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Immigration Litigation Bulletin

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BIA PROCEDURAL REFORMS UPHELD BY DISTRICT COURT

In ***Capital Area Immigrants' Rights Coalition v. U.S. Dept. of Justice,*** __F. Supp.2d__ (D.D.C. May 21, 2003) (*Bates*), the district court rejected a challenge, under the Administrative Procedure Act, to the Attorney General's regulation establishing procedural reforms for the Board of Immigration Appeals (BIA). See 27 Fed. Reg. 54878 (August 26, 2002).

"There was a rational connection between the facts found and the choice made."

The August 2002 regulation made review by a single BIA member the dominant method of adjudicating most appeals. These reforms were intended to reduce delays in the review process, enable the BIA to keep up with its caseload and reduce the existing backlog of cases. These reforms would also permit the BIA to focus more attention on those cases presenting significant issues for resolution by a three-member panel. The regulation also provided for the reduction of the size of the BIA from twenty-three authorized members to eleven.

The lawsuit was filed in October 2002, by a coalition of advocates and immigrants rights groups in the Washington, D.C. metropolitan area (CAIR), and the American Immigration Lawyers Association. Plaintiffs contended that the regulation reforming the BIA was issued in violation of the APA because the government, in deciding to promulgate these rules, failed to employ reasoned decision-making, failed adequately to respond to comments and adverse evidence cited in comments to the proposed rule, departed from previous practices and findings, and supported their result with inconsistent and contradictory reasoning. Plaintiffs sought a declaration that, *inter alia*, the final rule was arbitrary and capricious under the APA.

On May 21, the district court denied the government's motion to dismiss on standing and non-reviewability grounds, but granted its motion for summary judgment, thereby upholding the regulations on their mer-

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REMOVAL OF SOMALI ALIEN NOT SUBJECT TO PRIOR ACCEPTANCE

In ***Jama v. INS***, __F.3d__, 2003 WL 21212090 (8th Cir. May 27, 2003) (Bowman, *Arnold*; Bye dissenting), the Eight Circuit reversed a district court's finding that under INA § 241(b), the government could not remove the petitioner to Somalia without first establishing that Somalia would accept his return.

The petitioner, a native of Somalia, entered the United States as a refugee. Subsequently, he plead guilty to third degree assault in Minnesota state court. As a result of this conviction, the INS initiated removal proceedings against him as an alien who had been convicted of "a crime involving moral turpitude." Eventually the BIA issued a final order of removal and the INS

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SUPREME COURT DENIES CERT IN NEW JERSEY MEDIA CASE

The Supreme Court declined to grant a petition for certiorari filed by the plaintiffs in ***North Jersey Media Group, Inc. v. Ashcroft***, 308 F.3d 198 (3d Cir. Oct. 8, 2002), *cert. denied*, ___S. Ct.___, 2003 WL1191395 (May 27, 2003), thus leaving undisturbed a decision upholding the constitutionality of closed immigration hearings.

The plaintiffs, a consortium of media groups, had claimed that they had a qualified First Amendment right to attend certain immigration hearings that had been closed pursuant to a direc-

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Highlights Inside

BIA REFORMS UPHELD

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its.

Preliminarily, the court held that CAIR has associational standing to assert claims on behalf of its members who are immigrants with cases pending before the BIA. The court found that those immigrants with pending BIA appeals may be adversely affected by the new regulations. The court also rejected the government's view that the final regulation was not reviewable under the APA because under the INA the procedures and regulations for adjudicating immigration appeals are committed to the Attorney General's discretion. The court reasoned that while the INA may not provide judicially manageable standards for review, earlier regulations do provide some standards by which the court may review the final regulation. Additionally, the court noted that the fact that the Department of Justice proceeded through rulemaking suggested that the regulations were not merely procedural, but substantive rules that had the force and effect of law.

On the merits, the court rejected plaintiffs' argument that the regulations were arbitrary and capricious, and promulgated in violation of law. First, the court found that the government had articulated a satisfactory explanation for the decision to adopt streamlining, namely the single-Member BIA decisions, as the dominant method of adjudication. In particular, the court determined that the decision was supported by experience with a limited class of cases, by an independent study finding the experiment with a limited class of cases was a success, and by the data available, although the data was preliminary and incomplete. Thus, it concluded that there was a rational connection between the facts found and the choice made.

Second, the court upheld the reduction of the size of the BIA, finding that the government had articulated a satisfactory explanation for its action. The court noted particularly, that the history of repeated increases in BIA membership had failed to reduce the number of cases pending before the BIA. The court also pointed to the testimony of two former BIA members, including the testimony of former member Michael Heilman, who had three decades of experience at the INS and the BIA, who recommended reduction in the size of the BIA. The court also noted that streamlining proved to be an acceptable alternative to further expansion of the BIA as a means of attacking the backlog of pending cases.

Finally, the court rejected plaintiffs' claim that the regulation would irrationally require BIA members to adjudicate cases in 15 minutes in order to clear the backlog as envisioned by the regulation. The court found that the statistic was inaccurate and incomplete because it ignored the facts that the BIA had been preparing for backlog reduction before the regulation became effective. Moreover, the court noted that there are many simple appeals that can be decided in less than 15 minutes, leaving more time for the complex cases.

In a statement to the press, following the court's decision, the Department of Justice noted that the reforms have had a significant impact on the efficiency of the BIA. When the Attorney General announced the reforms in February 2002, the number of pending cases was 57,949. Of these cases, 38,843 were more than a year old and 13,707 were more than three years old. Currently, the number of pending cases is down to 38,000, with only 1,521 being more than three years old. The case backlog has been reduced by more than 28,000 cases.

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NJ MEDIA RULING LEFT UNDISTURBED

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tive from the EOIR's Chief Immigration Judge. Initially, a district court had enjoined the nation-wide enforcement of that directive. After the Third Circuit declined to grant a stay of that order, the government applied for and was granted a stay by the Supreme Court pending the disposition of the appeal.

On October 8, 2002, the Third Circuit reversed the lower court, and held that plaintiffs had no First Amendment right to access to proceedings of the political branches, including administrative removal proceedings. The Sixth Circuit, on the other hand, had earlier ruled against the government's decision to close hearings in certain immigration cases of special interest. ***Detroit Free Press v. Ashcroft***, 303 F.3d 681 (6th Cir. 2002).

The Attorney General hailed the decision, noting that the Supreme Court refused to disturb a Third Circuit ruling that is "an important victory in support of our work to secure the nation." Since the September 11th attacks, "time and again, the Department has successfully defended legal challenges to the tools we have used and actions we have taken to protect the American people," said the Attorney General. He noted that the Department has used "all legal tools available to disrupt and neutralize potential terrorist threats by removing dangerous individuals who have broken our nation's laws from the streets of our communities."

