



ADVISORY AND CASE UPDATE
National Immigration Project et al. v. DHS
April 25, 2012

New FAQ Reveals Serious Flaws in ICE “Policy” for Facilitating Return After Removal & Disclosed OSG Emails Show Lack of Policy and Practice at the Time of *Nken*

This advisory is intended to alert readers to two major developments concerning the return of immigrants who win their immigration cases in federal court. First, on April 23, 2012, the government provided additional information regarding implementation of the return “policy” it issued in February 2012. Second, on April 24, 2012, the Office of the Solicitor General (OSG) released emails that formed the basis of its erroneous claim to the U.S. Supreme Court that such a policy previously existed. The OSG further notified the Court of its incorrect statement and steps it intends to take going forward to ensure the timely return of successful litigants. This advisory addresses these developments, which are important for attorneys and litigants seeking stays of removal and attempting to accomplish return after prevailing in court. The advisory also provides contact information for attorneys seeking assistance with these issues.

ICE Issues a Flawed FAQ on New “Policy”

On April 23, U.S. Immigration and Customs Enforcement (ICE) posted on its website a “Frequently Asked Questions” (FAQ) page on how to return individuals pursuant to ICE “Policy” Directive 11061.1 issued on February 24, 2012. The FAQ is located at: <http://www.ice.gov/about/offices/enforcement-removal-operations/publicadvocate/faq.htm>

The FAQ sheds some light on the process of returning someone. Notably, the FAQ provides that ICE will restore people to their pre-removal status, and will not charge people as “arriving aliens” unless they were charged as such prior to their removal. In addition, the FAQ designates the ICE Public Advocate as the first point of contact in initiating return.

However, the FAQ also highlights several limitations and problems with the “policy” as it is currently written. Some of the more alarming limitations and problems are discussed here. Significantly, the “policy” does **not** extend to noncitizens who have prevailed on administrative motions to reopen or reconsider before an immigration judge or the Board of Immigration Appeals. These individuals—many of whom seek return to complete their immigration proceedings—remain stranded abroad without recourse to procedures for return.

The “policy” is also disturbingly discretionary. With regard to individuals who were not lawful permanent residents (LPRs) when removed, ICE has conferred to itself discretion to decide if, and under what circumstances, an individual’s presence in the United States is “necessary.” Thus, return is left to the unfettered discretion of ICE Enforcement and Removal Operations (ERO)—the party responsible for executing the removal order in the first place. ICE’s suggested use of teleconferencing and videoconferencing from U.S. embassies and consulates abroad is not a workable solution for a variety of due process reasons, including, but not limited to, little or no ability for individuals to communicate with their counsel, problematic presentation of evidence, and technological malfunctions and/or failure, as highlighted in a 2005 report by the Legal Assistance Foundation of Metropolitan Chicago and Appleseed.

The “policy” also puts lower income and indigent litigants at a significant disadvantage by requiring individuals to initiate contact with ICE, make travel arrangements, and pay their own travel costs. Many deported individuals were detained for months or years prior to their removal, effectively eliminating any source of income. Furthermore, the “policy” conditions return on possession of a valid foreign passport without exception. For these lower income and indigent individuals, as well as others including asylum seekers in hiding in their countries of origin, those who have fled to another country, or those who lack the language skills to work in the country to which they have been removed, this requirement may financially and/or practically prohibit return altogether.

Release of Unredacted OSG Emails & Letter to the Supreme Court

On April 24, pursuant to a federal court order, the OSG finally released email communications between OSG and DHS attorneys about the following representation that was made in *Nken v. Holder*, 556 U.S. 418 (2009):

“By policy and practice, the government accords aliens who were removed pending judicial review but then prevailed before the courts effective relief by, *inter alia*, facilitating the aliens’ return to the United States by parole under 8 U.S.C. 1182(d)(5) if necessary, and according them the status they had at the time of removal.”

