States' territorial boundaries thus should preclude any wholesale application of "in custody" law developed in the context of criminal habeas cases, such as *Carafas* and *Spencer v. Kemna*. A removed alien is under no obligation to inform his former custodian from the Bureau of Immigration and Customs Enforcement ("ICE") of his place of residence, his employment status, or his travels in the country of removal or elsewhere in the world.

The Supreme Court has emphatically rejected the notion that aliens abroad may seek to vindicate alleged violations of their presumed "rights" under the Constitution, laws or treaties of the United States, by bringing habeas actions in our domestic courts.

Recently, in *Samirah*, the Seventh Circuit specifically relied upon this lack of any continued supervision over an extraterritorial alien in rejecting a claim of section 2241 habeas jurisdiction, and found no merit to the alien's argument that restrictions on his reentry to the United States were enough to bring him within United States "custody." *Samirah*, ___ F.3d ___, 2003 WL 21507968, at *3-4. *Compare with Jones v. Cunningham*, 371 U.S. 236, 242 (1963) (cataloguing the "significant restraints" on a criminal parolee's liberty "because of his conviction and sentence, which are in addition to those imposed by the State upon the public generally").

While an alien's removal renders him inadmissible to the United States for a period of years (or permanently, in the case of an aggravated felon), he is no more in the "custody" of domestic immigration authorities than are "billions of other non-U.S. citizens around the globe who may not come to the United States without the proper documentation." *Samirah*, at *3-4.

In asking for dismissal, the government may encounter the argument that Congress intended for habeas jurisdiction to continue post-removal because, in enacting the 1996 immigration reforms, it repealed former section 106(c), 8 U.S.C. § 1105a(c) (1994), which had provided that "[an order of deportation or exclusion shall not be reviewed by any court if the alien . . . has departed from the United States after the issuance of the order." This language from former section 106(c) has no counterpart in the INA, as amended by IIRIRA, which implies that circuit court jurisdiction over a petition for review continues after an alien's removal from the United States. Seizing upon this change in the law, removed aliens are likely to assert that the presumption against extraterritorial application of 28 U.S.C. § 2241 is effectively rebutted by Congress's repeal of former section 106(c).

The short answer to this argument is that the alien's "in custody" status is a jurisdictional requirement of 28 U.S.C. § 2241, which exists independently of the requirement of former section 106(c) that the alien remain within the United States while his order is under review. Thus, the "in custody" requirement is unaffected by section 106(c)'s repeal. Moreover, before section 106(c)'s repeal, federal courts had no occasion to consider whether an alien's deportation ends his "in custody" status, and thus eliminates habeas jurisdiction to consider the alien's attack on his exclusion or deportation order.

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HABEAS JURISDICTION AFTER ALIEN'S REMOVAL

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Regardless of how the "in custody" question was resolved in an immigration case, the habeas petition would still be subject to dismissal under section 106(c). Finally, the government might point out that the thrust of the Supreme Court's jurisdictional analysis in *St. Cyr* is that the reach of habeas jurisdiction under 28 U.S.C. § 2241 is not directly controlled by the INA's jurisdiction-limiting provisions. By implication, habeas jurisdiction may be narrower than review under the INA § 242, 8 U.S.C. § 1252, which governs petitions for review.

Except where expressly foreclosed by circuit precedent, the government should vigorously seek dismissal of all habeas actions involving removed aliens, including those commenced before removal.

The government should leave no stone unturned in attempting to persuade courts to dismiss habeas petitions involving removed aliens. Continued habeas jurisdiction in such cases threatens the finality of immigration enforcement efforts, and exposes the Departments of Homeland Security and State to considerable cost and other administrative burdens. Accordingly, except where expressly foreclosed by circuit precedent, the government should vigorously seek dismissal of all habeas actions involving removed aliens, including those commenced before removal.

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Contributions To The Immigration Litigation Bulletin Are Welcomed!

FORMER INS LEGAL PROCEEDINGS UNIT TO REORGANIZE UNDER DHS

The legal program under the former INS is undergoing an historic reorganization to realign its program functions along the newly created bureaus within the Department of Homeland Security.

The Homeland Security Act (HSA) and the President's Reorganization Plan Modification split the functions of the former INS into three principal components: the Bureau of Immigration and Customs Enforcement (ICE), the Bureau of Citizenship and Immigration Services (BCIS), and the Bureau of Customs and Border Protection (CBP). Sections 442(c) and 451(d)(1) of HSA provide for the establishment of a Principal Legal Advisor for ICE and one for BCIS respectively. The legal program within CBP, which acquired the Border Patrol and the inspections program, is headed by Chief Counsel Alfonso Robles.

