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Ninth Circuit Protects Refugees with Assurances of Sponsorship

By Peter Margulies Friday, September 8, 2017, 4:10 PM

The Ninth Circuit held in a per curiam order on Thursday (summarized here) that, pending a definitive adjudication on the merits, refugees abroad with sponsorship assurances from U.S. resettlement agencies were *not* covered by President Trump's revised executive order (EO) on refugees and could enter the U.S. in the normal course of refugee resettlement. That's the right result, though it pushes the boundaries of the Supreme Court's June stay order and the Court's July clarification, which I wrote about at the time. It also raises some troubling questions about judicial review of Trump administration actions.

Under the Court's decision in *Nken v. Holder*, there are four elements that a party (here, the government) must show to receive a stay:

1. A "strong showing" of likelihood of success on the merits;
2. Irreparable injury;
3. The absence of harm to other interested parties; and
4. Consistency with the public interest.

Remember that before the July order, the government was seeking a stay from a district court injunction that narrowed the revised EO. That injunction applied the Supreme Court's holding in its June stay order: non-citizens abroad would not be covered by the EO if they could show a "bona fide relationship" with a U.S. person or entity. Interpreting the Supreme Court's "bona fide relationship" test, the district court held that the test was satisfied by:

1. A relationship with a U.S. relative, including not just a spouse, parent, or child, but also a grandparent, grandchild, fiancé, sibling, in-law, aunt/uncle, niece/nephew, and cousin; or
2. Sponsorship by a U.S. refugee agency.

In its preliminary decision in July, the Supreme Court let the first component stand (as did the Ninth Circuit on Thursday). But it ruled, pending a full review of the stay in the Ninth Circuit, that the second component—refugee agency sponsorship—did *not* meet the "bona fide relationship" test. Departing from the Supreme Court's ruling, the Ninth Circuit held on Thursday that refugee agency sponsorship does qualify as a bona fide relationship.

Thursday's per curiam found that, in light of the vulnerabilities of refugees and the need for continuity in refugee resettlement, the government did not meet elements (3) (harm to other interested parties) and (4) (the public interest) of the stay test. Sponsorship assurance by an experienced refugee agency occurs near the end of an elaborate framework of refugee processing that includes reviews by both United Nations and the U.S. government, including DHS. As the Ninth Circuit explained, the assurances that U.S. resettlement agencies provide entail the careful marshaling of resources, including the time and money required to stand up a network of U.S. caregivers who will ease the refugees' transition in the United States. A pause in refugee admissions would disrupt that painstaking process and fray connections that agencies labor to establish. Moreover, the U.S. *as a country* benefits from its well-earned reputation as a haven for refugees. A pause would injure that reputation, harming the public interest. Viewed in this light, the Ninth Circuit was right to exempt sponsored refugees from the revised EO, pending the Supreme Court's review of the EO's merits (the Court is set to hear argument on October 10).

However, on the merits, as I explain in a recent piece, the revised EO narrowly passes muster under both the Immigration and Nationality Act (INA) and the Constitution. The Supreme Court's June per curiam stay order suggested that equities tend to be less compelling for a noncitizen abroad who "lacks any connection to this country." That observation dovetails with the Court's holding in *United States v. Verdugo-Urquidez* that constitutional safeguards are few and far between for this group (at least if they're not detained by the U.S. at Guantanamo and are therefore entitled to habeas corpus per the Court's decision in *Boumediene v. Bush*).

Moreover, the President also has delegated power under 8 U.S.C. § 1182(f) to suspend the entry of noncitizens on a finding that such entry would be "detrimental to the interests of the United States." The revised EO provided for a 120-day pause in the admission of refugees and a 90-day pause in admission of nationals of six countries (Iran, Libya, Somalia, Sudan, Syria, and Yemen) that were either sites of tumultuous armed conflicts or state sponsors of terrorism. That pause would allow for a "worldwide review" to ensure the accuracy of U.S. screening processes.

As suggested by a Supreme Court case decided in June, *Maslenjak v. United States*, concerns about the accuracy of screening processes are not inherently illegitimate, no matter who occupies the White House. In *Maslenjak*, the Court held that the government had to show that a false statement made in the course of a noncitizen's naturalization was "material" to obtaining citizenship—i.e., that the false statement made a difference in the naturalization decision. In the course of holding that materiality was required, the Court discussed the false statement in the case, made by a refugee who had claimed that her husband had been subject to persecution in Bosnia. Her husband had in fact served in a Serbian unit responsible for unspeakable atrocities. While Justice Kagan's opinion did not definitively comment on the legal status of this false statement, the opinion left the strong impression that the statement was both egregiously false and material. A recent study by the Government Accountability Office (GAO) demonstrated that such fraud is sadly not an isolated occurrence. As a longtime immigration lawyer, I'm well aware of the problem that the GAO report documented: asylum and refugee processing hinges on the statements of applicants, and those applicants are human beings who sometimes surrender to the temptation to deceive others. As the *Maslenjak* case demonstrates, asylum adjudicators do not always spot such attempts at deception. Conflating perpetrators and victims of persecution is, in the words of 8 U.S.C. § 1182(f), "detrimental to the interests of the United States."

A brief pause tailored to facilitate a worldwide review of refugee and visa screening is consistent with the INA and the Constitution. While I don't favor such a pause as a matter of policy, judicial review does not turn on policy preferences. The Supreme Court's June per curiam stay order noted that "preserving national security is an urgent objective of the highest order," and that executive efforts to meet that "compelling need" were entitled to a measure of judicial deference. As Jack explained in an insightful post, while President Trump's excesses have created marked stresses in American governance, responding with an unduly hasty retreat from time-honored principles of deference can compound the problem. (See Josh Blackman's post here.) Viewed in this light, while I support the Ninth Circuit's equitable compassion for refugees, the overall direction of the Ninth Circuit's decision may augur a wrong turn in judicial review. Perhaps the Supreme Court will restore the balance.

Topics: Travel Ban, Immigration

Tags: Ninth Circuit, Hawaii v. Trump

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