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FEATURE: Asylum Authority

FEDERAL COURTS REMINDED OF EXECUTIVE BRANCH ASYLUM AUTHORITY

By Heather Anne Egan

Under federal law, immigrants can seek to avoid deportation if they can demonstrate “persecution or a well-founded fear of persecution . . . on account of . . . political opinion.” 8 U.S.C. § 1101(a)(42)(A), 1253(h) (1994 ed. and Supp. V). The law requires the United States Attorney General, who oversees the Immigration and Naturalization Services (“INS”) to grant asylum to immigrants who show their lives or freedom would be at risk if they are returned to their native country. Immigration and Nationality Act, § 101(a)(42)(A), 208(a), 243(h), 66 Stat. 166, as amended, 8 U.S.C. § 1101(a)(42), 1158(a),

“Under federal law, immigrants can seek to avoid deportation if they can demonstrate “persecution or a well-founded fear of persecution . . . on account of . . . political opinion.””

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1253(h)(1) (1994 ed. and Supp. V).

In 1993, Fredy Orlando Ventura, a citizen of Guatemala, fled his country and entered the United States illegally. Two years later, when the INS began deportation proceedings against him, he petitioned for political asylum in the United States saying that he left his Central American home because of political persecution.

At his deportation hearing, Ventura testified that he had received threats of death or harm from Guatemalan guerillas who were trying

to press him into service in the Guatemalan army. Ventura said that he was targeted for persecution because his family had many connections to the Guatemalan military.

His family connections include his uncle, a local military commissioner responsible for recruiting, who survived a machete attack in 1987, and his soldier cousin, who was shot and killed in 1988. Another one of his cousins, a civilian, also was shot, but survived. Ventura believed the guerillas assumed he held adverse political opinions due to his family’s views.

The immigration judge denied Ventura’s asylum petition, stating that he had failed to objectively demonstrate that the guerillas’ interest in him was tied to his political beliefs. The judge added that conditions in Guatemala had changed significantly over the past years, and that even if the guerillas had once had a political interest in hurting Ventura, there was no evidence to indicate they still had motivation and inclination to persecute him in the future. *Ventura v. I.N.S.*, 264 F.3d 1150, 1153 (9th Cir. 2001).

Ventura appealed the decision of the immigration judge to the Board of Immigration Appeals (“BIA”). *Ventura*, 264 F.3d at 1153. The BIA is a quasi-judicial division located within the Department of Justice. The BIA hears appeals from more than 200 immigration judges around the country who decide deportation and asylum cases. The BIA plays a crucial role in immigration litigation and basically serves as the supreme court of immigration law.

The BIA, considering the matter *de novo*, agreed with the immigration judge that Ventura failed to qualify for statutory protection because he did not meet his burden of proof that any persecution he faced when he left Guatemala in 1993 was “on account of his political opinion.”

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Ventura, 264 F.3d at 1153. He also hadn't shown that his fear of persecution upon returning to Guatemala was justified. The board, therefore, decided that it need not address the change in the political climate in Guatemala over the past nine years. *Ventura*, 264 F.3d at 1153.

Ventura asked the Ninth Circuit Court of Appeals to review the BIA's decision. Two issues were presented before the court in the *Ventura* case. First, whether Ventura would face actual persecution based on his political opinions if he returned to Guatemala. Second, whether Ventura no longer qualified for asylum protection because the conditions in Guatemala had improved to the point where no realistic threat of persecution existed. This issue, as an alternative argument, was presented by the Government solely before the court of appeals.

Both sides argued in front of the Ninth Circuit that the immigration judge had held that conditions had indeed changed. But, the BIA did not consider this. Therefore, both sides requested the court remand this case back to the BIA to answer this question.

The Ninth Circuit then reviewed the BIA's decision and reversed, saying the BIA should have reviewed the question of changed conditions in Guatemala. But rather than remanding the case for the BIA to decide, the court took it upon itself to evaluate the Government's claim and found in Ventura's favor. *Ventura*, 264 F.3d at 1157.

The court of appeals held that the evidence in the record failed to show sufficient change in Guatemala. Specifically, the court's decision was based on a 1997 State Department report regarding Guatemala that "clearly demonstrates that the presumption of a well-founded fear of future persecution was not rebutted." Bureau of Democracy, Human Rights and Labor, United States Department of State, Guatemala – Profile of Asylum Claims and Country Conditions 2 (June 1997). The court concluded that it could not be said that the risk to Ventura of future persecution on account of an imputed political opinion had been so

minimized as to rebut the presumption of such persecution. The court of appeals added that it need not remand to the BIA when it is clear that it would be compelled to reverse the BIA's decision if the BIA decided the matter against the applicant. Here, it decided a remand would be inappropriate.

The Government then sought *certiorari* in the United States Supreme Court arguing that the court of appeals exceeded its legal authority when it decided not to remand and rather to decide the changed circumstances in Guatemala issue on its own. The Government called the decision not to remand "a recurring error that

"...the Supreme Court Justices stated that the San Francisco-based Ninth U.S. Circuit Court of Appeals "seriously disregarded" federal immigration officials' role in deciding such cases when it took it upon itself to decide that a Guatemalan immigrant should be allowed to stay in the country rather than remand the issue back to the BIA."

puts the Ninth Circuit in conflict with the other courts of appeals, which generally respect the BIA's role as a fact-finder by remanding to the BIA in similar situations." Pet. For Cert. 11. See also Pet. For Cert. In *I.N.S. v. Chen*, O. T. 2002, No. 25, p23 (referring to eight other recent decisions from the Court of Appeals for the Ninth Circuit, which, in the Government's view, demonstrate this trend).

Solicitor General Theodore Olson, the Bush administration's lawyer before the Court,

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