The Attorney General stated that the Third Circuit decision "recognized that open deportation hearings would reveal sensitive information about our ongoing terrorism investigation and aid terrorists targeting our nation and people." He added that "this authority to close hearings, is an important, constitutional tool in this time of war, when we face an unparalleled threat from covert and unknown foes spread across the globe."

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REMARKS OF ATTORNEY GENERAL JOHN ASHCROFT AT THE OFFICE OF IMMIGRATION LITIGATION CONFERENCE, ST. LOUIS APRIL 23, 2003

Good afternoon. It is an honor to be here with so many public servants who have played a vital role in securing our nation's borders and enforcing our immigration laws.

You are part of a team that has undertaken a significant change of direction over the past 20 months. The Department of Justice has dedicated all the resources and personnel at its disposal to improving cooperation, communication, and teamwork in its war against terrorism. Our overarching mission is to detect, disrupt, and dismantle terrorists *before* they strike, using every lawful means at our disposal.

On September 11, 2001, we were reminded tragically that the physical borders of the United States are no longer sufficient to prevent our nation's enemies from treading on American soil and endangering our freedom.

We are confronting a new adversary whose soldiers seek to enter this country quietly, disguised as prospective citizens, legitimate tourists, students, and businessmen.

The United States is a compassionate and welcoming nation built on the hard work of immigrants. Our country's history confirms the wisdom of our Founding Fathers to open our land to any and all committed to pursuing a life of freedom. However, we must secure our borders and protect our people from those who would enter with ill intent.

You work to support this front line of defense, and never has your work been more important. We must identify, apprehend, detain, and remove or prosecute individuals who have violated the law. Our citizens cannot enjoy liberty *within* our borders if we cannot ensure the security *of* our borders.

We must be mindful that we are waging a war here at home because our enemy brought the fight inside our borders. The terrorists of September 11th took advantage of our immigration system. All 19 entered America legally, but obviously with unstated and malicious intents. Three of the 19 hijackers had overstayed the legal limits of their visas on the day of the attacks. All 19 exploited our free and open society.

Beyond investigating and prosecuting terrorists and those who give them aid and comfort, the Justice Department's abiding commitment is to the American people, that they will be protected from additional acts of terror.

You understand that violations of our immigration laws must not be taken lightly. The lawyers of the Office of Immigration Litigation, alongside hundreds of Assistant U.S. Attorneys, reinforce the rule of law every day.

"The lawyers of the Office of Immigration Litigation, alongside hundreds of Assistant U.S. Attorneys, reinforce the rule of law every day."

In the 20 months since September 11, I have often pledged that in protecting our country, the lawyers of the Department of Justice would "think outside the box but never think outside the Constitution." In case after case, you have confirmed that pledge. The legal victories that you have achieved are truly noteworthy. I would like to take a few minutes and acknowledge some of them today.

Since 9/11, a number of aliens have been taken into custody for criminal or immigration violations or as material witnesses. A great deal of information about these interviews and detentions has been made public. But we cannot compromise our national security — or the rights of the detained — by releasing the names of those being interviewed or detained.

Every detainee has violated immigration laws or other criminal laws. Every detainee in closed immigration hearings enjoys the same procedural rights as those in public hearings. Every detainee is protected by the right of *habeas corpus*. Aliens have the right to counsel and the right to call witnesses. They also have access to law libraries and other materials to prepare and defend their cases.

In *North Jersey Media v. Ashcroft* in October 2002, the 3rd Circuit upheld the Department's policy of closing special interest immigration proceedings as an appropriate and lawful means of protecting our national security. The 3rd Circuit rejected a First Amendment challenge to this policy. In the related case of *Detroit Free Press v. Ashcroft*, the 6th Circuit rejected the mechanism by which the immigration proceeding of Rabih Haddad was closed. However, the court *did recognize* that the government — with the task of preventing terrorism — had a compelling interest in closing particular immigration proceedings.

In addition to these cases, several aliens detained on violations of immigration law in connection with the terrorism investigation brought habeas petitions challenging their detentions. The Office of Immigration Litigation and the U.S. Attorneys' Offices have won all of these cases.

Last September, the Department of Justice deployed the National Security Entry-Exit Registration System (or NSEERS) — a critical improvement in our border security that has already led to the apprehension of 11 suspected terrorists, including one known member of Al Qaeda.

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Attorney General's Remarks At OIL Conference

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In addition to those 11, the NSEERS system has stopped more than 700 aliens at ports of entry, because the aliens had committed serious felonies or violated other laws rendering them inadmissible.

More than 100 felons have been identified through domestic NSEERS enrollment, including individuals convicted of narcotics trafficking, child abduction, sexual abuse, assault with a deadly weapon, and murder.

Since the NSEERS system was established, several aliens have challenged the authority of the United States government to detain aliens who are present in violation of immigration laws and who may present a national security risk. As a result of your hard work, we have won every single case challenging an NSEERS detention.

Another major regulatory reform launched by the Department of Justice concerned the Board of Immigration Appeals. The Board's procedures were streamlined, reasonable time limits were set, appropriate standards of review were established, and scrutiny by three-member panels was focused more efficiently.

In four separate cases in four different circuits, lawyers for the United States have established a 4-0 record in defeating challenges to these regulations. Your legal victories have secured an important reform that has vastly improved the adjudication of immigration cases.

Finally, there have been some high-profile victories that have drawn national attention to your work.

For example, the 11th Circuit upheld the detention and deportation of Mazen Al-Najjar, who engaged in fundraising and obtaining visas to bring terrorist members of the Palestinian Islamic Jihad into the United States. Al-Najjar operated in America for nearly 20 years after entering on a student visa. On August 24, 2002, Al-Najjar's stay ended when the INS deported him to Lebanon on visa violations charges.

In another case, *INS v. Ventura*, the Office of Immigration Litigation achieved an important Supreme Court victory in an asylum case. In November 2002, the Supreme Court summarily reversed the 9th Circuit. The lower court had reversed the Board of Immigration Appeals' judgment that an alien's persecution was not due to his political opinion.

The Supreme Court held that in doing so, the 9th Circuit exceeded its authority by ruling on an issue that the Board had not addressed in its hearing — specifically, the significance of changed political conditions in Guatemala. The Supreme Court stated that the 9th Circuit had "seriously disregarded the agency's legally mandated role."

These are just two of your recent noteworthy victories. I could go on with half a dozen more, but time does not permit. With this kind of success, more is going to be expected of you and your colleagues. I know you are up to the task.

The Department of Justice met its goals: we welcomed millions of visitors to our shores, but we improved our ability to identify and track potential threats, and to enforce our immigration laws. Failing to satisfy both goals would have been an abandonment of our heritage and an abdication of our duty.

