DEVELOPMENTS IN CRIMINAL IMMIGRATION AND BOND LAW: A SURVEY OF RECENT BIA PRECEDENT DECISIONS AND UPDATES IN BOND JURISPRUDENCE

Presented by: Board Member Roger A. Pauley, ACIJ Scott Laurent, Judge José Luis Peñalosa, Jr., Judge Kevin Riley, and Dan Cicchini

AVOIDING THE USE OR MITIGATING THE EFFECT OF THE CATEGORICAL APPROACH

Presented by Board Member Roger A. Pauley

Four Ways to Avoid Using, or Mitigate the Effect of, the Categorical Approach

1) Correctly concluding that the issue is one where it is not necessary to apply the categorical approach *at all*,
2) Finding the issue is governed by the so-called "circumstance-specific" approach,
3) Apply the doctrine that *requires an alien* to show that, where the charge is based on conviction for an aggravated felony, there is a "realistic probability" that his offense comes within the scope of the charge, and
4) Mitigating the effect of the categorical approach by applying it in a manner that permits a sensible result to be reached

1.) Issues Where it is Not Necessary to Apply the Categorical Approach *At All*

- *Matter of Obshatko*, 27 I&N Dec. 173 (BIA 2017)
  - *Because no conviction was required by the removability ground at issue, the Board concluded that the categorical approach was not implicated*
- Grounds that do not require that a conviction has occurred:
  - *INA section 237(a)(2)(E)(ii), Violation of Certain Protective Orders*
  - *INA section 212(a)(2)(D), Prostitution*
  - *INA section 212(a)(6)(E), Alien Smuggling*
  - *INA section 212(a)(2)(C), Reason to Believe Alien is a Controlled Substance Trafficker*

2.) "Circumstance-Specific" Approach

- *Nijhawan v. Holder*, 557 U.S. 29 (2009)
  - *The Supreme Court held that the categorical approach did not apply to the question of whether a conviction for an offense involving fraud or deceit was one where the loss exceeded $10,000. Rather, any reliable evidence may be used to make this determination.*
- *Matter of Davey*, 26 I&N Dec. 37 (BIA 2012 and *Matter of Dominguez-Rodriguez*, 26 I&N Dec. 408 (BIA 2014)
  - *The Board has held that the "circumstance-specific" approach is applicable with respect to the issue of whether, under INA section 237(a)(2)(B)(i), a controlled substance conviction was for "a single offense involving possession for one's own use of 30 grams or less of marijuana."*
- *Matter of H. Estrada*, 26 I&N Dec. 749 (BIA 2016)
  - *This approach should be used in determining the applicability of a charge under INA section 237(a)(2)(E)(i) for having been convicted of a crime of domestic violence. *Note: only the Ninth Circuit has held to the contrary.*

3.) "Realistic Probability" Doctrine

- *Gonzales v. Duenas-Alverez*, 549 U.S. 183 (2007)
  - The Supreme Court held that *an alien is required* to show that, where the charge is based on a conviction for an aggravated felony, there is a "realistic probability" that the alien's offense comes within the scope of the charge.
- The First, Third, Sixth Ninth and Eleventh Circuits have held the doctrine applies only where an alien's claim is based on "legal imagination."
- The Board held that the doctrine requires that an alien prove that the State actually successfully prosecuted cases of the same kind as that underlying the alien's claim of statutory over breadth.
  - *The Fifth Circuit, and the remaining circuits that have not decided the issue, follow the Board's interpretation.*
- Most circuits and the Board have held that this doctrine also applies to the CIMT context as well. The Third and Fifth circuits have held to the contrary.

