U.S. Department of Justice
Washington, D.C. 20530

Immigration Litigation Bulletin

Vol. 12, No. 1 *January 2008*

LITIGATION HIGHLIGHTS

■ **Asylum**

►Colombian's FARC conscription not persecution absent nexus to protected gound (1st Cir.) **7**

►Withholding claim of persecution requires "direct personal persecution" (2d Cir.) **8**

►Grant of withholding does not provide for derivative beneficiaries (5th Cir.) **10**

►Abduction by Guatemalan guerillas not persecution on account of political opinion (6th Cir.) **10**

■ **Crimes**

►Conviction for possession of between 50-2000 pounds of marijuana not an aggravated felony (5th Cir.) **10**

■ **Due Process—Fair Hearing**

►Due process violated where IJ failed to advise alien of the availability of free legal services (2d Cir.) **8**

►IJ flawed reasoning violated petitioner's due process (5th Cir.) **12**

►Due process violated where IJ failed to advise alien of the availability of free legal services (2d Cir.) **8**

■ **Jurisdiction**

►Arriving aliens in removal proceedings must seek adjustment before DHS (5th Cir.) **15**

■ **REAL ID Act**

►REAL ID Act does not violate Suspension Clause (9th Cir.) **13**

Inside

5 BIA Decisions
6 Further review pending
7 Summaries of court decisions
15 REAL ID Act practice tip
16 Inside OIL

Canadian court finds that United States is not a "Safe Third Country" under international human rights treaties

On November 29, 2007, the Federal Court of Canada ruled invalid the Safe Third Country Agreement ("STCA") between the United States and Canada, finding that "the United States' policies and practices do not meet the conditions set down for authorizing Canada to enter into a STCA. The U.S. does not meet the Refugee Convention requirements nor the Convention Against Torture prohibition." ***Canadian Council for Refugees, et al. v. Her Majesty the Queen***, [2007] F.C. 1262, at ¶ 7 (Federal Court of Canada) (hereinafter "*CCR*").

"The United States does not meet the Refugee Convention requirements nor the Convention against Torture prohibition."

The challenge to Canada's implementation of the STCA was brought by three non-governmental organizations (Canadian Council for Refugees, Canadian Council of Churches, and Amnesty International) and an unnamed "John Doe." By the court's description, John Doe is a Colombian refugee, currently residing in the United States. He was initially denied asylum by United States' authorities for failure to file his application within one year of arrival, after which he went into hiding in the United States. It was at this point that John Doe filed an application for an injunction in the Canadian court, seeking a determination that the STCA was invalid and could not be applied to him if he were able to make it to a Canadian port of entry.

The application by the claimants challenged the authority of the Canadian government to enter into the STCA with the United States. They argued, and the court agreed, that the preconditions for entering into an STCA were not present, as United States asylum law and policy did not comply with the requisite provisions of the *Convention Relating to the Status of Refugees* and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. The court found that the designation of the United States as a Safe Third Country was improper. In what follows, the reasoning underpinning the judge's decision in this case will be elaborated upon and, in concluding, will be weighed against the judicially obfuscated realities of the U.S. asylum system.

(Continued on page 2)

"Tattooed Gang Members" Not A Particular Social Group

In ***Arteaga v. Mukasey***, __F.3d__, 2007 WL 4531961 (9th Cir. Dec. 27, 2007) (*Trott*, Rawlinson, King), the court held that "tattooed gang members" do not constitute a particular social group under the asylum statute.

Petitioner, a citizen of El Salvador and LPR, was placed in removal proceedings following multiple criminal convictions, including a conviction for unlawful driving and taking

(Continued on page 4)

Safe Third Country Agreement Invalidated

(Continued from page 1)

The Relevant Legal Framework, both International and Domestic

The focus of the challenge was the STCA entered into between the United States and Canada. *See* Agreement for Co-operation in the Examination of Refugee Status Claims from Nationals of Third Countries, *available at* 2004 WL 3269854. The main operative provision of that agreement is Article 4 (1), which provides that "the Party of the country of last presence shall examine, in accordance with its refugee status determination system, the refugee status claim of any person who arrives at a land border port of entry . . . and makes a refugee status claim." This provision is meant to insure that applicants will have their claims adjudicated in Canada *or* the United States, but not in both.

Before entering into an STCA with any country, the delegate of the Canadian Parliament, in this case the Governor-in-Council ("GIC"), had to insure that the subject country complied with international law relating to refugees, specifically Article 33 of the Refugee Convention and Article 3 of the CAT. Article 33 of the Refugee Convention prohibits refoulement of a claimant to a country where his life or freedom would be threatened on account of a protected characteristic, while Article 3 of the CAT prohibits refoulement to a country where the claimant would be subjected to torture. If a country's asylum law and policy is deemed consistent with these international obligations, than the government of Canada may designate that country as a Safe Third Country, meaning that a claimant entering Canada from that designated country would not be eligible to have his or her claim heard by Canadian authorities. *See* Immigration and Refugee Protection Act ("IRPA") (Canada) § 101 (1)(e).

In making the determination of whether a third country does comply with the requisite provisions of international law, the GIC could consider four factors: 1) whether the country is party to the Refugee Convention and CAT; 2) its policies and practices regarding claimants covered by the Refugee Convention and CAT; 3) its human rights record; and 4) whether it is party to an agreement with Canada regarding the sharing of responsibility with respect to claims of refugee protection. *See* IRPA § 102(2). In addition to the initial designation, Canadian authorities must insure continuing compliance via periodic reviews of the laws and policies of the third country. *See* IRPA § 102(3). Finally, any designation must comply with the relevant provisions of the *Canadian Charter of Rights and Freedoms*. *See* IRPA §§ 3(d) & 3(f).

Preliminary Considerations and the "Battle of Experts"

As a preliminary matter, the court had to determine that the applicants had standing pursuant to the Canadian doctrine of "public-interest" standing. It determined that such standing existed, as it would not be possible for an applicant to challenge the STCA from within Canadian borders – by the very operation of the STCA, the aliens who are subject to it are returned as soon as practicable to the United States. Standing exists, the judge found, notwithstanding the application was ostensibly filed on behalf of an actual refugee. Yet the judge determined it important to note that these organizations did bring suit on behalf of an individual who was unable to effectuate an entry to Canada: "It is noteworthy that John Doe was hiding in the United States, unable to secure a reconsideration of his claim there, and feared exposure by arriving at the Canadian border only to be returned to the United States for deportation to Colombia." *CCR*, at ¶ 52.

Concerning the standard of review, the court determined that it would find the Canadian authorities lacked jurisdiction to designate the United States a Safe Third Country only "if the GIC erred in concluding that the preconditions existed, and that any reasonable inspection of the evidence of U.S. law and practice would lead to the conclusion that the U.S. is not in compliance with Article 33 of the Refugee Convention and Article 3 of the [CAT]." *Id*. at ¶ 82. The conclusions actually reached by the GIC would be reviewed pursuant to the Canadian administrative law standard of reasonableness *simpliciter* – the conclusions of the GIC will be upheld so long as there is a reasonable connection between the evidence and the conclusions reached.

This connection between evidence and the conclusions reached would be weighed against the evidence offered by several noted academics and practitioners. For the applicants, *inter alia*, Eleanor Acer of Human Rights First, Susan Akram of Boston University Law School, Deborah Anker of Harvard Law School, and the triumvirate of Ramji-Nogales, Schoenholtz and Schrag who offered the so-called "Georgetown affidavit," mirroring the conclusions reached in their study of adjudicatory disparities. *See* Jaya Ramji-Nogales, Andrew I Schoenholtz & Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 *Stanford Law Review* 295 (2007). For the government of Canada, the most noted proffer was that of David Martin, former general counsel of the Immigration and Naturalization Service, and current professor at the University of Virginia.

United States Law, Policy and Practice Regarding Refugees

The substantive analysis of the relevant portions of U.S. asylum law and policy was broken down into separate issues, each of which will

(Continued on page 3)

Canadian Court finds that United States is not a safe third country for purpose of asylum protection

be dealt with here in turn: 1) the one-year bar and the heightened standard for withholding of removal; 2) the categorical exceptions for criminality and terrorism; 3) U.S. interpretation of the term "persecution" and its application to social group and gender claims; 4) credibility determinations and corroboration requirements; and 5) detention issues and access to counsel.

