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SUPREME COURT ARGUMENT IN TWO CASES CHALLENGING CONTINUED DETENTION OF INADMISSIBLE ALIENS

On October 13, 2004, the Supreme Court heard oral argument in two cases addressing the issue of whether aliens who are stopped at the border, denied admission, and subsequently ordered removed based on the commission of crimes within the United States while on immigration parole, may be detained when their country of origin refuses to accept their return. *Benitez v. Rozos* (No. 03-7434) [below *Benitez v. Wallis*, 337 F.3d 1289 (11th Cir. 2003), *cert. granted* 2004 WL 67860 (2004)], and *Clark v. Martinez* (No. 03-878) [below *Martinez v. Smith*, 03-35053 (9th Cir. 2003)]. In a 5-4 decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court read section 241(a)(6) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1231(a)(6), to include a six-month presumptive limitation on the reasonableness of post-removal-order detention of lawful permanent resident aliens, and the lower courts since have disagreed as to whether that limitation is applicable to the length of detention of inadmissible, "arriving" aliens such as Benitez and Martinez.

Both aliens are Cuban nationals who attempted to enter the United States during the 1980 Mariel boatlift. At that time, the Attorney General exercised his authority to parole most of those Cubans, including Benitez and Martinez, into the United States. Unlike the vast majority of Cubans who remain on parole or adjusted their status, there are approximately 750 Mariel Cubans, including Benitez and Martinez, who have been held in immigration custody for more than six months after having their parole revoked because of their criminal behavior. The U.S. and Cuba reached a migration accord in 1984 providing for the return of 2,746 criminal aliens who arrived in the U.S. during the 1980 Mariel boatlift, and concluded further agreements in 1994 and 1995 to promote safe, legal and orderly migration, and deter dangerous boat voyages. The U.S. has consistently maintained that, as a matter of international law, Cuba is required to take back all of its nationals denied admission to this country, and as of the end of this year has repatriated approximately 1,693 Mariel Cubans under the 1984 migration accord.

> ***Is there any time limitation to the DHS detention of inadmissible aliens?***

Although both aliens in these cases are excludable Mariel Cubans, neither the parties nor the courts strictly limited the analysis to that class of aliens. The issue over which the Supreme Court granted *certiorari* extended to the detention of any inadmissible, arriving alien permitted into the United States on im-

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SUPREME COURT HOLDS THAT DUI IS NOT A CRIME OF VIOLENCE

On November 9, 2004, following oral argument in October, the Supreme Court held that driving under the influence and causing serious bodily injury was not a crime of violence under 18 U.S.C. § 16. *Leocal v. Ashcroft*, 2004 WL 2514904 (U.S. November 9, 2004). Writing for a unanimous Court, the Chief Justice stated that the key phrase in section 16 was "use . . . of physical force against the person or property of another" because it suggested a higher degree of intent than negligent or merely accidental conduct. The Chief Justice also noted that statutory context was important in this case. Specifically, he explained that the Court was determining the meaning of a "crime of violence," and DUI offenses were not naturally included in a category of violent, active crimes that Congress sought to distinguish from other crimes and enhance punishment for those who commit such crimes. Further, the Court noted that in 8 U.S.C. § 1101(h) Congress did not include DUI offenses that result in personal injury within the meaning of a "crime of violence," as defined in 18 U.S.C. § 16, and identified this offense and a crime of violence as separate offenses under the definition of "serious criminal offense." The Chief Justice found this omission and separate listing to be revealing, as it suggested that Congress did not include

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migration parole, but detained as a criminal pending repatriation.

In the *Benitez* case, the Eleventh Circuit held that inadmissible aliens "have no constitutional rights precluding indefinite detention," and refused to extend the Supreme Court's "narrowing construction" of INA § 241(a)(6) in *Zadvydas*. That court reasoned that *Zadvydas* recognized that the critical distinction between resident aliens who have effected an entry, and aliens denied admission on arrival, "has been a hallmark of immigration law for more than a hundred years." The court held that *Shaughnessy v. Mezei*, 345 U.S. 206 (1953), "remains good law," and does not limit the duration of detention of unadmitted aliens whom the government is unable to remove. In contrast, in *Martinez*, the Ninth Circuit, following its decision in *Xi v. INS*, 298 F.3d 832 (9th Cir. 2002), held that because INA § 241(a)(6) draws no distinction between excluded aliens and those who have gained entry, the two groups must be treated identically for detention purposes under *Zadvydas*.

United States Deputy Solicitor General Edwin S. Kneedler argued that the parole statute, under which these aliens entered the United States, INA § 212(d)(5), 8 U.S.C. § 1182(d)(5), placed them in the position of applicants for admission subject to detention under INA § 235, 8 U.S.C. § 1225. The parole statute and the requirement to detain arriving aliens existed prior to the passage of INA § 1231(a)(6), and INA § 1231(a)(6) does not alter that existing law. In addition, Mr. Kneedler argued that the Court's reading of INA § 1231(a)(6) in *Zadvydas* required only an examination of the reasonableness of detention under the circumstances. The circumstances in *Zadvydas* included the rights accrued in the United States by lawful permanent resident aliens over a period in that status. Mr. Kneedler observed that Congress, in the language of the parole statute, precluded recipients of immigration parole from similarly acquiring status in the United States. Moreover, the *Zadvydas* decision had explicitly recognized an historic distinction between lawful permanent resident aliens and arriving aliens who had been stopped at the border and were present in the United States only through the grace of immigration parole. The same distinction avoided the constitutional concerns that the Court sought to avoid through its reading of the INA in *Zadvydas*. Moreover, if the United States were required to permit criminal aliens to live free in the United States, the political Branches' ability to fulfill their constitutional responsibilities to protect the nation's borders, manage migration crises, and conduct foreign relations would be severely degraded. National enemies could damage United States' interests and security by sending criminals to the United States and then refusing to accept their repatriation.

Initially the questions and comments from the Court for Mr. Kneedler were directed toward understanding the contention of the government that the parole statute, INA § 1182(d)(5), provided a statutory basis for detention of arriving aliens in addition to INA §(a)(6). Justice Ginsberg stated that it was incomprehensible to her that Congress would intend to permit longer detention of inadmissible "arriving" aliens than it permitted for other inadmissible aliens. In response to Justice Scalia, Mr. Kneedler stated that the parole statute demonstrated the intent of Congress to treat paroled aliens differently from those who had not been stopped at the border.

Justice Souter later observed that other inadmissible aliens who entered illegally but were not stopped at the border were not treated as "arriving," and DHS therefore applied the *Zadvydas* limitations to their detention. Justice Kennedy questioned the lack of argument regarding the parole statute in the *certiorari* pleadings, the government brief, and the litigation of the *Martinez* case from the Ninth Circuit, and wondered if the case should be remanded to develop the issue in the first instance.

Significant discussion focused on the arrival and parole of the Mariel Cubans. Justice Souter asked how the government could maintain the "entry fiction" that the Mariel Cubans remained "at the border" when the President had announced that they would be welcomed, then they came and were paroled, free to work, travel, own property, and live indefinitely in the United States. Mr. Kneedler responded that the President had clarified his announcement within days, long before these aliens arrived, and the terms under which Cubans would be paroled were immediately and thorough publicized.