At a time when terrorist threats here at home were a very real possibility, your successful defense of the government's removal of aliens has been invaluable in the war on terrorism. Even as you were undertaking many of these difficult tasks, the Administration initiated a major reorganization of the federal government specifically designed to meet the threats our nation faces today. The Administration, and Congress, created a Department of Homeland Security which now has the lead responsibility for integrated border and immigration security. And thanks to your hard work and resulting legal precedents, we hand to the new Department a more secure immigration system.

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Attorney General John Ashcroft being introduced by Peter D. Keisler, who has been confirmed as the Assistant Attorney General for the Civil Division

SUMMARIES OF RECENT BIA DECISIONS

"Petty Offense" Exception

In ***Matter of Garcia-Hernandez***, 23 I&N Dec. 590 (BIA 2003), a panel of the Board (*Pauley*, Grant, Osuna) considered the eligibility of a criminal alien for cancellation for removal for nonpermanent residents under INA § 240A(b). Garcia was convicted in 1997 of corporal injury to a spouse. He had previously been convicted of battery in 1994. The case turned upon whether the "petty offense exception" to INA § 212 (a)(2)(A)(ii)(II) applied. The exception provides that an alien is not inadmissible based on a crime involving moral turpitude if convicted of "only one crime" for which the maximum term of imprisonment is one year and the alien was not sentenced to a term in excess of six months. The Board first concluded that Garcia's corporal injury conviction was a crime involving moral turpitude, but was clearly subject to the petty offense exception. After considering the history of the petty offense exception and the legislative history of the 1990 Act, the panel concluded that the reference to "only one crime" in § 212(a)(2)(A)(ii)(II) referred to "only one crime involving moral turpitude" and that Garcia's second conviction for battery did not preclude his admissibility or his eligibility for cancellation. The Board remanded for further proceedings.

In ***Matter of Deanda-Romo***, 23 I&N Dec. 597 (BIA 2003), a Board panel considered whether an alien who has two convictions for crimes involving moral turpitude is eligible for cancellation of removal under INA § 240A (a). The alien's first CIMT conviction qualified under the petty offense exception and thus did not render him inadmissible. Before he was convicted of the second offense, he accrued the seven years of continuous residence required for cancellation. Since his accrual of continuous physical presence did not end until his commission of the second CIMT and he had already accrued the requisite seven years by that time, the Board held that he was eligible to apply for cancellation of removal.

Asylum

In ***Matter of Y-T-L-***, 23 I&N Dec. 601 (BIA 2003), the Board *en banc* considered whether the fact that an alien or his spouse had undergone forced sterilization would constitute a fundamental change in circumstances and thus lead to a discretionary denial of asylum. Y-T-L- was a Chinese citizen whose wife underwent forced sterilization in 1986 and the family was fined substantially following the birth of their third child. After reviewing the legislative history, by a 10-3 vote, the Board determined that "[c]oerced sterilization is better viewed as a permanent and continuing act of persecution that has deprived a couple of the natural fruits of conjugal life, and the society and comfort of the child or children that might eventually have been born to them." The Board found that these circumstances did not constitute a change of circumstances and granted asylum to Y-T-L-. The case provoked a significant dissent from Board Member Filppu, joined by Chairman Scialabba and a second dissent from Board Member Pauley. The dissenters complained that the majority opinion established a new theory of asylum law, that of a "permanent and continuing act of persecution." The dissent also objected that the decision would result in special rules for aliens complaining of coercive family planning policies that do not exist for other asylum seekers.

The Board determined that "[c]oerced sterilization is better viewed as a permanent and continuing act of persecution that has deprived a couple of the natural fruits of conjugal life, and the society and comfort of the child or children that might eventually have been born to them."

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ATTORNEY GENERAL'S REMARKS

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We are a nation of people from every corner of the globe. Many immigrants choose to make America their adopted homeland because of their desire to live in a nation of freedom, a nation that respects human dignity, a nation that defends those beliefs.

Many of our forefathers passed through New York Harbor and saw the Statue of Liberty raising her lantern of freedom. There at the statue's base are the words of the poet Emma Lazarus: "Give me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore; send these, the homeless tempest-tost to me, I lift my lamp beside the golden door!"

It is a statement of welcome. It is a statement of confidence in the power of our nation's freedom. It is a statement that when peoples' freedoms are respected and their freedoms are protected, there is no limit to the heights to which individuals can rise.

It is that understanding of what America is, and what freedom means, that must animate us in the pursuit of justice. We cannot allow those who step on our soil to take away our liberty by using our freedoms against us. But we must wage this fight with respect for those vital freedoms.

You serve because you understand that freedom's defense requires vigilance. You understand that what defines America is our freedom, our Constitution, our rule of law. Every day you are fighting for those ideals. I thank you for your service, the security you uphold, and the freedom you defend.

God bless you, and God Bless America.

Summaries Of Recent Federal Court Decisions

ASYLUM

■Third Circuit Holds Former Child Guerrilla Is Member Of A Particular Social Group

In ***Lukwago v. Ashcroft***, __ F.3d__, 2003 WL 21078346 (3rd Cir. May 14, 2003) (*Sloviter*, Greenberg, Rendell), the Third Circuit affirmed the BIA's finding that the petitioner, a Ugandan national who was forcibly recruited into the violent guerrilla group Lord's Resistance Army (LRA), had not been persecuted on account of a protected ground. However, the court also held that the petitioner may have a well-founded fear of persecution on account of his membership in particular social group consisting of former LRA child-soldiers who escaped LRA servitude.

The court held that former child soldiers who had escaped LRA servitude in Uganda constituted a particular social group under our asylum laws.

The petitioner claimed that he was a member of the particular social group of children from Northern Uganda who are abducted and enslaved by the LRA and oppose their involuntary servitude. The immigration judge denied petitioner's application asylum and withholding on credibility grounds but granted withholding of removal under CAT. On appeal, the BIA reversed the credibility findings but, nonetheless, denied the request for asylum, withholding, and withholding under CAT. The BIA determined that petitioner had not shown that he was targeted by the LRA because he was a child, or by the Ugandan government because he was a former LRA child soldier. The BIA denied the CAT application because petitioner had failed to demonstrate that he was likely to be tortured by the Ugandan government.

Preliminarily, the Third Circuit rejected the government's argument that forced military conscription, under petitioner's circumstances, does not constitute persecution. The court found that while a sovereign nation enjoys the right to enforce its laws of conscription, "conscription into service by guerrillas engaged in attacks on the established government is an entirely different matter." Here, petitioner was forcibly abducted by the LRA, and endured physical and psychological abuses. The court noted that petitioner was forced to "kill his friend, to watch the murder of his parents, and to view the mutilation of innocent civilians." This treatment, concluded the court "may constitute persecution under the INA."

