The Green Card

Welcome to the Newsletter of the FBA's Immigration Law Section

H. Raymond Fasano, Section Chair

Quote of the Month

"People who say it cannot be done should not interrupt those who are doing it."—George Bernard Shaw

Message From The Section Chair

The holiday season is behind us but the merriment is not. I wait with great anticipation for the new year and look forward to the Immigration Law Section being in the forefront of the FBA. The Memphis conference has been finalized and speaker invitations have been sent out. This year promises to be the most successful year we have had. I urge all ILS members to make your hotel reservations now at the Marriott Hotel Downtown by calling (901) 527-7300. Be sure to request the FBA rate, which is $159 per night. The conference is much more enjoyable when you stay at the hotel where most participants will be staying. As a section we were very fortunate to have *The Federal Lawyer* publish an article I wrote on behalf of the section this month. Please see the January/February 2013 issue of *The Federal Lawyer*, "The Reach and Impact of Immigration issues in Our Daily Practice." There is a lot going on in immigration law, not the least of which is the much anticipated provisional waiver. This may also be the year when we see comprehensive immigration reform. Enjoy this issue and I look forward to meeting everyone in Memphis. ◆

Message From The Editor

In this issue, you will find the solution to the fantastic asylum crossword puzzle from last issue. Thanks to the anonymous section member who designed it. I'm sure we have some other crossword fans who can design more puzzles with an immigration theme.

Joining our amazing list of regular columnists this issue is Joe Grieboski, founder and chair of The Institute on Religion and Public Policy. As most of you know, good background information is essential to any successful asylum case. Grieboski is renowned for the quality of his research on religious freedom (or the lack of it) in the world today. He presents the statutorily-mandated briefing on religious persecution to the immigration judges of the Executive Office for Immigration Review (EOIR), and will hopefully update us on the latest country conditions at the CLE in Memphis this May. The Institute is the only NGO devoted to religious liberty that is not connected to any religion or denomination.

Speaking of Memphis, now is the time to register and make your reservations for our section's crowning achievement, the Immigration Seminar, taking place May 17-18, 2013. The tentative program is posted on the section's FBA website, so you are able to see the incredible

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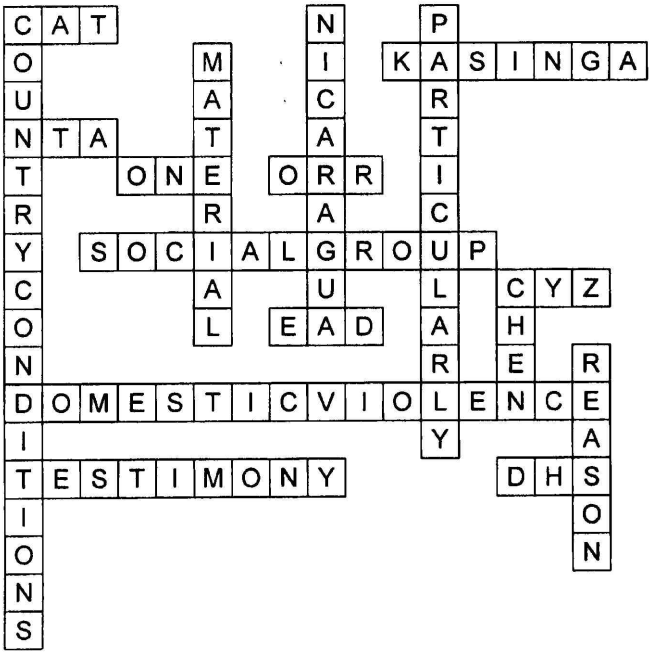
variety of programs offered—70 presentations in only two days. Our super-successful riverboat cruise will be repeated in 2013, and the food will continue to be amazing. If you're still hungry, you can attend the International Bar-B-Q Festival which overlaps with our seminar. Make your reservations at the Memphis Downtown Marriott, by calling (877) 901-6632 or (901) 527-7300; be sure to request the special FBA rate of $159 per night. Book early, because Memphis fills up fast during the festival.

If you want to see your firm, and your beautiful faces, featured in the *Green Card*, please send your announcements, news items, and photos to our news editor Bob Beer at Bob@bobbeer.com. You do not have to be the section chair to be featured in the news column, but you do have to send something to Bob. We want to see what our section members are up to! Continue to send all other articles to me, Larry Burman at LBurman@aol.com. ◆

Asylum Law Puzzler 101 Solution



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The Green Card is published by the Federal Bar Association's Immigration Law Section, 1220 North Fillmore Street, Suite 444, Arlington, VA 22201, (571) 481-9100, (571) 481-9090 fax.

For more information about the section, please visit www.fedbar.org/Sections/Immigration-Law-Section.aspx.

Asylum Applicants Highly Satisfied with USCIS

Jason Dzubow

According to a new report released by U.S. Citizen and Immigration Services (USCIS), asylum applicants are "highly satisfied" with the service they receive at the nation's various asylum offices.

Asylum seekers who appeared for interviews at the different asylum offices answered the written survey. A total of 933 responses were collected from September 2011 through March 2012. Surveys were collected after the interview but before the final decision (for obvious reasons).

According to the survey, customers are highly satisfied with the services they receive from USCIS's asylum offices; their overall satisfaction index is 87 on a scale of 0 to 100. For comparison, the federal government satisfaction index is currently 67. At the office level, customers who were serviced by the Miami Asylum Office, Chicago Asylum Office, and the Houston Asylum Office were the most satisfied with indices of 93 or 94. Conversely, satisfaction was the lowest for those serviced by the New York Asylum Office with a satisfaction index of 70.

Overall, 17 percent of respondents felt that the asylum officer was either argumentative or biased; at the New York office, 29 percent of respondents felt the officers were argumentative or biased. In Los Angeles, the next highest, the number was 23 percent.

With overall satisfaction at 87, the report opines that it may be difficult for USCIS to significantly improve its asylum office customer satisfaction scores at an aggregate level. However, the report notes, at certain locations there appears to be opportunity for improvement. Most significantly, in New York and Los Angeles, asylum officers should try to provide more information to applicants about the process. They should also try to appear less argumentative during interviews. According to the report, offices in Los Angeles, Newark, New York, and San Francisco should address wait times for the start of the interview.

The survey also contained a comments section. Most comments are very positive. A typical comment reads, "Everything was good." Some of the more interesting comments include:

> "Cannot think of anything right now to improve the service, how do you improve on perfection?"
>
> "Smile more."
>
> "No need to improve anything unless you decide to improve something."
>
> "My service overall was good with exception of the officer which directed my interview in a coercive and threatening manner."
>
> "Provide free coffee and donuts." [I fully endorse this idea!]

The survey results (if not all the written comments) comport with my view of the asylum office. I find the officers to be very professional and courteous. They don't always grant my cases (the nerve!), but in the large majority of cases, I find that they are fair and reasonable. Congratulations to the asylum officers on the survey results and on a job well done.

Asylee Info Line Bites the Dust

Until recently, if you were granted asylum in the United States, you could call the National Asylee Information and Referral Line, a toll-free number, where you could speak to someone about benefits potentially available to you (such as food stamps, Pell Grants, medical assistance, etc.). For people granted asylum through the Asylum Offices, the toll-free number was—and still is—listed on the approval notice.

However, as of Dec. 28, 2012, the info line is kaput. But have no fear—asylees can still learn about benefits. Visit the Department of Health and Human Services, Office of Refugee Resettlement (ORR) Benefits page on the Internet.

Unfortunately, the ORR website is not so easy to use. Admittedly, I am fairly inept with a computer, and so many people might have an easier time with this than me. But it really does seem confusing.

For one thing, the site directs the user to a map of the United States, where she can click on her state to find

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Kawashima v. Holder

Hon. Paul Wickham Schmidt, *U.S. Immigration Judge, Arlington, Virginia*

What Are the Broader Practical Implications of the Supreme Court's Decision in *Kawashima v. Holder*?

I am tempted to view the Supreme Court's recent ruling in *Kawashima v. Holder*[1] as a highly technical application of federal tax law to the field of immigration. While certainly critically important to Mr. and Mrs. Kawashima, who are now subject to removal after living in the United States for more than a quarter century, at first glance the decision does not appear to have any broad implications for immigration practice. But, my initial impression might be wrong.

At least three aspects of *Kawashima* extend beyond the narrow circumstances of the particular tax violations committed by the Kawashimas and give us some insights for the future. These involve the element of fraud or deceit, the use of the "rule of lenity," and the possible inclusion of state and federal tax misdemeanors within the court's interpretation.

What tax crimes did the Kawashimas commit?

"In 1997, Mr. Kawashima pleaded guilty to one count of willfully making and subscribing a false tax return in violation of 26 U.S.C. § 7206(1). Mrs. Kawashima pleaded guilty to one count of aiding and assisting in the preparation of a false tax return in violation of 26 U.S.C. § 7206(2)."[2]

What provision does the DHS invoke against the Kawashimas?

The DHS charges the Kawashimas with removability as "aggravated felons" based on section 101(a)(43)(M)(i) of the INA.[3] That section defines "aggravated felony" as including a crime that" "(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or (ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the government exceeds $10,000."

What does the court hold?

The court holds that each of the Kawashimas was convicted for a felony that involved "deceit."[4] Therefore, both are removable because they are aggravated felons under section 101(a) (43)(M)(i).[5]

Is the court unanimous?

The court's decision is 6-3. Justice Thomas writes for the majority. Justice Ginsburg dissents, joined by Justice Breyer and Justice Kagan.

What important statement does the court make about fraud or deceit?

The court reads the aggravated felony removal statute expansively. Accordingly, the court states that the fraud or deceit crime defined in Section 101(a)(43)(M)(i) "is *not* limited to offenses that include fraud or deceit as *formal elements*. Rather, Clause (i) refers more broadly to offenses that '"involv[e]"' fraud or deceit—meaning offenses with elements that *necessarily entail fraudulent or deceitful conduct*."[6]

What does the court say about the rule of lenity?

The court acknowledges that "we have, in the past, construed ambiguities in deportation statutes in the alien's favor."[7] While the dissent posits that § 101(a)(43)(M)(i) is ambiguous and should therefore be construed in the Kawashimas' favor, the majority disagrees.[8] According to Justice Thomas, "the application of the present statute [is] *clear enough* that resort to the rule of lenity is not warranted."[9]

Does the Court's decision have some broader implications in prosecutions for less serious tax misdemeanors?

The dissent observes that the court's construction potentially makes "all tax offenses involving false statements,"[10] including federal and state misdemeanors that meet the statute's $10,000 threshold, grounds for removal. The dissent argues that this might well affect future tax prosecutions by discouraging resident alien taxpayers from pleading to lesser charges.[11] The dissent cites the court's 2010 decision in *Padilla v. Kentucky*,[12] finding that defense counsel's failure to inform of immigration consequences can amount to "ineffective assistance," as evidence of the overriding importance of potential immigration consequences in criminal proceedings involving foreign nationals.[13]

What is the bottom line?