Justice Breyer asked how the same words of the statute could be read differently for two different groups of people, and indicated he had found only contrary precedent. Mr. Kneedler indicated that the Court in *Zadvydas* read the statute to include an element of reasonableness under particular circumstances. The considerable interests of the political branches in controlling national borders and immigration, and the lesser rights of an inadmissible, arriving alien to remain free in the United States are circumstances that increase the reasonableness of detaining aliens stopped at the border.

Justice O'Connor inquired about the detention status of the petitioners in the cases before the Court, one whom was released by order of the district court and the other who is now assigned to a halfway house. Mr. Kneedler observed that neither case was moot and that the progress of Mr. Benitez toward release on terms of supervision demonstrated that the Mariel Cuban Review Plan process for detention review works effectively to

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detention review works effectively to limit detention without judicially-imposed presumptive limitations.

Justice O'Connor also inquired whether such aliens could be detained under INA § 236A, 8 U.S.C. § 1226a, added by the Patriot Act after *Zadvydas*, specifically permitting "indefinite detention" of aliens who are terrorists or "engaged in any other activity that endangers the national security of the United States." Mr. Kneedler answered that some inadmissible, arriving aliens may be detained under 8 U.S.C. § 1226a. At various points throughout the argument, several justices noted that the passage of 8 U.S.C. § 1226a demonstrated that Congress was aware of the implications of the *Zadvydas* decision to long-term detention and that Congress clearly knew how to state its intention to permit or regulate such detention if it chose to do so.

Mr. Kneedler argued that inadmissible aliens have no constitutional rights in connection with admission to the United States.

In response to a question from Justice Stevens, Mr. Kneedler stated that although inadmissible arriving aliens are "persons" who have some due process rights, they nonetheless have no constitutional rights in connection with admission to the United States.

Christine Stebbins Dahl, the attorney representing Martinez, argued that the parole statute is not an independent authority to detain. The sole authority to detain a non-terrorist alien pending repatriation is 8 U.S.C. § 1231(a)(6), the statute interpreted by the Court in *Zadvydas*. Questioned by Chief Justice Rehnquist and Justice O'Connor, Ms. Dahl contended that the government reliance on *Mezei* is misplaced in spite of the Court's reference to *Mezei* in *Zadvydas*, because the Court had considered the duration of the excludable alien's presence in the United States in another case, *Kwong Hai Chew v. Colding*, 253 U.S. 590 (1953), in the same year as *Mezei*. Ms. Dahl also stated that there had been a national security basis for the government's action in *Mezei*, but Justice Souter disagreed, observing that *Mezei* held only that the government did not have to explain the basis for its action.

Justice Stevens asked Ms. Dahl if duration matters, and if the government can release on strict terms of supervision, can the such a release under terms of supervision continue indefinitely? Ms. Dahl stated that the duration of terms of supervision was not limited, and the availability of such terms of supervision demonstrated that unlimited detention was unreasonable. She discounted the government's concern that the absence of the power to detain would leave the United States defenseless against other countries that might dump dangerous undesirables into the United States, asserting that the United States now had effective means of preventing aliens from ever physically crossing United States borders. Justice Kennedy asked Ms. Dahl if she was asking the Court to take judicial notice that the Mexican border was impermeable to aliens.

John S. Mills, the attorney for Benitez, argued that the availability of detention would not affect the behaviors of other countries dumping their undesirables and declining to accept them for repatriation, and he asserted that the United States has the power to forcibly repatriate Cubans or other aliens if it believes they threatened the national security. In response to a question from Chief Justice Rehnquist about the historic distinction between excludable and removable alien acknowledged in *Zadvydas*, Mr. Mills argued that Congress had eliminated the distinction between inadmissible and removable aliens in 1996, that therefore in *Zadvydas* the government had argued that there was no such distinction, and that if Congress disagreed with the presumptive limitations established in *Zadvydas*, Congress could amend the statute. Noting that he had dissented in *Zadvydas*, Justice Scalia pointed out that Congress may have viewed the constitutional avoidance language of the *Zadvydas* majority as a warning against a statutory fix. Justice Breyer again noted that Congress did respond to *Zadvydas* in the Patriot Act, but only in the area of detention of alien terrorists.

Mr. Kneedler presented a convincing rebuttal, arguing that everything in the 1996 amendments to the Immigration and Nationality Act demonstrated the intent of Congress to limit the rights of aliens, particularly criminals, and nothing suggested any intent of Congress to alter a century of immigration law and practice by expanding the rights of arriving aliens. However, the five justices who formed the majority in *Zadvydas* asked critical questions regarding how the statute could have one meaning for excludable or arriving aliens and a different meaning for resident or deportable aliens, and about the government's position that the parole statute at 8 U.S.C. § 1182(d)(5)(A) provides independent authority for detention of excludable or arriving aliens. The Court's decision in the case is not expected until the Spring. [Author's note: the Court heard the case immediately following oral argument in an extremely high profile case regarding the death penalty for juveniles, which dominated media coverage.]

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DUI offenses within the definition of a crime of violence, and the government's attempt to harmonize section 1101(h) and section 16 would leave the former "practically devoid of significance." Finally, he reiterated the Court's recognition that drunk driving is a nationwide problem. Nonetheless, the Chief Justice concluded that "this fact does not warrant shoehorning it in statutory sections when it does not fit."

In 1990, the Supreme Court noted that it had lamented for decades the tragedy of drunk driving, and that no one could seriously dispute the magnitude of the problem or the States' interest in eradicating it. *See Michigan Department of State Police v. Sitz*, 496 U.S. 444, 451 (1990). The INS, and its successor, the United States Immigration and Customs Enforcement (ICE), have attempted to remove aliens convicted of driving under the influence when their conduct results in serious bodily injury or death. Specifically, the Supreme Court considered whether driving under the influence that results in serious bodily injury is a crime of violence under 18 U.S.C. § 16, and whether the use of force against another or another's property involves a mens rea of at least recklessness.

DUI offenses were not naturally included in a category of violent crimes.

In these cases, the INS had asserted that aliens were removable for driving under the influence that resulted in a serious bodily injury or death because they had been convicted of a "crime of violence," as defined in 18 U.S.C. § 16, and therefore they had been convicted of an aggravated felony, as defined by 8 U.S.C. § 1101(a)(43)(F). A crime of violence is "(a) an offense that has an element the use, attempted use, or threatened use of physical force against the person or property of another," or "(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(a) & (b).

