

# **AILA NE Litigation Committee Update**

## **April 24, 2020 through November 30, 2020**

### **U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT**

*DE PENA-PANIAGUA V. BARR*, 957 F.3d 88 (1st Cir. Apr. 24, 2020): The First Circuit found that there is no categorical rule barring formulation of a particular social group as women unable to leave a domestic relationship, disagreeing with that aspect of the Attorney General's decision in *Matter of A-B*, 27 I&N Dec. 316 (A.G. 2018).

*GÓMEZ-MEDINA V. BARR*, 975 F.3d 27 (1st Cir. September 15, 2020): The First Circuit denied a petition for review of a gang-based asylum case, finding that the petitioner failed to show that the Honduran government was unable or unwilling to protect him where he testified that the police's arrival at the scene of an attack prevented his murder.

### **OTHER U.S. COURTS OF APPEAL**

*VELASCO LOPEZ V. DECKER*, No. 19-2284 (2d Cir. Oct. 27, 2020): Citing a petitioner's 15-month incarceration and due process principles, the Second Circuit upheld a habeas grant ordering a new bond hearing with the burden placed on DHS to prove danger and flight risk by clear and convincing evidence.

*VELASQUEZ V. BARR*, No. 19-2130 (8th Cir. Oct. 27, 2020): The Eighth Circuit joined the Sixth and the Ninth circuits in holding that a grant of TPS amounts to inspection and admission for purposes of establishing eligibility for adjustment of status. *Practice note*: We do not yet have a precedent decision on this question in the First Circuit.

### **U.S. DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS**

*DIAS V. SOUSA*, Civil No. 20-11513-LTS (D. Mass. Oct. 13, 2020): Where a Cape Verdean habeas petitioner had been detained for over two years (including 11 months after a final removal order), ICE was unable to show any potential flight dates, and no travel documents had issued, the court found that the petitioner had provided "good reason to believe that" his removal was not "reasonably foreseeable" and that he merited release under *Zadvydas v. Davis*, 533 U.S. 678 (2001).

## **BOARD OF IMMIGRATION APPEALS AND ATTORNEY GENERAL:**

### **Asylum/withholding**

*NEGUSIE*, 28 I&N Dec. 120 (A.G. 2020): AG Barr determined that coercion or duress does not excuse cooperation with an oppressive government regime for purposes of the persecutor bar to asylum; once there is a suggestion the bar applies, the applicant must show by a preponderance of the evidence that it does not.

*A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020): BIA must conduct an independent, de novo analysis of each element of an asylum claim, including review of the IJ's decision, the parties' stipulations, and any elements omitted; PSGs comprising "many millions" of people should be scrutinized for nexus; and the PSG cannot be "incidental, tangential, or subordinate to" the persecutor's reasons for persecution.

*O-F-A-S-*, 28 I&N Dec. 35 (A.G. 2020): Torture does not count as "under color of law" for CAT relief unless it is inflicted or approved by a person acting in an official capacity, even if the torturer was wearing a police uniform at the time.

*M-D-C-V-*, 28 I&N Dec. 18 (BIA 2020): Under section 235(b)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1225(b)(2)(C) (2018), an asylum seeker who is arriving on land from a contiguous foreign territory may be returned to that country pursuant to the Migrant Protection Protocols, regardless of whether the asylum seeker arrives at or between a designated port of entry.

*F-S-N-*, 28 I&N Dec. 1 (BIA 2020): To prevail on a motion to reopen alleging changed country conditions where the persecution claim was previously denied based on an adverse credibility finding in the underlying proceedings, the respondent must either overcome the prior determination or show that the new claim is independent of the evidence originally found not to be credible.

*K-S-E-*, 27 I&N Dec. 818 (BIA 2020): A "viable and available offer" to apply for permanent residence in a third country satisfies the firm resettlement bar to asylum, even where the asylum seeker does not want to live in that country.

### **Crim-imm/Bond**

*VOSS*, 28 I&N Dec. 107 (BIA 2020): A criminal conviction which was charged as a ground of removability or was known to the Immigration Judge at the time that cancellation of removal was granted under section 240A(a) cannot serve as the sole factual predicate for a charge of removability in subsequent removal proceedings.

