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Suppression: Respondents Look for a Shield and Sword in Immigration Proceedings

by Sara A. Stanley and Daniel L. Swanwick

The Department of Homeland Security's Immigration and Customs Enforcement ("ICE") continues to increase enforcement of the United States immigration laws, not only along the nation's borders but also in the interior of the country. In fiscal year 2007, ICE removed 276,912 individuals unlawfully present from the United States, a record number.[1] Increased enforcement has been characterized by more aggressive workplace enforcement and a new emphasis on fugitive operations. Over the past two years, ICE has more than quadrupled the number of Fugitive Operations Teams ("FOTs"), special teams responsible for investigating and apprehending individuals present in violation of immigration removal orders.[2] The FOTs made more than 30,000 arrests in fiscal year 2007, nearly doubling its total from the prior fiscal year.[3] Worksite enforcement operations in fiscal year 2007 resulted in 863 criminal arrests and 4,077 administrative arrests.[4]

Perhaps the most salient characteristic of increased enforcement is the widespread use of warrantless arrests. Increased use of warrantless arrests by ICE has not gone unnoticed by the media and the public. High profile enforcement actions in 2007, such as those carried out at Swift & Co. meat processing facilities in six states and at Michael Bianco Co., in New Bedford, Massachusetts, drew national media coverage. Many have alleged that the manner in which these warrantless worksite and home enforcement actions are being conducted regularly violate the Fourth Amendment rights of the individuals involved.[5]

Groups have responded to what they perceive as constitutional violations in various ways. For example, labor and immigrant advocates, led by the United Food and Commercial Workers International Union, have formed the National Commission on ICE Misconduct and Violations of 4th Amendment Rights.[6] The Center for Social Justice at the Seton Hall University School of Law has filed a civil rights law

suit in federal district court against the Department of Homeland Security (DHS), ICE, various ICE officers and state officials for their participation in "a practice of unlawful and abusive raids of immigrant homes across the state of New Jersey."[7] Because this wave of increased enforcement is characterized by warrantless searches and seizures, an increase in suppression motions has been noted in some immigration courts.[8]

In removal proceedings, and when it can be applied, suppression of evidence can be both a shield and a sword for respondents. On the one hand, for many respondents suppression may serve as a vital safeguard against coercive interrogation methods and egregiously unlawful searches and seizures based on race or other impermissible factors. If the court finds that the government engaged in such tactics while gathering the evidence that is now being offered for admission, the court must exclude that evidence, and if the government has no additional evidence of the respondent's alienage or removability, proceedings must be terminated. *See Woodby v. INS*, 385 U.S. 276, 286 (1966) (the government bears the burden of proving removability by clear, unequivocal, and convincing evidence). On the other hand, a respondent may file a suppression motion offensively, in order to divert attention from the central issue of removability in a proceeding where "delay may be the only 'defense' available." *See INS v.Lopez-Mendoza*, 468 U.S. 1032, 1048-49 (1984) (quoting *Matter of Sandoval*, 17 I&N Dec. 70, 80 (BIA 1979)).

Suppression, however, is a limited tool because the exclusionary rule generally does not apply in civil immigration proceedings. *Lopez-Mendoza,* 468 U.S. at 1050. While remaining open to a re-examination of its conclusions "if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread," the Supreme Court found that the benefit of deterring constitutional violations by immigration enforcement officers was generally outweighed by the harm of releasing from custody "persons who would then immediately resume their commission of a crime through their continuing, unlawful presence in this country." *Id.*

Only an egregious violation of the Fourth Amendment, or a violation of the alien's Fifth Amendment right to due process that renders the relevant evidence unreliable in such a way that its use would "transgress notions of fundamental fairness," will trigger suppression in a civil immigration proceeding. *Id.* at 1050-1; *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006); *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980). As such, *Lopez-Mendoza* leaves only a "glimmer of hope of suppression" in the immigration context. *Navarro-Chalan v. Ashcroft*, 359 F.3d 19 (1st Cir. 2004). This article will examine the legal standard for motions to suppress and the case law defining the contours of what constitutes an "egregious" violation and what renders information "unreliable."

Burden Shifting

The respondent has the burden of proving a *prima facie* case for suppression before the burden of proof shifts to the government to justify the manner in which it obtained the evidence. *Matter of Wong*, 13 I&N Dec. 820, 822 (BIA 1971). However, "a mere demand for a suppression hearing is not enough to cause one to be held." *Id.* To get a suppression hearing, the alien must present a *prima facie* case for suppression in his or her motion and enumerate the articles to be suppressed. *Id.* The motion must be supported by an affidavit containing specific and detailed statements based on personal knowledge. *Matter of Tang,* 13 I&N Dec. 691 (BIA 1971). Unsworn representations made by counsel in a legal document are not sufficient to establish a *prima facie* case. *Matter of Wong*, 13 I&N Dec. at 822.

If a suppression hearing is granted, the alien may not rest on his or her affidavits, but instead must present testimony supporting his or her case for the illegality of the government's conduct. *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988). If the alien satisfies this burden, only then will DHS be called upon to justify the manner in which it obtained the evidence. *Id.* Failure to do so will result in suppression. *Id.*

Threshold Matters

There are two threshold matters to examine before proceeding to the core of the suppression analysis. First, under the independent source doctrine, an alien's identity is never suppressible, even if it was obtained as a result of an unlawful arrest, search or interrogation. *Lopez-Mendoza,* 468 U.S. at 1039. The practical upshot is that once a respondent has been placed in removal proceedings, any evidence obtained independently of an admittedly deficient search may be relied upon. *Matter of Cervantes*, 21 I&N Dec. 351, 353 (BIA 1996).

Such independently obtained evidence will typically come from one of several sources. At times the respondent, on his own or through counsel, will admit removability, or facts sufficient to establish removability, during removal proceedings. *See*, *e.g.*, *Miguel v. INS*, 359 F.3d 408 (6th Cir. 2004); *Rodriguez-Gonzales v. INS*, 640 F.2d 1139, 1140-41 (9th Cir. 1981); *Matter of Carrillo*, 17 I&N Dec. 30, 32 (BIA 1979). Similarly, the respondent may fail to object to the admission into evidence of documents sufficient to establish removability. *See Lopez-Mendoza,* 468 U.S. at 1040. Once a respondent has admitted to factual allegations or failed to object to documents sufficient to establish removability, the Immigration Judge may determine that removability has been established by clear and convincing evidence, notwithstanding the existence of arguably inadmissible prior statements. *See Miguel v. INS*, 359 F.3d at 410-11; 8 C.F.R. § § 1240.8(a), 1240.10(c) (2008).

Independent evidence concerning a respondent's removability may also come from official files maintained by DHS or other entities. If a respondent's statements made during an illegal arrest lead authorities to discover his or her identity, which in turn is used to discover evidence regarding prior entries or immigration violations, those statements and the resulting evidence may not be suppressed. *United States v. Guzman-Bruno*, 27 F.3d 420 (9th Cir. 1994); *United States v. Orozco-Rico*, 589 F.2d 433, 435 (9th Cir. 1978); *See Matter of Cervantes* 21 I&N Dec. at 353-54.

The second threshold matter concerns the suppression of evidence based on an agent's failure to give *Miranda* or similar warnings. As a general rule, aliens are not entitled to be advised of their rights prior to or during an immigration arrest. For example, a failure to give *Miranda* warnings will not result in the suppression of evidence in immigration court, because, "in light of the alien's burden of proof, the requirement that the alien answer non-incriminating questions, the potential adverse consequences to the alien of remaining silent, and the fact that the alien's statement is admissible in the deportation hearing despite his lack of counsel at the preliminary interrogation," those warnings have been found to be inappropriate and even potentially misleading in the removal context. *Trias-Hernandez v. INS*, 528 F.2d 366, 368-69 (9th Cir. 1975), quoting *Chavez-Raya v. INS*, 519 F.2d 397, 400-01 (7th Cir. 1975).