The courts of appeals had split on the question whether drunk driving was a crime of violence. *Compare United States v. Gonzalez-Lopez*, 335 F.3d 793, 798-99 (8th Cir. 2003) (holding that a violation of Utah's Automobile Homicide committed while under the influence of alcohol "contains, as an element, the use of physical force against another," and therefore is a crime of violence under U.S.S.G. § 2L1.2(b)(1)); *United States v. Santana-Garcia*, 211 F.3d 1271, 2000 WL 491510, **2 (6th Cir.) (holding that Indiana's statute concerning the death of another person through operation of a motor vehicle while intoxicated was a crime of violence under both section 16(a) and section 16(b)) (unpublished) *with United States v. Vargas-Duran*, 356 F.3d 598 (5th Cir. 2004) (holding that Texas' intoxication assault statute did not include a mens rea requirement, and therefore the offense was not within section 16(a)) (*en banc*); *Bazan-Reyes v. INS*, 256 F.3d 600, 608 (7th Cir. 2001) (holding that section 16(a) requires volitional conduct, and therefore drunk driving cannot be a crime of violence under section 16 (a), because Wisconsin's homicide by intoxicated use of a vehicle statute did not require that the offender intentionally use force to hit someone); *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001) (imposing a volitional requirement on the term "use" and concluding that driving under the influence was not a crime of violence because "it could be committed with a mens rea of negligence."); *see also Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001) (holding that a crime of violence under section 16(b) must involve a substantial risk of the intentional use of physical force); *accord, Bazan-Reyes* and *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001).

In addition, the Board of Immigration Appeals held that in removal proceedings in the United States Circuit Courts of Appeals that had not addressed whether driving under the influence was a crime of violence under 18 U.S.C. § 16, recklessness would be the minimum level of mens rea necessary for a driving-under-the-influence offense to qualify as a crime of violence. *See Matter of Ramos*, 23 I&N Dec. 336, 346-47 (BIA 2002). The Board also held that it would "'follow the law of the circuit in those circuits that have addressed the question of whether driving under the influence is a crime of violence.'" *Id.* The Board explained that the meaning of the term "crime of violence" under 18 U.S.C. § 16 was a matter of federal criminal law, and that the Board would defer to the courts of appeals' interpretations of federal criminal law.

On January 7, 2000, shortly after 1:00 a.m., Josue Leocal was driving his vehicle and he failed to stop at a flashing red traffic signal. He struck another vehicle, pinning the driver in behind his steering wheel. A police officer observed that Leocal was not aware that he had been in a serious accident and noted a strong odor of alcohol on his breath. He admitted that he had been drinking. Leocal was arrested and convicted of driving under the influence and causing serious bodily injury, in violation of Florida Statutes § 316.193(3)(c)(2). The INS commenced removal proceedings against Leocal, he was ordered removed from the United States by an immigration judge, and the Board summarily dismissed his appeal.

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Leocal's removal proceedings arose in Florida. Therefore, the law of the Eleventh Circuit was the law that governed his challenge to the order of removal. In *Le v. Attorney General*, 196 F.3d 1352 (11th Cir. 1999), the Eleventh Circuit held that the Florida offense of driving under the influence and causing serious bodily injury was a crime of violence, as defined by 18 U.S.C. § 16(a). Accordingly, the Eleventh Circuit dismissed Leocal's petition for review because of *Le.*

Joseph Sollers argued on behalf of Mr. Leocal. Justice O'Connor asked Mr. Sollers whether someone who drives drunk creates a substantial risk of the vehicle causing personal or property damage to another. Mr. Sollers responded that there is an increased risk of an accident. He also noted that, for offenses that fall under 18 U.S.C. § 16(b), courts would apply a categorical approach by looking at a State's provision on drunk driving and inquiring whether that provision contained as an element the "use of force." If the provision contained no mens rea requirement concerning the use of force, in Mr. Soller's view, the offense could not be a crime of violence under 18 U.S.C. §16(b).

Justice Scalia asked Mr. Sollers whether a drive-by shooting into an occupied building was a crime of violence, if the shooter did not intend to hit anyone. Mr. Sollers replied that this would be a crime of violence because it involved intentional conduct that has a substantial likelihood of causing injury. Justice Scalia stated that driving under the influence also involves intentional conduct with a substantial likelihood of injury. Mr. Sollers also stated that the pulling of the trigger was an intentional act. Justice O'Connor stated that getting behind the wheel of a car when one is drunk and turning the car on is also an intentional act. Mr. Sollers repeated that one should turn to the underlying statute, and the underlying statute in this case did not even require negligence for a conviction. Justice Kennedy responded to this point, stating that there is always a substantial risk in drunk driving, and that Sollers wanted the Court to say that there was no substantial risk in drunk driving.

The Government argued that the misdemeanor offense of drunk driving could not be a crime of violence because force would not be an element of that offense.

Justice Stevens asked what would be the result under immigration law if two equally drunk drivers got into their cars, but only one of them struck someone. Mr. Sollers replied that only the individual who struck someone would be subject to removal. Justice Kennedy asked whether this was true because section 16(b) states that an offense is a crime of violence when by its nature there is a substantial risk concerning the use of force. Mr. Sollers answered that there is a substantial risk of an accident when an intoxicated person gets behind the wheel of a car, but there is no substantial risk of the intentional use of force arising from such conduct.

Chief Justice Rehnquist asked whether Leocal could rely on the rule of lenity because this case concerned a deportation statute, not a criminal statute. Mr. Sollers replied that this case was about the scope of a criminal statute, 18 U.S.C. § 16. Justice Scalia, however, stated that the deportation statute in question here did not impose criminal penalties on its own.

Assistant Solicitor General Dan Himmelfarb argued on behalf of the government. Justice Kennedy noted that drunk driving cases that are seen in traffic court are not thought of by traffic judge as crimes of violence. Mr. Himmelfarb responded that the simple offense of drunk driving is ordinarily a misdemeanor, and for an offense to qualify as a crime of violence under 18 U.S.C. § 16(b) it had to be a felony. Mr. Himmelfarb added the simple offense of drunken driving could not be a crime of violence under section 16(a) because force would not be an element of that offense.

Justice Stevens pointed out that this case is really about whether Leocal should be sent back to Haiti for the offense of driving under the influence that caused serious bodily injury, and it does not, in terms of moral culpability, make any difference whether he hit somebody when he was drunk or not. Justice Stevens also noted that 8 U.S.C. § 1101(h)(3) seemed to exclude reckless driving or driving while intoxicated and causing an injury from the scope of 18 U.S.C. § 16 because section 1101(h)(3) stated that a "serious criminal offense," for purposes of 8 U.S.C. § 1182(a)(2)(E), included any felony, any crime of violence under 18 U.S.C. § 16, and any crime of reckless driving or driving while intoxicated or under the influence and causing bodily injury to another person. Mr. Himmelfarb responded that different Congresses enacted 18 U.S.C. § 16 and 8 U.S.C. § 1101(h)(3), that there was not complete overlap between the two provisions, and that the two provisions can be read separately.

Justice Breyer noted that 18 U.S.C. § 16 has nothing to do with drunk driving because its origin was grounded in a District of Columbia Criminal Code provision that addressed murder, manslaughter, burglary, robbery, extortion, and blackmail. Mr. Himmelfarb stated that the District of Columbia Code referred to specific offenses, but Congress chose to enact section 16 without reference to specific offenses because its scope

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might be broader by reference to a general definition of covered offenses.

Justice Scalia asked whether the rule of lenity applied to this case. Mr. Himmelfarb stated that if, at the end of the interpretive process, the Court was left with a grievous doubt about the statute, the rule would apply, but there is no grievous doubt in this case. Justice Ginsburg put the question another way, asking whether there was a principle in immigration law that ambiguities are construed in favor of the alien. Mr. Himmelfarb answered that the Court has expressed such a view, but that the government has never accepted that view.