The former INS's legal program had approximately 700 attorneys. Under the reorganization plan, about 600 former INS attorneys will be allocated to ICE, 68 attorneys will be transferred to BCIS and 37 attorney positions will be transferred to CBP, including all the former INS Border Patrol Sector Counsel.

ICE

Within ICE, the reorganization plan establishes an Office of the Principal Legal Advisor (OPLA), that will provide legal advice to the Assistant Secretary, and Offices of Litigation and Legal Advice (OLLA) which will represent the government in removal proceedings and provide legal advice to field operations. The 32 district counsels' offices will be reorganized into 25 OLLA's each headed by a Chief Counsel and realigned with the 25 Special Agent in Charge Areas of Responsibility. The legal programs will no longer have regional counsels because the regions have been eliminated.

Mark Wallace, who was the first Principal Legal Advisor for ICE and BCIS, recently left his position. Victor Cerda, ICE's Chief of Staff, has been designated by the Assistant Secretary as the Acting Principal Legal Advisor. At the ICE headquarter, the Principal Legal Advisor will be assisted by a Deputy and the Chiefs of the Divisions for National Security Law, Enforcement Law, Commercial and Administrative Law, and the Chief Appellate Counsel. Barry O'Mellin has been appointed as the Acting Deputy Principal Legal Advisor. The Chief Counsels for the OLLA's will report directly to the Deputy Principal Legal Advisor who will be assisted by the Director of Field Operations, a position filled by William Odencrantz, the former Regional Counsel for the Western Region.

BCIS

The Office of the Principal Legal Advisor will advise the Director of BICIS on legal issues relating to asylum, refugee, adjudication, naturalization, and administrative law, and will represent BCIS in visa petition appeals before EOIR. The Principal Legal Advisor will be assisted by a Deputy and the Chiefs of the Divisions for Adjudications Law, Refugee and Asylum Law, and Commercial and Administrative Law. The reorganization will establish five BCIS Legal Advisors who will report directly to the Deputy Principal Legal Advisor. The former INS Deputy General Counsel Dea Carpenter has been designated as the BCIS Acting Principal Legal Advisor.

The reorganization of the legal programs in ICE and BCIS is expected to be accomplished by July 21, 2003.

By Francesco Isgro, OIL

Summaries Of Recent Federal Court Decisions

ASYLUM

■First Circuit Affirms Denial Of Motion To Reopen And Underlying Ethiopian's Asylum Claim

In ***Fesseha v. Ashcroft,*** __F.3d__, 2003 WL 21374082 (1st Cir. June 16, 2003) (Selya, Cyr, *Lynch*), the First Circuit affirmed the BIA's denial of asylum and of a motion to reopen filed by a citizen of Ethiopia who claimed that she had been persecuted and had a well-founded fear of persecution on account of her ethnicity as an Amhara.

Petitioner's entered the United States as a student in 1985 and applied for asylum in 1988. Presumably that application was denied by an asylum officer because in 1989 the INS instituted deportation proceedings against petitioner on the basis that she had been employed without authorization. Petitioner renewed her asylum application claiming that she had been detained and arrested several times after missing a local committee meeting organized by the police. She also testified that her family had supported the government of Haile Selassie and that some of her relatives were opposed to the post-Selassie government. In 1993, an immigration judge found that petitioner was not credible and that she was not eligible for asylum because conditions in Ethiopia had changed with the new government. Seven years later, on April 13, 2000, the BIA upheld the IJ's decision on the non-credibility finding and also determined that even if petitioner was credible she failed to establish eligibility for asylum. Several months after the BIA's decision, petitioner filed a motion to reopen based on a change of country conditions rooted in the 1991 coup d'etat. The BIA denied that motion finding that petitioner had not shown a prima facie case of eligibility for asylum. Both decisions of the BIA were consolidated on appeal to the First Circuit.

The First Circuit found substantial evidence to support the BIA's determination that petitioner's several prior detentions were "too short and too tangentially related to political affiliation to constitute persecution." As to future persecution, the court held that the finding below that Ethiopia is undergoing a transition to a federal system of government undermined her claim of persecution, and there was no evidence that "would compel a reasonable adjudicator to conclude to the contrary." The court also found, relying on *Carter v. INS*, 90 F.3d 14 (1st Cir. 1996), for the proper standard of review, that the BIA had not abused its discretion in denying petitioner's motion to reopen on the basis of her failure to show a prima facie case.