The court then considered whether the persecution was on account of a protected ground. Petitioner argued that he had been persecuted because he was a member of a particular social group of children who were abducted and enslaved by the LRA. The court held that children themselves do not constitute a "particular social group" for asylum purposes, and that a "particular social group" is not created by persecution directed at some persons who share general characteristics, but "must exist independently of the persecution suffered by the applicant for asylum." The court the found that, although there was evidence in the record that the LRA targeted children, there was also evidence that the LRA indiscriminately persecuted civilians regardless of age. Consequently, the court concluded there was substantial evidence in the record to support the BIA's finding that petitioner had not been targeted because he was a member of a particular social group.

On the issue of future persecution, the court agreed with the BIA that petitioner had not demonstrated that he had a well-founded fear of being persecuted by the Ugandan Government on account of any of the protected grounds. However, the court reversed the BIA's finding that petitioner had not shown a well-founded fear of persecution by the LRA on account of his membership in a group of former child soldiers who had escaped LRA captivity. First, the court found that the particular social group of former child soldiers shared a past experience of abduction, persecution, and escape at the hand of the LRA. Thus, said the court, the group's membership was not dependent on a member's current age, but rather on the shared experience. Therefore, the group met the *Acosta* definition that the members of a group share a common, immutable, characteristic. Second, the court found that petitioner had demonstrated a reasonable probability that the LRA would target him if he returns to Uganda.

The court agreed with the BIA's finding that petitioner had not demonstrated his eligibility for withholding of removal under CAT.

Accordingly the court remanded the case to the BIA to reconsider petitioner's fear of future persecution in light of its finding that petitioner belonged to a particular social group and also to consider whether the question of future persecution on account of imputed political opinion.

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■Third Circuit Holds Alien May Be Eligible For Asylum Based On Imputed Membership In A Particular Social Group

In ***Amanfi v. INS***, __F.3d__, 2003 WL 21122420 (3rd Cir. May 16, 2003) (*Becker*, Nygaard, Ambro), the Third Circuit held in an issue of first impression that an alien may qualify for asylum on account of imputed membership in a particular social group. Here, the petitioner claimed, *inter alia*, that he would be persecuted by "macho men" and Ghanian authorities on account of his imputed status

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Summaries Of Recent Federal Court Decisions

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as a homosexual. The BIA, while acknowledging that homosexuals are a protected social group (*see Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990)), found that there was no "legal precedent" supporting the doctrine that asylum may be granted because of imputed membership in a particular social group. The court found that the BIA's conclusion appeared to contravene prior BIA decisions that had applied the concept of imputation to other protected grounds. Accordingly, the court remanded the case to the BIA to reconsider the claim in light of the court's legal finding.

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■First Circuit Holds General Criminality Does Not Support Asylum

In ***Oliva-Muralles v. Ashcroft***, __F.3d__, 2003 WL 21012586 (1st Cir. May 6, 2003) (*Lynch*, Coffin, Porfilio), the First Circuit held that the alien's fear of a pervasive climate of criminality and violence in Guatemala, absent persecution on account of a protected ground, did not support a grant of asylum. The court also held that it would not consider the petitioner's claim for relief under the Convention Against Torture (CAT), because she did not exhaust it before the BIA, and her mother's CAT application did not cover the petitioner, who was not a minor.

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CITIZENSHIP

Ninth Circuit Holds District Court May Reopen Old Case To Revoke Naturalization

In ***United States v. Inocencio,*** __F.3d__, 2003 WL 21137733 (9th Cir. May 19, 2003) (*Goodwin*, Rymer, T.G. Nelson), the Ninth Circuit held that the district court did not err in reopening defendant's criminal case 5 years after sentencing occurred, in order to revoke her naturalization. The defendant's conviction for naturalization fraud required that her United States citizenship be revoked under 8 U.S.C. § 1451(e), but this point had been overlooked by the government and the district court. The Ninth Circuit held that revocation was automatic, a "simple ministerial task" that involved "no exercise of discretion because the revocation is statutorily mandated," and thus the government was not required to initiate a new action, and defendant was not entitled to notice or an opportunity to respond

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■Naturalization Illegally Procured Where Conviction Not Revealed

In ***United States v. Samaei***, __ F. Supp.2d __, 2003 WL 21003320 (M.D. Fl. May 5, 2003), the district court found that the record clearly revealed that the defendant had been convicted of two crimes involving moral turpitude during the statutory period in which he was required to maintain good moral character. One of the crimes had been the theft of a pair of sunglasses. The defendant pled guilty to a charge of petit theft for the sunglasses after his naturalization interview but before his oath ceremony. Defendant did not disclose this conviction, choosing instead to disclose an earlier arrest for petit theft. Defendant was subsequently naturalized on February 20, 1996.

The court held that the government was entitled to revoke defendant's naturalization on the basis that he was a person lacking good moral character and thus ineligible to naturalize.

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■Seventh Circuit Holds Child Citizenship Act Did Not Automatically Confer Citizenship On Alien Who Was Over 18 Years Old On Its Date Of Enactment.

In ***Gomez-Diaz v. Ashcroft***, __F.3d__, 2002 WL 1793126 (Flaum, *Coffey*, Williams) (7th Cir. On April 7, 2003), the Seventh Circuit affirmed the BIA's decision finding petitioner was a removable alien, despite his claim that he was a United States citizen. The BIA found that petitioner was not a United States citizen because he was over 18 years of age when the Child Citizenship Act (CCA) was passed on February 27, 2001, and was ineligible for any form of relief because he was convicted of aggravated felonies. The court agreed that petitioner must have been under 18 years of age on the date of enactment of the CCA and rejected petitioner's arguments that his convictions were not aggravated felonies.

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CRIMES

■Ninth Circuit Holds That Some Conduct Under Arizona Theft Statute Does Not Constitute An Aggravated Felony

In ***Nevarez-Martinez v. INS,*** 326 F.3d 1053 (9th Cir. 2003) (*Noonan*, Tashima, Wardlaw), the Ninth Circuit held that petitioner's conviction of "theft of a means of transportation" under Arizona law, did not support a finding that petitioner had been convicted of a "theft offense" under INA 101(a)(43(G), and thus, was not removable as an aggravated felon.

The BIA had held that conviction under any of the five sections of the Arizona statute in question constituted an aggravated felony. Applying a modified categorical analysis, the court determined that three sections of the divisible statute did not require the "criminal intent to deprive" critical to generic theft offenses, and covered more than generic theft.