Different Congresses enacted 18 U.S.C. §§ 16 and 1101(h)(3), and the two provisions can be read separately.

Mr. Himmelfarb turned to the government's central argument: that 18 U.S.C. § 16 does not contain a mens rea requirement, and the Court should not require the statute to read that an alien engages in a crime of violence by intentionally using physical force. Justice Scalia asked whether such an alien commits a crime of violence if he bumps into someone after getting off a bus. Justice Scalia queried whether the normal use of language would include such conduct under the term "crime of violence." Mr. Himmelfarb presented Justice Scalia with a hypothetical newspaper article that described as "violent" a collision between two outfielders who were chasing a fly ball. Justices Souter and Scalia noted that such an event might be described as violent, but it would not be a violent crime.

Justice Scalia questioned whether negligent homicide would be a crime of violence. Justice Breyer inquired whether a traffic infraction would be sufficient. Justice Souter noted that the term "offense" in 18 U.S.C. § 16(a) would be broad enough to encompass traffic infractions. Mr. Himmelfarb responded that negligent homicide would be a crime of violence, and that a traffic infraction would not be a crime of violence because the use of force must be directed against another person.

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On November 2, 2004, Under Secretary for Border and Transportation Security (BTS), Asa Hutchinson announced the transfer of the Office of Air and Marine Operations (AMO) from U.S. Immigration and Customs Enforcement (ICE) to U.S. Customs and Border Protection (CBP). The transfer will take place in two phases. Phase I, the movement of AMO intact from ICE into CBP has now been completed, and was effective on October 31, 2004. The integration of all CBP air and marine personnel, missions and assets will occur in Phase II, to be completed by the end of FY 05.

In separate Federal Register notices dated November 3, 2004, the Department of Homeland Security announced the extension of Temporary Protected Status for Nicaraguans and Hondurans until July 5, 2006. 69 FR 64084 and 64088, 2004 WL 2448561 and 2448560. Nationals and those who last habitually resided in these countries must have previously registered under the January 8, 1999, designation, unless they qualify for late registration under 8 U.S.C. § 1254a(c)(1)(A) and 8 C.F.R. § 244.2(f)(2) and (g). In addition, affected aliens must re-register for TPS and must have maintained continuous physical presence in the United States since January 5, 1999, and continuous residence in the United States since December 30, 1998. The re-registration period will run from November 5, 2004, until January 3, 2005.

The Executive Office for Immigration Review announced the extension of the motion to reopen period as defined in section (II)(B)(4) of the settlement agreement in *Barahona-Gomez v. Ashcroft*, 243 F. Supp. 2d 1029 (N.D. Cal. 2002). 69 FR 63178, 2004 WL 2408713. The period was extended until March 20, 2005.

SUPREME COURT CONSIDERS WHETHER THE UNITED STATES CAN REMOVE ALIENS TO SOMALIA

On October 12, 2004, the Supreme Court heard oral argument in *Keyse Jama v. INS*, No. 03-74 (U.S.), to consider the question whether the United States can remove aliens to Somalia despite the fact that Somalia does not have a central functioning government to accept or reject their return. This case has been in the making for 45 years and its origins lie thousands of miles away from Somalia. On October 1, 1949, the People's Republic of China ("PRC") was established as the sole government in China. The U.S. did not recognize the PRC until January 1, 1979. In the 30 years prior to U.S. recognition, the U.S. attempted to deport Chinese aliens to Mainland China without first obtaining the PRC's agreement to accept the return of these aliens. In 1959, Judge Learned Hand of the Second Circuit concluded that the U.S. must in all cases obtain acceptance from a country before it deports an alien to that country. *See United States ex rel. Tom Man v. Murff*, 264 F.2d 926 (2d Cir. 1959). Judge Hand held that deportation under former 8 U.S.C. § 1253(a) was subject to the condition that the receiving country accept the alien (reversing the district court's conclusion to the contrary).

Can DHS remove aliens to a country which does not have a central functioning government?

Thirty-five years after *Tom Man*, the Eighth Circuit rejected Keyse Jama's attempt to bar the U.S. from removing him to his country of birth, Somalia, without first obtaining acceptance of his return from a functioning government there. *See Jama v. INS*, 329 F.3d 630 (8th Cir. 2003) (reversing district court's conclusion to the contrary). Jama relied on *Tom Man* and the successor to section 1253, 8 U.S.C. § 1231(b)(2). In the government's view, section 1231(b)(2) contains a three-step removal process. The first step involves removal to a country designated by the alien, unless the government of that country does not accept the alien's return or removal to that country is inimical to the interests of the U.S. *See* 8 U.S.C. § 1231(b)(2)(A). Second, if removal under the first step cannot be accomplished, the U.S. must remove the alien to the country of which the alien is a national or citizen, unless that government refuses to accept the alien's return or does not inform the U.S. or the alien within 30 days of the inquiry whether it will accept the alien. *See* 8 U.S.C. § 1231 (b)(2)(D). Third, if neither the first or second options resulted in the alien's removal, the U.S. must turn to seven removal options provided in section 1231(b)(2)(E), which includes removal to the alien's country of birth, and that none of the options required that the U.S. obtain the acceptance of the alien's country of removal, except for the last clause, section 1231(b)(2)(E)(vii).

The Eighth Circuit held that 8 U.S.C. § 1231(b)(2)(E)(iv) permitted the United States to remove Jama to his country of birth, Somalia, without first obtaining the acceptance of his return from a functioning government Rejecting Jama's reliance on *Tom Man*, the Court stated that it was neither bound nor persuaded by *Tom Man* because it ignored the plain language of the statute. The Eighth Circuit also stated that Congress inserted an acceptance requirement into steps one and two of the three-step removal process and, "as a matter of simple syntax and geometry," the acceptance requirement in the third step was confined to the last clause ((E)(vi)), and did not apply to clauses (E)(i) through (E)(vii). Four months after *Jama* was decided, the Ninth Circuit, applying *Tom Man*, upheld a district court's nationwide injunction barring the removal of aliens to Somalia. *See Ali, et al. v. Ashcroft, et al.*, 346 F.3d 873 (9th Cir. 2003) (excluding from the injunction's coverage, aliens, like Jama, with pending habeas challenges to removal under section 1231(b)). Asserting a conflict in the circuits and a case of national importance, Jama urged the Supreme Court to reverse the 8th Circuit.

Jeff Keyes argued on behalf of Jama. Before he could explain why the 8th Circuit erred, Justice Ginsburg noted that the statute was not intended to confer any benefit on the alien. She added that section 1231(b) contemplated the existence of another government when it said removal shall occur to a country only when its government has assented to the return of the alien. Jama's counsel responded that if an acceptance requirement was not imposed, a risk existed that the alien would be in international traffic and bounced back to the United States. The Chief Justice stated that Jama needed an expression from Congress that the statute conferred a right on a private individual. In Justice O'Connor's view, Congress, at the end of the day and after other removal options had been exhausted, wanted to provide the Executive branch with a place of removal for people in the absence of acceptance, and the options for removal without acceptance exist in section 1231(b)(2)(E). She added it was therefore possible for the 8th Circuit to read the statute the way it did.