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CITIZENSHIP

■Ninth Circuit Holds That "Legal Separation" Requires Prior Marriage, Finds Alien Did Not Acquire Citizenship From Naturalized Father

In ***Barthelemy v. Ashcroft***, 329 F.3d 1062 (9th Cir. 2003) (Noonan, Berzon, *Tallman*), the Ninth Circuit, held that petitioner who was born outside the United States of alien parents was not entitled to derivative citizenship under INA § 321(a) on the basis of his father's subsequent naturalization because his natural parents never married and thus could not *legally* separate.

Petitioner was born abroad to Haitian parents who were never married. After his natural mother abandoned him, petitioner's father immigrated to the United States. Subsequently petitioner's father married Marie, a United States citizen and the two of them filed a visa petition to bring petitioner to the United States. In 1989, petitioner, who was then 11 years old, entered the United States as a lawful permanent resident. Marie never adopted the petitioner. In 1993, petitioner's father was naturalized. In 1998, petitioner was convicted of unlawful sexual intercourse with a minor, and was ordered removed from the United States as an alien who had been convicted of an aggravated felony. For obvious reasons, petitioner contended that he was entitled to derivative citizenship under INA § 321(a) on the basis of his father's naturalization in 1993.

Preliminarily, the court acknowledged that it lacked jurisdiction to review a criminal alien's order of removal, but where as here petitioner claimed that he was a United States citizen, it the had the jurisdiction to determine whether petitioner was an alien or citizen.

On the merits, the court held, based on the plain language of the statute, that petitioner had not acquired derivative citizenship through his father because his natural parents were never married and thus could not legally separate.

The Ninth Circuit also rejected petitioner's two equal protection challenges to the constitutionality of the statute. First, the court rejected the contention that INA § 321(a) discriminated on the basis petitioner's parents former marital status. Petitioner contended that this provision impermissibly distinguishes between those children born of parents who never married and those born of parents who at one time were married and legally separated. The court found that Congress had a facially legitimate and bona fide reason for such classification, namely the protection of the parental rights of the alien parent.

Second, the court rejected the contention that INA § 321(a)(3) impermissibly discriminates on the basis of gender. This provision authorizes the grant of derivative citizenship upon the "naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation." The court found that as applied to petitioner that provision did not discriminate on the basis of sex be-

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cause petitioner had been legitimated by his father. To the extent that petitioner objected to the statute's requirement that fathers had to take affirmative steps to legitimate their children, but mothers legitimated their children by giving birth, the court noted that the Supreme Court "extinguished this equal protection argument" in *Nguyen v. INS*, 553 U.S. 53 (2001).

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■District Court Holds Aggravated Felon Cannot Naturalize Despite Military Service

In ***Boatswain v. Ashcroft***, __F.Supp.2d__, 2003 WL 21312322 (E.D.N.Y. June 9, 2003) (Block), the district court held that the petitioner, who had an extensive criminal history involving drugs, was an aggravated felon and thus could not satisfy the good moral character requirement to naturalize. The district court rejected the alien's argument that he was exempted from the good moral character requirement because he was a wartime veteran, holding that the immigration statute's overarching denial of good moral character status to aggravated felons still applied to the significantly relaxed requirements for the naturalization of applicants who served the United States during wartime.

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CONVENTION AGAINST TORTURE

■Third Circuit Orders Remand To Immigration Judge For Consideration Of Torture Convention Claim

In ***Zubeda v. Ashcroft***, __F.3d__, 2003 WL 21436806 (3rd Cir. June 23, 2003) (*McKee*, Smith, Hochberg), the Third Circuit vacated the BIA's denial of protection under CAT and remanded the case to the immigration judge for further proceedings including determination whether petitioner will be tortured because she belongs to a particular tribal group.

