

# IMMIGRATION LITIGATION UPDATE

by Francesco Isgro\*



## SUPREME COURT ACTIVITIES

*Supreme Court Vacates and Remands Case to Ninth Circuit for Consideration Under Antiterrorism and Effective Death Penalty Act*

On April 24, 1996, the President signed into law the Anti-Terrorism and Effective Death Penalty Act (AEDPA). This legislation, aimed at alien terrorists, made significant changes to the Immigration and Nationality Act. Among those changes were two that affected the case of *Elramly v. INS*, No. 93-70369 (9th Cir.), No. 95-939 (S. Ct.). Elramly had been denied a waiver of inadmissibility under INA 212(c) by the BIA on the basis of his plea of guilty for selling hashish, which was a serious drug offense. Consequently, the BIA required Elramly to show unusual and outstanding equities before exercising its discretion to grant relief. The Ninth Circuit subsequently reversed the BIA, finding that it had committed "an error of great consequence" by treating the drug offense as a "very serious drug offense." The government then sought, and the Supreme Court agreed, to review the ruling of the Ninth Circuit.

However, under AEDPA, the Attorney General has been divested of authority to grant relief under INA 212(c) to any alien who has been convicted of a drug offense. Moreover, AEDPA further provides that courts lack jurisdiction to review a deportation order entered against an alien who has been convicted of a drug offense. This double-barreled attack on criminal aliens led the Supreme Court to issue a one-sentence opinion vacating the Ninth Circuit's opinion and remanding the case for further consideration in light of AEDPA.

## RULINGS FROM THE LOWER FEDERAL COURTS

### Impact of AEDPA

As noted earlier, AEDPA made some significant changes affecting the ability of criminal aliens to obtain relief under INA 212(c) and to seek judicial review of unfavorable administrative decisions. This double-barreled approach aimed at criminal aliens is spawning a rash of litigation in the lower federal courts. We summarize below some of the most recent decisions.

### *Ninth Circuit Dismisses for Lack of Jurisdiction the Appeal Filed by a Criminal Alien where*

### *Appeal Was Pending when AEDPA Was Enacted*

In 1975, Alfredo Aries Duldulao, a native of the Philippines, was admitted to the United States as a permanent resident. In 1989, he was convicted of two firearm offenses in Hawaii. In 1994, the INS commenced deportation proceedings against Duldulao on the basis that his firearm offenses made him subject to deportation. Duldulao was found deportable and his application for adjustment of status was subsequently denied when BIA issued the final order of deportation on February 21, 1995. On March 3, 1995, Duldulao filed a petition for review in the Ninth Circuit. On June 10, 1996, the government moved to dismiss the petition because, in light of AEDPA 440(a), the court no longer had jurisdiction.

In *Duldulao v. INS*, \_\_\_ F.3d \_\_\_ (9th Cir. July 24, 1996), the court found that AEDPA 440(a) revoked its jurisdiction over Duldulao's appeal. First, it determined that Congress had not made any express provisions regarding petitions for review pending at the time of the enactment of § 440(a). Then it determined that the provision in question was a jurisdictional statute and consequently the presumption against retroactive application of new legislation did not apply. "AEDPA § 440(a) withdraws the jurisdiction that Congress had previously con-

\*Senior Litigation Counsel, Office of Immigration Litigation, Civil Division, U.S. Department of Justice; Adjunct Professor, Georgetown University Law Center. The views expressed by the author are not necessarily the views of the Department of Justice. The information appearing in this column is generalized and should not be considered a substitute for professional legal advice in specific situations.

ferred on courts of appeals to review certain final orders of deportation." Therefore, noted the court, all pending actions fall within the reach of AEDPA 440(a).

