

IMMIGRATION LITIGATION UPDATE

by Francesco Isgro*

RULINGS FROM THE FEDERAL COURTS

Supreme Court Declines to Review Jurisdictional Question Involving Scope of Habeas Relief Available to Aliens Ordered Deported

The Supreme Court declined to review a court of appeals' decision regarding the scope of habeas review available to aliens ordered deported, even though the Solicitor General had acquiesced to the petition for certiorari. In *Galaviz-Medina v. Wooten*, 27 F3d 487 (10th Cir. 1994) (reported in the last issue of *MW*), the court held that an alien who was held "in custody" could not challenge the merits of a final order of deportation in a district court by way of a habeas petition because the proper court was the court of appeals. There is a split in the circuits as to the proper interpretation of the jurisdictional statute in section 106 of the Immigration and Nationality Act.

Eleventh Circuit Dismisses Lawsuits Filed by Cuban and Haitian Migrants Who Have Been Provided Safe Haven in Guantanamo Bay, Cuba, and in Panama

The Eleventh Circuit in a sweeping opinion, rejected all claims filed against the government by Cubans and Haitians who have been provided safe haven in Guantanamo Bay, Cuba, and in Panama. *Cuban American Bar Association, Inc. v. Christopher*, ___ F3d ___ (11th Cir. Jan. 18, 1995). The court also rejected the claims of legal organizations who had sought to have access to the migrants.

The court held that Cuban or Haitian migrants in safe haven outside the physical border of the United States do not have any cognizable statutory or constitutional rights. The court rejected plaintiff's argument that the leased military bases abroad are the functional equivalent of land borders or ports of entry of the United States. The court also rejected the argument that the immigration statute and the U.S. constitution applied extraterritorially. The court noted that it had rejected the same argument in *Haitian Refugee Center v. Baker*, 953 E2d 1498 (11th Cir.), cert. denied, 112 S.Ct. 1245 (1992). In that case, the court had found that interdicted Haitians had no substantive rights under the Immigration and Nationality Act, the 1967 United Nations Protocol, or international law. Therefore, concluded the court, the claims asserted by the Cuban and Haitian migrants "continue to be untenable."

The court also rejected plaintiff argument that they had a due process right to obtain and communicate with legal counsel of their choice regarding asylum application or parole. The court found that the migrants did not have a protectable liberty or property interest. It said that "providing safe haven residency is a gratuitous humanitarian act which does not in any way create even [a] putative liberty interest."

Haitian migrants who were unaccompanied minors had also asserted statutory and constitutional equal protection claims to be paroled into the United States on the same basis that

unaccompanied minor Cubans had been paroled or would be paroled into the United States. The court held that the Executive had the power to draw distinctions among aliens based on nationality, and that aliens could be excluded on grounds that might be "suspect under domestic legislation." The court found that the Attorney General had legitimate reasons for exercising her discretion given the different political climates in Haiti and in Cuba. The court concluded, based on prior precedents, that "aliens outside the United States, cannot claim right to enter or be paroled into the United States based on the Constitution."

The court also rejected claims of legal organizations that they had a First Amendment right to freedom of association with the migrants and free speech such that the government had to provide the lawyers with access to the migrants who requested counsel. The court found that a right to associate for purpose of engaging in litigation is predicated upon the existence of a legal claim. However, since in this case the migrants had no statutory or constitutional claims, it would not only be improper but also nonsensical for the attorneys to have access to the migrants for the purpose of advising them of their legal rights.

Finally, the court denied the legal organization's claim that their First Amendment rights had been violated because the government refused to disclose the identities of the Haitian migrants at Guantanamo Bay.

In its conclusion, the court observed that while the migrants are without legal rights cognizable in the courts of the United States, "they are nonetheless beneficiaries of the American tradition of humanitarian concern and conduct. In the context of the refugee's world of today (e.g., Bosnia and Rwanda) this is significant."

Ninth Circuit En Banc Holds That Attorney General Has the Authority to Continue Detention of Excludable Mariel Cuban Who Was Ordered Excluded and Deported in 1985

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In 1989, Barrera, a Mariel Cuban who had been paroled into the United States, filed a petition for habeas corpus challenging his continuing detention pending. His removal from the United States has not been possible because neither Cuba, nor any other country, has been willing to accept him. In October 7, 1993, a district court ordered the government to parole Barrera to a halfway house unless the Attorney General could show that his deportation was imminent. The government appealed. In a 2-1 decision, the Ninth Circuit affirmed, finding that Barrera's nearly nine-year immigration detention constituted "punishment" in contravention of the Fifth and Sixth Amendments, and exceeded the Attorney General's authority under the Immigration and Nationality Act. The government then petitioned the court to rehear the case en banc. The en banc court reversed (11-1) the district court. *Barrera-Echavarría v. Rison*, ___F.3d___ (9th Cir. Jan. 11, 1995).