However, there are limited circumstances where a failure to advise an alien of his or her rights may result in suppression. For example, evidence may be excluded based on the government's failure to comply with its own regulations regarding immigration-related advisories. Pursuant to 8 C.F.R. § 287.3(c) (2008), the government is required by regulation to notify respondents arrested without a warrant and placed in formal proceedings of their right to be represented at no expense to the government and to provide them with a list of available free legal services. To prevail in an exclusion motion based on a violation of this regulation, the respondent must prove—in addition to the fact that the regulation was violated—that the regulation in question was intended to benefit the respondent and that the respondent was prejudiced by the violation. *See Navia-Duran v. INS*, 568 F.2d 803 (1st Cir. 1977), *Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980).

The First Circuit recently found that 8 C.F.R. § 287.3 is not intended to benefit the respondent, and thus the government's violation of this section of its regulations will not support exclusion. *Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 23 (1st Cir. 2004) (relying on 8 C.F.R. § 287.12, which states that the regulations at 8 C.F.R. § 287 "do not, are not intended to, shall not be construed to, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal.") Other circuits have not gone so far as to preclude suppression for any respondent seeking to rely on 8 C.F.R. § 287.3, but those which have taken up the question do require the respondent to show prejudice before a regulatory violation may support exclusion. *See Martinez-Camargo v. INS*, 282 F.3d 487 (7th Cir. 2002); *Hernandez-Luis v. INS*, 869 F.2d 496 (9th Cir. 1989).

Legal Standard for Suppression

Generally, the test for admissibility of evidence in removal proceedings is whether the evidence is probative and whether its use is fundamentally fair so as not to deprive the alien of due process. *See Bustos-Torres v. INS*, 898 F.2d 1053, 1055 (5th Cir. 1990); *Matter of Ponce-Hernandez*, 22 I&N Dec. 784, 785 (BIA 1999). For example, it has been held that, absent evidence that a Form I-213 contains information that is incorrect or was obtained by coercion or duress, that document is considered "inherently trustworthy" and admissible as evidence to

prove alienage or deportability. *See Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988). Although the suppression of an admission of alienage is an "exceptional remedy" in civil immigration proceedings, *Lopez-Mendoza*, 468 U.S. at 1046, exclusion of certain evidence is warranted for Fourth Amendment violations that are egregious or Fifth Amendment violations that transgress notions of fundamental fairness, or undermine the probative value of the evidence obtained. *Id.* at 1050-51; *Almeida-Amaral v. Gonzales*, 461 F.3d at 235.

The first issue in analyzing a suppression motion is whether a seizure occurred. A seizure occurs when a reasonable person, in light of all the circumstances surrounding the incident, would have believed that he is not free to leave. *INS v. Delgado*, 466 U.S. 210, 215 (1984). Factors to consider include the presence of multiple officers, the display of weapons, physical contact, and the use of language or tone of voice indicating a command rather than a request. *United States v. Flores-Sandoval*, 474 F.3d 1142, 1145 (8th Cir. 2007); *Benitez-Mendez v. INS*, 707 F.2d 1107, 1108 (9th Cir. 1983), *rehr'g granted and opinion modified*, 752 F.2d 1309 (9th Cir. 1984). Notably, a warrantless search is lawful without reasonable suspicion or probable cause if an alien voluntarily consents to a search, without duress or coercion. *United States v. Castellanos*, 518 F.3d 965, 969 (8th Cir. 2008) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27 (1973)).

Next, the Immigration Judge must determine whether the officer had a lawful reason for the stop, seizure, warrantless arrest or warrantless search. In order to lawfully stop an individual the officer must have a reasonable suspicion that the individual is unlawfully present in the United States. *United States v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975). Specifically, the officer "must articulate objective facts providing a reasonable suspicion that the subject of the seizure was an alien illegally in the country." *Orhorhaghe v. INS*, 38 F.3d 488, 497 (9th Cir. 1994) (internal quotes and brackets omitted). In contrast, to lawfully execute a warrantless arrest the officer must have a reason to believe the individual is unlawfully present in the United States. *See* section 287(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1357(a)(2). "Reason to believe" has been interpreted as equivalent to probable cause. *Martinez v. Nygaard*, 831 F.2d 822, 828 (9th Cir. 1987). Probable cause must be accompanied by a determination by the officer that the individual is likely to escape before a warrant can be obtained. *See* section 287(a)(2) of the Act. Generally, immigration officers have discretion, based on their training and experience, to draw inferences and make deductions based on the totality of the circumstances as they appear when determining whether reasonable suspicion or probable cause exists. *United States v. Cortez*, 449 U.S. 411, 418-19 (1981).

However, even if an officer lacked reasonable suspicion or probable cause, a Fourth Amendment violation alone is not sufficient to require the suppression of evidence in immigration proceedings. *Lopez-Mendoza*, 468 U.S. at 1051; *Sandoval*, 17 I&N Dec. at 83. In order to trigger the remedy of suppression, the alien must show that the Fourth Amendment violation was either *egregious* or was obtained in such a way as to make it *unreliable*. *See Lopez-Mendoza*, 468 U.S. at 1050-51; *Almeida-Amaral*, 461 F.3d at 235.

Egregiousness

The Second Circuit explained that "the egregiousness of a constitutional violation cannot be gauged solely on the basis of the validity (or invalidity) of the stop, but must also be based on the characteristics and severity of the offending conduct." *Almeida-Amaral*, 461 F.3d at 235. Thus, a stop may be found to be egregious if the manner in which it is effected is sufficiently severe, or alternatively if it is based on race "or some other grossly improper consideration." *Id.* Similarly, the Ninth Circuit has held that a seizure or arrest based on race, without any indication of severity, may warrant suppression. *Gonzales-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994).[9]

Where a motion to suppress is based on allegations of racial profiling, the analysis will turn on whether the stop was justified by reasonable suspicion that the individual was unlawfully present in the United States. *See Almeida-Amaral*, 461 F.3d at 236. In the case of a warrantless arrest, the issue is whether there was probable cause to believe the individual is unlawfully present and he or she is likely to escape before a warrant can be secured. *See* section 287(a)(2) of the Act; *see also United States v. Moya-Matute*, 2008 WL 2323522 (D.N.M. 2008).

There are innumerable constellations of facts that may create reasonable suspicion that an individual is unlawfully present in the United States. Factors such as proximity to the border and the suspect's behavior may be considered. *United States v. Garcia-Barron*, 116 F.3d 1305, 1308 (9th Cir. 1997); *United States v. Tehrani*, 49

F.3d 54 (2d Cir. 1995). The fact that a group of individuals are speaking predominantly in a foreign language may be considered along with the individuals' inability to speak English. *United States v. Manzo-Jurado*, 457 F.3d 928, 937 (9th Cir. 2006). However, an individual's inability to understand English, without more, will not justify an investigatory stop "because the same characteristic applies to a sizable portion of individuals lawfully present in this country." *Id.* at 937*; see also United States v. Sigmond-Ballesteros*, 285 F.3d 1117, 1126-27 (9th Cir. 2002).