Jama's counsel contended that the last clause - clause (vii) - in section 1231(b)(2)(E) contained an acceptance requirement, and therefore the whole of section 1231(b)(2)(E) should be read to require acceptance. Justice Scalia countered that counsel imposed a strange reading on the statute by contending that the acceptance requirement in the last clause in section 1231(b)(2)(E) should be read into each clause in that provision. This drew Jama's counsel to his central argument, that in the absence of accep-

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REMOVAL OF ALIENS TO SOMALIA

(Continued from page 7)

tance by a country, the U.S. cannot remove the alien at all. Jama's counsel asserted that the rationale for this rule was that Congress wanted an orderly removal process, not one that bounced the alien around in international traffic and returned him to the United States. Justice Stevens stated that it seemed strange to him that an alien could litigate whether a country accepted his return because the alien either gets off the plane or he does not, and he is either accepted or not when delivered to the country of removal.

Justice Breyer questioned whether a country without a government can be a place where an alien is deported, and that in the 1996 version of the statute Congress assumed that a country was synonymous with a place with an organized government. Justice Ginsburg noted that Jama did not challenge whether Somalia was a country in the lower courts, and the Chief Justice underscored that point, stating that the issue was not raised in the question presented in Jama's petition for certiorari. Jama's counsel conceded that the issue was not addressed by the majority opinion in the 8th Circuit.

Assistant Solicitor General Malcolm Stewart argued that section 1231 (b)(2)(E)(iv) authorizes removal of an alien to his country of birth, and that this statutory authorization was not conditioned on acceptance by the receiving country's government. Justice Ginsburg asked about the outcome in a case from S.D. Tex., where the district court, relying on the 8th Circuit's decision in *Jama*, upheld an alien's removal to Ethiopia, and Ethiopia rejected the attempt to return the alien. Mr. Stewart responded that the alien's return to the U.S. was consistent with the government's position that it historically had not attempted to return an alien to a country over the objection of that country's central functioning government.

Justice Souter noted that when Congress revised and re-enacted section 1253 in current section 1231(b)(2), a House report stated that there was no intent to change the substance of section 1253. He then concluded that section 1253, and now the current statute, contained a clear condition that the U.S. remove an alien to a country that is willing to accept the alien. In Justice Souter's view, if the government prevailed in this case, it could make an end run past the second step in section 1231(b)(2)(D) by proceeding directly to section 1231(b)(2)(E), finding the alien's country of birth, and removing the alien to that country without obtaining acceptance of the alien's return. Mr. Stewart pointed Justice Souter to the text of current section 1231(b)(2)(D), and asserted that the import of the text was that Congress expressed a strong preference that the Executive branch remove aliens to countries that would accept their return, and where acceptance was lacking, to resort to the options provided in section 1231(b)(2)(E).

The statutory authorization to remove aliens is not conditioned on acceptance by the receiving country's government.

Justice Breyer noted that the government's view of the statute was one sustainable view, but countered that it was a view rejected by Judge Hand in *Tom Man* and three other appellate courts, and that Congress, on reenactment in 1996, indicated in a House report that it was not making any substantive change in the law. Justice Scalia asked whether the Senate reached the same conclusion as the House report and whether the President read the House report. Mr. Stewart countered that Judge Hand was not infallible and noted that only two courts of appeals actually barred deportation because there was no acceptance from the receiving country's government.

Justice Stevens asked whether the statute imposed a mandatory duty on the U.S. to remove an alien to a country that would not accept his return. Mr. Stewart responded that section 1231(b)(2)(E)(vii) provided the U.S. with discretion to forgo removal where it would be impractical, impossible, or inadvisable. Justice Stevens then asked whether it would be impossible to remove an alien to a country whose government would not accept the alien's return. Mr. Stewart answered that it would not always be impossible, and he hypothesized in a case whether a foreign country embarked on a program of encouraging its nationals to illegally enter the U.S. and then refused to take them back, the U.S. President would not want to be hamstrung by a statute that precluded removal unless the receiving country accepted an alien's return.

Mr. Stewart responded to the policy objections raised by Jama to the government's interpretation of the statute. Specifically, Mr. Stewart noted that the government was well equipped to deal with the potential for disputes between our government and another over whether the alien is a citizen or national of a particular country, and would exercise its considerable discretion in the area of foreign relations to act in the U.S.' interests if a foreign government refuses to accept the return of its nationals or citizens, and while a functioning foreign government may provide certain protections to returning aliens and the U.S. has certain programs to aid aliens who are not willing to return to their countries, Jama is not eligible for asylum, withholding of removal, TPS, or CAT protection because of a criminal conviction, and he should not be allowed to use the absence of a functioning government as a surrogate for those programs.

A decision from the Court is expected by early 2005.

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UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES

Created as a component within the Department of Homeland Security (DHS) by the Homeland Security Act of 2002, U.S. Citizenship and Immigration Services (USCIS) is tasked with the administration of immigration benefits and services. USCIS has approximately 15,000 employees and contractors, and is headed by Director Eduardo Aguirre, who reports directly to the Deputy Secretary for Homeland Security. The Office of the Chief Counsel (OCC) is the legal program for USCIS, providing legal support to USCIS operational components, and to OIL and the Offices of the U.S. Attorneys that handle federal litigation involving USCIS.

Understanding the function of the USCIS operational offices is essential to providing legal assistance to the agency. USCIS has a network of offices and services to process all immigrant and non-immigrant benefits provided to individuals in the U.S. These offices include District Offices, Service Centers, Application Support Centers (ASC), National Customer Service Call Centers (NCSC), Forms Centers, and the Internet.

There are 33 USCIS District Offices in the U.S. Each District Office, headed by a District Director, has a specified service area that may include part of a state or territory, an entire state, or many states. The majority of the operational field staff is located at District Offices. The field personnel are responsible for receiving certain walk-in applications, conducting many kinds of interviews related to filed petitions and/or applications, adjudicating various applications, as well as responding to specific case inquiries, providing information to the public, and providing immigration forms. Some District Offices also have Sub Offices that serve a portion of the District's jurisdiction. A Sub Office, headed by an Officer-in-Charge, provides many of the previously mentioned service functions. There are three Regional Offices, headed by Regional Directors, that supervise the work of the District Offices. The Regional Directors report to the Executive Associate Commissioner for Field Operations. The Regional Offices are located in Burlington, VT (Eastern), Dallas, TX (Central), and Laguna Niguel, CA (Western).

USCIS has four Service Centers nationwide: Vermont Service Center, Nebraska Service Center, Texas Service Center, California Service Center. These centers were established under legacy INS to handle agency mail, conduct data entry, and adjudicate certain applications. Since the Service Centers are not staffed to handle walk-in applications, conduct interviews, or answer questions. Applications processed by the USCIS Service Centers are only received through the mail. There are also eight Asylum Offices within the U.S., employing approximately 300 Asylum Officers. These Officers are responsible for interviewing applicants regarding their asylum claims and issuing a decision or referring the matter to the IJ for further review.