First, the judge considered whether the one-year asylum bar, coupled with the higher standard for withholding of removal, constituted a significant danger of refoulement. He noted that the U.S. Supreme Court has definitively noted the higher burden of proof required for establishing eligibility for withholding of removal. *See INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). Moreover, citing to statistics provided by Professor Anker, he also noted that, while immigration judges grant 38% of asylum claims, they grant only 13% of withholding of removal claims. *CCR*, at ¶ 152. Because the bar will leave some refugee-claimants with only the possibility of withholding of removal, and because this standard is higher and granted less frequently, the judge determined that the operation of these two points of law created a real risk of refoulement, such that the Canadian government's determination that the U.S. was in compliance with the Refugee Convention was unreasonable.

The judge went further, however, and posed the question of whether the one-year bar was itself incompatible with the Refugee Convention. Although noting the existence of exceptions to the one-year bar, he found them to be permissive rather than mandatory, too narrow, and even if an alien did qualify for an exception he could still be barred for failure to file within a reasonable period of time. *Id.* at ¶ 159. He also noted in passing the U.N. High Commissioner on Refugee's concern with any filing deadlines. *Id.* Due to these concerns, it was again found to be unreasonable for the Canadian government to conclude that U.S. law and policy was consistent with the Refugee Convention.

Second, the judge examined the categorical exceptions for criminality and terrorism. The judge began by noting that these exceptions only apply to asylum and withholding of removal claims, and would not bar an alien from protection under CAT. However, he found the breadth of the terrorist exceptions broader than Canada's similar exceptions. Specifically, the exceptions seemed to bar a far broader group of individuals than that contemplated by the exceptions contained in the Refugee Convention. *See id.* at ¶¶ 174-91 (*citing Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006) & *Matter of A-H-*, 23 I&N Dec. 774 (AG 2005)). Because the U.S. terrorist exceptions barred individuals who should be permitted to seek protection under the Refugee Convention, it was unreasonable to conclude that U.S. law was in compliance with its international obligations on this point. Regarding the criminality exceptions, the judge found that the Canadian, international, and U.S. schemes were substantially similar, and that it could not be deemed unreasonable for the government to have concluded that the U.S. was in compliance with its Refugee Convention obligations.

The Canadian court found that United States law does not sufficiently protect those whose asylum claims are gender-based, specifically victims of domestic violence.

Third, upon a review of the evidence proffered by the Applicants experts, the judge found that U.S. law does not sufficiently protect those whose claims are gender-based, specifically victims of domestic violence. *Id.* at ¶¶ 198-206. It was also determined that the application of the term "persecution" varied as between adjudicators, and that the status of mixed motive analysis made refoulement a real possibility. *Id.* at ¶¶ 207-16. For these reasons, the judge again found that it was unreasonable to find the U.S. in compliance with its obligations under the Refugee Convention.

The Applicants also challenged U.S. law and policy regarding corroboration and credibility, and detention and access to counsel, but the judge found no potential refoulement problems with those provisions. Notwithstanding the REAL ID Act amendments concerning corroboration and credibility, the judge determined that those provisions were substantially similar to prevailing international and Canadian norms. Moreover, the issues of detention, although seemingly punitive, and a lack of access to counsel could not be deemed to contribute to any significant danger of refoulement. On the whole, however, the judge found it unreasonable for the GIC to conclude that the U.S. was in compliance with the Refugee Convention, meaning that it acted outside its authority in entering into the STCA.

United States Law, Policy and Practice Regarding Torture

The STCA was also challenged on the basis that the U.S. does not comply with its obligations under the CAT. Concerning the burden of proof, the "more likely than not" standard, the judge found that the U.S. and Canadian laws were identical. *Id.* at ¶ 243. The intent requirements and interpretation of "acquiescence" were also close

(Continued on page 4)

Tattooed Gang Members not a particular social group in El Salvador

of a vehicle in violation of California Vehicle Code § 10851(a). Petitioner then applied for asylum, withholding of removal, and CAT protection. He claimed that if removed to El Salvador, he would automatically be placed in detention by El Salvadoran authorities pursuant to a law that requires a 72-hour detention of aliens removed from the U.S. who are suspected of gang activity. Once in detention, petitioner claimed, rival gang members would be able to identify his gang affiliation by looking at his tattoos and would then beat him. Thus, petitioner argued, his status as a gang member constituted membership in a particular social group and he more likely than not would be beaten in the El Salvadoran detention facility.

The IJ denied all relief. First, the IJ found that petitioner's conviction constituted an aggravated felony which precluded him from seeking asylum. Second, the IJ denied withholding of removal because he found that tattooed gang members did not constitute a particular social group. The IJ denied CAT protection because he found that El Salvadoran authorities were not complicit in the abuse of persons housed in El Salvadoran jails. The BIA affirmed.

The Ninth Circuit affirmed the decisions of the IJ and BIA. The court relied on *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000), for its finding that a social group is a "group united by 1) a voluntary association which imparts some common characteristic that is fundamental to the members' identities, or 2) an innate characteristic." The court found that "[w]e cannot conclude that Congress, in offering refugee protection for individuals facing potential persecution through social group status, intended to include violent street gangs who assault people and who traffic in drugs and commit theft." "In fact," the court said, "the outlaw group to which the petitioner belongs is best described as an 'antisocial group'" and "to do as [petitioner] requests would be to pervert the manifest humanitarian purpose of the statute in question and to create a sanctuary for universal outlaws." While the record did reflect some evidence that "prison authorities are indifferent to the conditions of the prisons," the court also held that the BIA properly denied CAT protection.

Finally, the court rejected petitioner's argument that his conviction under California Vehicle Code § 10851(a) did not constitute an aggravated felony because the statute did not categorically prohibit theft offenses and because his arrest for "joyriding" did not involve the requisite intent of a permanent taking. The court found that both arguments were precluded by *Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815 (2007)

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Canadian court strikes down Safe Third Country Agreement

(Continued from page 3)
enough so that unreasonableness could not be presumed on the part of the GIC. *Id.* at ¶ 255. However, the judge determined that the likely occurrence of torture in the country of removal *was not* an absolute bar to removal under U.S. law, due to the receipt of "assurances" from the receiving country. *Id*. at ¶ 259. The judge noted directly the Maher Arar case, and the fact that the U.S. had alleged compliance with CAT during the commission proceedings in Canada. *Id*. at ¶ 260-61. As the U.S. seemingly would return an alien to a country where torture would be likely, it was deemed unreasonable for the GIC to conclude it was compliant with the CAT.

Concluding Thoughts

The decision is superficial and lacks a concentrated analysis of the many layers of nuance provided by the U.S. asylum system. Moreover, contrary to the alleged assessment by the judge concerning compatibility with international standards, the decision reads more like a comparison of U.S. law with Canadian and EU standards. The decision is currently being appealed to the Canadian Supreme Court, although it will take a number of years for the process to work itself out. As part of the appeal, the government attorneys have also requested a stay of the Federal Court's decision. The more significant and immediate impact will be on Canadian-U.S. relations, reciprocal aid in the immigration context, and additional stress on an already over-extended and much criticized Canadian asylum system. It is patently absurd to assert that the U.S. is not a safe-third country, as the asylum system here is one of the most liberal in the world. As the *New York Times* noted, the decision is "outrageous, and has the whiff of Canadian cultural superiority about it." Adam Liptak, "U.S. Is No Haven, Canadian Judge Finds," *N.Y. Times*, Dec. 10, 2007, at A16 (citation omitted). What the end result in this case will be, however, is not clear. It is not the first time, nor will it be the last, that a foreign or international court has found the U.S. in supposed noncompliance with its international obligations. At least in the subsequent proceedings here, one can hope for a pragmatic and realistic assessment of U.S. law and policy, and a realization that the U.S., year in and year out, accepts more refugees and immigrants than any other country in the world.

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Board of Immigration Appeals Decisions

Welfare fraud offense under Rhode Island law is not a "theft offense"

In ***Matter of Garcia-Madruga***, 24 I&N Dec. 436 (BIA 2008), the Board addressed the distinction between a "theft offense" described in INA § 101(a)(43)(G), and an "offense that involves fraud or deceit" described in INA § 101(a)(43)(M)(i). Several courts of appeals, including the Third Circuit in *Nugent v. Ashcroft*, 367 F.3d 162 (3d Cir. 2004), and the Fourth Circuit in *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005), had struggled with the distinction.