The court in *Kawashima* declines to limit the fraud-related aggravated felony removal provision to those offenses where fraud or deceit is an actual element of the crime. Rather, the court establishes a broader test which includes crimes that "necessarily entail" fraud or deceit. The court declines to apply the "rule of lenity" where the removal statute is "clear enough." While the Kawashimas' removal is predicated on tax felony crimes, the court's holding appears broad enough to include those convicted of various federal and state tax misdemeanors that meet the $10,000 threshold. Consequently, to avoid "ineffective assistance of counsel" claims, practitioners must be particularly aware when advising foreign nationals of the potential immigration consequences of pleading guilty to various tax crimes. ◆

These are my views, and they do not represent the official position of the attorney general, the Executive Office for Immigration Review, the Office of Chief Immigration Judge, the Federal Bar Association, my colleagues at the Arlington Immigration Court, or anyone else of any importance whatsoever. They also do not represent my position on any case that I decided in any capacity in the past, that is pending

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Telephonic Interpretation and Asylum

MARIA MCFADDEN

One of the most challenging tasks for an interpreter is telephonic interpretation. While court interpreters aspire to be unobtrusive in order to allow each party to have their say, being able to observe or signal the speakers can make communication flow much more easily.

During interviews at the asylum office, telephonic interpreters are rarely used to interpret the actual proceedings; rather, they serve as monitors. The role of these monitor interpreters is to ensure the quality and accuracy of the on-site interpreter. Oftentimes, the person brought to the interview to serve as an interpreter is not a professional. While such a person might be aware of and adhere to the interpreter code of ethics, their ability to interpret is sometimes not sufficient to ensure an accurate translation. This could damage the credibility of the asylum applicant and deprive her of the chance to tell her story.

At times, the monitor might "challenge" the interpretation. Likewise in court, attorneys who are bilingual, can often challenge the interpretation. This could cause the on-site interpreter to become flustered and become defensive. If he/she feels that their interpretation is correct, they should state so to the officer/judge. Each interpreter has the right to stand by his or her interpretation and it is up to the officer/judge to settle the matter.

Being a monitor is not an easy task and most interpreters take the job seriously. If you feel that the monitor is being unnecessarily disruptive and combative, this issue should be addressed to the asylum officer. There is no need to talk to the monitor interpreter.

If you have a telephonic interpreter, please keep the following points in mind:

1. Keep your voice loud and clear. While this is important when working with an on-site interpreters as well, it is even more important over the phone.
2. Don't shuffle papers as you speak; you might as well stop talking because the interpreter will not be able to hear you.
3. Try not to talk over other people. The interpreter can only translate for one person at a time. Over the phone, it will be impossible for the interpreter to understand what is being said if people talk over each other. This could result in a statement by the applicant going unheard by the asylum officer—with potentially disastrous consequences.
4. Wait for the interpreter to finish interpreting before making another statement or asking a question.
5. If you don't hear or can't understand the interpreter, speak up!

By keeping this short list of pointers in mind, the process will go smoother for all involved. ◆

McFadden is a contract interpreter in Spanish and Portuguese. In addition to superb service in the immigration courts, she provides interpretation and translation services in state and federal courts, as well as businesses, hospitals, and other venues.

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organizations that assist with benefits. The organizations that receive ORR grant money are listed, as are state coordinators and directors. The problem is, I cannot tell who to contact to ask questions about benefits. If there is an NGO or ORR employee who helps asylees learn about benefits, this should be made more explicit.

There is a helpful fact sheet available in English and eight other languages that explains certain benefits, such as the Employment Authorization Document, the Refugee Travel Document, and how asylees can obtain their green cards. But this does not help with medical benefits, food stamps, English language programs, and the like.

I understand that we live in an era of budget cuts and looming fiscal apocalypse, and I guess that the info line was discontinued in order to save money. But I do not see why it would cost much money to make the ORR website simpler to use. In that way, asylees will more easily obtain the services they need, and more quickly become self sufficient. This benefits the asylees, of course, but it will also save money for the government.

I hope that the Office of Refugee Resettlement plans to make its website more user-friendly. Given that ORR provides grants to implementing agencies, perhaps it could also require the local agencies to follow an easy-to-use model website for providing localized information to asylees. A dedicated, accessible website will go a long way towards replacing the telephone info line and towards helping asylees begin to adjust to their new life in the United States. ◆

Article

Analysis on Russia's New Laws: The Law on High Treason and the Law on Foreign Agents

JOSEPH K. GRIEBOSKI

Introduction

Since May 2012, when Vladimir Putin was re-elected president, the human rights situation in Russia has been steadily deteriorating. Anti-government protests have been met with a series of repressive laws restricting freedom of expression and association. Civil society is experiencing a crackdown, while opposition figures and human rights defenders are facing frequent harassment and intimidation.

The most recent developments in Russian legislation have been particularly suppressive, raising public criticism and dissent.

The most troubling two laws passed within the last few months that are both going in force at practically the same time, are the Federal Law on Foreign Agents, effective Nov. 20, 2012, and the Federal Law on State Treason (High Treason), effective Nov. 14, 2012.

Pursuant to the broad and vague provisions of the new law on foreign agents, most non-profit organizations that receive some form of foreign funding run the risk of being branded as foreign agents by the government even if they refuse to register, or affirmatively registering as foreign agents in order to receive funding from abroad. The term *foreign agent* is a Cold War phrase which evokes betrayal and treachery in Russia. At the same time, the new law on high treason significantly broadens the article of the Criminal Code on espionage and high treason in such a way that the new, updated article now says espionage includes "furnishing financial, material, technical, consultative or other help to a foreign state, or international or foreign organization." Almost any conversation between Russian citizens and representatives of foreign organizations on human rights issues could now be considered treasonous—with jail sentences of up to 20 years. Under the absurdly broad and vague definitions of both these laws, many peaceful and law-abiding civil society organizations and individuals have the potential to become a target of political and legal harassment in the form of serious penal sanctions.

The above laws follow the swift passage of a series of other Russian laws that have been adopted this year restricting civic freedoms and foreign influence. These include laws that criminalize slander, blacklist websites containing what officials consider objectionable material (over 180 sites have been banned so far) and curb public protests (fines against unauthorized public events and unsanctioned demonstrations now exceed an average yearly salary).

NGOs in Russia and human rights groups worldwide have criticized these new laws as providing further repressive weapons for the Kremlin to suppress freedom of expression and association.[1]

How the New Laws Work

Foreign Agents Law

The draft of the law was proposed at the end of July 2012 by the members of the "United Russia" party (the majority party of the State Duma). It was approved by the majority of the members of each house of the Parliament. The President then signed it, and the law came into legal force on the Nov. 20, 2012 despite protests from national and international human rights organizations and concern from intergovernmental bodies such as the OSCE, Council of Europe and UN.

According to the law, non-commercial organizations (NCOs) funded from abroad that wish to engage in "political activities" are required to register as organizations "performing the functions of foreign agents" before receiving foreign funding. Originally designed to regulate activities of NCOs participating in political activities, the final provisions of the foreign agents law seriously restrict activities of many non-profit organizations in Russia, especially human rights and civil rights groups.

A glaring human rights defect of the law is that it provides no clear definition as to what activity fits within the ambit of the term *political activity*. Instead, the law lists out what is *not* considered political activity. This list is very limited. In practice, many constructive activities not on this list of exemptions could arguably be labeled political activity by a prosecutor.

Pursuant to Paragraph 3, No. 6, Art. 2 of the law, activities that fall under the following categories will *not* be considered political:

- Science
- Cultural activities
- Art
- Prevention and health protection
- Social support and protection
- The protection of mothers and children
- Social support for people with disabilities
- Promotion of healthy lifestyles
- Physical Education and sport
- The protection of flora and fauna
- Charitable activities as well as activities in the promotion of philanthropy and volunteerism

Moreover, the law stipulates that any material published by such organizations (promotional materials, communication, media, letters, articles, publications) will have to be labeled as being published or distributed by NCOs "performing the functions of foreign agents."[2] In the event that international NCOs wished to conduct activities in Russia,

a mandatory auditing from a solely Russian organization will be required, and the results will be made available through the Government-authorized body's website or the mass media. Also, strict control measures will be applied on foreign-funded NCOs to closely monitor their activities.[3]

As of Nov. 20, 2012, the Ministry of Justice is maintaining a state registry of NCOs that are "performing the functions of a foreign agent." In this regard, the Ministry of Justice has issued a regulation that establishes the process of registering NCOs as foreign agents and the order of keeping this registry.

The NCOs getting registered as foreign agents will be required to submit the following information to the Ministry of Justice:

1) data about the founder organizations, including individual information about the officers of the corporation;
2) information on the foreign sources of funding any incoming support in the form of finances or properties (actual and/or planned);
3) requisites of the documents that prove that the foreign organization or government start providing the funding;
4) data about the purposes of funding and the financial allocation (what the money and any other properties are being used for); and
5) data about the political activities of the organization.

Data about foreign sources of funding (or planned funding) and most of the information listed above will be promptly posted on the Internet by the Ministry of Justice and will be available for public access.

A prosecutor can start an investigation of an NCO to determine if it falls under this law based on a report from a single individual or on information published by the media.

The foreign agents law has added an article into the Criminal Code which covers the sanctions for non-compliance with the law: for avoiding registering as a foreign agent there is a list of sanctions applied to both individuals and organizations, from two years of imprisonment to $10,000 - $20,000 of fines.

High Treason Law

On Sept. 21 2012, the State Duma passed the draft law "On Amendments to the Criminal Code and Article 151 of the Criminal Procedure Code of the Russian Federation." Specifically, the existing articles about high treason, espionage and disclosure of a state secret have been broadened. The law has also introduced a new article into the Criminal Code: regarding the "illegal receipt of information constituting a state secret."

The law, drafted and introduced by the Federal Security Bureau (FSB, the KGB's successor), was meant to target those offenders who intend to turn a state secret into an object of purchase and sale, for example, those who steal secret data bases for their own enrichment. Supporters of the law also say that the measures outlined in the high treason law are meant to protect young people from child pornography and information about suicide and drug use, and to keep the public safe.

However, the law created an uproar with civil society organizations and national and international human rights groups have complained that its provisions infringe on fundamental rights by suppressing information and stifling freedom of expression and association.

Prior to the effective new date of the law on the Nov. 14, 2012, the Criminal Code classified treason as hostile action that threatens the external security of the Russian state. In the updated version, treason is classified as, *but not limited to*, "an act committed by a citizen of the Russian Federation, detrimental to Russia," and "providing advice or assistance to a foreign state, international or foreign organization, or their representatives in activities directed against the security of the Russian Federation, including its constitutional order, sovereignty …"[4]

As in the Foreign Organizations Law, key language in the high treason law is not defined. Yet, the terms "detrimental to Russia" "providing advice or assistance to a foreign state, international or foreign organization" and "state security" are so broad and so vague as to invite unfettered discretion on behalf of the government to prosecute perceived civil society targets for engaging in lawful democratic activities.

