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SUPREME COURT HOLDS THAT FOREIGN NATIONALS DETAINED AT GITMO HAVE RIGHT TO PETITION FOR HABEAS CORPUS

In ***Rasul v. Bush***, __U.S.__, 2004 WL 1432134 (June 28, 2004), the Supreme Court held that United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and held at Guantanamo Naval Base, Cuba.

Statutory habeas jurisdiction does not require the prisoner's presence within the territorial jurisdiction of the district court; all that is required is that his "custodian can be reached by service of process."

The two consolidated habeas petitions were filed in the District Court for the District of Columbia by relatives on behalf of certain foreign nationals who were captured during military operations in Afghanistan and who are currently detained at Guantanamo. They alleged that they never engaged in combat against the United States or any terrorist acts. They claimed that their detention violates the Constitution, international law, and United States treaties because they have been held for over two years without charges against them and have been denied the right to counsel and access to the courts. The district court dismissed for lack of jurisdiction, and the D.C. Circuit affirmed. Both courts held that *Johnson v. Eisentrager*, 339 U.S. 763 (1950), establishes that aliens detained outside the sovereign territory of the United States have no right to petition for habeas.

The Supreme Court reversed and remanded in a 5-1-3 decision by Justice Stevens. The Court began by noting that habeas traces its roots to the Magna Carta and the present habeas statute grants "federal district courts, 'within their respective jurisdictions,' the authority to hear applications for habeas corpus by any person who claims to be held 'in custody in violation of the Constitution or laws or treaties of the United States'" (quoting 28 U.S.C. 2241(a), (c)(3)). The Court then distinguished *Eisentrager*, which involved German citizens held in occupied Germany. Here, the Court stated, petitioners "are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control." Moreover, the Court stated, *Eisentrager* dealt with "*constitutional* entitlement to habeas corpus," not "*statutory* entitlement." Subsequent decisions, the Court stated, have "overruled the statutory predicate to *Eisentrager*'s holding" and made clear that statutory habeas jurisdiction does not require the prisoner's presence

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SUPREME COURT FINDS THAT HABEAS RESPONDENT IS IMMEDIATE CUSTODIAN

In ***Rumsfeld v. Padilla***, __U.S.__, 2004 WL 1432135 (June 28, 2004), the Supreme Court held (5-4) that the district court in New York lacks habeas jurisdiction over the petition filed by Padilla, whose immediate custodian, the only proper respondent, is located in South Carolina. In a footnote, the Court left open the question of whether the Attorney General is a proper respondent when the habeas petition is filed by an alien detained pending deportation.

Padilla, a United States citizen, was arrested in Chicago and then held in New York as a material witness in connection with the grand-jury investigation of the 9/11 attacks. When the President designated Padilla as an "enemy combatant," he was transferred to military custody and sent to the naval brig in South Carolina. Padilla's counsel then filed a habeas petition in the Southern District of New York naming as respondents the President, Secretary Rumsfeld, and the commander of the naval brig. The Second Circuit held that Secretary Rumsfeld was a proper respondent because of his personal involvement in Padilla's detention. The President and the brig commander were dismissed as parties. On the merits, the court of appeals granted habeas, holding that the President lacks authority to detain Padilla, a United States civilian,

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within the territorial jurisdiction of the district court; all that is required is that his "custodian can be reached by service of process." "No party questions the District Court's jurisdiction over petitioners' custodians," the Court stated, and section 2241 "requires nothing more." The Court then dismissed the notion that statutes are not presumed to have extraterritorial application "unless such intent is clearly manifested." That presumption "certainly has no application to the operation of the habeas statute," the Court held. In addition, "the United States exercises 'complete jurisdiction and control' over" Guantanamo under its 1903 lease with Cuba, the Court added. Noting that the government conceded that a federal court would have habeas jurisdiction over a United States citizen held at Guantanamo, the Court held that "the statute draws no distinction between Americans and aliens held in federal custody." The Court then noted that the *Al Odah* petitioners also invoked the district court's jurisdiction under the federal-question statute and the Alien Tort Statute. The Court stated that *Eisentrager* does not bar such jurisdiction, that "[t]he courts of the United States have traditionally been open to nonresident aliens," and that the fact that petitioners are "in military custody is immaterial" to this issue. The Court stated that it was only deciding the jurisdictional issue, leaving open "[w]hether and what further proceedings may become necessary."

Justice Scalia, in a dissenting opinion joined by the Chief Justice and Justice Thomas, would have found that *Eisentrager* controls and precludes extending habeas jurisdiction under section 2241 "to aliens detained by the United States military overseas, outside the sovereign borders of the United States and beyond the territorial jurisdictions of all its courts." The dissenters characterized the consequence of the Court's holding as "breathtaking" and as "judicial adventurism of the worst sort."

JURISDICTION OVER HABEAS RESPONDENT

in military custody.

In a 5-4 decision by the Chief Justice, the Supreme Court reversed on the jurisdictional ground without reaching the merits issue. "The federal habeas statute straightforwardly provides that the proper respondent to a habeas petition is 'the person who has custody over [the petitioner],'" the Court began, quoting 28 U.S.C. 2242. Since its 1885 decision, the Court continued, the proper respondent has been held to be the person having "immediate custody" of the party detained.

> The Court declined to resolve the issue of "whether the Attorney General is a proper respondent to a habeas petition filed by an alien detained pending deportation."

The Court stated that it has "long implicitly recognized an exception to the immediate custodian rule in the military context where an American citizen is detained outside the territorial jurisdiction of any district court." Another exception allows habeas to be brought against "a supervisory official who exercises legal control" if "there is no immediate physical custodian with respect to the challenged 'custody,'" the Court added, and a third exception applies "when the Government moves a habeas petitioner after she properly files a petition naming her immediate custodian." But no exception applies to this case, the Court held. Thus, the brig commander in South Carolina, not Secretary Rumsfeld, is the proper respondent. The Court then held that the New York court did not have jurisdiction over the brig commander. "The plain language of the habeas statute thus confirms the general rule that for core habeas petitions challenging present physical confinement, jurisdiction lies in only one district: the district of confinement," the Court held.

The Court rejected the dissent's position that jurisdiction also lies in New York because that court could assert jurisdiction over Secretary Rumsfeld pursuant to New York's long-arm statute. That rule would produce "rampant forum shopping, district courts with overlapping jurisdiction, and the very inconvenience, expense, and embarrassment Congress sought to avoid when it added the jurisdictional limitation 137 years ago," the Court stated.

