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IN THIS ISSUE

The United States Supreme Court recently issued opinions regarding the Convention Against Torture and DACA, and there is a Circuit Court split on the Trump Administration's rule regarding the public charge provision of the Immigration and Nationality Act. This article addresses those cases.

Immigration Law Update

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Supreme Court Permits Circuit Court Review in CAT Deportation Cases

Nidal Khalid Nasrallah is a native and citizen of Lebanon. Nasrallah v. Barr, 140 S.Ct. 1683, 1688 (2020). In 2006, Nasrallah came to the United States on a tourist visa. Id. He became a lawful permanent resident in 2007. Id. In 2013, Nasrallah pled guilty to two counts of receiving stolen property. Id.

Based on Nasrallah's conviction, the Government initiated deportation proceedings under the Immigration and Nationality Act (INA).[1] Id. In those proceedings, Nasrallah applied for relief under the international Convention Against Torture (CAT) to prevent his removal to Lebanon.[2] Id. Nasrallah alleged that he was a member of the Druze religion, that he had been tortured by Hezbollah before he came to the United States, and that he would be tortured again if returned to Lebanon. Id.

Noncitizens who commit certain crimes are removable from the United States. Id at 1687. During removal proceedings, a noncitizen may raise claims under CAT. Id. If the noncitizen demonstrates that he likely would be tortured if removed to the designated country of removal, then he is entitled to CAT relief and may not be removed to that that country (but may be removed to other countries). Id.

"If the immigration judge orders removal and denies CAT relief, the noncitizen may appeal to the Board of Immigration Appeals. If the Board of Immigration Appeals orders removal and denies CAT relief, the noncitizen may obtain judicial review in a federal court of appeals of both the final order of removal and the CAT order." Id.

In the court of appeals, for cases involving noncitizens who have committed any crime specified in 8 U.S.C. § 1252(a)(2)(C), federal law limits the scope of judicial review. Those noncitizens may obtain judicial review of constitutional and legal challenges to the final order of removal, but not of factual challenges to the final order of removal. Id. at 1687-88.

The Immigration Judge determined that Nasrallah was removable, but also found he had previously suffered torture at the hands of Hezbollah, and likely would be tortured again if returned to Lebanon. Id. at 1688. The Immigration Judge ordered Nasrallah removed, but also granted CAT relief and thus blocked Nasrallah's removal to Lebanon. Id.

On appeal, the Board of Immigration Appeals disagreed that Nasrallah likely would be tortured in Lebanon. Id. The Board vacated the order granting CAT relief and ordered Nasrallah removed to Lebanon. Id.

[1] See 8 U.S.C. § 1227(a)(2)(A)(i).

[2] See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100–20, p. 20, 1465 U. N. T. S. 114.

Nasrallah filed a petition for review in the U. S. Court of Appeals for the Eleventh Circuit, claiming that the Board erred in finding that he would not likely be tortured in Lebanon. Id. at 1688-89. Nasrallah raised factual challenges to the Board's CAT order. Id. at 1689. The Eleventh Circuit declined to review Nasrallah's factual challenges, finding that noncitizens convicted of § 1252(a)(2)(C) crimes may not obtain judicial review of factual challenges to a "final order of removal." Id.

On appeal to the U.S. Supreme Court, Nasrallah claimed the Eleventh Circuit should have reviewed his factual challenges to the CAT order because the statute bars review only of factual challenges to a "final order of removal." Id. According to Nasrallah, a CAT order is not a "final order of removal" and does not affect the validity of a final order of removal. Id. Therefore, according to Nasrallah, the statute by its terms does not bar judicial review of factual challenges to a CAT order, although he conceded the review should be deferential. Id. On the other hand, the Government claimed that judicial review of a CAT order is analogous to judicial review of a final order of removal, so the court of appeals may review the noncitizen's constitutional and legal challenges to a CAT order, but not the noncitizen's factual challenges to the CAT order. Id. at 1688.

The narrow question before the Supreme Court was this: "in a case involving a noncitizen who committed a crime specified in § 1252(a)(2)(C), [should] the court of appeals … review the noncitizen's factual challenges to the CAT order (i) not at all or (ii) deferentially?" Id. The Supreme Court held that the court of appeals should review factual challenges to the CAT deferentially. Id.