USCIS processes 30,000 applications for benefits daily.

Various immigration applications require that USCIS conduct FBI fingerprint or other background checks on the alien applicant. Most applicants who require such a background check will be scheduled to appear for fingerprinting or biometrics at one of the 130 Application Support Centers (ASC) nationwide. Additionally, the National Customer Service Center (NCSC) provides assistance by telephone to customers within the U.S. about immigration services and benefits. Service is available in English and Spanish.

On a typical day, USCIS averages the following workload: processing 30,000 applications for benefits, issuing 20,000 Permanent Resident Cards (Green Cards), welcoming 3,000 new citizens, granting asylum to 50 individuals in the United States, capturing 8,000 sets of fingerprints at the ASCs, requesting 140,000 national security background checks, seeing 25,000 visitors in the field offices, handling 50,000 calls at the NCSC, receiving 100,000 web hits, and naturalizing 50 military personnel.

USCIS' Office of the Chief Counsel

OCC is the legal program within DHS responsible for providing legal support to all of the operational functions of USCIS. This support includes advising USCIS components on adjudications, naturalization, administrative, and asylum and refugee law matters; providing comprehensive federal litigation support to OIL and the Offices of the U.S. Attorneys; providing legal education and training to USCIS personnel; advising on legislative and regulatory matters; and representing USCIS in visa petition appeals and administrative proceedings. OCC also provides legal advice to the DHS General Counsel on these matters.

OCC attorneys and support personnel are stationed at Headquarters in Washington D.C., in the four (4) Service Centers, and in selected District Offices across the U.S. At present, there are 37 attorneys assigned to HQ and 34 assigned to field offices. OCC Headquarters consists of the following components: Adjudications Law Division, Refugee & Asylum Law Division, Commercial Law Division, Ethics Office, Special Counsel, Legislative Counsel, Special Counsel for

(Continued on page #)

Recent Board of Immigration Appeals Decision

***Matter of L-K-*,**
23 I&N Dec. 677 (BIA 2004)

On September 30, 2004, the BIA decided *Matter of L-K-*, sustaining the appeal of DHS and finding that the IJ erred in granting L-K-'s application for adjustment of status under INA Section 245(a). L-K-, a native of the USSR and a citizen of Ukraine, entered as a nonimmigrant and filed an affirmative asylum application, which was referred to an IJ. The IJ denied asylum and L-K- appealed. While her appeal was pending, however, she learned that she had been approved for a diversity visa through the FY2002 lottery, and she was granted a remand on that basis. The IJ granted her adjustment application, over the objections of DHS that she did not qualify because she was not in lawful status. DHS appealed the decision to the BIA.

The Board first observed that Section 245(c) precludes eligibility for adjustment to aliens who have failed to maintain continuous lawful presence in the U.S., or who have otherwise violated the terms of a nonimmigrant visa – other than through no fault of their own or for "technical reasons" – and that the "grandfathering" provisions of Section 245(i) do not apply to diversity visa recipients. The BIA found it "undisputed" that L-K- was not in lawful immigration status after September 1993, when her period of authorized stay expired. According to the Board, "[t]he pivotal question in this case is whether her failure to maintain lawful status was for 'technical' reasons by virtue of the pendency of her asylum application that had been filed while she was in nonimmigrant status." Agreeing with DHS, the BIA held that L-K-'s unlawful immigration status was not "for technical reasons," and hence was not excusable under Section 245(c)(2) of the INA.

Consequently, the BIA concluded that L-K– was ineligible for adjustment. Her violation of Section 245(c)(2) was not a "technical violation resulting from the inaction of the [DHS]" as required by 8 C.F.R. § 1245.1(d)(2)(ii). Moreover, the Board rejected L-K-'s contention that an "action" by DHS requires a final adjudication on the merits of asylum, because asylum officers can approve, deny, refer, or dismiss applications, and "any one of these constitutes an 'action' on the part of the DHS." The decision also noted that the drafters of the adjustment regulation did not include the pendency of an asylum application as a "technical reason" for being out of lawful status. The BIA therefore held that "once the DHS has acted upon a pending asylum application, the 'technical' reasons for the violation cease to exist, and the applicant may no longer be considered to be out of status for technical reasons." Because L-K- did not apply for adjustment until well after the referral of her asylum application to an IJ, the Board agreed with DHS that she was precluded from adjustment.

An alien whose asylum application was filed while in nonimmigrant status, but whose status subsequently expired, and who was referred to an IJ before filing an adjustment application is ineligible for adjustment of status.

The Board emphasized that its holding "is narrow and limited to the factual scenario at issue." Specifically, the decision applies only to situations in which an asylum application was filed while the alien was in nonimmigrant status, that status subsequently expired, and the asylum application was referred to an IJ prior to the filing of an application for adjustment. As to asylum, the BIA held that L-K– established past persecution in Ukraine on account of religion, and remanded to provide DHS with an opportunity to establish fundamentally changed circumstances

Contact: Thomas Ragland, OIL

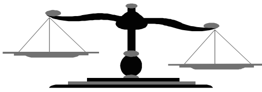
USCIS

Regulations, National Security Liaison Counsel, and Special Counsel for Field Operations. These components specialize in advising OCC field counsel and USCIS operations on issues related to their subject-matter expertise. The Chief Counsel is Robert C. Divine; he is assisted by Deputy Chief Counsel Dea Carpenter.

The OCC attorney field structure is divided into five Areas: Northeast, Southeast, Northern, Central, and Western. Each Area is headed by a USCIS Chief Area Counsel, and has a team of Associate Area Counsels stationed at various District Offices within that Area. Not all 33 USCIS District Offices or Sub-Offices have a legal counsel on site. In District Offices where no legal counsel is physically stationed, Associate Area Counsels within that Area are assigned to provide legal support by remote means. These Area teams also include the Associate Counsels stationed at the five Service Centers, who provide legal support to the corresponding Service Center and are supervised by an Chief Area Counsel.

Associate Area Counsels are assigned to provide federal litigation support in cases involving District and Asylum Offices, and Service Center attorneys are responsible for providing litigation support in actions involving the Service Centers. These attorneys also provide legal education and training to USCIS personnel within their Area or assigned Service Center, as well as represent USCIS in visa petition appeals.

Contact: Cathy Muhletaler, USCIS



Summaries Of Recent Federal Court Decisions

Adjustment of Status

In ***Akhtar v. Burzynski***, 384 F.3d 1193 (9th Cir. Oct. 5, 2004) (*Browning*, Reinhardt, Wardlaw), the Ninth Circuit ruled that the age-out provisions of 8 C.F.R. § 214.15(g), as interpreted by the INS, were contrary to congressional intent and frustrate congressional policy.

The court found that nothing in the legislative history indicated that Congress intended the V-2 visa to expire when the holder reached the age of 21. The court held that the LIFE Act was intended to reunite families while applications for permanent residency were processed, and to place a time limit on such visas would run counter to congressional intent.

