



IMMIGRATION LITIGATION UPDATE

by Francesco Isgro*

SUPREME COURT ACTIVITIES

Supreme Court To Consider New Law Limiting Aliens' Access To Courts In Case Involving INS's Efforts To Remove Alleged Terrorists

The Supreme Court has granted the Government's petition for certiorari filed in **American-Arab Anti-Discrimination Committee v. Reno**, 119 F.3d 1367 (9th Cir. 1997), cert petition granted, 66 U.S.L.W.3525 (U.S. June 1, 1998)(AADC). More than ten years ago, in January 1987, the INS instituted deportation proceedings against eight aliens based on their activities on behalf of the Popular Front for the Liberation

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of Palestine (PFLP). The aliens' response to the Government's efforts to deport them has spawned a series of collateral lawsuits at the district court level and in subsequent appeals to the United States Court of Appeals for the Ninth Circuit. The aliens contend that they were targeted for deportation based on their association with the PFLP and that supporters of other similar organizations were not placed in deportation proceedings. They also argue that the Government's efforts to deport them constitute selective enforcement of the immigration laws in violation of their First Amendment right to freedom of association.

In this latest aspect of the litigation, the Government challenges the jurisdiction of the district court in light of the jurisdictional statutory changes made by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). In particular, Section 242(g) of IIRIRA provides that no court will have jurisdiction to challenge the Attorney General's authority "to commence proceedings, adjudicate cases, or execute removal orders against any alien under the [INA]." The courts below had held that the aliens had demonstrated a likelihood of success on their selective enforcement claim and were therefore entitled to preliminary injunctive relief. See 970 F.2d 501 and 70 F.3d 1045. The question that the Supreme Court will hear is, "Whether the courts below had jurisdiction to entertain respondents' challenge to the deportation proceedings prior to the entry of a final order of deportation." The Government in its petition claimed that the courts below had "flouted clear statutory limitations on their own jurisdiction, and have imposed wholly unwarranted constraints on the Executive Branch's enforcement of the immigration laws."

The Supreme Court's decision in this case will have far-reaching consequences because it will decide the scope of IIRIRA § 242(g), the centerpiece of Congress' efforts to limit the jurisdictional reach of the federal courts in matters involving the removal of aliens

Government Seeks Supreme Court's Review of Ninth Circuit's Decision Reversing BIA's Denial of Asylum Where Applicant Had Committed a Serious Nonpolitical Crime

The Government has asked the Supreme Court to review *Aguirre-Aguirre v. INS*, 121 F.3d 521 (9th Cir. 1997) petition for cert. filed, 66 USLW 3720 (U.S. May 27, 1998) (No. 97-1754), where the Ninth Circuit held that the BIA had erred in finding an asylum applicant ineligible for asylum and withholding of deportation.

Aguirre sought asylum and withholding of deportation claiming that if he were returned to Guatemala he would be persecuted on account of his political opinion and related activities. As a member and leader of a local student union, Aguirre personally participated from 1989-92 in at least ten bus burnings to protest increases in bus fares and the Guatemalan government's seeming inaction in investigating the alleged disappearance of student leaders. Together with other students, wearing masks to hide their identities, Aguirre and his cohorts stopped public buses and, when passengers did not cooperate by getting off, they stoned the passengers, hit them with sticks, or tied them with ropes. The buses were then doused with gasoline and set on fire. Aguirre and his friends also vandalized privately owned shops forcibly evacuating the stores by beating the customers, breaking windows, and destroying merchandise.

The BIA found that Aguirre was statutorily ineligible for withholding of deportation under the "serious nonpolitical crime" exception in Section 243(h)(2)(C) of the INA. It found that his actions were "serious enough to affect the lives of innocent bus passengers, shop owners and their customers" and that the criminal nature of his acts "outweigh their political nature." The BIA also denied asylum as a matter of discretion without addressing statutory eligibility.

A divided panel of the Ninth Circuit reversed, holding that the BIA had erred as a matter of law in finding Aguirre statutorily ineligible for withholding of deportation. It found that the BIA should have considered Aguirre's ultimate success in obtaining his objective in balancing the criminal nature of his acts against their political character. It further found that the BIA had failed to consider whether the crimes were "grossly out of proportion to the alleged objective" or involved "acts of an atrocious nature." It found that those violent actions amounted only to minor crimes against property and were a "political necessity" because the Guatemalan government was an "accomplice or accessory to terroristic methods of government." Finally, it held that the BIA had erred in failing to consider the severity of persecution that Aguirre might suffer if returned to Guatemala. In light of its finding on the withholding issue, the panel also vacated the discretionary denial of asylum and remanded it to the BIA for reconsideration consistent with its opinion. The panel's ruling prompted a vigorous dissent by Judge Kleinfeld, who wrote that "the United States should be a haven for innocent people fleeing persecution. It should not be a haven for thugs."