In footnote eight, the Court noted that in *Ahrens v. Clark*, 335 U. S. 188, 189 (1948), it had left open the question whether the Attorney General is a proper respondent to a habeas petition filed by an alien detained pending deportation." The Court noted that the lower courts have divided on this question, with the majority applying the immediate custodian rule and holding that the Attorney General is not a proper respondent. Compare *Robledo-Gonzales v. Ashcroft*, 342 F. 3d 667 (CA7 2003) (Attorney General is not proper respondent); *Roman v. Ashcroft*, 340 F.3d 314 (CA6 2003) (same); *Vasquez v. Reno*, 233 F. 3d 688 (CA1 2000) (same); *Yi v. Maugans*, 24 F.3d 500 (CA3 1994) (same), with *Armentero v. INS*, 340 F. 3d 1058 (CA9 2003) (Attorney General is proper respondent). *See also Henderson v. INS*, 157 F.3d 106 (1998) (discussing issue). However, the Court again declined to resolve the issue noting that it was not "before us today."

Justice Stevens joined by Justices Souter, Ginsburg, and Breyer dissented. They would have found that "special circumstances" justified an exception to the general rule that habeas must be filed in the district where the immediate custodian is located.

LITIGATING CLAIMS OF DUE PROCESS VIOLATIONS IN IMMIGRATION PROCEEDINGS

Immigration-related litigation has increased dramatically since 1996, and many of these cases involve due process challenges. Perhaps one of the least noted of the Government's litigation successes has been its argument that aliens lack a liberty interest upon which to predicate due process challenge to discretionary denials of immigration benefits and relief. As explained below, this argument has been accepted in almost every circuit, including three decisions of the Ninth Circuit. Where the argument is made and addressed by the courts, it wins; but courts often find due process violations by omitting entirely any analysis of whether a liberty interest exists, particularly if the Government does not raise the issue. This article will hopefully persuade Government briefers of the value of making the liberty interest argument in the appropriate cases.

> Courts often find due process violations by omitting entirely any analysis of whether a liberty interest exists.

When Congress enacted IIRIRA, it included numerous provisions intended to limit the jurisdiction of federal courts to review administrative immigration decisions. Notable amongst these jurisdictional bars were the provisions barring review of the Attorney General's discretionary decisions. *See Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 486 (1999) ("many provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts -- indeed, that can fairly be said to be the theme of the legislation").

The courts nevertheless sought ways to preserve their role in reviewing discretionary decisions. They engaged in tortured interpretations of the review bars. *See. e.g., Medina-Morales v. Ashcroft*, 362 F.3d 1263 (9th Cir. 2004) (Congress barred courts from reviewing Board denials of discretionary relief, but not from reviewing discretionary motions to reopen to apply for discretionary relief). They also sought to limit the review bars on discretionary decisions by holding that "a BIA decision that denies due process does not involve the exercise of discretion." *Antonio-Cruz v. INS*, 147 F.3d 1129, 1130 (9th Cir. 1998). This latter decision is particularly troubling because it encourages the proliferation of due process claims.

A search of Westlaw's court of appeals immigration database (FIM-CTA) revealed 2,307 post-IIRIRA civil decisions involving due process claims. While it is "axiomatic that before due process protections can apply, there must first exist a protect[a]ble liberty or property interest," *Bunn v. Conley*, 309 F.3d 1002, 1010 (7th Cir. 2002), very few of these cases even addressed this element of the due process claim. In fact, the words "liberty interest" appeared in only 88, less than four percent, of these cases. The appropriate response to this judicial misapplication of basic constitutional law is for the Government to brief the liberty interest issue on a consistent basis. There is good reason to do so – to date, the Government has won the issue in nine circuits, with multiple decisions in many circuits.

Here are the basics. Not every Government action is restricted by the Due Process Clause. The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Thus, "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the [Due Process Clause's] protection of liberty and property." *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). To have a protectable property or liberty interest in a benefit, "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Roth* at 577. Thus, no entitlement, no liberty interest, no due process claim.

Aliens in deportation proceedings are of course entitled to due process. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). With respect to whether or not an alien is deportable, there is little question that a liberty interest is at stake. It does not follow, however, that an alien who is deportable and seeks discretionary relief also has a liberty interest in that relief. Citizens in the criminal justice system obviously are entitled to due process protections.

Even a life prisoner, however, has no due process right when he seeks a pardon from the executive. In Due Process Clause terms, "a Connecticut felon's expectation that a lawfully imposed sentence will be commuted or that he will be pardoned is no more substantial than an inmate's expectation, for example, that he will not be transferred to another prison; it is simply a unilateral hope," and a "constitutional entitlement cannot be created -- as if by estoppel -- merely because a wholly and expressly discretionary state privilege has been granted generously in the past." *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465.

The Supreme Court in *Jay v. Boyd*, 351 U.S. 345 (1956), likened the discretion of the Attorney General with respect to suspension of deportation to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *Id.* at 354 n.16. The Court made clear that grant of suspension "is manifestly not a matter of right under any circumstances, but rather is in all cases a mat-

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LITIGATING DUE PROCESS CLAIMS

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ter of grace." *Id.; see also INS v. Yue Shaio Yang*, 519 U.S. 26, 30 (1996) (expressly reaffirming *Jay v. Boyd's* description of the Attorney General's discretion).