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Asylum

In ***Corado v. Ashcroft***, 384 F.3d 945 (8th Cir. Oct. 7, 2004) (Melloy, Lay, Colloton), in *per curiam* decision, the Eighth Circuit granted the petition for review of the Board's denial of the aliens' applications for asylum and withholding of removal. The IJ denied asylum, holding that a single death threat did not establish a pattern of persecution.

The court disagreed, holding that a single specific, credible, and immediate threat of death on account of political opinion is within the scope of persecution. The court remanded for further consideration of inconsistencies in petitioner's testimony.

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The Eleventh Circuit in ***D-Muhumed v. Ashcroft***, --- F.3d ----, 2004 WL 2340644 (11th Cir. Oct. 19, 2004) (Tjoflat, *Dubina*, Pryor) denied D-Muhumed's petition for review of the Board's decision denying asylum, withholding of removal, and relief under CAT. The IJ held that D-Muhumed's testimony concerning persecution in Somalia was incredible. Specifically, the IJ found that D-Muhumed's claim that his home was attacked over 1,000 times in a three year period yet he was not once injured was not credible, especially in light of the fact he mentioned only one attack on his application for asylum. The court found that there was substantial evidence supporting the IJ's findings and denied D-Muhumed relief.

> ***A single specific, credible, and immediate threat of death on account of political opinion can be persecution.***

Contact: Anthony Nicastro, OIL
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The Seventh Circuit in ***Ghebremedhin v. Ashcroft***, 385 F.3d 1116 (7th Cir. Oct. 13, 2004) (Posner, Ripple, *Rovner*), remanded to the BIA to enter an order granting asylum. Petitioner, an Eritrean Jehovah's Witness, alleged he had been fired from his job, was denied a business license and a renewal of his passport because of his faith. In addition, petitioner's friend and brother were both jailed, beaten, and subsequently died because they refused to perform national service, usually military service, on account of their beliefs.

The court found that deliberate imposition of substantial economic disadvantage on petitioner on account of his beliefs might, even standing alone, be sufficient to constitute persecution. Coupled with Eritrea's incarceration of Jehovah's Witnesses for refusal to perform national service, the court held that the evidence of persecution was so compelling that no reasonable factfinder could agree with the decision denying petitioner asylum.

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In ***Gjyzi v. Ashcroft***, — F.3d —, 2004 WL 2300412 (6th Cir. Oct. 13, 2004) (Moore, *Cole*, Marbley), the Sixth Circuit remanded the BIA's decision affirming petitioner's denial of asylum and withholding of removal. The IJ denied asylum and withholding of removal, finding petitioner's vagueness surrounding his entry rendered him incredible. The BIA reversed the IJ's adverse credibility finding, but affirmed the denial of asylum and withholding of removal without explanation.

The court held that while the evidence did not necessarily compel a conclusion either way, the uncertainty as to whether petitioner's claim was decided within the prescribed regulatory framework required further consideration and explanation.

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In *Romilus v. Ashcroft*, -- F.3d –., 2004 WL 2059565 (1st Cir. Sept. 14, 2004) (Torruella, *Howard*, Rosenn), the Court denied the alien's asylum claim because he could not show that his troubles in Haiti were on account of a protected ground under the INA. The Court found that: (1) the alien's two physical confrontations with a military officer arose from a personal dispute over a debt; (2) the robbery of the alien and his wife was economically motivated; and (3) there was no evidence that the raid on a community organization meeting by masked men, and the subsequent burning of the alien's house, were politically motivated.

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In ***Sael v. Ashcroft***, — F.3d — 2004 WL 2303444 (9th Cir. Oct. 14, 2004) (*Fletcher*, Trott, Fisher), the

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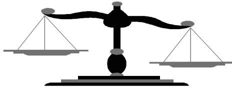

Summaries Of Recent Federal Court Decisions

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Ninth Circuit found compelling evidence that petitioner had a well founded fear of persecution and remanded for further proceedings. Petitioner, an ethnic Chinese native of Indonesia, was subjected to several bouts of discrimination and mob violence on account of her Chinese appearance.

The court found that while the incidents alleged by petitioner may not have constituted past persecution, they were indicative of her individualized risk of similar mistreatment if she returned to Indonesia. The court explained that petitioner's past experiences established a sufficient personal connection to the general persecution directed against ethnic Chinese in Indonesia, therefore she had a well-founded fear of future persecution.

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In ***Tolosa v. Ashcroft***, 384 F.3d 906 (7th Cir. Oct. 4, 2004) (Coffey, *Rovner,* Evans), the courtt vacated the final order of removal and denial of asylum. The IJ held that Tolosa's testimony was incredible and that she failed to provide sufficient evidence of past persecution attributable to her Oromo ethnicity.

The court held that testifying in greater detail at the hearing than on the application is not a sufficient discrepancy to render testimony incredible. Also, misstating the acronym of the persecuting military force does not render otherwise internally consistent testimony incredible. Furthermore, the IJ overlooked evidence that Tolosa's father was detained for several months and she herself interrogated on account of their Oromo ethnicity.

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In ***Ymeri v. Ashcroft,*** — F.3d —, 2004 WL 2348495 (1st Cir. Oct. 20, 2004) (Torruella, *Gibson*, Lynch), the First Circuit sustained the immigration Judge's removability finding and denied the petition for review. The court held that: (1) the aliens' admitted attempt to transit without a visa through the United States into Canada using false passports was sufficient evidence to support the immigration judge's removability finding; and (2) the immigration judge's adverse credibility finding was supported by material discrepancies in the aliens' testimony.

Testifying in greater detail at an asylum hearing than on the application is not a sufficient discrepancy to render the testimony incredible.

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In ***Zhang v. INS***, 386 F.3d 66, (2d Cir. Oct. 5, 2004) (Kearse, Straub, *Raggi*), the Second Circuit denied petition for review of Board's denial of asylum and withholding of removal. The IJ held that petitioner failed to provide consistent and credible testimony of persecution he suffered for opposing China's family planning policies.

The court held that while husbands whose wives have been sterilized are eligible for asylum, Zhang's inconsistent testimony regarding the sterilization of his wife and when he learned of it did not constitute "minor and isolated" discrepancies which no factfinder could rely on for an adverse credibility finding.

Judge Straub dissented, arguing that the Board did not adequately explain its adverse credibility finding.

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Cancellation of Removal

In ***Alcarez v. INS***, 384 F.3d 1150 (9th Cir. Oct. 1, 2004) (*Pregerson*, Tashima, Clifton), the court granted the petition for review of Board's decision finding the petitioners ineligible for cancellation. Petitioners had continuously resided in the U.S. for seven years prior to their application for cancellation. Between the filing and their hearing, Congress passed IIRIRA which retroactively changed the stop-time requirement for establishing residence, and rendered petitioners ineligible. Following an appeal to the Board, INS and EOIR issued memorandums instructing the Board to administratively close cases involving eligible aliens and draft "repapering" regulations. The Board failed to consider if petitioners were eligible for "repapering."

The Ninth Circuit held that petitioners had filed their appeal before the "repapering" memorandums were issued, therefore they had exhausted all administrative remedies available to them at that time and were eligible for "repapering." The court remanded to determine if petitioners qualified for cancellation of removal. The court did not discuss petitioners' equitable tolling claim as it was not raised on appeal to the Board.