The court rejected Duldulao's argument that AEDPA 440(a) was unconstitutional because it violated separation of powers and due process. The court found that "[t]he power of Congress to regulate the admission of aliens and to define the jurisdiction of lower federal courts defeats each asserted basis of unconstitutionality." The court explained that the power of Congress to expel or exclude aliens has been largely immune from judicial control. It noted that it only had power to review final orders of deportation and exclusion against aliens because Congress had conferred it. Since the Constitution empowers Congress to define the lower federal courts' jurisdiction, and to formulate policies for the expulsion of aliens, AEDPA 440(a) did not offend the separation of powers. Finally, it held that the new statute did not offend due process because the power to expel aliens may be exercised entirely through executive officers with such opportunity for judicial review as Congress may see fit to authorize.

#### *Second Circuit Finds It Lacks Jurisdiction under AEDPA to Review Alien's Petition*

In *Hincapie-Nieto v. INS*, 92 F.3d 27 (2d Cir. 1996), the court held that AEDPA 440(a) applied to cases which were pending at the time of its enactment. The court disagreed with the ruling of the Seventh Circuit in *Reyes-Hernandez*. The court, however, left open the question of whether certain criminal aliens may still have access to the federal courts when they are challenging their detention through a habeas petition.

#### *Fifth Circuit Holds that It Lacks Jurisdiction to Review Petition in Light of AEDPA*

Rogelio Mendez-Rosa was convicted of attempted capital murder with a deadly weapon. When INS sought to remove him, he

applied for relief under INA 212(c). Following the denial of the relief by the BIA, he sought judicial review. In *Mendez-Rosas v. INS*, 87 F.3d 672 (5th Cir. 1996), the Fifth Circuit held that, under AEDPA 440(a), it had not jurisdiction to review the petition.

On September 23, 1996, Mendez-Rosas filed a petition for certiorari seeking to have the Supreme Court review the question of whether AEDPA 440(a) applies to cases which were pending at the time of its enactment.

#### *Sixth Circuit Dismisses Petition for Lack of Jurisdiction and Finds Moot Issue of 212(c) Relief*

In *Qasguarcis v. INS*, \_\_\_ F.3d \_\_\_, 1996 WL 426234 (6th Cir. June 17, 1996), the alien had been found deportable on the basis of his firearm and controlled substance conviction. The alien argued that AEDPA did not apply to him because the BIA had entered its final order on April 9, 1996, prior to the effective date of AEDPA. He argued that it would be unlawful to apply AEDPA retroactively. The court nonetheless dismissed the petition for lack of jurisdiction, and found moot the issue of the alien's eligibility for INA 212(c) discretionary relief.

#### *Third Circuit Finds that § 440(a) Removes Its Jurisdiction to Hear Alien's Petition*

In *Salazar-Haro v. INS*, 95 F.3d 309 (3rd Cir. 1996), the Third Circuit, following the majority of the circuits that have decided the issue, held that AEDPA 440(a) removed its jurisdiction to decide the alien's petition which was pending at the time of AEDPA enactment.

Salazar-Haro, a citizen of Peru, had entered the United States in 1978 and became a permanent resident in 1983. In 1993, he was convicted on charges of conspiracy to distribute cocaine and was sentenced to 42 months imprisonment. When released from prison, the INS sought to deport him, but Salazar-Haro applied for relief under INA 212(c). On January 17, 1996, after the application for relief was denied by an immigration

judge, and the BIA had affirmed that decision, Salazar-Haro filed a petition in the court of appeals.

In dismissing the petition for lack of jurisdiction, the court said that "[t]here can be little doubt that Congress has the power to deprive a Court of Appeals of jurisdiction previously granted over certain categories of case." The court noted its disagreement with the Seventh Circuit's opinion in *Reyes-Hernandez*, indicating that it did not find it persuasive.

However, the court left open the question of whether AEDPA foreclosed an alien's opportunity to seek habeas relief in a federal district court. It noted that the Supreme Court has stated that "[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."