Race and appearance in general may be one factor taken into consideration when examining the totality of circumstances; however, race alone may never give rise to a reasonable suspicion of unlawful presence. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975). *See Gonzalez-Rivera*, 22 F.3d 1441 (9th Cir. 1994) (suppressing evidence where Border Patrol stopped an individual based on Hispanic appearance and all other reasons for the stop had low probative value). Similarly, a warrantless arrest based on a foreign-sounding name has been found to be egregious by the Ninth Circuit. *Orhorhaghe*, 38 F.3d at 502. However, an allegation that race prompted the arrest must be based on something more than the respondent's "own intuition." *Almeida-Amaral*, 461 F.3d at 237.

Unreliability

Involuntary statements have long been held to be unreliable and have been excluded from immigration proceedings on that ground. *See Bong Youn Choy v. Barber*, 279 F.2d 642, 646-47 (9th Cir. 1960). One class of involuntary statements that will support suppression is statements procured through the use of coercion or duress. Whether a statement was involuntary is determined by examining the totality of the circumstances and identifying any combination of factors that constitute coercion, such as physical abuse or the threat of physical abuse. *Id.* These standards have been applied to various factual scenarios in published and unpublished decisions. S*ee Mineo v. INS*, 19 F.3d 11 (4th Cir. 1994); Juan Manuel Camarena-Sanchez, A78 008 580 (BIA Jan. 8, 2008) (unpublished); (no involuntariness found in respondent's statement because, inter alia, the Immigration and Naturalization Service (INS) did not threaten, abuse, promise preferential treatment, or deprive respondent of food or drink); Alessandra De Paula, A96 414 623 (BIA June 18, 2007) (unpublished) (no egregious conduct where there was no indication that respondent was "physically abused, threatened or otherwise mistreated").

Denial of food or drink is another factor that may indicate that a statement was given involuntarily. *See Mineo*, 19 F.3d at 11. Statements may be deemed involuntary if the interrogating officers made threats of inevitable deportation or, in contrast, promised preferential treatment. *Navia-Duran v. INS*, 568 F.2d 803 (1st Cir. 1977) (statement found to be involuntary when respondent told repeatedly that she had "no choice" and that she must leave the United States "immediately" or in "two weeks"); *see Mineo* (no finding of coercion based in part on the fact that the respondent was not promised preferential treatment for her statement); *but see* Paula Palacios, A77-351-631 (BIA Nov. 27, 2007) (unpublished) (respondent claimed that agents threatened to take her children, but the Board found her reports of threats to be vague and non-specific, and there was ample record evidence, including within the videotaped statement itself, demonstrating that her statement was made voluntarily).

The length and time of day of the interrogation is another factor in gauging the voluntariness of the statement. *Navia-Duran*, 568 F.2d at 804, 810 (statement was involuntary where totality of respondent's circumstances included an interrogation lasting four hours, from 10 p.m. to 2 a.m.); *Bong Youn Choy,* 279 F.2d at 647 (respondent's statement was involuntary where he was interrogated for seven hours, then spent a sleepless night at home, before voluntarily returning to INS office to give the statement). *But see* Alessandra De Paula, A96 414 623 (BIA June 18, 2007) (unpublished) (statement not involuntary where respondent was detained for two hours and questioned for one, but the record contained no additional indicia of coercion or involuntariness).

Interference with an individual's exercise of the right to counsel will render a statement involuntary. *See Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980) (respondent's statement regarding alienage given after INS agents rubbed attorney's number off of the respondent's arm without permission and repeatedly ignored his requests for counsel found to be involuntary). However, because *Miranda* warnings are not required, an alien is not deprived of his right to counsel if, despite requesting counsel, his or her counsel is unavailable and the individual proceeds to answer questions freely. *See Matter of Baltazar*, 16 I&N Dec. 108, 111 (BIA 1977). In *Baltzar* the respondent requested time to confer with his attorney. *Id.* at 109.

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CIRCUIT COURT DECISIONS FOR MAY 2008

by John Guendelsberger

The United States Courts of Appeals issued 375 decisions in May 2008 in cases appealed from the Board. The courts affirmed the Board in 313 cases and reversed or remanded in 62 for an overall reversal rate of 16.5% compared to last month's 14%. There were no reversals from the Fourth, Fifth, Seventh, Eighth and Tenth Circuits.

The chart below provides the results from each circuit for May 2008 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	%
1st	4	3	1	25.0
2nd	68	61	7	10.3
3rd	75	71	4	5.3
4th	9	9	0	0.0
5th	10	10	0	0.0
6th	8	7	1	12.5
7th	8	8	0	0.0
8th	6	6	0	0.0
9th	160	112	48	30.0
10th	5	5	0	0.0
11th	22	21	1	4.5
All:	**375**	**313**	**62**	**16.5**

The Ninth Circuit reversed or remanded in 48 of its 160 decisions. Reversals in asylum cases involved adverse credibility (12 cases), level of harm for past persecution (3), nexus (2), the one-year filing bar (2), the particularly serious crime bar (1), and the well-founded fear determination (1). There were several reversals of Board denials of motions to reopen based on ineffective assistance of counsel, five *Tapia-Ibarra* remands in regard to continuous physical presence and two remands regarding sufficiency of evidence for continuous physical presence for cancellation of removal. A number of other decisions involved remands to further address issues presented on appeal.

The Second Circuit this month issued considerably fewer decisions than usual and reversed in only seven. The reversals involved a variety of issues including credibility, nexus, evidence of "other resistance," a motion to reopen based on changed country conditions, and whether the opportunity to appeal to the Board was knowingly waived.

The Third Circuit issued 75 decisions and reversed in four. The reversals involved nexus, whether an asylum application was frivolous, and two cases involving Convention Against Torture claims. The First Circuit issued its first reversal of the year, finding that past events in a Cambodian asylum claim amounted to past persecution.

The chart below shows the combined results for the first five months of 2008 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total Cases	Affirmed	Reversed	% Reversed
7th	40	31	9	22.5%
9th	832	675	157	18.9%
2nd	551	468	83	15.1%
6th	42	36	6	14.3%
11th	93	85	8	8.6%
3rd	245	224	21	8.6%
5th	58	56	2	3.4%
4th	63	61	2	3.2%
1st	37	36	1	2.7%
10th	26	26	0	0.0%
8th	31	31	0	0.0%
All :	**2018**	**1729**	**289**	**14.3%**

At this point last year we had more reversals (316), but also had more total decisions (2227), so that our overall reversal rate was at about the same point (14.2%).

John Guendelsberger is Senior Counsel to the Board Chairman, and is currently serving as a temporary Board Member.

Dadaism Reborn: Immigration Law in the October 2007 Term of the Supreme Court

by Edward R. Grant

Dadaism was a relatively short-lived artistic movement born out of opposition to World War I and to the bourgeois values that, according to the movement's founders, had fomented that catastrophic conflict. According to one description, Dadaists "tried to express the negation of all current aesthetic and social values, and frequently used deliberately incomprehensible artistic and literary methods" to that purpose.[1] The origins of the movement's name are murky, but one account states that a paper knife was stabbed into a dictionary, landing on the French word for "hobbyhorse."[2] Dadaism died out as a coherent force in the 1920s, but is credited with midwifing the Surrealist School, among others.

By sheer blinding coincidence, the most significant immigration case of the just-completed October 2007 Term of the Supreme Court shares the name and, some might argue, the creativity of the Dadaists. *Dada v. Mukasey*, __ S.Ct. __, 2008 WL 2404066 (June 16, 2008). *Dada* stepped in to resolve a split in the circuits on the following question: "Whether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure." *See Kanivets v. Gonzales*, 424 F.3d 330 (3d Cir. 2005); *Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005); *Azarte v. Ashcroft*, 394 F.3d 1278 (9th Cir. 2005); *Ugokwe v. U.S. Attorney General*, 453 F.3d 1325 (11th Cir. 2006) (all finding that motion tolls Voluntary Departure period); *but see Chedad v. Gonzales*, 497 F.3d 57 (1st Cir. 2007); *Dekoladnu v. Gonzales*, 459 F.3d 500 (4th Cir. 2006); *Banda-Ortiz v. Gonzales*, 445 F.3d 387 (5th Cir. 2006) (all rejecting tolling argument).

