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Immigration

**by Charles H. Kuck*
and Keith N. Jensen****

During the January 1, 2015 to December 31, 2015 survey period, the Eleventh Circuit courts decided hundreds of cases affecting immigration law. The following is a discussion of some of those decisions that clarified important issues pertaining to immigration law in the Eleventh Circuit.

I. SUBJECT MATTER JURISDICTION REQUIREMENTS FOR JUDICIAL REVIEW OF IMMIGRATION CASES

In *Indrawati v. United States Attorney General*,[1] the United States Court of Appeals for the Eleventh Circuit reaffirmed the jurisdictional requirements for its review of immigration cases, holding that the appellant did not exhaust her administrative remedies, resulting in the dismissal of two of her three claims brought on appeal.[2] The Eleventh Circuit held that it lacks subject matter jurisdiction to review a final order in an immigration case, unless the petitioner has exhausted all available administrative remedies.[3] The court summarized that this requires the petitioner to have presented the issue on appeal before the Board of Immigration Appeals (BIA) with sufficient factual and legal

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1. 779 F.3d 1284 (11th Cir. 2015).

2. *Id.* at 1289.

3. *Id.* at 1297. "We lack jurisdiction to review final orders in immigration cases unless 'the alien has exhausted all administrative remedies available to the alien as of right.' A petitioner fails to exhaust her administrative remedies with respect to a particular claim when she does not raise that claim before the [Board of Immigration Appeals]." *Id.* (citations omitted) (quoting 8 U.S.C. § 1252(d)(1) (2012)).

discussion to enable a legitimate review of the immigration judge's holding.[4] This serves two purposes: (1) it prevents interference with administrative procedure and (2) it ensures the administrative agency, charged with review of the issue, is not avoided in its responsibility to review the issue on appeal prior to an appellate decision.[5]

The Eleventh Circuit denied review of Indrawati's claims that she was denied both a sufficient opportunity to address the discrepancies between her asylum application and testimony before the immigration court and that she was denied due process by the immigration court's admission of a memorandum drafted by the Texas Service Center, which was based upon an interview conducted with Indrawati's mother that contradicted her asylum claim.[6] The court reasoned that Indrawati failed to exhaust her administrative remedies by not addressing either of these arguments in her appellate brief submitted to the BIA.[7] Thus, the Eleventh Circuit held that it lacked the requisite subject matter jurisdiction to resolve those two issues on appeal.[8]

The United States District Court for the Southern District of Georgia applied this same standard to a petitioner who filed an action for a writ of habeas corpus while he was detained in Immigration and Customs Enforcement (ICE) custody. The district court in *Thomas v. ICE*,[9] refused to consider petitioner's claim that his ICE detainer should be terminated because he should be released into treatment at a halfway house, rather than detained by ICE, which negatively impacted his public safety factor and resulted in a longer sentence.[10] The magistrate judge dismissed the claim, finding that the petitioner had not exhausted his administrative remedies and thus the court did not have subject matter jurisdiction.[11]

Further, the petitioner argued that he was eligible for United States citizenship through his status as a stepchild of a United States citizen prior to turning eighteen.[12] The court also dismissed this claim for lack of subject matter jurisdiction as the petitioner had not exhausted his administrative remedies.[13] Here, the petitioner filed the appropriate application with the United States Citizenship and Immigration Services

4. *Id.*
5. *Id.* at 1298.
6. *Id.* at 1297-99.
7. *Id.* at 1297, 1299.
8. *Id.* at 1297.
9. No. 5:13-cv-126, 2015 U.S. Dist. LEXIS 114784 (S.D. Ga. Aug. 28, 2015).
10. *Id.* at *2-3.
11. *Id.* at *1, *7, *12-13.
12. *Id.* at *2.
13. *Id.* at *12-13.

(USCIS), Form N-600.[14] However, that application had not yet been adjudicated, and thus the court did not have subject matter jurisdiction to review the pending application prior to an initial adjudicatory decision and subsequent administrative appellate processes for review.[15]

II. REASONABLE CONSIDERATION AND ADMINISTRATIVE REVIEW

The Eleventh Circuit's holding in *Indrawati* also clarified the degree to which the BIA is required to review decisions on appeal.[16] The Eleventh Circuit cited *Indrawati* in a recent unpublished opinion,[17] stating,

> In making this assessment, the agency shall consider "all evidence relevant to the possibility of future torture." However, each claim or piece of evidence presented by the petitioner need not be specifically addressed—a decision-maker may omit discussion of some evidence and still give reasoned consideration. We will remand only when the decision was so lacking in reasoned consideration that review becomes impossible.[18]