4.) Mitigating the Effect of the Categorical Approach

- *Matter of Rosa*, 27 I&N Dec. 228 (BIA 2018)
  - *The Board rejected the notion that only the most similar federal statute to the alien's State conviction could be used to determine whether the State offense corresponds to a federal felony.*
  - *Adjudicators should consider whether a particular interpretation as to an aggravated felony provision would lead to bizarre outcomes that run counter to any intent that can be rationally attributed to Congress*

FEDERAL COURT LITIGATION INVOLVING DETENTION RELATED ISSUES

Presented by Dan Cicchini

Immigration Detention: Litigation Update

- *Jennings v. Rodriguez*, 583 U.S. ___ (2018)
- *Matter of Rojas*, 23 I & N Dec. 117 (BIA 2001)

Jennings v. Rodriguez, 583 U.S. ___ (2018)

Background and History

- C.D. Cal. Permanent Injunction: Bond hearings required after 6 months even for aliens subject to mandatory detention and burden on DHS to justify continued detention.
- Ninth Circuit affirmed, based its ruling on statutory interpretation, not Constitution.
- Supreme Court granted certiorari and case was argued before 8 member court in 2016.
- Justices deadlocked (4-4) and case was re-argued the following term before full court.

Jennings v. Rodriguez, 583 U.S. ___ (2018)

Holding (5-3 Decision, Alito, J.)

- INA §§ 235(b) (arriving aliens) and 236(c) (criminal aliens) authorize detention until the conclusion of removal proceedings and aliens detained under those provisions have no statutory right to a custody hearing before an immigration judge.
- INA § 236(a) does not entitle individuals to a periodic bond hearing every six months, nor does it require the government to bear the burden of proof during bond hearings.
- It was error for Ninth Circuit to rely on the canon of constitutional avoidance.
- Case remanded to the Ninth Circuit to address whether the due process clause imposes any limits on mandatory detention under INA §§ 235(b) and 236(c) and to address certain procedural issues related to class certification and injunctive relief.

Jennings v. Rodriguez: Impact on Circuit Law (Pre-Order Detention)

Circuit Courts/District Courts Adopting Bright-Line (6 Month) Rule

- Ninth Circuit: Permanent Injunction remains in effect in C.D. Cal. while parties are litigating the constitutional issue on remand to the Ninth Circuit. Outside of C.D. Cal., *Jennings* abrogated the Ninth Circuit's Rodriguez decisions and therefore no more *Rodriguez* bond hearings in the Ninth Circuit.
- Second Circuit: Supreme Court GVR'd the Second Circuit's decision in *Lora v. Shanahan*, 804 F.3d 601 (2d. Cir. 2015) in light of *Jennings*.
  - *Lora no longer good law, but see Sajous v. Decker, No. 18 Civ. 2447 (S.D.N.Y.) (putative class action).*
- D. Mass: *Reid v. Donelan*, 22 F. Supp.3d 84 (D. Mass. 2014). The First Circuit vacated the District Court's injunction as to class-members in light of *Jennings*.

Jennings v. Rodriguez: Impact on Circuit Law (Pre-Order Detention)

Circuit Courts/District Courts Adopting Case-By-Case Approach

- Third Circuit: *Chavez-Alvarez v. Warden York County Prison*, 783 F.3d 469 (3d Cir. 2015) most likely abrogated by *Jennings* because court relied on constitutional avoidance. But some language indicating it was a constitutional holding.
- Sixth Circuit: *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) holding abrogated by *Jennings* because court relied on constitutional avoidance.
- Eleventh Circuit: *Sopo v. Attorney General*, 825 F.3d 1199 (11th Cir. 2016) this case was abrogated by *Jennings* because Circuit relied on constitutional avoidance.

Jennings v. Rodriguez: Impact on Circuit Law (Post-Order Detention)

- *Jennings* does not address post-order detention; however the Court's reasoning impacts Ninth Circuit case law relying on constitutional avoidance.

- *Casas-Castrillon v. DHS*, 535 F.3d 942 (9th Cir. 2008) held that aliens previously detained under INA § 236(c) with an administratively final removal order but a PFR and a stay are entitled to a bond hearing under INA § 236(a) at six month mark.
  - *Government is taking litigating position that Jennings abrogates Casas because Casas was based on same misuse of constitutional avoidance rejected by Jennings Court.*

Jennings v. Rodriguez: Impact on Circuit Law (Post-Order Detention)

- *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011) held that certain aliens detained under INA § 241(a)(6) are entitled to an enhanced bond hearing at six month mark.
  - *District Courts have not been receptive to Government's litigating position that Jennings abrogates Diouf II.*
- *Banos v. Asher*, 2018 WL 1617706 (W.D. Wash. Apr. 4, 2018).
  - *Diouf II is still good law and all aliens detained for withholding-only proceedings in W.D. Wash. entitled to automatic bond hearing at six month mark with burden on DHS.*

Pre- vs. Post-Order of Removal

- PFRs and Stays: Aliens with administratively final removal orders who have filed a PFR and have obtained a judicial stay of removal.