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■Despite Difficulties With Record Of Conviction, Ninth Circuit Holds That Alien Is An Aggravated Felon

In ***Olivera-Garcia v. Ashcroft***, __ F.3d__, 2003 WL 2013082 (9th Cir. May 5, 2003) (*Friedman*, Kozinski, Rawlinson), the Ninth Circuit dismissed petitioner's appeal for lack of jurisdiction, holding that he had been convicted of an aggravated felony. Both parties argued that petitioner's conviction document contained a clerical error and was unclear, and could be read to state either that the he had been convicted of a substantive drug offense or convicted of an accessory after the fact offense. The court held that it was limited to reviewing the record as filed with the court, notwithstanding possible flaws in that record. The petitioner had been convicted under a statute that described the nature of the offense as accessory after the fact to the manufacture of methamphetamine, a controlled substance. The judgment in petitioner's criminal case showed that he had ben found guilty of the substantive offense. Consequently, based on the record, the court concluded that the BIA correctly determined the alien was convicted of a substantive drug offense, and held it therefore lacked jurisdiction over the case of the alien's pending motion to remand.

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■Second Circuit Finds That Conviction Of Third Degree Assault Under Connecticut Law Is Not A Crime Of Violence Under The INA

In ***Chrzanoski v. Ashcroft***, __F.2d__, 2003 WL 1908143 (2d Cir. April 22, 2003) (Straub, *Katzmann*, Raggi), the Second Circuit held that a third degree assault under Connecticut law was not a crime a violence and therefore could not be considered an aggravated felony under INA § 106(43)(F). The petitioner, a lawful permanent resident alien, had pled guilty in 1996, to an assault in the third degree, a Class A misdemeanor under Connecticut General Statutes § 53a-61. An immigration judge determined that intentional assault under that statute included as an element the use of force, and therefore was a crime of violence. On appeal, the BIA agreed, finding that the petitioner's plea transcript revealed that he had caused injury by striking a person in the head and pushing her to the ground. Petitioner then sought relief by filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. The district court denied the petition, also finding that petitioner had been convicted of a crime of violence.

Under 18 U.S.C. § 16(a) the use of force must be an element of the offense for that offense to be a crime of violence.

The Second Circuit reviewed *de novo* the question of whether Connecticut's third degree assault constituted a crime of violence. The court noted that under 18 U.S.C. § 16(a) the use of force must be an element of the offense for that offense to be a crime of violence. Although petitioner pled guilty to assault in the third degree, the judgment of conviction did not identify the subsection with which petitioner was charged and to which he pled guilty. The court further noted that the Connecticut statute does not identify the use of force as an element for conviction. Thus, an individual could be convicted under that statute for injury caused by guile, deception, or even deliberate omission. The court refused to look to the legislative history of § 16(a), finding that the text of the statute was unambiguous. Accordingly, it reversed the judgment below and ordered the district court to grant the writ.

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DETENTION

Second Circuit Holds Alien Subject To Outstanding Order Of Removal Is Detained For Habeas Purposes

In ***Simmonds v. INS***, 326 F.3d 351 (2d Cir. 2003) (*Calabresi*, Pooler, Sotomayor), the Second Circuit held that the petitioner, who remains incarcerated by State authorities for a criminal conviction, is in INS custody within the meaning of the habeas statute, even if the outstanding removal order cannot be executed while he remains in State prison. The court equated a challenge to an outstanding removal order to a challenge to a "consecutive criminal sentence," because INS future custody will involve a deprivation of liberty and removal from the United States, thus permitting the alien to presently challenge INS' action before the district court in a habeas proceeding.

However, the court also held that it was not prudent to consider petitioner's claims challenging the final order of removal. "What the law will be when and if Simmonds comes to be detained by the INS is. . . anything but clear," noted the court. Thus, those claims would be better resolved at a time closer to the petitioner's opportunity for parole.

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■Ninth Circuit Holds Continued Detention Of Alien Proper When Alien Refuses To Cooperate With Efforts To Remove Him

In ***Pelich v. INS***, __F.3d__, 2003 WL 21204158 (9th Cir. May 22, 2003) (*Rawlinson*, Kozinski, Friedman, by designation), the Ninth Circuit held that no constitutional concerns are triggered when an alien's continued detention results from his refusal to complete a passport application to effect his removal.

The petitioner entered the United States in 1982 as a refugee from Poland. Two years later the INS approved his application for permanent residence. In that

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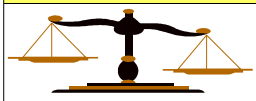

Summaries Of Recent Federal Court Decisions

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application, petitioner identified himself as a German national, and indicated that his mother lived in Poland and that his father was deceased. In 1998, petitioner pled guilty to embezzlement and was sentenced to five years' imprisonment. Upon completion of his sentence he was detained by the INS. During an interview with an INS officer, petitioner stated that his father was from Israel and his mother from Monaco. On January 3, 2001, and immigration judge ordered him deported to Poland or Germany. The INS then attempted to get travel documents. Petitioner, however, refused to complete an application for a Polish passport, and the German government denied a formal request for a travel document. Petitioner then sought a writ of habeas corpus, but his petition was denied. Consequently, petitioner has remained in custody since November 21, 2000.

> "Unlike the aliens in *Zadvydas*, petitioner has the keys to his freedom in his pocket . . . *Zadvydas* does not save an alien who fails to provide requested documentation to effectuate his removal."

The Ninth Circuit held that INA § 241(a)(1)(C), 8 U.S.C. § 1231(a)(1)(C) permits the extended detention of aliens who attempt to impede their removal. The court also found that *Zadvydas v. Davis*, 533 U.S. 678 (2001) was not controlling because it concerned the indefinite detention of aliens under 8 U.S.C. § 1231(a)(6), who, through no fault of their own, could not be removed because their native countries would not accept them. "Unlike the aliens in *Zadvydas*," said the court, petitioner "has the keys to his freedom in his pocket . . . *Zadvydas* does not save an alien who fails to provide requested documentation to effectuate his removal." The court also rejected petitioner's claim that his native country (Poland) would not accept him, finding "the Polish government is in a better – some might say unique – position to make that determination." It also rejected petitioner's attempted use of the defensive doctrine of "unclean hands," noting that petitioner was the movant and "even if the unclean hands doctrine applies, Pelich's misinformation [about his country of origin] points a finger right back at him."

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IN ABSENTIA

■Ninth Circuit Holds That Attorney's Bad Advice Constitutes Exceptional Circumstance Excusing Alien's Failure To Attend Hearing.

In ***Monjaraz-Munoz v. INS***, __F.3d__, 2003 WL 1957108 (9th Cir. April 28, 2003) (*Hall*, Thompson, Berzon), the Ninth Circuit held that the BIA abused its discretion in denying petitioner's motion to reopen his *in absentia* removal hearing. Petitioner claimed he did not appear at the removal hearing because he had been detained at the border, having followed the advice of his attorney's assistant to go to Mexico to test the validity of his passport. The BIA found these were not exceptional circumstances beyond petitioner's control.

The court disagreed, noting that "for the alien unfamiliar with the laws of our country, an attorney serves a special role in helping the alien through a complex and completely foreign process." Therefore, an alien's failure to appear because of actual and reasonable reliance on counsel's erroneous advice is an exceptional circumstance beyond the control of the alien, justifying reopening the case.