First, the court held that the Attorney General had the statutory authority to detain indefinitely an undepotable, excludable alien such as Barrera. The court found significant the fact that Congress for at least four decades has been aware of instances of long-term detention of excludable aliens, but has not changed the law. The court pointed to the famous case of *Schaughnessy v. Mezei*, 345 U.S. 206 (1953), where the Supreme Court upheld the detention of an excludable alien on Ellis Island, and to the various immigration hearings relating to the detention of excludable Cuban aliens.

Second, the court held that Barrera's detention was constitutional because an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application. Quoting from *Knauff v. Schaughnessy*, 338 U.S. 537, 544 (1950), the court said "whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." The court went on to note that while excludable aliens might enjoy certain substantive constitutional rights such as to be free of gross physical abuse at the hands of federal officials, they had no constitutional right to be free from detention. The court declined to distinguish the case from *Mezei*.

Finally, the court concluded that the alien's detention did not violate any rule of interna-

tional law enforceable by the court against the United States government. The court noted that even if Barrera's continued detention violated rules of international law, they were displaced by domestic law, which authorized the detention of excludable aliens convicted of aggravated felonies.

Claims for Asylum by Iranian Women Who Refuse to Adhere to Fundamentalist Moslem Doctrine Made Easier by Ninth Circuit Ruling

The Ninth Circuit, in a significant ruling, made it easier for Iranian women who refuse to conform to fundamentalist Moslem doctrine to obtain asylum in the United States. *Fisher v. INS*, 37 F.3d 1371 (9th Cir. 1994).

Saideh Fisher and her son left Iran in 1984 because of three incidents. The first occurred when she attended a party at a male friend's house during which she observed her host in bathing attire. The neighbors notified agents of the Khomeini government, who upon arriving at the house, handcuffed Fisher and then detained her at the local *Comite*. Fisher was questioned there for several hours and was told that being in the presence of a man dressed in bathing attire was "incorrect." As a result of this encounter, Fisher suffered from amnesia and "nerves." Fisher saw a psychiatrist, who gave her medication. Fisher did not return to her job as a teacher for several months after this incident because she was incapacitated. When she did return, the school fired her.

A few months after the "swimming incident," Fisher was stopped on the street and ordered at gunpoint into a car by four government agents. She was stopped because she had left some strands of hair outside her veil or *chador*, which the Iranian regime requires all women to wear. Once she was in their car, the agents told her that this was not a proper way to appear on the streets. The agents warned Fisher to cover her hair and told her that if she appeared that way on the streets again, she would be subject to questioning and possible arrest. The agents then drove her home.

The third incident occurred just before Fisher's departure. Government agents searched her house. Before leaving, they told Fisher that they had been informed that people who were against the Khomeini regime were visiting her house. They advised Fisher

that, if there were further comings and goings, she should inform the authorities. Fisher believed they were searching for people connected to her sister's husband, who was against the regime and was in prison at the time.

After leaving Iran, Fisher spent three months in Germany. On April 30, 1984, Fisher legally entered the United States on a "fiance" visa. Fisher did not, however, wed her fiance. On August 4, 1984, she married a United States citizen. They divorced in 1987.

After the INS instituted deportation proceedings in 1986, Fisher applied for asylum and withholding of deportation. She argued that her arrest for viewing her friend in a bathing suit and her detention for allowing her hair to become visible indicated that "she [had been] harassed for refusing to adhere to the regime's fundamentalist Moslem doctrines." She claimed that she possessed beliefs that were at odds with those espoused by the Khomeini regime, and that the incidents demonstrated that the government "was attempting to eradicate [her beliefs] through violence." Consequently, Fisher reasoned that it was likely that she would suffer persecution upon returning to Iran on account of those beliefs "whether considered as political or religious."

The Board of Immigration Appeals (BIA) rejected her arguments. The BIA noted that her detentions had been very brief and resulted from transgressing requirements that were applicable to "all women in Iran." Focusing on the treatment Fisher actually received, the BIA concluded that "[w]hile these rules may seem harsh by United States standards, we cannot say that they rise to the level of persecution."

The Ninth Circuit found the BIA's reasoning deficient. The court found that the BIA had erred in failing to consider whether Fisher might suffer harm that rises to the level of persecution for future noncompliance with the moral codes. It noted that there was significant evidence that severe sanctions can result from noncompliance with the Iranian ultraconservative laws, which we term the "moral codes." How these moral codes are enforced can demonstrate potential for persecution. The court noted that incarceration is not the only penalty faced by a woman who fails to comply with the practice of veiling, known as *hejab*. The court found that the threats to life or liberty described in these

reports clearly can rise to the level of "persecution." The court told the BIA to consider closely evidence of current enforcement practices in Iran in evaluating Fisher's claim.