> "A theft offense within the meaning of [INA §] 101(a)(43)(G) consists of the taking of, or exercise of control over, property without consent whenever there is criminal intent to deprive the owner of the rights and benefits of ownership."

In *Garcia-Madruga*, the Board concluded that the offenses described by Congress in INA § 101(a)(43)(G) and(M)(i) of the Act ordinarily involve distinct crimes. Whereas the taking of property without consent is required for a "theft offense," an "offense that involves fraud or deceit" ordinarily involves the taking or acquisition of property with consent that has been fraudulently obtained. To reach this conclusion, the Board clarified its interpretation of a "theft offense." Prior Board decisions had been interpreted to require an intent to deprive permanently as an element of a "theft offense." The Board noted the favorable reception upon judicial review of the Board's "theft offense" interpretation in *Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000), requiring that the property have been obtained from its owner "without consent," including the analysis of the Supreme Court in *Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815 (2007), observing that both courts and the Board "accepted as a generic definition of theft, the 'taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent.'" The Board therefore "refine[d] the definition in *Matter of V-Z-S-*, *supra*, to clarify that a theft offense within the meaning of [INA §] 101(a)(43)(G) consists of the taking of, or exercise of control over, property without consent whenever there is criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent."

Based on this refinement, the Board reviewed the statute under which Garcia-Madruga had been convicted, and found that "welfare fraud under section 40-6-15 of the General Laws of Rhode Island does not constitute the taking of, or exercise of control over, property without consent and with the criminal intent to deprive the owner of the rights and benefits of ownership." The Board therefore found that Garcia-Madruga not been convicted of an aggravated felony "theft offense" as defined in INA § 101(a)(43)(G), and sustained his appeal, and terminated his removal proceedings.

An IJ's order granting withholding without a grant of asylum, must include an explicit order of removal

In ***Matter of I-S- & C-S-***, 24 I&N Dec. 432 (BIA 2008), the Board sustained a DHS appeal that argued that an immigration judge erred by granting withholding of removal without first entering a removal order. Noting that "a grant of withholding of removal is not discretionary and does not afford the respondents any permanent right to remain in the United States," and that 8 C.F.R. § 1240.11 (e) provides that "[n]othing in this section is intended to limit the Attorney General's authority to remove an alien to any country permitted by section 241(b) of the Act," the Board held that the regulations require "that when an Immigration Judge decides to grant withholding of removal, an explicit order of removal must be included in the decision."

Adopted child under age of 18 is not disqualified if adopted prior to her younger sibling

In ***Matter of Anifowoshe*** 24 I&N Dec. 442 (BIA 2008), the Board held that an alien child who was adopted under the age of 18, and whose natural sibling was subsequently adopted by the same adoptive parent or parents while under the age of 16, may qualify as a "child" within the meaning of section 101(b)(1)(E) of the Immigration and Nationality Act, 8 U.S.C.A. § 1101(b)(1)(E), even if the child's adoption preceded that of the younger sibling.

On appeal, the USCIS had cited to a memorandum to support its argument that an adopted alien child who is under the age of 18 may be considered a "child" if the child is adopted with or after a sibling who is also considered a "child" under the Act. However, the BIA reaffirmed its prior precedents holding that decisions and internal memoranda issued by the INS or DHS are not binding authority on the Board. *See Matter of Briones*, 24 I&N Dec. 355, 365 n.7 (BIA 2007); *Matter of Tijam*, 22 I&N Dec. 408, 416 (BIA 1998). Accordingly, the Board agreed with the petitioner that although the beneficiary was adopted prior to her siblings, she was not disqualified on this basis under INA § 101(b)(1)(E)(ii).

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Contributions to the Immigration Litigation Bulletin Are Welcomed!

FURTHER REVIEW PENDING: Update on Cases & Issues

Voluntary Departure—Tolling

On January 7, 2008, the Supreme Court heard oral arguments in ***Dada v. Mukasey***, No. 06-1181, an unpublished Fifth Circuit decision. The question presented is:

> Does the filing of a motion to reopen removal proceedings automatically toll the period within which an alien must depart the United States under an order granting voluntary departure?

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Asylum — "Assisted" in Persecution

On November 13, 2007, the government filed a petition for rehearing en banc in ***Im v. Gonzales***, 497 F.3d 990 (9th Cir. 2007). The question presented is whether the alien assisted in persecution because he was a guard at a torture prison and took prisoners to the torture room?

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Asylum — Disfavored Group

On May 11, 2007, the Solicitor General filed an opposition to a petition for certiorari in ***Sanusi v. Gonzales***, 188 Fed. Appx. 510 (7th Cir. July 24, 2006). The question presented is whether an alien who has demonstrated membership in a disfavored group must also show individual singling out for persecution to establish it is more likely than not that life or freedom would be threatened.

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Jurisdiction — Sua Sponte Reopening

In ***Tamenut v. Gonzales***, 477 F.3d 580 (8th Cir. 2007), the Eighth Circuit held that it was required under its precedent, *Recio-Prado v. Gonzales*, 456 F.3d 819 (8th Cir. 2006), to take jurisdiction over the BIA's discretionary decision not to *sua sponte* reopen a case. On July 19, 2007, the court ordered the case submitted to the en banc court without oral argument.

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Constitution — Denial of 212(c) Relief Violates Equal Protection Clause

On November 29, 2005, the government filed a petition for rehearing en banc in ***Cordes v. Gonzales***, 421 F.3d 889 (9th Cir. 2005), where the Ninth Circuit held that the denial of § 212(c) relief violated equal protection. The court reasoned that petitioner was similarly situated to an alien who pled guilty when the crime was a deportable offense, who was eligible for § 212(c) relief at the time he pled, and who therefore relied on the expectation of obtaining § 212(c) relief.

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Constitution — Ineffective Assistance of Counsel, REAL ID Act

On December 14, 2007, the Ninth Circuit denied the government's petition for rehearing en banc in ***Singh v. Gonzales***, 499 F.3d 969, 980 (9th Cir. 2007). The questions raised are: Does the district court have jurisdiction over an ineffective assistance of counsel claim that counsel failed to file timely petition for review, or does 8 USC §§ 1252(a)(5) & (b)(9) preclude district court jurisdiction? Is there a Fifth Amendment constitutional due process right to effective counsel in immigration removal proceedings? The government is considering whether to seek certiorari.

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Visas — "Immediate Relative"

The government has filed an appeal in ***Robinson v. Secretary DHS***, No. 07-2977 (3d Cir.). The question raised is whether the spouse of a United States citizen qualifies as an "immediate relative" as defined in INA § 101(b)(2)(A)(I) when the citizen dies after the filing of an I-130 visa petition but before the petition was adjudicated and before the couple had been married for two years.

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Criminal Alien — Conviction Modified Categorical Approach

The government has filed a petition for rehearing en banc in ***U.S. v. Snellenberger***, 480 F.3d 1187 (9th Cir. 2007). The question is whether a minute order can be considered under the modified categorical approach

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Convention Against Torture Definition of "Torture"

On December 7, 2007, the Third Circuit granted *sua sponte* rehearing en banc in ***Pierre v. Attorney General***, No. 06-2496, a case transferred pursuant to the REAL ID Act from the District of New Jersey. On January 29, 2008, the government filed a brief responding to the following questions from the court: (1) does CAT require that the torturer specifically intend to inflict severe physical or mental pain or suffering, or is willful blindness considered and treated as specific intent? (2) is lack of prison medical facilities or resources to care for severely physically impaired or diseased prisoner to be considered and treated as tantamount to torture when the warden or jailer has no specific intent to inflict severe physical or mental pain or suffering? (3) is a statute, regulation, or other authority available to afford a remedy or humanitarian relief to severely impaired or diseased persons who will be imprisoned in the country of removal?

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ **FARC Conscription Not Persecution For Lack of Nexus**

In ***Tobon-Marin v. Mukasey***, __ F.3d __, 2008 WL 73400 (1st Cir. Jan. 8, 2008) (Lipez, *Cyr*, Howard), the First Circuit upheld findings that two brothers were not eligible for asylum where they failed to prove a nexus between the coercive conscription efforts of the Revolutionary Armed Forces of Colombia ("FARC") and one of the enumerated grounds.