EOIR proposed rules intending to resolve the issue in November 2007 – *after* the Supreme Court granted certiorari in *Dada* – that would have automatically terminated a grant of voluntary departure upon filing of a timely motion to reopen within the voluntary departure period. *See* Proposed Rules, Dep't of Justice, Executive Office for Immigration Review, *Voluntary Departure: Effect of a Motion to Reopen or Reconsider or a Petition for Review*, 72 Fed. Reg. 67674 (Nov. 30, 2007). Ironically, these proposed rules appear to have provided the road map for the Supreme Court's decision in *Dada* – the Court unanimously rejected the concept of "automatic tolling" upon filing of a motion to reopen during the voluntary departure period, but also held, by a 5-4 margin, that an alien must be given the opportunity to "withdrew" his or her request for voluntary departure previously granted in conjunction with a motion to reopen filed during the period. This opportunity, the majority concluded, was essential to preserve the right to file a motion to reopen for newly-available relief.

The factual matrix in *Dada* was commonplace: Mr. Dada arrived from Nigeria on a temporary visa and overstayed, later marrying a United States citizen. An I-130 was filed but denied in 2003 due to lack of documentary evidence. Removal proceedings ensued, after which a second I-130 was filed. The Immigration Judge denied a continuance for adjudication of the petition, found Mr. Dada removable, and granted voluntary departure. The Board affirmed and extended the grant of voluntary departure by 30 days.

On day 28, Mr. Dada filed a motion seeking to withdraw his request for voluntary departure and, submitting "new and material" evidence of the bona fides of his marriage, also moved to reopen and continue his proceedings pending resolution of the second I-130. The Board denied the motion two months later on grounds that Mr. Dada had failed to comply with the order of voluntary departure, and was thus barred from adjustment of status. The Fifth Circuit affirmed, relying on its ruling in *Banda-Ortiz*.

The Court began its analysis by noting that Mr. Dada is one of 42 million aliens granted voluntary departure from 1927 to 2005, that voluntary departure represents a *quid pro quo* with benefits to the alien and to the government, and that recent (1996) legislative changes regarding voluntary departure were motivated by concerns that many of the millions granted voluntary departure do not honor their part of the bargain. The Court then traced the history of motions in immigration proceedings (inexplicably failing to cite the Hurwitz opus on the topic[3]), noting that time and numerical limits were imposed as a result of regulatory and statutory changes in 1996. The Court concluded, significantly, that the 1996 amendments to the Immigration and Nationality Act "transform[ed] the motion to reopen from a regulatory procedure to *a statutory form of relief* available to the alien." *Dada*, 2008 WL 2404066 at *9. This was a cardinal

premise of the petition for certiorari in *Dada*, as well as of the rulings that adopted the "tolling" rule in the Third, Eighth, Ninth, and Eleventh Circuits.

From this premise, *Dada* rejected the government's argument that an alien who agrees to voluntary departure has knowingly surrendered the opportunity to seek reopening. The Court noted that nothing in the Act "or past usage with respect to voluntary departure" supports such a rule. *Id.* Furthermore, because of the backlog of cases at the Board, the "statutory right" to seek reopening in most cases would become a "nullity," as even most meritorious motions would be adjudicated after the expiration of the 60-day period, thus subjecting the alien to the bars on relief for failing to abide by the terms of the voluntary departure grant. "Whether an alien's motion will be adjudicated within the 60-day statutory period in all likelihood will depend on pure happenstance – namely, the backlog of the particular Board member to whom the motion is assigned." *Id*. at *10. Failing such prompt adjudication, "or" – notably – "remedial action by the Court," the alien with voluntary departure who filed a motion to reopen is stuck between the Scylla of waiting in the United States, hoping that the motion is resolved quickly, and the Charybdis of departing the country, which results in the motion being deemed withdrawn. "The purpose of a motion to reopen is to ensure a proper and lawful disposition. We must be reluctant to assume that the voluntary departure statute was designed to remove this important safeguard *for the distinct class of aliens most favored by the same law." Id.* at *11 (emphasis supplied). Thus, the Court concluded, the INA must be construed to preserve the alien's right to seek reopening, "while respecting the Government's interest in the *quid pro quo* of the voluntary departure arrangement." *Id.* at *12.

The Court concluded that its "remedial action" to the Scylla-Charybdis dilemma could take one of two forms: adopt the "tolling" provisions of the "*Azarte* rule," or permit an alien to withdraw his or her request for voluntary departure after the fact. Considering that the dispute over "tolling" created the very split in the circuits that *Dada* was meant to resolved, the Court paid it rather scant attention, ruling with little comment that the tolling rule violates the essential *quid pro quo* of voluntary departure.

> If the alien is permitted to stay in the United States past the departure date to wait out the adjudication of the motion to reopen, he or she cannot then demand the full benefits of voluntary departure; for the benefit to the Government – a prompt and costless departure – would be lost."

Dada, 2008 WL at *12.

The Court concluded benefits would not be lost if alien were permitted, within the period of voluntary departure, and without regard to the underlying merits of their motion to reopen, to unilaterally withdraw their request for voluntary departure at the time of filing the motion. The Court, after noting that the proposed rules on this subject warranted "respectful consideration," held that to "safeguard the right to pursue a motion to reopen" for those who have been granted voluntary departure, such aliens must be permitted to make such a unilateral request. *Id.* at *2. The alien would then become subject to removal, and, the Court noted, would have the option to seek a stay of removal while the motion is adjudicated.

The Court concluded by noting that its solution "still confronts the alien with a hard choice" but noted that aliens who can present genuine changed circumstances or new evidence are more likely to forego the benefits of voluntary departure in the hope that their case will be reopened, while those with little chance of reopening will not wish to forego those benefits. *Id.* The Court also noted that the dilemma could be further reduced by allowing aliens to pursue their motions to reopen from outside the United States, "much as Congress has permitted with respect to judicial review of a removal order." *Id.* at *13. But that issue – and the validity of the regulation that departure constitutes withdrawal of a pending motion – was not before the Court.

Justice Scalia, joined by the Chief Justice and Justice Thomas, dissented. He criticized the majority for having "blue-penciled" a statute that had no constitutional infirmity, and that could be reasonably construed in the manner proffered by the Government – that an alien who has accepted the benefits of voluntary departure has implicitly agreed that he may lose his right to reopening. "It is indeed utterly commonplace that *electing* to pursue one avenue of relief may require the surrender of certain other remedies." *Id*. at *14 (Scalia, A. dissenting) (emphasis in original). As for the "happenstance" of whether a timely

motion will be adjudicated within the 60-day period, the dissent argued that it is one "that the alien embraces when he makes his commitment to leave, and its effect upon him is therefore not arbitrary. If he wants to be sure to have his motion to reopen considered, he should not enter into the voluntary departure agreement." *Id.* at *17. Finally, Justice Scalia criticizes the reliance on the 2007 proposed regulations. First, he noted that the proposed rule would have had prospective effect only, while the rule adopted by the majority would affect current litigants. Second, assuming the regulation is adopted in its proposed form, it demonstrates that the issue presented in this case is both capable of administrative resolution, and that such resolution may be forthcoming. "It shows, in other words, that today's interpretive gymnastics may have been performed, not for the enjoyment of innumerable aliens in the future, but for Mr. Dada alone." *Id*. at *17.