Petitioner, a citizen of the Democratic Republic of the Congo (DRC), formerly Zaire, sought asylum, withholding of removal, and protection under the CAT because government soldiers had raped her and her mother and had killed her father and brother. Documentary evidence submitted at the hearing reflected flagrant and shocking human rights abuses that have been perpetrated in the DRC by both the government and the rebel forces. The immigration judge found that petitioner was not credible because of inconsistencies between her testimony and her written asylum application. Accordingly, he denied her application for asylum and withholding of removal. However, he granted petitioner's application under CAT finding that if she were returned to the DRC she would be detained by government officials and "perhaps raped, which is almost *modus operandi*, while detained." The INS appealed the immigration judge's decision. The BIA sustained the appeal relying on *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002), where the BIA held that conditions in Haitian prisons did not constitute torture under CAT. The BIA also noted that there was a dearth of evidence to support the IJ's finding that petitioner would be detained for any reason.

"A claim under the Convention is not merely a subset of claims for either asylum or withholding of removal."

The Third Circuit found that the BIA's "terse analysis" of petitioner's CAT claim, had completely ignored the basis of the IJ's decision, and was therefore "seriously flawed." The court noted that the IJ's rejection on credibility grounds of petitioner's application for asylum and withholding did not control the analysis of her claim under CAT. "A claim under the Convention is not merely a subset of claims for either asylum or withholding of removal," said the court, citing to *Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001). The court also faulted the BIA for accepting the IJ's adverse credibility findings without question. The court noted that it had previously "cautioned against placing too much weight on inconsistencies between an asylum affidavit and subsequent testimony at a hearing before an immigration judge . . . .This is particularly true when we consider that such an alien may have tried to suppress the very memories and details that have suddenly become so important to establishing his/her claim."

In remanding the case for further proceedings to allow, *inter alia*, clarification of the record and an opportunity to present new evidence, the court "commend[ed] counsel for the INS for the fair, forceful and thorough manner in which she presented the government's appeal."

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■Third Circuit Affirms Denial Of Relief Under Torture Convention But Remands Asylum And Withholding Claims In FGM Case

In *Moshud v. Blackman*, No. 98-6481 (3d Cir. June 18, 2003) (*Barry*, Fuentes, McLauglin (E.D.Pa.)) the Third Circuit, in an unpublished decision, reversed the BIA's denial of petitioner's asylum application, but affirmed the denial of her application for relief under the Convention Against Torture. Petitioner claimed that her Ghanian fiancee expected her to submit to female genital mutilation (FGM) as a condition for marriage, but that her own tribe did not practice FGM. She alleged that her fiancee would track her down and force her to submit to FGM if she returned to Ghana. The BIA, believing that her government could protect her,

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reversed the immigration judge's favorable credibility determination and held that, even if believed, she did not demonstrate a well-founded fear. The court held that the BIA's findings were not supported by substantial evidence, but also found that the government would not "acquiesce" in FGM.

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CRIMES

■Second Circuit Finds That Second-Degree Manslaughter Is Not A Crime Of Violence And Consequently Not An Aggravated Felony

In ***Jobson v. Ashcroft***, 326 F.3d 367 (2d Cir. 2003), the Second Circuit held that the offense of second degree manslaughter under N.Y. Penal Law § 125.15(1) is not a "crime of violence" within the meaning of 18 U.S.C. § 16(b), and thus is not an aggravated felony under INA § 101(a)(43)(F).

"A crime of violence under § 16(b) contemplates only intentional conduct and refers only to those offenses in which there is a substantial likelihood that the perpetrator will intentionally employ physical force."

The petitioner, a citizen of Jamaica and a lawful permanent resident since 1988, pled guilty to second degree manslaughter for recklessly causing the death of his two-an-one-half-month old son. An immigration judge and subsequently the BIA held that petitioner had been convicted of a crime of violence because there was a substantial risk that force could be used in the course of committing the offense in question.

The Second Circuit disagreed with the BIA interpretation, finding that a conviction for second-degree manslaughter under that particular state statute was not a "crime of violence" because the minimum criminal conduct required to commit second-degree manslaughter did not necessarily present a substantial risk of use of physical force against another's person, but rather only recklessness with respect to substantial risk of death of another person. Moreover, the court also reaffirmed its prior interpretation that a "crime of violence" under § 16(b) "contemplates only *intentional* conduct and refers only to those offenses in which there is a substantial likelihood that the perpetrator will *intentionally* employ physical force." *See Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001) (holding that driving under the influence under New York law was not a crime of violence under § 16(b)).

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■Ninth Circuit Finds That Conviction For Elder Theft Is Not Aggravated Felony Theft Offense.