The Court held that the aliens failed to prove that FARC targeted them for an unvoiced political opinion instead of as young, able-bodied males who might help the group. "Absent specific evidence that the FARC targeted petitioners as a means to punish them for their pro-government, anti-communist political views, forced conscription would not constitute 'persecution' for asylum purposes," said the court. Moreover, said the court, that even if petitioners had shown causal nexus the infrequent visits by the FARC to their home did not amount to the serious harm necessary to constitute persecution. The court noted that "threats standing alone constitute past persecution in only a small category of cases, and only when the threats are so menacing as to cause significant actual suffering or harm."

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SECOND CIRCUIT

■ **Burglary Under Conn. Gen. Stat. § 53a-103 Does Not Constitute A CIMT Unless The Alien Specifically Admitted To An Intent To Permanently Deprive The Victim Of Property In The Record Of Conviction**

In ***Wala v. Mukasey***, __F.3d__, 2007 WL 4322438 (2d Cir. Dec. 12, 2007) (Calabresi, Pooler, *Sotomayor*), the court held that the BIA improperly applied the modified categorical approach to infer from petitioner's plea colloquy that he had the necessary intent to permanently deprive another of property in order for his burglary conviction to constitute a CIMT. In so holding, the court stated that the BIA may only rely upon facts from the record of conviction that a defendant specifically admits to. The "modified categorical approach does not permit the BIA from drawing inferences of this kind," said the court.

The court found that the BIA could not infer that petitioner intended to commit larceny because, "however improbable, he could have been taking the jewelry with the intent to loan it to his girlfriend for one 'night on the town' and then return it."

Petitioner, a citizen of Poland, pled guilty to third degree burglary under Conn. Gen. Stat. section 53a-103. In petitioner's plea colloquy, the prosecutor recited that petitioner admitted to two occasions where he entered the victim's house and took jewelry and a credit card. An IJ found the Connecticut statute divisible, but determined that petitioner was removable for a CIMT on the basis of the burglary conviction. The IJ reasoned that petitioner had intended to commit a larceny when he entered the victim's house, and larceny constituted a CIMT. The BIA affirmed, adding that "the plea transcript is adequate to show that such offence involved a permanent taking of property."

Before the Second Circuit, petitioner argued that the record of conviction did not establish that he admitted to an intent to permanently deprive the victim of property and, therefore, his larceny did not constitute a CIMT. The court agreed. The court stated that under BIA precedent larceny constitutes a CIMT only when the perpetrator intends a permanent taking of the victim's property. Applying the modified categorical approach, the court looked to the plea colloquy to determine whether the petitioner "necessarily pleaded" facts that evidence a permanent intent to deprive another of property. According to the court, "a petitioner necessarily pleads to facts when, for example, he actually admits specific facts in his plea colloquy or comparable judicial record." Here, the court found that petitioner did not admit to taking the jewelry or credit card with the intent to permanently deprive. "[T]he charging document does not specifically name the intended crime associated with his burglary conviction" and, "however improbable, [petitioner] could have been taking the jewelry with the intent to loan it to his girlfriend for one 'night on the town' and then return it. Or, he could have been taking the credit cards with the intent to use them for a one-time identification purpose," the court said. "The point," stated the court, "is that either would have been sufficient to sustain [petitioner]'s guilty plea and conviction under Connecticut penal law. Thus, although it may have been reasonable for the BIA to infer that [petitioner] intended to permanently keep the items he admitted taking, the modified categorical approach does not permit the BIA to draw inferences of this kind."

Judge Calabresi concurred, but expressed his dissatisfaction with the modified categorical approach.

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■ **Second Circuit Reverses IJ's Adverse Credibility Finding As Speculative In Light Of The IJ's Finding That The Applicant Was Otherwise Credible.**

In ***Niang v. Mukasey***, __ F.3d __, 2007 WL 4409785 (2d Cir. Dec. 19, 2007) (Leval, *Calabresi*, Gibson), the Second Circuit held that substantial evidence did not support the denial of withholding of removal and CAT protection to an applicant who

Summaries Of Recent Federal Court Decisions

(Continued from page 7)

claimed to be Mauritanian. The court held that when an IJ finds an applicant to be otherwise credible, consistent, and compelling, the IJ cannot then base an adverse credibility finding on a speculative finding that the applicant had submitted inauthentic documents in support of his application.

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■ **Second Circuit Holds That It Lacks Jurisdiction To Review An Untimely Asylum Application And Finds That A Claim For Withholding Requires "Direct Personal Persecution"**

In ***Sun v. Board of Immigration Appeals***, __F.3d__, 510 F.3d 377 (2d Cir. 2007) (Minor, Cabranes) (*per curiam*), the court found that it lacked jurisdiction to consider an IJ's determination that petitioner's asylum application was untimely and affirmed the IJ's adverse credibility determination. The court further found that an asylum applicant from China could not claim "derivative persecution" based on the forced sterilization of his wife.

In support of his asylum claim, petitioner submitted an "abortion certificate" and a warning letter from family planning officials. An IJ denied relief, finding that petitioner was not credible because during his testimony he was evasive and non-responsive, there were numerous discrepancies in the record, and the documents he had submitted in support of his application appeared fraudulent. In particular, the IJ found that the existence of the documents was expressly contradicted by the Department of State Asylum Profile stating that family planning authorities do not issue "abortion certificates" or warning letters. The IJ also found that petitioner had not filed his asylum application within one year of his arrival in the United States, and that no circumstances existed that could excuse the untimeliness. The BIA affirmed without opinion.

The court affirmed the IJ's decision. First, the court found that it lacked jurisdiction to consider the timeliness of petitioner's asylum application. Second, the court found the adverse credibility determination supported by substantial evidence. While the court noted that one of the discrepancies the IJ relied upon was in error, the court was "confident that the same decision would be made in the absence of the [error]." The court also found that the IJ properly relied on the Department of State Asylum Profile to discredit the documents submitted by petitioner. Further, the court found that the IJ properly supported his decision by noting the petitioner's evasive and non-responsive demeanor. Finally, the court held that "even if the IJ erred in finding petitioner to be non-credible, we hold that petitioner is ineligible for withholding of removal to the extent his claim of persecution is based on the asserted forced sterilization of his alleged spouse." The court said that, "[l]ike a claim for asylum, withholding of removal requires a showing of direct personal persecution."

"We hold that petitioner is ineligible for withholding of removal to the extent his claim of persecution is based on the asserted forced sterilization of his alleged spouse."

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■ **Second Circuit Upholds Naturalization Denial, Finding That Alien's Aggravated Felony Conviction Occurred After Legislation Took Effect, Preventing Him From Establishing Good Moral Character**

In ***Puello v. BCIS***, __F.3d__, 2007 WL 4440916 (2d Cir. Dec. 20, 2007) (Cabranes, Sack, *Katzmann*), the Second Circuit affirmed the district court's grant of summary judgment to the government and upheld a naturalization denial. The USCIS and the district court had found that, as someone who had been convicted of an aggravated felony after the enactment of the 1990 amendments to the INA, the petitioner could not show the good moral character required for naturalization. Petitioner contended that he was actually convicted, for purpose of the statute, on the date he entered his guilty plea, which was prior to the amendments. As such, the petitioner argued that he could show his good moral character notwithstanding his conviction. The Second Circuit affirmed the district court's rejection of the alien's argument that his "conviction" occurred when he pleaded guilty before the legislative bar took effect, not at the time of sentencing and entry of judgment.

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■ **Second Circuit Finds Due Process Violation Where IJ Failed To Advise Petitioner Of The Availability Of Free Legal Services**

In ***Picca v. Mukasey***, __F.3d__, 2008 WL 80402 (2d Cir. Jan. 9, 2008) (*Straub*, Hall, Haight), the Second Circuit held that an IJ did not adequately protect an alien's privilege of legal representation at no expense to the government, in a case where the IJ had repeatedly informed the alien of the privilege and had continued proceedings four times to protect the privilege.