Justice Alito, in a briefer dissent, argued that the majority jumped the gun because neither the Board nor the Fifth Circuit had addressed the question presented by Mr. Dada's motion to withdraw his request for voluntary departure. Had either tribunal granted that request, the case would have been resolved. That, Justice Alito concluded, was a matter for the Board in the first instance.

Dada clearly has an immediate impact, drawing new rules on the interplay of voluntary departure and motions. Its full potential consequences are less easy to calculate. The 2007 proposed rule may be revisited, and a final regulation emanating from that process may resolve most of the day-to-day issues presented to Immigration Judges and the Board. Obviously, this forum can provide no binding advice in the interim. However, *Dada* does appear unambiguous on one critical point: that an alien's timely request for withdrawal of voluntary departure, in conjunction with a motion to reopen, must be granted, regardless of the merits of the motion. *Dada* emphasized that such a request is unilateral, and carries with it the loss of the benefits of voluntary departure. By rejecting the "tolling" option, *Dada* clearly does not contemplate an alien being able to make a request to withdraw voluntary departure contingent on the motion to reopen being granted.

Dada also speaks, if obliquely, to the issue of stays of removal. At the level of the Board, stay motions are considered only when an alien is detained and removal is imminent. (Such limitations do not exist in Immigration Court.) Board orders granting or denying stays are brief and, in the case of a denial, state only a general conclusion that the underlying motion is not likely to be granted. *Dada* raises an interesting issue on this score: "[T]hough the BIA has discretion to deny the motion for a stay, it may constitute an abuse of discretion for the BIA to do so where the motion states nonfrivolous grounds for reopening." *Id.* at *13 (majority opinion).

Finally, while finding that the proposed rule merited "consideration," *Dada* omitted perhaps the most controversial aspect of that rule – its provision that the filing of a petition for review to the court of appeals would also automatically terminate a grant of voluntary departure. That implied bargain – accepting voluntary departure in exchange for essentially waiving the right to appeal the denial of other forms of relief – would appear to have greater consequences than the ordinary "bargain" struck at the end of a proceeding in Immigration Court. It remains to be seen, of course, if that provision is included in any final version of the rule.

Thus, like *Dadaism* the movement, *Dada* the case may, as Justice Scalia suggests, be a short-lived response to a particular "crisis." However, the mining of a "statutory right" to a motion to reopen out of provisions (regulatory and legislative) that were intended to *curb* the incidence of motions to reopen demonstrates the vitality of the Court's interpretive powers. Moreover, its comments regarding motions filed by those who have departed the United States, and on the standards for the issuance of stays of removal, while opaque, may help generate future litigation on those questions. Thus, even if its direct impact is brief, *Dada* may foreshadow greater involvement in the "nuts and bolts" of immigration regulations.

Edward R. Grant has been since January 1998 a Member of the Board of Immigration Appeals.

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1. Allon Schemool, *Information on Dadaism*, at www.geocities.com/allon_art/dada.html.

2. *Id.*

3. Gerald S. Hurwitz, *Motions Practice Before the Board of Immigration Appeals,* 20 San Diego L. Rev. (1982) .

RECENT COURT ACTIVITY

Supreme Court:

Dada v. Mukasey, 554 U.S. ____, 2008 WL 2404066 (June 16, 2008): The issue before the Court arose from "the conflict between the right to file a motion to reopen and the provision requiring voluntary departure no later than 60 days" from the date of a final order. The respondent was granted voluntary departure by the IJ at the conclusion of his hearing. His appeal was denied by the BIA, which afforded him 30 days to voluntarily depart. Two days before he was required to depart, the respondent filed a motion to withdraw his voluntary departure request and reopen proceedings, based on his marriage to a USC and pending I-130 petition. The Board denied the motion subsequent to the expiration of the period of voluntary departure, finding that the respondent's failure to depart rendered him ineligible for the relief sought (adjustment of status). The decision was silent regarding the respondent's request to withdraw from voluntary departure.

The Court noted that a respondent who becomes eligible for a new benefit within the period of voluntary departure finds himself "between Scylla and Charybdis"; if he departs within his voluntary departure period, his motion is deemed abandoned; if he waits for the outcome of the motion, he becomes ineligible for the relief sought as an overstay. But the Court rejected the respondent's argument that a motion should toll the voluntary departure period. Analogizing voluntary departure to a settlement agreement, the Court found tolling to be unfair to the government, and also likely to invite abuse. "Absent a valid regulation otherwise," the Court crafted a compromise allowing a respondent to unilaterally withdraw a request for voluntary departure before such period expires, but in doing so, giving up the benefits of voluntary departure. *Id.* at *2. A respondent choosing such option may also be removed within 90 days, even if his or her motion is still pending. However, a respondent may file a motion to stay removal, which the BIA would be compelled to grant where the underlying motion states nonfrivolous grounds for reopening.

First Circuit:

Julce v. Mukasey,__ F. 3d __, 2008 WL 2469196 (1st Cir. June 20, 2008): The First Circuit dismissed the respondent's appeal from the Board's decision finding him ineligible for cancellation of removal based on his Massachusetts state conviction for possession of marijuana with intent to distribute, for which he was sentenced to two years imprisonment. Relying on the Supreme Court decision in *Lopez v. Gonzales*, 549 U.S. 47 (2006), respondent argued that he remains eligible for relief because the federal Controlled Substance Act, although categorizing such crime as a felony, contains a provision under which the distribution of small amounts for no remuneration is treated as a misdemeanor for sentencing purposes. The respondent argued that as the Massachusetts statute is silent as to quantity and remuneration, some convictions under the state statute might fall within the federal misdemeanor exception. The respondent thus concludes that his state conviction "does not categorically qualify as an aggravated felony under the [Immigration and Nationality Act]." *Julce, supra,* at *3. The Court rejected respondent's argument, noting that "it mistakes the nature of the federal misdemeanor sentencing exception," which "does not create a stand-alone misdemeanor offense," but rather "a mitigating sentencing provision." *Id.*

Second Circuit:

Hongsheng Leng v. Mukasey, __ F. 3d __, 2008 WL 2311590 (2d Cir. June 6, 2008): The Second Circuit upheld the Immigration Judge's pretermission of the asylum application as untimely; upheld the adverse credibility determination, but remanded because the remaining withholding claim was not based on testimony alone. The respondent's claim was based upon activities undertaken in the U.S. on behalf of the China Democracy Party. The Court found that the Immigration Judge had failed to consider whether other evidence in the record of respondent's CDP activities established that the Chinese authorities were aware or likely to become aware of such activities.

Third Circuit:

Pierre v. Att'y Gen., __ F. 3d __, 2008 WL 2331388 (3d Cir. June 9, 2008) (*en banc)*: The 3d Circuit, *en banc,* dismissed the respondent's appeal from an Immigration Judge's denial of his application for withholding of removal from Haiti under the Convention Against Torture. The respondent was convicted of attempted murder and sentenced to 20 years imprisonment. The respondent had attempted suicide by drinking battery acid. The resulting injuries allow him to ingest a liquid diet only, through a tube, requiring daily medical care. The respondent claims if removed to Haiti, he would be imprisoned as an ex-convict, deprived of the necessary medical care, and would die as a result. He argued that the anticipated failure of the Haitian prison authorities to provide proper care would constitute torture. The Court

rejected this argument, holding torture "requires the goal or purpose of inflicting severe pain or suffering," and that such intent has not been shown regarding Haiti's policy of jailing ex-convicts. *Id.* at *8.

