

Recent developments with respect to First Amendments Rights in the immigration context

By Cindy G. Buys

As immigration practitioners may know, the extent of First Amendment rights of non-U.S. citizens has not been fully decided. In *American-Arab Anti-Discrimination Committee v. Meese*, 714 F. Supp.1060 (C.D.Cal.1989), a California District Court applied First Amendment rules that had been developed in free speech cases involving U.S. citizens to deportation cases involving lawful permanent residents who were removable because they were members of the Popular Front for Palestinian Liberation, an organization alleged to advocate terrorist acts. The Supreme Court reversed on jurisdictional grounds (545 U.S. 471), leaving open the question of whether immigrants' free speech rights are the same as those of U.S. citizens. Two recent District Court decisions from New York have reaffirmed the application of the usual First Amendment rules to immigration cases.

In *Turkmen v. Ashcroft*, Slip Copy, 2006 WL 1662663 (E.D.N.Y. 2006), a group of aliens of Middle Eastern descent who were detained immediately after the terrorist attacks of September 11, 2001 sued the U.S. Government on two grounds. First, they argued that the Government used their status as illegal aliens as an excuse to hold them in jail while the Government pursued its real interest—determining whether they were terrorists or could help catch terrorists. Second, Plaintiffs also alleged that the conditions of their confinement flagrantly violated the U.S. Constitution. The Government moved to dismiss both sets of claims. The Court agreed to dismiss the first set of claims, finding that the political branches have broad power over naturalization and immigration, including the power to "single out nationals of a particular country and focus enforcement efforts on them." The Court refused to dismiss most of the claims of constitutional violations arising from conditions of confinement, however.

The surviving claims included a claim that Plaintiffs' First Amendment

rights were violated. Specifically, Plaintiffs claimed that the Government imposed a communications blackout that prevented Plaintiffs from obtaining access to legal counsel and from petitioning the courts for redress of their grievances under the First Amendment. Acknowledging that the applicable legal standard for pretrial immigration detainees is not clear, the District Court resorted to the standard articulated by the Supreme Court in *Turner v. Safly*, 482 U.S. 78 (1987), which ordinarily applies to convicted prisoners. Under *Turner*, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests," with penological defined to mean related to prison management rather than punishment.

Using that test, the Government argued that "concern over communications between possible terrorists and potential escape and attack plans after September 11, 2001 justified the communications blackout as reasonable." The Plaintiffs countered that the Government had no reason to believe the Plaintiffs had any connection to terrorists. Plaintiffs further alleged that they were videotaped and audio taped while speaking with their attorneys, which prevented them from speaking candidly. Plaintiffs' allegations were supported by a 2003 report by the Office of the Inspector General of the United States Department of Justice. Plaintiffs also alleged that family members and lawyers who came to visit them at the Metropolitan Detention Center were falsely told they were not there and that the guards purposely dialed incorrect telephone numbers when they tried to call their lawyers and their families.

According to the Court: "These allegations, if proved, may well constitute a violation of clearly established rights." Immigration detainees have a right to counsel that is rooted both in the Due Process Clause of the Constitution and the Immigration and Nationality Act. The Court further stated: "The constitutional rights the plaintiffs assert — the

rights to due process of law, to equal protection of the laws, and to be free from unreasonable searches and seizures—apply not only to citizens but also to aliens present in our country." Thus, the Court used standards applicable to U.S. citizens when holding that Plaintiffs would be allowed to proceed with their lawsuit and given a chance to prove their claims of constitutional violations.

In a second New York case, *Ramadan, et al. v. Chertoff*, No. 06 Civ. 588 (S.D.N.Y. 2006), District Court Judge Paul A. Crotty ordered the Government to adjudicate the non-immigrant visa application of Tariq Ramadan, a Swiss-born scholar of Arab descent, in connection with a lawsuit claiming that Ramadan's exclusion violated the Plaintiffs' First Amendment right to hear his views. In January 2004, Ramadan accepted a long-term tenured teaching position at the University of Notre Dame. The University applied for an H-1B visa on his behalf, which was granted by the U.S. Citizenship and Immigration Service in May 2004. After Ramadan had made arrangements to move his family to South Bend, Indiana, (including having his furniture shipped there), the U.S. Embassy in Bern, Switzerland informed Ramadan by telephone that his visa had been revoked. Consular officials did not provide any explanation for the revocation, but told Ramadan he was welcome to reapply. One month later, in August 2004, the *Los Angeles Times* ran an article about the revocation of Ramadan's visa in which, "Russ Knocke, a spokesman for the Immigration and Customs Enforcement Division of the Department of Homeland Security, said the work visa was revoked because of a section of the federal law that applies to aliens who have used a 'position of prominence within any country to endorse or espouse terrorist activity.' . . . He said the revocation was based on 'public safety or national security interests,' but would not elaborate." In litigation, the U.S. Government maintained that Mr. Knocke's statement was

erroneous, but provided no explanation or elaboration.