In short, the availability of administrative grace in immigration proceedings – such as cancellation of removal, suspension, 212(c), voluntary departure, asylum, adjustment of status, parole, deferred action, issues of prosecutorial discretion, and motions to reopen, even in the ineffective assistance of counsel context -- creates no liberty interest, and the Ninth Circuit, and most of the other circuits have agreed. *See Tovar-Landin v. John Ashcroft*, 361 F.3d 1164 (9th Cir. 2004) ("no fundamental right to discretionary relief from removal for purposes of due process and equal protection"); *Munoz v. Ashcroft*, 339 F.3d at 954 ("Since discretionary relief is a privilege created by Congress, denial of such relief cannot violate a substantive interest protected by the Due Process clause"); *Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) (no liberty interest in discretionary grant of voluntary departure); *see also Ali v. Ashcroft*, __ F.3d __, 2004 WL 856612 (6th Cir. April 22, 2004); *Dave v. Ashcroft*, __F.3d __, 2004 WL 787242, *3 (7th Cir. 2004); *Dandan v. Ashcroft*, 339 F.3d 567, 575 (7th Cir. 2003); *Belbruno v. Ashcroft*, No. 02-2142 (4th Cir. Mar. 29, 2004); *United States v. Aguirre-Tello*, 353 F.3d 1199, 1205 (10th Cir. 2004) (*en banc*); *Mireles-Valdez v. Ashcroft*, 349 F.3d 213, 219 (5th Cir. 2003); *Nativi-Gomez v. Ashcroft*, 344 F.3d 805, 808 (8th Cir. 2003) *United States v. Calderon-Pena*, 339 F.3d 320, 324 (5th Cir. 2003); *Garcia v. Attorney General*, 329 F.3d 1217, 1223-24 (11th Cir. 2003); *United States v. Wilson*, 316 F.3d 506, 510 (4th Cir. 2003); *United States v. Lopez-Ortiz*, 313 F.3d 225, 230 (5th Cir. 2002); *Smith v. Ashcroft*, 295 F.3d 425, 429 (4th Cir. 2002); *Escudero-Corona v. INS*, 244 F.3d 608, 615 (8th Cir. 2001); *Aguilera v. Kirkpatrick*, 241 F.3d 1286, 1293 (10th Cir. 2001); *Huicochea Gomez v. INS*, 237 F.3d 696, 699-700 (6th Cir. 2001); *Ashki v. INS*, 233 F.3d 913, 921 (6th Cir. 2000); *Appiah v. INS*, 202 F.3d 704, 709 (4th Cir. 2000); *Tefel v. Reno*, 180 F.3d 1286, 1300 (11th Cir. 1999) (citing *Dumschat*, 452 U.S. at 465); *Mejia Rodriguez v. Reno*, 178 F.3d 1139, 1146 (11th Cir. 1999), *cert. denied*, 531 U.S. 1010 (2000); *Ahmetovic v. INS*, 62 F.3d 48, 53 (2d Cir. 1995); *Garcia v. INS*, 7 F.3d 1320, 1326 (7th Cir. 1993); *Gisbert v. U.S. Attorney General*, 988 F.2d 1437, 1443 (5th Cir. 1993); *Adras v. Nelson*, 917 F.2d 1552, 1558 (11th Cir. 1990); *Achacoso- Sanchez v. INS*, 779 F.2d 1260, 1264 (7th Cir. 1985); *Velasco-Gutierrez v. Crossland*, 732 F.2d 792, 798 (10th Cir. 1984); *Jean v. Nelson,* 727 F.2d 957, 981-82 (11th Cir. 1984).

Merely because aliens have due process rights with respect to the deportability determination, does not mean they have such rights with respect to the discretionary relief phase of the proceeding.

Aliens sometimes argue that even if they have no liberty interest in receiving the relief, the existence of an application process creates a liberty interest. The process of applying for discretionary relief itself, however, cannot be the protected interest. *See Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) (an "expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause"); *Tefel v. Reno*, 180 F.3d at 1301 ("just as Plaintiffs enjoy no "liberty or property' interest in their expectancy of receiving suspension of deportation, they enjoy no 'liberty or property' interest in being eligible to be considered for suspension."); *FDIC v. Henderson*, 940 F.2d 465, 475 (9th Cir. 1991) ("[A] substantive property right cannot exist exclusively by virtue of a procedural right."); *Kovats v. Rutgers*, 822 F.2d 1303, 1314 (3d Cir. 1987) ("the Supreme Court has made clear that promises of specific procedures do not create interests protected by the Due Process clause") (citing *Olim*); *Shvartsman v. Apfel*, 138 F.3d 1196, 1199 (7th Cir. 1998) (observing that "[i]f a right to a hearing is a liberty interest . . . then one has interpreted [due process] to mean that the state may not deprive a person of a hearing without providing him with a hearing. *Reductio ad absurdum*").

In conclusion, despite the overwhelming authority supporting the Government's position on this issue, it is plain that the courts simply do not like its implications. Thus, in one case, the court agreed that "there is no constitutional right to asylum," but then proceeded to find a constitutional violation in his asylum hearing, because "aliens facing removal are entitled to due process." *Abdulrahman v. Ashcroft*, 330 F.3d 587, 596 (3d Cir. 2003). The words "liberty interest" naturally do not appear in the opinion.

It is incumbent on Government briefers to impress upon the courts that merely because aliens have due process rights with respect to the deportability determination, does not mean they have such rights with respect to the discretionary relief phase of the proceeding. Failure to do so risks more decisions where courts find constitutional violations, despite the absence of constitutional rights.

By Douglas Ginsburg, OIL
☎ 202-305-3619

Contributions To The ILB Are Welcomed!

Summaries Of Recent Federal Court Decisions

ASYLUM

■Seventh Circuit Affirms Denial of Asylum To Nigerian Applicant Based on Threat of Female Genital Mutilation (FGM) to Applicant's Daughters

In ***Olowo v. Ashcroft***, 368 F.3d 692 (7th Cir. 2004) (Cudahy, *Ripple*, Wood), the Seventh Circuit affirmed the BIA's denial of an application for asylum, where the petitioner sought derivative asylum based on the likelihood that her daughters would be subject to FGM if she were removed to Nigeria.

"Claims for 'derivative asylum' based on potential harm to an applicant's children are cognizable only when the applicant's children are subject to constructive deportation' along with the applicant."

The petitioner, a citizen of Nigeria and an LPR, traveled to the Bahamas in 2000. When she returned from that trip she was apprehended by the INS and charged with removability under INA § 212(a)(6)(E)(i) for knowingly aiding an alien to enter the United States. Petitioner then sought asylum and withholding on the ground that, if she returned to Nigeria, her two LPR daughters would be persecuted on account of membership in a particular social group, namely women of the Yoruba tribe who are subject to female genital mutilation in Nigeria. She testified that she herself had been subject to FGM when she was twelve years old. She also claimed that if she returned to Nigeria with her daughters, her husband's family would force her daughters to undergo FGM and that she and her husband would be unable to protect them from this procedure.

The IJ found petitioner removable as charged and denied her application for asylum because she had already been subject to FGM and that she could not "bootstrap a claim for asylum based upon fear of harm to her children" because they and their father are legal permanent residents in the United States and would not be required to travel to Nigeria with their mother. The BIA affirmed the IJ's decision without an opinion.

The Seventh Circuit preliminarily rejected petitioner's contention that the INS had not met its burden of proving the charge of removability. The court determined that the IJ's credibility ruling discrediting petitioner's testimony and his reliance on the INS's evidence was not improper. Accordingly the court found that there was substantial evidence to support the finding that petitioner was removable for knowingly aiding another alien to enter the United States.

On the merits of petitioner's asylum and withholding claims, the court found that the eligibility standards for both forms of relief "require an applicant to demonstrate that she herself will be subject to persecution if removed, and do not encompass any consideration of persecution that may be suffered by others – even family members – who may be obliged to return with her to Nigeria." The court added, however, that "such claims for 'derivative asylum' based on potential harm to an applicant's children are cognizable only when the applicant's children are subject to 'constructive deportation' along with the applicant." In this case the court pointed out that petitioner's daughters are LPRs, as is their father, "and when there is a parent who is available to care for the daughters in the United States, they are under no compulsion to leave." Accordingly, the court held that the facts in petitioner's case did not support a claim for derivative asylum.