In so holding, the Supreme Court found that although the statute precludes judicial review of factual challenges to final orders of removal, but a CAT order is not a final order of removal because it is not an order concluding that the noncitizen is deportable, nor does it order deportation. Id. at. 1691. The Supreme Court also found that CAT orders do not merge into final orders of removal because a "ruling on a CAT claim does not affect the validity of a final order of removal and therefore does not merge into the final order of removal. Id.

Supreme Court Finds Trump Administration's Decision to Terminate DACA Was Arbitrary and Capricious

"In the summer of 2012, the Department of Homeland Security (DHS) announced an immigration program known as Deferred Action for Childhood Arrivals, or DACA. That program allows certain [noncitizens] who entered the United States as children to apply for a two-year forbearance of removal. Those granted such relief are also eligible for work authorization and various federal benefits." Department of Homeland Security v. Regents of the Univ. of California, 140 S.Ct. 1891, 1901 (2020).

In November 2014, "DHS issued a memorandum announcing that it would expand DACA eligibility by removing the age

cap, shifting the date-of-entry requirement from 2007 to 2010, and extending the deferred action and work authorization period to three years. In the same memorandum, DHS created a new, related program known as Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA. That program would have authorized deferred action for up to 4.3 million parents whose children were U.S. citizens or lawful permanent residents." Id. at 1902.

Before the DAPA Memorandum was implemented, 26 States filed suit in the Southern District of Texas. Id. The District Court entered a nationwide preliminary injunction barring implementation of both DAPA and the DACA expansion. Id. The Supreme Court affirmed the Fifth Circuit's judgment by an equally divided vote, which meant that no opinion was issued. Id. at 1903.

In June 2017, "following a change in Presidential administrations, DHS rescinded the DAPA Memorandum. In explaining that decision, DHS cited the preliminary injunction and ongoing litigation in Texas, the fact that DAPA had never taken effect, and the new administration's immigration enforcement priorities." Id.

In September 2017, Attorney General Jeff Sessions sent a letter to Acting Secretary of Homeland Security Elaine C. Duke, advising that DHS should also rescind DACA. Id. "The next day, Duke acted on the Attorney General's advice. In her decision memorandum, Duke summarized the history of the DACA and DAPA programs, the Fifth Circuit opinion and ensuing affirmance, and the contents of the Attorney General's letter." Id.

Multiple groups of plaintiffs ranging from individual DACA recipients and States to the Regents of the University of California and the National Association for the Advancement of Colored People challenged her decision in the U.S. District Courts for the Northern District of California, the Eastern District of New York, and the District of Columbia. Id. The plaintiffs claimed that the rescission was arbitrary and capricious in violation of the Administrative Procedure Act (APA) and that it infringed the equal protection guarantee of the Fifth Amendment's Due Process Clause. Id.

All three District Courts ruled for the plaintiffs. Id. One of the District Courts stayed its order for 90 days to permit DHS to "reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority." Id. at 1904.

"Duke's successor, Secretary Kirstjen M. Nielsen, responded via memorandum. She explained that, '[h]aving considered the Duke memorandum,' she 'decline[d] to disturb' the rescission. Secretary Nielsen went on to articulate her 'understanding' of Duke's memorandum, identifying three reasons why, in Nielsen's estimation, 'the decision to rescind the DACA policy was, and remains, sound' …. Secretary Nielsen acknowledged the 'asserted reliance

interests' in DACA's continuation but concluded that they did not 'outweigh the questionable legality of the DACA policy and the other reasons' for the rescission discussed in her memorandum." Id. (internal citations omitted).

After the Ninth Circuit affirmed the nationwide injunction in Regents, the Supreme Court granted the Government's petitions for certiorari and consolidated the cases for argument. Id. at 1905. The dispute before the Supreme Court was "not whether DHS may rescind DACA. All parties agree that it may. The dispute is instead primarily about the procedure the agency followed in doing so." Id.

The APA requires agencies to engage in reasoned decisionmaking, and directs that agency actions be set aside if they are arbitrary or capricious. Id. Judicial review of agency action is limited to "the grounds that the agency invoked when it took the action." Id. at 1907. If those grounds are inadequate, a court may remand for the agency to either offer "a fuller explanation of the agency's reasoning at the time of the agency action," or the agency can take new agency action. Id. at 1907-08 (citations omitted).