Seventh Circuit:

Ogayonne v. Mukasey, __ F. 3d __, 2008 WL 2437595 (7th Cir. June 18, 2008): The Seventh Circuit dismissed respondent's appeal of an Immigration Judge's decision pretermitting her asylum application as untimely and denying her applications for withholding of removal and CAT relief from the Central African Republic on the merits. The Court found that the Immigration Judge did not err in relying on evidence that the Immigration Judge had introduced into evidence, as the respondent did not object to such action, and the evidence "merely stated commonly acknowledged facts that were amenable to official notice" (and of which relevant parts were included in other properly admitted evidence). The Court also did not find the Immigration Judge's questioning of the respondent improper, where it occurred after direct examination was completed, was "brief and targeted," related directly to the application for relief, and covered testimony which otherwise "might never have gotten into the record, as the government seems to have neglected this issue."

Ninth Circuit:

Ahir v. Mukasey, __ F. 3d __, 2008 WL 2262410 (9th Cir. June 2, 2008): The 9th Circuit dismissed the respondent's appeal of an Immigration Judge's determination that her application for asylum was frivolous. The respondent had filed two I-589s, in 1994 and 2001. The second application contained the printed frivolous warnings. That application stated that the respondent had been arrested three times. The respondent subsequently became eligible to adjust her status based upon an approved labor certification. At the adjustment hearing, the respondent testified under oath that she had never been arrested. The Court found that all of the requirements of *Matter of Y-L-* had been met. The Court also held that although there was no "direct extrinsic evidence" of fabrication, that such conclusion was supported by a preponderance of the evidence, which was sufficient under *Y-L-*.

Lazaro v. Mukasey,__ F. 3d __, 2008 WL 2264589 (9th Cir. June 4, 2008): The Ninth Circuit dismissed in part and granted and remanded in part the respondent's appeal, stemming from an incomplete charge in the Notice to Appear. In the NTA, Immigration and Customs Enforcement (ICE) had charged the respondent removable as an aggravated felon under section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43), but failed to state a particular subsection. At a hearing before the Immigration Judge, ICE declined to amend the NTA to be more specific. The Immigration Judge accordingly amended the NTA to reflect the charges of 101(a)(43)(G) and (M), to which ICE stated that it had no objection. The Court dismissed respondent's appellate argument that the Immigration Court lacked jurisdiction over the case due to noncompliance with section 239(a)(1)(D) of the Act, 8 U.S.C. § 1229(a)(1)(D) due to the lack of specificity in the aggravated felony charge. The Court concluded that the statute was minimally satisfied by the charge as written. However, the two sides contested whether the Immigration Judge's *sua sponte* amendment of the NTA was proper pursuant to regulation, and the Court noted that the BIA had not addressed this issue. The Court concluded that it was appropriate for the BIA to decide this issue in the first instance, and remanded for such purpose.

BIA PRECEDENT DECISIONS

In *Matter of Hines*, 24 I&N Dec. 544 (BIA 2008), the Board considered whether the respondent derived United States citizenship through his mother's naturalization by virtue of his status as a child born out of wedlock in Jamaica whose paternity has not been established by legitimation under Jamaican law. The Board found that under Jamaican law, the sole means of legitimation of a child born out of wedlock is the marriage of the child's natural parents, overruling the Board's precedent in *Matter of Clahar*, 18 I&N Dec. 1 (BIA 1981). The respondent was born out of wedlock in Jamaica on October 5, 1980, and his biological parents never married each other. In 1988 respondent was admitted on a second preference visa filed by his mother, who was a lawful permanent resident at the time. In 1991, his mother naturalized, at which time respondent was residing in her custody. In reaching its decision, the Board took note that the Jamaican Status of Children Act of 1976 eliminated all legal distinctions between legitimate and illegitimate children and provided a way for fathers to acknowledge paternity, but section 2 of the Jamaican Legitimation Act remains in effect and continues to provide that the only way to legitimate a child is by the marriage of his or her parents. This determination is consistent with the Board's decision in *Matter of Rowe,* 23 I&N Dec. 962 (BIA 2006) in the context of Guyanese law. The Board

agreed with the Immigration Judge that the respondent derived citizenship.

In *Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549 (BIA 2008), the Board found that a single act of soliciting a prostitute on one's own behalf does not constitute "procur[ing] prostitutes" under section 212(a)(2)(D)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(D)(ii). The respondent was convicted on August 21, 2002, of disorderly conduct relating to prostitution in violation of 647(b) of the California Penal Code. The Board found that the term "procure" in the context of prostitution has a specific meaning, i.e. to obtain a prostitute for another. Under the most reasonable interpretation of the statute, and placed in historical context, procure does not extend to solicitation. The Board then reasoned that even if 212(a)(2)(D)(ii) reaches soliciting, the respondent's conviction falls outside the statute. In *Kepilino v. Gonzales*, 454 F.3d 1057 (9th Cir. 2006), the Ninth Circuit observed a State Department regulation which included a definition of prostitution. That regulation defines prostitution to be a pattern of behavior or deliberate course of conduct limited to sexual acts. 22 C.F.R. § 40.24(b). Like the California statute in this case, the statute at issue in *Kepilino* was broader than this definition, criminalizing isolated acts not necessarily involving sexual intercourse. Further, the record of conviction in this case includes no factual details about the offense to indicate that the respondent was engaged in anything more than isolated acts. The Board remanded the case.

REGULATORY UPDATE

73 Fed. Reg. 33875 (2008)
DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
8 CFR Part 1003

Board of Immigration Appeals: Composition of Board and Temporary Board Members

ACTION: Final rule.
SUMMARY: This final rule adopts without change an interim rule with request for comments published in the Federal Register on December 7, 2006. The interim rule amended the Executive Office for Immigration Review (EOIR) regulations relating to the organization of the Board of Immigration Appeals (Board) by adding four Board member positions, thereby expanding the Board to 15 members. This rule also expanded the list of persons eligible to serve as temporary Board members to include senior EOIR attorneys with at least ten years of experience in the field of immigration law.
Effective date: This rule is effective June 16, 2008.

73 Fed. Reg. 34356 (2008)
DEPARTMENT OF STATE

In the Matter of the Review of the Designation of Lashkar i Jhangvi as a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act, as Amended

Based upon a review of the Administrative Record assembled in this matter, and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that there is a sufficient factual basis to find that the circumstances that were the basis for the 2003 designation of Lashkar i Jhangvi as a foreign terrorist organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation. Therefore, I hereby determine that the designation of Lashkar i Jhangvi as a foreign terrorist organization, pursuant to Section 219 of the Immigration and Nationality Act, as amended (8 U.S.C. 1189), shall be maintained. This determination shall be published in the Federal Register.
Dated: June 9, 2008.
John D. Negroponte, Deputy Secretary of State,
Department of State.

73 Fed. Reg. 34654 (2008)
DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
8 CFR Part 1003

Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents

ACTION: Proposed rule with request for comments.
SUMMARY: This proposed rule would amend the Department of Justice (Department) regulations regarding the administrative review procedures of the Board of Immigration Appeals (Board) in three ways. First, this rule provides greater flexibility for the Board to

decide, in the exercise of its discretion, whether to issue an affirmance without opinion (AWO) or any other type of decision. This rule clarifies that the criteria the Board uses in deciding to invoke its AWO authority are solely for its own internal guidance, and that the Board's decision depends on the Board's judgment regarding its resources and is not reviewable. The revision related to AWO is needed to address divergent precedent in the United States Courts of Appeals regarding the reviewability of the Board's decision to issue an AWO. Finally, this revision clarifies that when the Board issues an AWO or a short decision adopting some or all of the immigration judge's decision, the decision is generally based on issues and claims of errors raised on appeal and is not to be construed as waiving a party's obligation to raise issues and exhaust claims of error before the Board. Second, this rule expands the authority to refer cases for three-member panel review for a small class of particularly complex cases involving complex or unusual issues of law or fact. Third, this rule amends the regulations relating to precedent decisions of the Board by authorizing publication of decisions either by a majority of the panel members or by a majority of permanent Board members and clarifying the relevant considerations for designation of precedents. These revisions implement, in part, the Memorandum for Immigration Judges and Members of the Board of Immigration Appeals issued by the Attorney General on August 9, 2006.
DATES: Comment date: Comments may be submitted not later than August 18, 2008.