The question as presented in the Government's petition for certiorari is "whether the court of appeals erred in reversing the decision of the BIA's determination that respondent is barred from eligibility for the relief of withholding of deportation under Section 243(h)(1) of the INA, 8 U.S.C. 1253(h)(1), because there are 'serious reasons for considering' that, prior to his arrival in the United States, respondent 'committed a serious nonpolitical crime' within the meaning of Section 243(h)(2)(C) of the INA, 8 U.S.C. 1253(h)(2)(C)."

RULINGS FROM THE FEDERAL COURTS

The federal courts have been busy interpreting the new jurisdictional pro-

visions under IIRIRA. IIRIRA severely limits aliens' access to the courts and for certain classes of aliens, in particular criminal aliens, judicial review is unavailable. At least, that would appear to have been Congress' intent. To date, however, as the following cases summaries reflect, the doors to most court-houses remain open.

First Circuit Rejects Government's Jurisdictional Arguments Under IIRIRA And AEDPA In Case Involving Criminal Alien

Raul Goncalves arrived in the United States at the age of three, and has been a permanent resident alien for twenty-five years. However, he committed some crimes of moral turpitude such as theft, possession of marijuana and the like, and the INS sought to deport him. In 1994, he filed an application for discretionary relief from deportation under § 212(c) of the INA. While Goncalves' application was still pending, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which, under § 440(d), restricted the availability of discretionary relief. The question immediately arose as to whether Congress intended these restrictions to apply retroactively. Ultimately the Attorney General decided in *Matter of Soriano* that the new law applied to pending cases, thereby making aliens such as Goncalves ineligible for 212(c) relief. After the BIA dismissed his appeal, Goncalves filed a petition for habeas corpus in the district court, rather than filing for direct review in the court of appeals. This he was required to do under *Kolster v. INS*, 11 F.3d 785 (1st Cir.1996).

The district court dismissed the action finding correct the Attorney General's interpretation of the new statute in *Matter of Soriano*. Goncalves then sought review in the court of appeals. In **Goncalves v. Reno**,

___F.3d___ (1st Cir. May 15, 1998), the First Circuit rejected the Government's contention that it did not have jurisdiction over the appeal. First, it held that the district court had habeas jurisdiction under the "transition rule" at IIRIRA § 309(c)(4)(C) to hear Goncalves' claims. It reasoned that the literal language of the "transition rule" repealed the court of appeals jurisdiction to review orders against the defined criminal aliens and that Congress never impliedly or expressly repealed habeas authority under 28 USC § 2241. Second, the court held that habeas review includes review of pure law claims. It reasoned that § 2241 expressly allows claims based on statutory law and that traditional habeas review of immigration orders for compliance with due process includes review of statutory law claims. Finally, the court found that AEDPA § 440(d) did not apply to pending applications and reversed *Matter of Soriano*. The court reasoned that it owed no deference to the Attorney General's interpretation in *Matter of Soriano*, and, that § 440(d) implicated retroactivity concerns by removing substantive relief and imposing new burdens and liabilities for past conduct. It found that AEDPA is silent on whether § 440(d) applies to pending applications but other provisions of AEDPA expressly make restrictions on discretionary relief retroactive, and that the legislative history confirms that Congress knew how to make, and had the opportunity to make, a provision retroactive through effective date provisions.

Court Finds No Jurisdiction To Enjoin INS From Removing Three Permanent Resident Aliens Who Had Been Convicted Of Drug Offenses

In **Jean-Baptiste v. Reno**, INS, No. 97-6062 (2d Cir. May 8, 1998) three permanent resident alien plaintiffs had been ordered deported following their criminal convictions for drug offenses. They then filed an action in the district court challenging the deportation procedures followed by the INS, alleging that those procedures vio-

lated their Fifth Amendment rights to due process. The district court dismissed their complaint and the Second Circuit affirmed the dismissal. The Second Circuit, while acknowledging that "the immigration laws appear at times to be a monstrous legislative morass, difficult to track and even more difficult to comprehend," held that the plain language of INA § 242(g) required dismissal for lack of jurisdiction since their claims challenged the Attorney General's decision to "commence proceedings, adjudicate cases, or execute removal orders" against them.

The court, however, noted that if Section 242(g) of the INA were construed as denying any judicial forum for a colorable constitutional claim, it would present a serious constitutional issue. Therefore to avoid that difficult question, § 242(g) should be read as permitting district court review of criminal aliens' deportation orders under 28 U.S.C. § 2241.

Third Circuit Finds That Federal Courts Lack Jurisdiction Under AEDPA § 440(a) To Review Non-Constitutional Errors Of Law Raised By Criminal Alien

Elcazar Morel was convicted of a drug offense in 1993. As a result, the INS instituted deportation proceedings against him while he was incarcerated. Admitting that he was deportable, Morel applied for relief under Section 212(c) of the INA. The Immigration Judge and then the BIA found him ineligible for this relief because he had not accumulated the prerequisite seven years of lawful domicile. Morel then sought review in the Third Circuit. That court initially reversed the BIA and remanded the case, concluding that the INS had erred in construing INA § 212(c) to impose a requirement of seven consecutive years domicile after Morel had been admitted to the United States as a lawful permanent resident.