These provisions raise the specter that activities such as NGOs raising human rights concerns in Russia with the UN, OSCE, Council of Europe, foreign states, or international human rights groups could be the subject of prosecution.

Under the high treason law, penal sanctions could be applied not only to those who directly work for foreign intelligence services or those who profit from selling state secrets, but also to anyone who might have access to any security-sensitive information that is being exchanged with foreign organizations.

Even official work on a contract with foreign civil organizations might be considered criminal under this law if it is proven that those foreign organizations were acting against the state security of Russia. Persons who had access to the disclosed information could be responsible under the law whether they obtained access to this information through their profession, in a University or any other innocent circumstances.[5]

In other words, right now to be accused of high treason in Russia, it is enough that one gets in contact with a foreign organization that is allegedly a threat to the state security. Even NGOs might be accused of high treason if they communicate some security-sensitive information abroad or if they unintentionally get access to a state secret.[6]

The penalties set by the law are from 12 to 20 years of imprisonment for high treason and from 10 to 20 years for espionage.

Definitional Problems

The particular concern that human rights groups express regarding the new legislation is the broad and

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vague language of both laws, raising the specter of unlimited discretion in application of the laws by prosecutors, which inevitably leads to abuse and discrimination.

As noted, rather than precisely defining what constitutes political activity, the law on foreign agents simply provides a short list of activities that are deemed *not* political. Any organization receiving foreign funding engaging in activity that does not fit within the scope of the list of exemptions will have to decide whether to register and be subject to the onerous obligations under the law and public hostility as a perceived foreign agent or refuse to register as a foreign agent and risk penal sanctions.

The term *foreign agent* carries a very negative connotation in Russia, and could be interpreted as a synonym for foreign espionage. This is the second major definitional problem of this law. Human Rights Watch has noted that the requirement to register as foreign agents would have the result of demonizing advocacy groups receiving foreign funding as foreign spies in the public eye.

In regards to the high treason law, the new law significantly expanded the already existing definition of high treason, covered in the Criminal Code, which used to simply mean "a hostile action against the state sovereignty." The law on high treason, however, is rendering the definition imprecise, unclear and broad. Pursuant to the new language given in the law, the definition is no longer tied to violent acts. Instead, as mentioned above, high treason is "an act committed by a citizen of the Russian Federation, detrimental to Russia"—a statement so vague and so broad as to raise the danger of a prosecutor initiating a case in bad faith without concrete evidence—"while providing advice or assistance to a foreign state, international or foreign organization, or their representatives in activities directed against the security of the Russian Federation, including its constitutional order, sovereignty, territorial and state integrity." None of these terms are defined either, inevitably paving the way for arbitrary prosecutions by the state.

Incompatibility with the International Human Rights Standards

As a member of the Council of Europe, Russia is bound by various international obligations with respect to observing human rights standards, including such rights and freedoms as freedom of assembly and association, freedom of opinion and expression, the right to due process and right to a fair trial. Russia is a signatory to and has ratified the *European Convention of Human Rights (ECHR)* and the *International Covenant on Civil and Political Rights (ICCPR)*. These international law instruments clearly establish fundamental rights and take precedence over national legislation according to Chapter 1, Article 15 of the Russian Constitution.

However, the recent legislation shows that Russia is not ensuring that the human rights standards are maintained in the country, but instead, moving in the opposite direction.

The European Court of Human Rights has become overwhelmed with cases from Russia. In 2011, 11.5 percent of all the judgments delivered by the court concerned Russia (133). Since the establishment of the court in 1959, near half of the judgments delivered by the court concerned four member states, including Russia, and 1,212 judgments of the court were done regarding just the Russian Federation.[7]

Although the rights established by the ECHR and ICCPR are not absolute, the allowable purposes of restrictions to these fundamental rights are very limited, and the quality of the domestic restrictions is also regulated. For instance, Article 18 of the ECHR prohibits Russia from applying the permissible restrictions for purposes other than those prescribed by the ECHR. Even if the restriction passes muster as necessary in a democratic society, it must be accessible and sufficiently foreseeable, which is not the case with the recent laws. The language and potential application of the new legislation goes beyond permissible restrictions and runs afoul of Russia's human rights obligations.

Regarding the high treason law in relation to Article 6 of the ECHR, the violation of this article is blatant, as it totally ignores and eliminates the right to *presumption of innocence.* An explanatory memorandum that accompanied the high treason law claims the amendments to the Criminal Code were necessary, in particular, because the previous wording "placed the burden of proof that a given act is 'hostile' on the prosecution," a circumstance Russia's lawmakers apparently see as unfairly benefiting defendants.[8] However, the necessity to prove one's guilt should not be considered a "burden," as it is the other way around: it is a *duty* of the intelligence services to collect enough evidence to prove someone guilty of high treason if they suspect such a crime.[9]

Pavel Chikov, human rights lawyer and president of Agora (a rights association that provides legal assistance to civic activists) says the new law on high treason gives the Federal Security Service (FSB), the bill's author, more leeway to put dissidents on trial. "In the past, only communications used for hostile purposes against the Russian Federation were considered high treason. But this was difficult for them to prove," Chikov says. "Now, to simplify their task, the term 'threat to security' is being introduced to replace the term 'hostility.' 'Threat to security' is a lot easier to use and is also more subjective."[10]

Article 10 of the ECHR establishes *the right to freedom of expression,* which includes the freedom to "receive and impart information and ideas without interference by public authority." Both of the new laws impose restrictions that will inevitably chill the rights of NCOs to perform activities at the heart of democratic values, as such groups run the risk of investigation and prosecution for such activities.

"Labeling NCOs and their materials by law as 'foreign agents' is clearly intended to stigmatize any activity conducted by civil society receiving foreign support, including legitimate ones," said the Special Rapporteur on the rights to freedom of opinion and expression, Frank La Rue. "Everyone should be entitled to promote their ideas freely without arbitrary restrictions."[11]

Article 11 of the ECHR protects *the right to freedom of assembly and association* and the right to form trade unions. Certain restrictions that are "in accordance with law" and "necessary in a democratic society" are also established by this article. But provisions of both of the new laws set restrictions that are so burdensome and oppressive that they exceed the limits fixed by the Article 11. "These amendments constitute a direct affront to those wishing to freely exercise their right to freedom of association," stressed Maina Kiai, UN Special Rapporteur on the rights to freedom of peaceful assembly and of association.

Part 1 (Article 1) of the ICCPR recognizes *the right of all peoples to self-determination, including the right to "freely determine their political status", pursue their economic, social and cultural goals, and manage and dispose of their own resources.*

As above, due to its broad and imprecise language, the new law on foreign agents makes it mandatory for many NCOs to label themselves foreign agents, claiming that they are involved in political activities, as it is often called in Russia, on a "mandatory-voluntary" basis—meaning that they have to do it on their own initiative but nevertheless have no other choice. Their financial operations will then be monitored and controlled by the Ministry of Justice, which is a violation of the above rights. The amount of red tape this registration and reporting will involve will be a serious obstacle for those groups to pursue their social and cultural goals, and it imposes discriminatory restrictions on their *freedom of association* too.

"I am gravely concerned that putting human rights defenders under such scrutiny will deter them from performing their important work," said the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya. "Furthermore, the extensive requirements proposed for NCOs 'engaging in political activities' could apply to any advocacy activity performed by NCOs with foreign support, and therefore infringes on the right of human rights defenders to raise human rights issues in public."

At the same time, the law on high treason significantly broadens the scope of activities that could potentially be classified as high treason or espionage and considered a crime under the vague provisions of this law. The Presidential Council's statement emphasized that the law could apply to information shared with intergovernmental organizations of which Russia is a member, such as the United Nations and the Council of Europe. Therefore, in some cases this law makes it a crime to pass on to foreign and international organizations information garnered even from open sources.

Another article of the ECHR violated by the recent legislation is Article 7, an article of vital importance, which embodies the *principle of legality*, which requires that *no one should be convicted or punished except for the breaching of an existing rule of law*. Article 7 provides that: *"No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."* Both of the new laws undoubtedly infringe on the principle of legality by failing to be foreseeable and precise, thereby infringing on all the rights and freedoms listed above.

Paragraph 1 of Article 7 prohibits the extension of existing offences to cover facts which previously did not constitute a criminal offence. Yet this is exactly what the new law on high treason does by over-broadening the definition of high treason. Russia's Human Rights Ombudsman Vladimir Lukin—who was appointed by President Vladimir Putin—said the law on high treason contradicted international law and Russia's constitution by giving a definition that was too broad to fairly determine an individual's guilt. In addition, Pavel Chikov from the human rights group Agora said that even complaints (addressed by Russians to international bodies, such as the UN Commission on Human Rights or the European Court on Human Rights) which contain information that may appear to the Federal Security Bureau as threatening to Russia's national security, can be essentially considered high treason now.[12]

The Russian Constitution itself guarantees the *freedom of activities of public associations* (NGOs) and states specifically that: "civil and human rights and freedoms can be limited by a federal law only as much as it is needed to protect the basics of the constitutional order, morals, health, rights and legitimate interests of others, to guarantee the defense of the country and security of the government." But, as can be observed from its language, the new legislation goes far beyond the limits set by the Constitution and the international human rights instruments, in depriving the citizens of their basic rights.

Analysis of Future use

Opponents of the new legislation are concerned that these laws could be potentially used against any Russian citizen who has had contact with a foreigner, harkening back to repressive Soviet Union laws.

There has been an alarming trend in suppressing human rights of groups and individuals in the Russian Federation, carried by the steadily escalating misuse of the extremist law within the last decade, since it was first adopted. As a note, the European Commission for Democracy through Law, better known as the Venice Commission—an advisory body on constitutional matters within the Council of Europe—at the time strongly criticized Russia's federal law on extremism. According to the commission, the law is too vague and unpredictable, creating the possibility of encroachment by authorities on the fundamental rights and freedoms of Russian citizens. In addition, the commission recommended amending the list of extremist activities to exclude actions that contain no element of violence or the incitement thereof.[13] However, the law was not revised or amended, and the imprecision of its definitions gave way to its further abuse.

The parallel between the fallout that followed the implementation of the extremist law and the potential for the two new laws to follow the same pattern is obvious. The extremist law did not contain a definition of the term

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extremism and this led to prosecutors defining the term so broadly that many non-violent organizations became targets of attack. The new legislation suffers from the same fatal defects of vagueness and arbitrariness, and it does not provide precise definitions either, hence the language of the laws can be broadly interpreted and then applied by authorities to target any group, organization or individual they desire to target regardless of their culpability.

Rights groups say the new laws harken back to Soviet-era repressions. The new legislation could, and most probably will be aimed at political enemies and "disfavored" NGOs, faith-based groups, human rights and civil rights activists and media outlets. The foreign agents law, together with the law on high treason, can be used by law enforcement and security services to justify close surveillance of NGOs and activists in the name of an inquiry, and could also be used to open a criminal case for alleged treason as a way of paralyzing a critic or political adversary, Human Rights Watch said.[14] The new legislation is widely seen as part of a recent Kremlin crackdown with the jailing of political opponents and the adoption of restrictive new legislation, including laws dramatically hiking fines for protesters.