*REYES*, 28 I&N Dec. 52 (A.G. 2020): If all of the means of committing a crime, based on the elements of the statute of conviction, amount to one or more of the

offenses listed in section 101(a)(43), then a noncitizen convicted of that crime has necessarily been convicted of an aggravated felony for purposes of the INA.

*R-A-V-P-*, 27 I&N Dec. 803 (BIA 2020): Upholding the IJ's determination that the respondent was a flight risk and denied his request for a custody redetermination where, although he had a pending application for asylum, he had no family, employment, or community ties and no probable path to obtain lawful status so as to warrant his release on bond.

*W-E-R-B-*, 27 I&N Dec. 795 (BIA 2020): An Interpol Red Notice may constitute reliable evidence that the serious nonpolitical crime bar for asylum and withholding of removal applies to a noncitizen.

### **Marriage fraud**

*PAK*, 28 I&N Dec. 113 (BIA 2020): Where there is substantial and probative evidence that a beneficiary's prior marriage was fraudulent, a subsequent visa petition filed on the beneficiary's behalf can be denied pursuant to section 204(c), even if the first visa petition was denied because of insufficient evidence of a bona fide marital relationship.

*R. I. ORTEGA*, 28 I&N Dec. 9 (BIA 2020): A noncitizen who has conspired to enter into a marriage for the purpose of evading the immigration laws by seeking to secure a K-1 fiancé(e) nonimmigrant visa is subject to the bar under section 204(c)(2). Conspiracy requires an agreement and an overt act in furtherance of that agreement.

### **TPS**

*PADILLA RODRIGUEZ*, 28 I&N Dec. 164 (BIA 2020): Removal proceedings should not be terminated where the TPS of a noncitizen who was previously present in the United States without being admitted or paroled has been terminated, as the noncitizen remains inadmissible under INA 212(a)(6)(A)(i). Also, a noncitizen whose TPS continues to be valid is considered to be "admitted" for purposes of establishing eligibility for adjustment of status only within the jurisdictions of the United States Courts of Appeals for the Sixth, Eighth, and Ninth Circuits.

### **Other important cases**

*J-G-T-*, 28 I&N Dec. 97 (BIA 2020): IJs may discount expert testimony on relevance and reliability grounds, and accord it less weight based on how probative and persuasive they deem it to be.

*R-C-R-*, 28 I&N Dec. 74 (BIA 2020): An application may be deemed waived when not filed by a deadline set by the IJ, unless good cause is shown; video hearings are sufficient for due process purposes.

*NIVELLO CARDENAS*, 28 I&N Dec. 68 (BIA 2020): The NTA provides adequate notice of the respondent's duty to file an address change with the Court, and reopening based on lack of notice is not proper even if the Court sends hearing notices to a misspelled town. Also, waiting over 18 years to update the address and file a motion to reopen "indicates a lack of due diligence" for purposes of equitable tolling.

*HERRERA-VASQUEZ*, 27 I&N Dec. 825 (BIA 2020): The DHS does not need to complete the classification boxes on the NTA, and this lack of notice of allegations is not a basis to terminate the proceedings of a person who has been returned to Mexico under the Migrant Protection Protocols.

*J-J-G-*, 27 I&N Dec. 808 (BIA 2020): For purposes of cancellation of removal where hardship hinges on a medical condition, the applicant must prove that "adequate medical care for the claimed condition is not reasonably available" in the country of removal.

## **CASES TO WATCH**

### **U.S. Court of Appeals for the First Circuit**

- *REID v. DONELAN* (No. 19-1787) – from D. Mass.
  - Issue: Whether prolonged detention of criminal noncitizens under 8 U.S.C. § 1226(e) beyond six months without any individualized bond hearing is unconstitutional.
  - Type: Class Action.
  - Stage: Oral Argument on December 9, 2020.
  - Counsel: Yale Law School, Western New England Univ. School of Law, ACLU-IRP, ACLU-MA, ACLU-SoCal, and Wolf Greenfield & Sacks PC.
  
- *BRITO v. BARR* (No. 20-1119); *DOE v. TOMPKINS* (No. 19-1368); *HERNANDEZ-LARA v. ICE* (No. 19-2019) – from D. Mass. and D.N.H.
  - Issue: Whether imposing a burden of proof at a bond hearing under 8 U.S.C. § 1226(a) on the petitioner is in violation of the Due Process Clause of the Constitution.
  - Type: Class action/Individual Habeas.
  - Stage: Consolidated Oral Arguments on December 9, 2020.
  - Counsel: ACLU-MA, ACLU-NH, ACLU-IRP, and Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, PC., Boston College Immigration Clinic, ACLU-NH and Sheehan Phinney Bass & Green.