Petitioner, a citizen of Italy and an LPR, was placed in removal proceedings on the basis that he had committed an aggravated felony. In his first appearance before an IJ, petitioner appeared *pro se* and was granted a continuance to allow petitioner time to find legal representation. At the rescheduled hearing he appeared with counsel but asked for an additional continuance in order to prepare an application for withholding of removal and CAT protection. The IJ granted the second continuance. The IJ then

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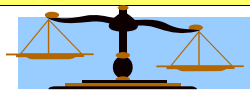

Summaries Of Recent Federal Court Decisions

(Continued from page 8)

granted a third continuance when petitioner again appeared with counsel, but counsel withdrew from the case. The IJ explicitly granted the third continuance in order for petitioner to seek new representation. However, when petitioner next appeared before the IJ, he had not obtained new representation but submitted a letter from his wife stating that the family could not afford an attorney. The IJ did not state whether he considered the letter, but proceeded to adjudicate petitioner's removal proceedings on the merits and denied relief. Petitioner appealed to the BIA claiming that his due process rights had been violated because he was not represented by counsel. The BIA disagreed, finding that petitioner had been given numerous opportunities to obtain counsel and that he had not shown prejudice.

The court rejected the government's argument that the multiple continuances granted by the IJ provided petitioner with sufficient notice of the right to counsel.

The Second Circuit reversed the BIA and remanded the case. The court, citing 8 C.F.R. § 1240.10(a), held that the IJ had failed to advise the petitioner of the availability of free legal services provided by organizations and attorneys. The court said that the "IJ's failure to do so was especially notable because the letter from [petitioner]'s wife indicated that [petitioner] likely would have taken advantage of free legal services if made aware of their existence." The court rejected the government's argument that the multiple continuances granted by the IJ provided petitioner with sufficient notice of the right to counsel. The court stated that the continuances did not remedy the fact that the IJ failed to inform petitioner of the availability of free counsel. The court also rejected the argument that petitioner's NTA had a list of free legal services attached to it because the list did not appear in the record and 8 C.F.R. § 1240.10(a) specifically requires the IJ to advise the petitioner.

Finally, the court held that petitioner did not have to show prejudice because "the subject regulations were for the alien's benefit and that the INS failed to adhere to them."

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THIRD CIRCUIT

■ **Third Circuit Holds That Remand Is Necessary Where The Immigration Judge Failed to Consider All Evidence Of Record**

In ***Myat Thu v. Attorney General***, __F.3d__, 2007 WL 4390398 (3d Cir. Dec. 18, 2007) (Ambro, *Jordan*, Roth), the court remanded the denial of an asylum claim because the immigration judge failed to consider all the evidence of record.

Petitioner, a citizen of Burma, claimed that he feared persecution on account of his political activities protesting the Burmese military regime. Specifically, he claimed he was arrested in 1998 and had participated in protests in Japan that had marked him for arrest. An IJ denied the claim for two reasons. First, the IJ found that petitioner had not testified credibly, citing inconsistencies between petitioner's credible fear interview, his asylum application, and testimony. The IJ rejected petitioner's explanation for these inconsistencies as implausible, to wit, petitioner's claims that he either misunderstood the questions or was too scared to answer consistently. The IJ additionally supported the adverse credibility determination with the fact that petitioner failed to corroborate the account of his arrest or that the Burmese government "knows or cares that [petitioner] demonstrated" in Japan. Second, the IJ found that even assuming credibility, the incidents described did not establish a well-founded fear of persecution. The BIA affirmed, citing petitioner's inability to corroborate.

The court, while making no determination on the adverse credibility finding, held that the IJ improperly failed to consider record evidence in finding that petitioner had failed to establish a well-founded fear of persecution. Specifically, the court stated that the IJ should have closely considered letters petitioner had submitted from other protestors claiming that petitioner should not return to Burma, the 2005 Country Report, the 2006 Amnesty International Report, and the U.S. Department of Treasury Overview of Sanctions on Burma, before finding that petitioner "had provided no proof that the Burmese government was aware of his political activities." The court explained that these documents are "the background that must in fairness be considered when reviewing [petitioner]'s testimony" and "on remand an IJ should consider [petitioner]'s explanations of any discrepancies in his statements in light of the Country Report and other evidence."

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■ **Third Circuit Affirms That Aird Affidavit Is Insufficient To Establish Eligibility For Asylum Based On China's Family Planning Laws**

In ***Yu v. Attorney General***, __F.3d__, 2008 WL 126632 (3d Cir. Jan. 15, 2008) (Rendell, *Stapleton*, Irenas), the court upheld the decision of the BIA finding that petitioners' submission of the oft-cited John Aird affidavit was insufficient to establish eligibility for asylum on the basis that the couple's second child would subject them to persecution under China's family planning laws.

Before the BIA, petitioners argued

(Continued on page 10)

Summaries Of Recent Federal Court Decisions

(Continued from page 9)
that the IJ erred in denying their asylum claims by relying "almost exclusively on an affidavit prepared by retired demography John Aird." The BIA, citing to *Matter of C-C-*, 23 I&N Dec. 899 (BIA 2006), found that "the evidence presented was insufficient to establish that there was a national and uniform policy of sterilizing returning Chinese citizens who have more than one child. The Third Circuit affirmed the decision of the BIA. The court found that the BIA's decision in *Matter of C-C-* was a "well-reasoned" explanation for why the BIA found the John Aird affidavit insufficient. Specifically, the court cited *Matter of C-C-*'s reasoning that the John Aird affidavit was not based on the personal knowledge of John Aird and was directly contradicted by the 2004 State Department Report. The court distinguished this case from *Guo v. Ashcroft*, 386 F.3d 556 (3d Cir. 2004), where the court had found that the Aird affidavit could provide prima facie evidence warranting reopening of a removal proceedings. "In this case," the court said, "the issue before the BIA was not whether petitioner made a prima facie showing for reopening, but whether they had carried their ultimate burden of persuasion in making an asylum claim. Our role in this latter context is limited to determining whether there is substantial evidence."

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FIFTH CIRCUIT

■ Fifth Circuit Joins Eleventh Circuit In Expressly Holding That Withholding Of Removal Does Not Provide For Derivative Beneficiaries

In ***Arif v. Mukasey***, 509 F.3d 677 (5th Cir. Dec. 7, 2007) (Jones, Wiener, Clement) (*per curiam*), the court held that it lacked jurisdiction to consider the BIA's determination that petitioner's asylum application was untimely and not excused by extraordinary circumstances and affirmed that the withholding of removal does not provide for derivative beneficiaries.

Petitioner made two arguments before the Fifth Circuit. First, she argued that the agency erred by finding that her asylum application was not timely filed within one year of arrival or, in the alternative, was untimely but excused by exceptional circumstances. However, the court found that it lacked jurisdiction to consider these arguments. The court explained that "we do not have jurisdiction to review determinations of timeliness that are based on findings of fact" and, "as both of these holdings involve questions of fact, we lack jurisdiction to consider the BIA's denial of Petitioner's claim for asylum."

A Mexican alien's conviction for possessing between 50 and 2000 pounds of marijuana was not an aggravated felony under the Supreme Court's reasoning in *Lopez v. Gonzales*.

Second, petitioner challenged her removal by claiming she was a derivative of her husband's grant of withholding of removal. The court disagreed. The court found "no evidence in the language of the statute to indicate that Congress intended to extend the relief afforded by withholding of removal to an alien's spouse or minor children without an independent ground for granting such relief to them." The court reasoned that the "statute providing for asylum expressly includes a provision for derivative beneficiaries, but the statute providing for withholding of removal makes no mention of derivative relief." The court further explained that pursuant to 8 C.F.R. § 1208.16(e), "the federal regulations governing withholding of removal and asylum indicate that a grant of withholding of removal does not provide relief to the spouse or minor children of an alien." The court rejected petitioner's argument that the I-589 application evidences congressional intent to extend derivative status to withholding because "the instruction page of the application clearly states that 'withholding of removal does not apply to any spouse or child included in this application."

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■ Fifth Circuit Holds That An Alien's Conviction For Possessing Between 50 and 2000 Pounds Of Marijuana Is Not An Aggravated Felony

In ***Arce-Vences v. Mukasey***, 512 F.3d 167(5th Cir. 2007) (*Jolly*, Higginbotham, Prado), the Fifth Circuit held that a Mexican alien's conviction for possessing between 50 and 2000 pounds of marijuana was not an aggravated felony under the Supreme Court's reasoning in *Lopez v. Gonzales*, 127 S. Ct. 625 (2006). In *Lopez*, the Court held *inter alia* that a state offense constitutes a felony punishable under the Controlled Substance Act (CSA) "only if it proscribes conduct punishable as a felony under that federal law." The court noted that mere possession is not a felony under the CSA. The court also noted that under INA 101(a)(43)(B), a felony could also constitute an aggravated felony if it fell within the general term of "illicit trafficking" regardless of a federal counterpart. "Trafficking" said the Court, ordinarily means "some sort of commercial dealing."