In November 2012, President Vladimir Putin stated that groups involved in "totalitarian activities" in Russia are dangerous and "growing like mushrooms" in the country.[15] This appears to be the primary motivation for these repressive laws.

Lyudmila Alexeyeva, 85, a Soviet-era dissident who heads the Moscow Helsinki Group, said: "Stalin, in order to create a totalitarian state, brought down an iron curtain around the country. And we've just joined the World Trade Organization. So why did we join the World Trade Organization? How are we going to be able to fence ourselves off in a globalized world? No, Putin was born too late."[16]

Numerous Russian NCOS have already stated that they are going to refuse to register under the foreign agents law. "We are announcing the campaign of civil non-compliance with this law," said the head of the "For Human Rights" movement, Lev Ponomaryov. He says that the members of his association might appeal to the Constitutional Court of the Russian Federation and to the European Court on Human Rights if they are being made liable under this law.[17] Other NCOs express similar opinions, calling the law on foreign agents unconstitutional and claiming that they are going to stand for their right not to be branded foreign agents in court, if they have to.[18]

"It's imperative for Russia's international partners to take a sober look at what is happening in Russia today," said Human Rights Watch's Europe director, Hugh Williamson, "and not to stand by silently as Russia's civil society is dismantled."

Conclusion

The recent developments in the Russian legislation raise grave concerns. Even though suppression of human and civil rights in Russia is, unfortunately, not new, especially since the adoption of the extremism law followed by numerous instances of its misuse and abuse, right now is probably the first time within the past two decades that the Russian society is suffering a crackdown of such intensity.

By adopting numerous laws that are aimed directly at marginalizing, if not demonizing the Russian society in the public eyes and that overtly and obnoxiously violate the human rights and civil rights of the country's population, the Russian Federation is launching a serious challenge to its human rights commitments and all the international human rights instruments that it signed up to.

Other countries, including the United States, need to become more vocal and demand that the Russian Federation starts respecting the human rights instruments, revise the laws that restrict the basic human rights and civil rights and possibly adopts new policy that would protect the rights of its society. Russia must ensure that the laws being adopted are interpreted and enforced in accordance with its own Constitution and, first and foremost, with the international human rights obligations that guarantee the fundamental freedoms of speech, religion, and assembly to all Russians. ◆

Endnotes

[1]See, e.g., www.golos-ameriki.ru/content/eu-russian-law-treason/1533665.html

[2]www.utro.ru/articles/2012/07/21/1060324.shtml

[3]www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12344&LangID=E

[4]www.hrw.org/news/2012/10/23/russia-new-treason-law-threatens-rights

[5]www.rg.ru/2012/11/13/taina-site.html

[6]www.inopressa.ru/article/25oct2012/faz/duma1.html

[7]European Court on Human Rights 2011 report. www.echr.coe.int/NR/rdonlyres/C99DDB86-EB23-4E12-BCDA-D19B63A935AD/0/FAITS_CHIFFRES_EN_JAN2012_VERSION_WEB.pdf

[8]www.sova-center.ru/en/misuse/news-releases/2012/09/d25412/

[9]As a note, in the Russian Federation the Federal Security Bureau, FSB, as well as any other law enforcement and intelligence services, does *not* have a right of legislative initiative and shouldn't have drafted or proposed a law, and such a draft shouldn't have been accepted in the first place. Legislative initiative in Russia is granted only to the Parliament, to the Federal Government (the Prime Minister, his deputies and the federal ministers) and to the local legislative bodies within states.

[10]www.rferl.org/content/russia-treason-bill-under-fire-open-to-abuse/24749903.html

[11]www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12344&LangID=E

[12]www.unhcr.org/refworld/country,,,,RUS,,5090e598c,0.html

[13]hro.rightsinrussia.info/archive/fsb/v/extremism-fsb

[14]www.hrw.org/news/2012/10/23/russia-new-treason-law-threatens-rights

[15]www.interfax-russia.ru/main.asp?id=355726

[16]www.nytimes.com/2012/11/22/world/europe/rights-groups-in-russia-reject-foreign-agent-label.html?emc=tnt&tntemail1=y&_r=0

[17]www.utro.ru/articles/2012/07/21/1060324.shtml

[18]www.lenta.ru/news/2012/11/19/boycott/

Article

Habeas Corpus and the Problem of Cross-Circuit Immigration Detention

ANDREA SAENZ

Here's an odd twist of tri-state area geography: thousands of immigrants detained in the New York City region are put into removal proceedings in Manhattan, in the jurisdiction of the U.S. Court of Appeals for the Second Circuit, but are actually held in county jails in New Jersey, in the Third Circuit. In fact, due to the broad power of Immigration and Customs Enforcement (ICE) to choose the place of detention of noncitizens, New York is not the only region where immigrants are detained in a different circuit than the one in which their bond and removal proceedings are conducted. This phenomenon turns out to be a more than immigration lawyer cocktail party trivia: it significantly affects the filing of habeas corpus petitions for those detainees, and is likely affecting the development of precedent in a number of circuits. This article describes the current state of "cross-circuit detention," as well as its possible effect on current trends in immigration habeas cases.

The Cross-Circuit Problem

Prior to 2010, the Varick Street Federal Building in New York City housed both an immigration court and a detention facility, which, while officially a short-term facility, had a large number of long-term residents. In February 2010, ICE removed all detainees from Varick and increased its use of county jail space across the Hudson River in New Jersey, citing improved cost efficiency.[1] Varick now serves only as a temporary holding facility; as a result of these changes, the majority of immigration detainees with removal hearings in New York City are actually detained in New Jersey.[2] New Jersey also holds a number of detainees whose hearings are before the Newark and Elizabeth immigration courts, and who do not have a "cross-circuit" problem.

Immigrant advocacy groups have raised various concerns regarding the way the shift to New Jersey-based detention may have affected immigration cases in the region, including concerns about access to counsel or conditions at the jails.[3] What has received less attention is the legal effect of housing a large number of detainees in the jurisdiction of the Third Circuit while their bond and removal proceedings remain within the jurisdiction of the Second Circuit. This state of housing has no effect on the law that applies to these detainees' removal proceedings; because the immigration judges in those cases are sitting in the Second Circuit, that circuit's law controls. *See* 8 U.S.C. § 1252(b)(2) (petitions for review are filed "with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings"). However, it may have significant effects on detainees' habeas corpus petitions in federal court, and thus on the law that develops relating to detention and bond.

Immigration habeas corpus petitions are brought under 28 U.S.C. § 2241, which requires the petition to be filed in the federal district court with jurisdiction over the place of confinement or the detainee's custodian. *See* 28 U.S.C. § 2241(a); *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004). Under the strictest interpretation of the Supreme Court's decision in *Padilla*, the only proper respondent in a § 2241 habeas petition is the detainee's "immediate custodian," which usually means the warden of the jail in which he or she is detained. 542 U.S. at 443. *Padilla* specifically left open whether this holding was appropriate for immigration habeas petitions, *id.* at 435 n.8, but many courts have either held or assumed that it applies. *See Yi v. Maugans*, 24 F.3d 500, 507 (3d Circuit 1994) (rejecting the argument that the district director of then-INS was the alien's actual custodian because he could order release, finding that that the jail warden is the proper custodian because he has "day-to-day control of the prisoner and can produce the actual body"); *Kholyavskiy v. Achim*, 443 F.3d 946, 953 (7th Circuit 2006) (same, and calling it a "logical misstep" to "conflat[e] the person responsible for authorizing custody with the person responsible for maintaining custody") (internal citation omitted).

In practice, there is wide variation in the respondents named in immigration habeas petitions, but the jail warden is usually at least one respondent, and the petition is virtually always brought in the district court of the jurisdiction where the alien is detained. For detainees in New Jersey who have removal proceedings in New York, this means they nearly always file in the District of New Jersey. Although these types of habeas petitions have led to recent Third Circuit precedents potentially expanding access to bond hearings in immigration court, for a large group of New Jersey detainees, these precedents have no binding effect across the river in their own hearings in Manhattan. *See Diop v. ICE/DHS*, 656 F.3d 221 (3d Circuit 2011); *Leslie v. Att'y Gen. of U.S.*, 678 F.3d 265 (3d Circuit 2012).

Diop and *Leslie* do not create bright-line rules entitling detained aliens to bond hearings in immigration court after a certain length of time. However, if the circuit used these cases as a stepping-stone to such a decision, or re-interpreted the mandatory detention statute more narrowly, the New Jersey-New York detainees would be in a strange spot, as the immigration judges at Varick Street are bound only by Board of Immigration Appeals (BIA) and Second Circuit precedent governing bond and mandatory detention. New Jersey detainees would still have to file individual habeas petitions and ask district court judges to order

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New York immigration judges to provide them with bond hearings, one case at a time. In fact, the very idea that a New Jersey district court judge can direct the actions of an immigration judge in New York City is a legal fiction, kept afloat thus far by the good faith actions of the government agencies involved. *See, e.g., Kerr v. Elwood*, No. 12-6330, 2012 WL 5465492, at *4 n.7 (D.N.J. Nov. 8, 2012) (noting that district courts have "neither an appellate mandate over immigration judges nor mandate to direct actions by immigration judges in the matters where such judges are not parties," but stating that the court will charge respondents with "the duty to ensure proper compliance" with the order to provide petitioner a bond hearing).

While New Jersey-New York cross-circuit detention provides a particularly clear example of this problem, it is not the only such set-up in the country, nor the only one producing habeas litigation. A number of detainees who appear before the El Paso Immigration Court are detained at the Otero County Processing Center in Chaparral, New Mexico—meaning that they are detained and usually bring habeas challenges in the Tenth Circuit, while their removal proceedings and appeals are in the Fifth Circuit. *See, e.g., Valdez v. Terry*,—F. Supp. 2d—, 2012 WL 2829438 (D.N.M. Apr. 18, 2012). Some detainees with cases at the Chicago Immigration Court, in the Seventh Circuit, are held at the Boone County Jail in Burlington, Ky., in the Sixth Circuit. *See, e.g., Rosario v. Prindle*, No. 11-217, 2012 WL 12920 (E.D.Ky., Jan. 4, 2012). Until recently, a number of detainees with cases at the Hartford Immigration Court, in the Second Circuit, were held at facilities in Massachusetts and Rhode Island, in the First Circuit. *See Bourguignon v. MacDonald*, 667 F. Supp. 2d 175 (D. Mass. 2009) (noting detention in Rhode Island and Massachusetts while petitioner's removal proceedings and appeals were in the Second Circuit). Similarly, ICE detainees in Missouri, in the Sixth Circuit, previously had their cases heard via videoconference with the Oakdale Immigration Court, in the Fifth Circuit.[4]

As ICE uses new facilities and discontinues the use of others, the specifics may change, but cross-circuit detention is likely to persist, given their wide discretion to choose the place of detention. *See* 8 U.S.C. § 1231(g)(1) ("The attorney general shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal."); *Calla-Collado v. Att'y Gen.*, 663 F.3d 680, 685 (3d Circuit 2011) (holding that an alien "does not have the right to be detained where he believes his ability to obtain representation and present evidence would be most effective.").