Acting on the government's invitation, the University of Notre Dame submitted a new visa petition for Ramadan in October 2004. When the University contacted the Department of State in December 2004 to check on the status, the University was told that no decision would be made on Ramadan's petition in the near future. Owing to the indefinite delay, Ramadan resigned his teaching position at the University. When his resignation was reported in the press, the Department of Homeland Security immediately sent the University an "Intent to Revoke" letter on December 21, 2004 based on Ramadan's resignation of his position.

In September 2005, at the urging of various organizations within the United States, Ramadan applied for a B visa to enter the United States on a temporary basis to participate in various conferences to which he had been invited. He was interviewed at the Embassy in Bern in September and December 2005 and was told in the latter interview that a decision could take up to two years. As of the date of the District Court's opinion in June 2006, the government had not acted upon Ramadan's visa. Accordingly, the American Academy of Religion, the American Association of University Professors, and the Pen American Center brought suit along with Ramadan in January 2006 challenging the Government's exclusion of Ramadan from the United States. Plaintiffs claimed that Ramadan's continued exclusion violated their First Amendment rights to hear Ramadan speak. Shortly after bringing the suit, Plaintiffs sought a preliminary injunction compelling the Government to permit Ramadan to enter the United States to attend their conferences, or, in the alternative, compelling the Government to render a final decision on Ramadan's visa application.

The U.S. District Court for the Southern District of New York applied the traditional test for injunctive relief, first finding that the "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." However, the Court said that Plaintiffs' First Amendment rights must be balanced against other legitimate governmental interests, such as national security. Here, the Court held that "the ability to

engage Ramadan in debate by way of videoconferencing is sufficient to satisfy Plaintiffs' First Amendment rights prior to a final adjudication on the merits." The Court expressly stated, however, that this part of its holding was limited to the preliminary injunction motion and that the Court was not holding that technological alternatives are sufficient to satisfy Plaintiff's First Amendment right to interact with Ramadan on a permanent basis.

With respect to the substantial likelihood of success on the merits, the Court reaffirmed that the First Amendment includes not only a right to speak, but also a right to receive information, including the right to have a non-U.S. citizen enter the United States to hear him explain or defend his views. But this right is a conditional one in light of the federal Government's broad power to regulate the admission of noncitizens. The Court cautioned, however, that "while the Executive may exclude an alien for almost any reason, it cannot do so solely because the Executive disagrees with the content of the alien's speech and therefore wants to prevent the alien from sharing this speech with a willing American audience." Relying on the Supreme Court's decision in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), the District Court held that the Executive may exercise its plenary power over immigration and visa issues negatively on the basis of any "facially legitimate and bona fide reason." In *Mandel*, the visa was denied due to previous visa violations. In this case, however, the Government did not provide any reason for excluding Ramadan from the United States. As previously noted, the Government disavowed the statement of its spokesman, Mr. Knocke, but failed to provide an alternate explanation or any explanation at all, for its actions. Thus, the Court found it impossible to determine whether the plaintiffs' First Amendment rights had been violated. The Court found the Government's general reference during litigation to unspecified "national security" concerns to be inadequate because there was no basis in the record for the Court to evaluate whether such concerns were facially legitimate or bona fide.

Pursuant to section 6 of the Administrative Procedure Act, government agencies are to render decisions within a reasonable period of time.

What is reasonable varies depending on circumstances. The record in Ramadan showed that most nonimmigrant visa applications submitted to the Bern Embassy are processed within two days and that most "special clearances" were processed within 30 days. Thus, Ramadan's nine-month wait was well beyond "reasonable" under those circumstances. "Out of an excess of caution," the Court gave the Government an additional 90 days to adjudicate Ramadan's pending application for a B visa. The deadline to appeal this decision has now passed without an appeal by the government. Thus, the government must issue a decision with respect to Ramadan's visa application before the end of September 2006. The Ramadan decision suggests that while the Government has broad power to admit or exclude noncitizens, where First Amendment rights are implicated, the Courts may be willing to require the Government to be more specific than simply alleging general national security concerns when excluding a non-citizen. Further developments in both these cases are awaited.

Cindy G. Buys is an Assistant Professor of Law at the Southern Illinois University School of Law where she teaches constitutional law, immigration law and a variety of international law courses. Professor Buys also is a section council member of the International and Immigration Law Section of the ISBA.

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