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JURISDICTION

■Seventh Circuit Holds That District Court Lacked Jurisdiction To Review Alien's Mandamus Claim Seeking To Order The BIA To Reconsider His Removal Order

In ***Bhatt v. INS***, __F.3d__, 2003 WL 21056016 (Flaum, *Bauer*, D. Wood) (7th Cir. May 12, 2003), the Seventh Circuit held that the district court lacked jurisdiction over a mandamus suit filed to compel the BIA to adjudicate a motion to reconsider. The petitioner, who had been denied asylum, had filed a motion to reconsider with the BIA. However, the BIA declined to reconsider its decision because the motion had not been filed within the thirty days of the decision and was thus untimely. The district court exercised jurisdiction over the mandamus action and held that the BIA had correctly interpreted the thirty day provision of 8 C.F.R. § 1003.2(b)(2).

In reversing the lower court, the Seventh Circuit held that, to the extent judicial review of BIA determinations is available, it must be sought in the courts of appeals. Here, the immigration statute bars review of petitioner's challenge to the BIA's decision not to adjudicate the merits of his untimely motion to reconsider. Consequently, the court remanded the case to the district court with instructions to dismiss it for lack of jurisdiction.

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■Eleventh Circuit Holds Exhaustion Requirement Applies Both In Direct Appeals From The BIA And In Habeas Proceedings

In ***Sundar v. INS***, __F.3d__, 2003 WL 1948970 (11th Cir. April 25, 2003) (*Carne*, Marcus, Suhrheinrich), the Eleventh Circuit joined the Fourth Circuit in holding that an alien is obligated to exhaust his administrative remedies

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whether he is directly appealing an administrative decision or a habeas decision issued by a district court. Petitioner failed to exhaust his administrative remedies because he did not appeal the immigration judge's removal order to the BIA. He waited 4 years after his removal to contest the immigration judge's order in district court, alleging that he was newly-eligible for relief. The court held that the immigration statute's exhaustion requirement "is not a complete preclusion of jurisdiction" in such cases, as it only requires the alien to seek relief before the administrative agency prior to seeking it in a habeas proceeding.

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■Tenth Circuit Holds It Lacks Jurisdiction Over BIA's *Sua Sponte* Refusal To Reopen

In ***Belay-Gebru v. INS***, 327 F.3d 988 (10th Cir. 2003) (*Tacha*, Seymour, Ebel), the Tenth Circuit dismissed the petition for review for lack of jurisdiction because it had been untimely filed. The court also held that it did not have jurisdiction over the BIA's refusal to reopen *sua sponte* because the governing regulations do not provide controlling standards by which to judge the BIA's implementation of the *sua sponte* authority.

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■In Transition Rule Case, Eleventh Circuit Holds Jurisdiction May Be Barred On Grounds Other Than Those Set Forth In Charging Document

In ***Garcia v. Attorney General***, __F.3d__, 2003 WL 21027214 (11th Cir. May 13, 2003) (Tjoflat, Anderson, Black), the Eleventh Circuit held that the transitional rules deprived it of jurisdiction to address the appeal of an alien convicted of aggravated child abuse under Florida law.

The INS had charged the petitioner with deportability for committing a crime of moral turpitude under former INA § 241(a)(2)(A)(i) (which does not bar appellate jurisdiction), but the Immigration Judge also found the alien statutorily ineligible for an adjustment of status because she was inadmissible under INA § 212(a)(2) (which does bar appellate jurisdiction). The court likened the case to *Ruckbi v. INS*, 159 F.3d 18 (1st Cir. 1998), "where the alien was charged on deportation grounds that did not trigger the bar but, at a hearing on his adjustment-of-status application, admitted committing acts covered by INA § 212(a)(2)." The court held that the alien's right to due process was not affected because she had an opportunity to contest her inadmissibility under INA § 212(a)(2).

"The failure to receive relief that is purely discretionary in nature does not amount to a deprivation of a liberty interest."

The court also found without merit petitioner's contention that the BIA's affirmance without opinion of the immigration judge's ruling had violated her due process rights. The court reaffirmed its view that "there is no entitlement to a full opinion of the by the BIA." *See Gonzalez-Oropeza v. Attorney General*, 321 F.3d 1331 (11th Cir. 2003). Finally, the court rejected petitioner's claim that she had received ineffective assistance of counsel. The court reaffirmed its holding in *Meja Rodriguez v. Reno*, 178 F.3d 1139 (11th Cir. 1999), where it had held that "the failure to receive relief that is purely discretionary in nature does not amount to a deprivation of a liberty interest."

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■Seventh Circuit Affirms BIA's Denial of Motion To Reopen On Exhaustion Grounds

In ***Awad v. Ashcroft***, __F.3d__, 2003 WL 2010721 (7th Cir.May 2, 2003) (*Coffey*, Rovner, Evans), the Seventh Circuit affirmed the BIA's denial of petitioner's motion to reopen removal proceedings. Petitioner had filed his motion to reopen to apply for suspension on September 30, 1996, the day IIRIRA was signed into law. Previously petitioner had withdrawn her applications for suspension and asylum on the basis of a marriage to a United States citizen that eventually failed. The immigration judge denied the motion on the basis that petitioner had not accumulated the seven years of continuous physical presence to qualify for suspension. The BIA affirmed that denial and also denied petitioner's motion to reconsider and remand a previously withdrawn application for asylum.

The Seventh Circuit held that the petitioner had failed to exhaust her administrative remedies as to her claim that the immigration judge had incorrectly interpreted the stop-time rule. The court also held that the BIA did not abuse its discretion in finding that she failed to establish prima facie eligibility for asylum in her motion to reopen. The court found that the BIA had properly treated the motion to reconsider as a motion to reopen because petitioner had attached new evidence in support of her motion.

Finally, the court held that petitioner was not denied due process where her asylum claim was never heard, because she never pursued it before the immigration judge. The fact that petitioner's "tactical choices ultimately turned out to be fruitless cannot be imputed on the INS as a denial of due process," concluded the court.

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STREAMLINING

Seventh Circuit Approves BIA Streamlining Procedure

In ***Georgis v. Ashcroft*** __F.3d__ 2003 WL 21150848 (7th Cir. May 20, 2003) (*Flaum*, Coffey, Evans), the Seventh Circuit reversed the immigration judge's adverse credibility determination and vacated the BIA's affirmance without opinion of the denial of asylum and withholding of removal.

The petitioner, an Ethiopian national and a member of the Amharic ethnic group, last entered the United States as a visitor in 1997. When she failed to depart, the INS placed her in removal proceedings. Petitioner then applied for asylum claiming persecution by the Ethiopian government. In particular, she claimed that she and her husband had been arrested an persecuted because of their activities with the All-Amhara People's Organization, a political group opposing the Ethiopian government. An immigration judge found petitioner not credible and denied her application for asylum and withholding of deportation. The BIA affirmed that decision without opinion under 8 C.F.R. § 1003.1(a)(7).

