

Right to Asylum

OVERVIEW

For the past five years, the National Immigrant Justice Center (NIJC) has been litigating cases in the United States Courts of Appeals relating to 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 is that there is 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 been urging courts to construe asylum as a form of “protection,” because the Government agrees that protection is not barred by the reinstatement statute. NIJC’s interpretation avoids a conflict between these two statutory provisions, 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. NIJC argues that courts should refuse to defer to the rules set forth by the Department of Homeland Security (DHS) (the agency) because, in order for a rule created by an agency to receive deference, there must be evidence that the agency understood what it was doing and not that it was just choosing one option out of a hat. Here, there is no evidence that DHS was aware that the regulations it created would limit access to asylum, thus the courts should not defer to the rules that the agency has crafted.

DEVELOPMENTS IN THE PAST SIX MONTHS

There have been a number of developments on this subject over the past six months:

Peres; Guzman v. Lynch, 835 F. 3d 1066 (9th Cir. 2016)

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, including one from international law scholars who addressed international treaty obligations to refugees. In December 2016, the Court ordered the Government to respond, specifically to the international law arguments. That petition for rehearing is still pending.

Garcia Garcia v. Sessions, No. 16-3234 (7th Cir.)

Briefing on this issue is now complete in the Seventh Circuit, with oral argument set for April 20, 2017. NIJC is arguing the case, and the American Immigration Lawyers Association (AILA) submitted an amicus brief in support.

Martinez; Cazun v. Att’y Gen., No. 15-3374 (3d Cir. argued Sept. 22, 2016)

NIJC argued this case in September 2016; no decision has been forthcoming.

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)

- *Garcia v. Sessions*, No. 15-2571 (1st Cir. argued Nov. 8, 2016)
- *Calla Mejia v. Sessions*, No. 16-1280 (4th Cir. argued Mar. 23, 2017)

NIJC was involved as amicus curiae in *Calla Mejia* and *R.S.C.*, and NIJC's shared briefing on this topic formed the basis for Petitioner's arguments in *Garcia*.

EXPECTED DEVELOPMENTS OVER THE NEXT SIX MONTHS

Given that this issue is currently pending or decided in nearly every circuit, the next six months are likely to be very significant. We expect decisions from one to five different courts of appeals. We also expect a decision on the petition for rehearing in the Ninth Circuit, which received the Government's response at the end of January 2017.

Regardless of the outcomes of these cases in various circuits, NIJC anticipates that *petitions for certiorari* to the United States Supreme Court are nearly inevitable. There is already a split in the reasoning on the issue between the circuits, and if the Government loses in any circuit they are likely to seek review by the court. In fact, it is possible that in the next six months—depending on timing—the Supreme Court could vote whether to hear this issue.

While making careful strategic decisions on next steps, NIJC will be in communication with individuals in the remaining circuits where it might be advantageous to attempt further litigation. In particular, the case that is currently pending in the Fourth Circuit could be resolved on alternative grounds and so we might need to identify an alternate case to pursue there. There is also a case pending at the Ninth Circuit that argues for a distinction between the facts of that case and *Perez Guzman*. Finally, litigation on this issue might be advantageous in the Second Circuit because that Court has issued a decision that can be construed as dispositive on this issue but where the issue was not briefed or considered.

Finally, in June 2017, NIJC staff will present on this issue at the national conference of the American Immigration Lawyers Association to update practitioners about what has happened, and to address next steps.

CONTACT INFORMATION FOR NIJC'S LITIGATION TEAM

Individuals who have questions on this effort should contact Keren Zwick or Chuck Roth from NIJC's litigation team:

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