## **SUMMARY OF OTHER LOWER COURTS**

### **DECISIONS NOT INVOLVING AEDPA**

#### *D.C. Circuit Affirms Dismissal of FAIR Lawsuit Challenging Attorney General's Decision to Parole Cuban Aliens*

In this appeal, the Federation for American Immigration Reform (FAIR), sought to overturn a district court ruling that held FAIR and its members lacked standing to challenge the Attorney General's decision to parole Cuban aliens into the United States. The Attorney General had decided to parole the Cubans pursuant to a September 9, 1994, United States-Cuba Joint Communique Concerning Normalizing Migration Procedures. This Joint Communique was designed to deter illegal migration to the United States while at the same time increasing lawful migration. FAIR alleged that such a decision harmed their members who lived in Miami because of diminished access to public services.

In *Fair v. Reno*, \_\_\_ F.3d \_\_\_, (D.C. Cir. August 30, 1996), the D.C. Circuit dismissed FAIR's appeal. The court found that FAIR lacked prudential standing to bring its lawsuit because its members



were not within the zone of interest of the challenged statutory provision.

***Alien Seeking Reopening to Apply for Asylum Must Show Reasons Why He Had Not Previously Sought It and Provide New Evidence***

In *Lainez-Ortiz v. INS*, \_\_\_ F.3d \_\_\_ (9th Cir. Sept. 16, 1996), the Ninth Circuit went further than the BIA ruling and held that an alien who seeks reopening to apply for asylum must explain not only the reasons for the failure to apply previously, but also must provide previously unavailable material evidence. The BIA had denied the motion to reopen on the basis that it lacked new evidence and had not addressed the other requirement.

The motion to reopen regulation at 8 C.F.R. 3.2 provides that "motions to reopen . . . shall not be granted unless it appears to the Board that evidence sought to be offered . . . was not available and could not have been discovered or presented at the former hearing. . . ." The asylum regulation at 8 C.F.R. 208.4(b)(4) further provides that motions to reopen to apply for asylum "must reasonably explain the failure to request asylum prior to completion of the . . . deportation proceedings." The court found that these regulations were clear and unambiguous and that they imposed two separate requirements.

The court's majority opinion drew a lengthy dissent from Judge Reinhardt, who would have found that an alien seeking to reopen a proceeding to apply for asylum must only satisfy the requirement of 8 C.F.R. 208.4(b)(4).

***Ninth Circuit Finds that Fijian of Indian Descent Suffered Past Persecution***

Rina Kumari Surita and her minor son entered the United States as visitors on July 1, 1987. When placed in deportation proceedings in 1990, Surita claimed that she could not return to Fiji because as a Fijian of Indian descent she had been subject to persecution and also feared future persecution on account of her ethnicity. Surita, who worked as a nurse in Fiji, claimed that after the Indo-Fijian

dominated government was overthrown in a 1987 coup, she became subject to robberies and harassment because of her Indian background. On one occasion, armed ethnic Fijian soldiers entered her house and looted the family's belongings. The soldiers threatened to rape and kill her if she reported the incident to the police. Despite the threats, Surita reported the incident to the police but was told they could not do anything and that they would have to wait until things calmed down.

Surita also testified about the climate of discrimination prevalent in Fiji against Indo-Fijians. She also stated that Hindu temples were desecrated and religious books were torn. Surita had been advised by her relatives not to return to Fiji because she would continue to be harassed and beaten.

Both the immigration judge and the BIA found that, even though Surita had been subject to discrimination, she had not suffered past persecution and had failed to establish a well-founded fear of future persecution.

In *Surita v. INS*, 95 F.3d 814 (9th Cir. 1996), the Ninth Circuit reversed the BIA and found that Surita had been subject to past persecution. The court stated that the BIA should have found that the multiple robberies and threats suffered by Surita constituted past persecution on account of race because ethnic Fijians had inflicted this harm for the reason that she differed from them racially in a way that they found offensive. Moreover, said the court, the police were unwilling or unable to control her persecutors. The court, however, remanded the case to the BIA to determine whether conditions in Fiji had changed to such an extent that Surita no longer could have a well-founded fear of persecution.