Here the Fifth Circuit found that petitioner's conviction for possession of marijuana was not an aggravated felony because the offense was not a federal felony and did not involve commercial dealing. Although the alien never challenged the aggravated felony finding below, the court concluded that he did not need to exhaust his administrative remedies in

(Continued on page 11)

Summaries Of Recent Federal Court Decisions

(Continued from page 10)
this regard because *Lopez* was not decided until after the alien filed his petition for review.

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SIXTH CIRCUIT

■ **Neither Petitioner's Forced Conscription Into The Guatemalan Civil Patrol Nor His Abduction by Guatemalan Guerillas Constituted Persecution On Account Of Political Opinion**

In ***Pascal v. Mukasey***, __F.3d__, 2007 WL 4409788 (6th Cir. Dec. 19, 2007) (Rogers, *Sutton*, Bertelsman), the court affirmed the agency's finding that petitioner had not established persecution on account of a political opinion imputed to him by either the Guatemalan government or Guatemalan guerillas, and that petitioner did not have a well-founded fear of future persecution because Guatemala does not economically persecute Mayans.

Petitioner claimed that his forced conscription into the Guatemalan civil patrol, and later his abduction by Guatemalan guerillas, during Guatemala's civil war constituted persecution on account of imputed political opinion. Petitioner further claimed the Guatemalan government persecutes ethnic Mayans by causing them economic hardship. An IJ denied both claims, and further found that petitioner could safely relocate within Guatemala. The BIA affirmed without opinion.

The court affirmed the decision of the IJ. Citing *INS v. Elias-Zacarias*, 502 U.S. 478 (1992), the court held that petitioner's forced conscription by either the Guatemalan government or Guatemalan guerillas was not on account of petitioner's political opinion because he "does not claim that he advocated, or indeed held, any particular political view when he lived in Guatemala." As for the argument that a political opinion had been imputed to petitioner, the court was hesitant to say that imputed political opinions can form the basis of an asylum claim, but declined to reach the issue as "[petitioner] has not established that either of his alleged persecutors acted on account of his opinion, imputed or otherwise." The court noted, however, that "imputed-opinion applicants may have more difficulty proving that they cannot return because of that persecution" as imputed political opinion "is premised on a persecutor's mistaken belief about the victim's views," and "finding a well-founded fear of future persecution would require an inquiry into whether the prospective persecutor would make the same mistake again if the alien returned."

"Economic stratification and deficient government support, regrettable though they are, do not establish a cognizable case of persecution."

Regarding petitioner's conscription into the civil patrol, the court held that "[petitioner]'s own testimony confirms that the civil patrol beat him because he 'was not serving his term' of mandatory duty. True, the patrolmen accused him of 'being part of the guerilla,' and threatened his family on that account while he was in captivity. These statements, however, do not compel a fact-finder to conclude that he was being persecuted on account of his political opinion." Regarding petitioner's abduction by guerillas, the court found that "that action, too, could fairly be characterized as motivated by the guerilla's own military, political, and welfare needs, not a desire to make [petitioner] pay for his political opinions." Furthermore, the court found that changed country conditions precluded petitioner's claim as the State Department Report shows that the current Guatemalan government following the civil war "generally respects the human rights of its citizens." The court rejected petitioner's claim of economic persecution on account of his Mayan ethnicity because "economic stratification and deficient government support, regrettable though they are, do not establish a cognizable case of persecution." Finally, the court found that the record also showed that petitioner could safely relocate in Guatemala.

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■ **Sixth Circuit Upholds Frivolous Asylum Application Finding**

In ***Ceraj v. Mukasey***, 511 F.3d 583 (6th Cir. Dec. 28, 2007) (Daughtrey, *Gilman*, Cook), the Sixth Circuit affirmed a determination by the BIA that an asylum applicant from Albania had filed a frivolous application, and its alternative ruling that the applicant was not credible, and therefore did not establish past persecution in Albania. The court further agreed with the BIA that even if past persecution was shown, conditions in Albania had changed, negating a well founded fear of future persecution. Because the applicant did not qualify for asylum, the court also found that he could not satisfy the more stringent standard for withholding of removal and protection under the CAT.

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■ **Sixth Circuit Holds That It Lacks Jurisdiction Over Asylum Denial On Untimeliness Grounds When Question Is Discretionary Or Factual, And Upholds Withholding Denial**

In ***Shulaku Purballori v. Mukasey***, __F.3d__, 2007 WL 4409794 (6th Cir. Dec. 19, 2007) (*Martin*, Gibbons, Sutton), the Sixth Circuit held that under 8 U.S.C. § 1158(a)(3), it lacked jurisdiction to review the denial of an asylum application as un-

(Continued on page 12)

Summaries Of Recent Federal Court Decisions

(Continued from page 11)

timely, unless the appeal sought review of constitutional claims or matters of statutory construction. "We will review asylum applications denied for untimeliness only when the appeal seeks review of 'constitutional claims or matters of statutory construction,' not when the question is 'discretionary' or 'factual,'" said the court. The court concluded that it could not consider petitioner's claim that his late filing was caused by the Immigration Court's scheduling because this was predominantly factual. The court also held that petitioner failed to show that he was "more likely than not" to face persecution or torture were he to return to Albania. The court found that the acts of violence petitioner endured in Albania did not constitute an extreme form of cruel and inhuman treatment, and thus did not warrant withholding of removal under the CAT.

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■ **BIA Did Not Abuse Its Discretion In Finding That Article On The Health Effects Of Torture Did Not Establish Changed Country Conditions**

In ***Alemu v. Mukasey***, 509 F.3d 907 (8th Cir. Dec. 11, 2007) (Wollman, *Gibson*, Benton), the court held that the BIA did not abuse its discretion by finding that an article submitted by petitioner on the health effects of torture in Ethiopia did not establish changed country conditions that would have excused her untimely motion to reopen.

Petitioner had sought asylum, withholding of removal, and CAT protection claiming that she feared persecution in Ethiopia on account of her Oromo ethnicity. An IJ denied the claim, finding that petitioner failed to provide credible testimony and failed to show persecution on account of a protected ground. The BIA affirmed, but failed to address petitioner's CAT claim. Following a remand, the BIA affirmed the IJ's denial of all reliefs. Petitioner then filed an untimely motion to reopen, submitting an article entitled *Somali and Oromo Refugees: Correlates of Torture and Trauma History*, 94 Am. J. Pub. Health 591 (2004). Petitioner argued that this article established changed country conditions. The BIA disagreed. The BIA found that the article did not address current conditions in Ethiopia or state when the tortures happened. Rather, the BIA found the article to be a "public health study, not a political or news analysis of current conditions."

The court held that the alien's challenge to his pre-final removal order detention was moot because his removal proceedings were complete.

The Eighth Circuit agreed with the reasoning of the BIA. The court stated that "the article is about the health effects of torture, not the current conditions in Ethiopia. The BIA's conclusion that this article did not show changed country conditions was a reasonable interpretation of the record and did not ignore or distort the evidence." The court also found that additional letters petitioner claimed supported her application did not appear in the administrative record.

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SEVENTH CIRCUIT

■ **Seventh Circuit Affirms Continued Detention Of Alien Terrorist Held For Two And A Half Years**

In ***Hussain v. Mukasey***, __F.3d__, 2007 WL 4387284 (7th Cir. Dec. 18, 2007) (*Posner*, Evans, Cudahy), the Seventh Circuit affirmed the district court's denial of the alien's petition for a writ of habeas corpus. The district court upheld the government's (i) invocation of the automatic stay to continue detaining the alien during its administrative appeal; and (ii) refusal to disclose classified information despite the fact that the U.S. Attorney's Office had agreed to vacate the alien's criminal conviction because of nondisclosure of this information. The Seventh Circuit held that the alien's challenge to his pre-final removal order detention was moot because his removal proceedings were complete. It further held that (i) 8 U.S.C. 1252(a)(2)(B)(ii) barred the court from ordering release of an alien pending judicial review of the removal order, and (ii) because a stay of removal is in effect, the six month period described in *Zadvydas v. Davis*, 533 U.S. 678 (2001), does not commence unless and until the court affirms the removal order.