Before the BIA took any action on remand, Congress enacted AEDPA. The Government went back to the court and asked it to rehear the case in

light of Section 440(d) of AEDPA. In *Morel v. INS*, ___ F.3d ___, No. 95-3271 (3d Cir. May 11, 1998) the Third Circuit granted rehearing and dismissed Morel's appeal. The court held that in the case of aliens convicted of certain criminal offenses, AEDPA § 440(a) removes from the courts jurisdiction to review a claim of legal error in deportation proceedings. The court noted, however, that Morel had not raised any claims "of constitutional proportion," but merely asserted that the BIA had committed an error of statutory construction. The court also found that relevant Supreme Court authority "does not mandate judicial review by an Article III court of questions of law underlying legislatively-created public rights such as immigration."

Ninth Circuit Finds That INA § 242(g) Divests The District Courts Of Habeas Corpus Jurisdiction To Review Aliens' Final Orders Of Exclusion Or Removal

Tarcila Hose, a citizen was ordered excluded from the United States because she did not have a valid visa. The order excluding Hose became final on April 25, 1997, when the BIA dismissed her appeal. On May 1, 1997, Hose petitioned the district court for a writ of habeas corpus, alleging procedural and constitutional claims. On May 2, 1997 the district court dismissed the petition for lack of subject matter jurisdiction, concluding that the IIRIRA removed the district court's habeas corpus jurisdiction under 28 U.S.C. § 2241 to review exclusion orders.

Hose appealed to the court of appeals, contending that the district court did have jurisdiction pursuant to both the United States Constitution and 28 U.S.C. § 2241. In *Hose v. INS*, ___ F.3d ___, 1998 WL 196260 (9th Cir. Apr. 24, 1998), the Ninth Circuit held that the district court lacked jurisdiction to entertain a petition for a writ of habeas corpus challenging a final order of removal. The

court found that the "clear" language of INA § 242(g) specifically eliminated the district court's jurisdiction to review aliens' final orders of exclusion or removal "even in section 2241 habeas proceedings." The court also found that the application of INA § 242(g) to bar habeas corpus review in district court, did not violate the Constitution's Suspension Clause because petitioner did not establish that review of her claims in the courts of appeals would be inadequate or ineffective. It found that the only permissible avenue for review of final orders entered after April 1, 1997, was through a petition for review timely filed in the court of appeals. The petitioner could have sought direct review of her claims in the court of appeals but did not do so. The court observed that "[u]nder IIRIRA, Congress has not attempted to preclude all federal court review of orders to exclude or remove aliens. Rather it has provided a streamlined approach for consideration by the courts of appeals of claims arising from those orders and the procedures leading to them."

REGULATORY DEVELOPMENTS

Attorney General Promulgates Regulation Governing Motions to Reopen Under NACARA

The Attorney General has published an interim rule governing the filing of motions to reopen under the Nicaraguan Adjustment and Central American Relief Act, Pub. L. 105-100, 111 Stat. 2160, 2193 ("NACARA"). See 63 *Fed. Reg.* 31890 (June 11, 1998).

NACARA provides special rules for certain aliens regarding their eligibility for suspension of deportation and cancellation of removal. See *XXVI Migration World* 1-2, 37 (1998). An alien eligible for NACARA benefits may file one motion to reopen to apply for such relief, without regard to the limitations imposed by law on motions to reopen. See NACARA § 203 amending IIRIRA § 309. The inter-

im rule simplifies the filing process by permitting eligible aliens to file the motion to reopen initially without a suspension or cancellation application and supporting documents. The applicant will then have until February 8, 1999, to submit a complete application.

The interim rule also clarifies who can file a motion to reopen under NACARA. The rule states that an alien who had a final order of deportation or removal may file a motion to reopen only if he or she has become eligible for cancellation of removal or suspension of deportation as a result of the amendments made by NACARA § 203. Thus, for example, while under the IIRIRA transitional rule, an alien who had been served with an order to show cause before being physically present in the United States for a continuous period of seven years would have been ineligible for suspension of deportation, under NACARA the applicant may now be eligible for such a benefit.

A motion to reopen filed under NACARA must establish that the applicant is prima facie eligible for suspension of deportation under former INA § 244(a) or the special rule for cancellation of removal. Given that the interim rule provides for the filing of a motion to reopen without an application or supporting documentation, the rule permits an applicant simply to allege in the motion that he or she is prima facie eligible for suspension or cancellation. The applicant must also allege that, but for the IIRIRA transitional rule, he or she would have been eligible for suspension or cancellation, and that he or she has not been convicted of an aggravated felony. Finally, the applicant must establish that he or she is within one of the classes eligible for benefits under NACARA. ■