In ***Macapagal v. Ashcroft***, No. 02-71167 (9th Cir. June 19, 2003) (Browning, B. Fletcher, Silverman), the Ninth Circuit in an unpublished decision reversed the BIA's finding that a conviction for elder theft under Section 368(d) of the California Penal Code was an aggravated felony theft offense. The court held that 368(d) punishes, at least in part, the theft of labor, and that 368(d) does not categorically qualify as a theft offense, as that term was defined by the court *in United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc).

Employing the modified categorical approach, the court held that under the terms of his indictment, petitioner could have been convicted of a theft of labor rather than a theft of money or property, and consequently that petitioner was not convicted of an aggravated felony theft offense.

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■Third Circuit Holds Alien May Not Collaterally Challenge State Convictions In Immigration Proceedings

In ***Drakes v. INS***, __ F.3d__, 2003 WL 21267259 (Scirica, *Sloviter*, Nygaard) (3d Cir. June 3, 2003), the Third Circuit held that a habeas petitioner may not challenge the constitutionality of a prior State conviction that provides the basis for an immigration order of removal. The Supreme Court bars such collateral challenges because of the need for finality in convictions and ease of judicial administration. The only exceptions occur when the defendant is not appointed counsel in violation of the Sixth Amendment, or in the rare case when the defendant had no avenue of appeal.

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CRIMINAL PROSECUTIONS

■Ninth Circuit Holds Alien's Admission To The United States On Parole Does Not Bar Prosecution For Illegal Reentry

In ***U.S. v. Pina-Jamie,*** __F.3d__, 2003 WL 21297167 (9th Cir. June 6, 2003) (Pregerson, *Thompson*, Wardlaw), the Ninth Circuit affirmed the alien's conviction for illegal reentry when he remained in the United States beyond the one-day parole he was granted to attend a child-custody hearing for his daughter. The alien argued that he did not violate INA § 276, which prohibits the reentry of removed aliens, because he entered the United States legally with the Attorney General's consent.

The court held that the Attorney General did not expressly consent to the alien's reapplying for admission in granting him one day of parole, and that the alien did not have to enter illegally to violate the "found in the United States" provision of INA § 276.

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Summaries Of Recent Federal Court Decisions

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DETENTION

■District Court Holds Detention Of Inadmissible Alien Is Reasonable

In ***Wilson v. Zeithern***, __F.Supp.2d__, 2003 WL 21312743 (E.D. Va. June 5, 2003) (Ellis), the district court held that the petitioner, an aggravated felon who entered without inspection, had a liberty interest falling somewhere between aliens outside the United States, who have little or no claim to a constitutionally cognizable liberty interest, and those who have been granted lawful permanent resident status. The district court held that the alien's five-month detention pending his removal from the United States was appropriate due to his immigration status, that his removal was not indefinite, and that his physical resistance to removal could not convert a detention of reasonable length into one of unreasonable length so as to entitle him to a bond hearing or other relief.

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DUE PROCESS

■Third Circuit Rejects Alien's Claims Of Immigration Judge Bias

In ***Abdulrahman v. Ashcroft,*** __F.3d__, 2003 WL 21211525 (Scirica, *Becker*, Shadur (by designation)) (3d Cir. May 21, 2003), the Third Circuit rejected the alien's allegation that the immigration judge was biased because she engaged in speculation and questioned the logic of his factual assertions in her opinion. The court held that the immigration judge's findings were proper and did not place her in the position of a witness, noting that she was required to weigh evidence necessary to make a credibility determination, and that impartiality does not require a fact-finder to be gullible. The court criticized the immigration judge for going beyond the bounds of propriety by making additional and generalized assertions of her own, but concluded that her lack of courtesy, and the absence of the expected level of professionalism, did not amount to a due process violation.

The immigration judge's lack of courtesy, and the absence of the expected level of professionalism, did not amount to a due process violation.

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IN ABSENTIA

■Supreme Court Denies Government's Request To Review Ninth Circuit Decision Concerning In Absentia Order.

On June 23, the Supreme Court denied the Government's petition for certiorari seeking review of the Ninth Circuit's decision in ***Singh v. INS***, 295 F.3d 1037 (9th Cir. 2002), in which the Ninth Circuit held that the BIA had abused its discretion in denying petitioner's motion to reopen his in absentia deportation order, and remanded for the BIA to consider the merits of his application for adjustment of status. The statute requires that "exceptional circumstances" "beyond the control of the alien" (including such compelling circumstances serious illness or the death of an immediate relative) for the reopening of an in absentia order. The Ninth Circuit held that petitioner's eligibility for adjustment was an exceptional situation excusing his failure to appear.