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■ **IJ's Flawed Reasoning Violated Petitioner's Right To Due Process**

In ***Bosede v. Mukasey***, __F.3d__, 2008 WL 114892 (7th Cir. Jan. 14, 2008) (Kanne, *Rovner*, Sykes), the court remanded petitioner's case because the IJ's decision denying withholding of removal and CAT protection and finding petitioner was convicted of an aggravated felony was so flawed that it violated the petitioner's right to due process.

Petitioner, a citizen of Nigeria and an LPR, was placed in removal proceedings after convictions for two drug possession offenses and a retail theft conviction. Petitioner then sought withholding of removal and CAT protection based on the claim that he would be persecuted in Nigeria due to his criminal drug convictions and his HIV-positive status. In support of this claim petitioner submitted evidence from the State Department that Nigeria enforces a law

(Continued on page 13)

Summaries Of Recent Federal Court Decisions

(Continued from page 12)

called "Decree 33," which "mandates a five-year sentence for any Nigerian citizen found guilty in any foreign country of an offense involving narcotic drugs." Petitioner also submitted a State Department report stating that Nigerian prisoners do not have access to doctors and medicine and are severely mistreated by prison officials.

After considering the evidence, the IJ denied relief. The IJ first concluded that petitioner's two drug possession convictions constituted aggravated felonies, thus precluding him from seeking withholding of removal. The IJ noted that each conviction involved less than one gram of cocaine, but concluded that petitioner had not "presented the type of rebuttal evidence necessary to offset the conclusion that he has been convicted of a particularly serious crime." The IJ next denied withholding of removal and CAT protection notwithstanding the aggravated felonies because petitioner did not show that petitioner would be "automatically detained on his return to Nigeria." The IJ acknowledged that because of Decree 33 "a drug offender should worry about his survival," but recalled petitioner's testimony that he "had once paid a bribe to escape Nigeria after being detained" and thus "might have 'other options available to avoid detention' even if arrested." The BIA affirmed.

The Seventh Circuit reversed the decision of the IJ. The court accepted the government's argument that it lacked jurisdiction to consider petitioner's removal order on the basis of the aggravated felony convictions, but found jurisdiction pursuant to 8 U.S.C. § 1252(a)(2)(D) as "the flaws in the IJ's reasoning cause us to doubt whether [petitioner] received the fair hearing to which he is statutorily and constitutionally entitled."

"The flaws in the IJ's reasoning cause us to doubt whether [petitioner] received the fair hearing to which he is statutorily and constitutionally entitled.

The court found that the IJ's reasoning was constitutionally flawed on both his determination that petitioner's aggravated felonies did not meet the "unusual circumstances" exception in *Matter of Y-L*, 23 I&N Dec. 270 (BIA 2002), and his determination that petitioner failed to meet his burden of proof for withholding of removal and CAT protection. Regarding petitioner's aggravated felonies, the court held that "the IJ did not confront [the] evidence [of exceptional circumstances] in any meaningful way" and did not explain why petitioner's convictions for possession "of less than one gram of cocaine" did not meet the requirements of *Matter of Y-L*. On the IJ's rejection of petitioner's withholding of removal and CAT protection claims, the court first was "appalled that the IJ would rest his decision on the absurd proposition that [petitioner] could evade imprisonment, mistreatment, and possibly death by approaching his jailers and trying to buy his way out."

The court next disagreed with the IJ's reasoning that petitioner "had not shown that Decree 33 would be enforced against him," because it "[was] confused as to what kind of further proof the IJ expected. Short of presenting himself to the Nigerian authorities and waiting to see their reaction, we do not fathom how, at this juncture, [petitioner] could do more than take at face value the State Department's evidence that Decree 33 has not fallen into desuetude." Accordingly, the court remanded the case as "[o]ur reading of the administrative record leaves us convinced that the IJ cared little about the evidence and instead applied whatever rationale he could muster to justify a predetermined outcome." Finally, the court rejected the government's argument that petitioner failed to exhaust his due process argument because this case was one of a "fundamental failure of due process" which need not have been first presented to the BIA.

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■ **Seventh Circuit Denies Bare Bones Motion To Stay Voluntary Departure**

In ***Stepanovic v. Mukasey***, __F.3d__, 2007 WL 4465545 (7th Cir. Dec. 21, 2007) (*per curiam*) (Flaum, Ripple, Rovner), the Seventh Circuit denied the alien's motion to stay the running of a voluntary departure period because the alien failed to present any argument regarding the likelihood that he would prevail on the merits of his petition for review. The court noted its prior decisions requiring stay motions in the removal context to set forth information necessary for proper adjudication, and denying bare bones stay motions. The same rule applies regarding motions to stay voluntary departure periods.

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NINTH CIRCUIT

■ **Ninth Circuit Holds That REAL ID Act Does Not Violate The Suspension Clause Where It Lacked Jurisdiction To Consider Petitioner's Habeas Writ Challenging His Removal With A Claim To U.S. Citizenship**

In ***Iasu v. Smith***, 511 F.3d 881, (9th Cir. 2007) (Trott, Rawlinson, *King*), the court held that it lacked jurisdiction to consider a district court's dismissal of petitioner's writ of habeas corpus challenging his removal on the basis that he was a naturalized citizen. The court also affirmed that the district court's refusal to transfer the habeas petition to the court of appeals pursuant to the REAL ID Act did not violate the Suspension Clause.

An IJ found petitioner removable on the basis that petitioner had committed an aggravated felony. Peti-

(Continued on page 14)

Summaries Of Recent Federal Court Decisions

(Continued from page 13)

tioner waived his right to appeal to the BIA and did not file a petition for review of the IJ's final order of removal. On July 22, 2005, petitioner filed an amended writ of habeas of corpus in a district court challenging his removal order by claiming for the first time that he was a naturalized citizen. The district court dismissed the petition for lack of jurisdiction pursuant to the REAL ID Act, and refused to transfer the petition to the courts of appeals because the petition was filed after the effective date of the REAL ID's transfer provision.

Before the Ninth Circuit, petitioner claimed that the REAL ID Act violated the Suspension Clause because it left him without a means to challenge his removal order in the federal courts. The court disagreed. Recognizing that prior to passage of the REAL ID Act, the court had held in *Rivera v. Ashcroft*, 394 F.3d 1129, (9th Cir. 2005), that a petitioner has a right to habeas relief "when a person with a non-frivolous claim to U.S. citizenship is deported without receiving a judicial determination of that claim," the court found that the REAL ID Act's elimination of habeas jurisdiction "is not an unconstitutional suspension of the writ because the new statutory scheme provides an 'adequate substitute' by allowing judicial review of the final order of removal through the courts of appeal." Thus, the court reasoned, petitioner "had a means for seeking relief (direct review)," but "simply failed to pursue the relief that the statutory scheme allows." Moreover, because petitioner's habeas petition was not pending on or before the effective date of the REAL ID Act, the court agreed with "case law from other circuits confirm[ing] that it is improper to allow a habeas petition" to be treated as a petition for review. The court expressed concern that *Rivera* still requires some forum for judicial review of a non-frivolous citizenship claim, but found that "a potential motion to reopen can suffice to alleviate Suspension Clause concerns. Finally, the court rejected petitioner's attempt to invoke the court's jurisdiction under 8 U.S.C. § 1252(b)(5) regarding nationality claims because that provision required direct review of a final order of removal. The court began to opine on the merits of the case - whether petitioner completed the "public ceremony" requirement for naturalization - but restated that it lacked jurisdiction over the merits because the petition was not on direct review.

The REAL ID Act's elimination of habeas jurisdiction "is not an unconstitutional suspension of the writ because the new statutory scheme provides an 'adequate substitute' by allowing judicial review of the final order of removal through the courts of appeal."

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Cancellation Statute's Requirement Of A Qualifying Relative Does Not Violate Religious Freedom Restoration Act (RFRA).