73 Federal Register 34770 (2008)
DEPARTMENT OF HOMELAND SECURITY
Office of the Secretary
DEPARTMENT OF STATE
Office of the Secretary

Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act

ACTION: Notice of determination.
DATES: This determination is effective June 3, 2008.
Authority: 8 U.S.C. 1182(d)(3)(B)(i). The Secretary of Homeland Security and the Secretary of State, following consultations with the Attorney General, hereby conclude, as a matter of discretion in accordance with our respective authorities under section 212(d)(3)(B)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(d)(3)(B)(i), as amended by the Consolidated Appropriations Act, 2008 (CAA), Public Law 110–161, Div. J, section 691(a), 121 Stat. 1844, 2364 (December 26, 2007), as well as the foreign policy and national security interests deemed relevant in these consultations, that section 212(a)(3)(B) of the INA, excluding subclause (i)(II), shall not apply with respect to an alien not otherwise covered by the automatic relief provisions of section 691(b) of the CAA, for any activity or association relating to appropriate groups affiliated with the Montagnards, provided that there is no reason to believe that the relevant terrorist activities of the alien or the recipients were targeted against noncombatant persons, and further provided that the alien satisfies the relevant agency authority that the alien: (a) Is seeking a benefit or protection under the INA and has been determined to be otherwise eligible for the benefit or protection; (b) has undergone and passed relevant background and security checks; (c) has fully disclosed, in all relevant applications and interviews with U.S. government representatives and agents, the nature and circumstances of each activity or association falling within the scope of section 212(a)(3)(B) of the INA;(d) poses no danger to the safety and security of the United States; and (e) is warranted to be exempted from the relevant inadmissibility provision by the totality of the circumstances. Implementation of this determination will be made by U.S. Citizenship and Immigration Services (USCIS), in consultation with U.S. Immigration and Customs Enforcement (ICE), or by U.S. consular officers, as applicable, who shall ascertain, to their satisfaction, and in their discretion, that the particular applicant meets the criteria set forth above. This exercise of authority may be revoked as a matter of discretion and without notice at any time with respect to any and all persons subject to it. Any determination made under this exercise of authority as set out above shall apply to any subsequent benefit or protection application, unless such exercise of authority has been revoked. This exercise of authority shall not be construed to prejudice, in any way, the ability of the U.S. government to commence subsequent criminal or civil proceedings in accordance with U.S. law involving any beneficiary of this exercise of authority (or any other person). This exercise of authority is not intended to create any substantive or procedural right or benefit that is legally enforceable by any party against theUnited States or its agencies or officers or any other person. In accordance with section 212(d)(3)(B)(ii) of the INA, 8 U.S.C. 1182(d)(3)(B)(ii), a report on the aliens to whom this exercise of authority is applied, on the basis of case-by-case decisions by the Department of

Homeland Security or by the Department of State, shall be provided to the specified congressional committees not later than 90 days after the end of the fiscal year. This determination is based on an assessment related to the national security and foreign policy interests of the United States as they apply to the particular persons described herein and shall not have any application with respect to other persons or to other provisions of U.S. law.
Dated: June 3, 2008.
Michael Chertoff, Secretary of Homeland Security.
Condoleezza Rice, Secretary of State.

73 Federal Register 34771 (**2008**)
Karen National Union/Karen National Liberation Army (KNU/KNLA)
73 Federal Register 34772 (**2008**)
Karenni National Progressive Party (KNPP)
73 Federal Register 34772 (**2008**)
Chin National Front/Chin National Army (CNF/CNA)
73 Federal Register 34773 (**2008**)
Activity or association relating to the Alzados
73 Federal Register 34774 (**2008**)
Arakan Liberation Party (ALP)
73 Federal Register 34774 (**2008**)
Kayan New Land Party (KNLP)
73 Federal Register 34775 (**2008**)
Chin National League for Democracy (CNLD)
73 Federal Register 34776 (**2008**)
Activity or association relating to the Mustangs
73 Federal Register 34776 (**2008**)
Activity or association relating to appropriate groups affiliated with the Hmong

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ADDENDUM: Emerging Trends in the Circuits: Asylum Claims Based on Female Genital Mutilation

On June 11, 2008, the Second Circuit Court of Appeals held that "the fact that an applicant [for withholding of removal] has undergone female genital mutilation in the past cannot, in and of itself, be used to rebut the presumption that her life or freedom will be threatened in the future." *Bah v. Mukasey*, _F.3d_ , 2008 WL 2357411, at *9 (2nd Cir. June 11, 2008). In reaching this holding, the Court found two problems in the Board's decisions in the cases petitioned for review, as well as in *Matter of A-T-*, 24 I&N Dec. 296 (BIA 2007). *Id.* at *4. The first was that the Board impermissibly relieved the government of its burden of rebutting the presumption of future persecution created by the respondent's demonstration that she had suffered persecution in the form of female genital mutilation ("FGM") on account of her membership in a particular social group. "If an applicant has established past persecution on account of one of the protected grounds, the government bears the burden of rebutting the presumption that the applicant's life or freedom will be threatened in the feature by a preponderance of the evidence." *Id at *9.* The Court observed that before relieving the government of this burden, the Board impermissiblely assumed that "mutilation is a 'one-time' act." *Id.* at *12 (quoting *Matter of A-T-*, 24 I&N at 299). The Court made this observation after noting that both the Board and several Circuit courts have acknowledged that an individual may suffer through FGM more than once. *Id. (citing Mohammed v. Gonzales*, 400 F.3d 785, 800 (9th Cir. 2005); *Tunis v. Gonzales*, 447 F.3d 547, 550 (7th Cir. 2006); *Matter of S-K- and H-A-H-*, 24 I&N Dec. 464 (BIA 2008)); *See also Cao He Lin v. Dept of Justice,* 428 F.3d. 391, 405 ("absent record evidence of practices in foreign countries, the [agency] must not speculate as to the existence or nature of such practices.").

The Court also found that once there is a finding of past persecution in the form of FGM, and the presumption if future persecution is triggered, FGM is not the only type of persecution relevant to the analysis of whether petitioners merited withholding of removal. *Id.* at 13. The Board had found that the respondent in *Matter of A-T-* would "not be subject to the 'risk of identical future persecution.'" *A-T-*, *supra* at 299. After reviewing 8 C.F.R. § 1208.16(b)(1)(i), the regulation governing withholding of removal, the Court stressed that persecution in the future does not have to "come in the same form or be the same act as the past persecution." *Id.* The Court then held that the Board "turned the presumption on its head" when it impermissibly failed to require the government to show that the respondent would not be subject to other forms of persecution on account of a protected ground. *Id.* at *14 (observing that the evidence in the record demonstrated that individuals in the respondent's social group were "routinely subjected to various forms of persecution and harm beyond genital mutilation.")

Perhaps most important to keep in mind while reading *Bah*, is that even though the Court found that it cannot be assumed that FGM is a one-time act, it

declined to reach the issue resolved in *Matter of A-T-*, the question of whether FGM is a *continuing persecution.* There were two concurring opinions, one which would have found FGM to be a continuing persecution.