Preliminarily, the Seventh Circuit rejected petitioner's contention that the BIA's streamlined review procedures violated any due process rights. The court held that since it reviews "directly the decision of the IJ . . . fair appraisal of the petitioner's case is not compromised, and the petitioner's due process rights are not violated." However, the court held that the immigration judge's adverse credibility determination did not warrant deference because five of the six reasons given for the finding, were not supported by the record or were based on incomplete or improperly excluded evidence. The court remanded the case for a reconsideration of the credibility finding.

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TERRORISTS

Ninth Circuit Will Examine Classified Materials Used Against Terrorist In Immigration Proceeding

In ***Singh v. INS***, __F.3d__, 2003 21135671 (9th Cir. May 16, 2003) (Noonan, McKeown, Rawlinson), the Ninth Circuit ordered the government to produce to the court the unexpurgated decisions of the immigration judge and all classified materials submitted to the immigration court. The petitioner in this case challenges the BIA's denial of asylum, withholding of deportation, and withholding of removal CAT. The BIA had granted deferral of removal under CAT but had denied asylum and withholding. In its decision the BIA had noted that in denying asylum and withholding but granting deferral of removal under the CAT, it had relied solely upon unclassified evidence. However, the BIA also indicated that it had adopted the immigration judge's decisions, including the factual findings, and those factual findings were partly based on classified evidence. Accordingly, the court ordered the INS to make those documents available or to show cause why sanctions should not be imposed.

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VISAS

■Seventh Circuit Holds Winner Of Diversity Visa Lottery Has No Claim To Relief When His Visa Application Is Not Timely Adjudicated

In ***Ahmed v. Ashcroft,*** __F.3d__, 2002 WL 21035903 (7th Cir. May 9, 2003) (Ripple, *Wood*, Rovner), the Seventh Circuit affirmed the district court's dismissal of the alien's mandamus complaint, in which he sought an order to compel the adjudication of a diversity lottery visa. The application for that visa had not been adjudicated before authority to grant the application had expired. The court observed that the sequence of events leading to the filing of the lawsuit "bears an unfortunate resemblance to the experience in the past of recipients of large envelopes from organizations like Publisher Clearing house announcing in huge letters that the person is ALREADY A WINNER, but containing a disclaimer buried in the middle of the packet that explains that the only thing that has been won is a chance at the big prize."

The petitioner, a Pakistani national, won the visa lottery in 1998, entitling her to apply for a diversity visa in FY 1989. Subsequently, petitioner was instructed to go to the U.S. Embassy in Islamabad for an interview. She then sought to reschedule that appointment because she recently had given birth. The interview was never rescheduled and eventually she received a letter informing her that "her chance for a visa was thus dead." Almost two years later, petitioner filed this mandamus action in the Northern District of Illinois. The district court dismissed the petition for lack of subject matter jurisdiction.

Preliminarily, the court held that the district court had jurisdiction under 28 U.S.C. § 1331, to determine whether the prerequisites for mandamus relief, under the *Bell v. Hood* test, had been satisfied. However, the court then held, relying on *Iddir v. INS*, 301 F.3d 492 (7th Cir. 2002), that the alien failed to state a claim for which relief could be granted because the government lacks authority to grant a diversity visa after the expiration of the fiscal year in which the diversity visa lottery was held. The case would have been different, observed the court, if the action had been filed before the end of the visa year, while the INS still had the statutory authority to issue the visa and if the district court has acted within that time period.

The court declined to reach the government's alternative argument that the doctrine of consular nonreviewability barred petitioner's suit. However, *in dicta* it indicated that unlike the normal visas adjudications abroad, the diversity visa programs abroad "are equivalent to

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those of the INS (now the Department of Homeland Security) inside the United States."

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■**Ninth Circuit Bars Application Of INS Precedent Decision And Recent Legislation To Certain Immigrant Investors**.

In ***Chang v. United States***, __F.3d__, 2003 WL 1961487 (9th Cir. April 29, 2003) (*B. Fletcher*, Hawkins, Bury (by designation)), the Ninth Circuit held that an INS precedent decision published in 1998, *Matter of Izumii*, which clarified some of the regulatory standards of the "EB-5" immigrant investor program, could not be fairly applied to aliens who received approval by the INS under the pre-*Izumii* standards of their first-stage "I-526" petitions for conditional lawful resident status, but now faced disapproval under *Izumii* of their second-stage "I-829" petitions to remove the condition on their status.

In barring application of *Izumii*, the court relied upon a line of cases headed by *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322 (9th Cir. 1982), holding that, in certain circumstances, legal principles announced in an adjudicatory decision may not be applied "retroactively." After briefing in this case had been completed, section 216A of the Immigration and Nationality Act was amended to provide relief to aliens situated like these aliens, but only if such aliens filed motions to reopen their I-829 or removal proceedings by January 1, 2003. The government filed a motion to dismiss this appeal on the ground that the new legislation rendered the issues moot, but the Ninth Circuit denied the motion, ruling that it would also be unfairly retroactive to require the plaintiffs to comply with the legislation's procedural deadlines.

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PRIOR ACCEPTANCE NOT REQUIRED TO EXECUTE ORDER OF REMOVAL AGAINST SOMALI NATIONAL

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followed with the issuance of a warrant of removal. Petitioner then filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241, to prevent the execution of his removal order.

The district court rejected the government's argument that it lacked jurisdiction over the claims and agreed with petitioner's contention that he could not be removed to Somalia unless that government accepted his return. However, Somalia lacked, and continues to be without a functioning government, rendering it impossible for the INS, and now DHS, to obtain Somalia's prior acceptance. Consequently, the government appealed the district court's decision.

"Whether it's politically wise, efficient, or considerate of the United States to remove an alien without prior acceptance of the alien's destination country is, quite simply, a question that lies outside our province."

The Eight Circuit preliminarily rejected the government's renewed arguments that the district court lacked jurisdiction to consider the issues raised by the petitioner. The court held that habeas jurisdiction was appropriate because petitioner could not directly appeal the BIA's decision because he had been ordered removed as a criminal alien and the court of appeals lacked jurisdiction to review that order. The court also found that permitting petitioner to proceed with his habeas petition was consistent with the Supreme Court's decisions in *St. Cyr*, *Calcano*, and *Demor*e.