- *RIVERA-MEDRANO V. DHS* (No. 20-1573) – from D.N.H.
  - Issue: Whether a noncitizen who is detained under 8 U.S.C. § 1231 is entitled by statute and the Due Process Clause, after six months of detention (or alternatively after detention became unreasonably long), to a bond hearing at which the government must prove to an immigration judge that the noncitizen is a flight risk or a danger to the community.
  - Type: Individual Habeas.
  - Stage: Pending.
  - Counsel: ACLU-NH.
  
- *AGUASVIVAS v. POMPEO* (No. 19-1937) – from D.R.I.
  - Issue: Whether the secretary of state may proceed to consider the petitioner’s CAT claim and render a decision on his extradition to the Dominican Republic, despite the BIA’s deferral of CAT relief because he would be more likely than not tortured there.
  - Type: Individual Habeas.
  - Stage: Oral argument was held. Waiting for the decision.
  - Counsel: Federal Public Defender Office and ACLU-IRP/ACLU-RI (amicus).
  
- *BOLLAT VASQUEZ v. WOLF*, 460 F. Supp. 3d 99 (D. Mass. 2020) and 1st Cir. No. 20-1554 – From D. Mass
  - Issue: Judge Talwani ordered DHS to rescind their order returning plaintiffs to Mexico under MPP, DHS appealed decision to First Circuit.
  - NOTE: This appeal is being held in abeyance pending decision by the U.S. Supreme Court in *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020), *cert. granted sub nom. Wolf, Sec. of Homeland, et al. v. Innovation Law Lab, et al.*, No. 19-1212 (Oct. 19, 2020).
  - Counsel: ACLU-MA, Fish and Richardson.

**U.S. District Court for the District of Massachusetts**

- *CALDERON JIMENEZ v. CRONEN* (No. 1:18-cv-10225-MLW)
  - Issue: Whether the government can lawfully remove individuals subject to their final orders of removal from the United States while these individuals’ provisional waivers are pending.
  - Type: Class Action.
  - Stage: Discovery.
  - Counsel: ACLU-MA, WilmerHale, and Kathleen M. Gillespie.

- *LUNN v. SMITH* (No. 1:17-cv-10938-IT)
  - Issue: Whether ICE may detain for a purported violation of conditions of release where there is no showing of a likelihood of removal in the reasonably foreseeable future.
  - Type: Habeas
  - Stage: Motion for Summary Judgment pending
  - Counsel: ACLU-MA, Laura Murray-Tjan, Ropes & Gray, and Kirkland & Ellis.
  
- *SAVINO v. HODGSON* (No. 1:20-cv-10617-WGY)
  - Issue: Whether the conditions of the Bristol County House of Corrections entitle ICE detainees to be considered for conditional release in light of the COVID-19 disease.
  - Type: Class Action.
  - Stage: Pending.
  - Counsel: Lawyers Committee for Civil Rights and Economic Justice, Yale Law School Jerome N. Frank Legal Services Organization, Wilmer Hale LLP.
  
- *AUGUSTO v. MONIZ* (No. 1:20-cv-10685-ADB)
  - Issue: Whether the conditions of the Plymouth Correctional Facility entitle ICE detainees to be considered for conditional release in light of COVID-19.
  - Type: Class Action.
  - Stage: Pending.
  - Counsel: ACLU-National/MA, Rubin Pomerleau PC, Demissie & Church.

**U.S. District Court for the District of New Hampshire**

- *GOMES v. ICE* (No. 1:20-cv-00453-LM)
  - Issue: Whether the conditions of the Strafford County DOC entitle ICE detainees to be considered for conditional release in light of COVID-19.
  - Type: Class Action.
  - Stage: Discovery (medically vulnerable detainees can request for bail hearings).
  - Counsel: ACLU-NH/National, Nixon Peabody LLP, Whatley Kallas LLP, Shaheen & Gordon PA, Newman Law Office PLLC, and Hinckley Allen & Snyder LLP.
  