The court also found that in considering whether Fisher's experiences with the enforcement of the moral codes rose to the level of "persecution," the BIA was wrong in implying that persecution must be evaluated solely on the basis of the physical sanction (for instance, prolonged imprisonment, lashes with a whip, or other direct forms of torture) imposed by the Iranian regime. The court held that when a person with religious views different from those espoused by a religious regime is required to conform to, or is punished for failing to comply with, laws that fundamentally are abhorrent to that person's deeply held religious convictions, the resulting anguish should be considered in determining whether the authorities have engaged in "extreme conduct" that is "tantamount to persecution."

Moreover, the court found that since a person can violate the moral codes inadvertently, Fisher did not have to show that if returned to Iran she will take conscious steps to violate the moral codes.

Finally, the court held that enforcement of the moral codes can result in persecution on account of religion. The court noted that the mere fact that a generally applicable law affects a particular religious group more harshly than it affects the general population will not, of course, establish the requisite motive of the persecutor. However, if the evidence establishes that one of the reasons for the existence and enforcement of a generally applicable law is to oppress those with minority religious views, the existence of the necessary motive is clear. Consequently, Fisher may demonstrate persecution on account of religion.

Palestinian Born in Saudi Arabia Not Eligible for Asylum Based on Discriminatory Treatment That Is Imposed on All Non-Saudis

Elians Joseph Faddoul, of Palestinian ancestry, was born and raised in Saudi Arabia. He was not eligible to receive Saudi citizenship because Saudi law grants citizenship solely on the basis on ancestry. Faddoul was unable to obtain a Saudi passport but was allowed to travel with a Lebanese travel document known as a *laissez-passe*. Faddoul last entered the United States in 1984 as a nonimmigrant student, but he ceased attending classes in May 1985. He was eventually placed in deportation proceedings and he applied for asylum.

Faddoul claimed that if returned to Saudi Arabia, he would face persecution because the government severely restricted the rights of Palestinians. In particular, Saudi law forbade all non-Saudis from owning property or businesses, attending certain schools, and marrying Saudis. Non-Saudis were also prohibited from traveling within Saudi Arabia without written permission and were only permitted to remain in the country so long as they were sponsored by a Saudi employer or received derivative sponsorship through their parents' employment. In addition, Faddoul claimed that Saudi Arabia would likely prohibit him from returning at all because his reentry visa had expired and he could no longer receive derivative sponsorship due to his age. He speculated that were he to return to Saudi Arabia without a visa, he could face imprisonment.

The IJ denied Faddoul's requests for asylum or withholding of deportation, finding that the discriminatory treatment that Palestinians, as non-Saudis, receive in Saudi Arabia did not constitute persecution. The BIA affirmed the IJ's decision.

In *Faddoul v. INS*, 37 F.3d 185 (5th Cir. 1994) the court agreed with the finding that Faddoul had not established that the feared persecution was on account of his race, religion, nationality or other protected characteristic. The court noted that there was no evidence that the Saudi government had ever arrested, detained, interro-

gated, or physically harmed Faddoul in any way. The court found that while Saudi Arabia obviously denies Palestinians certain rights enjoyed by Saudi citizens, the government does not single out Palestinians for such discriminatory treatment. Saudi law grants citizenship based solely on ancestry (*jus sanguinis*). Thus, children born of Saudi parents automatically receive Saudi citizenship while the children of all non-Saudis, regardless of their place of birth, do not. The court said that to find persecution under these circumstances would require a finding that *jus sanguinis* is persecution *per se*. The court declined to do so because it found that the decision to bestow or deny citizenship is deeply rooted in national sovereignty and must be left to the individual nation's discretion.

Similarly, the court found that the particular restrictions Saudi Arabia places on the rights of Palestinians and other non-Saudis also fail to manifest the kind of persecution envisioned in the INA. A nation's right to control access to its borders is central to its sovereignty. For this reason, all nations are entitled to place entry and travel restrictions on aliens without thereby being deemed to have persecuted them. Neither do government policies denying access to certain schools amount to persecution.

Ninth Circuit Holds Valid Regulation Barring Asylum to Aliens Convicted of Particularly Serious Crimes

In *Komarenko v. INS*, 35 F.3d 432 (9th Cir. 1994), the Ninth Circuit rejected the alien's challenge that the regulation barring a grant of asylum to an applicant convicted of particularly serious crimes was *ultra vires*. The court also rejected an equal protection challenge to the BIA's finding that § 212(c) of the INA is unavailable to aliens who have been convicted of a weapons offense.