Finally, the court was concerned about the possibility that petitioner would take her children to Nigeria and allow them to be subjected to FGM. The court directed the government attorney to share those concerns with DHS, which in turn would inform the Illinois state authorities about this case. The court also directed the Clerk of the court to mail a copy of the opinion to the Illinois Department of Children and Family Services for appropriate action.

Contact: Terri Scadron, OIL
☎ 202-514-3760

■Ninth Circuit Reverses Asylum Denial to Guatemalan Applicant And Remands For Reconsideration of Changed Country Conditions.

In ***Lopez v. Ashcroft***, 366 F.3d 799 (9th Cir. 2004) (Silverman, *Gould*, Bea), the Ninth Circuit reversed the BIA's denial of asylum, finding that the petitioner had been subject to persecution by the guerrillas in Guatemala on account of his political opinion.

The petitioner, who entered the country without inspection in 1991, testified he left Guatemala because he was receiving death threats from leftist guerrillas opposed to the Guatemalan government. Petitioner and his father worked on a plantation of a wealthy landowner in San Marcos, Guatemala. On one occasion in 1988, the guerrillas went to petitioner's workplace where he was the storekeeper, tied his hands, locked him in a grain warehouse and set the warehouse on fire. During this incident he suffered burns on his hands and back. The guerrillas threatened to kill him again in 1990 and 1991, telling him that he should be helping the guerrillas take property from the rich and not working for the rich. The guerrillas had kidnapped petitioner's father in 1979 because he would not cooperate with them. Petitioner's father had escaped but continued to endure harassment from the guerrillas. The IJ denied the application for asylum and withholding. The BIA affirmed in a split decision, finding no past persecution and that peti-

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tioner had not established persecution on account of a protected ground. The BIA alternatively concluded that petitioner did not have a fear of future persecution due to changed country conditions, and that he did not merit a humanitarian grant of asylum.

Preliminarily, the Ninth Circuit accepted petitioner's "testimony as true because neither the IJ nor the BIA made an adverse credibility finding." The court then determined that the guerrillas' attempts to murder petitioner constituted persecution, rejecting the BIA's contrary conclusion that petitioner's injuries did not rise to the level of persecution. The court also found that there was compelling evidence in the record to conclude that the guerrillas' assaults on petitioner were a "punishment for his pro-establishment political opinions," noting that the guerrillas had chastised him for working on a wealthy landowner's plantation and supporting the rich. "Refusal to cooperate with guerrillas, at least where the refuser was perceived as a political opponent by the guerrillas, may constitute a political opinion," said the court. Here, the court found that petitioner was persecuted on account of political opinion because he rejected the guerrillas' warnings, and because of his pro-establishment political views. The court then rejected the BIA's alternative holding based on changed country conditions, finding the BIA's analysis on this issue "scanty." The court noted that "if past persecution is shown, the BIA cannot discount it merely on a say-so. Rather our precedent establishes that in such a case the BIA must provide 'an individualized analysis of how changed conditions will affect the specific petitioner's situation.'" The court then determined to remand the case to the BIA consistent "with the spirit and reasoning of *Ventura*."

> ***"If past persecution is shown, the BIA cannot discount it merely on a say-so. Rather our precedent establishes that in such a case the BIA must provide 'an individualized analysis of how changed conditions will affect the specific petitioner's situation.'"***

Contact: Joshua Braunstein, OIL
☎ 202-305-0194

■Eighth Circuit Upholds Denial Of Albanian Asylum Claim Based Upon Changed Country Conditions

In ***Hasalla v. Ashcroft,*** 367 F.3d 799 (8th Cir. 2004) (Arnold, *Murphy,* Magill), the Eighth Circuit upheld the IJ's denial of asylum and withholding of removal to husband and wife from Albania who claimed persecution on account of political opinion.

The petitioners' claim for relief rested on their claim that between 1982-86 they they had been persecuted by the Communist government in Albania, and that from 1995 until 1998, they had been harassed and threatened because of their involvement with the Democratic Party. An IJ determined that petitioners had been subject to past persecution, but that in light of changed country conditions they were not eligible for asylum. The IJ further found that petitioners had not established a well-founded fear of future persecution because they had failed to establish "a cause and effect relationship" between the incidents they had encountered and their political opinion. The IJ also denied petitioners' request for protection under CAT. The BIA affirmed the IJ's decision without opinion.

Preliminarily, the Eight Circuit rejected petitioners' contention that the BIA should not have streamlined their case because they had presented legal and factual issues of a substantial nature. The court held, citing to its opinion in *Loulou,* that petitioners had "no constitutional or statutory right to an administrative appeal and no regulatory right to a full opinion by the Board."

On the merits the court agreed with the IJ's finding that conditions in Albania have changed so that petitioners no longer have a well founded fear of persecution on account of political opinion. The Communist party was no longer in power in Albania and the State Department Reports indicated no post-Communist retribution against political leaders. The court noted that the threats against petitioners were anonymous, and the fact that police did not take any action on the anonymous threats "does not necessarily mean that the Albania government was unwilling or unable to control the individuals who made the threats."

Contact: Shelley Goad, OIL
☎ 202-616-4864

CRIMES

■Third Circuit Holds That Filing A False Tax Return With A Loss To The Government In Excess Of $55,000 Is Not An Aggravated Felony Under INA § 101(a)(43)(M)(i)

In ***Lee v. Ashcroft***, 368 F.3d 218 (3d 2004) (Sloviter, Alito, *Oberdorfer*), the Third Circuit reversed the IJ's determination that filing false tax returns where the aggregate loss to the government exceeded $55,000, constituted an aggravated felony under the INA. The court held that a conviction for filing a false tax return, in violation of 26 U.S.C. § 7206(1) of the Internal Revenue Code, is not an "aggravated felony" as defined by INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i.)

The petitioners, husband and wife, are citizens of Korea and lawful permanent resident aliens. For many years they have operated a dry laundry cleaning business. In May 1997, they pled guilty to a three-count information which charged them with filing false income tax returns in 1989, 1990, and 1991. According to the information, petitioners had understated their taxes by $112,453, causing a tax deficiency of $55,811. In November 1997, the

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INS charged petitioners as being subject to removal as aliens who had been convicted of an aggravated felony as defined by INA §§ 101(a)(43)(M)(i) and (ii). These two provisions classify an offense as an aggravated felony if it (i) involves fraud or deceit in which the loss to the victim exceeds $10,000; or (ii) is described in § 7201 of the Internal Revenue Code (related to tax evasion) in which the revenue loss to the government exceeds $10,000.