III. SOUTHERN DISTRICT OF FLORIDA HOLDS ADMINISTRATION OF INVOLUNTARY NUTRITION CONSTITUTIONAL

In *Department of Homeland Security, Immigration & Customs Enforcement v. Ayvazian*,[19] the United States District Court for the Southern District of Florida granted an emergency court order granting permission to administer involuntary nutrition to three noncitizens in ICE detention.[20] There, three noncitizens started a hunger strike to protest their detention.[21] A medical official for the Department of Homeland Security (DHS) testified that due to the hunger strike, ICE had three available options: (1) let the protesting individuals die, (2) administer involuntary nutrition, or (3) end the detention of the three individuals participating in the hunger strike.[22] The court found the

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14. *Id.* at *10.
15. *Id.* at *10-11.
16. *See Indrawati*, 779 F.3d at 1298.
17. Camelien v. U.S. Att'y Gen., No. 15-10239, 2016 U.S. App. LEXIS 109(11th Cir. Jan. 7, 2016) (citations omitted) (quoting 8 C.F.R. § 208.16(c)(3) (2015)).
18. *Id.* at *7.
19. No. 15-23213-Civ-Scola; 2015 U.S. Dist. LEXIS 121363 (S.D. Fla. Sept. 11, 2015).
20. *Id.* at *1.
21. *Id.*
22. *Id.* at *12.

first and third options unreasonable and approved the motion to administer involuntary nutrition to the detainees.[23]

IV. CLASSIFICATION OF AGGRAVATED FELONIES AND CRIMES INVOLVING MORAL TURPITUDE

In *Walker v. United States Attorney General*,[24] the Eleventh Circuit held that operating a "chop shop" is an aggravated felony offense and in the alternative that it is a crime involving moral turpitude (CIMT) under the categorical approach.[25] Under the Immigration and Nationality Act (INA),[26] an alien who commits an aggravated felony is removable.[27] Under 8 U.S.C. § 1227(a)(2)(A)(ii),[28] a noncitizen who commits more than two crimes involving moral turpitude is removable.[29] A noncitizen who admits committing a CIMT or who admits committing acts that constitute the essential elements of a CIMT is inadmissible.[30] The Florida statute at issue specifically provides the following: "Whoever utters and publishes as true a false, forged or altered record, deed, instrument or other writing . . . knowing the same to be false, altered, forged or counterfeited, with intent to injure or defraud any person, shall be guilty of a felony of the third degree. . . ."[31]

The Eleventh Circuit held the offense at issue requires deceit, as the offender knowingly makes a false representation regardless of the specific intent required under the statute.[32] An aggravated felony theft offense is defined as "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year."[33] The United States Supreme Court held that the term "theft offense" in 8 U.S.C. § 1101(a)(43)(G)[34] referred to the generic definition of theft: "taking of property or [exercising] control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or

23. *Id.* at *12-13.
24. 783 F.3d 1226 (11th Cir. 2015).
25. *Id.* at 1229.
26. 8 U.S.C. §§ 1101-1537 (2012).
27. 8 U.S.C. § 1227(a)(2)(A)(iii) (2012).
28. 8 U.S.C. § 1227(a)(2)(A)(ii) (2012).
29. *Id.*
30. 8 U.S.C. § 1182(a)(2)(i)(I) (2012).
31. FLA. STAT. ANN. § 831.02 (West 2006).
32. *Walker*, 783 F.3d at 1228-29.
33. 8 U.S.C. § 1101(a)(43)(G) (2012).
34. 8 U.S.C. § 1101(a)(43)(G).

permanent."[35] Both the BIA and the lower courts interpreted the theft provision in the same manner, finding that "a taking of property constitutes a 'theft' whenever there is criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent."[36] Here, the Eleventh Circuit held the offense of uttering a forged instrument requires a level of deceit, justifying the classification as an aggravated felony under 8 U.S.C. § 1101(a)(43)(G).[37]

Applying the categorical approach adopted from *Fajardo v. United States Attorney General*,[38] the Eleventh Circuit held, under 8 U.S.C. § 1182(2)(A)(i)(I),[39] the offense of uttering a forged instrument is a CIMT.[40] A CIMT refers generally to the following:

> [C]onduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general . . . . Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude.[41]

Crimes involving moral turpitude involve reprehensible conduct that is committed intentionally or with some other form of scienter, be it specific intent, deliberateness, willfulness, or recklessness.[42] Whether a crime involves moral turpitude "depends upon the inherent nature of the offense, as defined in the relevant statute, rather than the circumstances surrounding a defendant's particular conduct."[43]

Here, the Eleventh Circuit simply held that because the crime of uttering a forged instrument "involves deceit," it qualifies as a CIMT and a "behavior that runs contrary to accepted societal duties and involves dishonest or fraudulent activity."[44] The Eleventh Circuit reasoned that, at the very least, knowingly aiding and abetting the operation to conceal

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35. Gonzales v. Duenas-Alvarez, 549 U.S. 183, 189 (2007) (quoting Penuliar v. Gonzales, 435 F.3d 961, 969 (9th Cir. 2006)).