- *ACLU-NH v. CBP* (No. 1:19-cv-00977-LM)
  - Issue: FOIA lawsuit on CBP roving patrol (in private uniforms and unmarked vehicles) in New Hampshire.
  - Type: FOIA.
  - Stage: Pending.

- Counsel: ACLU-NH.
- *DREWNIAK v. CBP* (No. 1:20-cv-00852-LM)
  - Issue: Bivens Claim against CBP officers and legality of checkpoint in New Hampshire.
  - Type: Individual.
  - Stage: Pending.
  - Counsel: ACLU-NH/ME/VT and McLane Middleton.

### **U.S. District Court for the District of Rhode Island**

- *YANES v. ICE* (No. 1:20-cv-00216-MSM-PAS)
  - Issue: Whether the conditions of the Wyatt Detention Center entitle ICE detainees to be considered for conditional release in light of COVID-19.
  - Type: Class Action.
  - Stage: Bail hearings.
  - Counsel: ACLU-National/RI, Roger Williams University School of Law, Morgan, Lewis & Bockius LLP.

### **U.S. District Court for the District of Vermont**

- *MIGRANT JUSTICE v. DHS* (No. 2:17-cv-00197-cr)
  - Issue: FOIA lawsuit on CBP's activities on the activists of Migrant Justice.
  - Type: FOIA.
  - Stage: Pending.
  - Counsel: ACLU-VT, National Immigration Law Center, and National Center for Law and Economic Justice.
- *MIGRANT JUSTICE v. NIELSEN* (No. 5:18-cv-00192-gwc)
  - Issue: Whether the government violated the Migrant Justice members' First Amendment rights when it targeted, surveilled, infiltrated, and harassed them because of their involvement in actions against ICE.
  - Type: First Amendment – Injunctive Relief/Federal Tort Claims Act.
  - Stage: Settled
    - <https://www.acluvt.org/en/press-releases/migrant-justice-settles-federal-lawsuit-ice-retaliation-trump-administration-agrees>
  - Counsel: ACLU-VT, National Center for Law and Economic Justice, Center for Constitutional Rights, National Immigration Law Center, and Gibson, Dunn & Crutcher.

## U.S. District Court for the District of Maine

- *ACLU-ME/NH/VT v. DHS* (No. 2:18-cv-00182-JDL)
  - Issue: FOIA lawsuit on CBP checkpoints.
  - Type: FOIA.
  - Stage: Pending.
  - Counsel: ACLU-ME/NH/VT.
- *CANELA RODRIGUEZ v. DHS* (No. 2:20-cv-00393-LEW)
  - Issue: Whether ICE's plan to transfer the plaintiff to southern states for detention pending removal proceedings is unconstitutional in light of COVID-19 and conditions of the facilities in the southern states.
  - Type: Individual.
  - Stage: Pending.
  - Counsel: ACLU-ME/MA, Pierce Atwood LLP, University of Maine School of Law Cumberland Legal Aid Clinic.

## Other Circuits and Districts:

- *CASA DE MARYLAND, INC. v. WOLF*, No. 8:20-cv-02118-PX, 2020 WL 5500165 (D. Md. Sept. 11, 2020)
  - Issue: Asylum EAD timeline elimination and other rules
  - Type: Injunctive relief.
  - Stage: On appeal.
  - Counsel: IRAP, ASAP, Gibson Dunn & Crutcher LLP.
  - NOTE: A September 11, 2020 preliminary injunction provides injunctive relief to members of two organizations, CASA de Maryland (CASA) and the Asylum Seeker Advocacy Project (ASAP), in the application of the Removal of 30-day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications Rule and the Asylum Application, Interview, and the Employment Authorization for Applicants Rule to Form I-589s and Form I-765s filed by asylum applicants who are also members of CASA or ASAP. \*\*If your client could benefit from this injunction, you should inquire with CASA or ASAP about membership in their groups.\*\*

## BIA/AG:

- *A-M-R-C-*, 28 I&N Dec. 7 (A.G. 2020): A request for amicus curiae briefs regarding due process, standards of review, and the exercise of discretion in deciding issues relating to the persecutor bar and the serious nonpolitical crime bare. Deadline for submission expired September 29, 2020.
- Other pending and archived agency invitations to provide amicus briefs can be found online at <https://www.justice.gov/eoir/amicus-briefs>