In ***Fernandez v. Mukasey***, __F.3d__, 2008 WL 60541 (9th Cir. Jan. 7, 2008) (per curiam) (B. Fletcher, Berzon, Rawlinson), the Ninth Circuit held that the statutory requirement, 8 U.S.C. § 1229b(b)(1)(D), that nonpermanent resident cancellation applicants have a qualifying relative does not substantially burden the free exercise of religion under either the Free Exercise Clause of the First Amendment or the "stricter" RFRA, 42 U.S.C. § 2000bb 1(a) by Catholics unable to conceive children by natural means and unwilling to utilize in vitro fertilization. The court observed that the aliens' religious beliefs did not prevent them from adopting a child, and further concluded that "the connection between having a child and obtaining cancellation of removal is too attenuated to create a substantial burden on [the aliens'] religious exercise."

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■ **Ninth Circuit Holds That Alien's Conviction Under Arizona's Resisting Arrest Stature Is Categorically A Crime Of Violence**

In ***Estrada Rodriguez v. Mukasey***, __F.3d__, 2007 WL 4554053 (9th Cir. Dec. 28, 2007) (D.W. Nelson, Bea, Oberdorfer (by designation)), the Ninth Circuit held that the alien's conviction under § 13 2508 of the Arizona Revised Statutes is categorically a crime of violence because resisting arrest naturally involves the risk that physical force may be used against an officer. The court relied on an Arizona court of appeals decision citing the proposition that resisting arrest requires actual opposition or resistance and finding that neither nonviolent non submission, nor flight from an officer, constituted resisting arrest.

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ELEVENTH CIRCUIT

■ **Case Remanded To Find Whether Conditions In Columbia Have Changed Or That Alien Could Avoid Further Persecution By Relocation**

In ***Santamaria v. Attorney General***, __F.3d__, 2008 WL 109406 (11th Cir. Jan. 22, 2008) (Edmondson, Dubina, *Story*), the Eleventh Circuit reversed the IJ's determinations that: (1) the alien had failed to demonstrate past persecution; (2) that the incidents were on account of her political opinion; and (3) that the alien's repeated visits to the United States and voluntary return to Columbia during the events negated a subjective fear of persecution. Because the court reversed the IJ's finding regarding past persecution, the alien was entitled to a rebuttable presumption of a well-founded fear of future persecution. The case was remanded for further inquiry regarding changed country conditions in Columbia or the possibility of relocation.

(Continued on page 15)

REAL ID Act Practice Tip

Does Section 242(g) of the INA Apply to PFRs?

Question

Does Section 242(g), 8 U.S.C. § 1252(g), apply to divest a court of jurisdiction over a claim that falls within its terms if that claim is raised in a petition for review?

Background

Section 242(g) provides that: "Except as provided in this section [i.e., Section 242] and "notwithstanding any other provision of law . . . no court shall have jurisdiction" over a claim "arising from a decision or action by the Attorney General [or DHS] to commence proceedings, adjudicate cases, or execute removal orders . . . ." Section 242(g) was enacted to "protect[]" the Executive's discretion." *Reno v. American-Arab Anti-Discrimination Committee ("AADC")*, 525 U.S. 471, 486 (1999). In particular, it was designed to avoid "the deconstruction, fragmentation, and hence prolongation of removal proceedings" by pre-mature suits in district court, and to channel review to the courts of appeals through petitions for review. *Id.*

Answer

No. Section 242(g) does not apply to petitions for review. The statute's reach is qualified by the language -- "[e]xcept as provided in this section" -- indicating that the provision does not apply to actions filed under Section 242(a), which authorizes the filing of petitions for review of removal orders in the courts of appeals. Some courts, however, have found that Section 242(g) precludes jurisdiction over claims challenging the Attorney General's decision to commence proceedings against an alien, even though the claim was raised in a petition for review. *See Mohammad Hussain v. Keisler*, 505 F.3d 779, 784 (7th Cir. 2007); *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 598-599 (9th Cir. 2002). These cases fail to address the "[e]xcept as provided" language in Section 242(g).

We should *not argue* that Section 242(g) applies to preclude review of a claim raised in a petition for review.

Accordingly, we should *not argue* that Section 242(g) applies to preclude review of a claim raised in a petition for review. There may, however, be other grounds for arguing that the court cannot review the claim. If, for example, the alien challenges the Attorney General's determination to initiate removal proceedings, we should argue that such a claim is unreviewable because it implicates the Attorney General's prosecutorial discretion, and there are no standards for the court to apply. *See AADC*, *supra* at 489-92; *S-Cheng v. Ashcroft*, 380 F.3d 320, 324 (8th Cir. 2004) (Attorney General's decision to place alien in removal proceedings rather than exclusion proceedings is within his unreviewable prosecutorial discretion); *Martinez-Garcia v. Ashcroft*, 366 F.3d 732, 735 (9th Cir. 2004) ("It is well settled that the decision to place an alien in immigration proceedings, and when to do it . . . is akin to prosecutorial discretion."); *cf. Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.").

If we are in a circuit that has interpreted Section 242(g) contrary to our position, we should acknowledge its interpretation, but note that we read Section 242(g) differently.

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Federal Court Decisions

(Continued from page 14)
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■ **Eleventh Circuit Upholds Interim Regulation Requiring Arriving Aliens In Removal Proceedings To Seek Adjustment Of Status Before DHS**

In ***Scheerer v. United States Att'y Gen.***, __F.3d__, 2008 WL 131466 (11th Cir. Jan. 15, 2008) (*Wilson*, Hull, Tjoflat), the Eleventh Circuit became the first court to uphold 8 C.F.R. § 1245.2(a)(1), the interim regulation requiring nearly all arriving aliens in removal proceedings to file adjustment of status applications with USCIS, rather than with an IJ (with narrow exceptions not present here). The court determined that the Attorney General had properly exercised his statutory authority to promulgate regulations concerning the process for seeking adjustment. The court noted that the regulation "does not alter the eligibility standards governing adjustment applications. Rather it removes a category of applications from the jurisdiction of the immigration courts, leaving those applications to be adjudicated by USCIS pursuant to the companion regulation 8 C.F.R. § 245.2(a)(1).

The court rejected petitioner's challenge that the new regulation had an impermissible retroactive effect.

INDEX TO CASES SUMMARIZED IN THIS ISSUE

Alemu v. Mukasey	12
Arce-Vences v. Mukasey	10
Arif v. Muksasey	10
Arteaga v. Mukasey	01
Bosede v. Mukasey	12
Canadian Council for Refugees	01
Ceraj v. Mukasey	11
Estrada Rodriguez v. Mukasey	14
Fernandez v. Mukasey	14
Hussain v. Mukasey	12
Iasu v. Smith	13
Matter of Anifowoshe	05
Matter of Garcia-Madruga	05
Matter of I-S-	05
Myat Thu v. Attorney General	09
Niang v. Mukasey	07
Pascal v. Mukasey	11
Picca v. Mukasey	08
Puello v. BCIS	08
Santamaria v. Attorney General	14
Scheerer v. Attorney General	15
Shulaku Purballori v. Mukasey	11
Stepanovic v. Mukasey	13
Sun v. BIA	08
Tobon-Marin v. Mukasey	07
Wala v. Mukasey	07
Yu v. Attorney General	09

INSIDE OIL

Deputy Director David McConnell recently presented length of Service Award pins to the following OILers who have been with the federal government for 30 or more years:

James Hunolt, Senior Litigation Counsel for 35 years of service; ***David Bernal***, Assistant Director, for 30 years of service; ***Allen Hausman***, Senior Litigation Counsel, for 30 years of service; ***Norah Schwarz***, Senior Litigation counsel, for 30 years of service; and, ***Darlene Waddy***, Legal Assistant, for 30 years of service.

OIL congratulations to all of them!

Former OIL attorney **Patrick P. Shen,** who was recently appointed Special Counsel, for the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC), was the guest speaker at OIL's Brown Bag Lunch & Learn on January 28, 2008.

Papu Sandhu, Francesco Isgrò, Patrick Shen, David McConnell, Christopher Fuller

The ***Immigration Litigation Bulletin*** is a monthly publication of the Office of Immigration Litigation, Civil Division, U.S. Department of Justice. This publication is intended 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.

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.

If you have any suggestions, or would like to submit a short article, please contact Francesco Isgrò at 202-616-4877 or at francesco.isgro@usdoj.gov.

Office of Immigration Litigation

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