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■Sixth Circuit Holds Alien Gave Adequate Notice Of Address Change In Letter, Despite Not Using Correct EOIR Form, Finding That Change Of Address Regulation Is Invalid

In ***Beltran v. INS,*** __ F.3d __, 2003 WL 21305404 (Boggs, *Suhrheinrich*, Siler) (6th Cir. June 9, 2003), the Sixth Circuit reversed the BIA's decision affirming an immigration judge's denial of petitioner's motion to reopen an order of deportation entered in absentia.

The petitioner, a native of the Philippines, entered the United States legally in 1977 at the age of fourteen. In 1994, the INS instituted deportation proceedings against the petitioner, claiming that he had been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. Petitioner then unsuccessfully applied for a 212(c) waiver. However, the BIA reversed that decision finding that the immigration judge had not adequately explained petitioner's right to counsel. Petitioner never received that decision because in the interim he had changed his address. The immigration court then held the remand hearing and entered an in absentia order.

Subsequently, after petitioner was detained and held for deportation, he moved to rescind the in absentia order claiming that he had never received notice of the hearing date. The immigration judge denied the motion. On appeal, the BIA found that petitioner had not received notice of the hearing because he had sent his change of address in a letter on legal services letterhead to the INS office instead of, as required by 8 C.F.R. § 3.15(d)(2), to the immigration court on the proper form (EOIR Form 33).

Preliminarily, the court held that it had jurisdiction because at least one of petitioner's convictions did not impose imprisonment of more than one year. The court then held that petitioner, who had a low IQ, satisfied his obligation to provide notice of his new address, a requirement that the court found was "not meant to be [] overly burdensome." More importantly, the court held that the regulation creating the EOIR Form 33 was an addendum to the notice statute that did not represent a

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"reasonable interpretation of the statute because it adds additional requirements not contemplated by Congress."

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JURISDICTION

■Seventh Circuit Dismisses Untimely Petition For Review For Lack of Jurisdiction

In ***Sankarapillai v. Ashcroft***, __F.3d__, 2003 WL 21278804 (7th Cir. June 4, 2003) (Bauer, Posner, Williams), the Seventh Circuit held that the alien's petition for review was untimely as it was filed more than 30 days after the BIA's final order of removal. The court held that the filing deadline was jurisdictional and that it lacked any authority to extend the deadline. It declined to apply *Houston v. Lack*, 487 U.S. 266 (1988) (notice of appeal timely where prisoner delivered notice to prison officials for mailing within the statutory period), because the alien was represented by counsel.

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Fifth Circuit Holds It Lacks Jurisdiction Due To Alien's Drug Convictions, But Remands Case To District Court To Address Alien's Burglary Conviction

In ***Flores-Garza v. Ashcroft***, 328 F.3d 797 (5th Cir. 2003) (*Jolly*, Duhe, Wiener), the Fifth Circuit granted the government's motion to dismiss the appeal for lack of jurisdiction based on the alien's controlled substances convictions. Because the jurisdictional finding was dispositive, the court declined to consider the alien's claims that his burglary conviction was not an aggravated felony and that he was eligible to apply for cancellation of removal. The court then vacated the district court's dismissal of the alien's habeas petition and remanded to address the alien's claim regarding his burglary conviction.

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STREAMLINING

■Fourth Circuit Holds That Streamlining Rule Does Not Have A Retroactive Effect

In ***Khattak v. Ashcroft***, __F.3d__ (4th Cir. June 13, 2003) (*Wilkins*, Shedd, Wooten (sitting by designation)), the Fourth Circuit held that the streamlining procedure at 8 C.F.R. § 3.1 (a)(7)(ii), did not attach new legal consequences to events occurring before it was created and therefore did not have a retroactive effect under *Landgraf*.

The petitioner, a Pakistani national, entered the United States in 1985 and in 1988 obtained temporary resident status under the special Agricultural Workers Program (SAW). However, the INS subsequently revoked petitioner's SAW status after discovering that it had been fraudulently obtained. In 1997, the INS instituted deportation proceedings against the petitioner on the basis that he was an overstay. An immigration judge denied petitioner's applications for asylum, withholding, and suspension of deportation. The BIA summarily affirmed that decision under the streamlining rule.