The OSG emails show that DHS emails contained opinions about an informal and incomplete procedure for facilitating return, much less a “policy and practice.” Moreover, DHS described a process with serious limitations that would pose challenges for individuals who seek to return, the substance of which was not communicated to the Supreme Court. These limitations were reflected in the following statements:

- “[W]e generally handle [these cases] on a by-request basis. But, anytime the BIA decision is vacated, I would believe the alien could ask to come back to the US to have the former status restored.”
- “As we all know there is no statute that directly addresses the issue, and given that CBP [Customs and Border Protection] will not simply let the person pass through inspection based upon the pfr [Petition for Review] grant, we have relied on parole under section 212(d)(5). I don’t believe that ICE has established a ‘procedure’ per se, but has handled them on a case by case basis. The process is generally that ICE grants the parole and sends a cable to the consulate or embassy nearest to the alien with instructions to issue a travel document/boarding letter to the alien. The alien must supply his/her own transportation to the U.S., and if the alien was in detention prior to deportation, the alien is returned to detention upon arrival at the POE [Port of Entry].”

Although the OSG’s office expressed some doubts about the accuracy of its intended statement to the Supreme Court, noting “we don’t want to open ourselves up to trouble,” the final representation in its brief did not reflect the qualifications or reservations expressed by DHS.

Also on April 24, the OSG submitted a six-page letter with six attachments to the Supreme Court “in order to clarify and correct” misleading statement in its brief in *Nken*. Pointing to declarations included in the Complaint for *National Immigration Project et al. v. DHS*, as well as various agency documents obtained during the course of the Freedom of Information Act lawsuit, the OSG admits the following:

- “In light of those materials, the government is not confident that the process for returning removed aliens, either at the time the brief was filed or during the intervening three years, was as consistently effective as the statement in its brief in *Nken* implied. The government therefore believes that it is appropriate both to correct its prior statement to this Court and to take steps going forward to ensure that aliens who prevail on judicial review are able to timely return to the United States.”
- “[W]ithout providing additional detail about the government’s approach to effectuating return and restoring status, the statement that relief was accorded ‘[b]y policy and practice’ suggested a more formal and structured process than existed at the time. The government should have provided a more complete and precise explanation.”
- “[Significant impediments in returning] stemmed in part from the absence of a written, standardized process for facilitating return; the resulting uncertainty in how to achieve that objective in field offices, U.S. embassies and consulates, and other agencies involved in the process; and the lack of clear or publicly accessible information for removed aliens to use in seeking to return if they received favorable judicial rulings.”

Despite the OSG’s admission that it may have fallen short in its “special obligation to provide this Court with reliable and accurate information at all times,” the OSG concludes that the Supreme Court need not take any action. Instead, the OSG asserts, “Where the government contends that removal alone does not constitute irreparable harm, it will submit to the lower courts the procedures to facilitate return described above.” The OSG further claims that in pending stay litigation, the government will submit letters regarding its procedures to facilitate

return, pursuant to the Federal Rules of Appellate Procedure. However, as briefly described in this advisory, the “policy” is insufficient as an effective return system.

The full letter and attached exhibits, as well as the email communications in *Nken*, will be posted soon to the National Immigration Project website. Other materials, such as a declaration drafted prior to these latest developments, contain useful information on the unfolding of this litigation, and will also be available on this page:

<http://www.nationalimmigrationproject.org/legalresources.htm#nipnlg>.

Contact Us!

The plaintiffs in *National Immigration Project, et al. v. DHS* are represented by Nancy Morawetz and a team of law students at New York University’s Immigrant Rights Clinic, including Martha Saunders, Saerom Park, Nikki Reisch, and Wonjun Lee.

Trina Realmuto of the National Immigration Project of the National Lawyers Guild and Jessica Chicco of the Boston College Post-Deportation Human Rights Project track and provide assistance to attorneys and individuals who are litigating stay requests and/or seeking to return to the United States after winning a motion to reopen or reconsider. Trina and Jessica also share information with the NYU team that may be of assistance in the litigation. Please contact **Trina Realmuto** at trina@nationalimmigrationproject.org or **Jessica Chicco** at jessica.chicco@bc.edu for assistance with stay litigation or return strategies.