The Current State of Immigrant Habeas Corpus Petitions

The cross-circuit situation is particularly relevant because in recent years, some, but not all, federal circuit courts have issued new interpretations of the statutes the government uses to detain noncitizens, especially the "mandatory detention" statute, INA § 236(c), and expanded bond hearings to new classes of aliens. This makes it particularly important for a given detainee to know which circuit's law will control his custody and right to any bond hearing. In 2009, the First Circuit overruled BIA precedent that permitted mandatory detention for certain aliens with convictions pre-dating the effective date of the statute. *Saysana v. Gillen*, 590 F.3d 7 (First Circuit 2009) (rejecting *Matter of Saysana*, 24 I&N Dec. 602 (BIA 2008)). However, the decision bound only the immigration judges sitting at the Boston Immigration Court, and would not have bound, for example, an immigration judge sitting at the Hartford Immigration Court even if faced with an alien detained in Massachusetts. Soon after *Saysana*, DHS retreated from their position and the BIA overruled its prior decision, eliminating that particular problem, but similar ones are likely to arise. *See Matter of Garcia-Arreola*, 25 I&N Dec. 267 (BIA 2010) (overruling *Saysana*).

However, following in the footsteps of the *Saysana* litigation is a large group of challenges to the BIA's decision in *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2011). Challenges to *Rojas* deal with the meaning of the mandatory detention statute's command that ICE take applicable aliens into custody "when released" from criminal custody for certain offenses. In *Rojas*, the BIA held that an alien who was at liberty for three days before ICE detained him was still subject to mandatory detention without bond. 23 I&N Dec. at 127. This spawned dozens of habeas petitions from aliens who were not detained until months or even years after their release from custody for offenses listed in the statute. *See, e.g., Monestime v. Reilly*, 704 F. Supp. 2d. 453, 458 (S.D.N.Y. 2010) (petitioner detained eight years after release from custody for a qualifying offense); *Dang v. Lowe*, No. 10-446, 2010 WL 2044634 (M.D. Pa. May 20, 2010) (same, with detention occurring almost ten years after release from custody).

Unlike challenges to *Matter of Saysana*, which were overwhelmingly successful in the district courts, *Rojas* challenges have not been a slam-dunk for detainees, although they have been more successful than not. *See Hosh v. Lucero*, 680 F.3d 375, 379 n.2-3 (4th Circuit 2011) (collecting a large number of cases). Only one circuit court has passed judgment on *Rojas*—the Fourth Circuit, which afforded it deference in *Hosh*—but the issue has been appealed to many other circuits, including the Second and Third, setting up the strong possibility of a circuit split. *See Santana v. Muller,* No. 12-430, 2012 WL 951768, at *5 (S.D.N.Y. Mar. 21, 2012) (noting that the challenge to *Rojas* is "of interest and should be definitely resolved by the Second Circuit at the earliest opportunity"); *Kerr*, 2012 WL 5465492, at *3 (noting that *Rojas* challenges are pending before the Third Circuit in several cases).

The second major issue in current immigration habeas cases is challenging detention that has become prolonged, raising due process challenges beyond the general constitutionality of the statute, which was upheld in *Demore v. Kim*, 538 U.S. 510 (2003). A number of district courts have ordered bond hearings for detainees whose mandatory

detention has reached lengths the courts found to raise constitutional concerns. *See, e.g, Madrane v. Hogan*, 520 F. Supp. 2d 654, 666-67 (M.D. Pa. 2007) (finding detention of over three years unconstitutionally prolonged); *Vongsa Sengkeo v. Horgan*, 670 F. Supp. 2d 116, 127 (D. Mass. 2009) (same, for detention of twenty months); *Monestime*, 704 F. Supp. 2d. at 458 (same, for detention of over eight months).

Moreover, three circuit courts have found that detention cannot continue indefinitely, with the Ninth Circuit setting bright-line rules for certain classes of aliens due a bond hearing before an immigration judge and the Sixth and Third Circuits employing an individualized analysis of whether detention has become "unreasonable." *See Diouf v. Napolitano*, 634 F.3d 1081 (9th Circuit 2011); *Casas-Castrillon v. Department of Homeland Security,* 535 F.3d 942 (9th Circuit 2008); *Ly v. Hansen*, 351 F.3d 263 (6th Circuit 2003); *Diop,* 656 F.3d 221. Clearly, the circuit of an alien's detention will continue to be important, if not dispositive, in deciding his rights. In addition, there are at least two class action suits currently pending with the precise aim of going beyond a single habeas victory and further expanding access to bond hearings for classes of aliens subject to mandatory detention. *See Rodriguez v. Robbins*, No. 07-3239 (C.D. Ca., preliminary injunction granted Sept. 13, 2012); *Gayle v. Napolitano*, No. 12-2806 (D.N.J., filed Nov. 15, 2012).

In all three of these types of cases—*Saysana*, *Rojas*, and prolonged detention—detainees generally sought, or are seeking, not "straight" release, but a bond hearing, usually before the immigration court. For that reason, they all implicate the cross-circuit problem when aliens are detained in a different circuit from the immigration court that would conduct the bond hearing. Precedents on the current use of mandatory detention are likely to keep coming, and therefore, circuit splits are likely to produce confusing results for this group of detainees.

Living (And Filing) Under *Rumsfeld v. Padilla*

Meanwhile, as these challenges are litigated across the country, many district courts are strictly applying *Padilla*, and requiring detainees to name the warden of the local jail holding them—and sometimes only the warden—as the respondent. *See, e.g., Allen v. Holder*, No. 10-2512, 2011 WL 70558 (S.D.N.Y Jan. 4, 2011) (determining that the warden of the petitioner's New Jersey jail was the only proper respondent, and transferring the case to the District of New Jersey); *Kerr*, 2012 WL 5465492, at *1 n.1 (dismissing all respondents other than the warden of petitioner's New Jersey jail). However, other judges have acknowledged that the warden has little control over an immigration detainee, and allowed other lead respondents to be named. *See Farez-Espinoza v. Chertoff*, 600 F. Supp. 2d 488, 494 (S.D.N.Y. 2009) (the attorney general and DHS secretary are proper respondents, given their power over removal cases and deportation); *Roman v. Ashcroft*, 340 F.3d 314, 320-21 (6th Circuit 2003). (proper respondent is the ICE field office director in charge of the petitioner's detention).

Importantly, the district court in *Farez-Espinoza* held that an immigration habeas petition may not be not a "core" challenge to confinement, and thus, *Padilla* does not apply. 600 F. Supp. 2d at 495. This idea deserves further scrutiny in the context of the mandatory detention challenges discussed above, in which aliens are not seeking an order of release, but the procedural right to a bond hearing before an immigration judge. This form of relief is substantively different from the "straight" release sought by, for example, detainees with final orders of removal, filing habeas petitions pursuant to *Zadvydas v. Davis*, 533 U.S. 678 (2001), and may require a different analysis as to whether the detainee is bringing a core challenge to confinement. *See, e.g., Zhen Yi Guo v. Napolitano*, No. 09-3023, 2009 WL 2840400, at *3-4 (S.D.N.Y. Sept. 2, 2009) (in post-final order habeas case, finding that only warden was proper respondent because Guo had brought a "core habeas petition," distinguishing facts of *Farez-Espinoza*, and transferring petition to Middle District of Pennsylvania).

Against this backdrop of unpredictability, there are a few ways that cross-circuit detainees have tried to navigate the potential pitfalls of having a habeas proceeding in one district and a bond case in another. One is to file a habeas petition while detained in the district of the alien's removal proceedings, even if that detention lasts a matter of days or hours. A very few New Jersey-New York detainees have done just that, filing their petitions in the southern district of New York during the very short window in which they were transported into Manhattan for a hearing at the Varick Street court and detention facility. *See, e.g., Mendoza v. Muller*, No. 11-7857, 2012 WL 252188, at *1 (S.D.N.Y. Jan. 25, 2012) ("Petitioner filed the instant petition … while in custody attending a hearing before an immigration judge at the Varick Street Immigration Court in this district."); *Guillaume v. Muller*, No. 11-8819, 2012 WL 383939, at *1 n.1 (S.D.N.Y. Feb. 7, 2012) ("Although Guillaume has spent the majority of his detention in [New Jersey], he filed the instant petition in this federal judicial district while in custody at the Varick Street Immigration Court."); *Santana*, 2012 WL 951768, at *1 (same).

Is this forum-shopping in action? Strange as it seems, this maneuver may be the opposite of forum-shopping: instead of using broad jurisdictional rules to file in a district where precedent is most favorable to the litigant, these petitioners attempted to function within narrow jurisdictional rules to get into a district that makes more sense in terms of the actual relief sought. *See Farez-Espinoza*, 600 F. Supp. 2d at 497 ("the strict application of traditional principles of venue minimize" concerns over forum-shopping.) It is also worth noting that the judges of the southern district of New York seem to be *more* likely to defer to the BIA's decision in *Matter of Rojas* than their New Jersey counterparts, as evidenced by the fact that all three of the petitioners mentioned above lost their *Rojas* challenges on the merits—so if this was forum-shopping, it was a poor attempt at it. *See Mendoza*, 2012 WL 252188, at *4; *Guillame*, 2012 WL

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383939, at *6; *Santana*, 2012 WL 951768, at *4.

However, this move does not appear to be used often by *pro se* detainees, who regularly file habeas petitions that are dismissed for failure to name a proper respondent or file in the proper jurisdiction. *See, e.g., Solomon v. Terry*, No. 12-411, 2012 WL 6097094 (W.D. Tex. Dec. 7, 2012) (dismissing petition for failure to file in the district of New Mexico); *Marroquin v. Robins*, No. 12-876, 2012 WL 4815404, at *2 (C.D. Cal. Sept. 4, 2012) (magistrate judge report recommending dismissal for failure to name the proper custodian under *Padilla*); In this way, a particularly strict application of *Padilla*, if courts do not transfer petitions or allow *pro se* litigants to amend their petitions, functions as a barrier for *pro se* detainees to seek habeas relief.

A second strategy is to simply seek release or a bond hearing from the district court itself, instead of from the immigration court. This approach is discussed rarely in habeas opinions, but avoids the cross-circuit problem by entirely separating the habeas proceeding from an immigration court bond proceeding. While in many mandatory detention challenges, the parties agree that if the petitioner is not properly detained under INA § 236(c), the authority for his detention will "revert" to INA § 236(a), which authorizes an immigration judge to set bond, this form of relief is in no way required. In a prolonged detention case in Massachusetts, the district court discussed at length the appropriate equitable relief to fashion, concluding that having the district court conduct the bond hearing was more efficient and appropriate than sending the petitioner back to the agencies which had created the prolonged detention. *Flores-Powell v. Chadbourne*, 677 F. Supp. 2d 455, 474-79 (D. Mass. 2010); *see also Ramirez v. Watkins*, No. 10-126, 2010 WL 6269226, at *17-20 (S.D. Tex. Nov. 3, 2010) (finding that the district court should not direct an immigration judge to hold a bond hearing, given the immigration judge's limited jurisdictional authority and the history of immigration court delay in the case); *Madrane*, 520 F. Supp. 2d at 668-70 (finding petitioner's detention unconstitutionally prolonged, and ordering his release after conducting a bond hearing before the district court).