36. *In re* V-Z-S-, 2000 BIA LEXIS 13, at *19-20 (B.I.A. Aug. 1, 2000).

37. *Walker*, 783 F.3d at 1228-29.

38. 659 F.3d 1303 (11th Cir. 2011).

39. 8 U.S.C. § 1182(2)(A)(i)(I) (2013).

40. *Walker*, 783 F.3d at 1228-29; *see also Fajardo*, 659 F.3d at 1305.

41. *In re* Franklin, 1994 BIA LEXIS 15, at *3 (B.I.A. Sept. 3, 1994).

42. *See id.*

43. Sosa-Martinez v. U.S. Att'y Gen., 420 F.3d 1338, 1342 (11th Cir. 2005) (quoting Itani v. Ashcroft, 298 F.3d 1213, 1216 (11th Cir. 2002)).

44. *Walker*, 783 F.3d at 1229 (quoting *Itani*, 298 F.3d at 1216).

or house parts amounts to deceit and dishonesty sufficient to justify the classification of CIMT.[45]

Comparatively, an immigration judge in Atlanta found that a respondent who had been convicted twice for shoplifting under section 16-8-14 of the Official Code of Georgia Annotated (O.C.G.A.)[46] was not removable under 8 U.S.C. § 1227(a)(2)(A)(ii).[47] In the unpublished decision, the judge held that DHS did not meet its burden to show by clear and convincing evidence that the respondent is deportable.[48] The judge applied the categorical approach under *Fajardo*, finding that the offense of shoplifting under O.C.G.A. § 16-8-14 does not require the same intent to deceive required for a CIMT.[49] Specifically, in Georgia,

> A person commits the offense of theft by shoplifting when he alone or in concert with another person, with the intent of appropriating merchandise to his own use without paying for the same or to deprive the owner of possession thereof or of the value thereof, in whole or in part . . . Conceals or takes possession of the goods or merchandise of any store or retail establishment.[50]

The court determined that because one could be convicted of the offense without the intent to permanently deprive another of possession, this offense does not amount to the level of a CIMT, and the respondent was not removable on these grounds.[51]

V. ELEVENTH CIRCUIT DISMISSES CHALLENGE TO DHS AUTHORITY TO ISSUE 2012 H-2B REGULATIONS FOR LACK OF STANDING

The Eleventh Circuit dismissed a claim in which the petitioners challenged the authority of the Department of Labor (DOL) to promulgate H-2B regulations.[52] The H-2B nonimmigrant visa program permits employers to hire foreign workers to come temporarily to the United States and perform temporary nonagricultural services or labor

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45. *Id.* at 1227, 1228-29.

46. O.C.G.A. § 16-8-14 (2011 & Supp. 2015).

47. *Order of the Immigration Judge*, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, *availabe at* www.ga-al.com/wp_content/uploads/2015/09/GA-shoplifting-not-CIMT.pdf. (last visited Feb. 2, 2016) (providing a heavily redacted copy of an immigration court order).

48. *Id.*

49. *Id.*; *see also Fajardo*, 659 F.3d at 1305.

50. O.C.G.A. § 16-8-14(a)(1).

51. *Order of the Immigration Judge*, *supra* note 47.

52. Bayou Lawn & Landscape Servs. v. Sec'y, United States DOL, 621 F. App'x 620, 621 (11th Cir. 2015).

on a one-time, seasonal, peakload, or intermittent basis.[53] In February 2012, the DOL issued regulations altering the H-2B nonimmigrant visa program, specifically limiting when and how employers could hire foreign workers under the program.[54] Initially, the district court found that the DOL did not have the authority to promulgate the regulations at issue; rather, the authority was properly held by the DHS.[55] However, in early 2015, DOL and DHS jointly filed new H-2B regulations, which superseded the regulations at issue, making this particular suit moot.[56] Thus, the court dismissed the action for lack of standing.[57]

53. *H-2B Certification for Temporary Non-Agricultural Work*, DEPARTMENT OF LABOR, (Oct. 22, 2009) https://www.foreignlaborcert.doleta.gov/h-2b.cfm.

54. *Bayou Lawn & Landscape Servs.*, 621 F. App'x at 621.

55. *Id.*

56. *Id.*

57. *Id.*

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