Before the Fourth Circuit petitioner argued that he had relied on his entitlement to three-member BIA review and full BIA opinion when he had conceded his deportability in the immigration court. Specifically, he contended that, under *Ballew v. Georgia*, 435 U.S. 223 (1978), the streamlining procedures produce a retroactive effect because a smaller fact-finding body results in a greater chance of an inaccurate result. In *Ballew*, the Supreme Court held that trial by a five-person jury was unconstitutional, relying in part on data suggesting that smaller juries do not find facts as accurately as larger one. The Fourth Circuit rejected this "leap in logic," noting that "BIA members are professionals who adjudicate immigration cases regularly," and that the only appeals adjudicated by a single BIA member are the "easiest cases."

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■First Circuit Rejects Alien's Challenge To BIA's Streamlining

In ***El Moraghy v. INS,*** __F.3d__, 2003 WL 21355904) (Selya, Lynch, Young) (1st Cir. June 12, 2003), the First Circuit vacated the BIA's denial of asylum and withholding of removal and remanded the case to the BIA for further proceedings. The petitioner, an Egyptian Coptic Christian, claimed that he was persecuted by Muslim fundamentalists on account of his religion. He challenged the BIA's summary affirmance of the IJ's denial of his claims, as well as the denial of asylum itself. Finding no evidence of systemic violation by the BIA of its regulations, the court rejected the alien's streamlining challenge, and implicitly rejected any challenge to the BIA's decision to streamline a particular case. The court held that that it would review the IJ's decision, and if the IJ erred, it would remand. Because the IJ made no finding regarding whether the alien had demonstrated past persecution on account of his religion, and made no adverse credibility determination, the court remanded the case for further proceedings.

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SUSPENSION

Ninth Circuit Holds That Homeless Alien Sufficiently Proved His Continuous Physical Presence For Purposes of Suspension Of Deportation

In ***Vera-Villegas v. INS***, __F.3d__, 2003 WL 21277191 (9th Cir.

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June 4, 2003) (*Reinhardt*, W. Fletcher, Gould), the Ninth Circuit held that the alien, an applicant for suspension of deportation, adequately proved his physical presence in the United States during a period of homelessness, which he claimed extended through his first two years of residence in the United States.

The court held that the immigration judge erred in not fully crediting the alien's evidence regarding his physical presence, which consisted of testimony and declarations of individuals who stated that they knew him during his homeless period, seven years before the hearing. The court remanded for consideration of whether the alien satisfied the extreme hardship and good moral character requirements for suspension of deportation.

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PERMANENT RESIDENCE

■Fifth Circuit Holds Lawful Permanent Resident's Extended Visits To Pakistan Were Not "Temporary Visits Abroad," And That She Abandoned Her Lawful Permanent Residence.

In ***Moin v. Ashcroft,*** __F.3d__, 2003 WL 21435473 (5th Cir. June 20, 2003) (*Kazen*, Jones, Benevides), the Fifth Circuit affirmed the BIA's decision finding that petitioner had abandoned her lawful permanent residence in the United States and was therefore excludable.

The court held that petitioner's three extended visits to Pakistan were not "temporary visits abroad" because the petitioner had spent only 6 of her 54 months of lawful permanent residence in the United States, that her visits to Pakistan were never of a relatively short period of time or fixed by particular events likely to occur within a short time frame, and that she had minimal ties to the United States, in contrast to her substantial ties in Pakistan.

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REINSTATEMENT

■Eighth Circuit Holds That District Court Lacked Habeas Jurisdiction To Review Reinstatement Order Where Alien Had Available Judicial Forum In Court Of Appeals

In ***Lopez v. Heinauer***, __ F.3d__, 2003 WL 21347122 (7th Cir. June 11, 2003) (*Hansen*, Heaney, M. Arnold), the Eighth Circuit held that jurisdiction over the alien's challenge to his reinstatement order was available only in the courts of appeals and not the district court. The court transferred Lopez's habeas petition from the district court to itself and treated it as a petition for review, holding that the reinstatement statute authorizes reinstatement of petitioner's deportation order and such an application does not violate due process.

"While we recognize that the BIA is swimming in a sea of cases, barely able to keep itself afloat, there remains no excuse for the apparent failure to read the decision one is reviewing."

