Jun 7 The BIA and Selective Dismissal

On May 31, the BIA published a precedent decision in *Matters of Andrade Jaso and Carbajal Ayala* (https://www.justice.gov/eoir/file/1167381/download). In that decision, Board Member Garry Malphrus (writing for a panel that included Hugh Mullane and Ellen Liebowitz) held that immigration judges have the authority to dismiss removal proceedings upon a finding that it is an abuse of the asylum process to file a meritless asylum application with USCIS for the sole purpose of seeking cancellation of removal in proceedings before the immigration court.

As always, some context is required. Cancellation of removal is a relief available to those who have been in the U.S. for at least 10 years, have led a generally clean life here, and have a child, spouse, or parent who is a U.S. citizen or green card holder who would suffer a very high degree of hardship if their noncitizen relative were to be deported. The hardship might be to elderly parents for whom the noncitizen is a necessary caregiver, or to a spouse with a serious medical or psychological condition, or children with special needs. But unlike most other forms of relief, which usually involve the mailing of an application to

USCIS, cancellation of removal may only be requested from an immigration judge after the applicant is placed in removal proceedings in immigration court.

Once, an attorney who felt his client had a strong enough claim would arrange with the ICE investigations unit to process the client and place her or him into removal proceedings. A number of years ago, under the Obama Administration, ICE discontinued this practice. According to a former ICE official, the reason given by the investigations office for the change was that it is not their job to help people obtain benefits.

With this decades-old avenue suddenly closed, attorneys asked the ICE office of general counsel for guidance. ICE's own response: apply for asylum with USCIS. Any asylum applicant not granted is referred to an immigration judge, where the applicant can then apply for any relief, including cancellation of removal. This answer was confirmed at a high level in ICE headquarters, which assured that there was nothing wrong with filing for asylum for the sole purpose of applying for cancellation of removal before an immigration judge.

It is worth noting that ICE's present solution places a very unfair burden on the USCIS Asylum Offices, which are already overwhelmed with the backlog of asylum claims and credible and reasonable fear interviews. The workload of individual asylum officers is untenable at present. The simple and obvious solution would be to have ICE return to processing those wishing to be placed into proceedings, but that's a matter for DHS to work out internally. In the meantime, applying for asylum remains the only avenue for cancellation of removal candidates.

The question obviously arises as to how an immigration judge can find the following of DHS's own recommendation to be an abuse of the asylum process, or how such argument can be raised by attorneys employed by the exact ICE office that came up with the suggestion in the first place.

Such a position might have been justifiable under the Obama Administration, which in response to the growing case backlog created a system of prioritization, which included the closing out of cases not considered urgent. However, as we all know, the Trump Administration did away with such priority system (https://www.americanimmigrationcouncil.org/research/immigration-enforcement-priorities-under-trump-administration), on the apparent belief that everyone should be deported immediately. Those cases closed as non-priority under Obama are being forced back

(http://immigrationimpact.com/2018/08/08/dhs-deportation-cases-immigrants/) into an already overloaded system. The press is filled with stories of a pizza delivery man (https://www.usatoday.com/story/news/nation-now/2018/06/06/ice-pizza-delivery-man-military-base/678479002/), or a father dropping his child at school (https://www.latimes.com/local/lanow/la-me-immigration-school-20170303-story.html) being arrested, detained, and placed into removal proceedings. Of course, we have all read the reports of children being torn from their parents (https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/family-separation) and detained separately (undoubtedly causing permanent psychological damage), and, if lucky enough to be released, sped through the system (https://www.wnyc.org/story/fast-tracking-families-through-immigration-court/) because this administration believes everyone deserves to be deported.

