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In the Courts: Special Immigrant Juvenile Status and the Problem of Federal Consent to State Jurisdiction

By Katherine Hinkle

Special Immigrant Juvenile Status (“SIJS”) was created by the Immigration Reform Act of 1990, and amended by the Trafficking Victims Protection Reauthorization Act of 2008, to protect undocumented immigrant children who had been abused and neglected and to give them a path to citizenship. However, a 1997 amendment to the Immigration Reform Act allowed the Federal Government to step in and deny children seeking SIJS the opportunity to present their case for permanent residency if the federal government had reason to believe that they were seeking SIJS for reasons other than protection from abuse. Courts have repeatedly found that this amendment gives the federal government broad powers to deny children SIJS. As a result of these developments, vulnerable immigrant youths are being denied the protection they were originally guaranteed under SIJS.

Immigrant youths, including the undocumented, may apply for SIJS status in order to seek protection from abuse or neglect, proceed on the path to permanent residency, and get their “green card.” In order to receive this special status, the child must have been declared dependent by a juvenile court in the United States. Additionally, a state court must determine that reunification with the juvenile’s parents is impossible due to abuse, neglect, or abandonment.

In 1997, the process to apply for SIJS became more complicated when the federal government became more involved and took the determination of abuse, neglect, and abandonment out of the hands of state courts. When an immigrant youth is in the custody of the United States, the Attorney General must expressly consent to the juvenile pursuing SIJS in state court by allowing the juvenile court to have jurisdiction over the traditionally federal matter of immigration. In other words, the Attorney General, or a lower official appointed by the Attorney General, serves as a gatekeeper to state court proceedings. The federal government must approve the petition to ensure that SIJS is not being sought for means other than protecting the child from abuse and neglect.

Seeking SIJS is already challenging for vulnerable immigrant youths, but the most troublesome area of an SIJS proceeding is the issue of federal consent to SIJS. The federal government has final say over whether the child may pursue SIJS, even before a state court gets the chance to determine if the child meets the criteria. Courts

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have upheld federal denials of consent in cases where there is clear evidence of abuse, denying the child the right to plead his or her case to the state court, in contravention of Congressional intent to leave such determinations of abuse, neglect, and abandonment to the expertise of state courts.

In a U.S. Court of Appeals Third Circuit case, *Yeboah v. U.S. Department of Justice*, a young man from Ghana was denied consent to seek SIJS because the Immigration and Naturalization Service (INS), acting on behalf of the Attorney General, believed that the boy was sent to America in order to procure citizenship for himself and bring his family over from Africa. A child psychologist found that the boy's father had seriously abused him while they were living in Ghana, but the INS still refused to grant consent for SIJS, even though fact-finding of this nature is traditionally left to the family court system.

The Third Circuit found that any request for a dependency hearing for a child in the custody of the United States is entirely dependent on an INS director's consent to such proceedings. The court reasoned that it was proper for the INS director to make a determination that the child's primary purpose in seeking SIJS was not to gain protection from abuse or neglect, even when there was mixed evidence on the issue. This finding was in stark contrast to Congressional intent for SIJS, which clearly left the determination of dependency, abuse, and neglect to the more experienced state juvenile courts. Nevertheless, the Third Circuit affirmed the federal government's ultimate authority in the SIJS procedures to make a preliminary determination that SIJS is sought due to abuse or neglect, and thus substitute the federal government officials' own judgment for that of the state court.

Additionally, federal courts have held that the Department of Homeland Security (DHS), which took over the INS's role in SIJS proceedings after its creation in 2002, may properly refuse to render a decision on a child's request for consent to SIJS proceedings. In *F.L. v. Thompson*, a federal district court for the District of Columbia found that, not only may the federal government refuse to allow a child's matter to be heard in state court, but it may also keep a child in limbo by refusing to grant or deny consent at all. The court found

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that the revision of the Immigration Reform Act to require federal consent was “intended to curtail the granting of special immigrant juvenile status . . . [and] demonstrates an intent to remove immigration decisions from the exclusive control of juvenile courts and the social agencies affiliated with them.” Therefore, the *F.L.* decision strongly suggests that the purpose of federal consent to SIJS is to make it harder for children to receive the protections of SIJS.

Furthermore, because federal courts will review the actions of the federal government only to assess if such determinations are “arbitrary and capricious,” youth who are denied SIJS proceedings will rarely succeed in challenging a federal determination of ineligibility. In order to prove that the federal government’s determination was incorrect, a juvenile will have to prove that the DHS had *no reasonable basis* to make the determination. With such a deferential standard of review, once the federal officials have chosen to deny consent, it will be almost impossible for an immigrant youth to overturn the decision.

The judicial trend towards limiting access to SIJS status through denying federal consent has made seeking SIJS protection even more challenging for these vulnerable youths. By interpreting changes to the governing law as limits on access to SIJS, federal courts are denying these children the chance to present their case to state courts, which have the requisite expertise to determine whether there is sufficient evidence of abuse, neglect, and abandonment, to warrant SIJS. The complex issues of federal consent to SIJS means that some youths will never receive the benefit of being heard in juvenile court, where judges are better equipped to handle the types of determinations inherent in SIJS status.

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