Circuit Court	INA § 236	INA § 241
Hechavarria v. Sessions, 2018 WL 2223388 (2d Cir. 2018)	X	
Leslie v. Attorney Gen., 678 F.3d 265 (3d Cir. 2012)	X	
Prieto-Romero v. Clark, 534 F.3d 1053, 1059 (9th Cir. 2008)	X	
Akinwale v. Ashcroft, 287 F.3d 1050 (11th Cir. 2002)		X

Pre- vs. Post-Order of Removal

- Aliens with a reinstated removal order and detained pending withholding-only proceedings.

Court	INA § 236	INA § 241
***Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016)**	X	
***Padilla-Ramirez v. Bible*, 862 F.3d 881 (9th Cir. 2017)**		X
***Diaz v. Hott*, 2018 WL 1042800 (E.D. Va. Feb. 26, 2018)**	X	

Matter of Rojas, 23 I & N Dec. 117 (BIA 2001)

- A criminal alien is subject to mandatory detention under INA § 236(c) even if DHS does not detain the alien immediately after his release from criminal custody.
- Circuit Courts are Split on the Issue:
  - *Third, Fourth, and Tenth follow the Matter of Rojas rule*
  - *The First and Ninth do not follow the rule*
- Supreme Court granted certorari: *Nielsen v. Preap*, 138 S. Ct. 1279 (2018).

BOND

Presented by Judge José Luis Peñalosa, Jr.

Notable BIA & Circuit Decisions Regarding Bond

- *Matter of Fatahi*, 26 I&N Dec. 791 (BIA 2016)*
- *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017)*
- *Matter of Siniauskas*, 27 I&N Dec. 207 (BIA 2018)*
- *Jennings v. Rodriguez*, 583 U.S. ___ (2018)

Matter of Fatahi, 26 I&N Dec. 791 (BIA 2016)

- In determining whether an alien presents a danger to the community, an IJ should consider both direct and circumstantial evidence of dangerousness.
  - *This includes whether the facts and circumstances present national security considerations.*
- The question of whether an alien poses a danger to the community is not limited to proof of specific instances of past violence or direct evidence of violent tendencies.
- Here, the respondent's conflicting explanations and the circumstances surrounding his procurement of a falsified passport gave the IJ significant reason to deny his bond request on national security grounds.
  - *The Board also noted evidence showing the passport had passed through the hands of a terrorist organization before it reached Respondent.*

Matter of Siniauskas, 27 I&N Dec. 207 (BIA 2018)

- A DUI is a significant adverse consideration in determining whether an alien is a danger to the community in bond proceedings.
- In deciding whether to set a bond, an IJ should consider the nature and circumstances of the alien's criminal activity, including any arrests and convictions, to determine if the alien is a danger to the community.
  - *NOTE: family and community ties generally do not mitigate an alien's dangerousness.*

Hernandez v. Sessions, 872 F.3d 976 (9th Cir. 2017)

- In setting the bond amount, the Court must:
  - *(a) consider the alien's financial ability to pay a bond;*
  - *(b) not set bond at a greater amount than that needed to ensure the alien's appearance; and*
  - *(c) consider whether the alien may be released on alternative conditions of supervision, alone or in combination with a lower bond amount, that are sufficient to mitigate flight risk.*

PROCEDURAL ISSUES

Presented by ACIJ Scott Laurent

Recent BIA Decisions Regarding Procedural Issues

- *Matter of Chairez*, 27 I&N Dec. 21 (BIA 2017)("*Chairez IV*")
- *Matter of Mohamed*, 27 I&N Dec. 92 (BIA 2017)
- *Matter of Jasso Arangure*, 27 I&N Dec. 178 (BIA 2017)*
- *Matter of Marquez Conde*, 27 I&N Dec. 251 (BIA 2018)*