DHS elected to rest on the Duke Memorandum while elaborating on its prior reasoning. Id. at 1908. DHS was therefore limited to the agency's original reasons, but DHS's explanation bore little relationship to its prior reasoning, and impermissibly relied on three subsequent "separate and independently sufficient reasons" for the rescission. Id. In doing so, DHS violated the basic rule that an agency must defend its actions based on the reasons it gave when it acted. Id. at 1909-10.

The Supreme Court also found that DHS's decision to rescind DACA was arbitrary and capricious because Acting Secretary Duke should have addressed the options of retaining forbearance or accommodating reliance interests, which the Government admitted existed, but did not do so. Id. at 1910-15.

Circuit Split Regarding "Public Charge" Rule

The INA provides that a noncitizen may be denied admission to the United States if he "is likely at any time to become a public charge." Cook County, Illinois v. Wolf, 962 F.3d 208, 215 (7th Cir. 2020), citing 8 U.S.C. § 1182(a)(4)(A). The statute does not define the term "public charge." Id. Instead, the INA calls for a "totality-of-the-circumstances" analysis, which identifies several factors to be considered, including age, health, family status, assets, resources, financial status, and education and skills. Id. The INA does not specify how officials should weigh the listed factors and any others that appear to be relevant. Id.

On August 14, 2019, DHS issued a rule interpreting this provision (Rule). "In it, DHS defines as a 'public charge' any noncitizen (with some exceptions) who receives certain cash and noncash government benefits for more than '12 months' in the aggregate in a 36-month period. It applies to all legally admitted immigrants … The Rule is not limited to federal benefits; instead, it sweeps

in any federal, state, local, or tribal cash assistance for income maintenance; Supplemental Nutrition Assistance Program (SNAP) benefits; most forms of Medicaid; Section 8 Housing Assistance under the Housing Choice Voucher Program; Section 8 Project-Based Rental Assistance; and certain other forms of subsidized housing. Each benefit received, no matter how small, is counted separately and stacked, such that receipt of multiple benefits in one month is considered receipt of multiple months' worth of benefits. For example, an immigrant who receives any amount of SNAP benefits, Medicaid, and housing assistance, and nothing else for four months in a three-year period, will be considered a public charge and likely denied adjustment of status. The stacking rule means that a person can use up her '12 months' of benefits in a far shorter time than a quick reading of the Rule would indicate." Id.

Taking different paths, the Second Circuit[3] and the Seventh Circuit[4] found the Rule is arbitrary and capricious and should be enjoined. For example, the Seventh Circuit found that the "Rule has numerous unexplained serious flaws: DHS did not adequately consider the reliance interests of state and local governments; did not acknowledge or address the significant, predictable collateral consequences of the Rule; incorporated into the term 'public charge' an understanding of self-sufficiency that has no basis in the statute it supposedly interprets; and failed to address critical issues such as the relevance of the five-year waiting period for immigrant eligibility for most federal benefits." Id. at 233.

The injunction in the Seventh Circuit case is geographically limited to the State of Illinois. Wolf, 962 F.3d at 217. The Second Circuit narrowed the geographic scope of the injunction in that case from a nationwide injunction to the States of New York, Connecticut, and Vermont. New York, 2020 WL 4457951 at *32.

On the other hand the Fourth Circuit[5] and the Ninth Circuit[6] found the Rule is not arbitrary and capricious. For example, the Fourth Circuit found that "[p]roperly evaluated, the … Rule is unquestionably lawful. Congress has delegated to the executive the power to implement a purposefully undefined provision of law in an area where the executive possesses inherent constitutional powers and unique structural competencies. To whatever extent the federal courts are empowered to review how the executive discharges this duty, the separation of powers demands careful deference from the judiciary and intervention, if at all, only in truly exceptional situations. This is not one of them." Casa de Maryland, Inc. v. Donald J. Trump, 2020 WL 4664820 at *19 (4th Cir. Aug. 5, 2020).

[3] *New York v. United States Dept. of Homeland Security*, 2020 WL 4457951 (2nd Cir., Aug. 4, 2020).
[4] *Cook County, Illinois v. Wolf*, 962 F.2d 208 (7th Cir. 2020).
[5] *Casa de Maryland, Inc. v. Donald J. Trump*, 2020 WL 4664820 at *19 (4th Cir., Aug. 5, 2020).
[6] *City & Cty. Of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019).

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