***Seventh Circuit Applies Strict Jurisdictional Statutory Limits for Filing of Petitions for Review***

Stanislaw Nowak claimed that he did not timely file a petition for review within the 90-day statutory requirement because neither he nor his counsel received a copy of the BIA

decision. In *Nowak v. INS*, 94 F.3d 390 (7th Cir. 1996), the Seventh Circuit essentially said, "too bad!" The court found that under *Stone v. INS*, 115 S. Ct. 1537 (1995), the jurisdictional statute had to be followed "slavishly." Consequently, the 90-day statutory limit begins to run when BIA mails the decision to the alien's address of record.

***Third Circuit Finds Lawful Domicile and Admission for Permanent Residence Are Two Separate Requirements under § 212(c) and Therefore Domicile of Parent Can Be Imputed to Child***

In *Morel v. INS*, \_\_\_ F.3d \_\_\_ (3d Cir. July 26, 1996) the Third Circuit held that INA 212(c) does not require that seven consecutive years' domicile after admission as a permanent resident and that a child may satisfy the seven year domicile requirement piggybacking on the parents' domicile. The court applied a variation of the common law rule for domicile by making it more stringent in the context of § 212(c) relief.

***Tenth Circuit Affirms Decision of BIA to Deny Suspension of Deportation Even Though It Finds that Alien Was "Every Mother's Dream"***

Stanislaw Kuciemba sought suspension of deportation claiming his return to Poland would be an extreme hardship. In *Kuciemba v. INS*, \_\_\_ F.3d \_\_\_ (10th Cir. August 7, 1996), the Tenth Circuit found that, even though Kuciemba was "every mother's dream," he had not established that his deportation to Poland would cause him extreme hardship. The court found that the hardship to his cousins was irrelevant, as was the hardship to his coworkers in the business that would likely close without him.

***Ninth Circuit Rejects BIA Reasoning that Cuban Who Would Be Prosecuted in Cuba for Unauthorized Departure Could Not Show That Punishment Would Be Persecution***

Francisco Lucas Rodriguez-Roman, a native and citizen of Cuba, claimed that he left Cuba for political reasons and that, if deported, he would be subjected to prolonged incar-

ceration, and possibly even death, for his unauthorized departure. The immigration judge and BIA determined that because Rodriguez would be punished pursuant to Cuban criminal law, the punishment, no matter how severe, could not constitute persecution.

In *Rodriguez-Roman v. INS*, \_\_\_ F.3d \_\_\_, 96 WL 577820 (9th Cir. Oct. 9, 1996), the Ninth Circuit found that the BIA interpretation of the term "persecution" was squarely inconsistent with the court and BIA precedents addressing punishment for illegal departure, as well as with the United Nations Handbook on Procedures and Criteria for Determining Refugee Status. First, the court found that, according to the Handbook, there are circumstances when the "consequences of unlawful departure or unauthorized stay outside country of origin" may constitute persecution. For example, an alien qualifies as a refugee under the Handbook if he can demonstrate that he would be subject to severe penalties for his illegal departure or unauthorized stay abroad, and that he left or has remained abroad on account of race, religion, nationality, membership in a particular social group, or political opinion. Second, the court held that the BIA decision was inconsistent with its own precedents and a number of federal court decisions. The court relied principally on the reasoning of the Second Circuit in *Sovich v. Esperdy*, 319 F.2d 21 (2d Cir. 1963) where the court, although recognizing that not every punishment for illegal departure constitutes persecution, the court was "unwilling to believe . . . that Congress ha[d] precluded from relief . . . an alien threatened with long years of imprisonment, perhaps even life imprisonment, for attempting to escape a cruel dictatorship."

The court stated that the IJ and the BIA had simply concluded, arbitrarily and capriciously, that because a Cuban statute was violated, the punishment Rodriguez faced constituted prosecution rather than persecution. "Freed from the governing legal principles by its failure to acknowledge the applicable cases, the

IJ and BIA treated the offense of illegal departure as if it were no different from ordinary criminal conduct." Because the BIA finding was legally erroneous, the court determined that the BIA interpretation was "manifestly contrary to the statute and arbitrary and capricious."