Matter of Jasso Arangure, 27 I&N Dec. 178 (BIA 2017)

- DHS is not precluded by res judicata from initiating a separate proceeding to remove an alien as one convicted of an aggravated felony burglary offense under INA section 101(a)(43)(G) based on the same conviction that supported a crime of violence aggravated felony charge under section 101(a)(43)(F) in the prior proceeding.
- Home invasion in the first degree in violation of the Michigan Compiled Laws section 750.110a(2) is a categorical burglary offense under INA section 101(a)(43)(G).

Matter of Marquez Conde, 27 I&N Dec. 251 (BIA 2018)

- Reaffirmed *Matter of Pickering,* 23 I&N Dec. 621 (BIA 2003) while modifying the decision to give it nationwide application.
  - *Pickering held that if a court vacated an alien's conviction because of a procedural or substantive defect rather than for reasons solely related to rehabilitation or immigration hardships, the conviction is not within the meaning of INA section 101(a)(48)(A) and is eliminated for immigration purposes.*
- The Board found that INA section 101(a)(48)(A) is silent regarding the effect of a vacated conviction on an alien's immigration status.
  - *As such, the Board concluded that "conviction" includes convictions that have been vacated as a form of post-conviction relief but exclude convictions vacated based on procedural and substantive defects.*

SPECIFIC CRIMES

Presented by Judge Kevin Riley

Recent BIA Decisions Regarding Crimes Against the Person

- *Matter of Mendoza Osorio*, 26 I&N Dec. 703 (BIA 2016)
- *Matter of Estrada*, 26 I&N Dec. 749 (BIA 2016)
- *Matter of Guzman-Polanco*, 26 I&N Dec. 806 (BIA 2016)
- *Matter of Silva-Trevino*, 26 I&N 826 (BIA 2016) ("*Silva-Trevino III*")
- *Matter of Calcano De Millan*, 26 I&N Dec. 904 (BIA 2017)
- *Matter of Kim*, 26 I&N Dec. 912 (BIA 2017)
- *Matter of Calcano De Millan*, 26 I&N Dec. 904 (BIA 2017)
- *Matter of Jimenez-Cedillo*, 27 I&N Dec. 1 (BIA 2017)
- *Matter of Wu*, 27 I&N Dec. 8 (BIA 2017)
- *Matter of Izaguirre*, 27 I&N Dec. 67 (BIA 2017)
- *Matter of Tavdidishvili*, 27 I&N Dec. 142 (BIA 2017)
- *Matter of Keeley*, 27 I&N Dec. 146 (BIA 2017)
- ***Matter of Obshatko*, 27 I&N Dec. 173 (BIA 2017)***
- ***Matter of Sanchez-Lopez*, 27 I&N Dec. 256 (BIA 2018)***
- Matter of Cervantes Nunez, 27 I&N Dec. 238 (BIA 2018)

Matter of Obshatko, 27 I&N Dec. 173 (BIA 2017)

- Whether a violation of a protection order renders an alien removable under INA section 237(a)(2)(E)(ii) is not governed by the categorical approach, even if a conviction underlies the charge.
  - *Instead, an IJ should consider the probative and reliable evidence regarding what a State court has determined about the alien's violation.*
- The Board clarified its decision in *Matter of Strydom*, 25 I&N Dec. 507 (BIA 2011), concluding that it erred by presuming the categorical approach applied to section 237(a)(2)(E)(ii).

Matter of Sanchez-Lopez, 27 I&N Dec. 256 (BIA 2018)

- The offense of stalking in violation of section 649.9 of the California Penal Code is not "a crime of stalking" under section 237(a)(2)(E)(i) of the INA.
- The Board concluded that because the California legislature explicitly replaced the specific reference to death or great bodily injury with the broader term "safety," stalking offenses committed with the intention of causing a victim to fear nonphysical injury may be prosecuted in California.
  - *"Safety" is overbroad and indivisible.*