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WAIVER

■Ninth Circuit Rebukes BIA For Misunderstanding Immigration Judge's Decision And Holds 8 DUI Convictions Do Not Bar Adjustment Of Status

In ***Murillo-Salmeron v. INS***, 327 F.3d 898 (9th Cir. 2003) (Noonan, Rashima, *Wardlaw*), the Ninth Circuit reversed an order of the BIA summarily affirming an immigration judge's decision to deny a waiver of inadmissibility under INA § 212(h). Petitioner, a Mexican citizen, had applied for adjustment of status based on his marriage to a United States citizen. Because he had had a number of DUI convictions, petitioner also applied for a § 212(h) waiver. The IJ determined that petitioner was not inadmissible because of his drunk driving history, but denied his application for adjustment under INA § 245 as a matter of discretion. On appeal, the BIA "affirmed" the IJ's denial of the § 212(h) waiver, "a decision that the IJ did not make." As the court saw it, "the decision on review can best be described as two ships passing in the night . . . While we recognize that the BIA is swimming in a sea of cases, barely able to keep itself afloat, there remains no excuse for the apparent failure to read the decision one is reviewing and to review the decision that was made."

Preliminarily, the court rejected the government's contention that it lacked jurisdiction to review a discretionary denial of adjustment. The court held that it was reviewing "the legal determination" that petitioner required a § 212(h) waiver. "Whether DUI convictions render an alien inadmissible, thus requiring him to obtain a § 212(h) waiver of inadmissability, is non-discretionary legal question squarely within our jurisdiction," said the court. Moreover, noted the court, the BIA did not deny adjustment as a matter of discretion, but rather it "purported to affirm the denial of a waiver that had not been denied." On the merits, the court held that under *Matter of Torres-Varella*, 23 I&N Dec. 78 (BIA 2001), "simple DUI convictions, even if repeated, are not crimes of moral turpitude." The court remanded the case to the BIA under *Ventura v. INS*, 123 S. Ct. 353, 355-56 (2002), but noted in *dicta*, that petitioner's years of residence and family ties in the United States "more than outweighed" his DUI convictions.

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CASES SUMMARIZED IN THIS ISSUE

"Since September 11th, 2001, every agency and every public servant at the Department of Justice has worked to replace a reactive culture of compartmentalization with an assertive and courageous culture of action and results." *Attorney General Ashcroft*

INSIDE OIL

The dramatic increase in the number of petitions for review filed in immigration cases has prompted the Civil Division to detail 18 attorneys from other Division components to the Office of Immigration Litigation. The attorneys detailed from National Courts are: **Tim McIlmail**, **Leslie Ohta**, **Daniel McClain**, **Patricia Smith**; from Frauds: **Tom Lederman**, **Susan Lynch**, **Rene Rocque**; from Financial: **Frances McLaughlin-Keegan**, **Michelle Thresher**; from Constitutional Torts: **Lisa Watts**; from Environmental Torts: **Rena Curtis**; from FTCA: **Colette Winston**; from Aviation/Admiralty: **Victor Lawrence, Andrew Eschen**; from Tobacco: **Don Scroggin;** and from Federal Programs: **Jen Paisner**, **Isaac Campbell**, **Elizabeth Layton.** The Executive Office for Immigration Review has detailed Associate General Counsel, **Carolyn Piccotti**.

On June 3, 2003, a delegation from OIL conducted two training classes at the Seattle office of the Department of Homeland Security. Principal Deputy Director **David Kline**, Senior Litigation Counsel **Julia Doig**, and Trial Attorney **Anh-Thu Mai** made presentations. The morning session included two of the local Immigration Judges, attorneys from the Department of Homeland Security, and Assistant United States Attorneys. The afternoon session was attended by DHS operational personnel from Inspections, Adjudications, Detention and Removal, and Investigations. In total, 38 people attended the sessions. Topics included: asylum, juvenile issues, citizenship and nationals, criminal alien issues, and reinstatement.

INSIDE EOIR

On June 6, 2003, **Paul W. Schmidt** took the oath of office as an Immigration Judge in Arlington, Virginia. Judge Schmidt served as Chairman of the BIA from 1991-95 and as a Board Member until this latest appointment. Judge Schmidt previously had served for ten years as the Deputy General Counsel of the former INS. Also sworn in as Assistant Chief Immigration Judges were **Anne J. Greer** and **Daniel Echeverria**. Prior to her appointment, Judge Greer served as a senior panel attorney for EOIR. Judge Echeverria served in the EOIR's Office of the General Counsel.

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"

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