Given the odd situation created by cross-circuit immigration detention, a broader reconsideration of the consequences of *Rumsfeld v. Padilla*, along with the most appropriate equitable remedies for immigration detainees who prevail in habeas cases, may be in order. At the least, the legal community should be aware of this phenomenon, and those following the evolving case law of immigration detention should be on the lookout for the way new developments affect detainees living in the legal space between two circuits. ◆

Andrea Saenz is a staff attorney at the United States Court of Appeals for the Second Circuit. The views expressed in this article are those of the author and do not represent the positions of the court or any other government agency or office, nor do they constitute legal advice.

Endnotes

[1]Nina Bernstein, *Immigrants in Detention to Be Sent Out of State*, New York Times, Jan. 14, 2010, at A24.

[2]The Department of Justice's list of the jails over which the Varick Street Court has jurisdiction is available at: www.justice.gov/eoir/vll/courts3.htm#Varick (last visited Dec. 18, 2012)

[3]*See, e.g.,* Nina Bernstein, *Sick Detainees Complicate Plans to Close Immigration Jail*, New York Times, Feb. 24, 2010, at A18; Nina Bernstein, *Move Across Hudson Further Isolates Immigration Detainees*, New York Times, Mar. 16, 2010, at A23.

[4]*See* www.justice.gov/eoir/sibpages/kan/kanmain.htm#detained (last visited Dec. 18, 2012).

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before me, or that might come before me in the future. They also are not legal advice and are not a substitute for reading the applicable statutes, regulations, precedents, and practice manuals.

Endnotes

[1]*Kawashima v. Holder*, ___ U.S. ___, ___ S. Ct. ___, 2012 WL 538277 (2012), hereafter "*Kawashima*."

[2]*Id*. at *3.

[3]8 U.S.C. § 1101(a)(43)(M)(i).

[4] *Kawashima* at *4, *5.

[5]INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) provides for the removal of aliens who are convicted of aggravated felonies.

[6]*Kawashima* at *4 (emphasis supplied).

[7]*Id*. at *8 (citation omitted).

[8]*Id*. at *8, *12.

[9]*Id*. (emphasis supplied).

[10] *Id*. at *12.

[11]Id. at *8.

[12]*Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473 (2010).

[13]*Kawashima* at *12.

Reforming Immigration "With Liberty and Justice for All"

ANGELO A. PAPARELLI

As Republicans join Democrats in contemplating reform of the nation's dysfunctional immigration system, the final line of the Pledge of Allegiance ("with liberty and justice for all") is the best place to start.

Revitalizing our broken and outdated 20th Century immigration laws to respond to the needs of 21st Century America will turn in large part on how we face the challenge of persuading desirable foreign citizens to make our country their home. Coveted immigrants now enjoy an array of choice locales; they are lured by the wealth, opportunity and blandishments of competitor nations throughout the developed and developing world.

While the United States has long been the most preferred destination, our national rose seems to have lost much of its bloom. For too many foreigners possessing the attributes and skills we need, America may be tempting but just too risky. We have posted a "road closed" sign when we should be cleaning off the welcome mat.

Why would any intelligent person or family take a chance on America if it means that every critical step along the way raises the prospect of disrespect, insult, suspicion, delay and rejection? Those are the sorry results of our archaic and unwelcoming Immigration and Nationality Act, passed as the law of the land in the 1950s McCarthy era, modestly refreshed in 1990, but then made more draconian in 1996, and since at least the turn of the century, administered by bureaucrats who've too often espoused an inhospitable "culture of no."

America would be wise to transform our immigration laws in tangible ways that make manifest the pledge's promise "of justice and liberty for all." Here, then, are several suggested reforms to the immigration laws (with more to follow in future posts) that would serve us well by serving the needs of desirable immigrants:

Be more respectful and stop treating visa applicants like suspects and liars. Eliminate the presumption in current law which says that every applicant for a nonimmigrant visa is presumed to want to remain in America permanently unless s/he proves otherwise to the satisfaction of a consular officer. The presumption is jingoistic and haughty, too often counter-factual, and in any case unhelpful in that it breeds ill will among would-be entrants. Establish clear visa-eligibility requirements that must be proven by a preponderance of the evidence (a more likely than not standard), and maintain very strict security-clearance procedures. In addition, videotaping all visa applicants while recording the voice of the consular officer would by itself enhance our security while likely improving the behavior and courtesy of interviewing officers. Just as Mitt Romney learned that disrespectful urgings about self-deportation insulted the Latino community, "ugly American" consular behaviors are a turn-off to those whom we would welcome.

Eliminate consular absolutism. No one—not even someone as admired until recently as Gen. David Petraeus—is infallible. Yet current law says that no government official, not the president or the secretary of state or the attorney general or any federal judge, can correct mistaken findings of fact made by a consular officer when deciding to refuse a visa application. Justice for all means due process for all and it means that no one, not even consular officers, are above the law. Congress should create a means of challenging consular visa refusals and visa revocations, especially where the rights of American companies and families are adversely affected. The review process can begin with a pilot program covering all immigrant visas and nonimmigrant visas for investors and work-visa applicants, and then be expanded to cover additional categories.

Establish due process border protections. U.S. border inspectors at ports of entry possess extraordinary authority, including the power of expedited removal without judicial oversight, and the power to deny foreign applicants for admission, including permanent residents, all access to legal representation. When the interests at risk in a refusal of admission are significant, and an unjust refusal adversely affects the rights of American citizens and businesses, the unregulated "third-degree" style of border enforcement must give way to the rule of law and enhanced due process protections.

Create additional immigration checks and balances. The current system of immigration justice too often fails to provide prompt and legally correct decisions. Probably the worst offender is the Administrative Appeals Office (AAO) of U.S. Citizenship and Immigration Services (USCIS), a faux-"tribunal" that has failed to fulfill its professed mission. It is staffed by too many non-lawyers, issuing too many legally dubious and inordinately delayed decisions, without rules of court, from within the same agency (USCIS) that issued the initial decision, while denying many parties with legal interests in the outcome an opportunity to be heard or affording a means to preserve the status quo (e.g., uninterrupted employment authorization) when an appeal remains pending. It should be moved out of the Department of Homeland Security and perhaps into the Justice Department, say to the Office of the Chief Administrative Hearing Officer (OCAHO) where other administrative claims under the legal immigration system are heard.

Better yet, Congress should create a new federal Immigration Court (FIC), styled after the federal Bankruptcy Court and the Tax Court, to be staffed by judges appointed under Article III of the Constitution, possessing jurisdiction over all immigration law issues, in place of not just the AAO, but also the Board of Immigration Appeals, the Department of Labor's administrative law judges and Administrative Review Board, and the federal district courts. The FIC could also assume jurisdiction over appeals of consular visa refusals under the pilot program suggested above.

Other immigration checks and balances would entail

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enhancing the power of (a) the Office of the USCIS Ombudsman, by giving it the authority to overrule legally erroneous actions of USCIS, and (b) the Department of Homeland Security's Office for Civil Rights and Civil Liberties, by expanding beyond its authority to advise the DHS Secretary on policy changes and authorizing it to investigate and penalize violations of civil rights, civil liberties and due process.

Reassign agency roles. The Fraud Detection and National Security Directorate (FDNS) of USCIS has no place in an agency charged with conferring immigration benefits on deserving petitioners and applicants. FDNS should be moved into U.S. Customs and Immigration Enforcement (ICE) because the missions of FDNS and ICE are hand-in-glove aligned and ICE has established a variety of due process protections which, alas, FDNS now routinely ignores (like prior notice to counsel of client site visits). Similarly, the Department of Labor's Employment and Training Administration should be ordered by Congress to cease its wasteful and duplicitous labor market testing process known as "labor certification." Instead, the Bureau of Labor Statistics should be instructed to publish lists of shortage occupations based on data collected nationally, and prospective employers should be allowed to petition for foreign workers based on the shortage lists. Employers should also be allowed to petition for inclusion of new or omitted occupations on the lists based on a regulations proposed for public comment and finalized under the Administrative Procedure Act.

Expand or eliminate work- and investor-visa quotas. Numerous studies have shown that employment-based immigration promotes economic growth and opportunity in the importing nation and—through remittances sent back home—in the exporting nation as well. Why then should there be a quota on economic growth? The only conceivable situation is where growth creates tangible problems that are proven to override the economic benefits of employment-based immigration. Our current immigration system, however, pulls quota numbers out of thin air, without regard to any published financial or demographic metrics. Take for example the H-1B visa quota which is now set at 85,000 but has ranged from 65,000 to close to 200,000 since its imposition in 1990, and it is Swiss-cheesed with exemptions for Chileans, Singaporeans, Australians, and other privileged classes. The history of the program has shown that the quota is inadequate when market demand for foreign workers is high and unnecessary when demand is low. So, why have a quota on "smart people" (as business leader and philanthropist Bill Gates has asked)?

Establish uniform privileges across all work visa categories. There is no reason why spouses of E, J-1 and L-1 visa holders are allowed to work and spouses of other visa holders are prohibited. If promoting dual-career households is a public good, then make the opportunity available uniformly for all work visa categories. There is likewise no reason why H-1B, H-4, L-1, and L-2 visa holders can travel abroad and reenter on their visas without being deemed to have abandoned their green-card applications, while applicants in other visa categories applying for green cards must re-apply if they leave and return. Nor is it logical that H-1B visa holders have "portability" of benefits when they change employers and can extend their cumulative stay beyond the usual multi-year maximum if they pursue a green card but other work visa holders are denied these privileges. And the mother of all illogical immigration notions—the presumed intent of a nonimmigrant visa applicant to immigrate unless the contrary is proven—should be just as inapplicable to all visa categories as it is to a few (such as the H-1B, L-1 and O-1 visas).

Promote immigration transparency and accountability. The immigration stakeholder community has no way to identify adjudicators who consistently misinterpret the law, misunderstand basic business concepts, defy headquarters directives or ignore judicial precedents. Unlike immigration judges whose patterns of decisions are trackable, immigration decision-makers do not affix their name or a tracking number to their decisions. These bad apples taint the rest of the produce in the barrel and bring disrepute on the system. Personnel laws administered behind the scenes are not enough to deter incompetence or insubordination. Congress should mandate a system of transparency and accountability that allows the public to monitor and protest malfeasant and miscreant behaviors among immigration adjudicators.