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Convention Against Torture

In ***Maindrond v. Ashcroft***, 384 F.3d 98 (1st Cir. Oct. 6, 2004) (Torruella, Seyla, *Lynch*), the First Circuit affirmed the Board's denial of petitioner's motion to reopen. The court held that as petitioner was represented by counsel, failure to raise the CAT issue on appeal was a knowing waiver. Furthermore, petitioner failed to present a prima facie case showing her eligibility for relief under CAT.

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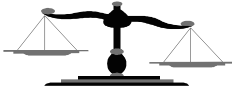

Summaries Of Recent Federal Court Decisions

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Crimes

In ***Singh v. Ashcroft***, --- F.3d ---, 2004 WL 2360149 (9th Cir. Oct. 21, 2004) (Graber, *Gould*, Berzon), the Ninth Circuit held that Singh's misdemeanor conviction for harassment is not a crime of violence under 18 U.S.C. § 16(a). The court held that the state statute, which proscribes offensive physical contact with intent to harass or annoy, reaches conduct that does not amount to the use, attempted use, or threatened use of physical force. Because the court concluded that the state statute does not have the use of physical force as an element, the court ruled that Singh is not removable on the ground that he was convicted of a crime of domestic violence and vacated the removal order.

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Jurisdiction

In ***Njenga v. Ashcroft***, --- F.3d ---, 2004 WL 2348566 (1st Cir. Oct. 29, 2004) (Lynch, *Stahl*, Lipez), the First Circuit affirmed the Board of Immigration Appeals' denial of asylum, withholding of removal, and protection under the Convention Against Torture. Njenga claimed to have fled Kenya in order to escape being forcibly subjected to female genital mutilation, but failed to file her application within one year of her arrival.

The court held that the INA barred review of the IJ's decision denying her untimely asylum request. Moreover, because Njenga failed to provide credible testimony, the court found that substantial evidence supported the denial of her application for withholding of removal and for protection under the Convention Against Torture.

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In ***Sapoundjiev v. Ashcroft***, 384 F.3d 916 (7th Cir. Oct. 7, 2004) (Easterbrooke, Manton, Kanne) (*per curiam*), the Seventh Circuit denied petitioners' motion for rehearing of the Board's decision upholding their removal order. Petitioners challenged the invocation of the fugitive-disentitlement doctrine as unwarranted because they could not have known that a stay of removal did not relieve them of the need to report for custody. The court held that while invocation of the fugitive-disentitlement doctrine is discretionary, it was appropriate given petitioners' enduring failure to report for custody.

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The 10th Circuit held that the Board's application of the streamlining provision is not reviewable.

In ***Tsegay v. Ashcroft***, --- F.3d ---, 2004 WL 2384964 (10th Cir. Oct. 26, 2004) (Ebel, *Tymkovich*, Heaton), the Tenth Circuit affirmed a streamlined opinion and determined that it lacked jurisdiction to review the Board's decision to streamline the case. The court renewed its previous holding that the streamlining regulation does not violate an alien's due process rights and also held that the Board's application of the streamlining provision is not reviewable. The court rejected the Ninth Circuit's decision in *Chen v. Ashcroft*, 378 F.3d 1081, and stated that court should "avoid second-guessing an agency's case management decisions" where the court is "unable, objectively speaking, to manage agency resources better than the agency itself."

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Miscellaneous

In ***Arevalo v. Ashcroft***, 386 F.3d 19 (1st Cir. Oct. 5, 2004) (Toruella, Campbell, Selya), the First Circuit (*per curiam*) dismissed ICE's appeal of the district court's decision to grant Arevalo's petition for habeas relief. The district court granted habeas, holding that ICE could not detain Arevalo after the 90-day period established by 8 U.S.C. § 1231(a) had expired.

The court subsequently vacated Arevalo's removal order, rendering the district court's decision moot, and dismissed ICE's appeal due to lack of jurisdiction. The court vacated the district court's decision, arguing that since Arevalo was no longer subject to the reinstatement of her removal order, vacating the judgment harmed neither party, and would allow the interpretation of 8 U.S.C. § 1231(a) to be litigated in a more appropriate case.

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In ***Baltazar-Alcazar v. INS***, --- F.3d ---, 2004 WL 2360139 (9th Cir. Oct. 21, 2004) (*McKoewn*, Bybee, Breyer), the Ninth Circuit reversed the denial of suspension of deportation. Petitioners appeared before the immigration judge with an attorney from a law firm which the immigration judge had previously banned from representing the lead petitioner. The immigration judge proceeded with the hearing, with petitioners acting *pro se,* and found they did not qualify for suspension of deportation.

The court ruled that the immigration judge may not summarily ban an entire law firm from representing petitioners unless they knowingly and voluntarily waive their right to counsel of their choice.

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Coming soon on the Justice Television Network: a training course presented by the Office of Immigration Litigation, entitled The Nuts and Bolts of Immigration Brief Writing.

INSIDE THE BIA

Chairman of the Board of Immigration Appeals, Lori Scialabba, has announced the creation of a new position at the Board, Director of Operations. The BIA's Director of Operations will report to the Chairman and will supervise attorney operations and the Clerk's Office. Chief Administrative Hearing Officer Jack E. Perkins has been appointed to this new position. Jack Perkins comes to the Board with a wealth of accomplishment and experience within the Executive Office for Immigration Review and the Department of Justice. At EOIR, Mr. Perkins was appointed Chief Administrative Hearing Officer in January 1990. He served as Acting Deputy Director of the Executive Office for Immigration Review from March to August 2001 while continuing to serve as Chief Administrative Hearing Officer.

Mr. Perkins received his Bachelor of Arts degree at San Jose State University (with honors) in 1966, and his law degree from the University of California, Hastings College of the Law, in 1972. He has served in many capacities within the Department of Justice, including: Deputy Assistant Attorney General, Office of Legislative Affairs, 1986 to 1990; legislative counsel and staff attorney, Office of Legislative Affairs, 1976 to 1985; staff attorney, Criminal Division, 1974 to 1976 and 1972 to 1973; and Assistant U.S. Attorney, Northern District of California, 1973 to 1974. Prior to joining the Department, Mr. Perkins served in the U.S. Marine Corps from 1966 to 1969 as an infantry officer and instructor of military tactics and history. He is a member of both the California and District of Columbia Bars.

INSIDE OIL

OIL welcomes two new secretaries who started recently: Alyia Stevens and Gloria Rosada. Ms. Stevens is assigned to work on Terri Scadron's team and Ms. Rosada on Mike Lindemann's team.

OIL Director Thom Hussey has announced several staffing changes, effective November 15th. Senior Litigation Counsel Greg Mack will move from the Appellate Team to Terri Scadron's team; Senior Litigation Counsel Margaret Perry will move from Mark Walters' team to the Appellate Team; and Senior Litigation Counsel Julia Wilcox will move to Mark Walters' Team. Ms. Perry will serve as special counsel for asylum.

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 Julia Doig Wilcox at 202-616-4893 or at Julia.Wilcox@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.

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

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