Some immigration judges used their authority to administrative close, delay, dismiss, or terminate proceedings where appropriate in the hopes of affording justice to those caught in proceedings. Former attorney general Jeff Sessions reacted quickly, issuing binding decisions prohibiting such efforts. In *Matter of Castro-Tum* (https://www.justice.gov/eoir/page/file/1064086/download), Sessions stripped IJs of their long-standing ability to administratively close cases. In *Matter of L-A-B-R-* (https://www.justice.gov/eoir/page/file/1087781/download), Sessions made it prohibitively more difficult for IJs to even grant continuances for legitimate reasons. And in *Matter of S-O-G- & F-D-B-* (https://www.justice.gov/eoir/page/file/1095371/download), Sessions held that immigration judges have no inherent authority to dismiss or terminate proceedings, a move consistent with his overall goal of downgrading independent judges to the role of assembly line workers. Sessions also stated that an IJ may dismiss proceedings only under the limited circumstances set out in the regulations.

The applicable regulation, 8 C.F.R. § 239.2(a) (https://www.ecfr.gov/cgi-bin/text-idx?SID=13546ba6df3f723e2eb6012ad530eb4e&mc=true&node=se8.1.239_12&rgn=div8), lists seven circumstances under which DHS (but not the private bar) may seek dismissal of proceedings. The first four, where the respondent turns out to in fact be a national of the U.S., to not be deportable from or inadmissible to the U.S., to be deceased, or to not be in the U.S., are pretty obvious reasons to dismiss proceedings, as all involve situations in which, due to either error or intervening events,

there is no living respondent in the U.S. who is removable under the law, and thus no case to pursue in court. Reason 5 involves a very specific situation where one granted conditional residence as the spouse of a U.S. citizen or permanent resident was placed into proceedings because she or he did not timely file the petition to remove the condition on their residence within the required time frame, but it turned out they filed late for a legitimate reason permitted by the law. Reason 6 is where the NTA was improvidently issued. An example of that is where after issuing an NTA, DHS realizes that the respondent was already issued an NTA at an earlier time, and therefore seeks to dismiss the second NTA and reopen the first proceeding.

Reason 7 is where circumstances have changed since the NTA was issued to such an extent that continuation of the proceedings is no longer in the best interest of the government. This is obviously meant to be a broadly-defined category. However, it clearly doesn't cover the situation arising in *Andrade Jaso*. DHS advised those wishing to apply for cancellation of removal but lacking a path to be placed into proceedings to file an asylum application for the sole purpose of being referred to the immigration court. The DHS asylum offices are so cognizant of the situation that a pilot project was briefly instituted to allow asylum applicants with over 10 years of residence to waive their asylum interview. So what is the drastically changed circumstance? Furthermore, all of the first 6 examples involve situations where the person in proceedings is not removable, because they are dead, outside of the U.S., actually in lawful status, etc., or may be removable, but there is some technical defect with the issuance of this specific NTA. All focus on whether there is a respondent who is properly removable; none allow for termination of the proceedings of a removable respondent based on what they might be seeking as a relief. But *Andrade Jaso* was properly in removal proceedings, and is properly removable from the U.S. as charged in the NTA. In all similar cases, the respondents admit removability, because otherwise, they would not be able to apply for cancellation of removal.

So in summary, *Andrade Jaso* is inconsistent with all of the AG's precedent decisions under this administration, and with binding regulations. And yet, a three Board Member panel had no reservations (there wasn't any dissent) in issuing this decision. Why? Because it prevents the only group of people who actually want to be in proceedings from having the chance to apply for legal status.

The good news is that the decision states that an immigration judge "may" terminate proceedings, not that they must. Hopefully, judges will exercise good judgment in refusing to terminate worthy cases. However, the decision might offer an equitable resolution where one who lacks the requirements for cancellation of removal, which requires an exceptional degree of hardship to the qualifying relative, was wrongly steered into removal proceedings and would otherwise have faced certain removal.

In closing, it is wondered how the AG or BIA might respond to a situation in which an IJ dismisses proceedings upon the motion of a DHS attorney that the separation of a child from its parent with no plan as to how to reunite the family, the permanent psychological damage such separation causes to child and parent, and the subsequent need to rush the family through the system before they can adequately obtain counsel or prepare their applications, constitutes such an abuse of the asylum system as to warrant dismissal under the same regulation. Are any DHS attorneys willing to make such motion?

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