Promote entrepreneurship and investment. Congress should promote economic pragmatism and eliminate the current bars that prevent working owners, entrepreneurs and investors from immigrating to the United States. It should allow a greater measure of "free-agency" for talented foreign nationals rather than permit pre-arranged employer sponsorship as the sole or primary vehicle for business-related immigration benefits. It should also streamline the EB-5 program so that adjudicators are not allowed to demand rail-car loads of irrelevant paper based on ever-changing and novel interpretations of legal requirements. It should allow for the creation of a founders or start-up visa. It should confer immigration benefits on investors in residential or commercial real estate. It should establish a race-to-the-top competition which would confer to states proposing innovative commercial, business, artistic or scientific projects the right to grant a share of work visas and green cards to the most promising foreign applicants. And it should foster worthy pilot immigration projects targeted to solving big problems.

These suggestions for a more welcoming immigration system receive little attention from the press and politicians who focus on border and interior enforcement, a path to citizenship for the undocumented and future flows of immigrant workers.

While the problems the politicos and pundits identify require a solution, America will still fail to create a 21st Century immigration system unless it takes aggressive steps to welcome the world's most desirable immigrants. ◆

Angelo Paparelli is an immigration attorney (and inveterate blogger) in Los Angeles, Calif. He is a member of the ILS Governing Board.

A Split Among the Circuits: Taking Opposing Sides on Silva-Trevino

BRIA DESALVO

The attorney general's goal in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), was to standardize the patchwork of approaches to the crime involving moral turpitude (CIMT) analysis across the nation. But early this year the United States Court of Appeals for the Fourth Circuit joined the Third and Eleventh Circuits in abandoning critical parts of the decision. In *Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012), the Fourth Circuit rejected the use of *Silva-Trevino*'s third step in the CIMT analysis, which allows consideration of evidence outside the record of conviction. Practically, the circuits' elimination of the third step means that adjudicators of cases arising out of the Third, Fourth, and Eleventh Circuits can no longer look to police reports or other documents outside the record of conviction to determine whether an alien's conviction is for a CIMT.

In contrast, the Eighth Circuit, after seeming to signal that it would also retreat from *Silva-Trevino*, held in *Bobadilla v. Holder*, 679 F.3d 1052 (8th Cir. 2012), that the framework was reasonable and deserving of deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Thus, the happenstance of geography that the attorney general desired to minimize continues its reign unchecked with potentially severe consequences for respondents applying for relief or contesting removability. This article will examine which of the holdings in *Silva-Trevino* fell under the Fourth Circuit's knife, highlight those that survived, and consider how *Prudencio* and *Bobadilla* compare to other circuit court decisions considering *Silva-Trevino*.

Silva-Trevino

In a push for uniformity, the attorney general offered a standard definition of a CIMT—the crime must involve both reprehensible conduct and some form of scienter, either specific intent, deliberateness, willfulness, or recklessness. *See Silva-Trevino*, 24 I&N Dec. at 689 n.1. In addition to the definition, the opinion intended to establish a uniform procedure for adjudicators to follow in making the CIMT determination, thereby ensuring fairness and accuracy, while avoiding the perception that removability or eligibility for relief is determined by the happenstance of geography. *See id.* at 694-95.

The attorney general found two sources of ambiguity in Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), which allowed the agency to exercise its duty to provide an authoritative interpretation of the statute. Section 212(a)(2)(A)(i)(I) provides that "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of … a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime … is inadmissible."

First, the attorney general noted that the statute is silent as to which method should be employed to make the CIMT determination. The use of the term *convicted* seemingly points to a categorical approach, while the words *committing* and *acts* invite a more circumstance-specific inquiry. Second, the term *involving* seems to allow for inquiry into the facts of a crime.

The attorney general's framework begins with the categorical approach, borrowed from Supreme Court cases dealing with sentencing: *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005). The first step allows the adjudicator to examine only the statute of conviction. Before *Silva-Trevino*, adjudicators selected the appropriate standard under the applicable circuit law to determine whether, under the statute, the crime was categorically a CIMT. The various standards in use in different circuits included the "least culpable conduct," the "minimum criminal conduct necessary to sustain a conviction," and the "general nature" of the crime. *Id.* at 693-94 (citing *Amouzadeh v. Winfrey*, 467 F.3d 451, 455 (5th Cir. 2006); *Partyka v. Att'y Gen. of U.S.*, 417 F.3d 408, 411 (3d. Cir. 2005); *Marciano v. INS*, 450 F.2d 1022, 1025 (8th Cir. 1971)). The Board of Immigration Appeals also had its own test: whether moral turpitude "necessarily inheres" in a conviction under a given statute. *Id.* In an attempt to unify the many standards, the attorney general held that adjudicators should consider whether there is a "realistic probability, not a theoretical possibility" that the statute could reach nonturpitudinous conduct. *Id.* at 690 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (internal quotation marks omitted)).

Assuming that the statute has a realistic probability of encompassing nonturpitudinous conduct, the adjudicator then proceeds to step two, the modified categorical approach, in which he or she examines the record of conviction to determine whether the offense was a CIMT. *Id.* The formal record of conviction includes such documents as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.*

Finally, if the record of conviction is inconclusive, *Silva-Trevino* permits adjudicators to consider evidence beyond the formal record of conviction "to the extent they deem it necessary and appropriate." *Id.* This third step allows adjudicators to consider documents such as police reports to determine whether the conduct and circumstances indicate that the crime involved moral turpitude, rather than limiting the analysis to the formal record of conviction.

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The Fourth Circuit: The Third Circuit To Reject the Third Step

In *Prudencio*, the Fourth Circuit rejected the third step of the *Silva-Trevino* analysis, thus eliminating the practice of looking to documents beyond the record of conviction to make the CIMT determination. 669 F.3d at 484. The petitioner, a lawful permanent resident, was charged under section 237(a)(2)(A)(i) of the act, 8 U.S.C. § 1227(a)(2)(A)(i), as an alien convicted of a CIMT within five years of admission. *Id.* at 475. The petitioner was initially charged with having carnal knowledge of a 13-year-old child, without the use of force, in violation of Section 18.2-63 of the Virginia Code. *Id.* at 476. However, he pled guilty to contributing to the delinquency of a minor under section 18.2-371 of the Virginia Code, which has two subparts. The first provides that any person over 18 who "willfully contributes to, encourages, or causes any act, omission, or condition which renders a child delinquent, in need of services, in need of supervision, or abused or neglected … shall be guilty of a Class 1 misdemeanor." The second subsection prohibits "consensual sexual intercourse with a child 15 or older."

Under step one of the *Silva-Trevino* framework, the immigration judge determined that the conviction was not categorically for a CIMT because the first subsection could encompass conduct that was not turpitudinous. The immigration judge then applied the modified categorical approach, but the record of conviction did not resolve the question. Finally, the immigration judge moved to the third step, considering a police report indicating that the petitioner had sexual relations with a 13-year-old girl when he was over 18. The dissent further notes that the victim was infected with a sexually transmitted disease as a result of the petitioner's actions. The immigration judge concluded that the conviction was for a CIMT, sustained the charge of removability, and entered an order of removal. *Prudencio*, 669 F.3d at 477.

The Fourth Circuit determined that Section 212(a)(2)(A)(i)(I) of the act was not ambiguous or silent and refused to accord *Chevron* deference to the attorney general's interpretation of the statute in *Silva-Trevino*. First, the court found that any ambiguity introduced by the terms *committing* or *acts* did not make the part of the statute referring to convictions ambiguous. *Id.* at 481. In contrast to the attorney general's focus on the ambiguity of the statute as a whole, the Fourth Circuit considered each phrase separately, finding no ambiguity in the phrase *convicted of* because *conviction* has the same meaning in the immigration context as it does in the criminal context. Additionally, the court found that *involving* was not ambiguous when viewed as part of the term of art "crime involving moral turpitude," because that term has been in use for over 100 years and even predated the act. *Id.*

The Fourth Circuit rejected the government's argument that the Supreme Court's reasoning in *Nijhawan v. Holder*, 557 U.S. 29 (2009), supported the use of the third step in the CIMT analysis. In *Nijhawan*, the Supreme Court held that an adjudicator could look beyond the record of conviction to determine whether the alien was convicted of an offense involving fraud or deceit in which the loss to the victim exceeds $10,000. The government argued that *Nijhawan* allows for a circumstance-specific inquiry when considering statutory criteria that are not typically elements of criminal offenses. However, the Fourth Circuit interpreted *Nijhawan* more narrowly, reasoning that the specific loss amount needs no interpretation and invites a circumstance-specific inquiry on its face, while CIMT is a term of art with a long history of judicial interpretation. *Prudencio*, 669 F.3d at 483. Whether a loss exceeds $10,000 is one "threshold fact," while the third step of the attorney general's framework involves consideration of all the underlying circumstances of the offense. *Id.*

The Fourth Circuit buttressed the legal reasoning with policy and practical considerations that undermine the third step. For example, the third step allows immigration judges to rely on "documents of questionable veracity" as proof of conduct. *Id.* at 483. These documents contain unsworn witness statements and initial impressions from early in the investigation, and they cannot take into account later events such as witness recantations, amendments, or corrections. *Id.* at 483-84. The Fourth Circuit cautioned that considering only facts alleged, not facts proved, has inherent risks, even in the context of civil, rather than criminal, proceedings. *Id.* at 483. Finally, prosecutors have the ability to develop a complete record of conviction that will resolve the CIMT question at the second step if they want to ensure a certain outcome in the immigration context. *Id.*

The Fourth Circuit then applied the holding to the petitioner, finding that neither the statute under which he was convicted nor the record of conviction established that his conviction was for a CIMT. The record of conviction contained only one document, a felony arrest warrant listing the original charge under the carnal knowledge statute. *Id.* at 485. However, the court found this warrant to be irrelevant because the petitioner pled guilty to a different charge. The court therefore vacated the order of removal against the petitioner, finding that the government had not established that his conviction was for a CIMT. *Id.* at 486.

Most significantly, the Fourth Circuit did not disturb the "realistic probability" standard, which serves as the gateway to the second step. Additionally, the Fourth Circuit left intact the definition of a CIMT from *Silva-Trevino*. It therefore remains necessary under Fourth Circuit law to show both reprehensible conduct and some degree of scienter to establish that an offense is a CIMT.

How Does the Fourth Circuit Compare to Other Circuits that have Retreated from *Silva-Trevino*?

The Third Circuit: The Most Significant Blow

In *Jean-Louis v. Attorney General of the United States*, 582 F.3d 462 (3d Cir. 2009), the Third Circuit dealt the most significant blow to *Silva-Trevino* because it eliminated the third step and rejected the "realistic probability standard." The petitioner in *Jean-Louis* was convicted under a statute that criminalized the assault of a child under 12 but did not specify a mental state. *Id.* at 464-65.

The Third Circuit selected the "least culpable conduct" standard for the categorical approach, holding that "the possibility of conviction for nonturpitudinous conduct, however remote, is sufficient to avoid removal." *Id.* at 471. The court then found that the child assault statute could reach conduct involving accidental harm to a victim, even when the offender did not know the victim was under 12. Therefore, the categorical inquiry did not resolve the CIMT question. In rejecting the "realistic probability" test, the Third Circuit noted the practical challenge that respondents face in proving that someone has previously been convicted of nonturpitudinous conduct under a particular statute. *Id.* at 482.