An IJ determined that petitioners were subject to removal under either of the two subsections. The BIA affirmed that decision without opinion.

On appeal, the government conceded that INA §§ 101(a)(43)(M)(ii) did not apply to petitioners. Thus, the only question before the Third Circuit was the application of the (M)(i) provision. After applying traditional rules of statutory construction, the court determined that Congress' intent was "clear": "in enacting subsection (M)(ii), it intended to specify tax evasion as the only deportable tax offense; it follows that it did not intend subsection (M)(i) to cover tax offenses."

The court reasoned that if it were to adopt the government's proposed construction, and were to hold that any tax offense involving fraud and deceit over $10,000 was an aggravated felony under subsection (M)(i), subsection (M)(ii) would be mere surplusage.

Judge Alito dissented. He would have found that filing false tax returns makes any offense involving fraud or deceit in which the loss to the victim exceeds $10,000 an aggravated felony.

Contact: Lyle D.Jentzer, OIL
☎ 202-305-0192

■Third Circuit Holds That Theft By Deception Under Pennsylvania Law Is Not An Aggravated Felony

In ***Nugent v. Ashcroft***, 367 F.3d 162 (3d Cir. 2004) (Sloviter, Rendell, *Aldisert)*, the Third Circuit, in a consolidated appeal, dismissed petitioner's petition for review for lack of jurisdiction, and affirmed the denial of a habeas petition after finding that petitioner's conviction for theft by deception, in violation of Pennsylvania law, is not an aggravated felony.

Congress in enacting INA § 101(a)(43)(M)(ii), "intended to specify tax evasion as the only deportable tax offense; it follows that it did not intend subsection (M)(i) to cover tax offenses."

The petitioner, a citizen of Jamaica, entered the United States as an LPR in 1971, when he was seven years old. In 1984 petitioner was convicted of theft by unlawful taking and in 2000 of theft by deception. The INS then instituted removal proceedings claiming that the latter conviction constituted an aggravated felony. In response to petitioner's motion to terminate proceedings, an IJ issued an interlocutory order finding that the conviction of theft by deception constituted an aggravated felony. The INS also lodged an additional charge alleging that petitioner was removable for having been convicted of two crimes involving moral turpitude. The IJ concluded, based on petitioner's admission, that he was also removable on this charge. The IJ then ordered petitioner removed from the United States based on convictions for both the aggravated felony listed in the NTA (theft by deception) and the two crimes of moral turpitude. The BIA affirmed that decision without opinion.

The Third Circuit held that petitioner had been convicted of two crimes involving moral turpitude and therefore under 8 U.S.C § 1252(a)(2)(C), the court lacked jurisdiction to review the removal order. The court then asked for supplemental briefing on the question of whether it had jurisdiction to decide the aggravated felony issue. While this matter was pending, a district court denied petitioner's habeas corpus petition, holding that theft by deception is an aggravated felony. Petitioner appealed that decision, thus obviating the need for the court to address the jurisdictional issue. On the merits, the court applied the "categorical approach" under *Drakes v. Zimski*, 240 F.3d 246 (3d Cir. 2001), which "requires comparison of the elements of the state law offense to see if they encompass[ ] acts beyond those subject to prosecution under the federal definition." After an exhaustive analysis the court held that "although an offense under the Pennsylvania statute is a 'theft offense' so that 8 U.S.C. 1101(a)(43)(G) applies, because the state statute is bottomed on 'fraud or deceit,' the offense must also meet the requirements of 8 U.S.C. 1101(a)(43)M)(i) to qualify as an aggravated felony under the INA." Here, the petitioner's bad checks transaction for which he was convicted did not qualify as an aggravated felony, because the victims' loss did not exceed $10,000 as required by 8 U.S.C. 1101(a)(43)M)(i).

In a concurring opinion, Judge Rendell applauded "Judge Aldisert's logical tour de force," but stressed that the majority's "logic should not compel that we combine definitions within this section, as a general rule. Rather, only where the offense is a hybrid — as I submit theft by deception is — and where the aggravated felony classifications contain two distinct, clearly applicable tests, should we conclude that both must be fulfilled in order for the offense to qualify as an aggravated felony."

Contact: Jamie Dowd, OIL
☎ 202-616-4866

JURISDICTION

■IJ's Alternative Discretionary Denial Of Application For A Waiver Trumps Court's Jurisdiction

In ***San Pedro v. Ashcroft***, __F.3d__, 2004 WL 1396286 (9th Cir. June 23, 2004)(*D.W. Nelson*, Kozinski, Graber),

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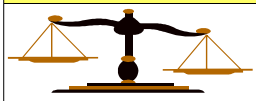

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the Ninth Circuit dismissed the appeal from a denial of a waiver under INA § 237(a)(1)(H), for lack of jurisdiction, finding that the IJ's alternative holding denying the waiver as a matter of discretion "render[ed] futile any review of the IJ's statutory interpretation" that petitioner was statutorily ineligible for the waiver.

The petitioner, a citizen of the Philippines, entered the United States in 1987, on a preference visa as the unmarried son of a United States citizen. In April 2000, the INS placed petitioner in removal proceedings after discovering that petitioner had been married at the time he obtained the visa. Petitioner conceded removability, but sought several reliefs, including a waiver under INA § 237(a)(1)(H). The IJ found petitioner statutorily ineligible for the waiver on the ground that his father, who had petitioned for his entry visa, died several months before petitioner's visa interview. The IJ reasoned that, upon his father's death, petitioner's visa was automatically revoked, retroactive to the date of the visa approval. The IJ also held, that even if petitioner was statutorily eligible for the waiver, he did not merit the favorable exercise of discretion. The BIA summarily affirmed that decision.

The Ninth Circuit held that the IJ's alternative ruling rendered futile any review of the IJ's determination of statutory eligibility, because under INA § 242(a)(2)(B)(ii), it lacked jurisdiction to review the discretionary denial.

The Ninth Circuit held that the IJ's alternative ruling rendered futile any review of the IJ's determination of statutory eligibility, because under INA § 242(a)(2)(B)(ii), it lacked jurisdiction to review the discretionary denial. The court first noted that under *INS v. Bagamasbad*, 429 U.S. 24 (1976), "as a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach." The court then found that although the there are non-discretionary elements that must be met to obtain a waiver under INA § 237(a)(1)(H), the ultimate authority whether to grant the waiver rests entirely in the discretion of the Attorney General, and thus, is not subject to judicial review.