Komarenko, a Soviet citizen who had been convicted of assault with a deadly weapon, sought asylum, withholding of deportation and § 212(c) relief. The BIA found that he was in-

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eligible for any relief. In his appeal, Komarenko argued the denial of § 212(c) relief denied him equal protection under the Due Process Clause of the Fifth Amendment. The court rejected his argument, finding that the deportation provision against aliens convicted for firearms charges was not substantially identical to the exclusion provision for moral turpitude.

The court also found that the Attorney General could exercise her discretion by denying asylum to all aliens convicted of a particularly serious crime. The court noted the statute merely states that "the alien may be granted asylum in the discretion of the Attorney General. . . . It, therefore, does not preclude the Attorney General from exercising this discretion by promulgating reasonable regulations applicable to particularly dangerous or undesirable classes of aliens."

Court Finds Sudanese Who Lived in United Arab Emirates for Many Years to Have Been Firmly Resettled and Therefore Ineligible for Asylum

In *Abdalla v. INS*, ___ F.3d ___ (10th Cir. 1995) the court affirmed a decision of the BIA finding that Abdalla, a native and citizen of Sudan, was ineligible for asylum because he had been firmly resettled in the United Arab Emirates (UAE). According to the evidence, Abdalla had lived for some twenty years in the UAE, for which he possessed a "residence" visa/permit, prior to entering the United States. The court noted that under the regulations, the onus was on Abdalla to prove that his extended, officially sanctioned stay in the UAE did not constitute a firm resettlement. Abdalla did not meet this evidentiary obligation. The court found that the record disclosed additional circumstances, particularly the existence of longstanding and significant family ties in the UAE, supporting the BIA's finding of firm resettlement. The court also rejected Abdalla's challenge to the regulation mandating denial of asylum where an alien has been firmly resettled, for failure to have raised the issue before the BIA.

PENDING LITIGATION

Lawsuit Challenges INS Program to Replace I-151, the "Old Green Card"

In *Espindola et al. v. INS et al.*, No. CIV-S-92-1871 (E.D. Cal.), a nationwide class of aliens challenges the INS program that requires lawful, permanent resident aliens holding Form I-151 (the "green card"), to replace it with Form I-551, a more secure alien registration card. The district court held that the INS can charge a fee to replace the old green card. The claim of whether the INS properly calculated the fee has not yet been decided.

On September 14, 1994, INS published a notice in the Federal Register that extended the validity of the old green cards until March 20, 1995. The application fee for obtaining the I-551 is currently \$75.00. The fee can be waived for those aliens who apply and demonstrate their eligibility for a fee waiver.

California ACLU Class Action Challenges INS Policies and Practices in Adjudicating Applications for Employment Authorization Filed by Asylum Applicants.

Turcios v. Reno, No. 94-5220 (C.D. Cal.), is a class action lawsuit, filed in California by the American Civil Liberties Union, and the National Immigration Law Center, challenging principally "the failure of the INS to issue timely and continuous employment authorization to asylum applicants as required by federal regulations."

Class Action Lawsuit Challenges INS Practice in Document Fraud Proceedings

In *Walters v. Reno*, No. C94-1204 (W.D. Wa.), plaintiffs challenge INS practices in document fraud proceedings brought under § 274(c) of the INA. Plaintiffs claim that in implementing the document fraud provision, the INS has instituted unconstitutional policies and procedures.

NEW LITIGATION

In *Federation for American Immigration Reform, Inc. (FAIR) v. Reno*, No. 94CV02459, a lawsuit filed in the District Court for the District of Columbia, the plaintiff claims that the Attorney General is proposing to take unlawful actions to implement the migration agreement concluded between Cuba and the United States on September 9, 1994. Specifically, FAIR contends that the Attorney General's proposal to parole inadmissible Cubans into the United

States violates various provisions of the Immigration and Nationality Act.

ET ALIA

Paul W. Schmidt has been appointed as Chairman of the Board of Immigration Appeals (BIA). Mr. Schmidt has had a long and distinguished career in the immigration field both within and outside government. He is currently the managing partner of the Washington, D.C. office of Fragomen, Del Rey and Bernsen. A 1973 graduate of Wisconsin Law School, Mr. Schmidt began his career as a staff attorney with the BIA. He subsequently joined the INS General Counsel's office and became the Deputy General Counsel in 1978. He also served as Acting General Counsel during the implementation period of the Immigration Reform and Control Act of 1986. After leaving the INS, he became a partner with the law firm of Jones & Day.

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