NATIONAL IMMIGRANT JUSTICE CENTER
A HEARTLAND ALLIANCE PROGRAM

RIGHT TO ASYLUM IN REINSTATED REMOVAL PROCEEDINGS: YEAR END REPORT
AUGUST 2017

STATEMENT OF THE ISSUE

Since 2011, the National Immigrant Justice Center (NIJC) has been litigating cases about the right to seek asylum for individuals who have been previously removed from the United States and who are subject to reinstatement of a prior removal order. The primary argument in these cases is that there is a tension between the asylum statute, which states that "any alien" may seek asylum "irrespective" of immigration status, 8 U.S.C. § 1158(a)(1), and the reinstatement provision, which bars a noncitizen who returns to the United States from seeking "any relief," 8 U.S.C. § 1231(a)(5). NIJC has urged courts to construe asylum as a form of protection in order to avoid a conflict between these two statutory provisions. This approach, we argue, is most consistent with the statutory text of the two statutes, honors Congressional intent, and is necessary to maintain the United States' commitments under the Refugee Convention. In addition to advocating for a construction of the statutes that would allow a Court to avoid this conflict, NIJC has been arguing in the alternative that Courts should refuse to defer to the rules set forth by immigration officials because there is no evidence that the Agency perceived of or endeavored to resolve tension between the statutes when issuing regulations.

DEVELOPMENTS IN THE PAST SIX MONTHS

When NIJC provided its mid-year report on this issue, many of the cases were pending. Many of them have since been resolved, unfortunately against us. However, NIJC continues to litigate the issue, and has filed petitions for rehearing and is in the midst of preparing the first petition for ***certiorari*** on the topic. Those developments are addressed below by circuit.

Perez Guzman v. Lynch, 835 F. 3d 1066 (9th Cir. 2016) ***reh'g denied*** (Apr. 26, 2017)

The Ninth Circuit issued an adverse decision in August 2016. In doing so, it disagreed with previous circuits to have ruled on this issue: instead of finding the language of the statute clear against the noncitizen, it "deferred" to the Agency's interpretation. NIJC coordinated a rehearing effort that included multiple briefs, such as one from international law scholars who addressed international treaty obligations to refugees. In December 2016, the Court ordered the government to respond and particularly ordered the response to address the international law arguments. On April 26, 2017, the Court denied the petition for rehearing.

A ***certiorari*** petition is due in the case at the end of August. NIJC is now co-counsel with the law firm Osborn Maledon on the case. In addition, NIJC has secured three amicus briefs in support of ***certiorari***: one from international law scholars (authored by Mayer Brown LLP), one on behalf of administrative law scholars (by Winston & Strawn LLP), and one on behalf of the American Immigration Lawyers Association.

Martinez Cazun v. Att'y Gen., No. 15-3374, 856 F.3d 249 (3d Cir. May 2, 2017)

Immediately following the denial of rehearing in the Ninth Circuit, the Third Circuit issued a decision also denying relief. The majority panel of the Court (McKee and Rendell) decided the issue at ***Chevron*** step two, following the Ninth Circuit's reasoning. Notably, the Court gave somewhat extended treatment to the international treaty obligations owed to asylum seekers, but did so in a manner that misstated the position of international law scholars. The Court also rejected the distinction between relief and protection put forth by both parties (The government argued that asylum was relief and withholding and CAT are protection; NIJC argued that all were protection.) Judge Hardiman issued a concurring decision, noting that he would have resolved the case at ***Chevron*** step one.

A petition for panel rehearing was filed on July 17, 2017. NIJC argued that the panel misconstrued the arguments regarding the role of international treaty obligations and that it based its decision on a factual error about the Agency's process in adopting its regulations.

Victor Garcia Garcia v. Sessions, No. 15-2571, 856 F.3d 27 (1st Cir. May 3, 2017)

The day after the decision in ***Martinez Cazun***, the First Circuit rejected these arguments, also at ***Chevron*** step two. One positive aspect of this decision is that there was a vigorous dissent by Judge Stahl, who stated that he dissented because the majority approach would "put the United States in violation of international law, and countenance the flagrant due process violations that occurred [in this underlying case]." In particular, Judge Stahl emphasized the mandatory treaty obligations and due process concerns that are implicated by the United States' creation of a tiered asylum system, whereby withholding recipients are "overqualified" for asylum but denied that remedy because of a technicality.

In coordination with the American Immigration Lawyers Association, NIJC wrote an amicus brief in support of rehearing in this case. Because a second amicus brief was filed by international law scholars, NIJC's brief focused on the errors in the panel's decisions at both steps one and two of ***Chevron***.

Cirilo Garcia Garcia v. Sessions, No. 16-3234, 859 F.3d 406 (7th Cir. June 8, 2017)

In the most erroneous of all of the decisions arising from this issue, the Seventh Circuit rejected the arguments. Instead of reaching the merits on the issue, the Court relied on its decision in a different case, ***Delgado Arteaga v. Sessions***, which addressed whether someone who had been issued a Final Administrative Removal Order (FARO) could challenge that process in order to seek asylum. In ***Delgado Arteaga***, the Court held that the applicant had no standing to raise the challenge because asylum is discretionary in nature, and the Court relied on that logic.

NIJC filed a petition for ***en banc*** rehearing in that case on July 24, 2017, and the Court has called for a response. In that petition, NIJC argued that the conclusions in ***Delgado-Arteaga*** and ***Cirilo Garcia Garcia*** are a dramatic departure from precedent. They mean that any noncitizen seeking discretionary relief lacks standing to raise questions of statutory interpretation, in conflict with statutory text as well as Circuit and Supreme Court precedent.

Other Pending Matters

In addition, the issue was argued and is currently pending in three other circuits:

- ***R-S-C v. Sessions***, No. 15-9572 (10th Cir. argued Sept. 19, 2016)
- ***Calla Mejia v. Sessions***, No. 16-1280 (4th Cir. argued Mar. 23, 2017)
- ***Salvador Flores v. Sessions***, No. 17-70533 (9th Cir.) The opening brief in this case is due August 2017. There will be an attempt to distinguish the case from ***Perez Guzman***.

Expected Developments over the Next Six Months

Despite the lack of a true Circuit split (though there is now a clear divergence in reasoning), it is clear to NIJC that, the more courts consider this issue, the less support appears for the government's position. In early cases, courts adopted the government's arguments relying on the plain meaning of the reinstatement bar, but did so without addressing the statutory interplay. Since then, no court has resolved the matter at ***Chevron*** step one. The Ninth, Third, and First Circuits found the statutes ambiguous and deferred to the Agency, the First Circuit doing so over a strong dissent. And the Seventh Circuit, rather than addressing the issue, preferred to avoid it by resolving the case in a plainly incorrect manner.

NIJC is committed to seeking ***certiorari*** in these cases and maintains some optimism that the Seventh Circuit will rehear ***Cirilo Garcia Garcia*** given the dramatic error in its decision. NIJC has therefore requested (in a separate document) continued support from the Barbara McDowell and Gerald S. Hartman Foundation to continue with this work.

Contact Information

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