Contact: Anthony Nicastro, OIL
☎202-616-9358

DUE PROCESS

■Seventh Circuit Holds That Alien Must Present Evidence Demonstrating That Due Process Violation Could Have Affected Outcome of Removal Hearing

In ***Kuschchak v. Ashcroft***, 366 F.3d 597 (7th Cir. 2004) (*Flaum*, Posner, Ripple), the Seventh Circuit upheld the BIA's decision deeming the petitioner's application for asylum abandoned. The petitioner, a citizen of the Ukraine Republic, entered the United States as a visitor in July 1996. He did not depart when his visa expired. Instead, almost two years later, he applied for asylum. When the Asylum Officer denied his request, petitioner was placed in removal proceedings. At the preliminary hearing petitioner indicated that he would be applying for asylum based on his eligibility for a diversity visa and also for asylum and withholding. The IJ noted that petitioner appeared ineligible for asylum because he had not filed his application within one year of his arrival in the United States. Petitioner's counsel indicated that there were special circumstances for the late filing. The IJ then set the case for a hearing on merits on the application for withholding. Petitioner subsequently filed an "Emergency Motion to Advance Hearing." The IJ granted that motion. At the hearing, the IJ denied the application for adjustment for lack of eligibility. The IJ then requested petitioner's attorney to continue to present his case for the applications of any other relief. The attorney refused to continue with the hearing, even after being informed by the IJ that a refusal to continue would cause the applications for asylum and withholding to be considered abandoned. The IJ also explained the situation to petitioner who decided to trust his attorney. Consequently the IJ deemed abandoned petitioner's applications for asylum and withholding. The BIA affirmed that decision, agreeing with the IJ's conclusion that petitioner had abandoned his applications for asylum and withholding.

Before the Seventh Circuit, petitioner argued that the IJ deprived him of his right to due process when he deemed that he had abandoned his applications for relief. Preliminarily, the court noted that to prevail on a due process claim, an alien must show not only a due process violation, but also "must produce 'concrete evidence' indicating that the due process violation 'had the potential for affecting' the outcome of the hearing." Here the court found that petitioner, unlike the applicant in *Podio v. INS*, 153 F.3d 506 (7th Cir. 1998), was not deprived of the opportunity to present corroborating or other crucial evidence.

The court further found that neither the IJ not the government took any action to mislead or confuse the petitioner. Rather any confusion was the result of petitioner's motion and the assumptions under which his attorney was proceeding, said the court. Finally, the court held that, even if the IJ's action deprived petitioner of his right to due process, he was still required to come forward with evidence to show that the deprivation "had the potential for affecting the outcome of the hearing." He failed to do so, said the court, and therefore he failed to make the necessary showing of prejudice in order to make out a due process violation.

Contact: Rena Curtis, OIL
☎ 202-616-4219

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■First Circuit Rejects Birth of Second Child as "New Evidence" Warranting Reopening, and Ineffective Assistance Claim Under *Lozada*

In ***Wang v. Ashcroft***, 367 F.3d 25 (1st Cir. 2004) (Torruella, *Cyr*, Lipez), the First Circuit affirmed the BIA's denial of petitioner's motion to reopen and remand. The petitioner, a native and citizen of China, sought to enter the United States in June 1992 with a counterfeit alien registration card. When placed in exclusion proceedings, he applied for asylum based on his opposition to the Communist Party. In 1996 petitioner married and his wife gave birth to a boy in January 1997, and to a girl in May 2000. In June 2000, an IJ denied the application for asylum. Petitioner appealed to the BIA. While the appeal was pending, petitioner obtained new counsel and filed a motion to remand based on "new circumstances," namely that because of the birth of the two children he or his wife would be forced to undergo sterilization if returned to China.

To demonstrate ineffective assistance of counsel, the alien must demonstrate that counsel's action rendered the immigration proceedings "'so fundamentally unfair that the alien was prevented from reasonably presenting his case,' and that there is a reasonable probability that counsel's conduct resulted in actual prejudice to the case."

The BIA denied the appeal and the motion, finding that the birth of the of the second child did not constitute new evidence because the child was born before the June 2000 hearing, and that petitioner had provided no testimony before the IJ of any fear of coerced sterilization. Once again petitioner retained new counsel who filed another motion to reopen and a second motion to remand with the BIA, contending that his previous attorneys rendered ineffective assistance because they did not pursue the sterilization claim for asylum. In June 2003, the BIA denied both motions, finding that petitioner had not met the threshold procedural requirements for a claim of ineffective assistance of counsel under *Matter of Lozada*.

The First Circuit agreed with the BIA's finding that petitioner's affidavit did not satisfy the *Lozada* requirement because, *inter alia*, it did not indicate the scope of the legal representation agreed upon with his former attorney. Additionally, the court noted that "to demonstrate ineffective assistance of counsel, the alien client must demonstrate that counsel's action or inaction rendered the immigration proceedings 'so fundamentally unfair that the alien was prevented from reasonably presenting his case,' and that there is a reasonable probability that counsel's conduct resulted in actual prejudice to the case." Here, the court found that petitioner could not prove prejudice because petitioner admitted that he never informed his prior counsels of his subjective fears of forced sterilization nor testified to the IJ about any fear of sterilization upon returning to China.

Contact: Emily Radford, OIL
202-616-4885

JURISDICTION

■Seventh Circuit Affirms District Court's Ruling That It Lacked Jurisdiction To Review the INS' Decision To Revoke The Approval Of Petitioner's Immigrant Visa Petition

In ***El-Khader v. Monica***, 366 F.3d 562 (7th Cir. 2004) (*Coffey*, Ripple, Kanne), the Seventh Circuit held that the district court properly dismissed petitioner's complaint that the INS had improperly revoked his visa petition, for lack of subject matter jurisdiction under INA § 242(a)(2)(B)(ii).

The petitioner, a Jordanian citizen, had entered the United States as a student in 1988. In 1991, petitioner unsuccessfully applied for asylum. In 1995, the INS instituted deportation proceedings. While the proceedings were pending petitioner filed for and was granted a non-immigrant worker visa, and he worked for the employer-sponsor until December 1997. On May, 9, 1997, petitioner married a United States citizen, but the couple divorced on October 27, 1998. During the marriage, however, petitioner's wife filed a visa petition on his behalf and petitioner filed a concurrent application for adjustment of status. When the marriage terminated by divorce, the INS denied the visa petition and the adjustment application.