In light of the extensive evidence in the record, including a finding by the immigration judge and BIA acknowledging the possibility of death as punishment, the court concluded that Rodriguez has established a clear probability of persecution. The court remanded the case to the BIA for a determination as to whether asylum should be granted in the exercise of discretion.

In a concurring opinion, Judge Kozinski, who acknowledged that he and his family had arrived in the United States as refugees, observed that "[w]hat happened in this case at the administrative level is chilling. Rodriguez, a refugee from Communist Cuba, established that, if returned to his country, he might be shot, imprisoned for many years or simply made to 'disappear.' These are not fantasies."

In a specially concurring opinion, Judges Reinhardt and Hawkins joined Kozinski's statement of the importance of an independent judicial review to prevent grave injustices. "[J]udicial review of asylum cases may mean the difference between life and death for refugees from tyranny or from religious or racial persecution. As a nation that proclaims its strong belief in the importance of human life and political freedom for all peoples, that should be enough to persuade us of the necessity of judicial review."

#### *Third Circuit Invalidates Existing Asylum Procedures for Stowaway Aliens*

In *Marincas v. Lewis*, 92 F.3d 195 (3d Cir. 1996), the court invalidated the existing procedures applicable to stowaways who seek asylum and ordered that alien stowaways be accorded an evidentiary hearing before an immigration judge.

#### *Ninth Circuit Affirms BIA Denial of Suspension of Deportation Where Aliens Claimed They Would Suffer Extreme Hardship if Deported to Israel*

Gad and Tifferet Perez entered the United States in 1984 as visitors. Several months later Mrs. Perez gave birth to a son, Avi. Avi is now 12 and attends school. When the INS caught up with them and instituted deportation proceedings, the Perezes applied for suspension of deportation.

They argued that their son would face adjustment problems if he accompanies them to Israel. Avi will have to learn to read and write Hebrew, of which he has some oral understanding but in which he is illiterate. Avi will also have to adapt to a new culture, new friends, new foods, and new schools. A school psychologist from Avi's elementary school wrote a supporting letter concluding that, due to "environmental differences" between the United States and Israel, a move would "cause serious adjustment difficulties" for Avi. The immigration judge suspended deportation but BIA, after considering the cumulative hardships posed by deportation, reversed and denied the petition for suspension.

In *Perez v. INS*, \_\_\_ F.3d \_\_\_, 1996 WL 520419 (9th Cir. Sept. 16, 1996), the court found that the BIA had correctly determined that the Perezes had failed to establish unusual or extreme hardship. "The hardships faced by their citizen child with regard to adjusting to a new language, culture and educational environment are what would normally be expected with any child accompanying a deported alien to a foreign country."

#### *Tenth Circuit Holds That Fleuti Doctrine Does Not Apply to Alien Who Sought to Reenter the U.S. Illegally While His Immigrant Visa Application Was Pending in Mexico*

Ramon Baca-Prieto, a Mexican citizen, entered this country illegally in 1980, and later married a United States citizen. In 1985, after his wife filed an immigrant visa petition on his behalf, he applied for permanent resident status. In December 1985, petitioner traveled to the United

States Consulate in Mexico for an interview on the immigrant visa, which was issued based on his marriage. Upon his return, however, petitioner misrepresented himself as a lawful permanent resident and was held up by immigration officials, to whom he admitted, under oath, that his marriage was a sham entered into for immigration purposes. The INS consequently revoked his immigrant visa for fraud. After returning briefly to Mexico, petitioner illegally reentered the United States.