The Third Circuit also rejected the third step, referring to it as a novel approach and indicating that the court would give it no deference. *Id.* at 470. The court found that the CIMT provisions spoke with the requisite clarity, noting that the term *conviction* has been defined by Congress in Section 101(a)(48)(A) of the act, 8 U.S.C. § 1101(a)(48). *Id.* at 473-75. The court distinguished the phrase *convicted of* from the language dealing with admissions. Finally, it determined that the term *involving* was not ambiguous in the context of a CIMT.

The Third Circuit cited policy reasons for eliminating the third step, observing that "*Silva-Trevino* sets no limitations on the kinds of evidence adjudicators may consider" and noting that simplicity and efficiency are just as important in immigration proceedings as in sentencing. *Id.* at 472, 478. *Jean-Louis* dealt the most significant blow to *Silva-Trevino*, concluding that the methodology adopted by the attorney general "is contrary to Congress's intent, and would overturn nearly a century of jurisprudence." *Id.* at 482.

The Eleventh Circuit: A Middle Ground

The reasoning in *Prudencio* most closely resembles the Eleventh Circuit's holding in *Fajardo v. U.S. Attorney General*, 659 F.3d 1303 (11th Cir. 2011), which strikes a middle ground between the Third and the Seventh Circuit's holdings on either end of the spectrum. In *Fajardo*, the Eleventh Circuit found that section 212(a)(2)(A)(i)(I) of the act was not ambiguous, so the attorney general's construction was not entitled to *Chevron* deference. *Id.* at 1310. However, the Eleventh Circuit, like the Fourth in *Prudencio*, chose not to disturb the "realistic probability" standard for the categorical approach.

In *Fajardo*, the petitioner was convicted of false imprisonment, misdemeanor assault, and misdemeanor battery, all stemming from one altercation. *Id.* at 1305. Although the petitioner's false imprisonment offense was not categorically a CIMT, the immigration judge considered the petitioner's other two crimes under step three to find that false imprisonment was a CIMT.

The Eleventh Circuit rejected the use of the third step and distinguished *Nijhawan* in the process. However, the court did not refer to the many policy arguments against the third step found in other opinions. Instead, it simply found that the statute was clear. Therefore the court concluded that it did not owe *Chevron* deference to the attorney general's construction.

The Eighth Circuit: From Retreat to Chevron *Deference*

The Eighth Circuit initially seemed to signal its rejection of the third step in one sentence in *Guardado-Garcia v. Holder*, 615 F.3d 900 (Eighth Cir. 2010), a case somewhat unlike the cases of its sister circuits in that the petitioner argued that the board must use the third step. The petitioner argued that documents outside the record of conviction established that his offense, misuse of a social security number under 42 U.S.C. § 408(a)(7)(B), was not a CIMT. *Id.* at 901. The record of conviction indicated that the petitioner, with intent to deceive, used a social security number not assigned to him to get an airport identification badge. The board upheld the immigration judge's finding that this was a CIMT, concluding the analysis at step two. However, the petitioner argued that the board must apply *Silva-Trevino*'s third step to reach evidence showing that he posed no security risk and establishing that his offense was not a CIMT. The court rejected his argument that the board must reach the third step, cited *Jean-Louis*, and stated, "We are bound by our circuit's precedent, and to the extent *Silva-Trevino* is inconsistent, we adhere to circuit law." *Id.* at 902.

However, in May the Eighth Circuit indicated that this statement in *Guardado-Garcia* was "wrong as a matter of federal administrative law" and not necessary to the decision. *Bobadilla v. Holder*, 679 F.3d 1052, 1057 (8th Cir. 2012). The court further concluded that the *Silva-Trevino* "methodology is a reasonable interpretation of the statute," which should be accorded deference. *Id.* The petitioner in *Bobadilla* was convicted of giving a false name to a peace officer under Section 609.506, Subdivision 1 of the Minnesota Statutes, which required an "intent to obstruct justice." The immigration judge held that the offense was categorically a CIMT and the board affirmed this finding. The Eighth Circuit disagreed, finding the intent lacking and noting that not every intentional act making a government official's task more difficult is inherently base, vile, or depraved. Thus, holding that the term CIMT was ambiguous "[w]ithout question," the Eighth Circuit affirmed the use of both the third step and the realistic probability standard. *Id.* at 1054.

The Seventh Circuit: A Springboard for Silva-Trevino

In *Silva-Trevino*, the attorney general relied heavily on the Seventh Circuit's reasoning in *Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008), although he ultimately reached a different result. In *Ali*, the Seventh Circuit gave adjudicators free reign to consider all relevant evidence, rejecting the idea that the adjudicator must first attempt to resolve the CIMT question under step one or two. In effect, although the attorney general's "necessary and appropriate" language postdates *Ali*, the Seventh Circuit determined that it is always appropriate to consider evidence beyond the record of conviction.

The petitioner in *Ali* was seeking a waiver pursuant to Section 212(h) of the act, which would waive his aggravated felony conviction so that he could adjust status. *Id.* at

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739. This waiver would not be available to him if his aggravated felony was also a CIMT. The petitioner was convicted of conspiracy "to commit any offense against the United States, or to defraud the United States" under 18 U.S.C. § 371. *Id.* The board looked beyond the record of conviction to a presentence report, which described the petitioner's participation in a conspiracy to sell firearms without a license. The board reasoned that this offense was a type of fraud, which has long been considered a CIMT. *Id.* at 740.

The Seventh Circuit found that Section 212(a)(2)(A)(i)(I) of the act supported the use of evidence beyond the record of conviction because moral turpitude is not an element of any crime. Therefore the CIMT determination was unlikely to be resolved by the record of conviction. *Id.* at 741-42. The court found that the justifications for the more limited approach of *Taylor* and *Shepard* do not apply in the immigration context. *Id.* at 741. *Shepard* was premised on Sixth Amendment protections that are not applicable outside of criminal proceedings. *Taylor* was meant to simplify sentencing so that judges would not have to spend time and resources on a retrial of a prior offense. However, the Seventh Circuit concluded that even if abandoning the categorical approach is more time or resource intensive, the attorney general should decide how to use the time and resources of his agency. *Id.*

Practical Effects of the Elimination of the Third Step in the Third, Fourth, and Eleventh Circuits

One of the most significant changes brought about by the elimination of the third step under *Silva-Trevino* is that adjudicators can no longer rely on police reports when determining whether a conviction is for a CIMT. Warrants or other documents containing initial unproven charges are similarly out of bounds if an alien pled down to a reduced charge. The impact may be somewhat muted in the context of discretionary forms of relief, because adjudicators are not prohibited from considering information beyond the record of conviction in that context.

Another practical effect of the elimination of the third step is the increased responsibility that falls to criminal prosecutors who want to ensure certain immigration consequences. Developing a complete record of conviction takes on a much greater importance. Prosecutors will strive to include more facts related to the conduct of the defendant in the plea colloquy or written plea agreement, while defense attorneys will try for a clean or inconclusive record of conviction. The added significance of the language and level of detail in the record of conviction will certainly increase the value of the proffer language as a bargaining chip in criminal court. Alien defendants will likely accept more severe sentences in exchange for proffer language that does not settle the CIMT question.

Conclusion

The Seventh Circuit's decision in *Ali* and the Third Circuit's in *Jean-Louis* currently mark opposite ends of the CIMT analysis spectrum. Between the three circuits that have rejected the third step and the two that upheld it fall a number of circuits that have declined to address the issue. Those on both sides of the debate will have their eye on the circuits that have not yet weighed in, and possibly the Supreme Court, to see whether the *Silva-Trevino* framework, which was intended to introduce uniformity, will become a historical footnote. ◆

Bria DeSalvo is an attorney advisor at the Arlington Immigration Court. This article was reprinted from the Immigration Law Advisor, *Vol. 6 No. 9.*

Section News

New York

Our section chair, H. Raymond Fasano, had a big month in January. Ray was the attorney who briefed and argued *Gashi v. Holder*, 2012 WL 6572970 (2d Cir. 2012), which was decided on Dec. 18, 2012. The *New York Law Journal* ran a cover story about the case after the Second Circuit Court of Appeals agreed with Ray's argument that Gashi deserved asylum status because he met the definition of a particular social group as a witness to war crimes in Kosovo. See "Denial of Asylum to Serbian Found In Error," *New York Law Journal*, Dec. 19, 2012, p. 1.

In addition to his hard work winning cases, Ray and the staff of Youman, Madeo & Fasano, LLP enjoyed their holiday party on December 15, which was a cruise around the Manhattan skyline. The highlight of the festivities was when the boat drifted in the shadows of the Statue of Liberty. Ray commented, "Being an immigration lawyer made the sight of the Statue of Liberty be of extra significance for my partners, our staff and me."

New York. Staff of Youman, Madeo & Fasano LLP

New York. Left to right: Rodney Youman, Ray Fasano, and Donald Madeo

New York. Ray Fasano with Sulan Peng. Peng has been a great help to the Immigration Law Section's governing board, during Ray's tenure as section chair.

Denver

During the Spring Semester 2013, ILS secretary and board member the Hon. Mimi E. Tsankov will be teaching advanced immigration law at the University of Denver Sturm College of Law, and Asylum Law at the University of Colorado School of Law.

The Tenth Circuit Court of Appeals issued published decision *Barrera-Quintero v. Holder*, 699 F.3d 1239 (10th Cir. 2012) in which it joined six other circuits in according Chevron deference to the board's holding in *Matter of Romalez*, 23 I&N Dec. 423 (BIA 2002). The Tenth Circuit concluded that the petitioner's return to Mexico under threat of removal in 2004 —although less than 90 days in duration—broke his continuous physical presence in the United States. In that case, the petitioner pled guilty to falsifying government records under section 76-8-511 of the Utah Code Annotated. After being placed into custody by the DHS and given a Spanish-language form which provided him with three options: removal proceedings before an immigration judge, an asylum hearing, or a waiver of his right to a hearing and return to his native Mexico, the petitioner chose the third option. In a subsequent removal proceeding, after the petitioner had reentered the United States, the immigration judge found him ineligible for cancellation of removal, for failure to establish continuous physical presence. The immigration judge also held that both of the petitioner's convictions were for crimes involving moral turpitude.

Denver. Hon. Mimi E. Tsankov

Washington, D.C.

On Oct. 31, 2012, the Immigration Law Section, in conjunction with the District of Columbia and Capitol Hill Chapters, and the American Immigration Lawyers Association, sponsored a program entitled Deferred Action for Childhood Arrivals (DACA): Nuts & Bolts. The program boasted an all-star cast. Thanks to Prakash Khatri of our Section board and the D.C. chapter for organizing the event.

Send your announcements, news items, and photos to our news editor Bob Beer at Bob@bobbeer.com. ◆