On April 1, 1998, Ameritrust Mortgage Corporation filed for an immigrant visa petition on behalf of petitioner. When that petition was approved, petitioner filed a new application for adjustment with the INS. The filing triggered an INS investigation into petitioner's prior marriage. The INS determined petitioner never cohabitated with his former wife, never consummated their marriage, and that the marriage had been a sham, undertaken to evade immigration laws. On the basis of this finding, the INS notified Ameritrust of its intent to revoke the approval of the visa petition. The employer and petitioner responded to the notice claiming, *inter alia*, that the marriage was legitimate and, as an arranged marriage under the Islamic faith "it was perfectly proper for the consummation of his marriage to be delayed and for him not to live immediately with his wife." On November 1, 2002, the INS formally issued a decision revoking the approval of the visa petition under INA § 205, and denied the application for adjustment. Petitioner did not file an administrative appeal of that decision but rather challenged the denial in district court. The district court granted the government's motion to dismiss on the basis that under INA § 242(a)(2)(B)(ii), the court lacked jurisdiction over petitioner's claim.

The Seventh Circuit rejected petitioner's argument that INA § 242(a)(2)(B)(ii), applies only in the context of

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removal and deportation determinations. The court noted that it had decided that precise issue in *Samirah v. O'Connell*, 335 F.3d 545 (7th Cir. 2003), where it had held that the scope of § 242(a)(2)(B)(ii), "is not limited to discretionary decisions made within the context of removal proceedings." Rather, said the court, the plain language of the statute "bars court from reviewing any discretionary decision of the Attorney General made under the authority of sections 1151 through 1378 of title 8 of the United States Code, which collectively constitute the subchapter that § 1252(a)(2)(B)(ii) references." The court then determined that the revocation of petitioner's visa petition under INA § 205, was on its face a discretionary decision and thus not subject to judicial review.

Contact: David McConnell, OIL
☎ 202-616-4881

STREAMLINING

■Eighth Circuit Holds That BIA's Decision To Streamline A Case Is Committed To Agency Discretion, And Affirms Denial of Asylum, Withholding, And CAT

In ***Ngure v. Ashcroft***, 367 F.3d 975 (8th Cir. 2004) (Melloy, Beam, *Colloton*), the Eighth Circuit held that it lacked jurisdiction to consider whether "the BIA properly employed streamlined 'affirmance without opinion' procedures" to decide petitioner's appeal, finding that determination "committed to agency discretion by law."

The petitioner, a citizen of Kenya entered the United States as a student in 1995, but did not depart when his visa expired. When the INS placed him in proceedings, he applied for asylum. However, the IJ determined that he was not eligible for asylum because he did not file his application within one year of arriving in the United States, and failed to demonstrate any changed circumstances for his failure to do so. Alternatively, the IJ found the petitioner not credible, and denied his applications for asylum and withholding, and protection under CAT. The BIA affirmed without opinion (AWO) that decision under its streamlined procedures.

"The Attorney General surely did not intend to create substantive rights for aliens in the determination whether a particular decision of an IJ was affirmed without opinion."

The Eighth Circuit had previously held that the AWO procedures comports with Due Process Clause of the Fifth Amendment. *Loulou v. Ashcroft*, __F.3d__ (8th Cir. 2004). Here, the court was presented with a non-constitutional challenge to the use of the AWO procedures in petitioner's case. The court agreed with the government's argument that the decision to employ the AWO procedures in a particular appeal is not subject to judicial review. The court concluded, after reviewing the history of the streamlining regulations, that "the Attorney General surely did not intend to create substantive rights for aliens in the determination whether a particular decision of an IJ was affirmed without opinion." The court observed that "judicial review of the BIA's streamlining decision would have 'disruptive practical consequences' for the Attorney General's administration of the alien removal process." Moreover, the court determined that it would not be possible to devise a meaningful and adequate standard of review because in this case in order for a court to rule that the criteria for affirmance without opinion were not satisfied, it would have to conclude either that the result reached by the IJ was incorrect or that the BIA was wrong to find that "factual or legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case." Such determinations, said the court, "would duplicate the review of the merits already undertaken." The court concluded that "the summary affirmance system represents a careful balancing of the need to ensure correct results in individual cases with the efficiencies necessary to maintain a viable appellate organization that handles an extraordinary large caseload."

On the merits, the court held that it lacked jurisdiction to determine whether petitioner had established "exceptional circumstances" to excuse his delay in timely filing for asylum. The court then found that a reasonable fact-finder would not have been compelled to find that petitioner had been subject to persecution or had a well-founded fear of future persecution on account of his political opinion or his religious beliefs. Consequently, petitioner was not eligible for withholding of removal. The court also affirmed the denial of protection under CAT, noting that while the country reports indicated that Kenya's human rights record was generally poor, "the reports alone were insufficient to demonstrate that it is more likely than not that a particular individual will be tortured by the government if returned to Kenya."

Contact: Jennifer Paisner, OIL
☎ 202-616-8268

VOLUNTARY DEPARTURE

■Third Circuit Holds That It Lacks Jurisdiction To Reinstate Or Extend a Voluntary Departure Order

In ***Reynoso-Lopez v. Ashcroft***, 369 F.3d 275 (3d Cir. 2004) (Barry, *Fuentes*, Rosenn), the Third Circuit affirmed the IJ's adverse credibility finding and rejected petitioner's request for reinstatement of his expired period of voluntary departure and extension of the departure date previously ordered by the IJ and affirmed by the BIA. On January 20, 2000, an IJ denied petitioner's request for asylum, ordered him deported, and granted him voluntary

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departure until March 6, 2000. On July 23, 2002, the BIA affirmed the IJ without opinion but granted petitioner thirty days of voluntary departure.

On appeal, petitioner claimed that he did not depart voluntarily because he wanted to appeal the BIA's denial of his request for asylum. He contended that the court had the jurisdiction, as a matter of due process, to reinstate the expired voluntary departure date if the court affirmed the BIA's denial of his asylum claim. He claims that the inability of the Court to extend voluntary departure dates will cause aliens to lose "the privilege of voluntary departure."

The court first affirmed the IJ's denial of asylum based on an adverse credibility determination. The court then considered whether it had jurisdiction to extend a voluntary departure order pending the judicial review of a denial of a request for asylum. The court found that "under IIRIRA, the executive branch, not the judiciary, is given the sole authority to determine when an alien must depart." Moreover, said the court, the statutory provisions precluding judicial review of a denial of voluntary departure, "underscore the fact that, in enacting IIRIRA, Congress intended to vest the right to set deadlines for an alien's voluntary departure solely with the executive branch, and not the courts." The court added that petitioner is not left without a remedy, because he can apply for reinstatement or extension of voluntary departure directly with the district director. Additionally, said the court, under IIRIRA, petitioner was "free to voluntarily depart and still pursue a petition for review, preserving his appellate rights." Finally, the court noted that a number of circuit courts that have considered the voluntary departure issue "have similarly found that they lack jurisdiction to extend a voluntary departure order."