On the merits, the court considered the plain language of the statute. Section 241(b) of the INA sets forth a progressive three-step process for determining a removable alien's destination country. If the alien cannot be removed under steps one and two, then the third step of the process permits the removal of the alien to a list of additional removal countries. Clause four of this last step permits the removal of an alien to a country in which the alien was born. Clause seven of this last step provides that "if impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country." The INS sought to remove petitioner under clause four of the last step. The court held that under the plain language of the statute and "as matter of simple statutory syntax and geometry," the acceptance requirement in the statute is confined to clause seven and does not apply to the other clauses, including clause four. "Whether it's politically wise, efficient, or considerate of the United States to remove an alien without prior acceptance of the alien's destination country is, quite simply, a question that lies outside our province," concluded the court.

In a dissenting opinion, Judge Bye would have affirmed the district court, because in his view the courts have consistently held that the government cannot deport an alien unless the receiving country advises us that it is willing to accept the alien.

By Francesco Isgro, OIL

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Editor's Note: Notwithstanding the Eight Circuit's decision, the government has been enjoined from removing any Somalis to Somalia by a district court in Seattle in *Ali v. Ridge*, No. 02-2304P (W.D. Wash). On May 16, 2003, Assistant Attorney General McCallum notified the U.S. Attorneys to coordinate with the Office of Immigration Litigation any litigation involving the detention or removal of Somali nationals. A copy of the memo is available on the OIL web site.

Recent Immigration Prosecution Cases

ILLEGAL REENTRY

■***United States v. Dixon***, ___F.3d___, 2003 WL 21018583 (3rd Cir. May 2, 2003). A violation of 8 U.S.C. § 1326 requires only that an alien return illegally to the United States, and his subsequently discovered illegal presence in this country, regardless of whether that presence is voluntary or the result of some criminal detention, is all that is required to sustain a conviction under the statute.

■***United States v. Perez***, ___F.3d___, 2003 WL 21101289 (2d Cir. May 15, 2003). Alien demonstrated that he had exhausted his administrative remedies, that he was denied the opportunity for judicial review of the IJ's denial of his motion for relief under § 212(c), and that the entry of the deportation order against him was, therefore, unlawful; as such, he was entitled to dismissal of the indictment against him for illegally reentering the United States.

A violation of 8 U.S.C. § 1326 requires only that an alien return illegally to the United States.

■***United States v. Lubo***, ___F.Supp.2d___, 2003 WL 21128938 (W.D. Tex. May 16, 2003). Even if the IJ improperly or inadvertently communicated to the alien that the order reinstating his prior removal order was not subject to appeal, the alien failed to show that it was a fundamental error because he failed to show prejudice. The alien, who had shown little more than that he was a twice-convicted drug trafficker who, despite the fact that Mexico was a large country, chose to return to a location where a drug cartel that was after him was headquartered, had not shown a reasonable likelihood that he would have been found eligible for relief under CAT had he not been denied his right to appeal.

■***United States v. Aguirre-Tello***, 324 F.3d 1181 (10th Cir. 2003). The defendant's collateral attack on his prior deportation proceedings, during his hearing to determine whether he could be indicted for illegal reentry, was not barred by his failure to exhaust administrative remedies which were available to him at the time of the prior proceedings, where due process violations prevented the alien from exhausting the remedies; deportation hearing was rendered fundamentally unfair, in violation of the alien's due process rights, where the IJ left the alien with the impression that he would become eligible on the following day for a "pardon," when in fact he would become eligible for a discretionary waiver of deportation, and where alien may have been led to believe that bond was not available, and was not advised that free legal services were available.

■***United States v. Frias-Gomez***, ___F.Supp.2d___, 2003 WL 21098659 (E.D.N.Y. May 15, 2003). Since alien's previous deportation order violated his constitutional rights to due process in that he was not afforded the opportunity to apply for discretionary relief from removal, it could not be the basis for a subsequent criminal indictment against the alien for attempted illegal reentry after removal.

MARRIAGE FRAUD

■***United States v. Rashwan,*** ___F.3d___, 2003 WL 21032015 (4th Cir. May 8, 2003). Wharton's Rule does not apply in a situation where the crime is capable of being committed by one person; here, the language of the marriage fraud statute, 8 U.S.C. § 1325 (c), makes plain that it is intended to punish "any individual who knowingly enters into a marriage for the purpose of evading" the immigration laws; thus, it was the individual fraud which the defendant engaged in that constituted criminal activity for which he could be separately convicted.

SENTENCING

■***United States v. Bamfield***, ___F.3d___, 2003 WL 21027247 (3rd Cir. May 8, 2003). The most analogous sentencing information was that relating to the old failure to depart statute, and as such, District Court's reliance upon that information to formulate and apply a sentence for alien convicted under the new failure to depart statute was appropriate and not erroneous.

BRINGING IN ILLEGALS

■***United States v. Gasanova***, ___F.3d___, 2003 WL 21202828 (5th Cir. May 22, 2003). Court dismissed appeal of criminal defendants convicted of bringing in illegal aliens to the United States under 8 U.S.C. § 1324(a)(2); § 1324(a)(2) originated in IRCA, the central purpose of which was to combat illegal immigration; to construe the statute to exempt behavior such as the defendants in this case would be to permit a defendant to bring to the United States an alien who the defendant knows is ineligible to enter so long as the defendant succeeds in purloining a visa from an official source, an interpretation which is directly at odds with the fundamental purpose behind Congress' passage of the statute in the first instance.

SEARCH & SEIZURE

■***United States v. Chacon***, ___F.3d___, 2003 WL 20033812 (5th Cir. May 2, 2003). The District Court must determine, based upon the evidence adduced, whether the border patrol agent's actions in walking away from the alien, and then returning to follow-up with more immigration-related questions, was within the purview of the initial immigration stop and, therefore, constitutionally proper, or whether it was an independent search for which the officer had to articulate a reasonable suspicion in order to withstand constitutional scrutiny.

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CASES SUMMARIZED IN THIS ISSUE

CONTRIBUTIONS TO THE IMMIGRATION LITIGATION BULLETIN ARE WELCOMED

INSIDE OIL

OIL welcomes the following summer interns: **Shirley Rivadeneira** (American University), **Jillian Woods** (Catholic University), **Matthew Skahill** (University of Connecticut), **Phillip "Mike" Truman** (University of Utah), **David Carey** (American University), **Adam Gerowin** (Washington University, St. Louis), **Angela Gi** (Georgetown University), **Eric Heining** (Harvard University), **Janice Lam** (George Washington Universtiy), **Tina Patricia Smith** (Howard University), and **David Stern** (College of William and Mary).

ANNUAL OIL-DHS(Former INS) PICNIC—The 21st Annual OIL-INS picnic will be held on June 27, 2003 at Bolling Air Force Base, Pavillion No. 4. Please note that you must rsvp by June 17 if you and your guest would like to attend. For additional information contact *david.stern@usdoj.gov.*

Some of the summer interns had a special evening tour of the White House. Pictured from L to R are, Matthew Skahill, Jillian Woods, Angela Gi, Robbin Blaya (Atty) Janice Lam, and Francesco Isgro (Atty).

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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