In 1986, Prieto divorced his first wife and remarried, once again to a United States citizen, who subsequently petitioned for an immigrant visa on his behalf. In February 1988, Prieto returned to the United States Consulate in Mexico for another visa interview. This time he was advised that he was excludable based on his earlier fraud and that he would have to obtain a waiver of such condition before he could be considered for an immigrant visa. Prieto applied for the requisite waiver, but then attempted to reenter the United States before a decision had been made on the application. He was, accordingly, denied formal admission, and only paroled into the United States for humanitarian reasons. The INS eventually denied his waiver application and instituted exclusion proceedings. The IJ ultimately found Prieto excludable as an applicant for admission without a valid immigrant visa and ordered him deported. A district court then enjoined the INS from deporting Prieto until it was determined whether he had made an "entry" into the United States. INS appealed.

In *Baca-Prieto v. INS*, 95 F.3d 1006 (10th Cir. 1996), the Tenth Circuit held that the *Fleuti* doctrine was not available to Baca-Prieto because he was not a permanent resident at the time he returned to the United States in February 1988. In *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), the Supreme Court held that a permanent resident alien who had taken a brief, casual, and innocent excursion to Mexico could not be subject to

the consequences of an "entry" into the United States.

The court also rejected Prieto's argument that his parole in the United States should not have subjected him to exclusion proceedings. The court noted the long line of cases that have held that a physical entry through ordinary parole does not upgrade an alien's status from excludable to only deportable.

#### *District Court Dismisses Habeas Challenging Denial of Legalization, EVD, and Asylum, Where Ethiopian National Arrived in U.S. as Stowaway in 1980*

As aptly observed by the court, "Waldei's immigration problems begin and end with his status as an entrant stowaway." Waldei, who arrived in the U.S. as a stowaway in 1980, was denied asylum by the INS in 1982. When the INS instituted exclusion proceedings, Waldei renewed his asylum claim. In 1984, BIA in a published decision held that the IJ lacked jurisdiction to consider an asylum claim filed by a stowaway. Waldei then became the beneficiary of EVD status, granted to Ethiopians until 1988. As EVD ended, Waldei applied for amnesty under IRCA. The Legalization Appeals Unit (LAU) denied his application because he had not made an "entry." For the same reason, the LAU also denied adjustment under the EVD adjustment program.

In *Waldei v. INS*, \_\_\_ F. Supp. \_\_\_, 1996 WL 520419 (E.D. La. September 13, 1996), the court found that it lacked jurisdiction to review the LAU decision because it could only be reviewed in the context of a review of a final order of deportation. Alternatively, the court found that the LAU properly held that Waldei was statutorily ineligible for legalization and EVD adjustment because he had not made an "entry" in the U.S. Finally, the court rejected Waldei's argument that the INS should have been estopped from denying his asylum application because it delayed its adjudication in light of an advisory opinion from the Department of State that he had a valid asylum claim. In the end, however, the

court suggested that given the fact that Waldei has been in this country for over 15 years, "this fact is considered in any future immigration proceedings involving Waldei."

## PENDING LITIGATION

### *Court Finds That INS Can Seize Green Cards Pending Administrative Determination of Aliens' Status as Long as Aliens Are Provided with Temporary Document Showing LPR Status*

In *Herrera-Loa v. Trominsky*, No. B-94-215 (S.D. Tex.), a class action, the district court found that the INS could seize the green cards of class members pending a determination of their alien status as long as INS provided temporary documents showing that the alien was a permanent resident, authorized to be employed, and the alien could renew the temporary document upon its expiration. Plaintiffs contended, among other matters, that the seizure of their green cards violated their rights and that the temporary card was inadequate.

### *Class Action Challenges INS Removal of Criminal Aliens Claiming That Class Members Should Have Been Warned They Could Have Been Removed from the United States*

In this class action, which appears frivolous on its face, plaintiffs, who are lawful permanent residents claim that their constitutional rights have been violated because the INS had not warned them of the consequences that their criminal convictions would have on their ability to remain in the United States. In *Jean-Baptiste v. Reno*, No. 96-CV-4077 (E.D. N.Y.), the plaintiffs claim that they had a vested property interest in their green cards and that their deportation would deprive them of this interest without due process of law.