Contact: Erica Franklin, OIL
☎ 202-616-4213

■Fourth Circuit Affirms Denial of Asylum And Holds That It Lacks Jurisdiction To Reinstate Expired Period of Voluntary Departure

In ***Ngarurih v. Ashcroft***, __ F.3d __, 2004 WL 1277041 (4th Cir. June 10, 2004) (Wilkinson, Gregory, *Shedd*), the Fourth Circuit affirmed the BIA's denial of petitioner's application for asylum and further held that IIRIRA "does not permit a court of appeals to alter the period allowed by the BIA for voluntary departure, either by reinstating or staying the departure period."

The petitioner, a citizen of Kenya, entered the United States as a non-immigrant student. In May 2000, he filed an application for asylum claiming that if would be persecuted if returned to Kenya because he had criticized President Moi and his government's tea farming policies. Petitioner, who began farming tea on a portion of his father's land in the early 1990's, claimed that he organized protests, marches, and a boycott to protest the government's tea policies. Petitioner went into hiding when President Moi issued a statement to end the boycott or face "dire consequences." Petitioner surrendered to local authorities in 1992. He was taken to prison where he was interrogated, subjected to mistreatment, and threatened with execution. Subsequently, petitioner was imprisoned for eight months and then released in April 1993. Petitioner stated that with the help of Peace Corps volunteers he obtained a student visa to enter the United States in 1995. Petitioner returned to Kenya in June 1997 to visit his brother who had been arrested. After obtaining his release, petitioner returned to the United States in August 1997.

The IJ denied petitioner's application for asylum finding that although petitioner had been subject to past persecution, his two month trip to Kenya demonstrated that he was willing to return to his native country and that he could be involved in public matters without reprisal by the Kenyan government. The IJ also denied the request for withholding but granted petitioner's request for voluntary departure. The BIA affirmed the IJ's decision also finding that petitioner's return to Kenya undermined his claim to "humanitarian asylum," and constituted evidence of changed circumstances. The BIA also granted a 30-day period of voluntary departure.

The Fourth Circuit held that "while one could argue that the factfinder could have reached a different conclusion, it is not our task to 'reweigh the evidence and determine which of the competing views is more compelling.'" The court found that substantial evidence supported the denial of asylum. The court also found that the BIA's denial of "humanitarian asylum," was not "manifestly contrary to law or an abuse of discretion." In particular, the court noted that the past persecution suffered by the petitioner was not as severe as the persecution suffered by the alien in *Matter of Chen*, and in two other cases decided by the court.

The court then considered petitioner's request to reinstate to reinstate his expired voluntary departure period. The court held that "under current law, the decision whether to permit an alien to depart the United States voluntarily is committed entirely to the discretion of the Attorney General." The court further rejected petitioner's contention that the court should exercise its equitable powers, pursuant to 28 U.S.C. § 2349, to stay the period specified for voluntary departure. "Having concluded, however, that 8 U.S.C. 1252 (a)(2)(B) precludes judicial review of the BIA's order granting voluntary departure, we cannot evade this statutory directive by resort to equity," said the court. "Indeed, since we lack jurisdiction over the BIA's order granting voluntary departure, there is nothing before us to stay."

Judge Gregory concurred that the IIRIRA precluded the court from reinstating an expired period of voluntary departure, but dissented from the majority's "unnecessary" conclusion that the IIRIRA precludes the use of equitable powers to stay or toll a voluntary departure period.

Contact: Deborah Misir, OIL
☎ 202-305-7599

CASES SUMMARIZED IN THIS ISSUE

NOTED

In ***Hamdi v. Rumselfd***, __U.S.__, 2004 WL 1431951 (June 28, 2004), a plurality of the Supreme Court (4-2-2-1) held that Congress authorized the detention of a United States citizen captured abroad and designated as an enemy combatant. The Court further found, however, that due process required that the United States citizen be given a meaningful opportunity before a neutral decision maker to contest the factual basis for that detention.

INSIDE OIL

OIL welcomes two new lawyers: **S. Nicole Nardone** and **Margot Nadel**. Ms. Nardone is a graduate of King's College and of the University of San Francisco School of Law. After working in private practice for several years, in 2002, Ms. Nardone joined the Department of Justice's Civil Rights Division where she remained until her transfer to OIL. Ms. Nadel is a graduate of Cornell University and of the George Washington University Law School. Prior to joining OIL she was the Attorney Advisor for the Chief Immigration Judge at EOIR, where she had been hired under the Department's Honors Program.

OIL bids farewell to Trial Attorney **Nelda Reyna Ackerman**. Mr. Ackerman joined OIL in 1994 after serving as a staff attorney for the Mexican-American Legal Defense & Educational Fund ("MALDEF").

ANNUAL OIL-DHS (Former INS)-EOIR PICNIC—The 22d Annual OIL-DHS-EOIR picnic will be held on July 9, 2004, 12-4:00 pm, at Bolling Air Force Base, Pavillion No. 6. If you have not rsvp and would like to attend, contact Lauren Lanahan at *Lauren.lanahan@usdoj.gov*.

INSIDE ICE

Congratulations to former OILer **Patrick P. Shen**, who has been appointed as the first Director of the ICE's Office of Policy and Planning. Prior to joining ICE, he served as immigration counsel for the Senate Judiciary Committee. Mr. Shen was a Trial Attorney at OIL from 2001 to 2003. Prior to joining OIL he was a Special Assistant U.S. Attorney for the Eastern District of New York.

Robert Divine has been appointed as the first Principal Legal Advisor for U.S. Citizenship and Immigration Services. Prior to his appointment, Mr. Divine practiced immigration law with the law firm of Baker, Donelson, Bearman Caldwell & Berkowitz. He is the author of "Immigration Practice," a practical treatise addressing all aspects of immigration law.

INSIDE EOIR

Kevin J. Chapman has been appointed Acting General Counsel of the Executive Office for Immigration Review. Prior to joining EOIR in 2003, Mr. Chapman served as associate general counsel for the U.S. Marshals Service.

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.

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

Peter D. Keisler
Assistant Attorney General

Jonathan Cohn
Deputy Assistant Attorney General
United States Department of Justice
Civil Division

Thomas W. Hussey
Director

David J. Kline
Principal Deputy Director
Office of Immigration Litigation

Francesco Isgro
Senior Litigation Counsel
Editor

Kate Miller
Law Intern