For original article "Emerging Trends....", see ILA Vol 1 No 10 Oct 2007.

Suppression: Respondents Look for a Shield *con't.*

Significantly, the immigration officer unsuccessfully attempted to contact the respondent's attorney, then the respondent admitted entering the United States as a nonimmigrant and subsequently misrepresented his intent to remain in the country permanently. *Id.* The Board declined to suppress the admissions because they were not the result of duress or coercion. *Id.* at 110. Such a scenario is clearly distinguishable from a situation where an immigration officer falsely informs the respondent that attorneys are not allowed on the premises or purposefully misinforms an individual of his or her rights. *See, e.g.,* Juan Manual Camarena-Sanchez, A78 008 580 (BIA Jan. 8, 2008) (unpublished). Denial of phone access during a brief detention, however, has not been held to require suppression of subsequent statements. *Id.*

The rare cases where a respondent's statements are found to be involuntary and the motion to suppress is granted generally involve a confluence of several of these factors. *See*, *e.g.*, *Matter of Garcia*, 17 I&N Dec. at 321 (finding involuntary and suppressing statements made "after a significant period in custody," after respondent's requests to contact his attorney were repeatedly rebuffed, and after he had been lead to believe that he had no rights and his return to Mexico was inevitable); *Navia-Duran*, 568 F.2d at 810 (finding involuntary and suppressing statements made after four hours of interrogation between 10:00 p.m. and 2:00 a.m. and after INS agent "actively misinformed" the respondent about her rights).

Unreliability may also be present in circumstances unrelated to coerced or involuntary statements. The most common example of this is where a respondent disputes facts alleged by the government to make the respondent removable. As noted above, the Board has held that a Form I-213 Record of Deportable Alien is "inherently trustworthy" and admissible into evidence to prove alienage or removability. *Matter of Mejia*, 16 I&N Dec. 6, 8 (BIA 1976). However, this presumption of reliability and admissibility may be defeated by a respondent who demonstrates that the I-213 contains material information that is incorrect, *Espinoza v. INS*, 45 F.3d 308, 311 (9th Cir. 1995); that the information was obtained by coercion or duress, *Matter of Mejia*, 16 I&N Dec. at 8; or that it rests on hearsay from a non-governmental third party who was not made available for cross-examination, *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 681 (9th Cir. 2005).

To suppress an I-213 based on incorrect factual information appearing on that form, the facts in dispute must be material to the purpose for which the form was admitted. *See Espinoza v. INS*, 45 F.3d at 309 (upholding the Broad's admission into evidence of the respondent's I-213 over claimed errors which were "irrelevant to the purpose for which the form was admitted, which was to demonstrate alienage"). *See also Hernandez-Guadarrama*, 394 F.3d at 679-80 (a dispute over the respondent's precise role in an alien-smuggling enterprise was material, where his removability was premised on those actions); *Murphy v. INS*, 54 F.3d 605, 608 (9th Cir. 1995) (the respondent's claim to birthright citizenship based on his assertion that he was born in the United States rather than Jamaica was material); *Cunanan v. INS*, 856 F.2d 1373, 1374 (9th Cir. 1988) (a dispute over the respondent's alleged entry into a sham marriage was material, where it was central to his eligibility for voluntary departure).

An I-213 may likewise be suppressed if the officer completing it relied on the hearsay statements of a non-governmental third party who is not the respondent, and the third party is not made available for cross-examination. *See*, *Murphy*, 54 F.3d at 610 (an I-213 was given "little (if any) weight" where its author relied on statements made by an INS informant with alleged ulterior motives, and INS presented no testimony to explain the form); *Cunanan v. INS*, 856 F.2d at 1374 (the Board's reliance on an I-213 was "fundamentally unfair" and an abuse of discretion where the form was completed with information purportedly provided by the respondent's wife, who the government had made no effort to present for cross-examination). However, if the statements on the form were taken directly from the respondent, then the form is inherently reliable, absent additional indicia of unreliability. *See*, *Matter of Ponce-Hernandez*, 22 I&N Dec. 784, 785 (BIA 1999); *Bustos-Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990). Similarly, third-party hearsay affidavits may be admitted into evidence where the government provides the respondent advance notice

of its intended use of the documents and offers to make reasonable accommodations to allow the respondent to depose the affiant. *Bachelier v. INS*, 625 F.2d 902, 904 (9th Cir. 1980).

Conclusion

Over the last several years, ICE has steadily increased its enforcement of immigration laws in the interior of the United States. This increased enforcement has led to a large number of warrantless arrests in workplaces and homes, which in turn has produced a wave of suppression motions in civil immigration proceedings. Although such motions may be filed in an attempt to delay or shift the focus of proceedings, case law holds that evidence should be suppressed if use of the evidence in question would be fundamentally unfair or if it was obtained through an egregious violation of the respondent's constitutional rights.

Notably, when the *Lopez-Mendoza* Court held that the exclusionary rule should not generally apply in civil immigration proceedings, it left space to reconsider its analysis. A plurality of the Supreme Court Justices noted that their "conclusions concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread." *Lopez-Mendoza*, 468 U.S. at 1050. Although the increased number of motions to suppress in immigration courts may simply reflect a more aggressive strategy being employed by the private immigration bar in response to ICE's increased enforcement efforts, it may also indicate that respondents are seeking to protect themselves from an increasing number of Fourth Amendment violations. If ICE enforcement efforts continue to increase with the same frequency and characteristics of recent actions, expect advocates to argue that the "widespread" standard set forth by the *Lopez-Mendoza* Court has been reached.

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1. U.S. Immigration and Customs Enforcement, *FY07 Accomplishments*, Jan. 2008, http://www.ice.gov/doclib/pi/news/factsheets/fy07accmplshmntsweb.pdf. The 276,912 individuals physically removed from the United States includes 40,534 individuals who voluntarily returned to their countries of origin. U.S. Immigration and Customs Enforcement, *ICE Fiscal Year 2007 Annual Report*, Jan. 2008, http://www.ice.gov/doclib/about/ice07ar_final.pdf.
2. *Id.*
3. U.S. Department of Homeland Security, *Fact Sheet: Border Security and Immigration Enforcement*, Feb. 29, 2008, http://www.dhs.gov/xnews/releases/pr_1204311226540.shtm.
4. *Id.*
5. *See*, *e.g.*, Sandra Hernandez, *ICE Increases Its Use of Warrantless Home Raids*, Daily Journal, Mar. 26, 2008, *available at* http://eoirweb/newsdigest/articles/03-27-08/ICEIncreasesItsUseOfWarrantless-HomeRiadsDailyJournal.pdf.
6. *See* N.C. Aizenman, *Immigration Agency Accused of Illegal Searches*, Wash. Post, Feb. 26, 2008, at A04, *available at* http://washingtonpost.com/wp-dyn/content/article/2008/02/25/AR2008022503369.html.
7. *See Immigration Home Raids in New Jersey*, http://law.shu.edu/csj/iceraids.html.
8. *See generally* Stephanie Francis Ward, *Illegal Aliens on I.C.E.*, ABA Journal, June 2008, http://www.abajournal.com/magazine/illegal_aliens_on_ice/ (quoting Matt Adams, legal director of the Northwest Immigrant Rights Project, for the proposition that the number of suppression motions filed in immigration court has recently increased).
9. The Ninth Circuit has led the way in ordering suppression due to race-based egregiousness, and the Second Circuit has explicitly adopted its reasoning. See *Gonzales-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994); *Orhorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994); *Almeida-Amaral v. Gonzales*, 461 F.3d 231 (2d Cir. 2006). No circuit has rejected the proposition that reliance on race alone may be sufficiently egregious to warrant suppression.

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